Re-Imagining Resolution of Online Defamation Disputes

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Abstract
If an individual or company is defamed online, they have two options to resolve the dispute, absent a technical solution. They can complain to an intermediary or launch a civil action. Both are deficient for a variety of reasons. Civil litigation is often unsuitable given the nature of online communications (across different platforms, jurisdictions, involving multiple parties, and spread with ease), the length and cost of litigation, and the ineffectiveness of traditional remedies. Intermediary dispute resolution processes can sometimes be effective, but lack industry standards and due process, place intermediaries in pseudo-judicial roles, and depend on the changeable commitments of management. At its core, the problem is the high-volume, low-value, and legally complex matrix of online defamation disputes. In this article, I ask: Are there alternative ways to resolve disputes that would improve access to justice and resolution for complainants? The key to resolving some of these problems, I argue, is revisiting the basic issue of what complainants want in the resolution of a defamation dispute and then connecting this with innovations in dispute resolution. Ultimately, I recommend the creation of an online tribunal as a complement to traditional court action. In coming to this conclusion, I explore various issues and proposals for reform, including the challenges wrought by online defamation, what defamation claimants want when they sue, the role of technology in resolving such disputes, streamlined court processes, online dispute resolution, and the regulatory role of intermediaries.

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Re-Imagining Resolution of Online Defamation Disputes

EMILY B. LAIDLAW

If an individual or company is defamed online, they have two options to resolve the dispute, absent a technical solution. They can complain to an intermediary or launch a civil action. Both are deficient for a variety of reasons. Civil litigation is often unsuitable given the nature of online communications (across different platforms, jurisdictions, involving multiple parties, and spread with ease), the length and cost of litigation, and the ineffectiveness of traditional remedies. Intermediary dispute resolution processes can sometimes be effective, but lack industry standards and due process, place intermediaries in pseudo-judicial roles, and depend on the changeable commitments of management. At its core, the problem is the high-volume, low-value, and legally complex matrix of online defamation disputes. In this article, I ask: Are there alternative ways to resolve disputes that would improve access to justice and resolution for complainants? The key to resolving some of these problems, I argue, is revisiting the basic issue of what complainants want in the resolution of a defamation dispute and then connecting this with innovations in dispute resolution. Ultimately, I recommend the creation of an online tribunal as a complement to traditional court action. In coming to this conclusion, I explore various issues and proposals for reform, including the challenges wrought by online defamation, what defamation claimants want when they sue, the role of technology in resolving such disputes, streamlined court processes, online dispute resolution, and the regulatory role of intermediaries.

Emily Laidlaw is an Associate Professor with the University of Calgary’s Faculty of Law. I wish to thank the Law Commission of Ontario for commissioning the work on which this article is based. See Law Commission of Ontario, Are we asking too much from defamation law? Reputation systems, ADR, Industry Regulation and other Extra-Judicial Possibilities for Protecting Reputation in the Internet Age: Proposal for Reform, by Emily Laidlaw (Ontario: LCO, September 2017), available at: <www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Laidlaw.pdf> [perma.cc/VY6Z-37ED]. Many thanks to Rose Pappas-Acreman for her research assistance.
RESOLVING ONLINE DEFAMATION DISPUTES is challenging for a variety of reasons. There might be multiple potential wrongdoers posting anonymously or pseudonymously. Defendants and intermediaries are sometimes located out of jurisdiction. Once a defamatory post is online, it is immortalized—in search engines, screenshots, sharing, archiving, et cetera—making erasure through content removal almost impossible. In addition, the nature of online spaces poses problems to resolution, with communications sent across different platforms and contexts, and involving multiple parties and unique communities with varying social norms about what is considered acceptable behaviour.

These challenges are exacerbated by the constraints of traditional litigation, which is slow, expensive, and rarely delivers the results complainants seek. Online defamation is an uneasy fit with traditional litigation because while the volume of defamation complaints is high, they are often not worth litigating given the low potential damages and legal complexity involved. More often, resolution of online defamation disputes is achieved through intermediaries.¹

1. There are many ways to define an internet intermediary. In the past I have approached intermediaries as those that control the flow of information online, identifying a particular category of gatekeeper (an internet information gatekeeper), which impacts participation and deliberation in democratic culture. A simpler definition, for our purposes, is that of the Organization for Economic Co-operation and Development, which defines intermediaries as those that “bring together or facilitate transactions between third parties on the Internet.” See OECD, Economic and Social Role of Internet Intermediaries (April 2010), online: <www.oecd.org/internet/ieconomy/44949023.pdf> [perma.cc/26HY-WC2S] at 9. Note that sometimes I use the term “platform,” which refers to the core role some intermediaries play in mediating and designing how we participate in the world. Julie Cohen aptly notes that “Platforms are
dispute resolution processes based on their terms and conditions of use. All of this creates a potential access to justice problem, where we have a high volume of defamation complaints, but prohibitive barriers for claimants seeking resolution through the courts.²

This article takes a step back and asks whether there is a better way to resolve these types of disputes. To put it another way: If we could design the system from scratch, what dispute resolution framework would improve access to justice and resolution for online defamation complainants? Ethan Katsh and Orna Rabinovich-Einy capture the access to justice issues with internet disputes:

One of the oldest maxims of law is that “there is no right without a remedy.” The history of law’s experience with the internet reveals a focus on statutory changes and court decisions but a neglect of remedies or dispute resolution processes. eBay’s sixty million disputes and Alibaba’s hundreds of millions of disputes are impressive, but also an indication that government and courts were not viable options. It also illustrates that innovative use of the new technologies can respond effectively to disputes.³

For the purpose of this article, access to justice is conceived in relation to dispute resolution. I adopt the definition used by the Online Dispute Resolution (ODR) Advisory Group of the Cyber Justice Council in the United Kingdom. The group argues for a “rethinking of access to justice”⁴ and advocates for a broader definition than dispute resolution (focused narrowly on resolutions through courts or streamlining court procedures) to include dispute avoidance and containment. Dispute avoidance is based on the belief that information enables parties to evaluate their situation and thereby avoid or resolve disputes. This might include tools to diagnose a legal problem or to prevent one from arising in the first place.⁵ Dispute containment focuses on de-escalating disputes and facilitating resolution.⁶ Access to justice as it is used in this article means

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⁵. Ibid at 17-19.

⁶. Ibid (and accompanying figures visually outlining their approach to access to justice).
three things: (1) dispute avoidance, (2) dispute containment, and (3) dispute resolution. I adopt this definition, because it allows for a wider set of remedial mechanisms to be considered, which Part I will show to be key to the nature of online defamation disputes.

In Part I, I identify the challenges of resolving online defamation disputes. This involves asking some of the following questions: What unique problems are posed to legal regulation by online defamation? Why do defamation plaintiffs sue? What outcomes do complainants want in the resolution of a defamation dispute? The answers to these questions provide the foundation for Parts II and III. In Part II, I examine various proposals for reforming resolution of legal disputes, both defamation and non-defamation specific, with a focus on the potential roles of ODR and intermediaries. In Part III, I make recommendations to reform the law, including conceptualizing an online dispute resolution framework that is aimed to meet the needs identified in Part I and incorporates lessons from Part II.

I. REPUTATION AND RESOLUTION

Re-imagining the resolution of online defamation disputes invites reflection on various aspects of defamation, in particular, the meaning of reputation in the digital age, specific problems created by online communications, and the kinds of outcomes complainants want. Such an enquiry helps identify the features that are important in a dispute resolution system and critical to improving access to justice.

A. REPUTATION AND CHALLENGES IN THE DIGITAL WORLD

An orienting case is Pritchard v Van Nes where Ms. Van Nes posted defamatory comments on Facebook about her neighbour, a middle school music teacher, which implied that he was a pedophile and unfit to teach children. Before the internet, Ms. Van Nes might have casually made these accusations to friends at a pub, for example, but she would have been less likely to stand on a podium with a microphone and repeat the accusations to a large audience. If these comments were communicated in the pub on a night out with friends, then however unfair and defamatory, the restrictions of the space and social convention meant there were built-in limits to the reputational damage. However, in the digital age,

7. Ibid at 17.
8. 2016 BCSC 686 [Pritchard].
9. Ibid at para 74 (Justice Saunders accepted this defamatory meaning).
defamation of this type is communicated with ease on social networking sites and with the impact of being centre stage with a megaphone.

In this case, Ms. Van Nes “vented,” as she put it, to her Facebook friends. Instead of her comments being heard by a few friends, her post was seen by over 2,000 Facebook friends, and commented on 48 times by 36 different friends. These comments characterized the defendant as “a ‘pedo’, ‘creeper’, ‘nutter’, ‘freak’, ‘scumbag’, ‘peeper’ and a ‘douchebag.’” In addition, her post was potentially visible not only to friends, but also friends-of-friends, and even the public, as Ms. Van Nes did not maintain any privacy settings. One friend emailed a picture of the post with a message to the plaintiff’s school principal. 

This case is mentioned to illustrate the ease with which defamation can be communicated and spread online. Viktor Mayer-Schönberger discusses the internet as an “environment of perfect remembering.” The permanence of such comments, whether because they are still available to view on the site, returned on search engine results, screenshot, printed or otherwise shared, makes even the most off-the-cuff remark potentially damaging. In the case of Pritchard, the damage of the Facebook post was severe, causing the plaintiff to experience stress and humiliation, withdraw from his professional and social community, lose his love of his career in teaching, and endure harmful comments by members of the community.

This environment of perfect remembering is magnified by search services. If the goal is to limit reputational harm, then part of the solution may be to remove the defamatory comment from search results to diminish its permanence and reach (as a link to the content would no longer be indexed in a search database). For instance, one can pay a reputation service to scrub certain content from search results. While such a solution can be effective, it is also imperfect and impermanent. If a legal avenue is sought, as was the case in Niemela v Malamas, the controversial debate largely centres on worldwide delisting (from all Google search services) versus more local delisting, such as from www.google.

10. Ibid at para 41.
11. Ibid at paras 23, 75.
15. Pritchard, supra note 8 at paras 33-38.
16. There are many online reputation management companies, such as Reputation.ca (Canadian-based) and ReputationDefender (American-based).
ca. In Niemela, the facts did not support worldwide delisting of the defamatory content from Google search results—over 90 per cent of the searches for the plaintiff were from Canadian IP addresses.

Such an order would not be enforceable in the United States in light of the Communications Decency Act (CDA) and the Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act. Unless a Canadian judgment can be directly enforced against a US intermediary, or an intermediary voluntarily complies, these intermediaries are, practically speaking, out of reach. The result is that Canadian law, however crafted, does not translate easily to resolve disputes in the online context, because many online platforms are American-based.

As the few examples above illustrate, resolving disputes in an area like defamation law is challenging. There are a few reasons for this. First, the lens through which reputation was historically analyzed is strained by the networked society. Reputation is “a social construct.” It is tied to our sense of self-worth, and our self-worth is tied to “the perceived level of esteem that we think others hold for us.” Indeed, our identity and reputation are developed through our interactions with others, rather than as something that exists inherently.

18. See e.g. Google Spain SL, Google Inc v Agencia Española de Protección de Datos, Marios Costeja González, (2014) Case C-131/12 (Google Spain); Equustek Solutions v Google Inc, 2017 SCC 34; Google LLC v Equustek Solutions Inc, No 5:17-cv-04207-EJD (US ND Cali) (issuing a temporary injunction, which was later made permanent); Equustek Solutions Inc v Jack, 2018 BCSC 610 (Google applied to the British Columbia Supreme Court to have the temporary injunction set aside, which the court declined to do).


22. For Canadian law on intermediary liability, see Emily Laidlaw & Hilary Young, “Internet Intermediary Liability in Defamation” (2019) 55 Osgoode Hall LJ.


The wrench in the system is that, historically, communities were more isolated. People had different reputations in different communities and information did not easily cross-pollinate. Defamation law was built around this construct of community—that there were social norms that governed behaviour in any particular community, that people only interacted with a small group of people, and that these groups were separated geographically.

In the networked society, communities and our portfolio of reputations are not as neatly placed in silos. Online communications often involve multiple parties, and information is shared across different platforms and contexts. Thus, your professional reputation on LinkedIn, friends on Snapchat, strangers on Twitter, and so on can bleed together. David Ardia discusses this interconnection as a “web of connections [that] leaves impressions, the sum of which comprises our reputation.”

The internet and the “web of connections” it inspires blow a hole in the notion of community that has sustained defamation law. A case like Pritchard is relatively straightforward in this respect—accusations of pedophilia are defamatory in any context and the community was clearly defined, even if the impact potentially reached other communities. In other cases, comments that are not defamatory in one interactive context, if shared on another platform and in another way, can carry a different potential reputational harm.

Second, traditional litigation is ineffective in resolving most defamation disputes. In practice, only a sliver of the harms that take place online can be remedied. Consider that Facebook has 1.7 billion users, Twitter has 320 million active users (1.3 billion accounts total), 4Chan has 11 million users, Snapchat has 100 million users, Reddit has 36 million accounts, and WhatsApp has 900 million users. On YouTube, users upload approximately 400 hours of video every minute, and it receives 200,000 flags for content per day. On Facebook,
1.3 million posts are shared every minute and approximately two million requests are made to Facebook per week to remove content. These requests are reviewed by Facebook’s approximately 7,500 moderators. We do not have the data regarding the number of requests made to Twitter, but consider that 500 million tweets are sent per day, and of those subject to a complaint to Twitter, only 1 per cent are removed. In contrast, Facebook removes 39 per cent of reported content, while YouTube removes approximately 90 per cent.

Although there are many studies on online abuse, most do not isolate defamation from other forms of abuse. A recent study by the Pew Research Centre found that 41 per cent of adults surveyed had been harassed online, of which 50 per cent had been harassed by strangers. Most of these incidents occurred on social networking sites. The study found that 26 per cent of adults had untrue information posted about them online and 9 per cent experienced emotional or mental distress as a result. Of the 26 per cent, half (49 per cent) attempted to

37. Home Affairs Committee, supra note 32 at Q 409 and Q 411.
38. Ibid.
have the information removed or corrected. Seventeen per cent of interviewees advised the untrue information related to their reputation or character.41

The structure of the internet (an interconnected network of computers) creates hurdles to resolution through traditional litigation. As Ardia explains, we seek information within the network, but our judicial system is outside this network, so it does not have the same influence on our views of one another and the world we live in: “[T]he fact that reputational information flows through networks makes defamation law’s task of protecting reputation more challenging and its remedies less effective.”42 Resolution through the courts is further complicated by the disconnect between online communities and courts. Consider Twitter—libel cases are difficult for courts to litigate as the norms that govern the space and the behaviours that comprise the community of interactions on Twitter are foreign to many of the courts hearing the cases.43

The above orients the reader to some of the key problems posed by online defamation to effective dispute resolution. They include:

*The defendant problem.* There might be multiple potential wrongdoers. The defendant posted anonymously or pseudonymously (and is not identifiable through a Norwich order44 or similar), or the defendant is located out of jurisdiction. The problem here is the basic question of who to sue.

*The jurisdiction and conflicts of law problem.* Defendants and intermediaries are sometimes located out of jurisdiction making it more difficult to sue or to enforce a judgment. Canadian law cannot be easily deployed to resolve transnational online defamation disputes, particularly in the context of intermediary liability and American-based companies.

*The permanence problem.* Once a defamatory post is online, it is almost impossible to undo its effects—or, as Ellyn M. Angelotti commented, “the toothpaste is out of the proverbial tube.”45 The reputational harms are immortalized.

41. *Ibid* at 11.
42. Ardia, *supra* note 23 at 306 [emphasis in original].
43. This was evident in a case of Twitter criminal harassment. See *R v Elliott*, 2016 ONCJ 35. See Ellyn M Angelotti, “Twibel Law: What Defamation and its Remedies Look Like in the Age of Twitter” (2013) 13 J High Tech L 430. Angelotti comments: “While the fundamental foundation of Twitter is fast, free communication, the traditional remedies for defamatory publications remain slow and costly” (*ibid* at 467).
44. This is a mechanism whereby courts can order a third party to provide documents or information that can help assist the plaintiff. See *Norwich Pharmacal Co v Customs and Excise Commissioners*, [1974] AC 133 (HL (Eng)).
The “network information economy” problem. The shift to internet participation represents a shift from the one-to-many mass media communications that typified our information consumption pre-internet (e.g., newspaper, broadcast), to the many-to-many business models of online platforms. Online communications often involve multiple parties sharing across various platforms. The notion of community is challenged, which is the focal point of assessing reputational harm in defamation law.47

The high-volume, low-value problem. All of the problems identified here, from the permanence problem to the network information problem, indicate a critical hurdle for resolution of these disputes: Most online defamation claims are high-volume and low-value. While there is a high volume of defamation online, most claims are not worth litigating given the low potential damages and legal complexity involved. The end result is that for many who are wronged, there is little opportunity for redress.

The traditional litigation problem. Traditional litigation is a minor player in online defamation dispute resolution. More commonly, resolution is achieved through the intermediary’s terms of use, or by scrubbing content from search results. These forms of dispute resolution have little connection to courts. Techno-legal solutions, meaning a legal response that involves a technological component, emerge as strong methods of dispute resolution. This is observable in Manitoba’s Intimate Image Protection Act,48 which focuses on providing support for victims of non-consensual distribution of intimate images, including technical support through the Canadian Centre for Child Protection (C3P).49

The problems identified above raise critical questions to re-imagining a system of dispute resolution: Why do defamation plaintiffs sue, and what outcome would be satisfactory for complainants to resolve an online defamation claim?

B. WHAT COMPLAINANTS WANT

Although there are no Canadian empirical studies on why people sue for defamation, American studies provide a sense of what motivates Canadian litigants. These studies answer key questions about the outcomes sought by

47. Ardia, supra note 23 at 282.
48. SM 2015, CCSM, c I87.
defamation claimants: Why do plaintiffs sue and what do they want out of a libel suit?

In the 1980s, researchers at the Iowa Libel Research Project\textsuperscript{50} empirically studied defamation suits, focusing on lawsuits against the press, asking who sues, why they sue, and why a news organization would allow a dispute to escalate to litigation.\textsuperscript{51} Note here that since the focus was on lawsuits against the press, the results might not be generalizable to all defamation suits. The key takeaway from the Iowa Project is that most defamation claimants are driven to sue for non-pecuniary-interests. Randall P. Bezanson, one of the original researchers, summarized the findings as follows:

Our study has led us to four basic conclusions [three of which are relevant to this paper]. First, libel plaintiffs do not sue for the sole purpose of obtaining a formal judicial remedy for reputational harm. They mainly sue to restore their reputation by setting the factual record straight, and this objective is accomplished in significant degree independent of the judicial result in the case. Second, money damages do not compensate libel plaintiffs. Indeed, money seems rarely to be the reason for suing. Most plaintiffs sue to correct the record and to get even. Third, the judicial decision in a libel suit does not reflect a fair and full determination of reputational harm or of the truth, falsity, or uncertainty of the published statement. These issues are rarely addressed and even more rarely decisive in litigation.\textsuperscript{52}

The above creates the possibility that forms of dispute resolution other than traditional litigation could potentially resolve disputes at less expense.\textsuperscript{53} Indeed, of those interviewed, the overwhelming majority would consider alternatives for resolution—70 per cent would consider it, and a further 13 per cent would consider it with certain qualifications.\textsuperscript{54}

The results may be even more striking in the Canadian context, given the fact that libel litigation at the time of the study was relatively inexpensive (with 80 per cent on contingency fee arrangements). Indeed, Bezanson identified this as one of the reasons plaintiffs sue despite the fact that less than 10 per cent of media

\begin{itemize}
\item \textsuperscript{50} There are several publications related to this project, but this article focuses on a select few.
\item \textsuperscript{52} Ibid at 227.
\item \textsuperscript{53} This was Robert M Ackerman's interpretation. See “Defamation and Alternative Dispute Resolution: Healing the Sting” (1986) Disp Resol J 1 at 7.
\end{itemize}
libel claims are successful in court. This is significant to the extent that the more expensive litigation is, the more attractive alternative resolution models will be.

While much has changed in the world since the 1980s, and while the study is focused on American litigants, I view this study as a compelling analysis that counters the assumed narrative of libel judgments. Indeed, this type of approach informed some of the defamation reform proposals in the United Kingdom that are detailed more in Part II.

One qualification relates to youth. In a 2017 study, Jane Bailey and Valerie Steeves interviewed twenty individuals between the ages of 15 to 21. The study participants saw the law as “a last resort” for resolving their reputational harm, preferring other forms of dispute resolution. In their view, a legal response would not de-escalate the conflict, resolve the social and emotional aspect of the harm, mend their reputation or change the behaviour, and would be costly and slow. Thus, participants preferred community-based resolution, followed by reporting to social media providers or schools. In Bailey and Steeves’s view, law reform should focus on supporting community-based resolution mechanisms, improving platform regulatory structures, and improving education, with direct legal intervention reserved for the most serious situations.

The concerns expressed by youth inform my thinking here more generally. In particular, containment and erasure most reflect what youth are seeking, including privacy in resolving their problem—whether it is suing or complaining anonymously, resolving it through a notice to the social networking provider, or containing the spread of the information by erasure of the content as much as possible.

The goals of complainants and challenges of the internet present an opportunity for more wholesale reform of how online defamation disputes are resolved. Certainly, the weaknesses of traditional litigation are exposed,

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56. See Ackerman, supra note 53 at 7-8, n 35.
58. Bailey & Steeves, supra note 57 at 46.
60. Ibid at 46.
61. Ibid at 93-95.
62. See e.g. AB v Bragg Communications Inc, 2012 SCC 46; Jane Doe 464533 v ND, 2016 ONSC 541 (default judgment set aside, awaiting re-trial: 2017 ONSC 127).
prompting the question of whether there are ways to either improve that system or to resolve disputes in a different way that better meets the outcomes sought by complainants.

II. REFORMING DISPUTE RESOLUTION

At the moment, a complainant’s options are limited. One can seek resolution through traditional litigation or can make a complaint to the intermediary based on the terms and conditions of use. There is a chasm between these two options with minimal remedial mechanisms, court-based or private, creating a hurdle to access to justice. Based on Part I, certain features of resolution emerge as important. First, speedy resolution is critical, because information spreads quickly and easily. Second, accessibility of resolution is important, in terms of cost and ease of use of the process. Third, containment and avoidance of disputes are key. Given the risk that online defamation spreads quickly and disputes escalate equally as fast, the facilitation of resolution that arrests further harm and de-escalates is preferable. This highlights many things as important to resolution, such as technical solutions like erasure, reaching the right communities and using the discursive nature of the internet in the resolution procedure. Finally, there is a rehabilitative aspect to the restoration of reputation by healing the dignitary or other harm.

Using the above as a blueprint, in this Part, I examine three aspects to dispute resolution: (1) reform to existing methods of resolving defamation disputes, which I view as tweaks to the traditional system; (2) ODR as more wholesale reform to methods of resolving online disputes; and (3) company-level dispute resolution and ways to conceptualize and incentivize intermediaries in this role.

A. TRADITIONAL DEFAMATION REFORM

Traditional litigation for the tort of defamation has always been an uneasy fit. The traditional goals of tort actions are compensating the plaintiffs for the harm they have suffered and signalling to defendants that their behaviour fell

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63. Bernstein, supra note 45 at 1484 (identifying four goals for online defamation dispute resolution, which complement the above: “containment, erasure, rehabilitation, and lowered costs”).
64. Mullis & Scott, supra note 2 at 19-21 (discursive remedies).
65. Hill v Church of Scientology of Toronto, [1995] 2 SCR 1130 at para 107 (dignity is especially important in Canadian defamation law). See also Reynolds v Times Newspapers Ltd and Others, [1999] UKHL 45 at para 43 (in the United Kingdom, “[r]eputation is an integral and important part of the dignity of the individual”); Bernstein supra note 45 at 1484-85.
below an acceptable standard. Defamation law struggles to fit within this paradigm, because of the underlying concern that imposing liability might have a chilling effect on freedom of expression. More generally, court proceedings can be lengthy, costly, uncertain, and formal; judges are often not experts in the particular field of law at issue; and proceedings are public, adversarial, and difficult to litigate or enforce if they involve parties from other jurisdictions.

Alternative Dispute Resolution (ADR), in contrast, is advantageous concerning, among other things, speed, cost, flexibility of proceedings and outcomes, and amenability to international disputes, while also being a less adversarial approach that requires less involvement of expert facilitators. More fundamentally, ADR provides an opportunity to resolve a defamation dispute by focusing on the interests of the parties more than their rights. In practice, it focuses on the interest of the defamation claimant to clear their name, or the interest of the journalist to be accurate. This might align with the interest of claimants to right a reputational wrong.

ADR, in the form of mediation, negotiation, or arbitration, is given some prominence in this article in light of the goal of defamation complainants to restore their reputation. Further, the outcomes and mechanisms identified do not necessarily need to be deployed by courts. Since key features in the resolution of online disputes are speed, containment, erasure, and lowered-costs, other regulatory models become interesting to explore.

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67. Ibid. See also Mullis & Scott, supra note 2 at 13 (objectives of damages in British libel law “to compensate for distress, hurt and humiliation; to compensate for unquantifiable, presumed reputation harm; to compensate for actual (provable) harm; and to vindicate or restore the claimant’s damaged reputation”).
69. Ibid.
70. Ackerman, supra note 53 at 24.
71. Ibid.
73. See Susan Blake, Julie Browne & Stuart Sime, A Practical Approach to Alternative Dispute Resolution, 4th ed (New York: Oxford University Press, 2016) at para 1.11. ADR does not have a single definition and not all agree on the types of dispute resolution that are ADR. To some, arbitration is not ADR because it is a regulated system, nor is negotiation, because it narrowly involves lawyers and clients. In this article, a broad definition is used.
However, I view traditional litigation as integral to resolving defamation disputes. Traditional litigation has many advantages. Among other things, it “inspires the respect of society,”74 is publicly accountable, can produce a judgment, and is enforceable with a great range of remedial powers; it has rules and procedures to ensure a fair trial,75 and trials can be “cathartic.”76 For some defamation complainants, traditional litigation is the appropriate route for resolving disputes where a judgment by a court carries a formal authority and public signalling important to the claimant. The problem is that traditional litigation is not suitable for most defamation claimants, in particular, those seeking to resolve online disputes. So, in exploring the potentiality of other forms of reform, the goal is for such mechanisms to be complementary to traditional court actions.

Over the years, many proposals have been made to reform mechanisms for resolving defamation disputes (non-specific to online defamation), particularly in the United Kingdom as part of its reform of defamation law. Proposals can be broken down into two, sometimes overlapping, variations: (1) streamlined processes and (2) alternative systems, either court-based or private.

One category of streamlined processes involves early intervention. This can take the form of early neutral fact-finding77 wherein a factual finding is made as to, for example, the falsity of the publication. Another form is early neutral evaluation, which enlists a judge or facilitator to evaluate the chances of success of the case. The latter is available for use in the United Kingdom to resolve construction disputes,78 although there has been little take-up, despite its success when used.79 Other proposals for defamation reform directly concern streamlined court processes. They include stricter case management, mediation, arbitration, or costs penalties for unreasonable refusal of ADR.80

Ireland’s Defamation Act81 includes a two-track process whereby claimants can elect to pursue an expedited declaratory order that the statement is false

74. Ibid at para 1.01.
75. Ackerman, supra note 53 at 26. Ackerman, in this context, notes that trials can be cathartic for those involved and that trials are especially appropriate when, for example, facts are in dispute.
76. Blake, Browne & Sime, supra note 73 at paras 1.01-1.02.
77. Ackerman, supra note 53 at 20-23. Ackerman, for example, suggests a streamlined fact-finding process by using a special verdict (see ibid at 10-15).
78. ALP, supra note 72 at 1, 13-14.
79. Ibid at 29.
80. Ibid at 9, 15-16.
81. Defamation Act 2009 (UK).
and defamatory. The catch is that the claimant foregoes a claim for damages. Another compelling version of a two-track model is proposed by Alastair Mullis and Andrew Scott. They recommend triaging cases, with complex cases going to the High Court and other cases going through a simplified, fast-track option.

Other proposals for defamation reform focus on creating specialized courts or tribunals. For example, one suggestion is an adjudication model, where a privately funded adjudicator would make a decision that is non-binding on the parties. Parties can be compelled to use the procedure by mandating it through legislation as a prerequisite to filing a claim, or it can be voluntary.

Another option is a specialized court, which would operate similarly to traditional court actions, except that the judge would be a specialist in defamation law, and trials could be limited in length, cost, and evidence. Complex cases could be transferred to a traditional court. One model is the United Kingdom’s Patents County Court. Such a model would not transfer easily to a Canadian context, where not as many judges are experts in defamation law and we do not necessarily have the population base to sustain such a bricks and mortar court. If, for example, one court were set up in Toronto, which is the only city where such a court would be sustainable, this would limit access for anyone outside the Greater Toronto Area. Therefore, a tribunal would be more workable in a Canadian context. Such a tribunal could be self-funded through claim fees.

The problem with some of the suggestions explored in this section is that, for the most part, they do not provide a techno-legal resolution. Authors such as Ardia, Angelotti, and Bernstein advocate such techno-legal solutions and Part I helped identify why such forms of resolution are increasingly important to resolve online disputes. There were two similar streams to Ardia and Angelotti’s recommendations. First, the authors emphasized the value of speedy resolution focused on reliable information, such as flagging content as disputed.

82. Ibid, s 28.
83. Ibid, s 28(2).
84. Mullis & Scott, supra note 2 at 18-19.
85. ALP, supra note 72 at 25.
86. Ibid at 25-26.
87. Ibid at 27.
88. Ibid at 28.
89. Ardia, supra note 23 at 318; Angelotti, supra note 43 at 467.
or procedures to contextualize information for accuracy or to correct false information.\textsuperscript{91} Second, they advocated the deployment of these types of solutions within the online communities. Not surprisingly, intermediaries were earmarked as in a good position to do this, because of their capacity to regulate users.\textsuperscript{92} Anita Bernstein proposes a techno-legal solution through the courts, suggesting a court-based arbitration scheme that is elective and non-binding combined with a technical solution, such as a remediator, to expunge material from the internet.\textsuperscript{93}

Further, while these proposals are promising tweaks to the system of dispute resolution, I question whether an opportunity for fundamental reform might be missed if one of these solutions were to be selected. Admittedly, this article seeks to re-imagine the system from scratch, but traditional reform proposals either miss the networked information core of the online defamation problem or were not designed with that specifically in mind. This invites consideration of another proposal for reform, such as ODR, as it better facilitates techno-legal solutions and reaches the online communities where the harm took place.

\textbf{B. ONLINE DISPUTE RESOLUTION}

ODR refers to the use of technology to resolve legal disputes.\textsuperscript{94} An instructive definition of ODR is as follows: “[T]he integration and use of technology in the process of dispute resolution, whether judicial or extrajudicial.”\textsuperscript{95} ODR ranges from technical support, such as online filing or document management systems, to more formalized legal institutions, such as the movement online of tribunals or courts. Thus far, ODR has flourished in the private sector. Part of the reason is market-driven: Businesses must deliver the holy trinity of trust, convenience, and expertise or users will go elsewhere.\textsuperscript{96}

However, Katsh and Rabinovich-Einy note that the pressure is mounting on government, because of what they describe as “liquid expectation”—the bleeding over of experiences from one area, such as the use of resolution tools on eBay or Amazon, to expectations in other arenas, such as dealings with the

\textsuperscript{91.} Ardia, \textit{supra} note 23 at 320-21.
\textsuperscript{92.} Ibid.
\textsuperscript{93.} See \textit{e.g.} Bernstein, \textit{supra} note 45 at 1487-89.
\textsuperscript{94.} See generally Wang, \textit{supra} note 68. See also Julia Hörnle, \textit{Cross-border Internet Dispute Resolution} (Cambridge: Cambridge University Press, 2009).
\textsuperscript{96.} Katsh & Rabinovich-Einy, \textit{supra} note 3 at 152.
\textsuperscript{97.} Ibid.
public sector.\textsuperscript{98} Online resolution tools in the public sector range from online tools to streamline court processes, such as Australia’s eCoutroom, which allows the submission of documents and communication online,\textsuperscript{99} to online courts. In the United States, for example, ODR was introduced to mediate railroad and airline disputes, and online processes are being used by the National Mediation Board.\textsuperscript{100} Online courts and tribunals now operate in several jurisdictions, including Michigan, Ohio, Puerto Rico, Australia, and Canada.\textsuperscript{101}

ODR has great potential to achieve the kinds of resolution defamation claimants seek. However, the lack of a contractual relationship, in most cases, between the complainant and the defendant in the context of a defamation claim impacts the potential enforceability of an ODR framework. Rather, the contractual relationship, if any, is usually with the intermediary through the terms of service. Part II(C) explores how to incentivize intermediary frameworks or capitalize on that contractual relationship to encourage dispute resolution.

In some ways, ODR and ADR share similar advantages over traditional litigation. However, the ODR process is potentially less expensive, faster (as there no need for physical convergence), more transparent by leaving a digital trail (although this also creates a privacy vulnerability), and more flexible.\textsuperscript{102} It also addresses geographic and economic barriers, both of which impact access to justice. For example, some complainants are located in rural areas creating hurdles to accessing courts, or the type of dispute is not one for which complainants typically sue, such as low-value e-commerce claims. Thus, ODR opens up an avenue for redress.\textsuperscript{103}

ODR has potential drawbacks. The United Kingdom Advisory Group recommended that ODR is not suitable to all disputes, and is best deployed for high-volume, low-value disputes.\textsuperscript{104} But low-value does not necessarily translate

\textsuperscript{98.} Ibid at 152-53.
\textsuperscript{99.} Ibid at 158-59.
\textsuperscript{100.} The National Mediation Board uses an online tool called STORM to facilitate the brainstorming of resolutions. For a discussion of the tool see ibid at 150-51, ch 6; Lori Clarke et al., “A Process-Driven Tool to Support Online Dispute Resolution” University of Massachusetts Technology Report: online <laser.cs.umass.edu/techreports/07-05.pdf> [perma.cc/ED9H-VEQQ].
\textsuperscript{101.} See Wang, supra note 68 at 25.
\textsuperscript{102.} Ibid at 28-29.
\textsuperscript{103.} Council of Europe, PA, Committee on Legal Affairs and Human Rights, Access to Justice and the Internet: Potential and Challenges, Doc 13918, by Jordi Xuclà (2015) at 8-9 [Access to Justice and the Internet].
\textsuperscript{104.} ODRAG, supra note 4 at 5.
to “legal simplicity.” Online defamation has the unfortunate position of being legally complex, high-volume and often low-value.

Relatedly, there might be concern that technology-facilitated resolution will be impersonal for resolution of these kinds of disputes, particularly if there is no human facilitator involved. However, human–computer interaction in the context of ODR can operate similarly to human–human interactions. As Darin Thompson explains:

Researchers have found that human–computer interactions follow patterns similar to human–human equivalents. Users may be aware they are interacting with machines, but still tend to follow human–human social rules, and treat computers as if they have feelings. Humans can become angry towards computers, and may be flattered or feel praised by them. Humans recognize computers cannot think or feel emotion, yet still follow human–human social patterns unconsciously. These manifestations are not limited to systems that take on anthropomorphic characteristics; research suggests they occur even with basic textual interfaces.

This means that technology can play a critical role in delivering the resolution needs of humans, including emotional needs. A properly designed ODR system, such as using a carefully crafted questionnaire, can “help users investigate and better understand their emotions in a dispute, along with the underlying interests to which they relate.”

More general concerns about ODR are that the use of technology will marginalize vulnerable populations who do not have access to it, technical difficulties will make it difficult to use, it might favour repeat players familiar with the procedures and mediators involved, it might create a privacy vulnerability for users, and users might not understand or trust the system. Despite these concerns, the immense potential of ODR has spurred a growing movement towards its implementation both internally by companies seeking to

105. Access to Justice and the Internet, supra note 103 at 9.
107. Ibid at 46.
108. Access to Justice and the Internet, supra note 103 at 11.
109. Ibid.
110. Ibid at 12.
111. Ibid at 13; Angelotti, supra note 43 at 490-91.
112. Angelotti, supra note 43 at 490-91 (on trust). See also the story of eQuibby: Robert Ambrogi, “Online Dispute Resolution Site eQuibbly Shuts Down” (7 March 2016), LawSites, online: <www.lawsitesblog.com/2016/03/online-dispute-resolution-site-equibbly-shuts-down.html> [perma.cc/WW9P-J8PU]; Access to Justice and the Internet, supra note 103 at 12-13 (governments can play a role in educating the public and accrediting providers).
resolve complaints, and through government initiatives to create ODR providers, minimum standards,\textsuperscript{113} online courts,\textsuperscript{114} or tribunals.\textsuperscript{115}

The key features of an ODR system include convenience, expertise, trust,\textsuperscript{116} accountability,\textsuperscript{117} transparency, confidentiality,\textsuperscript{118} and enforcement.\textsuperscript{119} Enforceability is problematic for the resolution of online defamation disputes where the losing party might simply refuse to comply with an outcome and the dispute resolution body has minimal enforcement powers. Direct self-enforcement is evident in some privately-run ODR systems. For example, domain names disputes are resolved through a private dispute resolution provider with the power to direct a transfer of the domain name.\textsuperscript{120} Here, the dispute provider “control[s] the resources at play.”\textsuperscript{121} As one interviewee commented, “a dispute resolution tribunal [for defamation] is a great idea in theory, but in practice it requires enforcement mechanisms built in and an identity system built in. The domain name system has both, but defamation has neither.” Other forms of enforcement might be, as Wang outlines: “[P]ayment system escrow, a refund system, a transaction insurance system and technological constraints.”\textsuperscript{122}

Alternatively, indirect enforcement of a defamation decision is possible. An indirect form of enforcement is where the losing party is incentivized to voluntarily comply through “the use of trustmarks, reputation management and rating systems, publicly accessible reports, exclusion of participants from marketplaces, and payments for delay in performance.”\textsuperscript{123} Jordi Xuclà advocates for indirect mechanisms including trustmarks to overcome enforcement

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{114} See e.g. HM Courts & Tribunals Service, “Money Claim Online,” online: <www.moneypayment.gov.uk/web/mcol/welcome> [perma.cc/L9YY-RY77] [Money Claim] (pilot online court); Wang, supra note 68 at 25.
\item \textsuperscript{115} See British Columbia’s Civil Resolution Tribunal, discussed in Part II.
\item \textsuperscript{116} Ethan Katsh & Janet Rifkin, Online Dispute Resolution: Resolving Conflicts in Cyberspace, (San Francisco: Jossey-Bass, 2001); Katsh & Rabinovich-Einy, supra note 3 at 37-38.
\item \textsuperscript{117} Wang, supra note 68.
\item \textsuperscript{118} Ibid at 83 (identifying a tension between transparency and the need for confidentiality).
\item \textsuperscript{119} See Katsh & Rabinovich-Einy, supra note 3; Wang, supra note 68 at 83.
\item \textsuperscript{120} See CIRA, “CDRP process and decisions,” online: <cira.ca/legal-policy-compliance/cdrp-process-and-decisions> [perma.cc/9LXY-L4WT] [CIRA].
\item For discussion of the CDRP process, see Teresa Scassa & Michael Detrubide, Electronic Commerce and Internet Law in Canada, 2nd ed (Toronto: CCH Canadian Limited, 2012) at 313-35.
\item \textsuperscript{121} Wang, supra note 68 at 83.
\item \textsuperscript{122} Ibid at 83-84.
\item \textsuperscript{123} Ibid at 84.
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issues in the e-commerce context, and to encourage compliance with ODR decisions. In a defamation context, indirect self-enforcement mechanisms are similarly viable. For example, a decision could be publicly accessible, for instance published on the ODR website or in the community where the defamation was communicated. Or, the decision could be used to effect notice and takedown (NTD), which means notice would be given to intermediaries to remove unlawful content.

To conceptualize how ODR might be deployed in a defamation context, I explore ODR in three case studies: (1) company-led (eBay); (2) government-pushed (European ADR Directive); and (3) government-created (British Columbia’s Civil Resolution Tribunal).

1. COMPANY-LED

eBay’s drive for developing its dispute resolution model is to build trust in its online marketplace. Its dispute resolution system now resolves 60 million disputes per year through a variety of means. For informal, or “soft” ODR, eBay uses a feedback system. Buyers are invited to review aspects of the transaction, including seller performance. This is viewable by the public and combined with other reviews to create a feedback score. Abuse of the feedback system can create dispute resolution needs, but the system itself is designed to avoid disputes. eBay also offers a “Seal Membership.” For a small fee, eBay sellers who commit to abide by a selling standard, and provide their identity and address, can have a trust seal posted as an icon on eBay linked to their seller identification. The icon is controlled by SquareTrade, a private ODR provider that eBay uses exclusively. SquareTrade can remove the seal at any time if the seller fails to abide by its selling standards.

For a formalized, or “hard” ODR system, eBay offers two services: (1) technology-assisted negotiation; and (2) if the dispute is not resolved at this stage,

124. In general, a “trustmark” is a seal, logo or something similar used by platforms in the e-commerce sector to indicate that a seller is trustworthy. See the discussion on eBay below in Part II(B)(1).
125. Access to Justice and the Internet, supra note 103 at 12.
126. For further information on NTD, see Laidlaw & Young, supra note 22.
128. See Part II.
then it can be escalated to a human mediator. Rarely do eBay disputes escalate to the second stage: Eighty-five per cent of disputes are resolved using software. Ultimately, if a resolution is not achieved, eBay offers an adjudication service, which is enforceable using its Money Back Guarantee.

Most eBay disputes concern transactions, unlike the relational nature of defamation disputes. For disputes concerning the feedback system, which can involve allegations of defamatory reviews, eBay uses “Net Neutrals.” This design is instructive for online defamation disputes in general. The ‘Independent Feedback Review’ process, as it is called, is led by a trained, neutral third party who reviews the information submitted by the parties, considers new arguments, and then decides whether the feedback should be removed based on a set of criteria. From start to finish, the process takes seven days. While the dispute is in progress, eBay removes the review.

eBay has taken novel approaches on many fronts concerning dispute resolution. As Katsh and Rabinovich-Einy explain, eBay designed a system, not a tool: “[I]t introduced the concept of an ODR system as opposed to an ODR tool. In an ODR system, data is generated that reveals patterns of disputes and provides opportunities to both facilitate and monitor consensual agreements, thus making disputes in the future less likely.” A database of decisions is created, which helps users see the provider as accountable. The data also provides a source for empirical research helping the provider identify trends and flaws in the system to make changes. For example, one study of eBay’s dispute resolution system revealed that use of eBay increased regardless of the outcome of a dispute resolution process. For the author of the study, Colin Rule, the key takeaway was that trust is key for online services, and “[r]esolution is a core component of user trust.” The larger message is that this data provides feedback to help improve a dispute resolution system, whether on the level of a single company, or through an online tribunal.

131. Katsh & Rabinovich-Einy, supra note 3 at 34.
132. Darin Thompson, “The Growth of Online Dispute Resolution and Its Use in British Columbia” (delivered at the British Columbia Civil Litigation Conference, 2014) [Thompson, “Growth of ODR”].
133. ODRAG, supra note 4 at 12.
134. Katsh & Rabinovich-Einy, supra note 3 at 35 [emphasis in original].
136. Rule, supra note 129 at 772.
137. Ibid at 774.
2. GOVERNMENT-PUSHED

Another option is to push for the use of ODR to settle defamation disputes through legislative reform. Such legislative initiatives can include encouraging disputants or online platforms to use ODR, mandating that online platforms provide ODR, setting standards for ODR, or creating ODR bodies. An example of government-pushed ADR and ODR is the European Union’s Directive on alternative dispute resolution for consumer disputes (ADR Directive),\^138 which focuses on both offline and online consumer disputes, as well as the related Regulation on online dispute resolution for consumer disputes (ODR Regulation),\^139 which implements an ODR platform for online consumer disputes. Notably, the ODR Regulation’s focus is limited to small e-commerce transactions rather than the kinds of disputes analyzed in this article.

The ADR Directive and ODR Regulation work in two ways concerning online consumer disputes. First, the ODR Regulation sets up a free, interacting ODR platform, which is operated by the European Commission.\^140 The platform does not itself provide ODR services. Rather, it is a portal through which to launch a complaint and find an approved ADR provider.\^141 While the use of the ODR platform is voluntary, businesses must provide a link to the platform on their website.\^142 Second, the ADR Directive sets minimum quality standards at a state level for ADR providers (related to both offline and online disputes).\^143 The Directive requires Members States to create a monitoring authority for certified ADR providers.\^144 The United Kingdom appointed the Trading


\^140. “Online Dispute Resolution,” online: European Commission <cc.europa.eu/consumers/odr/main/index.cfm?event=main.home.show&lng=EN> [perma.cc/33AL-ABBB] [ODR Platform]; ODR Regulation, supra note 139.

\^141. ODR Platform, supra note 140.

\^142. ODR Regulation, supra note 139, art 14.

\^143. ADR Directive, supra note 113 at ch II.

\^144. Ibid, art 20; Access to justice and the Internet, supra note 103 at 6.
Standards Authority as the competent authority to monitor ADR providers for non-regulated sectors.145

3. GOVERNMENT-CREATED

While the ODR platform is a clear example of government-pushed ODR, its focus remains on facilitating private ADR through setting minimum quality standards and improving accessibility. This section investigates the ways more formalized institutions of legal decision-making, namely courts and tribunals, have moved online. As Lord Justice Briggs commented, “the Online Court is a concept for which the time has come.”146 The United Kingdom Advisory Group advocated the potentiality of ODR for courts:

[A] legal system and the rule of law itself depend on the existence and widespread use of a public court system that applies, clarifies, and develops the law through decisions that are authoritative, enforceable, final and can set precedent. However, this policy position does not preclude the possibility of judges providing this service across the Internet. Nor need it limit the role of the courts to dispute resolution (as opposed to dispute containment and dispute avoidance).147

Most relevant here is the Civil Resolution Tribunal (CRT) in British Columbia (BC).148 The CRT is a product of the Civil Resolution Tribunal Act.149 The tribunal currently hears small claims under $5,000 and strata (condominium) disputes, and focuses on collaborative problem-solving for disputes.150 As one

145. Trading Standards Authority, “ADR Approval,” online: <www.tradingstandards.uk/commercial-services/approval-and-accreditation/adr-approval> [perma.cc/B8W6-XKD2]. In regulated industries, existing regulators (e.g., the Gambling Commission or Office of Communications (Ofcom)) will monitor and certify ADR providers.


147. ODRAG, supra note 4 at 26.

148. See Civil Resolution Tribunal Portal <civilresolutionbc.ca>. See also the discussion in Katsh & Rabinovich-Einy, supra note 3 at 151-60.

149. Civil Resolution Tribunal Act, SBC 2012, c 25.

150. There are no financial limits on strata disputes brought before the tribunal. See Shannon Salter, “Province of BC Expands Civil Resolution Tribunal’s Jurisdiction” (26 April 2018), online: <civilresolutionbc.ca/province-bc-expands-civil-resolution-tribunals-jurisdiction> [perma.cc/K8EZ-A8FR] (the British Columbia government proposed expanding the CRT remit to certain motor vehicle accident claims). See also Bill 20, The Insurance (Vehicle) Amendment Act, 3rd Sess, 41st Leg, British Columbia, 2018.
of the members of the BC Ministry of Attorney General’s project team, Darin Thompson, commented:

We know between 1-2% of cases filed in court will be resolved in trial. It is true across Canada, USA, and appears to be the case in England. So, 98% of the time it is not resolved in trial. Why would you make people start off that way if you aren’t going to end up in that adversarial contest of rights? The BC Ministry of Attorney General was inspired to design something that worked for the other 98%.\footnote{151}{Interview of Darin Thompson (5 June 2017).}

A key feature of the CRT is that legal representation is limited, although it is permissible for a lawyer to act as a helper.\footnote{152}{Civil Resolution Tribunal, “Do I need permission to have a helper?,” online: <civilresolutionbc.ca/how-the-crt-works/tribunal-process/starting-a-dispute/helpers-representation/#do-i-need-permission-to-have-a-helper> [perma.cc/W28T-2H7H].} Exceptions include children and adults for which mental capacity is an issue.\footnote{153}{Civil Resolution Tribunal, “Can I have a representative?,” online: <civilresolutionbc.ca/how-the-crt-works/tribunal-process/starting-a-dispute/helpers-representation/#can-i-have-a-representative> [perma.cc/7BHW-3P7T].}

The CRT operates in four phases: solution explorer, negotiation, facilitation, and adjudication.\footnote{154}{Civil Resolution Tribunal, “Starting a Dispute,” online: <civilresolutionbc.ca/how-the-crt-works/tribunal-process/#1-starting-a-dispute> [perma.cc/5H4U-7DRK]; Civil Resolution Tribunal, “Getting Started,” online: <civilresolutionbc.ca/how-the-crt-works/getting-started> [perma.cc/7EVQ-VJD6]; see Katsh & Rabinovich-Einy, \textit{supra} note 3 at 160.} In Phase One, the parties use online tools to try to diagnose and resolve their problem. The tools include interactive questionnaires and information services to help diagnose problems, and self-help services in the form of letter templates.

Phase Two is automated negotiation. Here, the parties try to negotiate a resolution party-to-party using online tools. Phase Two is initiated with the equivalent of filing a statement of claim. However, the emphasis in CRT is different. Rather than setting out different arguments to succeed in court, the focus is on resolving the problem. Technology facilitates resolution by providing tools, such as templates and dropdown menus, which frame the negotiation.\footnote{155}{Katsh & Rabinovich-Einy, \textit{supra} note 3 at 160.}

If the dispute is not yet resolved, then Phase Three introduces human facilitators. A tribunal member or case manager leads a mediation, which, if successful, can be made into a tribunal order. Phase Four is adjudication and the decision has the force of a court order.\footnote{156}{Ibid.} All of this is generally done using
the online platform alone, although in-person meetings are also permitted, depending on the situation.\(^{157}\)

Take-up of the CRT since its launch in July 2016 has been significant. As of December 2017, the CRT received 808 applications to resolve strata disputes, of which 369 were completed. Since expanding to resolve small claims matters in June 2017, the CRT received 2,236 small claims applications, out of which 687 were completed. On average, the CRT estimates that it receives 350-450 new applications monthly.\(^{158}\) Further, the remit continues to expand, most recently with the proposal that the CRT resolve certain motor vehicle accident claims.\(^{159}\) All the while, like eBay, the CRT analyzes data about the CRT system to continuously make improvements.\(^{160}\)

The United Kingdom is also developing an online small claims court,\(^{161}\) with a pilot version launched by Her Majesty’s Courts and Tribunals Service in April 2018.\(^{162}\) Such a court was proposed by Lord Justice Briggs in his 2016 report reviewing the structure of civil courts.\(^{163}\) The details of the United Kingdom model do not need to be explored in depth here as conceptually there are many similarities with the CRT.\(^{164}\) Two key distinguishing features of this model are an online court\(^{165}\) (unlike the tribunal structure of the CRT), and the inclusion of lawyers in the process. The current pilot is for small claims matters for fixed monetary claims under £10,000.\(^{166}\)

\(^{157}\) Thompson, “Growth of ODR,” *supra* note 132 at 1.1.5.

\(^{158}\) CRT, “Update: Since June 1, 2017 the #CRT has received 2236 small claims applications (687 completed). Since July 13, 2016, the CRT has received 808 strata applications (369 completed). The CRT now receives about 350-450 new applications for dispute resolution each month. #ODR #A2J” (4 Dec 2017 at 12:19), online: Twitter <twitter.com/CivResTribunal/status/937733030520619008/> [perma.cc/49Z4-J4CH].

\(^{159}\) Salter, *supra* note 150.

\(^{160}\) See the CRT’s continuous improvement strategy at work, online: Civil Resolution British Columbia <civilresolutionbc.ca/solution-explorer-quarterly-update-2017-q4> [perma.cc/DT8M-T76T].

\(^{161}\) Briggs, *supra* note 146; Katsh & Rabinovich-Einy, *supra* note 3 at 160.

\(^{162}\) HM Courts & Tribunals Service, “Quicker way to resolve claim disputes launched online” (6 April 2018), online: <www.gov.uk/government/news/quicker-way-to-resolve-claim-disputes-launched-online> [perma.cc/M6NU-P5T6]; see e.g. Money Claim, *supra* note 113.

\(^{163}\) Briggs, *supra* note 146.

\(^{164}\) For further information, see ODRAG, *supra* note 4; Briggs, *supra* note 146 at paras 6.4, 6.108-6.114.

\(^{165}\) Briggs, *supra* note 146 at paras 6.40-6.41.

\(^{166}\) Money Claim, *supra* note 114. Note that Lord Briggs’ proposal was for disputes up to £25,000. See Briggs, *supra* note 146 at paras 6.47-6.54.
The CRT and online court are potentially promising models for resolving defamation disputes. Of particular interest are the dispute avoidance and containment strategies reflected in the staircase approach, the accessible nature of these frameworks, the potential for speed, and remedies oriented to reputation corrections more than damages. Two evident hurdles are enforceability and legal complexity. The potentiality of an ODR tribunal or court is further explored in Part III.

C. THE ROLE OF INTERMEDIARIES

The potentiality of ODR invites closer analysis of the role of intermediaries, in particular, the role of social networking providers that host third-party content. The remedial mechanism an intermediary deploys is a form of company-level ODR. This type of ODR can provide inexpensive access to justice for those situations where a resolution within and by the community provides the kind of resolution sought. Two aspects must be examined here: the strengths and weaknesses of company-level ODR and how to incentivize it.

The biggest hurdle to the use of ODR and company-level ODR in the context of defamation claims is that transactional disputes evident in, for example, most eBay disputes, fundamentally differ from defamation disputes. Katsh and Rabinovich-Einy provide a useful summary of why the resolution of transactional disputes is simpler: For one, the feedback systems involved are a risk-reduction tool that increases the willingness to interact with someone whom the buyer or seller does not know. That, in turn, reduces the likelihood of a dispute occurring (although of course there are disputes over feedback ratings and there are commercial contexts in which feedback ratings are less effective). Second, the kinds of disputes that need to be resolved are limited. Most involve something broken, not paid for, not delivered, and so forth. Third, the disputes are two-party disputes rather than involving many different parties. It’s also difficult for parties to hide who they are, since identities are linked to some payment process; similarly, discovering who is at fault is easier with mechanisms such as shipment insurance and tracking. And last but far from least, monetary exchanges can occur immediately once an agreement is reached.\(^167\)

Anger can be high in both types of disputes, but anger can more easily be managed with transactional disputes (once parties realize there was a mistake and so on). With relationship disputes such as defamation, the anger might have been building up over time and, as a result, may be more difficult to manage.\(^168\)

\(^{167}\) Katsh & Rabinovich-Einy, supra note 3 at 113-14.

\(^{168}\) Ibid at 114.
Further, the infrastructure itself is designed to resolve transactional disputes. For example, credit cards have a chargeback system, whereas social media disputes do not have these systems. Rather, the main enforcement tool of social networking providers are content removal, account suspension, and similar tactics.

Most e-commerce disputes involve parties living at a distance, thus ODR has an obvious value in providing an inexpensive and efficient remedial mechanism. Facebook friends are often friends in the offline world, thus in-person resolution is possible. Katsh and Rabinovich-Einy argue that defamation is an area where disputes are easier to resolve in the offline world, and “more effective offline processes in schools and other contexts in which there is some spillover from disputes that originated online is sorely needed.” That said, in a study conducted by the Pew Research Centre, 54 per cent of interviewees stated that their most recent online harasser was anonymous. Unless the harasser can be identified, which is not always possible despite the availability of a Norwich order, resolution through schools or in similar contexts can be challenging.

Resolution through the intermediaries or courts is not an either/or proposition. We know that many social media providers and other platforms resolve defamation disputes. We know that some frameworks are better than others. To a certain extent, we need these platforms to provide this service considering the number of content complaints. The key, then, is in how to incentivize quality resolution structures. On the other hand, encouraging corporate social responsibility (CSR) does not forego traditional litigation, the development of defamation tribunals, ODR through the courts, or similar. Instead, these can be complementary. Without access to alternative methods to resolve complaints, the reality is that for most people a complaint to the intermediary is the end of the process. Arguably, there is an access to justice problem based on the definition of access to justice used in this article (dispute resolution, avoidance, and containment) if we continue on the same path limited to traditional litigation and company-level complaints mechanisms.

The benefit of encouraging company-level mechanisms is that they can provide innovative responses to the problems that persist on their platforms. This provides the kind of community-level response that Ardia advocated, and the techno-legal response explored throughout this article. For example, Riot Games revamped its dispute resolution procedure for League of Legends, an online

169. Ibid at 115.
170. Ibid.
171. Pew Research Centre, supra note 40.
172. Ardia, supra note 23.
game with 67 million active monthly players, in response to losing players due to online abuse. It assembled a “player behavior team” to study user profiles, comprised of psychology, cognitive science, and neuroscience professionals. They found as follows:

Persistently negative players were only responsible for roughly 13 percent of the game’s bad behavior. The other 87 percent was coming from players whose presence, most of the time, seemed to be generally inoffensive or even positive. These gamers were lashing out only occasionally, in isolated incidents—but their outbursts often snowballed through the community.

Riot Games targeted community norms. Three innovations helped reduce abuse in the game. First, they turned off an automatic chat function, which reduced abuse by 30 percent. Second, they strengthened communication concerning abusive behaviour by advising players why they were being punished, rather than just the disciplinary measure imposed, which decreased the recidivism rate. Third, they began involving the community as voluntary members of a tribunal, effectively juries, that voted on the appropriate punishment.

Other intermediaries are experimenting with community-appropriate responses. YouTube’s Trusted Flagger program is relatively established (it has been active since 2012). Individuals can apply to be flaggers and the content they flag is prioritized for review by content moderators. A subsidiary of eBay, Marketplaats, is experimenting with crowd-sourcing the resolution of feedback disputes. Facebook created a compassion team to innovate procedures for resolving interpersonal disputes. It uses social reporting to address offensive content that does not breach the Terms of Service (called its Community Standards). With social reporting, a user can complain to the offender directly or to a trusted friend to facilitate resolution. Twitter uses a mute, block, and report

173. Katsh & Rabinovich-Einy, supra note 3 at 129.
174. Laura Hudson, “Curbing Online Abuse Isn’t Impossible. Here’s Where We Start” (15 May 2014), online: Wired <www.wired.com/2014/05/-fighting-online-harassment> [perma.cc/6TJF-K3BS].
175. Ibid.
176. Katsh & Rabinovich-Einy, supra note 3 at 129.
178. ODRAG, supra note 4 at 12.
strategy to managing abuse on its service. 181 Many platforms are experimenting with artificial intelligence to detect and delete terrorism-related speech. 182

Despite some of these innovations, there are significant disadvantages to self-regulation of content disputes. In my earlier work on this subject, I explored these issues from the perspective of CSR and human rights. 183 Distilled to the relevant points for this article are the following.

These kinds of corporate regulations are not great for standard setting. Some platforms provide minimal dispute resolution structures, particularly some American-based websites that capitalize on the immunity provided by section 230 of the CDA. Even where platforms provide dispute resolution mechanisms, their frameworks vary wildly. Some may be innovative, illustrated by the examples above, but others may fail to reflect the law of defamation in Canada and fail to provide clear standards to users as to legal and non-legal behaviour.

One answer might be that users do not have to use Facebook, Snapchat, or other social media platforms. However, defamation complaints do not need to involve a registered user. As the case of Jones v Dirty World Entertainment Recordings LLC 184 illustrates, someone might post defamatory content about you on thedirty.com, and given the terms of service of that site and the host’s immunity under section 230, an individual would likely be unsuccessful in having the content removed.

The lack of standard setting means that principles of good regulation that one normally expects of public institutions are not normally present online. 185 Enforceability was noted above as an obstacle in defamation disputes. In the

181. Twitter, “Learn how to control your Twitter experience,” online: <support.twitter.com/articles/20170134> [perma.cc/FTA5-AB9S]. Note there are significant weaknesses with the governance frameworks of some of these social networking providers, which is not explored in depth here. See Emily Laidlaw, “What is a Joke? Mapping the path of a speech complaint on Social Networks” in Lorna E Gillies & David Mangan, eds, The Legal Challenges of Social Media (Cheltenham, UK: Edward Elgar Publishing, 2017) [Laidlaw, “What is a Joke?”].

182. See e.g. Mark Zuckerberg, “Building Global Community” (16 February 2017), online: <www.facebook.com/notes/mark-zuckerberg/building-global-community/10154544292806634> [perma.cc/M5KD-BZUP]; BBC, “Facebook’s AI wipes terrorism-related posts” (29 November 2017), online: <www.bbc.com/news/technology-42158045> [perma.cc/V6F7-M8QX]. This puts aside, for now, the issues surrounding automated solutions, namely that they are not yet sophisticated enough to analyze context, which is key in identifying lawful versus unlawful speech.


185. Laidlaw, Regulating Speech, supra note 183 ch 3, 6.
context of social media, transparency is notably deficient.\textsuperscript{186} Some SNPs are working towards improving their transparency. League of Legends, as detailed above, benefitted from clearer communication with users on why their accounts were blocked resulting in reduced recidivism. In 2018, Facebook published its first transparency report concerning enforcement of its community standards.\textsuperscript{187}

In most cases, once a complaint is made, that is the end of the matter. Principles of due process that we expect of a court system, such as notice, a right to be heard and to hear the case against you, transparency, a right to confront witnesses, and access to a neutral decision maker, are not even notionally replicated in most company dispute resolution systems, particularly in the social networking context.\textsuperscript{188}

Further, it forces these intermediaries into a pseudo-judicial role.\textsuperscript{189} For example, if a person posts a negative review of a hotel on TripAdvisor and the hotel complains to have it removed, how does a content moderator know if the review is based on accurate facts or, without more information, how does it untangle fact versus opinion? While in certain circumstances the defamatory nature of the review might be clear, a difficulty for intermediaries subject to NTD, such as in Europe, is identifying at what point the obligation to remove content is triggered—on notice of a defamation complaint, once the unavailability of defences is exhausted, or once knowledgeable of the strengths or weaknesses of a case.\textsuperscript{190}

At a more fundamental level, the voluntary nature of these types of CSR frameworks, set down through contractual arrangements with users, is problematic. CSR is too dependent on the vision of current management,

\begin{itemize}
  \item Under the leadership of Rebecca McKinnon, Ranking Digital Rights published a Corporate Accountability Index in 2015, 2017 and 2018. The 2017 report states: “Companies tell us almost nothing about when they remove content or restrict users’ accounts for violating their rules.” See Ranking Digital Rights, “2017 Corporate Accountability Index” (March 2017) at 29, online: <rankingdigitalrights.org/index2017/assets/static/download/RDRindex2017report.pdf> [perma.cc/18TB8Q-JR6F].
  \item Laidlaw, “What is a Joke?,” \textit{supra} note 181. See also the Guardian’s Facebook Files, specifically Nick Hopkins, “Revealed: Facebook’s internal rulebook on sex, terrorism and violence,” \textit{The Guardian} (21 May 2017), online: <www.theguardian.com/news/2017/may/21/revealed-facebook-internal-rulebook-sex-terrorism-violence> [perma.cc/C7UW-GWW9].
  \item Laidlaw, \textit{Regulating Speech}, \textit{supra} note 183 at 243-44.
  \item See discussion, Laidlaw & Young \textit{supra} note 22 at [Production to Insert Final Page Numbers].
\end{itemize}
making it difficult to develop and sustain standards. This is further problematized by the changeable nature of information technology companies and the human rights at stake.191

Further, Part I identified that a key outcome for defamation complainants is fixing the reputational harm, such as through a correction, retraction, or declaration of falsity. This requires some sort of public resolution, which is absent from many complaint mechanisms offered by social networking providers. As the Ranking Digital Rights Corporate Accountability Index reports, actions taken to enforce terms of service were not publicly disclosed by most of the companies investigated.192 A more formalized process that is either public or combined with technological processes that serve a public communication function (flagging disputed content or communicating that content has been removed for infringing community standards, et cetera) might serve that objective.

The reality is that given the multi-jurisdictional nature of internet communications and disputes, the high costs of litigation, and low value of most defamation claims, the rules these platforms create for use of their services are virtually the only way to resolve defamation disputes for some people. Elsewhere, I describe it as the “law of Facebook” and the “law of Twitter.”193 I have previously researched the question, “how can CSR be used to complement other efforts to achieve a desired objective?,” which is instructive in how to conceptualize the role of intermediaries.194 In my view, companies must regulate their platforms, but equally, we need government leadership in providing access to justice through systems of resolution.

III. RECOMMENDATIONS FOR CHANGES TO THE LAW

Several key problems were identified in this article concerning the resolution of online defamation disputes, which inform the recommendations. At its core is the access to justice hurdle created by the high-volume, low-value, and legally complex matrix of defamation disputes. Complainants have two options, both of which are deficient. The complainant can pursue traditional remedies, as in court actions, but given the nature of online communications (across

191. Laidlaw, Regulating Speech, supra note 183 at 246-47.
192. Ranking Digital Rights, supra note 186.
different platforms, jurisdictions, involving multiple parties, and spread with ease), and the length and cost of litigation, to name a few issues, this route is less effective to resolve most disputes. Alternatively, the complainant can complain to the intermediary with the goal of content removal or another remedy (reply, account deletion or suspension, et cetera). This approach can be effective, but company-level dispute resolution mechanisms lack industry standards and due process, put intermediaries in a pseudo-judicial role, and are dependent on the changeable commitments of current management. This leaves complainants with few practical options to resolve their disputes. Other forms of resolution might fill the gap, but these are currently underdeveloped.

My recommendations seek to animate the goals of defamation claimants, namely to restore their reputation and to set the factual record straight. For online disputes, two things are key: Swift, accessible dispute resolution and subject matter expertise of caseworkers, adjudicators, and judges. In order to achieve these goals, we need to embrace imperfection in whatever regulatory structure is devised.

My recommendations consider interviews conducted with industry experts, practitioners, and members of the judiciary. All interviewees emphasized the importance of a speedy process for the resolution of online defamation disputes. Of the interviewees questioned about a tribunal or small claims process for defamation disputes, the vast majority viewed such a process as a welcome method to resolving defamation claims provided that it has one feature: That it be a specialized tribunal in the sense that the adjudicator or judge had specialized knowledge of defamation law and the internet. NTD complemented by ADR, a tribunal or something similar, was advocated by many interviewees.

I conclude that we need a multi-faceted response to resolving defamation disputes involving courts, intermediaries, and specialist tribunals. I recommend company-incentivized complaints mechanisms coupled with ODR as complements to traditional litigation as a combination that goes some way to resolving the problems identified.

A. TRADITIONAL LITIGATION AND IMPROVING ACCESS TO JUSTICE

Traditional actions to the court should be maintained and any proposals made here ought to be complementary to court actions. For complex claims, courts are the appropriate bodies to be deciding the disputes. Further, for some claimants,
in particular claimants for whom monetary damages might be appropriate or who have a public profile, traditional litigation is also appropriate. This is because traditional actions satisfy the public vindication sought by some claimants who wish to “set the record straight.” Given the technicality of defamation law, however, this article cautions that cases that proceed to a full determination do not generally provide a judgment that reflects a decision on the reputational harm, truth of the statement, or similar outcomes that could restore a claimant’s reputation. Further benefits of traditional litigation include the respect associated with courts, the cathartic function of trials, the procedures that ensure a fair trial, and the greater range of remedial powers.

B. LINKING ODR AND THE ROLE OF INTERMEDIARIES

As many interviewees noted, a common first step in addressing a defamation problem is to complain to the online platform, such as Facebook or Snapchat, or to the news organization that posted the story online (often in relation to the comments section). Law reform in the area of intermediary liability is explored in more detail with my co-author Hilary Young. However, not all defamation claims can be solved by complaints to an intermediary for a variety of reasons. The intermediary might not remove the content, regardless of what is codified in Canadian legislation (an enduring problem of regulatory arbitrage in the internet context). The complainant might not be satisfied with NTD, even if successful, and may wish to seek further remedies, such as an apology, retraction, declaration of falsity or monetary damages. The social harm might be so severe for the claimant that they deem other action appropriate or necessary. Indeed, NTD is a speedy remedy, but more limited in terms of its potential to bring about the outcomes that defamation litigants want. If fixing the reputational harm is the goal, NTD only solves part of the problem.

As a result of the weaknesses in traditional litigation and considering the limits of intermediaries, I recommend the creation of an ODR tribunal to resolve online defamation disputes. Before making the case for this recommendation, however, a problem concerning the development of ODR is relevant to intermediaries. As was discussed in this article, any Canadian-made mechanism to resolve defamation disputes is risky, because it cannot easily force litigants to

197. See discussion in Part II; Blake, Browne & Sime, supra note 73 at paras 1.01-1.02; Ackerman, supra note 52 at 26.
198. Laidlaw & Young, supra note 22.
the table. Some users post defamatory content anonymously or pseudonymously. While their identity might be obtained from the intermediary through a Norwich order, the wrongdoers are not always identifiable. Alternatively, the defamation might be the result of a pile-on and targeting all the wrongdoers is unfeasible. Equally, the wrongdoers might be located out-of-country, and a decision of a Canadian court might be unenforceable in the United States due to the SPEECH Act.\(^{199}\) Or simply, a defendant might not want to participate in a tribunal process if it is voluntary.

However, for the kinds of disputes that would be escalated beyond NTD, there is often a social harm in the local community that compounds the harm online. This might be local to a school, or, as was the case in *Pritchard*,\(^ {200}\) localized to the community in which the plaintiff lived and worked. In such a situation, there is an identifiable defendant(s) either to sue (as was the case in *Pritchard*), or to seek resolution with by means of an ODR mechanism.

Working models in other fields, such as domain names dispute resolution, have built-in direct enforcement powers. Domain names dispute resolution providers have a contractual relationship with the domain name owners and have the power to cancel or transfer domain names. This is largely absent from defamation law. Rather, indirect enforcement powers are more readily available. If a defendant refuses to participate in a tribunal process, then the decision is public, available on the tribunal website, and usable to seek NTD from an intermediary, or to post in a particular group or thread where the defamation happened. In short, the decision has an indirect enforcement effect by publicly communicating the wrong.

In addition, intermediaries usually have a contractual relationship with their users. One option is to model a system on Europe’s ODR platform. For example, minimum quality standards might be imposed on intermediary complaints mechanisms. Or, a legislative provision can mandate that intermediaries include a term in their terms of service that defamation disputes involving a Canadian-based claimant, which are not resolved using the internal process, must use the ODR tribunal. A softer approach, drawn from the ADR Directive, is to require that intermediaries provide a link to the ODR mechanism, effectively advertising the ODR tribunal.

\(^{199}\) SPEECH Act, supra note 21.
\(^{200}\) Pritchard, supra note 8.
Requiring that industry resolve disputes via an adjudicator is observable outside the technology sector. In the United Kingdom construction industry, an adjudication system was introduced “underpinned by legislation” through the Construction and Technology court. Under the Housing Grants, Construction and Regeneration Act, a party to the contract can unilaterally refer a dispute to adjudication. The scope is limited to certain contractual issues. Another model is the Financial Ombudsman Service in the United Kingdom, which resolves disputes between financial businesses and customers, and has the power to make monetary awards. Although a decision of the Ombudsman is final, fewer than 10 per cent of disputes ever reach that point. If the decision is accepted by the consumer, it becomes legally binding. This kind of adjudication model underpinned by legislation is an imperfect tool, but would provide an avenue for resolution that connects the kinds of remedial outcomes defamation claimants seek with solutions.

C. CREATION OF AN ONLINE TRIBUNAL

I recommend the creation of a specialized online tribunal for many reasons. First, taking into account that reputational harm is a societal harm, the lack of access to justice for individuals to repair their reputation has great social cost. This invites the re-imagining of a system that is more accessible, not just in terms of access to the courts, but in re-thinking what is a good remedy for resolving these types of disputes. This article takes cues from the United Kingdom’s ODR Advisory Group of the Civil Justice Council, which commented, “[t]he temptation to which many proposed reformers have succumbed in the past is to believe that the

201. In the LCO report, other industry regulatory models, such as media regulators, privacy commissioners, and domain names regulators, were explored in more depth.
207. Ardia, supra note 23 at 264.
best way forward in saving costs and increasing access to justice is to streamline our existing system rather than change it fundamentally.”

Second, the consistent message from the research and interviews was the need for access to a form of dispute resolution that was fast and less expensive, which tribunals are in a better position to deliver than courts.

Third, access to justice is about more than access to the courts. Rather, it includes dispute containment and avoidance. This requires different forms of dispute resolution, such as information to diagnose and avoid disputes, containment facilitated through a third party to settle or narrow the issues in dispute, and techno-legal solutions, such as flagged content and other similar approaches.

Fourth, alternative forms of dispute resolution better meet the outcomes sought by defamation plaintiffs. While a judgment certainly can provide public signalling that restores a reputational harm, I conclude it is insufficient for most cases of online defamation. The problem is that for most online defamation, claimants do not pursue redress. Both ADR and ODR provide a greater range of tools to resolve a defamation claim more quickly, and a tribunal is better positioned to deliver the broad access to justice approach of dispute avoidance, containment, and resolution discussed in this article.

Fifth, NTD is a mechanism, not a dispute resolution system. It is a mistake to view NTD as anything other than a tool to limit the harm. Fulsome resolution of disputes should be available in some means other than costly litigation. Alternative approaches were developed in other areas that face high-volume consumer disputes such as finance, domain names, and construction. In my view, the time has come to offer it to address online defamation disputes.

Sixth, tribunals can be specialized in a way that Canadian courts are not. This has multiple benefits in an area like defamation, where the law is technical. It expedites the process, creates consistency and provides clarity to litigants as to their situation and chances of success at a trial, if that route is elected. A key theme that emerged from the interviews was the need for experts in general, and in particular, if setting up a tribunal.

Seventh, since it is recommended that a traditional legal action for defamation is maintained, this tribunal would operate as a complement to court actions.

Eighth, techno-legal solutions are critical to resolve online defamation complaints, because they operate within the communities where the defamation

208. ODRAG, supra note 4 at 9.
209. Ibid at 17.
took place. Courts are often divorced from context. An online tribunal, because of its structure, is in a better position to facilitate delivery of techno-legal solutions.

The structure of the CRT process translates to defamation disputes. If a similar four-phase process is used in the defamation context it might work as follows. In Phase One’s information and diagnostic space, experts might help compile tools to facilitate diagnosis and resolution of the dispute. Many defamation litigants would be self-represented and such tools would help the claimant frame productive communication, diagnose the legal issues and craft responses.

If the parties fail to settle their dispute at this stage and a claim is filed, then Phase Two would offer technology-facilitated negotiation. The reader will recall that eBay reported that 85 per cent of disputes were resolved using software. If Phase Two fails, the parties move to Phase Three: Human facilitated negotiation. If a settlement is reached, it can be made into a tribunal order. The fourth and final phase is adjudication. Here, the decision has the force of a court order.

The business case for this tribunal requires further analysis. It is unclear how many claimants would use such a tribunal. We know some of the data on total complaints to, for example, social-networking providers, although we cannot isolate defamation complaints. We know the chasm between complaints to online providers and the numbers of cases that make it to full determination in a court. Defamation parallels e-commerce in that most do not sue and providing this tribunal would open-up an avenue of redress to those for whom it would otherwise be unavailable. The business case is strengthened if the scope of this tribunal is widened to include online abuse more generally, such as invasion of privacy, including non-consensual sharing of intimate images. However, such a proposal is beyond the scope of this article.

Several issues require further commentary, namely whether the tribunal should be mandatory or voluntary, private or public, whether legal representation should be permitted and whether the tribunal should have the power to award damages.

Mandatory or voluntary. There are strengths and weaknesses to mandatory use of such a tribunal. My inclination is to conclude that use of the tribunal should be voluntary for the claimant. This is because the underlying reasoning in this article is that a tribunal is complementary to a traditional court action

210. Thompson, “Growth of ODR,” supra note 132 at 1.1.3.
211. Broadening the scope of the tribunal would require further analysis. For example, the objective of complainants concerning other types of harm, in particular privacy invasions, is likely different. Defamation claimants usually seek public accountability, while privacy complainants often seek to contain revelation of private information, whatever the reason, and thus further publicity to the claimant would create further harm.
for defamation. A mandatory tribunal circumvents choice for the claimant and might impose greater costs on the litigants, especially for cases that are obviously suitable for court. Regardless, the defendant should be bound to the tribunal process if the complainant chooses that route, recognizing the enduring difficulty with anonymous or out-of-country defendants. I recommend that intermediaries be required to provide a link to the ODR mechanism to Canadian users.

*Private or public.* One option is to outsource such a dispute resolution service to a private body. There are certainly models for this kind of structure. The Canadian Internet Registration Authority has a contract with two Canadian arbitration providers to resolve domain names disputes. With the goals identified in this article, a tribunal created by legislation and through government would be more appropriate. A private route would simply layer private resolution on top of whatever private resolution is currently offered by some online companies.

*Legal representation.* As this article identified, the CRT largely does not permit legal representation, although lawyers can work as helpers for litigants. In contrast, the United Kingdom Online Court plans to allow legal representation. In Bernstein’s virtual model of containment, erasure, and rehabilitation, lawyers risk being impediments to the advantages of ADR:

> Containment, erasure, and rehabilitation fare better with lower costs, which in turn commends removing lawyers. Counsel can offer great value for plaintiffs and defendants in dignitary-tort actions but, as a general rule, only when the claims feature high damages, celebrity or notoriety, or pro bono implications. A dispute resolution mechanism that rests on the oft-stated contention that “it’s not about the money,” can conserve expenditures on damages, attorney time, and court formalities. Inside our virtual injury paradigm, lawyers impede remedies and increase transaction costs.

Lawyers should be restricted to “helper roles” for the first three phases, as they depend on direct litigant participation. This reflects the focus on problem solving and outcomes that is the crux of the tribunal, and the speed in resolution that is necessary to achieve the appropriate outcomes. However, I recommend that legal representation be permitted for the adjudication phase. Given the expected expertise of the adjudicator, this alleviates potentially uneven power between self-represented and represented litigants.

*Damages.* I hesitate to limit the tribunal to non-damages remedies. Previously, I have recommended that a regulator should, at minimum, have the power to

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212. CIRA, *supra* note 120.
impose fines.\textsuperscript{214} The benefit is evident with the United Kingdom’s Information Commissioner’s Office, which is a much stronger regulator since gaining the power to award fines.\textsuperscript{215} Similar calls are being made for the Office of the Privacy Commissioner.\textsuperscript{216} That said, in a defamation context, damages largely do not align with the outcomes sought by most litigants. Rather, as this article examined, defamation plaintiffs seek restoration of their reputation. This opens the door for other remedies, especially techno-legal solutions, that better target the kinds of harms explored here, but deploying many of these solutions can be costly.

\textbf{IV. CONCLUSION}

Lord Justice Briggs captures my thoughts on these matters in his comments about his recommendation to create an online court:

> While I have no doubt that its design and launch will be attended by setbacks, teething troubles and unexpected difficulties, I consider that the objective of making the civil courts more generally accessible to individuals and small businesses, for a just resolution of their simpler and small to modest value disputes at proportionate cost, fully justifies the risks in stepping a little into the unknown, and even the small risk that the time, money and effort about to be devoted to it may turn out to have been wasted.

> Those risks are in any event capable of being minimised by a thorough process of testing before launch, by a soft launch in stages, (as is being done for the CRT), and by ongoing development of the first generation model after launch, as its inevitable teething troubles emerge.\textsuperscript{217}

\begin{flushleft}
\textsuperscript{214} Laidlaw, Regulating Speech, supra note 183 at 263-65.  \\
\textsuperscript{215} Criminal Justice and Immigration Act 2008 (UK). This power increased with the General Data Protection Regulation. See EC, Commission Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ, L 119/1. Since gaining this power, one news article states that the ICO issued fines of 17.8 million pounds and collected on approximately 54 per cent of this amount. See Rebecca Hill, “Can’t pay Information Commissioner’s fine? No problem! Just liquidate your firm” (25 May 2018), online: The Register <www.theregister.co.uk/2018/05/25/millions_of_pounds_of_ico_fines_go_unpaid_as_directors_dissolve_firms> [perma.cc/UZ5Y-4VR7].  \\
\textsuperscript{216} House of Commons, Towards Privacy By Design: Review Of The Personal Information Protection And Electronic Documents Act: Report of the Standing Committee on Access to Information, Privacy and Ethics (February 2018) (Chair, Bob Zimmer).  \\
\textsuperscript{217} Briggs, supra note 146 at paras 6.44-6.45.
\end{flushleft}
In the area of defamation law, the objective is to make resolution of reputational disputes more accessible to complainants. As explored in this article, complainants currently have two options: Complain to the intermediary or launch a civil action. While complaints to intermediaries can solve the dispute some of the time, there are drawbacks. Notably, the dispute resolution procedures of intermediaries vary wildly, with some providing no method of resolving disputes. This makes it difficult to develop and sustain standards for resolving defamation disputes through company-developed procedures.

More generally, many of the processes bear little resemblance to traditional dispute resolution, with minimal transparency, accountability, accessibility, consistency, or due process. Civil actions offer a resolution for the few cases that are litigated, but given the length, cost, and uncertain outcomes, traditional actions are not a viable solution for most defamation complainants. This leaves a significant chasm where we have a high volume of defamation complaints and few methods of resolution.

This invites the re-imagining of a system of dispute resolution that improves access to justice and better delivers the outcomes sought by defamation complainants, namely non-pecuniary interests in a restoration of reputation, correction of falsity, or vengeance. In this article, I argue that the above are best met through the creation of an ODR tribunal envisioned as a complement to traditional litigation and company-incentivized complaints mechanisms. Such a tribunal would not solve all the problems wrought by online defamation. Indeed, anonymity and jurisdiction continue to present significant challenges to the resolution of defamation disputes. However, the proposal potentially provides an avenue for resolution for many defamation complainants, while the current system provides resolution to very few. An online tribunal is in a better position to provide specialized services, speedy resolution, techno-legal solutions, containment, erasure, and public communication, all of which are important tools for resolving online defamation disputes. In this way, an ODR tribunal arguably acts as a bridge, connecting the court system to online communities.