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Supreme Court rearticulates test under Ontario "anti-SLAPP" legislation

SEPTEMBER 14, 2020 13 MIN READ

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On September 10, 2020, the Supreme Court of Canada released a pair of highly anticipated decisions on two appeals addressing the test to be applied under Ontario's "anti-SLAPP" legislation – the first Supreme Court decisions to address the legislation. The decisions made a number of subtle but important revisions to the test previously articulated by the Court of Appeal for Ontario. Notwithstanding these revisions, the Court held that the "crux" of the analysis on an anti-SLAPP motion remains the same; that is, judges will consider "what is really going on in the particular case before them" and assess whether it is one where litigation is being used strategically to silence, or as a genuine attempt to protect one's reputation. The Court also provided some interesting discussion on the defence of qualified privilege, where the judges were split 5-4 on its application.

We previously wrote about the Court of Appeal's decisions underlying the appeals here.

Ontario's anti-SLAPP legislation

SLAPP suits – or Strategic Lawsuits Against Public Participation – are actions brought by persons subject to public criticism in an effort to silence or intimidate their critics (who are often of significantly lesser financial means). In 2015 – in an effort to address the growing number of these types of suits – the Ontario Legislature enacted the *Protection of Public Participation Act, 2015*, which in turn introduced sections 137.1 to 137.5 to Ontario's *Courts of Justice Act* (the CJA). Section 137.1 provides an expedited, summary mechanism for defendants of SLAPP suits to seek to have those actions dismissed in a relatively expedient and less expensive manner.

Section 137.1 of the CJA

Section 137.1 of the CJA allows a defendant to move at any time after a proceeding is commenced (even before they have filed a statement of defence) for an order dismissing the proceeding. In rearticulating the test the defendant must meet to have the proceeding dismissed, Justice Côté, who wrote for a unanimous court in *1704604 Ontario Ltd. v. Pointes Protection Association*, adopted in part the framework established by Justice Doherty of the Court of Appeal in the underlying decisions, with some important distinctions.

To have a proceeding dismissed under s. 137.1, the defendant, as a preliminary step, must first "satisfy the judge that the proceeding arises from an expression relating to a matter of public interest" as required by s. 137.1(3). The Court described this as the defendant's "threshold burden."

Where the defendant meets the threshold burden, the onus then shifts to the plaintiff to show why the proceeding should not be dismissed. To do so, the plaintiff must clear what the Court (adopting Justice Doherty's wording) described as the "merits-based hurdle" and the "public interest hurdle."

The merits-based hurdle requires that the plaintiff satisfy the judge that there are "grounds to believe" that:

- the proceeding has substantial merit (s. 137.1(4)(a)(i)); and
- the defendant has no valid defence in the proceeding (s. 137.1(4)(a)(ii)).

The public interest hurdle requires that the plaintiff satisfy the judge that: "the harm likely to be or have been suffered by the [plaintiff] as a result of the [defendant's] expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression." (s. 137.1(4)(b)).

A failure by the plaintiff to clear both hurdles will lead to a dismissal of its action.

The threshold burden (s. 137.1(3))

The Court described the threshold burden as a "two-part analysis" where the defendant must show on a balance of probabilities that (i) the proceeding arises from an expression made by the defendant, and (ii) the expression relates to a matter of public interest. Justice Côté explained that the proceeding must be causally related to the expression in question, though s. 137.1(3) is broad enough to encompass any proceeding arising from an expression (i.e., not just defamation cases, in which anti-SLAPP motions are most regularly brought).

The merits-based hurdle (s. 137.1(4)(a))

Once the defendant has cleared the threshold requirement, the onus shifts to the plaintiff to satisfy the judge on the merits-based hurdle that there are "grounds to believe" that the proceeding has substantial merit and the defendant has no valid defence.

Significantly, the Court departed from the Court of Appeal on the applicable standard of proof to be applied at this stage. The Court of Appeal had held that the standard of proof was the usual civil standard of balance of probabilities. Justice Côté held that the words "grounds to believe" require the plaintiff to establish "a basis in the record and the law – taking into account the stage of litigation at which a s. 137.1 motion is brought – for finding that the underlying proceeding has substantial merit and that there is no valid defence." She described the standard as requiring "something more than mere suspicion" but less onerous than proof on the balance of probabilities. She also indicated that the test is a subjective one – that is, the particular motion judge (not simply a "reasonable trier of fact") must assess the record and determine that there is a basis in fact and in law that the plaintiff's claim has substantial merit and that the defendant has no valid defence to the claim.

On the first prong of the merits-based hurdle, the plaintiff must establish that its claim has "a real prospect of success." This does not require the plaintiff to show that her claim is "likely" to succeed, but requires that, taking into account the stage of the proceeding, the claim is "legally tenable and supported by evidence that is reasonably capable of belief." The Court emphasized that anti-SLAPP motions are distinct from motions to strike and summary judgment motions. In distinguishing summary judgment motions, the Court explained that s. 137.1 motions arise earlier in the litigation process and have corresponding procedural and

evidentiary limitations. Thus, while the motion judge need not accept the record at face value or accept bald allegations, the motion judge should only engage in a limited weighing of the evidence and should not make any ultimate determinations on credibility or the merits. Justice Côté repeated the Court of Appeal's warning that courts must not turn s. 137.1 motions into de facto summary judgment motions.

On the second prong, the Court held that the plaintiff need not anticipate every defence the defendant might ultimately raise in the proceeding. Rather, the defendant must first put the defences it intends to present "in play" on the motion – only then does the plaintiff have to demonstrate that there are grounds to believe that each of those defences is not valid. Justice Côté held that this prong "mirrors" the first prong in that the plaintiff must show that there are grounds to believe that the defences have no real prospect of success, meaning that any defences in play "are not legally tenable or supported by evidence that is reasonably capable of belief."

The public interest hurdle (s. 137.1(4)(b))

The Court described the public interest hurdle as "the crux" and "the core" of the s. 137.1 analysis. It noted that the public interest hurdle is more than a mere balancing exercise – rather, the statute "requires that one consideration outweigh the other, and not simply that the considerations be balanced against one another." To succeed, the plaintiff must show that the harm caused by the expression outweighs the public interest in protecting the expression.

First, the motion judge must analyze the alleged harm. The plaintiff must show the existence of harm and that the harm was suffered as a result of the defendant's expression. Harm can be monetary or non-monetary (e.g., reputational damage) and there is no threshold requirement for the harm to be sufficiently worthy of consideration at this stage. The court emphasized that the plaintiff is not required to prove harm or causation, "but must simply provide evidence for the motion judge to draw an inference of likelihood in respect of the existence of the harm and the relevant causal link." No definitive determination of harm or causation is necessary on the motion.

Second, if harm and causation are established, courts will weigh that harm against the public interest in protecting the expression. At this stage of the analysis, the court's assessment is qualitative and can consider the quality of the expression and the motivation behind it. While judges "should be wary of the inquiry descending into a moralistic taste test" it is nevertheless true that not all expression is equally worthy of protection. Justice Côté held that factors that can assist courts in weighing the harm suffered and the public interest in protecting the underlying expression include:

- the importance of the expression
- the history of litigation between the parties
- broader or collateral effects on other expressions on matters of public interest
- the potential chilling effect on future expression either by a party or by others
- the defendant's history of activism or advocacy in the public interest
- any disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award
- the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group or a group protected under s. 15 of the Charter or human rights legislation

Qualified privilege

In both decisions, the Court was unanimous on the proper framework for the test on an anti-SLAPP motion. However, in the second of the Court's two decisions – *Bent v. Platnick* – there was a 5-4 split on whether the action should be dismissed, which centred around a divergence between the two sides on the applicability of the defence of qualified privilege.

Qualified privilege protects statements, whether true or not, where the communication is fairly made on a privileged occasion by a person in the discharge of a legal, social, or moral duty or interest to individuals with a corresponding duty or interest in receiving the communication. However, the qualified privilege can be defeated, typically where the comments go beyond the occasion giving rise to the privilege or the statement was published with recklessness or malice.

Facts

The defendant lawyer in *Bent* was a member of the Ontario Trial Lawyers Association (the OTLA) – an organization of lawyers representing persons injured in motor vehicle accidents. She sent an email to an OTLA Listserv alleging that the plaintiff, a doctor regularly hired by insurance companies to review and assess accident victims' level of impairment, had altered doctor's reports and changed a doctor's decision about the victim's level of impairment. The email was leaked and was ultimately published in a magazine. The plaintiff sued the defendant for defamation, and the defendant brought a motion to dismiss the claim under s. 137.1. The motion judge granted the motion and dismissed the plaintiff's defamation claim, but the Court of Appeal overturned that decision and reinstituted the action.

Decisions on qualified privilege

The majority decision, written by Justice Côté, dismissed the appeal, thus allowing the defamation claim to go forward. The majority and the dissent agreed that the proceeding arose from the defendant's expression on a matter of public interest and that the burden therefore shifted to the plaintiff to establish, among the other aspects of the test, that there were grounds to believe the defendant did not have a valid defence of qualified privilege. This was the source of the disagreement between the majority and dissenting opinions.

The majority held that there were grounds to believe that there was no merit to the defence of qualified privilege because the defendant lawyer had exceeded the scope of her privilege because she unnecessarily identified the plaintiff by name in her email. The defendant could have communicated her concerns about the alteration of medical reports without naming the plaintiff. Because identifying the plaintiff was not necessary to satisfy the defendant's duty under the circumstances, the defendant exceeded her privilege. The majority also pointed to the OTLA Listserv's prohibition of potentially defamatory remarks as evidence that posting potentially defamatory material is not relevant to the duty relied on under the circumstances. The majority also noted that the defence was potentially not valid because the defendant had been reckless as to the truth of her expression (i.e., had made the statement with malice). The defendant took no steps to corroborate her allegation of serious professional misconduct, communicate with the plaintiff, or consult her own notes on her interactions with him before making the statement in question.

The majority found that the plaintiff was vulnerable to significant harm as a result of the serious allegations of misconduct levelled against him – thus the public interest in allowing the claim to proceed on the merits was correspondingly high. In contrast, the expression was a gratuitous attack on the plaintiff. Justice Côté held that there was sufficient evidence that

the public interest in permitting the defamation action to proceed outweighed the public interest in protecting the defendant's expression.

The dissenting judges (in reasons written by Justice Abella) found that the defendant's expression did not exceed the scope of her privilege. Justice Abella disagreed with the majority inquiring whether it was "necessary" for the defendant to identify the plaintiff in her email to satisfy her duty. She found that this approach defeats the purpose of the defence of qualified privilege because the defence, by definition, will only be engaged when a particular person is identified (otherwise the communication will not meet the initial test of being defamatory). Justice Abella held that qualified privilege will be exceeded if the expression is not "reasonably appropriate" in the sense that it is not relevant and pertinent to discharging the duty or safeguarding of the interest that creates the privilege. In other words, relevance, not necessity, is the key to the analysis of whether a statement is covered by a qualified privilege. Applying this analysis, she found that the defendant's email was protected by qualified privilege because, as a member of the OTLA, the defendant had a duty to inform its members about misleading and improper expert reports and to seek to improve the administration of justice. The recipients of the expression, the other OTLA members, also plainly had a corresponding interest and duty to receive that information. Justice Abella further held that there was no evidence that the defendant was motivated by malice in publishing her email and that the defendant had no reason to expect that the members of the OTLA Listserv would leak the email in violation of the terms of the Listserv and their professional obligations as lawyers. Assuming any harm arose from the expression, it was caused by the leak of the information, which was not properly foreseeable. The dissent found that the defendant's communication was critical to the administration of justice and any harm caused by the expression was outweighed by the considerable chilling effect that permitting the lawsuit to proceed would have on this type of expression.

Takeaways

These decisions provide the definitive articulation of the test to be applied under Ontario's anti-SLAPP legislation. While the Court provided a clear framework, the contextual and fact-specific approach it mandated means that there may be significant variation in the factors courts will consider when weighing the public interest in permitting meritorious lawsuits to vindicate genuine harm against the public's interest in protecting expression on matters of public interest. It also remains to be seen how motions judges will interpret and apply the standard of proof the Court set out on the merits-based hurdle (which falls between "mere suspicion" and "balance of probabilities"). The Court's split on the validity of the qualified privilege defence on the facts of *Platnick* further serves to highlight an inherent difficulty in applying that defence, even on an occasion that all judges agreed invoked the privilege.