

Allegedly defamatory Tweets about medical doctor dismissed as “fair comment” under Anti-SLAPP legislation (Gill v. Maciver)

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1 March 2024

In *Gill v. Maciver*, 2024 ONCA 126 (CanLII), the Court of Appeal for Ontario upheld the dismissal of an action brought by a medical doctor against multiple defendants seeking \$12,000,000 for defamation, conspiracy, and negligence.

The subject of the plaintiff's action concerned statements made about her on Twitter by the defendants. One of the defendants, a physician, had criticized the plaintiff for having previously blocked him on Twitter, thereby preventing him from responding directly to attacks that the plaintiff had made against the Ontario Medical Association. Some of the other defendants, including a freelance healthcare writer, had criticized the plaintiff's position on the government response to the COVID-19 pandemic.

The defendants brought a motion under [section 137.1](#) of the Ontario *Courts of Justice Act* (the “CJA”), which permits the dismissal of proceedings that limit debate on matters of public interest. The motion judge determined that the proceedings were “precisely of the kind that s. 137.1 is designed to discourage and screen out” and dismissed the action.

On appeal, the Court of Appeal noted that the purpose of [section 137.1](#) of the CJA is to provide a mechanism to prevent “strategic lawsuits against public participation” (i.e. SLAPPs), which are lawsuits that have been initiated as an indirect tool to limit the expression of others rather than to vindicate *abona fide* claim: *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, at paragraphs 16, 38, 62 and *Bent v. Platnick*, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraph 74.

Section 137.1 places an initial burden on the moving party, the defendant in a lawsuit, to satisfy the judge that the proceeding arises from an expression relating to a matter of public interest.

In the case at hand, the appellant did not challenge the motion judge's finding that the impugned statements by the respondents related to matters of public interest, pursuant to [section 137.1\(3\)](#) of the CJA.

The burden therefore shifted onto the appellant to satisfy the court regarding the criteria set out in s. 137.1(4)(a) and (b) of the CJA, specifically that there are grounds to believe that the proceeding has substantial merit, that the moving party has no valid defence, and that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression. If a plaintiff is unable to satisfy even one of the relevant criteria, the proceeding will be dismissed: *Pointes Protection*, at paragraphs 18, 33.

In the case at hand, the respondents relied in part on the defence of “fair comment,” which is premised on the idea that citizens must be able to openly declare their opinions on matters of public interest without fear of reprisal in the form of actions for defamation.

For a defence of fair comment to be successful, a defendant must prove that (i) the comment was about a matter of public interest; (ii) was based on fact; (iii) was recognizable as a comment; (iv) viewed objectively, any person could honestly express the opinion on the approved facts; and (v) the speaker was not motivated by malice: *Hansman v. Neufeld*, 2023 SCC 14, at paragraph 96.

The appellant argued that motion judge failed to consider whether the comments made by the defendants were based on “proven facts”, namely, that the statements made by the appellant were in fact untrue or, alternatively, that the statements made by the defendants were true. The appellant also argued that the motion judge failed to consider whether the defendants were motivated by malice.

The Court of Appeal did not agree. For the defence of fair comment, a defendant did not have to prove that the statements they made were true since this would mean collapsing the distinction between the defences of “fair comment” and “justification”. Rather, all that is necessary to satisfy the “based on fact” element of the fair comment defence is that the defendant identify the factual foundation upon which the impugned statement is based so that a reader can “make up their own minds as to its merits”: *Hansman*, at paragraph 99.

The authors of the impugned Tweets had expressly identified the specific statements of the appellant with which they took issue, and their basis for making those statements. Nothing further was required in order to satisfy the “based on fact” requirement of the fair comment defence.

Further, the motion judge made clear findings, based on the record, concerning the absence of malice based upon the defendants’ concerns that the appellant’s public statements had the potential to mislead or misinform the public, thereby creating a potential risk to public health. The appellant failed to adduce any credible evidence to the contrary.

The additional grounds raised by the appellant were considered and rejected. The appellate court noted that the appellant had waited nearly two years before commencing a proceeding against one of the defendants and yet was unable to produce any evidence of reputational or other harm resulting from his tweets.

In the Court of Appeal’s view, the motion judge had correctly found that the appellant’s defamation claim against the critics of her unorthodox views on effective treatment for COVID-19 was intended to silence those critics. This is precisely the type of “SLAPP” proceeding that section 137.1 of the *CJA* was designed to foreclose.

The case is a cautionary example of the potential consequences of commencing a defamation action seeking substantial damages against multiple defendants. The costs awarded by the motion judge, which totalled over \$1.1 million, was upheld by the Court of Appeal. A PDF version is available for download [here](#).

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