

Defamation claim by long-term care home dismissed due to lack of evidence of harm (Universalcare Canada Inc. v. Gusciglio)

Anti-SLAPP Legislation | Defamation | Litigation | Litigation & Dispute Resolution | Long-term Care Homes

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In *Universalcare Canada Inc. v. Gusciglio*, 2023 ONSC 6874 (CanLII), a defamation action against the daughter of a resident of a long-term care home was dismissed under Ontario's anti-SLAPP legislation in section 137.1 of the *Courts of Justice Act* ("CJA")

The defendant's mother lived at a senior centre in Vaughan, Ontario, from June 2015 until she died in March 2020. During her mother's time there, the defendant claims that she witnessed elder abuse and neglect. She complained to the Ontario Ministry of Health and Long-Term Care, who investigated the complaints and made several orders against the care home.

Despite these orders, the defendant felt she did not see any change in the care home's behaviour. As a result, she expressed her frustrations and concerns on the social media platform then known as Twitter.

The care home and the CEO of the home's management company sued the defendant for what they alleged were defamatory tweets.

The defendant moved to dismiss the action as a strategic lawsuit against public participation under the anti-SLAPP provisions of the CJA.

The motion judge adopted the succinct formulation of the test for an anti-SLAPP motion from *Gill v. Maciver*, 2022 ONSC 1279 (CanLII), at paragraph 8:

Subsections 137.1(3) and (4) of the [CJA] set out a two-part test for a motion to dismiss an action on this basis. First, the defendant has the onus of showing that the plaintiff's proceeding arises from an expression that "relates to a matter of public interest". If the defendant meets that threshold, the court must dismiss the action unless the plaintiff satisfies the court that there are grounds to believe the proceeding has substantial merit, that there are grounds to believe that the defendant has no valid defence, and that the harm suffered by the plaintiff is sufficiently serious such that the public interest in allowing the proceeding to continue outweighs the public interest in protecting that expression."

The defendant had the initial onus of establishing that the proceeding arises from an "expression" made by her relating to a matter of public interest: *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, at paragraph 20.

At the motion, the plaintiffs agreed that at least some of the tweets related to elder care and long-term care homes which are matters of public interest. However, the plaintiffs argued that there were multiple tweets about private grievances with staff at the care home, which were less about raising awareness of the broader issues and more about expressing the defendant's animosity towards them.

In particular, the plaintiffs argued that the driving force of the defendant's tweets was retaliation over the fact that she did not have power of attorney over her mother's care and because she disagreed with decisions made by her siblings. As a result, the plaintiffs and the care home staff were caught in the middle of a

family dispute between the defendant and the instructions of the formal power of attorney holders which was reflected in at least some of the defendant's tweets.

The court did not agree that the defendant's tweets ought to be divided between expressions relating to elder care in a regulated long-term care facility in Ontario, as a matter of public interest, and criticism about staff over her mother's particular circumstances. The motion judge referred to the Supreme Court of Canada's guidance that expression should be assessed as a whole, not piecemeal, and that one must ask whether "some segment of the community would have a genuine interest in receiving information on the subject": *Pointes* at paragraph 27 citing, *Grant v. Torstar*, 2009 SCC 61.

The court found that the impugned tweets, read as a whole, related to a matter of public interest and some segment of the community would certainly have a genuine interest in receiving information about the plaintiff senior centre, its executive, and staff. As a result, the defendant met the initial burden on the motion to dismiss the proceeding.

The plaintiffs then had the burden to show (a) that the claim was legally tenable and supported by evidence establishing that they had a real chance of success (and that the defences put forth by the defendant had no real prospect of success); and (b) that they likely have suffered, or will suffer serious enough harm from the expression which outweighs the deleterious effects of stifling it or discouraging public participation on a matter of public interest. Bald assertions are not sufficient. These requirements are conjunctive, meaning that a plaintiff's failure to establish any one of them will result in a dismissal of the action.

The motion judge was not persuaded that that the plaintiffs had likely suffered any harm, or that they would suffer harm from the defendant's tweets, let alone harm that was serious enough to outweigh the deleterious effect of stifling the defendant's expression on a matter of public interest.

The plaintiffs' evidence tendered on the motion included an affidavit from the CEO containing a bald statement that the tweets had serious harmful consequences for all the plaintiffs. He stated that staff refused to work the section of the centre where the defendant's mother had lived and that the defendant's harassment was the main reason why he believed one of the care home's directors had resigned. The CEO also complained that friends and family would constantly ask him about the tweets.

In the motion judge's view, the sum of the plaintiffs' evidence revealed little or no harm from the defendant's tweets. Most of the evidence was about the impact of the defendant's harassing conduct when she attended at the centre rather than the impact of her tweets.

The reasonable inference from the evidence was that the lawsuit was designed to address the defendant's behaviour at the centre rather than the tweets arising from her interactions and impressions, to teach the defendant a lesson, to stand behind the staff, and to deter others from behaving as she did. This, in the court's view, amounted to a proceeding intended to curb the defendant's commentary on a matter of public interest and was the type of claim intended to be stopped by section 137.1(4)(b) of the CJA.

Since the plaintiffs had failed to establish that they had suffered serious harm from the defendant's expression, the motion judge did not review whether the claim was legally tenable or any of the defences put forth by the defendant.

The decision shows that plaintiffs pursuing a defamation action should consider whether they have sufficient evidence of harm caused by an expression that arguably meets the threshold of addressing a matter of public interest. The lack of evidence of any harm may result in a dismissal of the action at an early stage.

It remains to be seen, however, whether the plaintiffs appeal this decision. A PDF version is available for download [here](#).

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