

Injunction to Remove Allegedly Defamatory Social Media Posts Dismissed

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A recent case of the Ontario Superior Court of Justice illustrates the difficulties that a plaintiff may encounter when seeking to stop allegedly defamatory posts from being published on social media. The granting of interim injunctive relief in defamation cases is rare and will only be ordered in the clearest of cases.

In *Sole Cleaning Inc. v. Chu*, 2020 ONSC 7226 (CanLII), the Plaintiffs brought a motion for an interim order removing posts which they alleged to be defamatory. The Defendant, a former employee of the Plaintiffs, posted comments on social media alleging, amongst other things, that she was terminated by the Plaintiffs for supporting the Black Lives Matter movement ("BLM movement"); that the individual Plaintiffs were racists and had used racist epithets; that the Plaintiffs' business did not care about Black people and only wanted to profit off of Black culture; and that the Plaintiffs treated their employees poorly. The Plaintiffs commenced an action seeking damages for defamation for those and other statements.

At issue on the motion was the test to be applied in a case where a plaintiff seeks to have allegedly defamatory comments removed from a defendant's social media accounts before the court has adjudicated on whether or not the impugned statements are actually defamatory.

A party seeking an injunction in a defamation action must establish the following criteria outlined by the Ontario Divisional Court in *Bagwalla v. Ronin et al and Ronin v. Ronin et al*, 2017 ONSC 6693 (CanLII), at para. 19:

- (1) The publication complained of must be clearly defamatory;
- (2) If the Defendant states an intention to justify or to rely on fair comment, the injunction must be refused unless it is clear that any such defence will inevitably fail; and
- (3) The Plaintiff must establish irreparable harm if the injunction is refused.

The Court noted that this is a very high test that recognizes the importance of protecting free speech, particularly in matters of public interest. At the time of the hearing in 2020, the Court was provided with only five decisions from across Canada which had addressed the issue.

There was no dispute that the Defendant's words referred to the Plaintiffs and were published and communicated to someone other than the Plaintiffs. The evidence was that the Defendant's social media accounts were widely disseminated.

There was also little question that the words were potentially defamatory. Calling an individual or corporation a racist has been found to be defamatory: *Upper Canada District School Board v. Gilcig*, 2017 ONSC 2904 (CanLII). However, that was not the end of the matter.

On a motion for an interlocutory injunction, a finding that the words are defamatory is not sufficient to grant the injunction where a defendant raises the defence of justification or fair comment. The defence of "justification" means that the impugned statements are substantially true. The defence of "fair comment" may apply where the impugned statements express an opinion (including a deduction, inference, conclusion or criticism). For this defence to succeed, the comment must be based on proven fact and on matters of public interest, and the defendant must prove that, objectively, any person could honestly express the comment based on the proven facts. Fair comments made honestly and in good faith on matters of public interest are protected against an action for defamation, unless

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made maliciously.

In the case at hand, the Defendant relied on both defences as some of the impugned statements were facts which the Defendant intended to prove were true, and others were opinions to which the defence of fair comment may apply. When those defences are raised, the injunction will only be granted where the plaintiff has satisfied the court that it is clear that the defences will inevitably fail. This is a stringent test and the Plaintiffs had the onus of demonstrating that the defences would inevitably fail.

In the Court's view, the matter at hand was not one of those clearest of cases.

The Plaintiffs pointed evidence that they put out a statement in support of the BLM movement and that all of its employees were members of the Black, Indigenous, and People of Colour ("BIPOC") communities. This evidence, they argued, demonstrated that they were not racist and the Defendant's statements to the contrary were therefore not true. The Plaintiffs further argued that the defence of fair comment could not succeed since the Defendant's evidence related to her employment issues and at best, might support her comments or opinion that she was mistreated as an employee but not that the Plaintiffs were racist.

In the Court's view, the appropriate approach was to assess the evidence as a whole, as opposed to looking at each individual piece of evidence in isolation. A contextual approach should be used.

Much like circumstantial evidence in a criminal matter, the evidence must be considered in its totality, as each piece of evidence is like a building block or piece of a larger puzzle that eventually fits together as a whole. Furthermore, even if the Court were to find that the evidence relied upon by the Defendant to support the defence of justification and fair comment was weak, that is not the test on an interim injunction in a defamation action.

The Court examined the evidence in its totality, including specific allegations that one of the Plaintiffs used the "N-word" (which the motions judge commented was not denied in the evidence), the hearsay evidence that co-workers heard the Plaintiffs use racial epithets, and that the Defendant was purposely addressed by the wrong name, that she felt belittled, humiliated, punished and targeted at work due to her support of the BLM movement, and that her employment was terminated shortly thereafter.

Based on the contextual analysis, the Court could not determine that the defences of justification and fair comment would inevitably fail, and that it was not one of those clearest of cases where injunctive relief ought to be granted pending trial.

Given the Court's findings that the defences would not inevitably fail, the issue of whether the Plaintiffs would suffer irreparable harm if the injunction was refused was not addressed. In the result, the impugned statements made by the Defendant were allowed to remain posted on the Defendant's social media accounts until the trial, in addition to being available for review in the publicly available judicial decision.

The case may give future plaintiffs pause before seeking the same type of interim relief in a defamation claim.

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