

# KEEPING CURRENT

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## Pro-life group's defamation claim against "online protestor" allowed to proceed

By Stephen Thiele

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Social media continues to be a fertile ground for the development of the law. Social media has become a tool for significant political debate and a place where political foes rally their supporters to engage in protests and counter-protests. However, political discourse on social media is not intended to be a free for all. A user cannot use social media to harass or defame others even though the topic at issue may qualify as a matter of public interest.

In [40 Days for Life v. Dietrich, 2022 ONSC 5588](#), the court was required to determine whether the plaintiff's claim for defamation, online harassment, breach of contract, inducing breach of contract, fraud and conspiracy should be allowed to proceed or be dismissed on a motion brought under [section 137.1](#) of the [Courts of Justice Act](#) (the "CJA").

The plaintiff was a Texas-based pro-life group that advocated for the end of abortion and had at least nine locations in Ontario. In the fall of 2021, the group organized protests at a hospital which

caused the defendant, D, to express her views on reproductive freedom by publishing 32 videos on TikTok between October 2 and October 29, 2021. While D contended that her videos expressed her opinions on the group's anti-abortion protesting, the group objected to fifteen videos, which it felt were, among other things, defamatory and a form of harassment. Four of the videos encouraged others to "falsely" sign-up for a 40 days "vigil" that the group was organizing, while another video encouraged "shopping cart" abandonment on the group's online store. The pro-life group contended that 8 of the videos were defamatory.

With respect to their action for defamation, the group alleged that D had characterized it as engaging in harassment, spreading false information and fearmongering. The group contended that this damaged its reputation "as a peaceful advocate for change."

D felt that her videos involved expression on a matter of public interest and that

she had valid defences to the causes of actions raised by the plaintiff. Accordingly, she sought to strike the group's claim under [section 137.1](#) of the [CJA](#).

A motion under [section 137.1](#) of the [CJA](#) contains shifting burdens. First, the defendant must establish that the expression at issue involves a matter of public interest. If this threshold is met, then the burden shifts to the plaintiff to establish under [section 137.4\(a\)](#) that the claim advanced has substantial merit and that the defendant has no valid defence, and under [section 137.1\(4\)\(b\)](#) that the harm suffered by the plaintiff is sufficiently serious that the public interest in permitting the action to continue outweighs the public interest in protecting the expression that gives rise to the proceeding.

In this case, D's videos were related to counter-protesting anti-abortion groups. Accordingly, the defendant was able to satisfy her burden that the expressions related to a matter of public interest. The term "public interest" as used in [section 137.1\(3\)](#) of the [CJA](#) is entitled to a broad interpretation and includes matters about which the public has substantial concern because it affects the welfare of citizens or is attached to public controversy.

However, the group was able to establish that its action for defamation, online harassment and conspiracy had substantial merit and that D did not have a valid defence.

With respect to the defamation claim, the court found that 5 of the 8 impugned videos tended to lower the reputation of the group and that the defences of truth and fair comment raised by the defendant could go either way. The court accepted that there were significant questions about what caused D to describe the group as

engaging in harassment and fearmongering and that it was arguable that the defendant communicated in a malicious and/or reckless manner. In the impugned videos, D made statements, such as, "so it messes with 40 Days for Life's schedule", "so it ruins 40 Days for Life goal to fearmonger", "don't let these people protest outside of hospitals" and "enough is enough". In [Zoutman v. Graham, 2019 ONSC 2834](#), aff'd [2020 ONCA 767](#), the court found that comment made solely to annoy and harass, or to harm, injure or punish someone will amount to malice.

With respect to internet harassment, the group argued that D's videos encouraged thousands of TikTok viewers to participate in false sign-ups and caused others to engage in shopping cart abandonment. As well, the videos harassed at least 8 people associated with the group. In response, D argued that the group could not sue for internet harassment because it was a corporation and that her conduct was not outrageous as required by [Caplan v. Atas, 2021 ONSC 670](#).

The court concluded that there were grounds to believe that the group's claim had substantial merit because the videos encouraged others to engage in activity that negatively impacted the group's activities. The fact that the group was a corporation was found to not give rise to a valid defence because the law, in its current state, did not definitively preclude a corporation from seeking damages for internet harassment.

With respect to conspiracy, the group sought damages for predominant purpose conspiracy, or, alternatively, unlawful conduct conspiracy. As set out in [Agribrands Purina Canada Inc. v. Kasamekas, 2011 ONCA 460](#), the elements of predominant purpose conspiracy are as follows:



- (i) the defendants acted in combination;
- (ii) the defendants had the predominant intention to injure the plaintiff; and
- (iii) as a result of the defendants' action, the plaintiff suffered damages.

Actual intention to injure the plaintiff is required.

Evidence demonstrated that D had co-ordinated with others to falsely sign-up for vigil shifts, to participate in shopping cart abandonment and to make reports to Facebook and Instagram about the group's content on these platforms. Accordingly, this claim survived the substantial merits test and the plaintiff was able to demonstrate that D did not have a valid defence.

However, the group's claim for unlawful conduct conspiracy in relation to defamation and fraud was rejected.

To succeed in an unlawful conduct conspiracy claim, the following elements must exist:

- (i) the defendants act in combination, or in concert, by agreement or with a common design;
- (ii) the defendants' conduct is unlawful;
- (iii) the defendants' conduct was directed toward the plaintiff;
- (iv) the defendants know or constructively know, in the circumstances, that injury to the plaintiff is likely to result; and
- (v) the defendants' conduct causes injury to the plaintiff.

The court held that the evidence did not support a conspiratorial agreement between D and other defendants to defame the group. Further, the court rejected allegations that D had violated

Canada's anti-spam legislation or the *Criminal Code*. In a nutshell, D had not acted unlawfully. With respect to fraud, [Hyrniak v. Mauldin, 2014 SCC 7](#) confirms that the tort of civil fraud is comprised of the following four elements:

- (i) a false representation by the defendant;
- (ii) some level of knowledge of the falsehood of the representation on the part of the defendant (whether knowledge or recklessness);
- (iii) the false representation caused the plaintiff to act; and
- (iv) the plaintiff's action resulted in a loss.

The court found that the plaintiff had failed to plead the shopping cart abandonment protest in support of its cause of action and that the evidence did not establish that it had been induced by the false sign-ups to act in a way that resulted in a loss. As well, the evidence showed that the plaintiff was aware of the false sign-ups. This provided D with a valid defence.

With respect to the public interest hurdle under [section 137.1\(4\)\(b\)](#) of the [CJA](#), the group provided evidence of harm and contended that the defendant's impugned expression fell on the low end of the protection scale because the videos targeted the group for sabotage and harassment. The court agreed with the group's position and held that its action for defamation, harassment and predominant purpose conspiracy should proceed.

The court was satisfied that there was a link between the group's alleged harm and the defendant's expression, and that D's motivation behind the videos evolved from being part of the abortion debate to actively seeking to disrupt



and impede the group's anti-abortion activities. There was no public interest in protecting the latter form of expression.

This case demonstrates that defendants must be careful in the manner in which they choose to express themselves on matters that involve a public interest. While people are free to engage in public debate on issues, they cannot do so in a manner that seeks to disrupt or impede the activities of others and that causes harm. This case is also important because it accepts that the tort of online harassment is an evolving tort that is not necessarily limited to claims brought only by individuals.

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