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Bona fide complaints to police are matters of public interest (*Zeppa v. Rea*)

By Stephen Thiele

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When a person believes that someone has committed a crime, it is, of course, perfectly reasonable that they report their belief to the police. In general, where a *bona fide* complaint has been made to police, even if the police eventually lay no charge, the person against whom the complaint has been made will not have a justifiable or valid claim in defamation against the complainant. A *bona fide* complaint to police that someone has allegedly committed a crime is protected by qualified privilege. Regardless, the person against whom the complaint has been made could still commence a civil action against the complainant for defamation.

However, as found in [Zeppa v. Rea, 2023 ONCA 668](#) such an action would be vulnerable to dismissal under [section 137.1](#) of the [Courts of Justice Act](#) (“CJA”) or Ontario’s anti-SLAPP law.

In this case, the plaintiff initially sued the defendant for \$1.1 million in connection with a complaint the defendant made to the York Regional Police concerning an alleged threat the plaintiff had made against the defendant during an encounter at a bar.

The plaintiff was the principal of a developer. The defendant was a City Councillor.

The plaintiff’s company had become embroiled in a development dispute with local residents that had resulted in the residents appealing a decision of City Council to approve a zoning change for a property owned by the company to the Local Planning Appeal Tribunal (“LPAT”). In response to the appeal, the company sued two of the residents for \$10 million. The company alleged that the residents were negligent and had unlawfully interfered with the company’s economic relations.

While the residents’ appeal to LPAT was dismissed for lack of standing, the company and the residents settled the company’s \$10 million action, with the company agreeing to dismiss the action and paying the two residents \$100,000 for their legal fees.

The plaintiff then amended his claim against the defendant, increasing the damages sought by \$10 million.

The defendant sought to dismiss the plaintiff’s action under [section 137.1](#) of the [CJA](#).

A motion judge refused to grant the motion on the grounds that the action, which was for defamation and misfeasance in public office, did not involve a matter of public interest.

The motion judge found that the defendant's complaint was motivated by a "personal dispute" and that even though the misfeasance in public office claim arose from a matter of public interest, the claim only impugned the lawfulness of the manner in which the defendant chose to make her complaint to police.

Furthermore, the motion judge found that the defendant had been motivated by a "personal vendetta".

The Court of Appeal for Ontario reversed the motion judge's decision. The appellate court found that the motion judge had taken too narrow an approach to what constituted an expression of matters of public interest.

In [1704604 Ontario Ltd. v. Pointes Protection Assoc., 2020 SCC 22](#), the Supreme Court of Canada determined that what constituted a matter of "public interest" was entitled to a broad and liberal interpretation.

Rather than protecting the defendant's expression to file a report with police, the motion set too high a bar for what constituted an expression on a matter of public interest.

The Court of Appeal for Ontario concluded that there was an obvious public interest in people feeling free to report alleged crimes to police. A person should not feel fearful that such a report could expose them to a legal action for defamation.

In [Hobbs v. Warner, 2021 BCCA 290](#), the British Columbia Court of Appeal held that there was significant public interest in protecting expressions to police to assist with the detection and prevention of crimes and that *bona fide* complaints are public expressions of great importance.

As well, the Court of Appeal for Ontario found that the motion judge had, among other things, conflated the stages of the test to be applied under [section 137.1](#) by commenting on the merits of the action and potential defences at the public interest stage of the test or under [section 137.1\(3\)](#).

The merits of a claim are to be considered under [section 137.1\(4\)](#) of the [CJA](#).

The distinction is important because under [section 137.1\(3\)](#) the burden rests on the defendant to show that the expression is on a matter of public interest, while under [section 137.1\(4\)](#) the burden rests on the plaintiff to show that there is reason to believe that the claim has substantial merit.

The motion judge was found to have repeated the same error when considering the plaintiff's claim for misfeasance in public office. Notwithstanding that the motion judge found that the misfeasance in public office claim arose from the defendant's expression on a matter of public interest, the motion judge, in finding that the defendant had failed to meet her burden under [section 137.1\(3\)](#), engaged in a balancing test which was more properly reserved to an analysis under [section 137.1\(4\)\(b\)](#) of the [CJA](#).

The Court of Appeal for Ontario explained that the motion judge had erred by being concerned about whether the defendant's report to police should be constrained in order to promote the interest of ensuring that public officials should be held accountable for their statements.

Since the motion judge had made no findings in connection with the other aspects of the test laid out in [section 137.1](#) of the [CJA](#), the matter was remitted to a different judge to determine whether the plaintiff would be able to satisfy that his action had substantial merit and that the defendant had no valid defence, and whether the harm suffered by the plaintiff as a result of the defendant's report to police was sufficiently



serious that the public interest in permitting the proceeding to continue outweighed the public interest in protecting that expression. Accordingly, it remains to be seen whether the defendant's motion will be successful.

However, the key takeaway from this decision is that there is a strong public interest in a person making a report to police about a potential crime. A person making a *bona fide* report to police should not feel fearful that an action for damages brought against them as a result of having made the report will be immune from dismissal under the anti-SLAPP regime because it will be considered a matter of "private" interest. Arguably, society would crumble if people feared being able to contact police to report an alleged crime.

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If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **Stephen Thiele** at 416.865.6651 or by email at sthiele@grllp.com

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