

KEEPING CURRENT

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You can't play dress up with a defamation action

By Stephen Thiele

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

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The law of defamation is subject to many strict rules, which may vary from province-to-province under respective special libel and slander statutes. It is also the law that a party cannot dress up a defamation action as another cause of action to avoid the well-established defences that are available to defendants in a defamation claim.

The recent case of [Ryan v. Canadian Broadcasting Corp., 2021 SKQB 12](#) provides some useful insight into the issue of a dressed up defamation claim and the fact that in certain defamation cases, particularly those involving the media, the provisions of a statute may have an impact on a claim.

This action arose out of a CBC news article which reported on a judicial proceeding involving the plaintiff. The plaintiff had been charged and convicted by a Provincial Court Judge of possessing a weapon for a purpose dangerous to the public peace contrary to [s. 88 of the Criminal Code](#). The charge stemmed from an incident where the plaintiff used a knife to remove a poster advertising a community event from a poster board.

A man and woman who had put up the poster were present at the time of its removal and were worried about their safety. According to the news story, the plaintiff stabbed at the poster, narrowly missing the man's hand.

The plaintiff complained to CBC about the article's contents and its subheadline, and after discussions with the plaintiff the CBC agreed to amend the subheadline. However, the CBC refused to publish comments that the plaintiff wanted to make on the story.

Dissatisfied, the plaintiff sued the CBC for defamation and "misrepresentation in negligence".

With respect to the "misrepresentation in negligence" claim, the plaintiff pleaded that the CBC had represented the plaintiff's defence at the criminal trial to be that the knife was not a weapon because it was dull. "That's a straw man's argument", the plaintiff pleaded, "that caused the public to dismiss my defence and accept the conviction as valid."



The CBC contended that the plaintiff's action should be dismissed because: (1) the article was not defamatory; (2) if the article was defamatory, either the defence of qualified privilege or justification applied; (3) the CBC did not owe the plaintiff a duty of care with respect to the claim in negligent misrepresentation; and (4) the article was true and therefore incapable of being a misrepresentation.

Justice R.S. Smith dismissed the plaintiff's "misrepresentation in negligence" claim because it was in substance a claim for loss of reputation. As such, the plaintiff's claim could not be framed in negligent misrepresentation or any other cause of action but for defamation. Under Canadian law, defamation claims cannot be "dressed up" as other claims to avoid the well-established defences that apply in a defamation action. To do so is considered to be "embarrassing" and an "abuse of process".

In [Byrne v. Maas, 2007 CanLII 49483 \(ONSC\)](#), Justice Forestell J. [stated](#):

Where a claim is not framed as defamation but is based on harm to reputation, the courts have concluded that the claims should be struck. A defamation cannot be "dressed up" as another claim to evade the defences available in a defamation action.

While the Supreme Court of Canada has recognized that the possibility of suing in defamation does not negate the availability of a cause of action in negligence, where the negligence claim is founded on the same factual allegations as a defamation claim, it likely will not be viewed as an independent claim.

In [Elliott v. Canadian Broadcasting Corp., 1993 CanLII 5508 \(ONSC\)](#) the court struck out several

causes of action based on the publication of a film and book because they represented an action in defamation. Justice Montgomery [stated](#) as follows:

In my view, the whole claim rests on the publication of the film and the book. Attempts to find another cause of action inexorably lead to the alleged harm and damage to reputation by the words complained of. The so-called subsidiary torts are nothing more or less than defamation.

With respect to the plaintiff's defamation claim, the CBC, was required to rely on the well-established common law defences because it was not protected by the defence of absolute privilege under Saskatchewan's [The Libel and Slander Act, RSS 1978, c. L-14](#). Although s. 11 specifically granted absolute privilege to reports of court proceedings, only newspapers enjoyed this protection.

Under the common law, however, privilege existed where a report of judicial proceedings took place, provided that the publication was without malice and represented a fair and accurate account of what had taken place before the tribunal. In Saskatchewan, this defence had previously been successfully used in [Wesolowski v. Armadale Publishers Ltd., 1980 CanLII 2035 \(SK QB\)](#).

Even though Justice Smith found that the CBC's article was not necessarily a perfect replication of the plaintiff's criminal proceeding, it was substantially accurate and was published without malice such that the common law defence of qualified privilege applied.

Media is not expected to be perfect, and under Canadian law minor inaccuracies in the coverage



of legal proceedings is tolerated. The article at issue captured the gist of the trial judge decision and did not mislead the public.

In *obiter*, Justice Smith also found that the CBC's defence of justification also applied because the "sting" of the article was substantially true.

The defence of justification was recently reviewed by Justice Côté in [Bent v. Platnick, 2020 SCC 23](#) wherein she [described](#):

Once a *prima facie* showing of defamation has been made, the words complained of are presumed to be false...To succeed on a defence of justification, "a defendant must adduce evidence showing that the statement was substantially true"...The burden on the defendant is to prove the substantial truth of the "sting", or main thrust, of the defamation"...In other words, "[t]he defence of justification will fail if the publication in issue is shown to have contained only accurate facts but the sting of the libel is not shown to be true."

The decision demonstrates that it is important to carefully consider a plaintiff's pleading where damages are sought for reputational harm.

Where a plaintiff seeks such damages based on a cause of action other than defamation, it may be possible to have the claim dismissed on the grounds that it is a "dressed up" defamation claim and is wrongly constituted.

Contact us

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

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