

## Defamation action dismissed on summary judgment motion

By **Stephen Thiele**

Law360 Canada (July 19, 2024, 9:49 AM EDT) -- In general, defamation actions are not conducive to dismissal on a summary judgment motion. As explained by the Court of Appeal for Ontario in *Baglow v. Smith*, 2012 ONCA 407, this general rule is based on the recognition that the threshold over which a statement must pass in order to be capable of being defamatory of a plaintiff is relatively low and the long-held view that the question of whether a statement is, in fact, defamatory is to be determined by the trier of fact on a full factual record with cross-examinations and possibly expert testimony.

However, as seen in *Martel v. Ottawa (City)*, 2024 ONSC 3738, a defendant can successfully use summary judgment, in an appropriate case, to dismiss a plaintiff's defamation action.

In this case, the plaintiff sued the City of Ottawa (the City) and one of its employees for comments made about him in two reports produced by the City in connection with a construction project related to the retrofitting of plate settler units at a water treatment plant.



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The City had entered into a contract with the plaintiff's employer, A, and at the same entered into a contract with an engineering firm to act as the designer, contract administrator and construction engineer on the construction project.

While A assigned the plaintiff to be its senior construction superintendent on the project, the City assigned the individual defendant, D, to be the project manager.

Under the contract between the City and A, the City was obligated to prepare an interim evaluation report regarding A's performance. The interim evaluation report classified A's work as "not satisfactory." The interim report was shared with A for comment and, eventually a final version of the report was shared with A through a private software program, the VPM system, used by the City. The final report was only available to A.

Subsequently, a telephone meeting was held between the City and A. The plaintiff participated in this meeting. Thereafter, the City issued a Notice of Non-Performance (NNP) in which D identified seven issues as evidence of unsatisfactory performance. The City asked A to remove the plaintiff from his existing role on the project and assign another person to fulfill the plaintiff's role. The City did not ask A to terminate the plaintiff from his employment.

However, a few days after receiving the NNP, A terminated the plaintiff's employment and the plaintiff sued the City and D for defamation.

In his statement of claim, the plaintiff alleged that the interim evaluation report personally attacked his integrity, competence and dedication to his work and, among other things, that it was "crafted with lies and misrepresentations" of events related to the project and its management.

With respect to the NNP, the plaintiff's pleading labelled the NNP a "character assassination" and that it was designed to destroy his career and to effectively blacklist him from any company doing business with the City.

Furthermore, the plaintiff alleged that the NNP was issued in retaliation for a complaint he had made to the Ministry of Labour Health and Safety Inspector about the project.

A defamation action can be defended under a small group of defences. In this case, the defendants' statement of defence pleaded the defences of truth/justification and qualified privilege. However, for the purposes of the summary judgment motion, the defendants relied only on the qualified privilege defence.

The qualified privilege defence attaches to an occasion upon which a communication is made. In *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, the Supreme Court of Canada explained that an occasion is privileged where the person who makes a communication has an interest or a duty, legal or social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. In other words, the qualified privilege defence comprises the following two elements: (1) a defendant must have some interest in making the statement and (2) those to whom the statement is made must have an interest in receiving it.

Qualified privilege can be a powerful defence. However, it is vulnerable to being defeated if the plaintiff can prove that the impugned comment was made with malice.

The plaintiff contended that the impugned comments about him in the report and the NNP were malicious and tied to a personal vendetta against him by representatives of the engineering firm. The plaintiff noted that the report failed to identify what he was supposed to do in his role and what he failed to do.

The court disagreed with the plaintiff's assertions about malice and found that the two reports were protected by the defence of qualified privilege. In granting summary judgment, the court identified four bases under which it could be concluded that the impugned comments were made on an occasion of privilege.

First, the contractual context protected the comments made by the defendants. Under the common law, qualified privilege arises in a contractual context where one party may be under an obligation to furnish information to another. In this case, the City and A had agreed to participate in the VPM program, to engage in frequent communications and to timely share concerns, and to have reports prepared and shredded on the VPM system.

Second, the communications fell within the category of business-to-business communications, which also was recognized as a privileged occasion. The commercial and business relationship between the parties created a social duty on the part of the City to make the communications.

Third, the common law recognized the importance of privilege in the context of construction projects. In a leading text on the law of defamation, Raymond Brown's *Brown on Defamation*, citing *LEC Engineering Ltd. v. Sam & Angel Holdings Ltd.*, [1999] B.C.J. No. 192, the author states:

Communications between various persons having an interest in a construction project are generally privileged...Where representatives of the contractor and owner of a building under construction meet in the presence of the consultant under the contract, the owner is privileged to express its views on why additional payments should not be made on the work that was performed.

Lastly, complaints made to an employer about an employee are a recognized occasion of privilege. The complaints about the plaintiff were made only to A and were restricted to his performance as the senior construction superintendent on the project.

On each of these occasions, A had an interest in receiving the report and NNP.

On the issue of malice, the motion judge found that the expressions about the plaintiff contained in the report and NNP were made in the City's interests and that there was no evidence that the defendants acted with any ulterior motive that conflicted with the interest or duty created by the occasion or acted in pursuit of a vendetta against the plaintiff. The defendants also did not exceed the scope of the occasion.

Overall, summary judgment was appropriate because it represented a proportional, expedient and cost-effective way to resolve the case. The motion judge was able to consider the evidence, the matters that were in issue and the respective position of the parties to reach a fair and just determination on the record before the court that there was no genuine issue requiring a trial.

The key takeaway from this case is that a defendant in a defamation action should not immediately discount the ability to bring a summary judgment to have the action dismissed. Although a court might be reluctant to grant the dismissal of the action, in the appropriate circumstances a defendant may be able to establish that there is no genuine issue requiring trial. The defendant should be cognizant that the evidentiary record permits the court to reach a fair and just determination on the case.

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