

Reputation can be everything

Defamation | Litigation | Litigation & Dispute Resolution

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On a day when travelers are learning that [Air Canada has barred emotional support animals](#) from planes, it is worth remembering that in the eyes of the law pets have traditionally been treated as items of property, no more, and subject to the same principles of legal ownership as any inanimate object. This applies whether the animal is livestock, a monkey running loose in a Swedish furniture store, or the family dog. Courts have recently started to broaden the principles of property which apply to pets, and are paying due heed to the reality that a meaningful relationship with the family dog goes beyond who originally bought it.

In *Coates v. Dickson*, 2021 ONSC 992 (CanLII), the court dealt with the ownership of two dogs by a couple in the midst of an acrimonious divorce. The couple acquired one dog, Jazz, as a guard dog, after an attempted home invasion. A year later they acquired their second dog, Jetta. At the time of the hearing Jazz was four years old and Jetta was three.

In determining ownership of the dogs, Justice Deena F. Baltman reviewed the traditional principles of pet ownership which turned on who paid for the dog, which allowed for little consideration to actual care and maintenance costs: *King v. Mann*, 2020 ONSC 108, at para. 71.

Justice Baltman noted that a broader, more contemporary approach had been adopted in many Small Claims Court decisions which assessed the circumstances of the relationship between the parties and their pets. A non-exhaustive list of the principles was summarized by Adjudicator W.A. Richardson in *MacDonald v. Pearl*, 2017 NSSM 5, at para. 25:

The tort of defamation is all about the protection of a person's reputation. Where a person suffers a loss of reputation because of words spoken or published about them to others, a cause of action for damages arises. But what if the person allegedly defamed already has a poor reputation? How will this impact their case?

Two recent decisions demonstrate that the prior existence of a bad reputation can negatively impact a claimant, particularly under anti-SLAPP legislation.

In *Rebel News Network Ltd. v. Al Jazeera Media Network*, 2021 ONSC 1035, the plaintiff online news outlet sought damages for defamation stemming from an internet article and YouTube video that contained alleged defamatory comments about the plaintiff. In the article, the defendant stated that the plaintiff was "connected to violent acts; acts like the Finsbury Park Mosque attack in London, the Quebec City mosque shooting, and in Fredericton, New Brunswick, the murder of two police officers. In all three instances, the men involved watched the Rebel Media and had become convinced Muslims were invading their countries".

The YouTube video essentially accused the plaintiff of driving some of its viewers to acts of violence and that "The Ottawa Police have filed a criminal complaint alleging that Rebel Media had breached a section of the Canadian [Criminal Code](#) by wilfully promoting hatred of the Muslim community."

In response to Notices of Libel delivered by the plaintiff, the defendant published corrections concerning men who watched Rebel News and that rather than filing a complaint, the Ottawa Police had received a complaint.

In *Levant v. Demelle*, 2021 ONSC 1074, the online news outlet and its founder, Ezra Levant, sought damages in connection with an alleged defamatory article written and published by the defendant on his website, which was devoted to issues such as climate change and the environment. The original article made certain personal accusations against Mr. Levant, which were later corrected, including that he was a climate denier and linking Mr. Levant and Rebel Media to "laudatory coverage" of a deadly Unite the Right rally in Virginia.

The defendants in both actions sought to dismiss the respective claims against them under s.137.1 of the *Courts of Justice Act* (the "CJA") and contended that the actions did not have substantial merit because the plaintiffs already had poor reputations at the time the alleged defamatory words were published.

In order for a statement to be defamatory, three elements must be established. The third element is that “the words must be defamatory in the sense that they would tend to lower the plaintiff’s reputation in the eyes of a reasonable person.”

In the *Al Jazeera Media* case, Justice Diamond wrote at paragraph 40:

Simply put, Al Jazeera submits that at the time of publication Rebel’s reputation was already “so low” (due to its allegedly pre-existing connection to violent acts and hateful conduct), and as such Rebel’s reputation could not be further lowered by the publication of the three statements.

In both cases, the defendants’ arguments were rooted in a comment made by the Supreme Court of Canada in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 (CanLII) which suggests that in assessing the defamatory nature of a statement, a court should consider “how much is publicly known about the plaintiff”.

For the purposes of the substantial merit analysis under s. 137.1 of the CJA, Justice Diamond rejected the defendants’ contentions that the plaintiffs did not have meritorious claims. The judge found that the alleged defamatory statements could lower the reputation of the plaintiffs in the eyes of a reasonable person and, more importantly, the issue of a plaintiff’s reputation inherently required a court to take a “deep dive” into the claim, which a court was not supposed to do on a motion under s. 137.1 of the CJA. As was recently found in *Subway Franchise System of Canada Inc. v. Canadian Broadcasting Corporation*, 2021 ONCA 26, a motion judge under s. 137.1 must avoid getting too deeply into the ultimate merits of a defamation action and should engage in a limited analysis.

However in each case, the court took into account the allegations of the plaintiffs’ already poor reputations under the public interest weighing test found in s. 137.1(4)(b) of the CJA. This section provides that a judge shall not dismiss a proceeding if satisfied that “the harm likely to be or have been suffered by the responding party as a result of the moving party’s expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.”

In *Demelle*, Justice Diamond was required to rely on this provision to dismiss the plaintiffs’ action because the plaintiffs had established that their claim had substantial merit, and that the defendant had no valid defence in the proceeding. More specifically, there was substantial merit that the words published about the plaintiffs could lower their reputation, and that there were grounds to believe that the defendant’s defences of justification, fair comment and responsible communication on matters of public interest had no real prospect of success.

In *Al Jazeera*, s. 137.1(4)(b) was an alternative ground for dismissing Rebel News’ action because Justice Diamond found that the plaintiff had failed to discharge its onus that the defence of responsible communication had no real prospect of success in the circumstances, notwithstanding that there was substantial merit that the words published about the plaintiff could lower its reputation, and that there were grounds to believe that the defendant’s defences of justification and fair comment had no real prospect of success.

The defence of responsible communication is met where (a) the impugned statements are on a matter of public interest, and (b) the publisher demonstrates that it was reasonable diligent in the steps taken to validate the accuracy of the factual statements made.

With respect to the public interest weighing test, the Supreme Court of Canada in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 has stated that a plaintiff must show two things: (a) the existence of some harm, and (b) that the harm is caused by the defendant’s expression. In each case, the plaintiffs were unable to meet this burden because they led no evidence of any particular or specific harm or damages to their reputation. This was particularly necessary because the defendants had each respectively alleged that the plaintiffs’ reputations were already poor before the alleged defamatory comments had been made.

In each case, Justice Diamond quoting from the concise words of Justice Belobaba in *B.W. (Brad) Blair v. Ford*, 2020 ONSC 7100 held that the plaintiffs had “not cleared the threshold of showing harm and causation.”

These two cases show, as we have written in earlier articles, that a plaintiff in defending a s. 137.1 motion needs to do more than just baldly assert that the impugned words have damaged his or her reputation in order to clear the s. 137.1(4)(b) threshold. This is especially the case where a plaintiff might have a poor reputation to start with. Accordingly, where a person believes that they have been defamed in a factual matrix that involves a matter of public interest, it is important to carefully consider before starting the action, even if it is meritorious, whether the harm caused to reputation is more than just general reputational harm and to critically self-assess your own reputation. This is important because of the potential cost consequences of a successful s. 137.1 motion. A PDF version is available to download [here](#).

If you require any litigation assistance, our [Dispute Resolution Group](#) lawyers are available to assist you. Please contact [Stephen Thiele](#) at 416.865.6651.



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