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Defamation: Action arising out of relationship breakdown to proceed, but no costs ordered

By **Stephen Thiele**

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Law360 Canada (January 14, 2025, 1:47 PM EST) -- The purpose of anti-SLAPP legislation is not to dismiss legitimate claims for the vindication of the reputation of a plaintiff who has been defamed. As seen in *Brown v. Landriault*, 2024 ONSC 7027, this includes a plaintiff who has been accused on social media of serious criminal conduct by a former boyfriend, girlfriend or spouse.

In this case, after a brief two-month relationship, the plaintiff and the defendant became embroiled in a bitter and tumultuous breakdown in which, among other things, the parties made multiple complaints to the Ottawa Police Services and made allegations that the other had engaged in sexual abuse. Although no criminal charges were ever laid against either the plaintiff or the defendant, the defendant eventually alleged on social media, including X and a local gaming community platform called "Super Smash Bros" or "Ottawa Smash" that the plaintiff had sexually assaulted her and was a sexual predator and child groomer.

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The defendant had 1,660 followers on X, while Ottawa Smash had approximately 1,000 members. The plaintiff was also an administrator and moderator of Ottawa Smash.

After then being banned from entering Ottawa Smash events, the defendant also made allegations against the plaintiff regarding sexual assault and child grooming on another social media platform that blacklisted global gaming community members from participating in events. In general, members of local Smash communities followed this database.

Eventually, the plaintiff commenced a legal proceeding against the defendant in the Ontario Superior

Court of Justice to which the defendant responded with a motion under s. 137.1 of the *Courts of Justice Act* (CJA) to have the proceeding dismissed on the grounds that it represented strategic litigation against public participation.

The defendant contended that she was a victim of sexual abuse and that, as a victim of intimate partner violence, she was entitled to speak publicly about her experiences with the plaintiff. In addition, she relied on the defence of justification to defeat the plaintiff's claim.

Under s. 137.1 of the CJA, a defendant bears the initial burden of establishing that the plaintiff's action arises from an expression on a matter of public interest. The term "expression" has an expansive meaning and a defendant is only required to show that some segment of the public has a genuine interest in knowing about the expression.

In the court's view, the defendant met this low initial burden because her statements about being a victim of sexual abuse and that the plaintiff was an alleged sexual predator were a matter of public interest.

By satisfying this threshold, the burden shifted to the plaintiff to establish that his claim had substantial merit, that the defence of justification was not valid, and the public interest in having his claim proceed outweighed the public interest in protecting the defendant's expressions.

While the defendant conceded that the plaintiff's claim had substantial merit and that he had demonstrated grounds to defeat the justification defence, she alleged that the plaintiff's action had the hallmarks of a traditional SLAPP lawsuit because the action represented a further attempt to manipulate and abuse her. In addition, the defendant only had limited funds to defend herself. Accordingly, protecting the defendant's expression outweighed the public interest in having the plaintiff's action proceed.

An action that has the classic hallmarks of a SLAPP proceeding is in general not genuine. As set out in *Bent v. Platnick*, 2020 SCC 23, the classic hallmarks of a SLAPP lawsuit are:

- The plaintiff has a history of using litigation or the threat of litigation to silence critics;
- The difference between the parties' resources, both financial and otherwise, give rise to a power imbalance favouring the plaintiff;
- By bringing the claim, the plaintiff seeks to punish or obtain revenge against the defendant; and
- The plaintiff has suffered minimal or nominal damages as a result of the defendant's conduct.

The court rejected the defendant's argument. The court found that there was no evidence that the plaintiff had previously engaged in litigation or threatened litigation, that the action had been brought for a retaliatory purpose, or that there was a power imbalance between the parties. The court stated as well that in the face of serious allegations of sexual and criminal conduct, the plaintiff was well within his rights to vindicate his reputation and clear his name.

The defendant's impugned social media postings including the following allegations:

> "I love how many fucking predators hang out in smash, even our local team has a child groomer on staff, just amazing this whole culture"; and
>
> "I was sexually assaulted by a staff member in my scene & was banned locally for proving he lied about me. Yet, our scene continued to harass me over this and support him. He was banned globally. I can't write about this every time they do something new."

The court was also satisfied that the plaintiff's damages were likely more than nominal and that they were caused by the impugned postings.

While the defendant steadfastly argued that if the plaintiff's action was allowed to proceed it would have a chilling effect on survivors of intimate partner violence from coming forward to speak about their experiences, the plaintiff showed that the defendant's statements had caused him to suffer

humiliation and embarrassment which impacted his overall general mental health. The plaintiff outlined that he suffered a sense of guilt and a loss of reputation due to a loss of business opportunities, and that he incurred therapy expenses.

The court also concluded that the defendant's statements were offensive and degrading, and that her statements were not worthy of protecting. Accordingly, the defendant's motion was dismissed.

However, no costs were awarded against the defendant for her unsuccessful motion.

Under the CJA, where a proceeding is not dismissed, there is a rebuttable presumption that a plaintiff is not entitled to costs on the motion. However, the court concluded that there was no reason to depart from the presumption because the defendant's motion had some basis. Intimate partner violence was a serious matter, and the motion was not frivolous.

This case demonstrates that actions for damages arising out of a defendant's serious allegations of sexual assault and sexual predatory behaviour, will not easily be dismiss on an anti-SLAPP motion, but that a defendant may nevertheless be protected against a costs award if the motion is unsuccessful.

Furthermore, this case serves as a reminder that individuals involved in the acrimonious breakdown of a relationship should refrain from using social media platforms and other forms of communication to disparage the reputation of a former partner. Complaints about sexual assault and sexual abuse should always be made to law enforcement and dealt with by the criminal justice system rather than the court of public opinion.

Stephen A. Thiele is the director of legal research at Gardiner Roberts LLP. He primarily works closely with dispute resolution lawyers, providing advice, value-added analysis and opinions on a wide range of litigation matters. He is the co-author of A Practical Guide to the Law of Defamation *(2024: LexisNexis).*

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