

Zak Sabbath's defamation claim allowed to continue against Mandy Morbid

Defamation | Facebook | Litigation | Litigation & Dispute Resolution | SLAPP | Social Media | libel

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In early 2019, a former model and adult film performer, Amanda Nagy also known as "Mandy Morbid," posted a message on her Facebook page saying that Zak Smith, her former husband, artist, tabletop role-playing game (RPG) creator and adult film performer also known as "Zak Sabbath," sexually, physically and emotionally abused her and other women during their marriage. Mr. Smith sued Ms. Nagy for defamation.

In June 2021, the Ontario Superior Court of Justice dismissed a motion by Ms. Nagy to have the action dismissed on the basis that it unduly limited debate on a matter of public interest: *Smith v. Nagy*, 2021 ONSC 4265 (CanLII).

Mr. Smith and Nagy met in 2006 when she was 21 years old and he was 29. She moved to the U.S. to live with him and they married in 2007. They were involved in polyamorous relationships with other women throughout their relationship. Ms. Nagy was featured in Mr. Smith's artwork, they live-streamed activities together, and collaborated on adult films. Their relationship and professional activities were featured in articles about Mr. Smith published in magazines such as Vice and Maxim.

In 2016, they separated, and Ms. Nagy returned to Canada. Over the next eighteen months, Ms. Nagy received counselling and was diagnosed with post-traumatic stress disorder.

In early 2019, Ms. Nagy posted a message on her Facebook page, which was accessible to any Facebook user due to her account settings. While the Facebook post was addressed to "Dear Zak Smith, aka Zak Sabbath," Ms. Nagy wrote above this greeting: "Please feel free to share this widely, on any platform you have". In a two-page long, single-spaced post, Ms. Nagy alleged that she had PTSD after a "decade of trauma" with Smith. She asserted that, throughout their relationship, he subjected her to sexual, psychological and emotional abuse.

Ms. Nagy attached statements from two other women, who alleged that Mr. Smith had "habitually abused and assaulted" women and that she had seen him have intercourse without first obtaining consent. Ms. Nagy urged readers to reconsider their support of Mr. Smith and his art.

The Facebook post was shared over 900 times, over 2000 users "liked" it, and over 200 comments were posted in response to it. The allegations circulated widely on various online and social media platforms and blogs. Within days, the publishers of the "Dungeons and Dragon's Player's Handbook" announced that it would remove all references to Mr. Smith in its online and print editions. Many colleagues disavowed him publicly. A digital retailer announced that, going forward, it would no longer work with Smith and would donate revenues from his prior publications to an anti-sexual violence organization. GenCon banned Mr. Smith from its events. Industry awards that Mr. Smith had previously won were retracted and his work was banned for future consideration.

Mr. Smith responded initially by posting two lengthy responses on his blog denying that he had abused or assaulted Ms. Nagy or the other women who had come forward. He provided a counter-narrative describing their relationship. His posts attached supportive statements from other women previously involved with Mr. Smith and Ms. Nagy as well as a statement by Ms. Nagy's father. They said that Ms. Nagy's statements about Mr. Smith were untrue.

However, Mr. Smith's responses failed to turn the tide of public opinion. After Ms. Nagy refused to take the Facebook post down, Mr. Smith served her with a libel notice and sued for defamation, seeking \$100,000 in general damages, \$50,000 in aggravated damages, \$50,000 in punitive damages, and an unspecified amount of

special damages for lost income and lost business opportunities. Mr. Smith also sought a public retraction of the allegations in Ms. Nagy's Facebook post and an injunction preventing her from any further publication of them.

Ms. Nagy served a statement of defence in December 2019, denying that the Facebook post was defamatory. In the alternative, she argued that her statements were true or substantially true, constituted fair comment, and/or were protected by qualified privilege. She alleged that there was an important and substantial public interest in her Facebook post, and that the defamation action was a Strategic Lawsuit Against Public Participation ("SLAPP") suit.

In January 2021, Ms. Nagy brought an "anti-SLAPP" motion under s. 137.1 of the *Courts of Justice Act* ("CJA"), asking the court to dismiss Mr. Smith's action on the basis that it unduly limited debate on a matter of public interest.

Section 137.1 of the *CJA* allows a defendant to seek the dismissal of a lawsuit on the basis that it will unduly eliminate or limit legitimate criticism about a matter of public interest.

The defendant making the motion must first persuade the judge that the lawsuit "arises from an expression made by the person that relates to a matter of public interest"; if the defendant cannot meet this threshold, the motion must be dismissed: s. 137.1(3).

If the defendant meets this threshold, the onus shifts to the plaintiff to persuade the motion judge that there are grounds to conclude that (i) the lawsuit has substantial merit; (ii) the defendant has no valid defence; and (iii) the harm likely to be or which has been suffered by the plaintiff as a result of the defendant's expression "is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression": s. 137.1(4)(b).

The motion was heard by Justice Sally A. Gomery in January 2021. As to the first stage, Her Honour found that the Facebook post was an expression that related to a matter of public interest. Mr. Smith argued that the Facebook post cannot relate to a matter of public interest because it was addressed to him and written in the first person. However, Ms. Nagy had posted her allegations in such a way as to make them publicly available, and invited readers to share the post widely on any platform.

While not every allegation of sexual misconduct by one person against another engages the public interest, even if one or more of them is a public figure, Justice Gomery held that the post was designed for a wider audience than Mr. Smith, and engaged the interests of the online adult RPG community. Ms. Nagy therefore satisfied the first stage of the s. 137.1 test.

As to the next stage, Ms. Nagy conceded that Mr. Smith's lawsuit had "substantial merit" given that there was a low hurdle to establish "a prospect of success" which tends to weigh more in favour of the plaintiff: *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 (CanLII), at para. 49.

The next issue was whether Ms. Nagy's defences could realistically be rejected, or in other words whether Mr. Smith was able to show that there were grounds on which the court could reject the defences to his defamation claim. He was able to do so with each of three defences raised:

- The evidence filed by Smith addressed the defence of "justification," namely that the allegations that he assaulted, threatened and coerced Ms. Nagy were not substantially true.
- As to the defence of "fair comment," Ms. Nagy would have to show that the statements were recognizable as "comments" based on facts that deal with a matter of public interest. Justice Gomery determined that the defamatory content of the Facebook post consisted of allegations of fact rather than expressions of opinion, and were not recognizable as simply comments.
- Lastly, the proposed defence of qualified privilege may not be valid, since Ms. Nagy had deliberately made the statements to an audience extending beyond those with a legitimate interest in the communications or a duty to receive it, which were grounds to defeat the defence.

Since Mr. Smith established that the defences raised by Ms. Nagy could be rejected at trial, the only remaining issue was whether the public interest nonetheless favoured a dismissal of his action. Justice Gomery conducted a balancing exercise and concluded that the harm suffered by Mr. Smith as a result of the Facebook post was sufficiently serious that the public interest in permitting the action to proceed to a hearing on the merits outweighed the public interest in protecting Ms. Nagy's expression.

An anti-SLAPP motion is an initial skirmish in a defamation action and is intended to discourage the use of litigation as a means of unduly limiting expression on matters of public interest. The decision reflects the balance of the interests involved in such claims. Justice Gomery was clear that the court's conclusions on the motion should in no way be taken to imply in any way that Ms. Nagy will be unable to prove her allegations against Mr. Smith at trial. A PDF version is available to download [here](#).



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