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SLAPPed! A One Year Post-Mortem Following *Platnick* and *Pointes Protection*

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In September 2020, the Supreme Court of Canada released two much-anticipated decisions which clarified the scope of anti-SLAPP legislation in Ontario.[1] As we approach the end of 2021, it is clear that anti-SLAPP motions (and appeals) continue to dominate the defamation landscape in Ontario.

Motion judges have adjudicated over twenty (20) anti-SLAPP motions since the Supreme Court decisions were released, and at least nine (9) appeals have dealt with the merits of anti-SLAPP motions, with many more in the queue that have been argued, taken under reserve, or otherwise scheduled.

Have the courts' interpretation and application of the legislation been consistently applied across the board?

This short article will focus on the courts' consideration of the harm allegedly suffered by plaintiffs, and when that harm is sufficiently serious to warrant the continuation of the litigation. As will be explored in further detail below, it appears that notwithstanding the cogent articulation of the test by the Supreme Court, judges across the province diverge on how to assess harm in the context of defamation claims for the purposes of anti-SLAPP motions.

THE LAW AND ITS OBJECTIVE

To recap, the "anti-SLAPP" amendments to the *CJA* were intended to provide a mechanism to weed out litigation of doubtful merit which unduly discourages and seeks to restrict free and open expression on matters of public interest.[2] On the other hand, a case should be allowed to proceed if the plaintiff appears likely to have suffered significant harm that outweighs the importance of encouraging debate and free expression.

A moving-party defendant bears the initial burden to satisfy the court on a balance of probabilities that the proceeding in question arises from an expression made by the defendant, and that the expression relates to a matter of public interest. If the defendant meets that threshold, the burden shifts to the plaintiff to satisfy the court that (i) there are grounds to believe that the proceeding has substantial merit, (ii) there are grounds to believe that there is no valid defence(s), and (iii) the harm suffered by the plaintiff as a result of the defendant's

[1] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 222 ("***Pointes Protection***"), and *Bent v. Platnick*, 2020 SCC 23 ("***Bent***")
[2] *Bernier v. Kinsella et al.*, 2021 ONSC 7451, citing with approval *704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685

expression is sufficiently serious that the public interest in permitting the plaintiff's action to proceed outweighs the public interest in protecting the defendant's expression.

It is the last prong of the test – s.137.1(4)(b) – that is said to be the "core" of the analysis and the "heart of the legislation".[3] Interestingly, a review of some cases since the Supreme Court decisions suggests that courts have taken different approaches in assessing harm at this early pre-screening stage during the anti-SLAPP motion process.

In particular, there appears to be divergence in the scope and strength of reliance on the presumption of damages (at-large) in defamation actions.

For example, recently the motion judge in *Bernier v Kinsella*[4] found as a fact that Mr. Bernier – the leader of the People's Party of Canada – would have difficulty proving that the defendant's allegations that Mr. Bernier was effectively a racist or xenophobic caused him reputational harm. The Court relied in part on the fact that there was widespread characterization of Mr. Bernier and the PPC using similar terms.

Notably, the motion judge in *Bernier* concluded the analysis of s.137.1(4)(b) by stating: "[i]n defamation actions, harm can be presumed, but that presumption does not apply in a motion under s. 137.1."

Plaintiffs' actions were similarly dismissed notwithstanding false and serious allegations that a Plaintiff was a disgraced neo-Nazi sympathizer,[5] and that a Plaintiff was connected to violent acts.[6] The motion judge in those cases found that relying upon the traditional principle that damages in a defamation action can be at-large, i.e., presumed, was insufficient, and that plaintiffs must lead evidence of harm or damage, especially when there could be other causes of the alleged reputational decline.

In the case of *Lemire v Burley*,[7] the motion judge noted that there is no minimum threshold to be met by the plaintiff in establishing harm, but the *magnitude* of the harm is relevant for a determination if the harm is sufficiently serious such that it outweighs the public interest in protecting the expression. Relying on *Pointes Protection,* the motion judge in *Lemire* ruled that a plaintiff is not required to prove harm or causation, but is required to provide evidence upon which the court can draw an inference of likelihood of the existence of the harm and the relevant causal link. The court noted that in a defamation action, harm is presumed, and the plaintiff is still required to support his claim for special damages, but the court is not required to make a definitive determination of harm or causation.[8]

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[3] *Pointes Protection* at paras 33, 62
[4] *Bernier v Kinsella*, 2021 ONSC 7451
[5] *Levant v Demelle*, 2021 ONSC 1074
[6] *Rebel News v. Al Jazeera Media*, 2021 ONSC 1035
[7] *Lemire v Burley* 2021 ONSC 5036
[8] *Lemire* at para. 144, citing with approval *Pointes Protection* at paras. 69 – 71

In *Lemire*, there were other potential causes of the harm that Mr. Lemire claims to have suffered. For that reason, he faced a significant challenge in establishing the seriousness of the harm that may be causally linked to Mr. Burley's expressions; the motion was allowed and the action dismissed.

These decisions appear to minimize the presumption of damages when there are other potential causes of harm, or at the very least demonstrate how the presumption could be overcome, even in instances with seemingly significant and damaging allegations that strike at the core of one's reputation.

These cases can be contrasted with others that support the opposite proposition – namely, that the gravity of some statements may be sufficient on their own at the early pre-screening stage to infer a likelihood of serious harm to one's reputation.

In *2504027 Ontario Inc. o/a S-Trip! v. Canadian Broadcasting Corporation (CBC) et al.*,[9] the motion judge considered the presumption of damages in defamation claims, albeit finding that the presumption was not enough to allow the action to proceed. The motion judge in that case considered whether a corporate plaintiff that was in the business of organizing trips was harmed by allegedly defamatory statements implying that students had easy access to alcohol, were subject to inadequate supervision by the plaintiff, and engaged in sexually suggestive activities organized by the plaintiff.

At first glance, these seem like quite damning statements that would impact the corporation's business activities. However, the motion judge relied on earlier jurisprudence supporting the principle that while harm can be presumed in a defamation action, the presumption is weaker in the case of a corporate plaintiff, because "a company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money."[10]

As in *Bernier*, the motion judge found that there were other sources that may have caused the plaintiff harm, and it was too difficult to isolate the harm the plaintiff stated it suffered from the expression with harm allegedly suffered through other sources. The court found that at best the plaintiff showed a weak case of harm, and had not met the prerequisite of showing that the harm was caused by the defendants' expression. The balance of the public interests at stake favoured free expression. The motion was allowed and the action dismissed.

Paul v. The Corporation of the Township of Madawaska Valley, 2021 ONSC 4996, is another recent decision where the motion judge allowed the action to proceed. In dismissing the anti-SLAPP motion, the motion judge considered in addition to alleged financial harm, damages "at large" in reliance on *Hill* that general damages are presumed from the publication of the libel, "even in the absence of any proof of actual loss."[11] The motion judge reiterated that it is not

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[9] *2504027 Ontario Inc. o/a S-Trip! v. Canadian Broadcasting Corporation (CBC) et al.*, 2021 ONSC 3471
[10] *Barrick Gold Corp. v. Lopehandia* (2004), 2004 CanLII 12938 (ON CA), 71 O.R. (3d) 416, at para. 49.
[11] ***Paul v. The Corporation of the Township of Madawaska Valley*, 2021 ONSC 4996 at para. 192**

the role of the Court on an anti-SLAPP motion to assess general damages. Rather, based on the evidence presented, there was a "sufficiently serious" claim by the Plaintiffs for general damages, which could amount to "more than nominal" damages and could serve as the basis for the Plaintiffs to proceed with their claim.

Brief Commentary and Conclusion

Since the pivotal Supreme Court decisions in *Pointes Protection* and *Bent* were released last September, at least thirteen (13) motions were granted in whole or in part, thereby eliminating Plaintiffs' claims that otherwise could have been substantially meritorious with no correspondingly valid defences. At least six (6) motions were dismissed. The Court of Appeal for Ontario has generally upheld the motion judges' determinations, overturning only four (4) anti-SLAPP lower-court decisions for a variety of different reasons.[12]

It appears that courts are still grappling with how to assess a plaintiff's alleged harm at such early stages in legal proceedings and weighing that harm against the harm of discouraging expressions on matters of public interest.

Some decisions have leaned heavily on the presumption of harm and damages 'at-large', while other decisions analyze more thoroughly whether the purported harm was actually caused by the expressions at-issue (as opposed to other factors), and whether there is actual evidence of tangible harm (reputational or monetary) that was caused by the offending party.

What is clear is that plaintiffs should consider the risk of pursuing litigation when the expression(s) at-issue even remotely engage matters of public interest. Defendants and their counsel focus right away on the viability of bringing anti-SLAPP motions, and with favourable cost consequences for moving parties under the legislation, even the dismissal of these motions significantly increase the high cost of prosecuting viable claims.

If the last year has been any indication, there is a strong presumption that the anti-SLAPP battleground will continue to play an important role as the anti-SLAPP jurisprudence continues to mature.

[12] Some appellate decisions rendered in the last year arose from motions argued and decided prior to the Supreme Court's release of *Pointes Protection* and *Bent*.