

CITATION: Gill v. Maciver, 2022 ONSC 1279
COURT FILE NO.: CV-20-652918-0000
DATE: 20220224

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Dr. Kulvinder Kaur Gill and Dr. Ashvinder
Kaur Lamba

Plaintiffs

– and –

Dr. Angus Maciver, Dr. Nadia Alam, André
Picard, Dr. Michelle Cohen, Dr. Alex
Nataros, Dr. Ilan Schwartz, Dr. Andrew
Fraser, Dr. Marco Prado, Timothy
Caulfield, Dr. Sajjad Fazel, Alheli Picazo,
Bruce Arthur, Dr. Terry Polevoy, Dr. John
Van Aerde, Dr. Andrew Boozary, Dr. Abdu
Sharkawy, Dr. David Jacobs, Tristan
Bronca, Carly Weeks, The Pointer, The
Hamilton Spectator, Société-Radio Canada,
the Medical Post

Defendants

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) *Rocco Galati, for the Plaintiffs*
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) *Howard Winkler, for the Defendant Dr.*
) *Angus Maciver*
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) *Julian Porter, for the Defendant Nadia Alam*
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) *Jaan Lilles and Katie Glowach, for the*
) *Defendants Dr. David Jacobs, Dr. Alex*
) *Nataros, Dr. Abdu Sharkawy, Dr. Nadia*
) *Alam and Dr. Michelle Cohen*
)

) *Susan Toth, for the Defendant Dr. John Van*
) *Aerde*
)

) *Andrea Gonsalves and Caitlin Milne, for the*
) *Defendant Dr. Andrew Fraser*
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) *Alex Pettingill, for the Defendants Dr. Ilan*
) *Schwartz, Dr. Marco Prado, Timothy*
) *Caulfield and Dr. Sajjad Fazel*
)

) *Timothy Flannery, for the Defendant Dr.*
) *Terry Polevoy*
)

) *Daniel Iny and Melanie Anderson, for the*
) *Defendant Dr. Andrew Boozary*
)

) *Meredith Hayward and Michael Binetti, for*
) *the Defendants Tristan Bronca and The*
) *Medical Post*
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) *Brad Radnoff and David Seifer, for the*
) *Defendant The Pointer Group Incorporated*
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) *Andrew MacDonald and Carlos Martins*, for
) the Defendants André Picard and Carly
) Weeks
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) *George Pakozdi*, for the Defendant Alheli
) Picazo
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) *Emma Carver*, for the Defendant Bruce
) Arthur
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) **HEARD:** September 27, 28 and 29, 2021

REASONS FOR DECISION

Stewart J.

Nature of the Motions

[1] The Plaintiffs have initiated proceedings as against these more than 20 Defendants and claim damages in the aggregate of approximately \$12,000,000.00 for defamation and other purported causes of action.

[2] The Defendants have brought these several motions pursuant to s. 137.1 of the *Courts of Justice Act* (“CJA”), R.S.O 1990, c C.43. Section 137.1 allows for the dismissal by judicial order of a proceeding that limits debate on matters of public interest. These motions are more commonly referred to as “anti-SLAPP” motions. A SLAAP refers to a strategic lawsuit against public participation, a characterization which the Defendants argue aptly attaches to the proceedings brought against them.

[3] The Plaintiffs argue that the motions do not satisfy the test for dismissal at this early stage and therefore submit that the relief requested by the Defendants should not be granted.

[4] The most relevant portions of Section 137.1 of the CJA provide as follows:

Dismissal of proceeding that limits debate

Purposes

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

- (a) to encourage individuals to express themselves on matters of public interest;
- (b) to promote broad participation in debates on matters of public interest;
- (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
- (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. 2015, c. 23, s.3.

Definition, “expression”

(2) In this section,

“expression” means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. 2015, c. 23, s. 3.

Order to dismiss

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest. 2015, c. 23, s. 3.

No dismissal

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

- (a) there are grounds to believe that,
 - (i) the proceeding has substantial merit, and
 - (ii) the moving party has no valid defence in the proceeding;and

(b) 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. 2015, c. 23, s. 3.

[5] It is not disputed that the tort of defamation is governed by a well-established test requiring that three criteria be met:

- (a) that the words complained of were published, meaning that they were communicated to at least one person other than the plaintiff;

(b) the words complained of referred to the plaintiff; and

(c) the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person.

[6] Even if the definition of defamation is met, a defendant may have several defences to rely on to escape liability. These include justification, fair comment, qualified privilege and responsible journalism (see: *Grant v. Torstar Corp.*, 2009 SCC 61).

[7] In order to properly consider the issues raised by a motion brought pursuant to s. 137.1 evidence may be filed by the parties to provide background and context to an impugned statement as well as to establish the chances of success of the claims and any available defences.

[8] Subsections 137.1(3) and (4) of the CJA set out a two-part test for a motion to dismiss an action on this basis. First, the defendant has the onus of showing that the plaintiff's proceeding arises from an expression that "relates to a matter of public interest". If the defendant meets that threshold, the court must dismiss the action unless the plaintiff satisfies the court that there are grounds to believe the proceeding has substantial merit, that there are grounds to believe that the defendant has no valid defence, and that the harm suffered by the plaintiff is sufficiently serious such that the public interest in allowing the proceeding to continue outweighs the public interest in protecting that expression.

[9] It is instructive to repeat that, once it has been established by the Defendants that the impugned communication relates to a matter of public interest, the burden on these motions rests on the Plaintiffs to establish that there is substantial merit to each of their claims.

[10] The three factors that comprise the plaintiff's onus to meet the second branch of the test are conjunctive. If the plaintiff fails to meet the onus on any one of those three requirements, the action must be dismissed.

[11] The Supreme Court of Canada has considered the test for dismissal under s. 137.1 and has expressed views on issues related to the approach to be applied thereunder in two recent decisions: *1704604 Ontario Ltd. V. Pointes Protection Association*, 2020 SCC 22 and *Bent v. Platnick*, 2020 SCC 23.

[12] In *Pointes Protection*, "substantial merit" was defined as a real prospect of success. The requirement was further refined in *Bent v. Platnick* as demonstrating a prospect of success that need not be demonstrably likely, but one that weighs more in favour of the plaintiff.

[13] Substantial merit has been described as a more demanding standard than that applicable on a motion to strike a claim pursuant to Rule 21 of the *Rules of Civil Procedure* for failure to disclose a cause of action. Accordingly, more than merely some chance of success is required. In *Bent v. Platnick*, was stated (at para. 49):

...for an underlying proceeding to have "substantial merit", it must have a real prospect of success — in other words, a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more

