

Court of Appeal Brings Qualified Privilege into the Internet Age

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The Ontario Court of Appeal's decision in *Thatcher-Craig v. Clearview (Township)* has significant implications for defamation law generally, and in particular its treatment in anti-SLAPP motions involving municipalities and other public authorities.

FACTUAL BACKGROUND IN *THATCHER-CRAIG*

The plaintiffs purchased a farm property in 2011. In 2018, they submitted a site plan application to support expansion of their operations, which included a release that indemnified the Township for harm arising from the publication of information related to the application.

Community newspapers published articles about the application, which led to the Township receiving negative correspondence from the public. The Township added the site plan application to its online application database, along with the unedited comments from the public.

The plaintiffs commenced an action for \$11.3M in damages, claiming that the publication of the comments had adversely affected their business.

THE ANTI-SLAPP MOTION

The Township, relying on “anti-SLAPP” legislation, moved to dismiss the action. SLAPP stands for “strategic litigation against public participation”. In 2015, the *Courts of Justice Act* was amended to allow defendants to seek dismissal of suits arising from expressions on matters of public interest. The idea is to discourage lawsuits that limit public participation and freedom of expression.

The motion judge ruled that the Township had met its onus of showing that the comments it posted related to a matter of public interest.

The onus then switched to the plaintiffs, who satisfied the judge that there were grounds to believe that the defamation claim had substantial merit, and the four defences raised by the Township – justification, fair comment, qualified privilege, and indemnification – had no real prospect of success. To reach this conclusion, the judge considered defamatory statements not pleaded in the claim.

The court also found that the plaintiffs had met the second prong of their onus by showing that the harm caused by the comments was sufficiently serious, and that the public interest in permitting the proceeding to continue outweighed the public interest in protecting publication.

The upshot was that the court refused to dismiss the action and allowed it to proceed.

THE COURT OF APPEAL'S ANALYSIS

The Court of Appeal disagreed with the motion judge and dismissed the defamation claim.

The judge, the court concluded, had erred in his treatment of the qualified privilege and indemnification defences. Both provided a real prospect for a successful defence, thereby satisfying the conditions necessary for dismissal.

As the Court of Appeal saw it, the defence of qualified privilege applied because the Township had “an interest or duty” in publishing the impugned statements, and the public had a corresponding “duty or interest” to receive them. In this case, the privilege extended “to the entire public land use planning process”, including the posting of the impugned comments, because the Township had a duty “to make the planning process transparent and accessible” and the public had an interest in accessing the information related to the process.

“Consistent with how information is typically communicated and accessed in today’s society, the municipality made all of the information and comments publicly available online on its website,” the court stated. “The expectation that citizens will attend at the municipal offices during business hours to view documents as the sole method for such access is obsolete. People now expect to be able to access publicly available information online.”

The fact that the website contents were accessible to others did not undermine the reciprocal duty and interest between the Township and its residents: “Today a website is the most efficient, accessible and cost-effective method of allowing the public access to government information,” the court stated.

While it was not necessary to the decision, the court further noted that the motion judge had erred in considering statements that had not been pleaded as a way of “rectifying substantive legal deficiencies” in the pleadings: the words complained of must be identified in the claim.

IMPORTANT TAKE-AWAYS

- In an increasingly online society, qualified privilege may attach to statements published online even when those statements are accessible to others without a direct interest in them.
- Public authorities may be exempt from claims for defamation arising from the publication of comments received from the public in response to an official process that contemplates public comment.
- Pleadings are especially important in defamation claims - courts should not consider alleged defamation that has not been specifically pleaded.

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