COURT OF APPEAL FOR ONTARIO

CITATION: Platnick v. Bent, 2018 ONCA 687
DATE: 20180830
DOCKET: C63103

Doherty, Brown and Huscroft JJ.A.

BETWEEN

Howard Platnick

Plaintiff (Appellant)

and

Maia Bent and Lerners LLP

Defendants (Respondents)

Timothy S. B. Danson and Marjan Delavar, for the appellant

Howard Winkler, Eryn Pond and Andrew K. Lokan, for the respondent, Maia Bent

Terrence J. O'Sullivan and Laura M. Wagner, for the respondent, Lerners LLP

Hart Schwartz, for the intervener, the Attorney General of Ontario

Heard: June 28, 2017

On appeal from the order of Justice Sean F. Dunphy of the Superior Court of Justice, dated December 1, 2016, with reasons reported at 2016 ONSC 7340, 136 O.R. (3d) 339, and from the costs order, dated January 24, 2017, with reasons reported at 2017 ONSC 585.

Doherty J.A.:

A. OVERVIEW

[1] The appellant sued the respondents for libel, claiming damages of more than $15 million. The respondents defended the claim, advancing several defences, including justification and qualified privilege.

[2] The respondents successfully moved for a dismissal of the action under s. 137.1 of the *Court of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"). The motion judge awarded the respondent, Maia Bent, her costs on a full indemnity basis, fixed at $282,943.42. He awarded the respondent, Lerners LLP, its costs on a partial indemnity basis, fixed at $30,000.

[3] The appellant appeals from the dismissal of the action. If that appeal is dismissed, the appellant seeks leave to appeal from the costs order.

[4] For the reasons that follow, I would hold that although the motion judge correctly determined that the expression in issue related to a matter of public interest, he erred in concluding that the appellant had failed to meet his onus under ss. 137.1(4)(a) and (b). I would hold that on a proper application of those provisions to the motion record, the appellant met that onus. I would further hold that s. 137.1 does not infringe s. 7 or s. 15 of the *Canadian Charter of Rights and Freedoms*.

[5] I would allow the appeal, set aside the dismissal of the action, and remit the matter to the trial court. Given my disposition of the main appeal, it is unnecessary to consider the application for leave to appeal the costs order.

B. THE FACTS

[6] The appellant, Howard Platnick ("Dr. Platnick"), is a medical doctor. He spends much of his professional time preparing and reviewing medical assessments done in the context of disputes between insurers and persons injured in motor vehicle accidents. Dr. Platnick works mostly, but not exclusively, for insurers.

[7] The respondent, Maia Bent ("Ms. Bent"), is a lawyer and partner with the respondent law firm, Lerners LLP ("Lerners"). She acts for individuals who have been injured in motor vehicle accidents and are seeking compensation from insurers. At the relevant time, Ms. Bent was also the president-elect of the Ontario Trial Lawyers Association ("OTLA"), an organization of lawyers, law clerks, and law students who represent persons injured in motor vehicle accidents and who are involved in the automobile insurance dispute resolution process.

[8] In November 2014, Ms. Bent was acting for Dr. Laura Carpenter, who had been injured in a motor vehicle accident. Dr. Carpenter claimed to have suffered a catastrophic impairment as a result of the accident. That designation would entitle her to claim enhanced medical and other insurance benefits from the insurer.

[9] The determination of whether an individual has suffered a catastrophic impairment is made using criteria and guidelines set out in, or incorporated into, the *Statutory Accidents Benefits Schedule*, O. Reg 34/10 under the *Insurance Act*,

R.S.O. 1990, c. I.8 (“SABS”). The scheme contemplates a variety of medical assessments using a scoring system for various kinds of impairments and a ranking of levels of impairment for various activities or bodily functions.

[10] The insurer can request a catastrophic impairment evaluation. That evaluation involves assessments by various medical professionals with different specialities. Some are very familiar with the criteria set out in the SABS and others are not. Insurers generally retain someone to obtain the necessary medical evaluations and to prepare the necessary reports and assessments.

[11] In Dr. Carpenter’s case, the insurer retained SLR Assessments (“Sibley”). Sibley retained the experts with the necessary specialities to perform Dr. Carpenter’s assessment. Those experts provided their reports to Sibley. Sibley corresponded directly with those experts in respect of issues raised by their assessments.

[12] Sibley also retained Dr. Platnick. Dr. Platnick is not a specialist. He was not asked to examine Dr. Carpenter or to assess her medical condition from a clinical perspective. Dr. Platnick was retained to do an impairment calculation based on the application of the applicable criteria in the SABS to the entirety of the medical information available, including the assessments prepared by the various experts.

[13] Sibley provided the medical records and expert reports to Dr. Platnick. Dr. Platnick prepared a report, which he sent to Sibley.

[14] Dr. Platnick's report entitled "Catastrophic Impairment Determination" begins with the following observation:

> My calculations detailed below incorporate and consider the findings of all assessors on this CAT assessment team.

[15] Dr. Platnick's report proceeds to examine the various criteria in the SABS that were relevant to Dr. Carpenter's catastrophic impairment assessment. In his report, Dr. Platnick makes extensive reference to the assessments of the other specialists, including the neurologist, Dr. King. At the end of the report under the heading "Impairment Calculation", Dr. Platnick sets out his conclusions based on the specialists' reports. He concludes that Dr. Carpenter does not meet the catastrophic impairment requirements under any of the criteria.

[16] After setting out his conclusion based on the information provided by the other experts, Dr. Platnick writes:

> It is the consensus conclusion of this assessment that [Dr. Carpenter] does not achieve the catastrophic impairment rating as outlined in the SABS.…

[17] Dr. Platnick had not spoken to any of the other experts who had assessed Dr. Carpenter when he wrote his report. Following his usual practice, he sent the report only to Sibley.

[18] The report Dr. Platnick sent to Sibley had an acknowledgement page attached to the back. That acknowledgement page indicated that Dr. Platnick's

executive summary was a “consensus conclusion of this assessment”. The acknowledgment page had a place for the signature of each of the other specialists who had assessed Dr. Carpenter. There were no signatures on that document when Dr. Platnick returned it to Sibley. In the normal course, Sibley would obtain those signatures. In Dr. Carpenter’s case, no acknowledgement was ever signed by the other experts and, as it turned out, there was not a consensus of opinion among them.

[19] Sibley provided Ms. Bent with a document entitled “Catastrophic Determination Executive Summary Report”. That document was identical to the report prepared by Dr. Platnick, except that it did not have the acknowledgment page on the back. Ms. Bent did, however, receive a copy of Dr. Platnick’s report with the unsigned acknowledgment. She also obtained the reports from the other specialists and related documentation.

[20] The dispute proceeded to arbitration before the Financial Services Commission of Ontario. The insurer relied on Dr. Platnick’s report and his opinion that Dr. Carpenter did not meet the catastrophic impairment rating criteria.

[21] Dr. King, who had done Dr. Carpenter’s neurological assessment for the insurer’s catastrophic impairment evaluation, testified at the arbitration. He indicated that he had not participated in any “consensus” meeting of the experts,

that he had not seen or signed Dr. Platnick's report, and that portions of his report had been omitted without his knowledge or consent.

[22] After Dr. King testified, the insurer offered to settle. An initial offer was refused, but a second offer was accepted. Under the settlement, Dr. Carpenter received a catastrophic designation, reinstatement of benefits, and payments of past medical and rehabilitative expenses with interest. The insurer also agreed to fully indemnify Dr. Carpenter for fees and disbursements, even though successful parties in the arbitration process normally receive only nominal costs.

[23] Ms. Bent was convinced that the insurer settled the arbitration on terms very favourable to her client to avoid public scrutiny of the insurer's conduct in respect of the medical evidence produced at the arbitration. Ms. Bent believed that Dr. King's evidence, combined with her own examination of the relevant documents, revealed an attempt to misrepresent the opinions of the medical experts who had examined Dr. Carpenter and mislead the arbitrator as to Dr. Carpenter's entitlement to a catastrophic impairment designation.

[24] A few days after the settlement, Ms. Bent posted an email on the OTLA member "Listserv", an automated email service. Only OTLA members could subscribe to the Listserv. Some members subscribed and some did not. There were about 670 subscribers. Members who subscribe are obligated to undertake, in writing, to maintain the confidentiality of the information provided on the Listserv.

However, Ms. Bent's email was "leaked", first to an advocacy organization and shortly thereafter to the press.

[25] Ms. Bent's email, dated November 10, 2014, bears the subject line "Sibley Alters Doctors' Reports". As the contents of the email are the basis for the defamation claim, I have set it out in full below. I have numbered each paragraph for the purposes of subsequent references in this judgment to parts of the email.

> [1] I am involved in an arbitration on the issue of catastrophic impairment where Sibley aka SLR Assessments did the multi disciplinary assessments for TD Insurance. Last Thursday, under cross-examination the IE neurologist, Dr. King, testified that large and critically important sections of the report he submitted to Sibley had been removed without his knowledge or consent. The sections were very favourable to our client. He never saw the final version of his report which was sent to us and he never signed off on it.
>
> [2] He also testified that he never participated in any "consensus meeting" and he never was shown or agreed to the Executive Summary, prepared by Dr. Platnick, which was signed by Dr. Platnick as being the consensus of the entire team.
>
> [3] This was NOT the only report that had been altered. We obtained copies of all the doctor's file[s] and drafts and there was a paper trail from Sibley where they rewrote the doctors' reports to change their conclusion from our client having a catastrophic impairment to our client not having a catastrophic impairment.
>
> [4] This was all produced before the arbitration but for some reason the other lawyer didn't appear to know what was in the file (there were thousands of pages produced). He must have received instructions from the insurance company to shut it down at all costs on Thursday night

> because it offered an obscene amount of money to settle, which our client accepted.
>
> [5] I am disappointed that this conduct was not made public by way of a decision but I wanted to alert you, my colleagues, to always get the assessor's and Sibley's files. This is not an isolated example as I had another file where Dr. Platnick changed the doctor's decision from a marked to a moderate impairment.

[26] The first four paragraphs of the email refer to Dr. Carpenter's arbitration. The last sentence of the fifth paragraph refers to a Catastrophic Determination Report prepared by Dr. Platnick about two years earlier in an unrelated case. The reference to Dr. Platnick changing another doctor's "decision from a marked to a moderate impairment" is a reference to a psychiatric assessment report done by a Dr. Dua. I will refer to that incident in more detail when considering the justification defence.

[27] Dr. Platnick became aware of the email shortly after it was sent. He requested an apology and a retraction. When his requests went unanswered, he commenced this lawsuit.

C. THE MOTIONS

[28] Ms. Bent brought a motion under s. 137.1 of the *CJA* to dismiss Dr. Platnick's claim against her. Although Lerners did not bring a similar motion, it was common ground that if Ms. Bent's motion succeeded, the action should also be dismissed against Lerners.

[29] In the course of the s. 137.1 motion, the appellant brought a motion seeking various orders in relation to the conduct of the s. 137.1 motion.[1] He also brought a motion for a declaration that s. 137.1 infringed ss. 7 and/or 15 of the *Charter* and was therefore of no force or effect.

[30] The motion judge rejected the constitutional arguments. The appellant renews those arguments on appeal.

[31] In allowing Ms. Bent's s. 137.1 motion, the motion judge reached three significant conclusions. He held that:

- Ms. Bent had established that her email constituted expression in respect of a matter of public interest (s. 137.1(3));
- Dr. Platnick had failed to satisfy him that there were grounds to believe that Ms. Bent did not have a valid defence to Dr. Platnick's libel claim (s. 137.1(4)(a)(ii)); and
- Dr. Platnick had not satisfied him that the harm suffered or likely to be suffered by Dr. Platnick as a result of the email was sufficiently serious that the public interest in allowing Dr. Platnick to proceed with his claim

[1] The motion judge declined to grant most of the relief sought by the appellant: *Platnick v. Bent (No. 2)*, 2016 ONSC 7474. In his Notice of Appeal, the appellant appeals from certain aspects of the motion judge's decision on the preliminary motion. In light of my conclusion that the s. 137.1 motion should be dismissed, I need not address the merits of those issues. It is sufficient to say that the motion judge's order involved the exercise of his discretion to control the proceedings before him and the appellant offers no basis upon which this court could properly interfere with the exercise of that discretion.

outweighed the public interest in protecting Ms. Bent's expression (s. 137.1(4)(b)).

[32] The appellant challenges all three holdings. To succeed on the appeal, he must demonstrate either that the motion judge erred in his s. 137.1(3) determination that the expression in the email related to a matter of public interest, or that he erred both in his determination under s. 137.1(4)(a)(ii), concerning the validity of the defences advanced, and his s. 137.1(4)(b) assessment of the competing public interests. In addition, to succeed on the appeal, Dr. Platnick must establish, as required by s. 137.1(4)(a)(i), that there are grounds to believe that his claim has "substantial merit". The motion judge found it unnecessary to decide this point in light of his conclusions outlined above.

[33] I will first examine the arguments that turn on the interpretation of the relevant provisions of s. 137.1. I will then consider the constitutional arguments.

D. THE INTERPRETATION OF SECTION 137.1

(i) Did the Motion Judge Err in his Interpretation of s. 137.1(3)?

[34] Section 137.1(3) provides:

> On a 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.

[35] This court considered the purpose of s. 137.1 in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685, at paras. 27-49 (released concurrently with these reasons), at length. I need not repeat that analysis. This court also considered the meaning of "public interest" in s. 137.1(3) in *Pointes*, at paras. 50-66. This court's analysis of that provision is consistent with the motion judge's analysis in this case: see paras. 61-79 of his reasons. Both lean heavily on the description of "public interest" set out in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640.

[36] Like the motion judge, I view the email as relating to a matter of importance to the proper administration of justice in Ontario. The email relates to the process put in place by the legislature for the determination of claims made by persons injured in motor vehicle accidents. The email raises concerns about the integrity of that process and, in particular, the honesty and reliability of medical reports filed on behalf of insurers in the arbitration process. The integrity and reliability of that process has a direct impact on a significant segment of the public.

[37] The email is also directed at persons with a vital interest in ensuring the honesty and integrity of the arbitration process. That interest is part of their greater responsibility to fully and effectively represent the interests of clients advancing claims under the scheme.

[38] It is important to emphasize that a finding that expression relates to a matter of public interest says nothing about the merits of Dr. Platnick's claim that the email libelled him. An expression may be defamatory, false, and malicious and still relate to a matter of public interest: *Pointes*, at para. 55. Similarly, a finding that expression relates to a matter of public interest does not determine the outcome of a s. 137.1 motion. The outcome depends on the analysis required under s. 137.1(4).

[39] In arguing for a very narrow reading of s. 137.1(3) that would limit the section to "a very serious societal or public interest", Dr. Platnick submits that constitutional values, which include the protection of reputation, must inform the interpretation. The relationship between *Charter* principles and statutory interpretation is explained in *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at paras. 18-19:

> It has long been accepted that courts should apply and develop common law rules in accordance with the values and principles enshrined in the *Charter*. However, it is equally well settled that, in the interpretation of a statute, *Charter* values as an interpretative tool can *only* play a role where there is a genuine ambiguity in the legislation. In other words, where the legislation permits two different, yet equally plausible, interpretations, each of which is equally consistent with the apparent purpose of the statute, it is appropriate to prefer the interpretation that accords with *Charter* principles. However, where a statute is not ambiguous, the court must give effect to the clearly expressed legislative intent and not use the *Charter* to achieve a different result….

> If this limit were not imposed on the use of the *Charter* as an interpretive tool, the application of *Charter* principles as an overarching rule of statutory interpretation could well frustrate the legislator's intent in the enactment of the provision. Moreover, it would deprive the *Charter* of its more powerful purpose – the determination of the constitutional validity of legislation. [Citations omitted; emphasis in original.]

[40] Dr. Platnick approaches the interpretation of s. 137.1 in the manner rejected in *Rodgers*. He sets out the constitutional values that he says must guide the balancing of the competing interests of protecting reputation and freedom of expression and then urges this court to read the statute, regardless of what it actually says, to accord with the proper balancing of those competing interests. As the motion judge put it in rejecting this argument, at para. 143:

> In my view, inserting the concept of "*Charter* principles" into the process of statutory construction before determining the intentions of Parliament in the first place … places the remedial cart before the interpretation horse. The *Charter* represents the borders of the canvass [*sic*] upon which Parliament is constitutionally authorized to paint its laws. Those borders have not been placed there to deflect Parliament's brush *before* it has gone past them. The plaintiff would have the court steer Parliament's hand clear of approaching the line instead of deciding when it has actually done so. The latter is my proper role; the former is not. *Charter*-values [*sic*] do not govern the task of interpreting legislation when no breach of the *Charter* exists. [Emphasis in original.]

[41] In my view, the motion judge properly defined the term "public interest" in s. 137.1(3). The evidence before the motion judge fully supported his conclusion that the email constituted expression in relation to a matter of public interest.

(ii) Did the Motion Judge Err in his Interpretation of s. 137.1(4)(a)?

[42] Sections 137.1(4)(a) and (b) set out the criteria upon which the motion judge must decide whether the claim should proceed. Section 137.1(4)(a) addresses the merits of the claim. It reads:

> A judge shall not dismiss a proceeding under subsection (3) if the responding party [plaintiff] satisfies the judge that,
>
> (a) there are grounds to believe that,
>
> (i) the proceeding has substantial merit, and
>
> (ii) the moving party [defendant] has no valid defence in the proceeding;

[43] As explained in *Pointes*, at paras. 69-70 and 75, s. 137.1(4)(a) puts the onus on the plaintiff (responding party) to establish on the balance of probabilities that there are reasonable grounds to believe both that the plaintiff's claim has substantial merit and that the defendant (moving party) has no valid defence. Broadly speaking, the section provides a mechanism whereby claims that have little apparent merit and that potentially undermine freedom of expression can be screened out of the litigation process at an early stage.

[44] Placed in the context of this case, the question raised by s. 137.1(4)(a) becomes:

> Could a reasonable trier conclude that Dr. Platnick had a real chance of establishing that he was libelled and could a reasonable trier conclude that Ms. Bent had no valid defence to the allegation?

If affirmative answers to both questions were within the range of conclusions reasonably available on the motion record, Dr. Platnick had met his onus under s. 137.1(4)(a).

[45] As is evident from the analysis in *Pointes*, I agree with several aspects of the motion judge's analysis. Like him, I reject the "no genuine issue for trial" test as applicable to s. 137.1(4)(a): see paras. 81-82 of his reasons. I also agree that the merits inquiry dictated by s. 137.1(4)(a) must be approached having regard to the summary nature of the motion and the point in the proceedings in which the motion is brought: para. 83.

[46] I would not, however, adopt the "compelling and credible information" standard taken by the motion judge from *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100. In *Mugesera*, the court was concerned with s. 19(1) of the *Immigration Act*, R.S.C. 1985, c. I-2, which provided that a person should not be granted admission into Canada if there were "reasonable grounds to believe" that the person had committed a "war crime" or a "crime against humanity" outside of Canada. In interpreting the provision, the court said, at para. 114:

> In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information.

[47] The kind of determination under consideration in *Mugesera* was very different from the determination a motion judge must make on a s. 137.1 motion.

In *Mugesera*, the Immigration and Refugee Board (Appeal Division), after hearing 24 days of evidence, had to decide whether there were reasonable grounds to believe that Mr. Mugesera had committed war crimes and crimes against humanity. This involved determining whether there were reasonable grounds to believe that certain facts existed which, as a matter of law, would constitute such crimes. The description of the reasonable grounds to believe standard as requiring "compelling and credible information" was made in the context of a fact-finding exercise carried out after a hearing that lasted over three weeks. Mr. Mugesera's right to stay in the country hinged on that fact-finding.

[48] A motion judge conducting a s. 137.1 motion does not make findings of fact under s. 137.1(4)(a). Instead, the motion judge assesses, at a preliminary stage and through the reasonableness lens, the merits of the plaintiff's claim and the validity of any defences advanced. The motion judge does so for the purpose of determining whether the lawsuit should be allowed to proceed through the normal process. In my view, the phrase "reasonable grounds to believe" used in the context of s. 137.1 calls for a less demanding inquiry than s. 19 of the *Immigration Act* required.

[49] Nor, in my view, is it simply a matter of word choice. I think the phrase "compelling and credible information" can easily lead a motion judge into an assessment of the ultimate merits of the case and the credibility of the claimants. As explained in *Pointes*, at paras. 78-82, the issue for the motion judge is not the

ultimate strength of the claim or the believability of the plaintiff, but only whether the record provides a reasonable basis for believing the claim has substantial merit and that there is no valid defence.

(a) Section 137.1(4)(a)(i)

[50] Section 137.1(4)(a)(i) requires Dr. Platnick to establish reasonable grounds to believe that his libel action has "substantial merit". In the context of libel actions, the "substantial merit" requirement refers to the facts that the plaintiff must establish to prove the claim: see *Pointes*, at para. 72. Affirmative defences, which the defendant must advance in either the pleadings or the materials on the s. 137.1 motion, are addressed under s. 137.1(4)(a)(ii): see *Pointes*, at para. 83.

[51] To succeed in a libel case, a plaintiff must establish three things in addition to establishing that the defendant made the statement complained of:

- the words complained of were published to at least one other person;
- the words complained of referred to the plaintiff; and
- the words complained of, in their natural and ordinary meaning or in some other meaning pled by the plaintiff, are defamatory: *Grant v. Torstar*, at para. 28.

[52] If the plaintiff establishes the three facts set out above, the falsity of the statements and the damages caused to the plaintiff are presumed: *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 1. The libel claim will

succeed unless the defendant can successfully advance a defence such as justification or qualified privilege.

[53] I have no difficulty concluding that there are reasonable grounds to believe that Dr. Platnick's claim has "substantial merit". Indeed, I do not understand Ms. Bent to suggest in her affidavit that her email was not published, did not in part refer to Dr. Platnick, and could not be understood in its natural and ordinary meaning as defamatory of Dr. Platnick. She relies on various affirmative defences, including justification and qualified privilege.[2]

[54] Ms. Bent makes it clear in her affidavit that, in her email, she alleged that Dr. Platnick deliberately altered or misrepresented assessments made by other doctors for the purpose of denying claimants a catastrophic impairment classification and the benefits that flowed from that classification. Ms. Bent specifically alleges that Dr. Platnick misrepresented the findings and opinions of other doctors and "committed professional malpractice". As I read Ms. Bent's affidavit and cross-examination, her defence to the claim is not that her comments were not potentially defamatory, but rather that they were true or protected by privilege.

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[2] In her Statement of Defence, Ms. Bent does deny that the contents of the email were capable of defaming Dr. Platnick. However, she makes no reference to that "defence" in her affidavit.

[55] The motion judge concluded that it was “reasonably likely” that Dr. Platnick could satisfy his burden in respect of the facts essential to support the libel claim (para. 92). The motion judge declined to determine whether Dr. Platnick was required to go further under s. 137.1(4)(a)(i) (para. 93). As explained in *Pointes*, at para. 80, Dr. Platnick had to satisfy the motion judge that, defences aside, his claim had a real chance of success. In my view, this claim clears that hurdle.

(b) Section 137.1(4)(a)(ii)

[56] The second part of the merits analysis described in s. 137.1(4)(a) focuses on the defences offered in response to the claim. Under s. 137.1(4)(a)(ii), Dr. Platnick had to satisfy the motion judge that there were reasonable grounds to believe that Ms. Bent had “no valid defence”. A valid defence is a defence that would succeed at trial: *Pointes*, at para. 84.

[57] The motion judge considered the defences of justification and qualified privilege. He concluded that Dr. Platnick had failed to meet his onus on both.

[58] The defence of justification is concisely described in Peter A. Downard, *The Law of Libel in Canada*, 4th ed. (Markham: LexisNexis, 2018), at paras. 6.2-6.3:

> The burden on the defendant is to prove the substantial truth of the “sting”, or main thrust, of the defamatory words. The sting of the words includes the expressed defamatory meaning of the words and any implication that is found to have been a correct defamatory meaning of them.

> If the sting of the words is justified on the evidence, minor inaccuracies will not prevent the defendant from establishing a defence of justification. The defendant is not required to justify every word, or statements that do not add to the sting or introduce any new actionable matter. [Footnotes omitted.]

[59] There are two statements in Ms. Bent's email that refer to Dr. Platnick. She asserts that:

- Dr. Platnick prepared an executive summary report for the Dr. Carpenter arbitration, that purported to be a "consensus" report, when in fact it did not reflect the consensus of the other experts who had examined Dr. Carpenter (para. 2); and
- In a different proceeding, Dr. Platnick had changed "a doctor's decision from a marked to a moderate impairment" (para. 5).

[60] The "sting" or "main thrust" of the allegations in the email, when read in the context of the email's entirety, is the assertion that, on two occasions, Dr. Platnick misrepresented or altered the opinions of other medical experts with a view to depriving a claimant of a catastrophic impairment classification to which the claimant was entitled. They are allegations of dishonesty and serious professional misconduct.

[61] I will address the two comments separately. In respect of the "consensus" comment, the motion judge indicated that Dr. Platnick described his report as "a consensus opinion" when it "plainly was not": para. 103. In his affidavit, Dr. Platnick

acknowledged that the word “consensus” was inappropriate, describing it as “a misnomer and misleading” and a vestige of an earlier SABS regime.

[62] To establish the justification defence, however, Ms. Bent had to do more than show that Dr. Platnick had wrongly used the word “consensus”. She had to show that the allegations of dishonesty and professional misconduct implicit in her allegations were true.

[63] Dr. Platnick offered a detailed explanation of how his reports were prepared. That explanation involved a description of his role, the coordinating role of Sibley, and the interaction among Dr. Platnick, Sibley, and the other medical assessors. Dr. Platnick explained that Sibley was responsible for coordinating and finalizing the reports prepared by the experts. He further explained that Sibley would send his report to each of the other assessors. The assessors would have to decide whether they agreed with Dr. Platnick’s report. If they did, they would “sign off” on his report by signing the acknowledgement page attached to the back. Dr. Platnick expected that if there were any problems with the report he provided to Sibley, that Sibley would contact him about those problems before forwarding his report to the claimant’s lawyer.

[64] In Dr. Carpenter’s case, the other experts did not “sign off” on Dr. Platnick’s report. The acknowledgement page attached to his report did not contain the other

assessors' signatures. Dr. Platnick and Ms. Bent offered different explanations for the failure of the other experts to "sign off" on Dr. Platnick's report.

[65] In his affidavit and cross-examination, Dr. Platnick took the position that no lawyer reading the report would be misled by the use of the word "consensus". In his cross-examination, Dr. Platnick insisted that, while there were several different levels of consensus, his use of the word could not mislead Ms. Bent or any other lawyer who received all of the medical assessments and relevant documentation, including the blank acknowledgement page. To support this contention, Dr. Platnick pointed out that Ms. Bent was certainly not misled by the use of the word "consensus" in his report. She knew there was no consensus.

[66] The motion judge rejected outright Dr. Platnick's explanation for the word "consensus". He said, at para. 105:

> Dr. Platnick's explanation is nonsensical and amounts to saying that he hoped the report would be true by the time it was used even though he knew it was not true when he delivered it.

[67] The motion judge erred in narrowly focusing on whether the use of the word "consensus" was literally accurate. The motion judge should have focused on whether the allegation that Dr. Platnick had deliberately misrepresented the opinions of other experts who had examined Dr. Carpenter was true.

[68] More importantly, the motion judge misstated Dr. Platnick's position. Dr. Platnick did not assert that he knew the word "consensus" was not true when he

delivered his report. Nor did he indicate that he “hoped” it would somehow be true by the time the report was used. The motion judge’s description of Dr. Platnick’s evidence is actually a description of the position put to Dr. Platnick on cross-examination by counsel for Ms. Bent.

[69] Dr. Platnick acknowledged that the use of the word “consensus” in the report sent to Sibley was a misnomer and at least potentially misleading. He explained how the word appeared in his report, and further why, in his opinion, it would not mislead the informed reader. Whatever the merits of Dr. Platnick’s explanation, the motion judge never came to grips with it.

[70] Having rejected Dr. Platnick’s explanation entirely, the motion judge accepted Ms. Bent’s evidence and concluded that there was credible and compelling evidence to support the justification defence: para. 110. That finding necessarily implies that Dr. Platnick had failed to show reasonable grounds to believe that there was no valid justification defence.

[71] It was not the motion judge’s function to decide whether Dr. Platnick’s explanation for the use of the word “consensus” should be accepted. The motion judge’s description of Dr. Platnick’s explanation as “nonsensical” was, in my view, unreasonable and based on a misunderstanding of his evidence.

[72] The explanation offered by Dr. Platnick was premised on his description of his role in the catastrophic impairment assessment process and the nature of the

relationship among Dr. Platnick, Sibley and the other medical experts. I think a proper assessment of Dr. Platnick's explanation for the word "consensus" can only be made after both sides have had an opportunity to present evidence on the process and relationships described by Dr. Platnick in his evidence. There is nothing inherently nonsensical about Dr. Platnick's explanation. It may or may not be ultimately accepted by a judge or jury.

[73] Bearing in mind that Ms. Bent has the onus of establishing the justification defence on the balance of probabilities at trial, I think a reasonable trier could find Dr. Platnick's explanation sufficiently credible to conclude that Ms. Bent had not established that the "sting" of the "consensus" allegation was true. Consequently, Dr. Platnick had met his onus of showing reasonable grounds to believe that the justification defence in respect of the "consensus" comment would not succeed and was therefore, in the language of s. 137.1(4)(a)(ii), not a "valid defence".

[74] The motion judge also found that there were no reasonable grounds to believe that Ms. Bent did not have a valid justification defence to the second allegation made against Dr. Platnick in the email. For convenience, I repeat that allegation:

> … I had another file where Dr. Platnick changed the doctor's decision from a marked to a moderate impairment.

[75] Ms. Bent's allegation that Dr. Platnick "changed the doctor's decision" can be read in at least two ways. First, it can be read as an allegation that Dr. Platnick

physically changed another doctor's report from a finding of a "marked impairment" to a finding of a "moderate impairment". Second, it can be understood as an allegation that Dr. Platnick misrepresented another doctor's opinion as to the level of impairment that that doctor had found. On either view, this was an unambiguous allegation of dishonesty and professional misconduct.

[76] This allegation related to a psychiatric report prepared by Dr. Dua in an arbitration proceeding that was some two years before the Dr. Carpenter arbitration. By the time the s. 137.1 motion was argued, there was no suggestion that Dr. Platnick had physically altered Dr. Dua's opinion. Dr. Dua had prepared a second assessment in which she had changed, in at least one respect, her assessment of the patient's level of impairment. She had prepared her second report after speaking with Dr. Platnick, who had contacted her concerning her first report at the request of the assessment company coordinating the preparation of the expert reports on behalf of the insurer. Ms. Bent received only the first report prepared by Dr. Dua. The case settled before arbitration.

[77] The exact role played by Dr. Platnick in Dr. Dua's preparation of her second report and the propriety of his involvement in the preparation of that report is a matter of dispute between the parties. It is, however, undisputed that Dr. Dua chose to change her assessment and prepare a second report. The references in Dr. Platnick's report are to Dr. Dua's second report. He makes no reference to the

existence of the first report. Dr. Platnick's report does not misrepresent the contents of Dr. Dua's second report.

[78] In considering Ms. Bent's justification defence as it related to the allegation that Dr. Platnick changed another doctor's opinion, the motion judge said, at para. 111:

> Firstly, the description of Ms. Bent is quite accurate at least in the narrow sense. Dr. Dua did change her recommendation after the intervention of Dr. Platnick.

[79] The motion judge misreads Ms. Bent's allegation in the last paragraph of the email. The email does not allege that Dr. Dua changed her opinion after an improper intervention by Dr. Platnick. The email alleges either that Dr. Platnick physically changed "the doctor's [Dr. Dua's] decision", or that he misrepresented that decision. The evidence on the motion establishes that the allegation in the email that Dr. Platnick "changed the doctor's [Dr. Dua's] decision" is not accurate in any sense.

[80] By the time of the motion, Ms. Bent had changed her allegation from her allegation in the email to an allegation that Dr. Platnick had improperly persuaded Dr. Dua to change her report, and had failed to make full disclosure of Dr. Dua's reports in his own report. Those are very different allegations from the allegation made in the email. To successfully advance a defence of justification, Ms. Bent had to justify the allegations actually made in the email.

[81] The motion judge went on to observe, at para. 111, that even if Dr. Dua, after consultation with Dr. Platnick, changed her opinion for good reasons, it was still important for Ms. Bent to alert her colleagues to the need to fully review the entire medical file in catastrophic impairment arbitration proceedings. No one would disagree with this observation. With respect, however, it has nothing to do with whether Ms. Bent had a defence of justification to the allegation she made against Dr. Platnick in the email.

[82] Also at para. 111, the motion judge criticized Dr. Platnick for not disclosing in his report that Dr. Dua had provided two different reports to him. The motion judge implies that Dr. Platnick's failure to make that disclosure may have precipitated the subsequent allegation in the email. Again, even if Dr. Platnick should have disclosed that Dr. Dua had provided two reports, his failure to do so has nothing to do with the truth of the allegation that he physically changed or misrepresented another doctor's opinion. An allegation, even if justified, that Dr. Platnick failed to make full disclosure in his own report, cannot justify an allegation that he changed someone else's report.

[83] The motion judge erred in law when addressing the justification defence by considering the justification for allegations other than the allegations made in the email. It may be that Dr. Platnick can be properly criticized for his interaction with Dr. Dua and his failure to refer to both of her reports in his report. To succeed with

a justification defence, however, Ms. Bent had to show that her allegation that he changed Dr. Dua's report was true.

[84] In my view, Dr. Platnick met his onus of presenting reasonable grounds to believe that the justification defence advanced by Ms. Bent could not succeed in respect of her allegation that Dr. Platnick had changed the decision of another doctor.

[85] The motion judge also considered the defence of qualified privilege, holding at para. 118:

> The record suggests that it is quite likely that Ms. Bent would be able to establish each of the elements of the defence of qualified privilege. There are therefore no grounds for me to believe that the moving party's qualified defence privilege is not valid.

[86] Qualified privilege applies to the occasion upon which a communication is made. An occasion is privileged if the person making the communication has an interest or duty – legal, social, or moral – in making the communication to the person to whom it is made, and if that person has a corresponding interest or duty in receiving the communication: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 143. The onus is on the defendant to establish qualified privilege. The question of whether the occasion on which the communication was made is properly the subject of qualified privilege is a question of law for the trial judge: Downard, at paras. 9.10-9.11.

[87] When the defendant establishes that the comment was made on an occasion of privilege, the *bona fides* of the defendant is presumed and the defendant may publish the comment even though it may be defamatory or untrue. However, the plaintiff can rebut the presumption of *bona fides* by showing that the communication was made maliciously, dishonestly, or with reckless disregard for the truth. Similarly, qualified privilege protects only communications that are reasonably appropriate to the discharge of the duty said to create the occasion of privilege. The communication of allegations or information not reasonably appropriate to the legitimate purpose of the occasion attracting the privilege will not be protected by the defence: *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, at paras. 78-80; *Hill*, at paras. 144-47.

[88] The motion judge's treatment of the qualified privilege defence is relatively brief: see paras. 115-18. When considering the defence, he does not distinguish between the two references to Dr. Platnick in the impugned email. In my view, he had to do so in order to properly assess whether there were grounds to believe that the qualified privilege defence would fail.

[89] I will accept, for the purpose of these reasons, that Ms. Bent's communication to her fellow OTLA members in which she outlined her concerns about the medical reports provided by the insurer in the Dr. Carpenter arbitration and cautioned her colleagues to "always get the assessor's and Sibley's files" met the criteria for an occasion of qualified privilege. Ms. Bent arguably had a duty or

interest in making the disclosure and giving the advice, and her colleagues had a corresponding interest or duty in receiving that information and advice.

[90] The second reference to Dr. Platnick in para. 5 of the email, in which Ms. Bent accuses him of changing another doctor's opinion in another case, arguably falls outside of the privileged occasion, either because it was made maliciously or with reckless disregard for the truth, or because it was not appropriate to the legitimate purpose of the occasion attracting the privilege.

[91] The allegation that Dr. Platnick changed another doctor's opinion refers to an arbitration that happened about two years earlier. The comment was certainly not necessary to make her point that lawyers representing claimants must be wary of medical reports presented on behalf of insurers and must check the entirety of the medical evidence available on the arbitration.

[92] I have examined the truth of the allegation that Dr. Platnick changed another doctor's decision in my consideration of the defence of justification. Based on the evidence adduced on the motion, I think the allegation could reasonably be seen as a gratuitous and inaccurate attack on Dr. Platnick's character. There is also a reasonable basis to infer that Ms. Bent was reckless as to the truth of her allegation. She acknowledged that when she sent the email, she was referring to something that had happened over two years ago, and yet she took no steps to verify her recollection of the events before sending the email. We now know that

Dr. Dua changed her own report. It is also apparent from the motion record that because the case involving Dr. Dua did not go to arbitration, Ms. Bent had no knowledge of the interactions between Dr. Dua and Dr. Platnick and no knowledge of the contents of Dr. Dua's other report. It would appear that Ms. Bent was really in no position to know what had gone on between Dr. Dua and Dr. Platnick, nor how Dr. Dua's opinion may have changed. In the absence of that information, it is arguably reckless to declare that Dr. Platnick changed Dr. Dua's opinion.

[93] The applicability of the defence of qualified privilege to the assertion that Dr. Platnick changed another doctor's opinion is reasonably open to different interpretations based on the evidence adduced on the motion. A reasonable trier could conclude that Ms. Bent went beyond the occasion of qualified privilege when she made that allegation. In other words, there are reasonable grounds to believe that the defence would not succeed at trial and is therefore not a "valid defence" within the meaning of s. 137.1(4)(a)(ii).

[94] There were other defences advanced in the Statement of Defence. They were not considered by the motion judge and they were not put forward on appeal as a basis for dismissing Dr. Platnick's claim. I do not propose to address those defences.

(iii) Did the Motion Judge Err in his Interpretation of s. 137.1(4)(b)?

[95] Section 137.1(4)(b) reads:

> A judge shall not dismiss a proceeding under subsection (3) if the responding party [plaintiff] satisfies the judge that,
>
> …
>
> (b) the harm likely to be or have been suffered by the responding party as a result of the moving party's [defendant's] expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[96] In *Pointes*, at para. 86, this court described s. 137.1(4)(b) as "the heart of Ontario's Anti-SLAPP legislation".[3] The section recognizes that some claims that target expression on matters of public interest, including defamation allegations, should not be allowed to proceed to trial even though the claims have technical merit. In explaining the reach of s. 137.1(4)(b) in *Pointes*, this court referred to the Anti-SLAPP Advisory Panel Report, which stated, at para. 37:

> If an action against expression on a matter of public interest is based on a technically valid cause of action but seeks a remedy for only insignificant harm to reputation, business or personal interests, the action's negative impact on freedom of expression may be clearly disproportionate to any valid purpose the litigation might serve. The value of public participation would make any remedy granted to the plaintiff an unwarranted incursion into the domain of protected expression. In such

[3] SLAPP refers to Strategic Lawsuits Against Public Participation.

> circumstances, the action may also be properly regarded as seeking an inappropriate expenditure of the public resources of the court system. Where these considerations clearly apply, the court should have the power to dismiss the action on this basis: Anti-SLAPP Advisory Panel, *Report to the Attorney General* (Ontario: Ministry of the Attorney General, 2010).

[97] The inquiry mandated by s. 137.1(4)(b) requires an evaluation of competing interests. It requires the court to consider, among other things, the motives of both the plaintiff in commencing the action and the defendant in making the impugned statement.

[98] In considering the competing public interests described in s. 137.1(4)(b), a motion judge may well begin by asking, “Does this claim have the hallmarks of a classic SLAPP?” In suggesting this approach, I do not adopt the appellant’s position that s. 137.1 applies only to litigation that meets the criteria of a SLAPP: see *Pointes*, at paras. 102-103. Rather, I suggest this approach as a way of focusing the harm analysis required under s. 137.1(4)(b).

[99] The *indicia* of a SLAPP suit include:

- a history of the plaintiff using litigation or the threat of litigation to silence critics;
- a financial or power imbalance that strongly favours the plaintiff;
- a punitive or retributory purpose animating the plaintiff’s bringing of the claim; and

- minimal or nominal damages suffered by the plaintiff.

[100] Dr. Platnick's lawsuit against Ms. Bent does not bear the *indicia* of a SLAPP. There is no evidence of a power imbalance between the parties to this lawsuit. There is no suggestion that Dr. Platnick routinely resorts to litigation or threats of litigation to silence critics. Nor does it seem sensible that Dr. Platnick would set out to punish or silence Ms. Bent, a partner in one of Canada's most prominent personal injury litigation law firms, by suing her.

[101] This is also not a case in which Dr. Platnick's potential general damages, should he establish the libel, would be minimal or nominal. General damages are presumed from the publication of the libel: *Hill*, at para. 164; *Grant v. Torstar Corp.*, at para. 28. Given that the allegations are made by a prominent member of the plaintiffs' bar, and attack Dr. Platnick's professional honesty and integrity, general damages are potentially significant: see Downard, at paras. 14.10 and 14.13-14.14.

[102] The motion judge considered the potential general and pecuniary damages suffered by Dr. Platnick as part of his harm assessment under s. 137.1(4)(b). The motion judge had "grave doubts" that Dr. Platnick would be able to establish "material pecuniary damages": para. 126. He also found that Dr. Platnick would have difficulty connecting his alleged general damages to the publication in the

email as opposed to subsequent publications for which the motion judge held Ms. Bent was not responsible: para. 126.

[103] Dr. Platnick gave extensive evidence in his affidavit about the negative impact of the email on his professional reputation, health, family life, and income. He claimed that within several days of the email being sent, insurers for whom he routinely did many medical assessments began cancelling appointments and stopped booking new ones. Dr. Platnick indicated that within a few weeks, almost all of his insurance work had dried up. By February 2015, about two-and-a-half months after the email was sent, some of the insurance work began to return to Dr. Platnick. He estimated that his income from that work remained at about 50% of what it had been before the email. Dr. Platnick claimed a loss of income for the period of January 1, 2015 to April 30, 2016, of $578,949. He filed an accountant's report said to support that figure.

[104] On cross-examination, Dr. Platnick was not asked for further details about his alleged loss of income. He did, however, acknowledge that his gross income from insurance-related work in 2015 was "around" $1 million.

[105] The motion judge described Dr. Platnick's evidence about his financial losses as "quite general and imprecise": para. 121. In so describing his evidence, the motion judge failed to bear in mind the nature of the s. 137.1 proceeding. As observed in *Pointes*, at para. 90:

> On the s. 137.1 motion, the plaintiff must provide a basis upon which the motion judge can make some assessment of the harm done or likely to be done to it by the impugned expression. This will almost inevitably include material providing some quantification of the monetary damages. The plaintiff is not, however, expected to present a fully-developed damages brief. Assuming the plaintiff has cleared the merits hurdle in s. 137.1(4)(a), a common sense reading of the claim, supported by sufficient evidence to draw a causal connection between the challenged expression and damages that are more than nominal will often suffice.

[106] Dr. Platnick's affidavit provides evidence quantifying his pecuniary loss claim. It also provides evidence of the causal connection between the email and the pecuniary loss. According to Dr. Platnick, the insurance work began to stop within a week or two of Ms. Bent sending the email. The temporal connection suggests a causal connection. In addition to the temporal connection, one could reasonably infer, given the nature of the allegations, that insurance companies would soon become aware of those allegations and would immediately distance themselves from the expert against whom those allegations were made. Even if the insurer had no reason to believe the allegations, from the insurers' perspective, it would be easier to retain an expert who was not tainted by those allegations.

[107] Finally, the motion judge diminished the damages claim on the basis that Ms. Bent could not be held liable for damages flowing from publication to anyone other than by way of the email. The scope of Dr. Platnick's damages claim, assuming he establishes libel, will require considerations of remoteness and

foreseeability. Both involve questions of fact. The motion judge effectively found, as a fact, that it was not reasonably foreseeable that Ms. Bent's allegations would spread beyond the recipients of the email, primarily because of the confidentiality requirements imposed on those obtaining the email: paras. 29 and 124. With respect, this finding is highly debatable, if not unreasonable. I would have thought it almost inevitable that an email sent to several hundred people involved in acting for claimants injured in motor vehicle accidents, alleging serious improprieties on the part of a medical expert routinely used by insurers, would rapidly find a much broader audience. That is in fact what happened.

[108] More to the point, it was not the motion judge's function to make a finding in respect of the scope of Dr. Platnick's damages claim. Dr. Platnick's affidavit and cross-examination provided potentially credible evidence of significant general and pecuniary damages attributable to the allegations in the email. In my view, that is enough for the purposes of s. 137.1(4)(b) to establish significant harm caused to Dr. Platnick by the contents of the email. The motion judge erred by approaching the question of Dr. Platnick's damages as if he was making a damage assessment at the end of a trial.

[109] In considering the public interest in protecting Ms. Bent's expression, the motion judge described a strong public interest in lawyers sharing information intended to improve the administration of justice: para. 132. I agree with his comments in this regard. However, much of the information relevant to the

administration of justice concerns could have been equally effectively revealed without referring to Dr. Platnick, or at least without reference to the potentially very damning allegation in para. 5 of the email.

[110] Without diminishing the public interest in protecting comments made to promote the effective administration of justice, I am satisfied that the potential harm to Dr. Platnick outweighs the public interest in protecting Ms. Bent's expression. Dr. Platnick's allegation, if eventually made out, is a very serious one, both in terms of the financial harm caused and the damage to his reputation. For the reasons set out above, he has cleared the "merits" hurdle in s. 137.1(4)(a). The public interest requires that he be allowed to pursue his claim in the normal course.

E. THE CONSTITUTIONAL ARGUMENTS

[111] The appellant alleges that s. 137.1 of the *CJA* breaches ss. 7 and 15 of the *Charter*. The motion judge rejected both arguments: paras. 144-73.

(i) The Section 15 Claim

[112] Section 15(1) reads:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[113] Dr. Platnick does not allege a s. 15 violation based on any of the enumerated grounds in s. 15. Counsel for Dr. Platnick argues that Dr. Platnick belongs to an analogous group. He describes that group as those "protecting constitutional principles and values of superordinate importance". On counsel's submission, anyone who chooses to advance any kind of claim said to be predicated on important constitutional principles and values becomes a member of an analogous group for the purposes of s. 15. The argument has no merit.

[114] Section 15 protects substantive equality. It does so by providing the means by which individuals can challenge distinctions made by laws that perpetuate arbitrary disadvantages to which those individuals, as members of certain groups, have been subject. As explained in *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at para. 19:

> The first part of the s. 15 analysis therefore asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground. Limiting claims to enumerated or analogous grounds, which "stand as constant markers of suspect decision making or potential discrimination", screens out those claims "having nothing to do with substantive equality and helps keep the focus on equality for groups that are disadvantaged in the larger social and economic context"…. [Citations omitted.]

[115] Section 15 prohibits laws that draw discriminatory distinctions based on membership in an enumerated or analogous group: *Kahkewistahaw First Nation*, at para. 18. Counsel's description of an analogous group effectively removes any

meaningful notion of discrimination from the s. 15 analysis. On counsel's approach, almost any legislative distinction becomes challengeable under s. 15.

[116] Counsel's submission also ignores the long-established Supreme Court of Canada jurisprudence describing analogous grounds by reference to immutable personal characteristics or personal characteristics which are changeable only at unacceptable cost to personal identity: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at paras. 13-14. "[P]rotecting constitutional principles and values" is not a personal characteristic.

[117] The appellant's s. 15 argument fails.

(ii) The Section 7 Claim

[118] Section 7 of the *Charter* reads:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[119] As best as I can understand counsel for the appellant's s. 7 argument, he submits that reputation is integral to individual liberty and security of the person and is therefore protected by s. 7. He contends that any government action that has a negative impact on reputation or the ability to defend one's reputation is a deprivation of individual liberty and security of the person and must accord with the principles of fundamental justice if it is to conform with s. 7. Counsel submits that s. 137.1, which he argues "severely limits, compromises and prejudices a person's

ability to vindicate a serious wrong", violates many principles of fundamental justice, some substantive and some procedural.

[120] The motion judge rejected the appellant's claim that reputation, or more precisely the protection of reputation, was encompassed in the right to "liberty" or the right to "security of the person": paras. 149-57. In doing so, he followed *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307. I am in substantial agreement with the analysis of the motion judge.

[121] Apart entirely from the absence of any interest protected by s. 7, the appellant's description of the impact of s. 137.1 on a plaintiff's ability to pursue a defamation claim is unsupported by a proper interpretation of that provision.

[122] Section 137.1 was enacted to address a specific and very real problem. The legislature recognized that litigation can be used as a weapon to silence and intimidate persons who speak out on matters of public interest. To address the very real societal harm caused by that kind of litigation, the legislature created a means by which the target of that litigation can seek an early, and hopefully relatively inexpensive, end of the litigation. The legislation did nothing more than put the onus on the plaintiff to show grounds to believe that the claim had real merit and that there is no valid defence, and to provide evidence of harm sufficient to override the public interest in promoting freedom of expression on matters of public interest.

[123] In my view, the limited “merits” analysis required by s. 137.1(4)(a) does not significantly limit a plaintiff’s ability to bring a valid defamation claim to trial. It places no significant burden on a plaintiff who has attacked someone’s right of expression on a matter of public interest to require that the plaintiff show that the attack has a real chance of ultimate success. Similarly, it can hardly be said that a plaintiff seeks to “vindicate a serious wrong” if the plaintiff cannot demonstrate that he has or is likely to suffer any significant harm as a consequence of the alleged defamation.

[124] Counsel for the appellant also asserts that s. 137.1 has created a “litigation chill”, “scaring” people into sacrificing or surrendering their legal rights. Counsel describes s. 137.1 as a “coercive and biased piece of legislation”.

[125] There is no support for the hyperbolic assertions made by counsel. They should be ignored.

[126] The s. 7 argument has no merit.

F. CONCLUSION

[127] I would allow the appeal, quash the order dismissing the action, and remit the matter to the Superior Court. Counsel should provide written submissions on costs relating to the appeal within 30 days of the release of these reasons. Those submissions should not exceed five pages.

[128] Counsel should also file within 30 days written submissions of no more than 5 pages relating to the costs of the motion. Those submissions should address:

- the scale of costs;
- whether this court should fix the costs or remit the fixing of the costs to the Superior Court; and
- the quantum of costs.

Released: “DD” “AUG 30 2018”

“Doherty J.A.”
“I agree D.M. Brown J.A.”
“I agree Grant Huscroft J.A.”