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"You can tell a lot about a man's character by how he behaves when given anonymity."
~ Dinesh Kumar Biran

Social Media and the Power of Anonymity

The case of Kumar v. Khurana 2015, ONSC 7858, involves defamatory statements made in public Facebook posts and sent by Facebook messages to specific recipients. The statements were made by the Plaintiff's nephew and essentially painted the Plaintiff as financially greedy and self-interested. The various messages made their way to the Plaintiff's attention, primarily by way of his immediate family members, who either saw the posts or were sent messages directly by the nephew.

As a result of the derogatory messages, the Plaintiff sought psychiatric counselling and fell into a depression. He looked to the Courts for retribution. This case addresses the intersection of the law of defamation and the ever-growing power and presence of social media.

With respect to the power of social media, Justice Faieta adopts a statement made by the Ontario Court of Appeal in *Barrick Gold Corporation v. Lopehandia* (71 O.R. (3d) 416) when it said: "Communication via the Internet is instantaneous, seamless, interactive, blunt, borderless and far-reaching. It is also impersonal, and the anonymous nature of such communications may itself create a greater risk that the defamatory remarks are believed."

In reaching the conclusion that the Plaintiff was owed general damages of $15,000 and aggravated damages of $15,000, Justice Faieta relied on the Supreme Court of Canada's decision in *Grant v. Torstar* (2009 SCC 61) in setting out the three necessary factors in proving every defamation case. First, the defamatory statements must be directed at the Plaintiff. Second, they must be published in the sense that they are discernible by the public. Third, the defamatory statements must be of such a nature that any reasonable person would feel harmed by them.

It is noteworthy that, with respect to liability, the defaming party need not have the *intention* of causing harm to the Plaintiff. In this sense, defamation is a strict liability offence. The appropriate scope (nature and amount) of damages

was also considered. The increasing potency of the effect of dissemination through social media was highlighted. General factors to be considered when assessing general damages include the nature and seriousness of the defamatory statements, the method which those statements were published, the "publisher's" motive and willingness to apologize and, as in this case, the increased harshness of the defamatory statements by having been published through social media (see *Mina Mar Group Inc. v. Divine* [2011], O.J. No. 785, paragraphs 11-13).

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• "V" is for Vexatious
• Statutory Third Party Representation and the Eponymous Ibarra Ruling

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No Free Passes, Intentional Walks Or Waivers

For the past 10 years, Master Dash's decision in *Ho v. Vo*, [2006] O.J. No 4333, has been the authority on conflict of interest when counsel wished to represent the insurer as statutory third party after defending the insured. In *Ho v. Vo*, the insured defendant, Vo, failed to attend his discovery and failed to cooperate with his counsel, who had defended him under his insurance policy. A motion was brought to remove his counsel as solicitors of record, and add the insurer, Kingsway, as a statutory third party who would be represented by the original law firm.

Master Dash was concerned that the law firm had given a coverage opinion to Kingsway while representing Mr. Vo, and that representing Kingsway would be a clear conflict of interest. This was regardless of whether counsel had received any confidential information from Mr. Vo. He concluded that counsel cannot act against the interests of a former client in the same manner in which they represented the former client.

Master Dash reconsidered his position in a new case in January 2016, *Ibarra v. Ibrahim* (2016), ONSC 218. He considered his approach in *Ho v. Vo* and some other related case law and decided that it was time to reconsider the earlier decision. The facts of *Ibarra* are very similar to Ho (defended the insured through the discovery phase; insured did not cooperate), other than the fact that counsel had not provided an opinion on coverage to the insurer.

Master Dash stated that counsel is not necessarily or automatically conflicted by going off record for the insured defendant and then acting for the insurer as statutory third party. As confirmed in two other cases dealing with the obligations of a statutory third party, Master Dash recognized that the insurer as statutory third party

must act in the best interests of its insured and it cannot take any position in the action contrary to the interests of its insured in any way. Insured and insurer as statutory third party share a common interest in fighting the insured's liability as a defendant and in contesting the extent of the plaintiff's damages. The insurer as statutory third party has the same rights as its insured under section 248 (15) of the *Insurance Act* to file a defence, contest liability and damages claimed, have production and discovery and participate at trial.

He concluded that there is no automatic conflict of interest if counsel represents the insurer after having represented the insured defendant, so long as counsel has not provided a coverage opinion contrary to the interests of the insured or received confidential information from the insured defendant. The same counsel may not, however, subsequently act for the insurer against its insured to recover any judgment or settlement paid out to the plaintiff, as this would clearly represent action against the interests of their former client. If any conflict of interest arises after counsel begins acting for the statutory third party insurer, counsel is still obligated to remove themselves as lawyers of record.

This decision brings clarification to the conflict of interest question and more appropriately fits with how insurers and their counsel have often believed such matters should be handled.

Michelle Mainprize practices exclusively in insurance defence litigation. She was called to the bar in 2002. She frequently appears in court as well as FSCO/accident benefits tribunals and private mediations

"V" is for Vexatious

We have all seen it. A claim which on its face appears without merit. Often these claims are made by self-represented plaintiffs. They are frivolous, vexatious, legally untenable and occasionally incoherent, and no amount of reasoning with the plaintiff will cause the claim to be dropped. If only there was a cost efficient way to address these claims without the need for a full summary judgment motion.

vex·a·tious

adjective

causing or tending to cause annoyance, frustration, or worry.

As it turns out, there is. Rule 2.1 came into effect in July 2014. It provided sweeping changes to the procedure for dealing with vexatious litigation and created a streamlined approach to dealing with vexatious litigation at the outset of litigation. This process involves an assessment of whether a claim is frivolous "on its face".

This inexpensive method for disposing of frivolous claims is typically initiated by a simple letter from the defence. Unlike every other document filed in court, this is not a time for advocacy. The statement of claim should speak for itself. The more explanation needed, the lower the defendant's chances of success. This process can also be commenced by the court, on its own initiative, or by the registrar.

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A Rule 2.1 request largely involves an exchange between the plaintiff and the court. If the court considers dismissing a claim, the plaintiff will be asked to make submissions within 15 days explaining why the action should not be dismissed. The submissions cannot exceed 10 pages. If required, the court may ask the defendant to respond.

RULE 2.1

The restrictive procedure is a critical component of Rule 2.1. Not only does it provide for an efficient determination of the matter; but it prevents the plaintiff from abusing this procedural step. Too often self-represented, including those making organized pseudo legal commercial arguments, turn procedural steps into a form of frivolous litigation in and of themselves. In our own use of this procedure, we have seen plaintiffs respond with voluminous records, which only served to support the position taken by the defendants that the claim was frivolous.

There are no set categories of claims for which a Rule 2.1 request can be made. Examples of some situations in which the defence has used this procedure successfully are:

•An action brought against a hospital claiming that the military implanted a brainwashing device and that hospital staff threw bugs on him to force itching so he could be interrogated.

•A second claim was commenced by a plaintiff to challenge orders made in a prior proceeding.

•A claim brought by the plaintiff commenced against her employer for WSIB benefits.

•A case in which a plaintiff sought to use the civil court system to air sociopolitical grievances.

It must be kept in mind that this peremptory approach is not for every case. The court has explained that this rule is "not for close calls". Justice Myers, who has been designated to hear these claims in Toronto, stated in a recent decision: "Frankly, these cases are usually obvious."

However, not all requests are successful. Some failed attempts to use this procedure include a claim by an upset parent against the Children's Aid Society after an aborted proceeding; and a claim against the government for the failure of a government to provide medical care to a prisoner.

It must also be kept in mind that Rule 2.1 is not the only way in which a defendant can seek to have a claim dismissed at an early stage. Defendants can bring a motion to have the action dismissed if it is frivolous or vexatious or is otherwise an abuse of the process in the ordinary course or, if evidence is required, a motion for summary judgment may be appropriate.

When faced with a particularly unusual claim, insurers and defence counsel should consider whether the pleadings would be susceptible to an early strike. If so, Rule 2.1 may provide the most cost-efficient route to file closure.

Stephen Libin is an associate at Dutton Brock. His principal focus is insurance defence including product liability, personal injury and property matters.

WEB CONTEST

The edition of this E-Counsel is "anonymous" whether that be the internet hackers who have adopted the name, or how anonymity impacts our everyday lives.

The last E-Counsel's trivia quiz about baseball and music was perhaps the most challenging so far. Correctly answering the quiz were John Breen, Brenda Smith, Mark Sones, Sarah Henderson, Bill Yates, Ken Jones and Jennifer Bethune. We are not listing where you work because you know who you are (and that is part of this issue's theme). In any case, give yourself a good pat on the back.

For this edition's quiz, and as part of being anonymous, many people adopt a new name or identity. This is particularly frequent in the Arts. Below, we provide the real name of some famous people and your challenge is to provide their "stage" name.

1.Olivia Cockburn
2.Stevland Hardaway Judkins
3.Samuel Longhorn Clemons
4.Caryn Elaine Johnson
5.Ralph Lifshitz
6.Peter Gene Hernandez
7.Josephine Esther Mentzner
8.O'Shea Jackson Jr.
9.Eric Marlon Bridge
10.Eric Arthur Blair

BONUS QUESTION: The internet hacker group known as Anonymous often is associated with persons wearing Guy Fawkes masks. Where did that inspiration come from and who were the creative masterminds behind it?

Email your answers to dlauder@duttonbrock.com. Do NOT email answers by hitting reply to this email address, as it will get lost in spam-limbo.

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