CITATION: Levant v. Demelle, 2021 ONSC 1074
COURT FILE NO.: CV-19-631995-0000
DATE: 20210216

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
EZRA LEVANT and REBEL NEWS NETWORK LTD.	)	*A. Irvin Schein and Samantha Schreiber,* lawyers for the plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
BRENDAN DEMELLE and THE NARWHAL NEWS SOCIETY	)	*M. Philip Tunley and Jennifer P. Saville,* lawyers for the defendant Brendan Demelle
	)	
Defendants	)	
	)	**HEARD: February 3, 2021**

REASONS FOR DECISION

DIAMOND J.:

Overview

[1] In early December 2019, the plaintiffs Rebel News Network Ltd. ("Rebel") and its founder Ezra Levant ("Levant") commenced this simplified procedure action against the defendants Brendan Demelle ("Demelle") and The Narwhal News Society ("Narwhal") seeking damages for defamation in the amount of $70,000.00, plus punitive and exemplary damages in the amount of $20,000.00.

[2] The plaintiffs' cause of action arises out of an allegedly defamatory statement contained in an article entitled "Right Wing Attacks on Greta Thunberg: How Low Can They Go? Canada's Extremist Network 'The Rebel' Tries for the Prize" written and published by Demelle on his website www.desmogblog.com on October 19, 2019. The plaintiffs allege that within the said article, Demelle published a defamatory statement (described in greater detail hereinafter).

[3] After defending Rebel's Statement of Claim, Demelle now brings a motion pursuant to section 137.1(3) of the *Courts of Justice Act*, R.S.O. 1990 c. C43 ("*CJA*") for an order dismissing this action as being a strategic lawsuit against public participation ("SLAPP").

[4] Demelle's motion was argued before me via video conference on February 3, 2021. At the conclusion of the hearing, I took my decision under reserve.

[5] These are my Reasons for Decision. I note that some of the contents of these Reasons (in particular the sections dealing with the applicable legal principles) are similar or even lifted from my decision reported at *Rebel News v. Al Jazeera Media* 2021 ONSC 1035 (CanLII). The section 137.1 motion in the Al Jazeera proceeding was argued before me two days before the section 137.1 motion in this proceeding, and involved the same counsel and at least one common party (Rebel).

The Parties

[6] Rebel was founded in 2015 by Ezra Levant ("Levant"). According to Levant, Rebel is an online source of news and commentary designed to be an alternative to mainstream news outlets and publications. It is not generally in dispute that Rebel has adopted a conservative and right-wing orientation in its presentation of news and commentary.

[7] DeMelle is a freelance journalist who admittedly specializes in media, politics, climate change and clean energy. Demelle launched his website in early 2006, and since 2010 he has reported on climate misinformation campaigns.

[8] As Al Jazeera did on its section 137.1 motion, Demelle has led evidence on this motion seeking to portray the plaintiffs in an unflattering, and arguably extremist, light. Demelle argues that Rebel and Levant are "alt-right" commentators who often publish anti-minority themes, allegedly entering on occasion into the realm of hate speech.

[9] In support of his motion, Demelle tendered his own affidavit along with the affidavits of Richard Warman ("Warman", a human rights lawyer and advocate against hate speech), John Miller ("Miller", a professor at Ryerson University School of Journalism and former newsman editor at the Toronto Star), and Richard Littlemore ("Littlemore", a Canadian journalist and former contributor and editor for Demelle's website).

[10] The above evidence further seeks to argue that the plaintiffs are both widely known for "platforming" contributors who are sympathetic to, or have themselves been described as, neo-Nazi or alt-right. Demelle points to the history of Rebel's contributors such as Faith Goldy ("Goldy"), Gavin McInness and Tommy Robinson in support of his position.

[11] In response, the plaintiffs filed the affidavit of Levant.

The allegedly defamatory statement

[12] As set out above, the allegedly defamatory statement is contained in an article written and published by Demelle on or about October 19, 2019.

[13] The article was entitled "Right Wing Attacks on Greta Thunberg: How Low Can They Go? Canada's Extremist Network 'The Rebel' Tries for the Prize". According to Demelle, he had

begun reporting on personal attacks against Swedish climate and environmental activist Greta Thunberg, and came across a video published by Rebel entitled "Greta Thunberg and her handlers run from questions in Edmonton!". Demelle claims he was shocked at the aggressive tactics and tone of the Rebel correspondent who filmed with care the outside of Thunberg's hotel so as to identify her whereabouts.

[14] As a result, Demelle began research for the article he ultimately published on October 19, 2019, including looking into Rebel's alleged involvement with Goldy's coverage of the 2017 Unite the Right rally in Charlottesville, Virginia.

[15] In the article, Demelle referred to Rebel as:

> "…founded by disgraced neo-Nazi sympathizer Ezra Levant, a climate denier who once interned at the Charles Koch Foundation. Levant and The Rebel Media earned some notoriety for their laudatory coverage of the deadly 2017 Unite the Right rally in Charlottesville." (the "statement").

[16] In the article, the words "laudatory coverage of the deadly 2017 Unite the Right rally in Charlottesville" are electronically linked to an article written by Dan Lett on August 19, 2017 entitled "Rebel Media's meltdown and the politics of hate" and published on the website of the Winnipeg Free Press ("the WFP article").

[17] According to the plaintiffs, the WFP article summarized Levant's explanation of what occurred at the August 2017 Charlottesville rally, his adverse reaction to Goldy's coverage of that rally, and the termination of Goldy's employment with Rebel as a result of her attendance at the rally.

[18] Of note, after subsequently receiving a Notice of Libel from the plaintiffs, in early November 2019 Demelle made the following revisions to the article:

a) Demelle removed the words "disgraced neo-Nazi sympathizer"; and,

b) Demelle removed the words "Levant and" in reference to the coverage of the Charlottesville rally, and amended the description of that coverage by indicating that it had been provided with respect to "participants" in the rally rather than the rally itself.

[19] The article generated slightly less than 16,000 views on the internet.

Test for dismissal under section 137.1 of the *CJA*

[20] The provisions of section 137.1 of *CJA* are as follows:

> (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.

(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.

(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.

(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."

[21] Section 137.1 came into force in 2015. It took several years for the jurisprudence under section 137.1 to settle, but ultimately the guiding principles for the exercise of the Court's discretion under a stated test was developed. In both *1704604 Ontario Ltd. v. Pointes Protection Association* 2020 SCC 222 and *Bent v. Platnick* 2020 SCC 23, the Supreme Court of Canada set out the burdens placed upon both parties on motions under section 137.1.

[22] To begin, the initial burden is on the defendant to satisfy the Court that (a) the proceeding in question arises from an expression made by the defendant, and (b) the said expression relates to a matter of public interest.

[23] If the defendant fails to discharge that onus, the motion is dismissed and the action continues. However, if the defendant does satisfy the threshold onus, then the burden shifts to the plaintiff to satisfy the Court that:

a) there are grounds to believe that the proceeding has substantial merit;

b) there are grounds to believe that there is no valid defence(s); and,

c) the harm suffered by the plaintiff as a result of the defendant's 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.

[24] Of note, the plaintiff's burden requires all three elements set out above to be proven.

[25] If one element is not proven, then the motion must be granted and the action is dismissed.

[26] I shall now address each element of the test under section 137.1 in turn.

Issue #1 Does the impugned statement relate to a matter of public interest?

[27] As stated, the initial burden is upon Demelle to satisfy the Court that this proceeding arises from an expression made by Demelle, and more importantly that the expression relates to a matter of public interest.

[28] There is no doubt that the statement is an expression made by Demelle.

[29] As held in *Pointes*, the words "relates to a matter of public interest" should be given a broad and liberal interpretation, consistent with the legislative purpose of section 137.1. While the expression should be assessed as a whole, no qualitative assessment of the expression in question need be made as it is enough that the expression *relates* to a matter of public interest.

[30] Demelle argues that the public has a strong interest in the following matters raised in his article: (a) the methods used by far-right, extreme-right, alt-right and neo-Nazi individuals, (b) the bullying and harassment of Thunberg and climate activists generally, and (c) the plaintiffs' laudatory coverage of participants in the Charlottesville Unite the Right rally and other similar far-right events.

[31] The plaintiffs submit that while some of the above issues could relate to matters of public interest, the article's reference to Levant as a neo-Nazi sympathizer raises no matter of public interest, and is nothing more than a "gratuitous insult of a deeply personal nature". The plaintiffs submit that the impugned statement is completely outside the context of the article, and as such there is no basis upon which any community would have a genuine interest in receiving that information.

[32] Mindful that I am to employ a broad and liberal interpretation, with some reluctance I am prepared to find at this stage that the impugned expressions relate to a matter of public interest. The article did concern itself with efforts allegedly used by those on the far or extreme right to intimidate climate chance activists, and Demelle's expressions, while arguably gratuitous, capture the plaintiffs with the "broad far-right brush". Assessing the impugned expression in the context of the entire article, I find that it does relate to matters of public interest.

[33] Accordingly, I find that Demelle has satisfied its onus on this motion. The burden now shifts to the plaintiffs to satisfy the three elements set out above.

Issue #2 Are there grounds to believe that this proceeding has substantial merit?

[34] I repeat and adopt the following comments from my decision in *Rebel News v. Al Jazeera Media* 2021 ONSC 1035 (CanLII).

> "As held by the Supreme Court of Canada in *Bent*, unlike a balance of probability standard, a 'grounds to believe' standard requires 'a basis in the record and the law – taking into account the stage of the litigation – for finding that the underlying proceeding has substantial merit and that there is no valid defence.' This means that any basis in the record and the law will be sufficient for Rebel to discharge its initial onus.
>
> Whatever basis may exist, it must be legally tenable and reasonably capable of belief. The Court must be satisfied that Rebel's prospects of success in this proceeding are more than a mere possibility.
>
> One issue which arose during argument was the level to which the Court may delve into the merits of the proceeding (ie. the evidence filed on this motion) at this early stage. As recently held by the Court of Appeal for Ontario in *Subway Franchise System of Canada Inc. v. Canadian Broadcast Incorporation* 2021 ONCA 26 (CanLII), given the early stage at which motions under sections 137.1 are argued, 'there is only a limited assessment of the evidence from the motion judge's perspective'. If the record before the Court raises serious credibility issues, or perhaps inferences necessary to be drawn from competing material facts, 'the motion judge must avoid taking a 'deep dive' into the ultimate merits and instead, engage in a much more limited analysis.'
>
> Counsel for both parties suggested that the lens through which the Court should assess the test under section 137.1 lies somewhere between the 'plain and obvious' test under a Rule 21 motion to strike, and the 'no genuine issue requiring a trial' test under a Rule 20 motion for summary judgment. While this may be somewhat accurate, wherever the test under section 137.1 may land on that scale, in my view there must be a sufficient evidentiary basis to

> support the findings on this motion being reasonable conclusions ultimately made by the trier of fact.

[35] It is somewhat trite to state that for a statement to be defamatory, three elements must be established:

a) the words complained of must be published to at least one person;

b) the words must refer to the plaintiff; and,

c) the words must be defamatory in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person.

[36] The plaintiffs submit that there is no question that the impugned statements are defamatory, and it is readily apparent that the impugned statements would lower the plaintiffs' reputations in the eyes of a reasonable person.

[37] Demelle concedes the first two elements of the above test. However, Demelle argues that the plaintiffs cannot show that there are grounds to believe that its action has substantial merit, in particular because the plaintiffs already owned the reputations of being connected to violent acts and of publishing hateful conduct, including far-right discourse disguised as cutting-edge journalism, which could lead to real-life ramifications. In support of his position, Demelle relies upon the evidence of Warman, Miller and Littlemore who all go to great lengths in their respective affidavits to both (i) document Rebel's alleged history of "platforming" (i.e. providing a voice/platform to) contributors who are sympathetic to and/or have been described as alt-right and neo-Nazi, and (ii) expose the plaintiffs' alleged sympathetic coverage of the 2017 Unite the Right Rally in Charlottesville, Virginia.

[38] In response, the plaintiffs submit that even if the Court was to accept the evidence that the plaintiffs already have a right-wing reputation, such evidence nevertheless falls far short of Demelle's accusations in the article.

[39] Like Al Jazeera did on its own section 137.1 motion, Demelle argues that cases such as *WIC Radio Ltd. v. Simpson* 2008 SCC 40 (CanLII) permit the Court to consider "how much is publicly known about the plaintiff" when assessing the defamatory nature of a statement. Again, in my view that analysis is typically carried out when the full merits of the claim are in play, either by way of trial or summary judgment. I agree with the plaintiffs that the Court's job at this early stage of the proceeding is more of a screening function than a full determination of the merits.

[40] In my view, the presence of grounds to believe that there is substantial merit to the plaintiffs' defamation claim cannot be questioned. The article clearly identifies Levant as a neo-Nazi sympathizer, and accuses the plaintiffs of being supportive of white supremacists. Such statements could lower the reputation of the plaintiffs in the eyes of a reasonable person.

[41] In any event, Demelle's argument cannot be accepted at this stage. The issue of the plaintiffs' existing reputation is one that inherently requires the Court to perform the frowned upon "deep dive", and is an issue better suited for a consideration of Demelle's defence(s) or perhaps Rebel's claimed damages.

[42] I find that the statement is capable of being defamatory, and as such there are grounds to believe that the plaintiffs' action has substantial merit. The plaintiffs have met their burden.

Issue #3 Do grounds exist to believe that Demelle has no valid defence?

[43] As held in *Pointes*, the plaintiffs now have the burden to show that there are grounds to believe that the defences raised by Demelle have no real prospect of success.

[44] In *V.(W.) Brad Blair v. Premier Doug Ford*, 2020 ONSC 7100 (CanLII) Justice Belobaba held that a "real prospect of success" is less than "a likelihood of a success" but more than merely "some chance of success" or even "a reasonable prospect of success." If the Court concludes that even one of the defences raised by Demelle has a real prospect of success (more than just a chance or even a reasonable chance, but less than probability), that alone is enough to dismiss the plaintiffs' action.

[45] Demelle raises three defences to the plaintiffs' claim: (a) justification, (b) fair comment, and (c) responsible communication on matters of public interest.

a) Justification

[46] Is there sufficient evidence in the record to justify the allegation that Levant is a neo-Nazi sympathizer and/or the plaintiffs gave laudatory coverage of the deadly 2017 Unite the Right rally in Charlottesville? Avoiding the "deep dive" that the Supreme Court of Canada in *Pointes* has guarded against, in my view the answer is "no".

[47] Demelle has attempted to create a patchwork historical account of Rebel contributors having prior associations with alleged xenophobic, white nationalist and/or far-right organizations. Some of those associations appear outdated and somewhat tenuous.

[48] For example, Demelle argues that one current Rebel contributor previously worked for Fireforce, a company known for selling apartheid-era white supremacist memorabilia. The evidence in support of that contention is that Demelle read an article published in a publication known as Ricochet which suggested that the contributor had worked for an allegedly white supremacist webstore. There is further evidence in the record that the contributor in fact worked as a person packing boxes of merchandise for shipment to purchase globally for an online store known as Fireforce, which according to the Fireforce website sells military surplus for many countries including Australia and New Zealand.

[49] The only Rebel contributor who was present at the 2017 Unite the Right Rally was Goldy. The evidence surrounding Goldy's attendance that day is contested, but it does not appear that she

was on assignment from Rebel. Levant gave evidence that when Goldy asked if she could attend the rally, he told her not to go. Goldy attended in any event, and live streamed her coverage from her own personal Periscope video account.

[50] Levant gave further evidence that a few days after the rally, Goldy showed Levant an email which she had just received from a National Post reporter that included a link to her appearance on a neo-Nazi podcast as a guest/participant during the rally. The email essentially asked Goldy to confirm whether the voice on the neo-Nazi podcast was hers. In response, Levant says that he was shocked and he was forced to terminate Goldy.

[51] Demelle argues that Levant's evidence lacks credibility, and Rebel in fact attempted to secure the rights to Goldy's footage afterwards. While this may be accurate, there are many reasons why Rebel may have wanted to secure the rights to that footage (financial reasons come to mind), and such a step does not necessarily translate into the plaintiffs themselves being neo-Nazi sympathizers. There is also no evidence that Levant and/or Rebel gave direct laudatory coverage of the rally.

[52] Accordingly, I agree with the plaintiffs and find on the record before me that there are grounds to believe that Demelle's defence of justification has no real prospect of success.

b) Fair Comment

[53] To succeed with its defence of fair comment, Demelle must prove the following five elements:

a) the comment must be on a matter of public interest;

b) the comment must be based on facts referred to in the publication or otherwise widely known;

c) the comment, although it can include inferences of fact, must be nevertheless recognizable as comment;

d) the comment must be one that any person can honestly make on the proven facts; and

e) the comment was not actuated by express malice.

[54] I have already found that the statement was made on matters of public interest, and so Demelle has satisfied the first element of the test.

[55] The background facts must either be stated in the publication (i.e. within the article and/or video) or otherwise publicly well known and understood by the reader/viewer. There are no background facts stated the article, and the link to the WFP article (which requires another step to access) does not sufficiently explain the background facts to the impugned expressions. I agree

with the plaintiffs that within the article, DeMelle fails to distinguish anything that he has been told by anyone else, and fails to provide facts that might enable a reader to reach his/her own conclusions with respect to the impugned expressions.

[56] Were the background facts already sufficiently publicized through other sources, and therefore likely known to the reader? Certainly, the events which took place at the 2017 Unite the Right rally were well within the public domain at the time of publication of the article. It is thus possible that Demelle could satisfy the second element of the test.

[57] However, I question Demelle's submission that the impugned expressions are "clearly comment". As held in *B.W.(Brad) Blair*, "words that may appear to be statements of fact may, in pith and substance, be properly construed as comment. What is comment and what is fact must be determined from the perspective of a 'reasonable viewer or a reader'. The notion of 'comment' includes 'deduction, inference, conclusion, criticism or judgment and is generously interpreted'".

[58] While the terms "disgraced" and "laudatory" could likely amount to comment, in my view calling Levant a neo-Nazi sympathizer traverses too far into the realm of fact, or at least imputation of fact, to accept that Demelle's defence of fair comment has a real chance of success. The article was concerned with climate change, and the efforts of the far right to muzzle those in support of climate change. There is no connection between Thunberg and (i) Levant as an alleged neo-Nazi sympathizer or (ii) the 2017 Unite the Right rally.

[59] Levant is presented in the article as a neo-Nazi sympathizer. In my view, this expression is difficult to see as being a "deduction, inference or conclusion" as the jurisprudence suggests.

[60] I find that the plaintiffs have shown the presence of grounds to believe that Demelle has no valid defence of fair comment.

c) Responsible Communication on Matters of Public Interest

[61] The defence of responsible communication on matters of public interest requires two elements to be proven: (a) the impugned statements must be on a matter of public interest, and (b) the publisher must demonstrate that it was reasonably diligent in the steps taken to validate the accuracy of the factual statements made.

[62] Once again, I have already found that the statement was made on matters of public interest, and so the first element of this defence has been met.

[63] With respect to the second element, Demelle must not adhere to a standard of perfection, but rather demonstrate that his published article was responsible in that it was reasonably diligent in its efforts to verify the allegations having regard to all the relevant circumstances. As held in *Bent*, the plaintiffs must demonstrate that there is a basis in the record and the law – taking into account the state of the proceeding – to support a finding that the defences put in play do not tend to weigh more in Demelle's favour.

[64] In my view, the plaintiffs have met their onus. As in the Al Jazeera action, the plaintiffs did not lead any expert evidence, choosing instead to rely upon Levant's evidence and the cross-examination of Demelle's witnesses. I find once again that to the extent that Miller attempted to answer the questions posed of him on cross-examination, those answers cannot be construed to form the basis of an expert opinion capable of being considered on this motion. Miller was never engaged to provide any opinion on journalistic standards, and the plaintiffs' reliance upon his answers at cross-examination are essentially carried out in a vacuum.

[65] However, on the record before me Demelle's evidence falls short of showing, at least at this stage, that he was reasonably diligent in verifying the accuracy of the impugned expressions. In coming to this conclusion, I rely upon (a) the minimalistic research carried out into concluding Rebel's contributor being "connected to white supremacists" as a basis for the impugned expressions, (b) Demelle's admitted history of tracking and exposing who he considers to be climate change deniers spreading misinformation on climate science, (c) Demelle choosing to overlook available facts about Goldy's attendance at the 2017 Unite the Right rally including Goldy live streaming from the rally on her personal time and account, and Levant having released statement that he had fired Goldy due to her having conducted the interview with the neo-Nazi podcaster, and (d) Demelle not contacting either plaintiff to allow them to respond to the issues raised and covered in the article.

[66] I find that the plaintiffs have shown the presence of grounds to believe that Demelle has no valid defence of responsible communication on matters of public interest.

Issue #4 Which of the two public interests outweighs the other?

[67] The final step under the section 137.1 analysis requires the plaintiffs to satisfy their onus of showing that the harm they suffered as a result of the defendant's expression is sufficiently serious that the public interest in permitting their action to continue outweighs the public interest in protecting Demelle's expression.

[68] In *Pointes*, the Supreme Court of Canada held that prior to the Court embarking upon this weighing exercise, the plaintiffs must show (a) the existence of some harm, and (b) that the harm was caused by Demelle's expression. There must be some evidence before the Court to draw the necessary inferences in respect of both the harm suffered and the said causal link.

[69] Apart from relying upon the traditional principle that damages in a defamation action can be "at large" (ie. presumed), the plaintiffs have led no evidence of any particular or specific economic harm or damage to their reputation as a result of the article. As in the Al Jazeera action, I believe that the plaintiffs' obligation to lead such evidence was arguably even more necessary given the evidence led by Demelle on this motion, namely that the plaintiffs' reputations are already poor to begin with (although I have made no specific finding on that submission).

[70] The plaintiffs have not led any specific evidence that any specific harm has been suffered as a direct result of Demelle's publications. The only evidence of harm is Levant's self-serving statement as follows:

> "I believe that the dissemination of these defamatory statements has damaged my reputation in this regard, and accordingly Rebel News and I should be entitled to compensation."

[71] As such, in the words of Justice Belobaba in *B.W.(Brad) Blair*, the plaintiffs have "not cleared the threshold of showing harm and causation."

[72] The plaintiffs' action is therefore dismissed.

Costs

[73] In light of the costs provisions set out in section 137.1(7) of the *CJA*, absent an agreement between the parties, counsel may serve and file written submissions on the issue of costs of this motion and this action. Those costs submissions shall be limited to five (5) pages including a Costs Outline, and be served and filed in accordance with the following timetable:

a) Al Jazeera's costs submissions to be served and filed within ten (10) business days of the release of these Reasons; and,

b) Rebel shall thereafter have an additional ten (10) business days from the receipt of Al Jazeera's costs submissions to serve and file its responding costs submissions.

Diamond J.

Released: February 16, 2021

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EZRA LEVANT and REBEL NEWS NETWORK LTD.

Plaintiff

– and –

BRENDAN DEMELLE and THE NARWHAL NEWS SOCIETY

Defendants

REASONS FOR DECISION

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