COURT OF APPEAL FOR ONTARIO

CITATION: Levant v. DeMelle, 2022 ONCA 79
DATE: 20220128
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Gillese, Trotter and Nordheimer JJ.A.

BETWEEN

Ezra Levant and Rebel News Network Ltd.

Plaintiffs (Appellants/
Respondents by way of cross-appeal)

and

Brendan DeMelle and The Narwhal News Society

Defendants (Respondent/
Appellant by way of cross-appeal)

AND BETWEEN

Rebel News Network Ltd.

Plaintiff (Appellant/
Respondent by way of cross-appeal)

and

Al Jazeera Media Network

Defendant (Respondent/
Appellant by way of cross-appeal)

A. Irvin Schein and Tamara Markovic, for the appellants/respondents by way of cross-appeal

M. Philip Tunley, for the respondents/appellants by way of cross-appeal

Heard: November 16, 2021

On appeal from the order of Justice James F. Diamond of the Superior Court of Justice, dated February 16, 2021 and March 15, 2021, with reasons reported at 2021 ONSC 1074, and from the order of Justice James F. Diamond of the Superior Court of Justice, dated February 16, 2021 and March 15, 2021, with reasons reported at 2021 ONSC 1035.[1]

Nordheimer J.A.:

[1] There are two orders in two separate proceedings, the appeals from which were heard together. In each case, the appeal is taken from the order of the motion judge, made pursuant to s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, that dismissed an action involving a claim for defamation. Additionally, in each appeal, there is a motion for leave to cross-appeal from the motion judge's award of costs.

[2] Since the appeals were heard together, I will deal with both of them in these reasons. While I do not agree entirely with the analysis undertaken by the motion judge in either case, I agree with the results that he reached and thus would dismiss both appeals. I do not, however, agree with the motion judge's costs awards in these cases. Consequently, I would grant leave to appeal the costs awards, and allow each of those cross-appeals.

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[1] The orders in issue improperly bear two dates. One date relates to the disposition on the merits and the other to the disposition on costs. There ought to have been separate orders signed, each bearing the date of the disposition to which the order related.

A. BACKGROUND

[3] Ezra Levant is a journalist and broadcaster. In 2015, he founded Rebel News Network Ltd. According to Mr. Levant, in keeping with his own personal beliefs, Rebel News adopted a conservative and pro-Israel orientation. Mr. Levant also says that Rebel News could be considered to hold an anti-Islamist orientation, Islamism being the political manifestation of radical Islam. Rebel News believes that radical Islam promotes violence and erodes secular civil liberties.

[4] Brendan DeMelle is a journalist, writer and researcher specializing in media, politics, climate change and clean energy. Since 2010, Mr. DeMelle has reported on climate misinformation campaigns as the executive director of DeSmog, an online news outlet focused on climate change and environmental concerns.[2]

[5] Al Jazeera is a public utility private corporation in accordance with the laws of the State of Qatar. Al Jazeera was founded in 1996 and launched its English language branch in 2006. Its head office is in the city of Doha, Qatar. Al Jazeera broadcasts worldwide.

(1) The Al Jazeera statements

[6] Rebel News alleges that Al Jazeera published three separate defamatory statements in an internet article and YouTube video published by it on or about

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[2] The Narwhal News Society is a British Columbia not-for-profit entity operating an online news and commentary service. From the record, it does not appear that it participated in any of these proceedings.

September 29, 2019. Both the article and YouTube video were co-produced by Ryan Kohls and Florence Phillips for a weekly program called “The Listening Post”. Mr. Kohls is a journalist who has worked as an interview producer for Al Jazeera since 2013. Ms. Phillips is a senior producer and reporter who has worked for Al Jazeera since 2009.

[7] The article was entitled “The Right Perspective? YouTube, Radicalization and Rebel Media”. After describing Rebel News as “one of the internet’s most influential far-right publications”, the article contained the following statements:

> Perhaps even more damaging to The Rebel’s reputation has been its connection to violent acts; acts like the Finsbury Park Mosque attack in London, the Quebec City mosque shooting, and in Fredericton, New Brunswick, the murder of two police officers. In all three instances, the men involved watched The Rebel Media and had become convinced Muslims were invading their countries.

[8] After receiving Notices of Libel from Rebel News, in mid-November 2019, Al Jazeera published the following addendum:

> Correction, November 15, 2019: Since this report was first published, we have updated it to correct the following facts: ... In the web article it was stated that the perpetrators of three violent attacks had all watched Rebel News. For strict factual accuracy, we have clarified that they watched Rebel News or the work of their regular contributors.

[9] Within the YouTube video, the following statement was made at the 22 second mark:

> The content, typically disguised as cutting-edge journalism, can have real-life ramifications; viral material that is capable of not just radicalizing the views of those that watch it, but driving some of them to acts of violence. Among the best-known practitioners of the art: The Rebel Media.

[10] At approximately the eight minute mark of the same video, the following statement was made:

> The Ottawa Police have filed a criminal complaint alleging that Rebel Media had breached a section of the Canadian Criminal Code by wilfully promoting hatred of the Muslim community.

[11] Once again, after Al Jazeera received Rebel News' Notice of Libel, it published this addendum in mid-November 2019:

> Correction, November 15, 2019: Since this report was first published, we have updated it to correct the following facts: In the video report we stated that the Ottawa Police had filed a criminal complaint against Rebel. In fact, a complaint had been received by the Ottawa Police.

[12] The program generated slightly fewer than 40,000 views on the internet.

(2) The DeMelle statements

[13] Mr. DeMelle wrote and published an article on or about October 19, 2019. 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".

[14] In the article, Mr. DeMelle referred to Mr. Levant and Rebel News as follows:

> The Rebel was 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.

[15] In the article, the words “laudatory coverage of the deadly 2017 Unite the Right rally in Charlottesville” are hyperlinked 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.

[16] After receiving a Notice of Libel from the appellants, in early November 2019, Mr. DeMelle made the following revisions to the article:

> (a) He removed the words “disgraced neo-Nazi sympathizer”; and,
>
> (b) He 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.

[17] The article generated slightly fewer than 16,000 views on the internet.

B. THE DECISIONS BELOW

[18] Rebel News commenced a proceeding against Al Jazeera seeking damages for defamation. Mr. Levant and Rebel News also commenced a simplified procedure action against Mr. DeMelle and The Narwhal News Society for defamation. Al Jazeera and Mr. DeMelle each brought a motion pursuant to s. 137.1(3) of the *Courts of Justice Act* for orders dismissing the plaintiffs’ actions.

(1) The Al Jazeera motion

[19] The motion judge began by setting out the contents of s. 137.1. He then properly set out the shifting burden on a s. 137.1 motion. He said that the initial burden is on the defendant to satisfy the court that the proceeding arises out of an expression made by the defendant and that the expression relates to a matter of public interest. If the defendant meets its onus, then the onus shifts to the plaintiff to show that there are grounds to believe that the proceeding has substantial merit; that there are grounds to believe that there are no valid defences; and that 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.

[20] The motion judge found that Al Jazeera met its initial onus. There was no doubt that the expression was made by Al Jazeera. Further, Rebel News conceded that the expression related to a matter of public interest.

[21] The burden then shifted to Rebel News. In considering whether the proceeding had substantial merit, the motion judge reviewed the evidence filed and the constituent elements of a claim for defamation. Al Jazeera contended that the article and YouTube video would not have lowered the reputation of Rebel News because Rebel News already had a reputation of publishing hateful commentary "disguised as cutting-edge journalism". Consequently, according to Al Jazeera, the

reputation of Rebel News was already so low that it could not be further lowered by the contents of the article and YouTube video.

[22] The motion judge rejected Al Jazeera's argument. He found that considering Rebel News' existing reputation would involve too close an examination of the merits of the action at an early stage of the proceedings. He concluded that the statements in the article and YouTube video were "quite capable of being defamatory", and as such he held that there were grounds to believe that the action had substantial merit.

[23] The motion judge then considered the defences raised and whether Rebel News had shown that none of them were valid. Three defences were considered: (i) fair comment; (ii) justification; and (iii) responsible journalism. The motion judge concluded that the first two defences were not valid. However, he held that the third defence might succeed. Therefore, the motion judge concluded that Rebel News had failed to show that there was no valid defence and, consequently, its action had to be dismissed.

[24] Notwithstanding his conclusion on that issue, the motion judge went on to consider the final step of the analysis, that is, which of the two public interests outweighed the other. He concluded that the weighing favoured the public interest in protecting Al Jazeera's expression and public debate. In doing so, the motion

judge noted that Rebel News had not led any evidence that it had suffered specific harm as a result of the article and YouTube video.

(2) The DeMelle motion

[25] The motion judge generally followed the same format in his decision on this motion. Again, there was no dispute that the expressions were those of Mr. DeMelle. On whether the expressions related to a matter of public interest, the motion judge concluded "with some reluctance" that they did. Consequently, Mr. DeMelle had met his onus and the burden shifted to Mr. Levant and Rebel News.

[26] On the issue of whether the action had substantial merit, the question again arose as to whether the reputations of Mr. Levant and Rebel News could be lowered as a result of the expressions – an argument that generally tracked the argument advanced by Al Jazeera on its motion. Once again, the motion judge rejected that argument largely for the same reasons he had when dealing with it in the Al Jazeera motion. The motion judge concluded that the presence of grounds to believe that the defamation action had substantial merit "cannot be questioned".

[27] Going on to the defences raised, the same three defences were in play: (i) justification; (ii) fair comment; and (iii) responsible journalism. In this case, though, the motion judge concluded that none of the defences were valid. In finding that the defence of fair comment was not valid, the motion judge found that referring to

Mr. Levant as a neo-Nazi sympathizer “traverses too far into the realm of fact, or at least imputation of fact,” and thus could not constitute comment. Consequently, the defence of fair comment was not available. In finding that the defence of responsible journalism was not valid, the motion judge found that Mr. DeMelle had not shown that he was reasonably diligent in verifying the accuracy of the impugned expressions.

[28] The motion judge then proceeded to the final issue, the weighing of the competing public interests. On this issue, the motion judge noted that Mr. Levant and Rebel News had not led any evidence of specific harm or damage to their reputations as a result of the expressions. He therefore found that Mr. Levant and Rebel News had not shown the necessary harm that would outweigh the public interest in permitting public expression. Consequently, he dismissed the action.

(3) The costs awards

[29] The motion judge addressed the costs of each motion in brief written endorsements. He noted that s. 137.1(7) of the *Courts of Justice Act* provides that, if the motion is granted and the proceeding is dismissed, the moving party is entitled to its costs of the motion and the proceeding on a full indemnity basis, unless the judge determines that “such an award is not appropriate in the circumstances”. On both motions, the motion judge found that an award of costs

on a full indemnity basis was not appropriate. Instead, he awarded each successful moving party its costs on a partial indemnity scale.

C. ANALYSIS

(1) The Al Jazeera motion

[30] Rebel News asserts two main errors by the motion judge. One has to do with the defence of responsible journalism. The other has to do with the motion judge's balancing of the public interests at stake.

[31] Before turning to these issues, I should address the argument over the proper standard of review. Rebel News contends that the standard of review is correctness because it says that the motion judge misconstrued the law on defamation and its defences. I do not agree. While Rebel News dresses up its complaint as the motion judge having misconstrued the law, what Rebel News is actually complaining about is the application of the law by the motion judge to the facts of this case. That application is not subject to a standard of review of correctness. Rather, the motion judge's decision is entitled to deference, absent a reviewable error: *Bent v. Platnick*, 2020 SCC 23, 449 D.L.R. (4th) 45, at para. 77.

a) The defence of responsible journalism

[32] Rebel News contends that the motion judge erred in finding that the defence of responsible journalism might succeed because, according to Rebel News, Al Jazeera did not act responsibly in respect to the article and YouTube video.

[33] I do not find a reviewable error in the motion judge's analysis of the defence of responsible journalism.

[34] First, Rebel News submits that the motion judge erred by not considering that Mr. Kohls, one of the authors of the expressions, had not spoken to certain individuals who might have provided contrary viewpoints to those that he had received, and thus the article could have been more "balanced".

[35] I do not see anything in the requirements of the defence of responsible journalism that places a burden on a journalist to interview every individual who might conceivably have something to offer on the subject being written on. Certainly, no such burden is to be found in the seminal decision on this defence, *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640. Indeed, placing such a burden on journalists would seem to be inconsistent with the point that McLachlin C.J. makes in *Grant*, at para. 113:

> The legal requirement to verify accuracy should not unduly hamstring the timely reporting of important news.

[36] The motion judge reviewed the steps that Mr. Kohls had taken to verify the accuracy of the article and video. Of importance to this issue is the salient fact that efforts had been made to interview Mr. Levant. However, as found by the motion judge, at para. 66:

> Given the opportunity to provide Rebel's side of the story, neither Levant nor Rebel provided any relevant comments, responses or facts.

[37] It is also relevant to this issue that, on a s. 137.1 motion, the motion judge is not finally determining whether a defence will succeed. Consequently, the motion judge is not to conduct the equivalent of a summary judgment motion. Rather, the motion judge only considers whether there are grounds to believe that there is no valid defence. As Côté J. explained in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, 449 D.L.R. (4th) 1, at para. 37:

> To be sure, s. 137.1(4)(a) is not a determinative adjudication of the merits of the underlying claim or a conclusive determination of the existence of a defence.

[38] Rebel News has not shown any palpable and overriding error in the motion judge's determination of the adequacy of the steps taken by Mr. Kohls in verifying the accuracy of the contents of the article and YouTube video, given the limited analysis that the motion judge was required to undertake. His conclusion on this issue is entitled to deference.

[39] Rebel News' second attack on the motion judge's conclusion is its contention that Mr. Kohls acted out of malice, and that fact precludes Al Jazeera's reliance on the defence. The motion judge did not directly address the contention that Mr. Kohls was actuated by malice. However, his conclusion that the defence of responsible journalism could succeed carries with it the implicit rejection of any allegation of malice, since the defence of responsible journalism is not available if malice is present. As McLachlin C.J. explained in *Grant*, at para. 92:

> Furthermore, it makes little sense to speak of an assertion of responsible journalism being defeated by proof of malice, because the absence of malice is effectively built into the definition of responsible journalism itself.

[40] Rebel News' third and final challenge to the motion judge's conclusion regarding the defence of responsible journalism is its contention that the motion judge erred in finding that Rebel News was provided with a proper opportunity to respond to the article and YouTube video before they were published. It submits that there was no evidentiary foundation for the motion judge's conclusion to the contrary at para. 66 of his reasons, to which I referred above.

[41] There is no question that, in the context of a defence of responsible journalism, the opportunity for the target of the expression to respond is important. McLachlin C.J. makes this point in *Grant*, at para. 116:

> In most cases, it is inherently unfair to publish defamatory allegations of fact without giving the target an opportunity to respond. [Citation omitted.]

[42] Rebel News asserts that Mr. Levant "was given no meaningful opportunity to reply, because none of the defamatory statements was ever put to Levant for comment." The record does not bear out that assertion. While the specifics of the article and video were not provided to Mr. Levant, Ms. Phillips did tell him that Al Jazeera was working on a "ten minute feature film that will in large part focus on The Rebel Media – your history, the outlet's origins, the varied presenters you offer a platform to, and some of the content that you produce". Ms. Phillips also told

Mr. Levant of one specific comment that was included in the video, and requested his response to it:

> The Rebel media is an alt-right media company that creates content on a range of issues. I would say anti-Muslim, anti-immigrant, anti-refugee, anti-climate, anti-liberal, anti a lot of things… And unlike a real news organization they don't look for balance. They don't look to try to actually find out what's really going on. But they simply try to create narratives and anger that really get people riled up…

[43] Mr. Levant refused to provide any response to Ms. Phillips. He said that he would respond to allegations of fact but not to opinions. Ms. Phillips then sent him a more specific quote but was met with the same response.

[44] The record demonstrates that Mr. Levant was given the opportunity to respond, on behalf of Rebel News, to the thrust of the article and YouTube video. He declined to do so. There is nothing in the decision in *Grant*, to my reading, that requires that the actual words of the proposed defamatory allegations must be put to the subject of the allegations. What Al Jazeera was required to do was give Rebel News "an opportunity to respond". In making that a meaningful opportunity, Al Jazeera was required to give Rebel News the essence, or "gist", of the proposed publication, sufficient to allow Rebel News to understand what was going to be said about it, and thus provide the necessary context for its response. That is what Al Jazeera did.

[45] On this point, I return to the nature of the exercise being carried out by the motion judge. It is to determine whether there are grounds to believe that a defence is not valid. It is not a "conclusive determination" of that issue: *Pointes*, at para. 37. Whether the opportunity to respond was sufficient is ultimately a matter for trial.

[46] All that the motion judge was required to do was to review the record and determine whether Rebel News had established that the defence of responsible journalism was not a valid defence. In reaching a conclusion on that question, the motion judge was not required to delve deeply into the evidence, or to make findings of credibility, or to otherwise resolve disputed questions of fact: *Pointes*, at para. 52. The role of the motion judge is much more limited, which coincides with the limited record that will exist, given the early stage of a proceeding when these motions are supposed to be addressed. Once again, the motion judge's conclusion, that the defence of responsible journalism was available to Al Jazeera on the record, is entitled to deference.

b) The weighing of public interests

[47] The second error alleged by Rebel News is the motion judge's weighing of interests under s. 137.1(4)(b). This weighing was described by Côté J. in *Pointes*, at para. 61, as "the crux of the analysis". The subsection reads:

> No judge shall dismiss a proceeding under subsection (3) if the responding party 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 expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[48] In considering this issue, I am mindful of the fact that the motion judge was not required to proceed to consider this issue in light of his conclusion about the presence of a potentially valid defence. Nonetheless, he chose to address the question in the interests of completeness. His relatively brief analysis should be considered in that context.

[49] Rebel News says that the motion judge erred in requiring it to lead evidence of specific harm or damage when such evidence is not required. In my view, this submission ignores the salient fact that Rebel News is a corporation. It is not an individual. That is a significant distinction in the law of defamation. For example, it directly affects the level of damages that can be awarded. As Blair J.A. noted in *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.), at para. 49, quoting from Peter F. Carter-Ruck and Harvey Starte, *Carter-Ruck on Libel and Slander*, 5th ed. (London: Butterworths, 1997):

> Limited companies, and other corporations, may also be awarded general damages for libel or slander, without adducing evidence of specific loss. However, it is submitted that in practice, in the absence of proof of special damage, or at least of a general loss of business, a limited company is unlikely to be entitled to a really substantial award of damages.

[50] Rebel News did not lead evidence of any specific harm it suffered as a consequence of the impugned expression. It was required to do at least that. As Côté J. said in *Pointes*, at para. 71:

> [T]he plaintiff need not prove harm or causation, but must simply provide evidence for the motion judge to draw an inference of likelihood in respect of the existence of the harm and the relevant causal link.

[51] One of the failings in the submissions of Rebel News on this question is its reliance on cases such as *Montour v. Beacon Publishing Inc.*, 2019 ONCA 246, leave to appeal to S.C.C. refused, 38657 (October 10, 2019); *Levant v. Day*, 2019 ONCA 244, 145 O.R. (3d) 442, leave to appeal refused, [2019] S.C.C.A. No. 194; and *Lascaris v. B'nai Brith Canada*, 2019 ONCA 163, 144 O.R. (3d) 211, leave to appeal refused, [2019] S.C.C.A. No. 147. Those cases were all decided prior to the decision in *Pointes* and the various refinements that that decision brought to the required analysis under s. 137.1. Further, all of those cases involved individual plaintiffs, where the harm to their reputations could be presumed, especially where their reputations were otherwise seemingly unblemished.

[52] In this case, any presumption of harm must be limited, not only because Rebel News is a corporation, but also because there was evidence before the motion judge that the reputation of Rebel News, however one might characterize it, cannot be said to be unblemished. On this point, I do find fault with the motion judge's analysis of harm insofar as he said that he was making "no specific finding"

about the state of Rebel News' reputation. I do not understand how the motion judge could maintain that position, while at the same time purporting to weigh the harm to the reputation of Rebel News against the public interest in protecting the expression. It seems to me that a consideration of the state of Rebel News' reputation was a necessary step to be taken in order to conduct a proper weighing.

[53] For the purposes of that weighing, however, it is sufficient to recognize the state of Rebel News' reputation as it appears from the record (not unblemished, as I put it earlier). Given that fact, it was incumbent on Rebel News to lead evidence, either of business lost because of the impugned expressions, or at least evidence that its reputation had been harmed in some respect by them. This requirement is evidenced in *Pointes*, at para. 72, where Côté J. said:

> [E]vidence of a causal link between the expression and the harm will be especially important where there may be sources other than the defendant's expression that may have caused the plaintiff harm. [Citation omitted.]

[54] Rebel News failed to lead specific evidence of harm. Given the absence of such evidence, I agree with the conclusion that the motion judge reached that weighing the two public interests favoured protecting the expression of Al Jazeera. Any harm to Rebel News appears slight whereas the harm that arises from interfering with publications by the media on matters of public interest is significant.

(2) The DeMelle motion

[55] Mr. Levant and Rebel News assert two main errors by the motion judge. One is that the motion judge erred in concluding that Mr. DeMelle's expressions relate to a matter of public interest. As in the Al Jazeera motion, the second has to do with the motion judge's balancing of the public interests at stake.

[56] The appellants, understandably, do not take issue with the motion judge's conclusion that there are grounds to believe that none of the defences asserted by the respondent were valid. The respondent does contest those findings, however, in responding to the appellants' challenge to the ultimate decision reached by the motion judge.

a) Statements relating to a matter of public interest

[57] The appellants take issue with the motion judge's conclusion that the impugned expressions were on a matter of public interest – a conclusion that he reached "with some reluctance". In making their submissions, the appellants focus on the accusation that Mr. Levant is "a neo-Nazi sympathizer". They say that the accusation is nothing more than a gratuitous insult and cannot be characterized as having anything to do with any matters of public interest.

[58] The flaw in the appellants' argument on this point is that they isolate the "neo-Nazi sympathizer" statement from the rest of the article. That is not the proper approach to determining whether the expression in issue relates to a matter of

public interest. Rather, it is the entire expression that must be considered. In other words, in this case, it is the article as a whole that must be considered in determining whether the expression is on a matter of public interest.

[59] That this is the proper approach is clear from the decision in *Grant*, which is referred to at some length on this subject in *Pointes*. In *Grant*, McLachlin C.J. said, at para. 101:

> In determining whether a publication is on a matter of public interest, the judge must consider the subject matter of the publication as a whole. The defamatory statement should not be scrutinized in isolation.

[60] It would appear that the motion judge took the same erroneous approach to the issue of public interest. If he did not, it is difficult to understand how he would have concluded “with some reluctance” that the expression related to a matter of public interest. The article, taken as a whole, clearly related to a matter of public interest. Indeed, it is difficult to identify an issue that is more in the public interest currently than the issue of climate change and its related topics, including the actions of climate change deniers. The alleged actions of climate change deniers in terms of trying to silence, or intimidate, or otherwise harass a person, who is as outspoken on the subject of climate change as Greta Thunberg, would naturally draw the public’s interest. I see no reason for “reluctance” in concluding that the expression related to a matter of public interest.

b) The defence of fair comment

[61] The question then becomes whether there are grounds to believe that the respondent has no valid defence to the appellants' claim.

[62] I do not consider it necessary to review each of the three defences that the motion judge found were not valid. His conclusions regarding the defence of justification and the defence of responsible journalism were open to him on the record and are entitled to deference. However, his analysis of fair comment is flawed, even though his conclusion that there are grounds to believe that Mr. DeMelle's fair comment defence is not valid is correct.

[63] The motion judge erred in concluding that "calling Levant a neo-Nazi sympathizer traverses too far into the realm of fact, or at least imputation of fact," to permit a defence of fair comment. In so concluding, the motion judge committed the same error that was identified by the Supreme Court of Canada in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420. In discussing the difference between comment and fact in that case, Binnie J., at para. 26, quoted with approval from the decision in *Ross v. New Brunswick Teachers' Assn.*, 2001 NBCA 62, 201 D.L.R. (4th) 75, at para. 56, where the New Brunswick Court of Appeal said that "comment" includes a "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof". Binnie J. also cited Raymond E. Brown, *The Law of Defamation in Canada* (Scarborough: Carswell,

1994) (loose-leaf updated 2007, release 4), for the proposition that words that may appear to be statements of fact may, in pith and substance, be properly construed as comment. Of significance to this case, Binnie J. noted that:

> This is particularly so in an editorial context where loose, figurative or hyperbolic language is used in the context of political debate, commentary, media campaigns and public discourse. [Citation omitted.]

[64] In the context in which it appears in the article, the statement that Mr. Levant is a neo-Nazi sympathizer is clearly a matter of comment. It therefore opens the door to the defence of fair comment. The elements of that defence are well-established. They were set out recently in *Blair v. Ford*, 2021 ONCA 841, at para. 45:

> There are five elements to the defence of fair comment:
>
> (i) the comment must be on a matter of public interest;
>
> (ii) the comment must be based on fact;
>
> (iii) the comment, although it can include inferences of fact, must be recognizable as comment;
>
> (iv) the comment must be one that any person could honestly make on the proved facts; and
>
> (v) the comment was not actuated by express malice.

[65] Where Mr. DeMelle's reliance on this defence falters is on the fourth element. Based on the record before us, no person could honestly express that opinion on the proved facts. Undoubtedly, that is the reason why, immediately

upon the Notice of Libel being delivered, Mr. DeMelle removed that comment from the article. The removal of the comment is not a defence to the claim for defamation, however. Rather, it is relevant to the issue of any damage that may have been caused by it: Raymond E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States* (Toronto: Carswell, 1994) (loose-leaf updated 2020, release 5), ch. 25 at 124-25.

c) The weighing of public interests

[66] The motion judge concluded that the weighing exercise required by s. 137.1(4)(b) favoured the respondent because, as was the case in the Al Jazeera action, the appellants had not led any evidence of "particular or specific economic harm or damage to their reputation". Largely for the same reasons that I have set out above in considering the weighing exercise in the Al Jazeera motion, I agree with the motion judge's conclusion, but not with his analysis.

[67] I begin by acknowledging that the harm analysis is different in this case given the personal presence of Mr. Levant as a plaintiff. The motion judge did not address that distinguishing factor. Some level of damage to Mr. Levant's reputation can be presumed from the defamatory statement. However, that is not sufficient for the purposes of s. 137.1(4)(b).

[68] The presumption of damages in a defamation action involving an individual only goes so far. While it may be sufficient to establish the existence of damages,

it is not sufficient to establish the level of those damages. This point is addressed in the decision of the Court of Appeal (England and Wales) in *Lachaux v. Independent Print Ltd.*, [2017] EWCA Civ. 1334, [2018] 2 W.L.R. 387, where that court was dealing with a statutory provision intended to limit actions for defamation and create a higher threshold for making out a defamation claim – a not dissimilar exercise as s. 137.1 engages. On the issue of the presumption of damages in a defamation case, the court said, at para. 72:

> [T]here is no presumption, at law, of serious damage in a libel case. Accordingly that, under s. 1(1), has to be proved. The point nevertheless remains that serious reputational harm is capable of being proved by a process of inference from the seriousness of the defamatory meaning. [Emphasis in original.]

[69] I accept that the "neo-Nazi sympathizer" comment is a serious one. I would not, however, draw an inference that it resulted in serious reputational harm to Mr. Levant on the record in this case. First, the statement was fairly quickly removed from the article in question. Second, the article itself drew limited attention, given the evidence that it generated slightly fewer than 16,000 views on the internet. Third, is the evidence regarding the state of Mr. Levant's reputation as reflected in the affidavits filed on behalf of the respondent. Balanced against all of that is the sole statement of Mr. Levant in his affidavit:

> 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.

That statement is not only self-serving, it is completely devoid of any foundation for the belief.

[70] Finally, on this point, when a person injects themselves into public debate over a contentious topic, they must expect that they are going to be met with some measure of rebuttal, perhaps forceful rebuttal, by those who take an opposite view. The case of *WIC Radio* is an example of that reality. The evidence demonstrates that the appellants quite readily inject themselves into the public debate on many of these types of issues. Indeed, there is evidence that they consider that to be part of the rationale for their existence. The appellants should not be surprised when they are then met with a response – even a very forceful response. While such responses do not justify crossing the line into defamatory speech, they are a factor to consider in assessing the level of damages that the defamatory aspect of the response may create. As Binnie J. said in *WIC Radio*, at para. 4:

> We live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones.

[71] As I concluded with respect to the Al Jazeera motion, the appellants have failed to lead evidence of any specific harm or any level of serious harm. Balanced against whatever harm may be presumed, is the public interest in protecting freedom of expression and in having robust debates on matters of public importance. I agree with the motion judge that the appellants failed to establish, in the words of s. 137.1(4)(b), that “the harm likely to be or have been suffered by the

[appellants] as a result of [the respondent's] expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression".

(3) The costs awards

[72] In both proceedings, the motion judge awarded costs to the respondents on a partial indemnity scale. The respondents seek leave to appeal from those costs awards, arguing that the motion judge erred in departing from the presumptive scale of costs provided for in s. 137.1(7), which reads:

> If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances.

[73] In the DeMelle motion, the motion judge said that he considered a full indemnity award of costs not to be appropriate "in the circumstances of this case". It is not clear what circumstances the motion judge was referring to. Slightly more clarity may be found in the motion judge's decision on costs in the Al Jazeera motion, where he said that "[b]alancing those findings", an award of full indemnity costs was not appropriate. The findings to which he was referring were the responsible journalism defence and the public interest in allowing Al Jazeera's expression, on the one hand, and that Rebel News' action had substantial merit and the two other defences advanced were not valid, on the other hand.

[74] I would grant leave to appeal in these cases because I conclude that there are “strong grounds upon which the appellate court could find that the judge erred in exercising his discretion”: *Brad-Jay Investments Ltd. v. Szijjarto* (2006), 218 O.A.C. 315, at para. 21, leave to appeal refused, [2007] S.C.C.A. No. 92. I reach that conclusion principally because of the lack of reasons provided by the motion judge for his costs awards.

[75] When an action is dismissed under s. 137.1, the statutory presumption is that the successful moving party will be awarded costs on a full indemnity basis, unless the judge determines that such an award is not “appropriate”. The statute does not provide any factors to be considered in deciding when the presumptive award will not be appropriate.

[76] That said, it is apparent from the wording of s. 137.1(7) that an award of full indemnity costs is not intended to apply to every case where the action is dismissed. The subsection clearly leaves the motion judge with the discretion to decide whether an award of full indemnity costs is not “appropriate” in a particular case. The issue then becomes what features will distinguish a case where an award of full indemnity costs is not appropriate as opposed to one where it is.

[77] In my view, merely concluding that there are countervailing determinations on the factors that are required to be considered under s. 137.1 is an insufficient basis to make a finding that it is not appropriate to award full indemnity costs. If

that was all that was required, most cases would not draw a full indemnity costs award since, as the existing case law under s. 137.1 amply demonstrates, there are countervailing determinations in many cases. To adopt that as the distinguishing feature would result in the presumptive costs award not being presumptive at all.

[78] The genesis for a presumptive award of full indemnity costs can be found in the Anti-SLAPP Advisory Panel, *Report to the Attorney General* (Ontario: Ministry of the Attorney General, 2010) (the "Report"). In *Pointes*, Côté J. observed that the Report is a "persuasive authority for the purposes of statutory interpretation" as it "was the clear impetus for the legislation, and was relied upon heavily by the legislature in drafting s. 137.1": at para. 14. In the Report, the authors said, at para. 44:

> It is important that the special procedure provide for full indemnification of the successful defendant's costs to reduce the adverse impact on constitutional values of unmeritorious litigation, and to deter the commencement of such actions.

[79] That statement reveals two factors driving the reason for a presumptive award of full indemnity costs: (i) to reduce the adverse impact on constitutional values of unmeritorious litigation; and (ii) to deter the commencement of "such actions". The reference to "such actions", I conclude, is a reference to actions that were launched with the intention to "unduly limit expressions on matters of public

interest" as set out in s. 137.1(1)(c). In other words, what is typically referred to as a strategic lawsuit against public participation ("SLAPP").

[80] On this latter point, I appreciate that the decision in *Pointes* narrowed the relevance of the indicia of a SLAPP lawsuit as they relate to the determination of a motion under s. 137.1: at paras. 78-79. However, that narrowing related to the merits of the motion, and not to the issue of costs and the appropriateness exception.

[81] In attempting to give some guidance to the appropriateness exception, I start with the recognition that this is a matter that involves the exercise of the motion judge's discretion. There will be many different factors that may impact on the exercise of that discretion depending on the circumstances of the individual case. Given the rarity of full indemnity awards, the presence or absence of factors that might drive an award of costs on a higher scale in regular civil litigation may be relevant to the exercise of the appropriateness discretion in these special cases. For example, claims borne of ulterior motives, which a SLAPP lawsuit represents, is an example of one such factor.

[82] Turning to the cases at hand, there is evidence that these actions were commenced in an effort to quell the public expressions made. They bear the indicia of a SLAPP lawsuit. Those indicia were set out by Doherty J.A. in *Platnick v. Bent*, 2018 ONCA 687, 426 D.L.R. (4th) 60, at para. 99, aff'd 2020 SCC 23:

- 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.

[83] Three of those four factors are present in these cases, the sole exception being a financial or power balance that strongly favours the appellants. There is a history of the appellants using litigation to silence critics. Indeed, Mr. Levant has publicly proclaimed that commencing such lawsuits is part of a deliberate campaign, which he calls his “stop de-platforming strategy”. Other aspects of his public statements also make it clear that there is a retributory purpose to bringing these claims. These lawsuits are clearly designed to make critics think twice about expressing their criticisms of the appellants for fear of being sued. Further, for the reasons that I have already set out above in considering the issue of harm, there is good reason to conclude that any damages suffered by the appellants arising from the defamatory expressions are minimal.

[84] These actions thus bear three of the four hallmarks of a SLAPP lawsuit. It is such lawsuits that s. 137.1 was designed to prevent, or at least quash at the earliest opportunity. As I have already set out, it is the deterrence of such lawsuits

that led to the Report's proposal for full indemnity costs. The purpose behind the presumptive costs award clearly applies to these cases.

[85] In considering this issue, I am mindful of the fact that costs awards are ones which normally attract a high degree of deference from appellate courts given the nature and subjectivity of costs awards. However, in this case, that high degree of deference is displaced by the paucity of reasons offered by the motion judge for his awards, especially where the motion judge was departing from a statutory presumption. In that situation, there is an obligation to provide sufficient reasons for the departure. In the absence of sufficient reasons, the costs awards are not entitled to deference.

[86] A further comment on the issue of the costs awards is warranted. The respondents argue that the motion judge erred not only in his determination of the merits of the actions but also in considering that determination as a factor when deciding costs. I do not agree that the motion judge erred in that regard. I have essentially addressed the respondents' challenges to the motion judge's conclusion on the apparent merits of the actions above. It is unnecessary to address those issues again in the context of costs.

[87] Before leaving the costs awards, I must address one other issue. In the costs sought by Al Jazeera there was included time charged by a solicitor in the United Kingdom. The justification for this inclusion, that is offered by Al Jazeera, is that it

is an international media organization that was served *ex juris* in the United Kingdom with this proceeding. Al Jazeera says that, in those circumstances, Rebel News "must have reasonably anticipated" that it would incur such costs and thus they should be recoverable. Al Jazeera does not provide any authority for this proposition.

[88] On this point, the motion judge simply said that the "solicitor was not retained as an expert, and those fees are not recoverable as disbursements". However, Al Jazeera was not seeking to recover these expenses as a disbursement but, rather, was seeking to recover them as part of the fees portion of their costs award.

[89] Nevertheless, I agree with the motion judge that the fees of the United Kingdom solicitor are not recoverable. Costs recoverable in Ontario are determined in accordance with s. 131 of the *Courts of Justice Act* and r. 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Rule 57.01(3) stipulates that when costs are awarded, they shall be fixed "in accordance with subrule (1) and the Tariffs". Tariff A, which deals with the fees and disbursements that are allowable, expressly stipulates that the fees that are recoverable are, first and foremost, "lawyers' fees". The term "lawyer" is defined in r. 1.03 as "a person authorized under the *Law Society Act* to practise law in Ontario".

[90] The end result is that fees recoverable as part of a costs award relate only to lawyers who are authorized to practice in Ontario. Absent evidence that the

United Kingdom solicitor was authorized to practice law in Ontario, the time spent by that solicitor is not recoverable as part of the fees portion of the costs awarded. I repeat that this is not a case where a foreign lawyer was retained to provide expert evidence. In that situation, the expense of the foreign lawyer may be recoverable like the expense of any other expert witness. However, that expense would be recoverable as a disbursement and not as part of the fees portion of the costs award. I should add that this result is not affected by the fact that this is a full indemnity costs award. Regardless of the scale of costs awarded, the proper component parts of a costs award do not change.

[91] Consequently, in fixing the amount of the full indemnity costs award in the Al Jazeera action, I have removed the amount relating to the United Kingdom solicitor.

D. CONCLUSION

[92] I would dismiss both appeals. I would allow both cross-appeals, set aside the costs awards below, and award full indemnity costs to the respondent, Mr. DeMelle, in the amount of $65,403.99, inclusive of disbursements and HST, and to the respondent, Al Jazeera, in the amount of $151,741.51, inclusive of disbursements and HST. The respondents are also entitled to their costs of the appeals. Having considered the bills of costs filed, I would fix the costs to Mr. DeMelle in the amount of $15,000, inclusive of disbursements and HST.

I would fix the costs to Al Jazeera in the amount of $20,000, inclusive of disbursements and HST.

Released: January 28, 2022 GRS

"Gillese J.A."

"Tulloch J.A."

"Fairburn J.A."