Defamation in the Age of the Internet: The Modern-Day Soapbox

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In our previous article on online defamation we discussed how online anonymity is not as absolute as some might imagine. Canadian courts are proving increasingly willing to order that websites disclose the identity of anonymous authors, and there are relatively straightforward mechanisms whereby disclosure can be obtained (either before or after commencing an action). In this article, we will review recent cases that have introduced a "privacy" component into requests for disclosure, and suggest that, in some circumstances, the privacy rights of the anonymous authors ought to be protected.

I. Privacy In the Era of "Officer Bubbles"

On September 29, 2010, Constable Adam Josephs of the Toronto Police Services filed a defamation lawsuit seeking $1.2 million in damages against the video sharing website YouTube and 25 anonymous "John Doe" defendants.

Josephs, nicknamed "Officer Bubbles", gained notoriety after a video shot during the Toronto G20 Summit showed him warning a young protester she could be arrested for blowing bubbles in his direction.

Soon after the incident, a series of eight online videos created by a user nicknamed ThePMOCanada appeared on YouTube, depicting a cartoon version of Constable Josesphs arresting people for various infractions. Constable Josephs Statement of Claim describes a typical video as follows [sic]:

> (By Josephs) "You're charged with wearing a disguise"
>
> (By doctor) "But I am a doctor. You arrested me in my doctor's office!"
>
> (By Josephs) "You talking to me?? You are charged with obstructing justice."
>
> (By Josephs) "What's in your bag?"
>
> (By Doctor) "Bandages"
>
> (By Josephs) "Weapon!"
>
> (By physician") "Gauze"
>
> (By Josephs) "Weapon!"
>
> (By physician") "Aspirin"
>
> (By Josephs) "You are charged with drug trafficking!"; and

(5) "Next time … Officer Bubbles tackles blind woman."[i]

In response, Constable Josephs filed suit against ThePMOCanada, YouTube, and 24 other anonymous commenter's who had commented on YouTube in response to the videos. As part of his lawsuit, Constable Josephs is seeking to compel YouTube to disclose the identities of the 25 anonymous defendants.

One possible route a plaintiff could use to obtain such disclosure is through the bringing of a "Norwich Pharmacal" application, which permits a plaintiff or potential plaintiff to identify a potential defendant by way of an "equitable bill of discovery". Unfortunately for Constable Josephs, recent jurisprudence in Ontario suggests that such orders may be harder to come by where the anonymous defendants have legitimate privacy interests in their identity, such as when they are commenting on matters of public interest.

II. The Importance of Privacy and Freedom of Expression

In the 2009 Ontario case of *York University v. Bell Canada Enterprises*[ii], York University sought a Norwich Pharmacal order compelling internet service providers (ISPs) to disclose the identity of the anonymous author of allegedly defamatory emails and web postings accusing York University's president of fraud. Uniquely, the court in this case considered the privacy rights of the defendants as an integral component of the test for disclosure.

Mr. Justice Strathy examined the role of the anonymous author(s) privacy expectations as they related to the interests of justice in granting the application. He applied the test for a Norwich Pharmacal order set out by the Ontario Court of Appeal in the leading case of *GEA Group AG v. Ventra Group Co.*[iii], The court specifically looked at the service agreements and privacy policies of the Bell and Rogers ISPs, both of which prohibited use of the internet services for the purposes of posting defamatory material and both of which provided that identifying information could be disclosed by court order. In granting the application, Mr. Justice Strathy found as follows:

> A Bell customer can reasonably contemplate, therefore, that his or her identity may be disclosed by order of the court in the event he or she engages in unlawful, abusive or tortious activity.[iv]

The courts concern was also reflected in the order granted, which included a term requiring the university to serve the author with a copy of the order, once identified. The author could then apply, on notice to the University, to vary or vacate the order.

Building on the consideration of the defendants privacy interests as articulated in *York University,* an Ontario Superior Court of Justice panel recently refused to grant an application for disclosure of identifying information under the Ontario *Rules of Civil Procedure,* citing the privacy interests of the internet users.

In *Warman v. Fournier et al*,[v] the plaintiff sought an order requiring named defendants to list all documents in their possession relating to the identities of the defendant John Does 1-8 in a defamation action. This included the e-mail addresses and IP addresses used when making the specific postings identified in the statement of claim. This order was granted at the trial level, and on appeal to the Ontario Superior Court of Justice the Canadian Civil Liberties Association was granted intervenor status to argue the importance of protecting the privacy of Internet users on behalf of the anonymous defendants.

The court noted at the outset that this application involved balancing conflicting privacy interests:

Privacy interests arise for consideration in the present case in favour of both the plaintiff and the John Doe defendants. As the Supreme Court ruled in *Hill*, the good reputation of an individual is intimately connected to his right to privacy, and thus the right to privacy of the plaintiff may be affected by the allegedly libelous postings. At the same time, the John Doe defendants who made the allegedly libelous postings arguably had a reasonable expectation of privacy, having expressly elected to remain anonymous when they did so.[vi] The Ontario Superior Court of Justice found that because these rules have the force of a statute, they must be interpreted in a manner consistent with *Charter* rights and values.[vii]

This involved consideration of more than the mere relevance where privacy concerns are raised:

> In circumstances where *Charter* rights are engaged and therefore courts are required to take such interests into consideration in determining whether to order disclosure, the case law indicates that the *Charter* protected interests are balanced against the public interest in disclosure in the context of the administration of justice by a combination of (1) a requirement of an evidentiary threshold, (2) fulfillment of conditions establishing the necessity of the disclosure sought, and (3) an express weighing of the competing interests in the particular circumstances of the litigation. In order to prevent the abusive use of the litigation process, disclosure cannot be automatic where *Charter* interests are

> engaged. On the other hand, to prevent the abusive use of the internet, disclosure also cannot be unreasonably withheld even if *Charter* interests are engaged.[viii]

After finding that there was no case law that specifically addresses relevant *Charter* considerations in an application under the *Rules of Civil Procedure,* the Ontario Superior Court of Justice turned to the *Norwich Pharmacal* jurisprudence. "The fundamental premise of *Norwich Pharmacal* is that, where privacy interests are involved, disclosure is not automatic even if the plaintiff establishes relevance and the absence of any of the traditional categories of privilege."[ix]

Given the competing privacy interests at stake in a defamation action, as well as the importance of freedom of expression, the court held that something more was required than the mere relevance test under the *Rules of Civil Procedure* (essentially the same test as that under B.C.'s Rule 7-1(18)) for the court to order disclosure of the identity of anonymous online authors:

> …because this proceeding engages a freedom of expression interest, as well as a privacy interest, a more robust standard is required to address the chilling effect on freedom of expression that will result from disclosure. It is also consistent with the recent pronouncements of the Supreme Court that establish the relative weight that must be accorded the interest in freedom of expression. In the circumstances of a website promoting political discussion, the possibility of a defence of fair comment reinforces the need to establish the elements of defamation on a *prima facie* basis in order to have due consideration to the interest in freedom of expression. On the other hand, there is no compelling public interest in allowing someone to libel and destroy the reputation of another, while hiding behind a cloak of anonymity. The requirement to demonstrate a *prima facie* case of defamation furthers the objective of establishing an appropriate balance between the public interest in favour of disclosure and legitimate interests of privacy and freedom of expression.[x]

This case has since been cited with approval by the Supreme Court of Nova Scotia.[xi] In *A.B. v. Bragg Communications Inc.*, the Plaintiff brought an action seeking disclosure of the identity of the author(s) of an anonymous Facebook profile, which included a photograph of the applicant and other particulars which identified her. The Facebook profile also discussed the applicant's physical appearance, weight, and allegedly included scandalous sexual commentary of a private and intimate nature.

In granting the application for disclosure, the Nova Scotia Supreme Court suggested that, in some circumstances authors of online postings may have a valid expectation of anonymity. Of particular interest, one such circumstance favouring anonymity identified by the court was "fair comment":

> The reasonableness of an expectation of anonymity must be assessed on a case-by-case basis. In view of a *prima facie* case of defamation, and the absence of any suggestion of a compelling interest that would favour anonymity (such as fair comment), the expectation of anonymity in these circumstances is not a reasonable one. Anonymity is not an automatic shield for defamatory words.
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> As to the question of whether the public interests favouring disclosure outweigh the legitimate interests of freedom of expression and right to privacy of the persons sought to be identified if the disclosure is ordered, I am mindful that *Charter* values of freedom of expression and privacy are involved here, and that "[t]he requirement to demonstrate a *prima facie* case of defamation furthers the objective of establishing an appropriate balance between the public interest in favour of disclosure and legitimate interests of privacy and freedom of expression" (*Warman* at para. 42). Defamatory speech does not lose its character as defamation simply because it is anonymous. In these circumstances, where a *prima facie* case of defamation is established, and no public interest beyond the general right of freedom of expression is offered in support of maintaining the author's anonymity, I am satisfied that the public interest favouring disclosure prevails.[xii]

Whether a defendant can successfully raise fair comment as a factor weighing against disclosure of their identity remains to be seen. However, the above case appears to open the door for such an argument.

The New Brunswick Court of Queen's Bench recently cited privacy concerns in narrowing the scope of a Norwich Pharmacal Order sought by an applicant. In *Doucette v. Brunswick News*[xiii], a Moncton firefighter sought a Norwich Pharmacal Order to obtain the identity of the author of anonymous comments on a newspaper's online comment section.

The firefighter wrote a letter to the editor to the Moncton Times & Transcript criticizing speed limits for the province's ambulances. In the online comment section of the newspaper an anonymous author referred the firefighter as a “goon”, and suggested he should be fired.

The firefighter brought an application seeking production of “any information that they have regarding the identity of "Anonymous Anonymous" including but not restricted to: the name, address, telephone number, account status, any secondary email addresses, account services, account creation date, logfile information associated with this account, including times and dates of logins and activity on the account, as well as the IP address data associated with the account.”[xiv]

Although the court granted the firefighter’s application, it commented that the scope of the Norwich Pharmacal Order sought was too broad and could possibly affect the privacy of others. Accordingly, the court granted a modified order which limited disclosure to information directly relating to the identity of the anonymous author.[xv]

In light of these decisions, the test for disclosure of identifying information under the *Supreme Court Civil Rules* might become more onerous and complicated. Exactly how a court should balance privacy interests of potential defendants is unclear - particularly as defendants are not typically given notice on Norwich Pharmacal applications. One should consider the privacy interests of the anonymous authors when bringing an application for disclosure either under the *Rules of Court* or by way of *Norwich Pharmacal* order. Finally, it may now be possible for anonymous defendants who wish to run a “fair comment defence” to argue that they have a legitimate privacy interest in keeping their identity hidden.

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[i] Statement of Claim, *Josephs v. YouTube LLC et al.,* filed September 29, 2010, Court File Number CV 10 410890, Ontario Superior Court of Justice.
[ii] *York University v. Bell Canada Enterprises*, 2009 CanLII 46447 (ON S.C.), at para. 1
[iii] *GEA Group AG v. Ventra Group Co*., 2009 ONCA 619
[iv] *Ibid.* At para. 34
[v] *Warman v. Fournier et al*, 2010 ONSC 2126
[vi] *Ibid.* At para. 18.
[vii] *Ibid.* At para. 22
[viii] *Ibid.* At para. 24
[ix] *Ibid.* At para. 27
[x] *Ibid.* At para. 42
[xi] *A.B. v. Bragg Communications Inc.*, 2010 NSSC 215
[xii] *Ibid* At paras. 21-22
[xiii] *Doucette v. Brunswick News*, 2010 NBQB 33
[xiv] *Ibid*, At para.. 1
[xv] *Ibid*, At para. 19