



SUPREME COURT OF CANADA

CITATION: Bent v. Platnick, 2020 SCC 23

APPEALS HEARD: November 12, 2019

JUDGMENT RENDERED: September 10, 2020

DOCKET: 38374

BETWEEN:

Maia Bent
Appellant

and

Howard Platnick
Respondent

AND BETWEEN:

Lerners LLP
Appellant

and

Howard Platnick
Respondent

- and -

British Columbia Civil Liberties Association, Greenpeace Canada, Canadian Constitution Foundation, Ecojustice Canada Society, West Coast Legal Education and Action Fund, Atira Women’s Resource Society, B.W.S.S. Battered Women’s Support Services Association, Women Against Violence Against Women Rape Crisis Center, Canadian Civil Liberties Association, Canadian Broadcasting Corporation, Barbra Schlifer Commemorative Clinic, Ad IDEM / Canadian Media Lawyers Association, Canadian Journalists for Free Expression, CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, Aboriginal Peoples Television Network and Postmedia Network Inc.

Intervenors

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 179)

Côté J. (Wagner C.J. and Moldaver, Brown and Rowe JJ. concurring)

DISSENTING REASONS:
(paras. 180 to 301)

Abella J. (Karakatsanis, Martin and Kasirer JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

BENT v. PLATNICK

Maia Bent

Appellant

v.

Howard Platnick

Respondent

- and -

Lerners LLP

Appellant

v.

Howard Platnick

Respondent

and

**British Columbia Civil Liberties Association,
Greenpeace Canada,
Canadian Constitution Foundation,
Ecojustice Canada Society,
West Coast Legal Education and Action Fund,
Atira Women's Resource Society,
B.W.S.S. Battered Women's Support Services Association,
Women Against Violence Against Women Rape Crisis Center,
Canadian Civil Liberties Association,
Canadian Broadcasting Corporation,
Barbra Schlifer Commemorative Clinic,
Ad IDEM / Canadian Media Lawyers Association,
Canadian Journalists for Free Expression,**

**CTV, a Division of Bell Media Inc.,
Global News, a division of Corus Television Limited Partnership,
Aboriginal Peoples Television Network and
Postmedia Network Inc.**

Interveners

Indexed as: Bent v. Platnick

2020 SCC 23

File No.: 38374.

2019: November 12; 2020: September 10.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Dismissal of proceeding that limits debate — Freedom of expression — Matters of public interest — Application of Ontario’s framework for dismissal of strategic lawsuits against public participation (SLAPPs) to defamation claim — Whether defamation claim against lawyer for statements made in email alleging that physician inappropriately altered medical reports should be dismissed under anti-SLAPP legislation — Courts of Justice Act, R.S.O. 1990, c. C-43, s. 137.1.

Evidence — Fresh evidence — Motion seeking to adduce fresh evidence filed before Supreme Court of Canada — Whether fresh evidence should be admitted.

B is a lawyer and partner at an Ontario law firm. She is a member and, at the relevant time, was the president-elect of the Ontario Trial Lawyers Association (“OTLA”). The OTLA is an organization comprised of legal professionals who represent persons injured in motor vehicle accidents. P is a medical doctor who is typically hired through insurance companies to review other medical specialists’ assessments of persons injured in motor vehicle accidents and to prepare a final report with an ultimate assessment of the accident victim’s level of impairment. Following two insurance coverage disputes in which B was acting as counsel for an accident victim, B sent an email to a Listserv (i.e. an email listing) of approximately 670 OTLA members in which she made two statements that specifically mention P by name and allege that, in the context of those disputes, P “altered” doctors’ reports and “changed” a doctor’s decision as to the victim’s level of impairment. B’s email was eventually leaked anonymously by a member of the OTLA and as a result, an article was published in a magazine which reproduced B’s email in its entirety and referred to testimony from B.

P commenced a lawsuit in defamation against both B and her law firm, claiming damages in the amount of \$16.3 million. B filed a motion under s. 137.1 of the *Courts of Justice Act* (“CJA”) to dismiss the lawsuit. The motion judge allowed B’s motion and dismissed P’s defamation proceeding. The Court of Appeal set aside the motion judge’s determination, dismissed B’s motion, and remitted P’s defamation claim to the Superior Court for consideration.

Held (Abella, Karakatsanis, Martin and Kasirer JJ. dissenting): The appeals should be dismissed.

Per Wagner C.J. and Moldaver, **Côté**, Brown and Rowe JJ.: While in *1704604 Ontario Ltd. v. Pointes Protection Assn.*, 2020 SCC 22, the Court recognizes the importance of freedom of expression as the cornerstone of a pluralistic democracy, the right to free expression does not confer a licence to ruin reputations. Thus, in addition to protecting expression on matters of public interest, s. 137.1 of the *CJA* must also ensure that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to pursue it. Applying the s. 137.1 framework set out in *Pointes Protection* to these appeals, B's s. 137.1 motion should be dismissed and P's lawsuit in defamation should be allowed to continue. P's claim is one that deserves to be adjudicated on its merits, and is not one that ought to be summarily screened out at this early stage.

First, B has met her threshold burden under s. 137.1(3) as B's email constitutes an expression that relates to a matter of public interest and P's defamation proceeding arises from that expression. B's email is captured by the statutory definition of "expression" found in s. 137.1(2) which contemplates any communication, even if it is non-verbal, and even if it is made privately. The underlying proceeding clearly "arises from" that expression, since B's email is the foundation for P's defamation proceeding. Moreover, B's email raises concerns regarding the truthfulness, reliability, and integrity of medical reports filed on behalf

of insurers in the arbitration process, which, in turn, raises concerns regarding the integrity of the arbitration process itself and the proper administration of justice. Whether B's concerns are valid or not is beside the point at this stage. Further, the email is directed at a not insignificant number of individuals, who have a special interest, as part of their broader mandate as members of the OTLA, to steadfastly represent victims of motor vehicle accidents, a public interest in itself. Therefore, B's email relates to a matter of public interest.

As B has met her burden on the threshold question, the burden shifts to P to show that there are grounds to believe that his defamation proceeding has substantial merit and that B has no valid defence to it under s. 137.1(4)(a) of the *CJA*. A "grounds to believe" standard requires a basis in the record and the law, taking into account the stage of the litigation, to support these findings. This means that any single basis in the record and the law will be sufficient as long as it is legally tenable and reasonably capable of belief.

P has discharged his burden under s. 137.1(4)(a)(i) and shown that there are grounds to believe that his defamation proceeding has substantial merit. Defamation is governed by a well-articulated test requiring that three criteria be met and all three of these criteria are easily satisfied in the present case: the words complained of were published, as B wrote an email and sent it to 670 OTLA members; the words complained of explicitly refer to P; and the words complained of

were defamatory, since an allegation of professional misconduct would tend to lower P's reputation in the eyes of a reasonable person.

P has also discharged his burden under s. 137.1(4)(a)(ii) and shown that there are grounds to believe that B has no valid defence to his defamation proceeding. In other words, there is a basis in the record and the law, taking into account the stage of the proceedings, to support a finding that the defences B has put in play do not tend to weigh more in her favour.

First, there are grounds to believe that B's defence of justification is not valid. To succeed on the defence of justification at trial, the burden is on the defendant to prove the substantial truth of the "sting", or main thrust, of the defamation. Applied to the facts of this case, the "sting" of B's email is an allegation of professional misconduct. In effect, B's two allegations are constituent parts of the same sting of professional misconduct and the truth of just one will be insufficient for the defence to succeed because B's two allegations are connected and inseverable. Thus, regardless of whether B's first allegation of P altering a report is true, if B's second allegation that P "changed" a doctor's decision is not substantially true, then this is sufficient to foreclose her defence of justification under s. 137.1(4)(a)(ii). In the present case, there is a basis in the record and the law to support a finding that the allegation that P "changed the doctor's decision" is not substantially true, and that therefore the defence of justification cannot be considered to weigh more in favour of B such that it may be considered "valid" under s. 137.1(4)(a)(ii).

Second, there are grounds to believe that B's defence of qualified privilege is not valid. An occasion of qualified privilege exists if a person making a communication has an interest or duty to publish the information in issue to the person to whom it is published and the recipient has a corresponding interest or duty to receive it. However, the privilege is qualified in the sense that it can be defeated. This can occur particularly in two situations: where the speaker was reckless as to the truth of the words spoken; or where the scope of the occasion of privilege was exceeded. In the present case, even assuming without deciding the issue that qualified privilege does attach to the occasion upon which B's email was sent, there is a basis in the record and the law to support a finding that the scope of B's privilege was exceeded and that the defence therefore does not tend to weigh more in her favour. This is because the specific references made to P may not have been necessary to the discharge of the duty giving rise to the privilege. In other words, B could have communicated her concerns regarding the alteration of medical reports without naming P specifically. Further, the Listserv's express prohibition on even potentially defamatory remarks suggests that the OTLA acknowledges that the posting of even potentially defamatory material is not necessary (or even relevant) to the duty encompassed within the particular occasion. Lastly, the record reveals a lack of investigation or reasonable due diligence by B prior to making her serious allegations. B took no investigative steps at all to corroborate an allegation of professional misconduct, and instead, relied on her recollection of a specific phrase, from a specific report, by a specific person, concerning a specific event, that had taken place three years earlier, without attempting to communicate with P or consulting her own

notes. In light of the heightened expectation of reasonable due diligence that the Court has historically imposed on lawyers, B's privilege may be defeated simply on the ground that she was indifferent or reckless as to the truth of her defamatory statements. Thus, even assuming that qualified privilege attaches to the occasion upon which B's communication was made, there are grounds to believe that the defence is not valid under s. 137.1(4)(a)(ii) because it may be defeated by virtue of B having exceeded the scope of the privilege, and perhaps even by her reckless disregard for the truth (i.e. malice).

Finally, the public interest hurdle at s. 137.1(4)(b) is the crux of the s. 137.1 analysis. P must show on a balance of probabilities that the harm likely to be or have been suffered as a result of the expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. First, the harm to P here is extensive and quite serious. Not only does it include significant monetary harm that is more than just a bald assertion, but reputational harm is also eminently relevant to the harm inquiry, even if it is not quantifiable at this stage, and it is only amplified when one considers professional reputation. Second, P's harm was suffered as a result of B's expression. B can be held liable for harm that may have resulted from the subsequent leak and/or reproduction of her email in the magazine because republication was reasonably foreseeable to B and/or authorized by B, expressly or impliedly. Even if B cannot be held liable for republication, causation is not an all-or-nothing proposition, and there is a sufficient causal link between the initial email publication and harm suffered by

P. No definitive determination of harm or causation is required at this stage. Therefore, the harm likely to be or have been suffered by P as a result of B's expression lies close to the high end of the spectrum and, correspondingly, so too does the public interest in allowing his defamation proceeding to continue.

In determining the public interest in protecting B's expression, it must be considered that she made a personal attack against P, which cast doubt on his professional competence, integrity, and reputation, without ever having met him and without any investigation into her allegations against him. Indeed, there will be less of a public interest in protecting a statement that contains gratuitous personal attacks and the motivation behind the expression will be relevant to the inquiry. The chilling effect on future expression and the broader or collateral effects on other expressions on matters of public interest must also be considered. Permitting P's defamation claim to proceed will deter others not from speaking out against unfair and biased practices, but from unnecessarily singling out an individual in a way that is extraneous or peripheral to the public interest, and from making defamatory remarks against an individual without first substantiating, or attempting to substantiate, the veracity of their allegations. In this way, rather than disincentivizing people from speaking out against unfair and biased practices, it will incentivize them to act with reasonable due diligence. Thus, when considered as a whole, the public interest in protecting B's expression lies somewhere in the middle of the spectrum: while B's specific references to P fall at the low end of the protection-deserving spectrum, her

email interpreted broadly as pertaining to the administration of justice in Ontario falls closer to the high end.

P has established on a balance of probabilities that the harm likely to be or have been suffered as a result of B's expression is sufficiently serious that the public interest in permitting his defamation proceeding to continue outweighs the public interest in protecting B's expression. In light of the open-ended nature of s. 137.1(4)(b), courts have the power to scrutinize what is really going on in the particular case before them. On its face, this is not a case in which one party is vindictively or strategically silencing another party; it is a case in which one party is attempting to remedy seemingly legitimate harm suffered as a result of a defamatory communication. This is not the type of case that comes within the legislature's contemplation of one deserving to be summarily dismissed at an early stage, nor does it come within the language of the statute requiring such a dismissal.

Moreover, P's motion to adduce fresh evidence pursuant to s. 62(3) of the *Supreme Court Act* should be allowed in part. This case is a transitional one: the considerable uncertainty surrounding s. 137.1 motions — due to a lack of judicial guidance with respect to both the test for withstanding a s. 137.1 motion, as well as the nature or comprehensiveness of the evidence required on a such a motion — militates in favour of granting the motion to adduce fresh evidence in part based on the test from *Palmer v. The Queen*, [1980] 1 S.C.R. 759.

Per Abella, Karakatsanis, Martin and Kasirer JJ. (dissenting): The appeal should be allowed and P's defamation action should be dismissed under s. 137.1 of Ontario's *Courts of Justice Act*. There is no dispute that P's defamation action was based on expression that relates to a matter of public interest, as B's email addressed questions of significance to the administration of justice, particularly the independence, accuracy and impartiality of experts and third-party assessment companies retained by insurers. Section 137.1(3) is therefore satisfied and P's defamation proceeding must presumptively be dismissed. Pursuant to s. 137.1(4), however, P's proceeding may continue if he satisfies a judge that the following three criteria are met: there are grounds to believe that his case has substantial merit, B has no valid defence to the proceeding, and the likely harm suffered by him is serious enough that it outweighs the public interest in protecting B's expression. Here, B has a valid defence of qualified privilege and is therefore entitled to the relief mandated by s. 137.1(3), namely the dismissal of P's defamation action.

A defence is valid if it has a real prospect of success, meaning that it must be legally tenable, supported by evidence that is reasonably capable of belief, and have a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the person being sued. The burden of showing that the defence can be said to have no real prospect of success is on the plaintiff. The defence of qualified privilege applies where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding

interest or duty to receive it. Qualified privilege can however be defeated if the communication exceeded the purpose of the privilege or if the communication was predominantly motivated by malice. A defendant will exceed the purpose of the privilege if the information communicated is not reasonably appropriate, that is, relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege. The question is not whether the statements were strictly necessary. A necessity-based approach would have dangerous and restrictive implications for the defence of qualified privilege. It would effectively exclude from the defence statements containing specific examples of misconduct, since statements like that can almost always be stripped of detail and reconstructed with the unnecessary examples they previously contained. Qualified privilege exists to acknowledge the benefit of expression which is relevant to protecting the public interest, including protecting the public from the perpetuation of wrongdoing or injustice. Generic accounts of misconduct, which do not refer to specific persons, do not require the protection of qualified privilege. The defence is, necessarily, engaged only when someone is identified.

The conclusion that B sent her email in circumstances protected by qualified privilege is supported by evidence that is reasonably capable of belief and sufficiently compelling to give the defence the necessary likelihood of success. As president-elect of the Ontario Trial Lawyers Association (“OTLA”), B had a clear duty to inform its members about selective and misleading expert reports which disadvantage the very individuals they advocate for and represent, as well as a duty to

advise OTLA members of ways to protect their clients' interests against unfair practices by experts and assessment companies. B also had a professional duty as a lawyer to participate in improving the administration of justice and to share best practices. Members of the OTLA Listserv — all plaintiff-side personal injury lawyers — unquestionably had a reciprocal duty as well as an interest in receiving B's communication. Being alerted to questionable conduct by experts and assessment companies — and advised of ways to guard against such conduct — was of professional significance to them and especially to their clients. B or her colleagues did not waive their professional obligation to exchange such information by joining a Listserv. B's communication, therefore, was made by a person with a professional interest and duty to share the information with her colleagues, who had a corresponding interest and duty to receive it. This supports the conclusion that her defence of qualified privilege has a real prospect of success based on both the facts and the law. It is also hard to see how B could have exceeded the bounds of her duty to inform OTLA members of selective and misleading expert reports, by identifying an expert who she reasonably believed to have engaged in precisely that conduct. It was clearly relevant and reasonably appropriate for B, in fulfilling her duty to protect her colleagues and their clients, to identify P, a frequently-retained expert in whose cases it had proven to be especially important to obtain full disclosure of the insurer's files. It would defeat the purpose of qualified privilege to withhold the defence from B because she chose to identify P by name.

Further, B sent her email while she was president-elect of the OTLA through a Listserv restricted to members of the OTLA who practiced plaintiff-side personal injury law. Members of the Listserv were bound by a wide-ranging undertaking to keep the information strictly confidential. As lawyers, Listserv members were also required by the *Rules of Professional Conduct* to strictly and scrupulously fulfill their undertakings. There was no reason for B to expect that Listserv members would breach these undertakings and, in so doing, breach their professional obligations. There is also nothing in the record to support a finding of malice against B, either due to recklessness or on any other basis. Additionally, the motion judge concluded that there was no evidence to reasonably support the inference that B acted with malice in publishing her email, a conclusion fully supported by the record, and this conclusion is entitled to deference.

In this case, protecting B's expression on matters of public interest outweighs the harm to P's reputation. Any harm resulting from the leak of B's email was caused by unforeseen and unforeseeable communication by others, not by B sending the email to its intended audience of lawyers on the Listserv. B's email addressed matters of critical importance to the administration of justice and there is a broader public interest in protecting B's expression, as permitting a defamation suit to proceed would produce a considerable chilling effect.

P's motion to admit fresh evidence should be dismissed. Most of the material he seeks to admit is clearly irrelevant and inadmissible. What is left are two

unsworn letters sent by email between counsel in a related matter. The emails relate to issues that were, from the day P brought his defamation action, live and in serious dispute but unchallenged and unexplored by him, and were rejected as fresh evidence four years ago by the motion judge. Admitting the emails would require the Court to overturn the exercise of discretion by the motion judge, ignore P's demonstrable lack of due diligence, and accept unsworn, untested, hearsay evidence, all to obtain information that would not, in any event, have affected the result of B's dismissal hearing. Such an outcome would not only frustrate the purposes of s. 137.1, it would inexplicably depart from the Court's jurisprudence on the admission of fresh evidence.

Cases Cited

By Côté J.

Applied: *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22; **referred to:** *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640; *People ex rel. Karlin v. Culkan*, 162 N.E. 487 (N.Y. 1928); *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3; *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *R.P. v. R.C.*, 2011 SCC 65, [2011] 3 S.C.R. 819; *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809; *United States of America v. Shulman*, 2001 SCC 21, [2001] 1 S.C.R. 616; *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 2, [2000] 1 S.C.R. 44; *R. v. Warsing*, [1998] 3 S.C.R. 579; *Platnick v. Bent (No. 2)*, 2016 ONSC 7474; *Kuczera (Re)*, 2018 ONCA 322, 58

C.B.R. (6th) 227; *Calaheson v. Gift Lake Metis Settlement*, 2016 ABCA 185, 38 Alta. L.R. (6th) 30; *R. v. 1275729 Ontario Inc.* (2005), 205 O.A.C. 359; *Elliott v. Sagl*, 2019 ONSC 2490; *R. v. Stolar*, [1988] 1 S.C.R. 480; *R. v. Moucho*, 2019 ONSC 3463, 53 M.V.R. (7th) 131; *R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *RTC Engineering Consultants Ltd. v. Ontario (Solicitor General)* (2002), 58 O.R. (3d) 726; *Adam v. Ward*, [1917] A.C. 309; *Rubin v. Ross*, 2013 SKCA 21, 409 Sask. R. 202, leave to appeal refused, [2013] 3 S.C.R. x; *Young v. Toronto Star Newspapers Ltd.* (2005), 77 O.R. (3d) 680; *Awan v. Levant*, 2016 ONCA 970, 133 O.R. (3d) 401; *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633.

By Abella J. (dissenting)

1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3; *Adam v. Ward*, [1917] A.C. 309; *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182; *MacDonald v. Sun Life Assurance Company of Canada*, 2006 CanLII 41669; *Burwash v. Williams*, 2014 ONSC 6828; *Daggitt v. Campbell*, 2016 ONSC 2742, 131 O.R. (3d) 423; *Douglas v. Tucker*, [1952] 1 S.C.R. 275; *Netupsky v. Craig*, [1973] S.C.R. 55; *McLoughlin v. Kutasy*, [1979] 2 S.C.R. 311; *Merit Consultants*

International Ltd. v. Chandler, 2014 BCCA 121, 60 B.C.L.R. (5th) 214; *Wang v. British Columbia Medical Assn.*, 2014 BCCA 162, 57 B.C.L.R. (5th) 217; *RTC Engineering Consultants Ltd. v. Ontario (Solicitor General)* (2002), 58 O.R. (3d) 726; *Chohan v. Cadsky*, 2009 ABCA 334, 464 A.R. 57; *Laufer v. Bucklaschuk* (1999), 145 Man. R. (2d) 1; *Board of Trustees of the City of Saint John Employee Pension Plan v. Ferguson*, 2008 NBCA 24, 328 N.B.R. (2d) 319; *Cush v. Dillon*, [2011] HCA 30, 243 C.L.R. 298; *Birchwood Homes Limited v. Robertson*, [2003] EWHC 293; *Tsatsi v. College of Physicians and Surgeons of Saskatchewan*, 2018 SKCA 53; *Foulidis v. Baker*, 2014 ONCA 529, 323 O.A.C. 258; *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067; *Jerome v. Anderson*, [1964] S.C.R. 291; *Hodgson v. Canadian Newspapers Co.* (2000), 49 O.R. (3d) 161; *Smith v. Cross*, 2009 BCCA 529, 99 B.C.L.R. (4th) 214; *Martin v. Lavigne*, 2011 BCCA 104, 17 B.C.L.R. (5th) 132; *Cimolai v. Hall*, 2007 BCCA 225, 240 B.C.A.C. 53; *Davies & Davies Ltd. v. Kott*, [1979] 2 S.C.R. 686; *Korach v. Moore* (1991), 1 O.R. (3d) 275; *Wells v. Sears*, 2007 NLCA 21, 264 Nfld. & P.E.I.R. 171; *Horrocks v. Lowe*, [1975] A.C. 135; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Crookes v. Newton*, 2011 SCC 47, [2011] 3 S.C.R. 269; *Breeden v. Black*, 2012 SCC 19, [2012] 1 S.C.R. 666; *Platnick v. Bent (No. 2)*, 2016 ONSC 7474; *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423; *McDonald v. Brookfield Asset Management Inc.*, 2016 ABCA 375; *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 2, [2000] 1 S.C.R. 44; *Bukshtynov v. McMaster University*, 2019

ONCA 1027; *R. v. M.(P.S.)* (1992), 77 C.C.C. (3d) 402; *Iroquois Falls Power Corp. v. Ontario Electricity Financial Corp.*, 2016 ONCA 271, 398 D.L.R. (4th) 652.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 2(b).

Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 137.1, 137.2, 137.3.

Insurance Act, R.S.O. 1990, c. I.8.

Libel and Slander Act, R.S.O. 1990, c. L. 12, s. 22.

Protection of Public Participation Act, 2015, S.O. 2015, c. 23.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rr. 30.10, 31.10.

Rules of Professional Conduct [made under the *Law Society Act*, R.S.O. 1990, c. L.8], rr. 2.1-2, 3.1-1, 5.1-6, 5.6-1, 7.2-1, 7.2-4, 7.2-11, 7.5-1.

Rules of the Supreme Court of Canada, SOR/2002-156, r. 47.

Statutory Accident Benefits Schedule — Effective September 1, 2010, O. Reg. 34/10, s. 1.

Supreme Court Act, R.S.C. 1985, c. S-26, s. 62(3).

Authors Cited

Brown, Donald J. M., with the assistance of David Fairlie. *Civil Appeals*. Toronto: Thomson Reuters, 2019 (loose-leaf updated December 2019, release 4).

Brown, Raymond E. *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, 2nd ed. Toronto: Thomson Reuters, 2019 (loose-leaf updated 2020, release 2).

Downard, Peter A. *The Law of Libel in Canada*, 4th ed. Toronto: LexisNexis, 2018.

Ontario. Ministry of Finance. *Ontario Automobile Insurance Dispute Resolution System Review: Final Report*. Toronto, 2014.

Ontario. Ministry of the Attorney General. *Anti-Slapp Advisory Panel: Report to the Attorney General*. Toronto, 2010.

Scott, Michaelin, and Chris Tollefson. “Strategic Lawsuits Against Public Participation: The British Columbia Experience” (2010), 19 *RECIEL* 45.

Underwood, Graham, and Jonathan Penner. *Electronic Evidence in Canada*. Toronto: Thomson Reuters, 2019 (loose-leaf updated 2019, release 1).

Young, Hilary. “Rethinking Canadian Defamation Law as Applied to Corporate Plaintiffs” (2013), 46 *U.B.C. L. Rev.* 529.

APPEALS from a judgment of the Ontario Court of Appeal (Doherty, Brown and Huscroft JJ.A.), 2018 ONCA 687, 419 C.R.R. (2d) 61, 417 C.R.R. (2d) 350, 82 C.C.L.I. (5th) 191, 23 C.P.C. (8th) 275, 426 D.L.R. (4th) 60, [2018] O.J. No. 4445 (QL), 2018 CarswellOnt 14124 (WL Can.), setting aside a decision of Dunphy J., 2016 ONSC 7340, 136 O.R. (3d) 339, 369 C.R.R. (2d) 243, 405 D.L.R. (4th) 674, 62 C.C.L.I. (5th) 115, 95 C.P.C. (7th) 326, [2016] O.J. No. 6223 (QL), 2016 CarswellOnt 19079 (WL Can.). Appeals dismissed, Abella, Karakatsanis, Martin and Kasirer JJ. dissenting.

Howard Winkler and Eryn Pond, for the appellant Maia Bent.

Terrence J. O’Sullivan, Andrew Winton and Paul Michell, for the appellant Lerner LLP.

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

Peter Kolla, Amanda Bertucci and Maia Tsurumi, for the intervener the British Columbia Civil Liberties Association.

Nader R. Hasan and Priyanka Vittal, for the intervener Greenpeace Canada.

Adam Goldenberg and Simon Cameron, for the intervener the Canadian Constitution Foundation.

Julia Croome, Joshua Ginsberg and Sue Tan, for the intervener the Ecojustice Canada Society.

David Wotherspoon, Rajit Mittal and Amber Prince, for the interveners the West Coast Legal Education and Action Fund, the Atira Women's Resource Society, the B.W.S.S. Battered Women's Support Services Association and the Women Against Violence Against Women Rape Crisis Center.

Alexi N. Wood and Jennifer P. Saville, for the intervener the Canadian Civil Liberties Association.

Sean A. Moreman and Katarina Germani, for the intervener the Canadian Broadcasting Corporation.

Joanna Birenbaum and *Alicja Putch*, for the intervener the Barbra Schlifer Commemorative Clinic.

Iain A. C. MacKinnon and *Justin Linden*, for the interveners the Ad IDEM / Canadian Media Lawyers Association, the Canadian Journalists for Free Expression, CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, the Aboriginal Peoples Television Network and Postmedia Network Inc.

The judgment of Wagner C.J. and Moldaver, Côté, Brown and Rowe JJ. was delivered by

CÔTÉ J. —

I. Introduction

[1] Freedom of expression and its relationship to the protection of reputation has been subject to an assiduous and judicious balancing over the course of this Court’s jurisprudential history. While in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, this Court recognizes the importance of freedom of expression as the cornerstone of a pluralistic democracy, this Court has also recognized that freedom of expression is not absolute — “[o]ne limitation on free expression is the law of defamation, which protects a person’s reputation from

unjustified assault”: *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 2, per McLachlin C.J. Indeed, “the right to free expression does not confer a licence to ruin reputations”: para. 58. That is because this Court has likened reputation to a “plant of tender growth [whose] blossom, once lost, is not easily restored”: *People ex rel. Karlin v. Culkin*, 162 N.E. 487 (N.Y. 1928), at p. 492, per Cardozo J., cited by Cory J. in *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, at para. 92. Values, therefore, are not without countervailing considerations.

[2] In these appeals, the Court must apply the framework set out in *Pointes Protection* in order to determine whether the respondent’s defamation claim against the appellants can proceed or whether it must be dismissed under s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (“CJA”). In effect, this Court must consider the delicate equilibrium between two fundamental values in a democratic society, freedom of expression and the protection of reputation, vis-à-vis the *Protection of Public Participation Act, 2015*, S.O. 2015, c. 23.

[3] For the reasons that follow, I would dismiss the appeals before this Court, and accordingly, I would dismiss the s. 137.1 motion and allow the respondent’s lawsuit in defamation to continue. While the appellant Maia Bent (“Ms. Bent”) successfully meets her threshold burden under s. 137.1(3), the respondent, Dr. Howard Platnick (“Dr. Platnick”), successfully clears both the merits-based

hurdle and the public interest hurdle under s. 137.1(4)(a) and s. 137.1(4)(b), respectively.

[4] Furthermore, and in order to avoid any misunderstanding, it is important to mention at the outset that a s. 137.1 motion is unequivocally not a determinative adjudication of the merits of a claim: *Pointes Protection*, at paras. 37, 50, 52 and 71. Instead, the implication of the findings that I set out herein is simple: Dr. Platnick deserves to have his day in court to potentially vindicate his reputation — “a fundamental value in its own right in a democracy”: para. 81. At trial, judicial powers of inquiry are broader, *viva voce* evidence can be given, and ultimate assessments of credibility can be made. Nothing in these reasons can, or should, be taken as prejudging the merits of Dr. Platnick’s underlying defamation claim either in fact or in law. Simply put, my resolution of this s. 137.1 motion means only that Dr. Platnick’s claim is one that deserves to be adjudicated on the merits, and is not one that ought to be summarily screened out at this early stage.

II. Background

A. *Factual Overview*

[5] The appellant Ms. Bent is a lawyer and partner at the law firm Lerner LLP (“Lerner”), which is also an appellant before this Court. Ms. Bent is a member and, at the relevant time, was the president-elect of the Ontario Trial Lawyers Association (“OTLA”). The OTLA is an organization comprised of lawyers,

law clerks, and law students who represent persons injured in motor vehicle accidents; it consists of approximately 1,600 members.

[6] The respondent, Dr. Platnick, is a medical doctor of general practice who worked as a family physician from 1988 to 2011. Since 1991, he has typically been hired through insurance companies to review other medical specialists' assessments of persons injured in motor vehicle accidents and to prepare a final report with an ultimate assessment himself — as in this case.

[7] Dr. Platnick has commenced a lawsuit against Ms. Bent and Lerner alleging defamation and damages in the amount of \$16.3 million. That is the underlying proceeding at issue here, which Ms. Bent is asking this Court to dismiss pursuant to s. 137.1 of the *CJA*.

[8] Of critical importance to these appeals, the following email — sent by Ms. Bent to a Listserv (i.e. an email listing, the parameters of which I explain in detail later in these reasons) of approximately 670 OTLA members — is the basis for Dr. Platnick's defamation action:

Subject: Sibley Alters Doctors' Reports
Date: November 10, 2014¹

...

Dear Colleagues,

¹ Dunphy J. of the Ontario Superior Court referred to the date of the email as November 14, 2014, in his reasons: 2016 ONSC 7340, 136 O.R. (3d) 339. The correct date is November 10, 2014.

I am involved in an [a]rbitration on the issue of catastrophic impairment where Sibley aka SLR Assessments did the multi-disciplinary assessments for TD Insurance. Last Thursday, under cross-examination the IE neurologist, Dr. King, testified that large and critically important sections of the report he submitted to Sibley had been removed without his knowledge or consent. The sections were very favourable to our client. He never saw the final version of his report which was sent to us and he never signed off on it.

He also testified that he never participated in any “consensus meeting” and he never was shown or agreed to the Executive Summary, prepared by Dr. Platnick, which was signed by Dr. Platnick as being the consensus of the entire team.

This was NOT the only report that had been altered. We obtained copies of all the doctor[s’] file[s] and drafts and there was a paper trail from Sibley where they rewrote the doctors’ reports to change their conclusion from our client having a catastrophic impairment to our client not having a catastrophic impairment.

This was all produced before the arbitration but for some reason the other lawyer didn’t appear to know what was in the file (there were thousands of pages produced). He must have received instructions from the insurance company to shut it down at all costs on Thursday night because it offered an obscene amount of money to settle, which our client accepted.

I am disappointed that this conduct was not made public by way of a decision but I wanted to alert you, my colleagues, to always get the assessor’s and Sibley’s files. This is not an isolated example as I had another file where Dr. Platnick changed the doctor’s decision from a marked to a moderate impairment. [Emphasis added.]

(A.R., vol. III, at pp. 31-32)

[9] As is clear on its face, Ms. Bent made two statements in her email that specifically mention Dr. Platnick by name. Each of them refers to a different factual matrix, but makes a similar allegation that Dr. Platnick “altered” reports. The first refers to what I will call the “Carpenter Matter”. The second pertains to a different

matter, which I will refer to as the “Dua Matter”. I set out the relevant factual predicate for each matter below.

(1) Carpenter Matter, November 2014

[10] In November 2014, Ms. Bent was acting as counsel in an arbitration with respect to an insurance coverage dispute. The crux of that dispute depended on whether Ms. Bent’s client — Dr. Carpenter, who had been injured in a motor vehicle accident — had suffered a “catastrophic impairment”. A “catastrophic impairment” is a technical designation which would have entitled Dr. Carpenter to enhanced medical and other benefits from her insurer. The determination of such a designation is made on the basis of the criteria and guidelines set out in, or incorporated into, the *Statutory Accident Benefits Schedule — Effective September 1, 2010*, O. Reg. 34/10, s. 1 (“SABS”), under the *Insurance Act*, R.S.O. 1990, c. I.8.

[11] To assess whether Dr. Carpenter should be given a catastrophic impairment designation, the insurer arranged for a series of independent medical examinations by various medical professionals through an assessment company named Sibley & Associates (“Sibley”).² While the medical professionals who perform such examinations have considerable expertise in their respective fields of practice, they have varying levels of understanding and expertise with regard to the *SABS* regime. Here, none of the medical experts were from or practised in Ontario, and the record reveals that they were not familiar with Ontario’s *SABS* regime and its

² Sibley & Associates has also been referred to as Sibley SLR and SLR Assessments.

criteria and classifications for catastrophic impairment designations. They were nonetheless retained to conduct their own medical assessments of Dr. Carpenter and to forward those assessments to Sibley.

[12] Sibley also retained Dr. Platnick as a “lead physician” in order to prepare a final report for it that would make an ultimate determination of whether Dr. Carpenter warranted a catastrophic impairment designation. Dr. Platnick, an Ontario physician who had previously acted in this role on numerous occasions, had expertise with regard to the *SABS* — an Ontario regulation — and its classifications and calculations relating to catastrophic impairment designations.

[13] Accordingly, Dr. Platnick’s report on Dr. Carpenter’s catastrophic impairment assessment was to be based on the applicable criteria in the *SABS*. Because it was not Dr. Platnick’s role to examine Dr. Carpenter himself, nor did he do so, his report was based on the data from the team of medical experts retained by Sibley who had actually conducted the individual medical assessments of Dr. Carpenter. As mentioned above, those medical experts forwarded their assessments *to* Sibley, since they had been retained *by* Sibley — they did not correspond with Dr. Platnick. In turn, Sibley provided those medical assessments and expert reports to Dr. Platnick so that he could prepare his ultimate report to send to Sibley.

[14] The contents of Dr. Platnick’s report are important to these appeals. He titled his report “Catastrophic Impairment Determination” and began it with the

following sentence written in bold: “My calculations detailed below incorporate and consider the findings of all assessors on this CAT [Catastrophic] Assessment Team” (A.R., vol. IV, at p. 187). Dr. Platnick’s five-page report examined the various criteria in the *SABS* that were relevant to Dr. Carpenter’s catastrophic impairment assessment, making extensive reference to the medical assessments done by the specialists retained by Sibley and periodically stating *his own* conclusions under the various criteria: indeed, Dr. Platnick used the words “I would conclude that” or “I was not able to identify” (p. 189 (emphasis added)). On the final page of the report, under the heading “Impairment Calculation”, Dr. Platnick wrote that “I complete the following calculation” and then that, based on that calculation, “I would conclude” that Dr. Carpenter “does not meet the catastrophic level based upon the *SABS* and utilizing the OCF-19 Form”: p. 191 (emphasis added). Crucial to this case is the fact that, after setting forth his conclusion, Dr. Platnick wrote that “[i]t is the consensus conclusion of this assessment that [Dr. Carpenter] does not achieve the catastrophic impairment rating as outlined in the *SABS*”: p. 191 (emphasis added).

[15] Dr. Platnick sent his report to Sibley, as he was meant to do. Attached to the back of the report was an acknowledgment page, which had a place for the signatures of the four specialists who had assessed Dr. Carpenter to acknowledge that Dr. Platnick’s report reflected the “consensus conclusion of this assessment”: p. 192. Dr. Platnick sent the report to Sibley without any signatures. As mentioned above, the medical experts who had assessed Dr. Carpenter had been retained by Sibley and

were not in contact with Dr. Platnick at any point. In the normal course of events, Sibley was supposed to obtain those signatures.

[16] Sibley did not obtain any signatures and, instead, provided the insurer and Ms. Bent with a document entitled “Catastrophic Determination Executive Summary”: pp. 180-85. The document was identical to Dr. Platnick’s report, but did not affix the acknowledgement page and had a different title page. In due course, Ms. Bent received a copy of Dr. Platnick’s original report with the unsigned acknowledgement page, as well as the individual assessments conducted by the specialists.

[17] On November 6, 2014, at the arbitration hearing before the Financial Services Commission of Ontario, testimony was given by Dr. King, one of the medical experts retained by Sibley who had conducted the neurological assessment of Dr. Carpenter. Of relevance, Dr. King testified on cross-examination that portions of his final assessment report had been omitted, without his knowledge or consent, from Dr. Platnick’s final report, that he had not seen or signed Dr. Platnick’s final report, and that he had never been “part of [a] consensus opinion”: A.R., vol. V, at p. 35.

[18] On November 7, 2014, the arbitration involving Dr. Carpenter was settled. The terms of the settlement involved Dr. Carpenter receiving a catastrophic impairment designation, a reinstatement of benefits, and payments of past medical and rehabilitative expenses with interest. The insurer also agreed to indemnify Dr. Carpenter in full for fees and disbursements.

[19] On November 10, 2014, Ms. Bent sent the alleged defamatory email through the OTLA Listserv. The foregoing factual context is particularly crucial to the following allegation made by Ms. Bent in her email:

[Dr. King] also testified that he never participated in any “consensus meeting” and he never was shown or agreed to the Executive Summary, prepared by Dr. Platnick, which was signed by Dr. Platnick as being the consensus of the entire team.

(2) Dua Matter, November 2011

[20] As I mentioned above, Ms. Bent’s email of November 10, 2014 to the OTLA Listserv also made reference to another matter, which had taken place in November 2011, three years before she sent the email.

[21] In that matter, much like the Carpenter Matter, Dr. Platnick had been retained to write a final “Catastrophic Determination” report on whether a victim of a motor vehicle accident should be given a catastrophic impairment designation.

[22] Dr. Varinder Dua was one of the medical specialists retained to conduct an assessment of the victim. As with the Carpenter Matter, Dr. Platnick’s ultimate report was to be informed by Dr. Dua’s assessment. Dr. Dua’s report found that “[o]verall, [victim] ha[d] Moderate impairment (Class 4)” and accordingly that a catastrophic impairment designation was warranted: A.R., vol. V, at p. 214.

[23] I note here that it has been pointed out to this Court, and it is not disputed, that “*Moderate* Impairment” carries a rating of “Class 3”, which does *not* constitute a catastrophic impairment designation. A “Class 4” rating corresponds to a “*Marked* Impairment” and *does* constitute a catastrophic impairment designation. Therefore, Dr. Dua’s assessment of “Moderate impairment (Class 4)” was, by definition, internally contradictory.

[24] Dr. Dua issued a *second* version of the report in which she changed the *SABS* classification to “Moderate impairment (Class 3)”, which meant that a catastrophic impairment designation was *not* warranted. Even though the second report was prepared after the initial report, Dr. Dua gave it the same date as her first report.

[25] Importantly, Dr. Platnick’s final report stated that “Dr. Dua rated [victim] overall at moderate impairment (Class 3)”, which meant that a catastrophic impairment designation was not warranted: A.R., vol. V, at p. 219. In this sense, Dr. Platnick’s final report appeared to be consistent with the conclusion in Dr. Dua’s second report, and it made no reference to the existence of the first version of the report.

[26] Ms. Bent, who was acting in the matter on behalf of the victim, was served only with a copy of Dr. Dua’s first report and Dr. Platnick’s final report, which Ms. Bent believed to display a discrepancy. She had no reason to know of a second version of Dr. Dua’s report and did not take steps to investigate the discrepancy.

[27] The parties do not dispute that Dr. Platnick communicated with Dr. Dua after she submitted her first report. The parties also do not dispute that Dr. Dua prepared a second version of the report after Dr. Platnick spoke with her. What is in dispute is what caused Dr. Dua to change her assessment and prepare a second report. Dr. Platnick argues that, at the behest of the insurance assessment company (known as the “vendor company”), which was seeking clarification, he pointed out the internal inconsistency to Dr. Dua, and Dr. Dua did not so much change her assessment as clarify what she had really meant, of her own volition. According to Ms. Bent, however, Dr. Platnick “changed the doctor’s decision from a marked to a moderate impairment” through inappropriate persuasion or otherwise.

[28] The foregoing took place in November 2011 and provides an important factual context in considering the following excerpt from Ms. Bent’s November 2014 email making reference to that incident:

This is not an isolated example as I had another file where Dr. Platnick changed the doctor’s decision from a marked to a moderate impairment.

(3) Leak and Republication

[29] Although Ms. Bent’s email was sent only to the OTLA Listserv, the email was eventually leaked anonymously by a member of the OTLA despite a confidentiality undertaking required by the Listserv.

[30] As a result, on December 29, 2014, an article was published in *Insurance Business Canada* magazine, which reproduced Ms. Bent's email in its entirety. The article was titled "Medical files 'routinely altered' to suit insurers, claims FAIR", and in reproducing Ms. Bent's email in full, referred to "testimony from Maia L. Bent, a partner at the law firm of Leners": A.R., vol. XI, at pp. 28-30.

[31] Dr. Platnick served KMI Publishing and Events Ltd. ("KMI"), the owners of *Insurance Business Canada*, with a libel notice on January 22, 2015. That claim is not at issue before this Court, but nonetheless shares part of its factual matrix with this case insofar as the issue of republication is concerned.

(4) Proceeding Against the Appellants

[32] After his requests to Ms. Bent for an apology went unanswered, Dr. Platnick commenced a lawsuit in defamation against both Ms. Bent and Leners on January 27, 2015.

[33] After having filed a Statement of Defence, Ms. Bent filed a motion under s. 137.1 of the *CJA* to dismiss Dr. Platnick's lawsuit in defamation against her. Leners also filed a Statement of Defence, but it did not file, for its own part, a s. 137.1 motion. However, as the Court of Appeal explained, it is understood that if Ms. Bent's motion succeeds, then the action should also be dismissed against Leners. The merits of Ms. Bent's s. 137.1 motion are before this Court.

B. *Procedural History*

- (1) Ontario Superior Court of Justice (Dunphy J.), 2016 ONSC 7340, 136 O.R. (3d) 339

[34] The motion judge, Dunphy J. of the Ontario Superior Court, allowed Ms. Bent's s. 137.1 motion and dismissed Dr. Platnick's defamation proceeding.

[35] Dunphy J. found that the email communication in question related to a matter of public interest within the meaning of s. 137.1(3) but that Dr. Platnick had been unable to discharge his burden under s. 137.1(4): paras. 61-79.

[36] While Dunphy J. declined to determine whether Dr. Platnick's claim had substantial merit under s. 137.1(4)(a)(i), he found under s. 137.1(4)(a)(ii) that there was "credible and compelling" evidence that Ms. Bent's defences of justification and qualified privilege were "reasonably likely... [to] succeed": paras. 93-118. Dunphy J. added that he was not satisfied that the public interest in permitting Dr. Platnick's defamation suit to proceed outweighed the public interest in protecting Ms. Bent's expression under s. 137.1(4)(b): paras. 119-35.

- (2) Court of Appeal for Ontario (Doherty, Brown and Huscroft JJ.A.), 2018 ONCA 687, 426 D.L.R. (4th) 60

[37] Doherty J.A., writing for a unanimous Court of Appeal, set aside the motion judge's determination, dismissed Ms. Bent's s. 137.1 motion, and remitted Dr. Platnick's defamation claim to the Superior Court for consideration: para. 127.

[38] Doherty J.A. agreed with the motion judge's assessment under s. 137.1(3) that the email communication related to a matter of public interest. However, he found that the motion judge had erred in his assessment of both s. 137.1(4)(a) and s. 137.1(4)(b): para. 4.

[39] With respect to substantial merit, Doherty J.A. had "no difficulty concluding that there [were] reasonable grounds to believe" that Dr. Platnick's claim had substantial merit under s. 137.1(4)(a)(i), as Ms. Bent's "defence to the claim is not that her comments were not potentially defamatory, but rather that they were true or protected by privilege": paras. 53-54. With respect to s. 137.1(4)(a)(ii), Doherty J.A. found that there were grounds to believe that neither defence would succeed and concluded that Dr. Platnick had met his burden of demonstrating "no valid defence": paras. 56-93. More specifically, Doherty J.A. found that the defence of justification was not valid because the sting, or the main thrust, of the two statements was not substantially true and that the defence of qualified privilege was not valid because the second statement either "was made maliciously or with reckless disregard for the truth, or because it was not appropriate to the legitimate purpose of the occasion attracting the privilege": paras. 73, 84 and 90. Finally, the Court of Appeal was satisfied that the potential harm to Dr. Platnick outweighed the public

interest in protecting Ms. Bent’s expression because this case bore none of the indicia of a SLAPP³ and because there was sufficient harm attributable to the initial publication irrespective of republication: paras. 95-110.

C. *Motion to Adduce Fresh Evidence*

[40] Prior to the hearing of these appeals, Dr. Platnick sought this Court’s leave to adduce fresh evidence pursuant to s. 62(3) of the *Supreme Court Act*, R.S.C. 1985, c. S-26 and Rule 47 of the *Rules of the Supreme Court of Canada*, SOR/2002-156. The motion was deferred to the panel hearing the appeals. Dr. Platnick’s motion contained the following evidence for which he sought admission for this Court’s consideration in these appeals.

[41] Exhibit B (the “Dua Letter”) is a letter from Dr. Dua bolstering Dr. Platnick’s evidence that the allegation that he “changed” her report is false: *Motion to Adduce Fresh Evidence*, at pp. 37-38. Specifically, Dr. Dua explains in her letter that Dr. Platnick called her to identify areas of concern that “required clarification”: p. 37. She says that she “corrected the typographical error from ‘Class 4’ to ‘Class 3’” of her own accord and that “at no time did Dr. Platnick pressure me to change my report. Nor did he conduct himself in any inappropriate fashion”: pp. 37-38 (emphasis in original). Dr. Dua states pointedly that “[t]o suggest that Dr. Platnick changed my report is simply untrue. Further, to characterize the

³ Strategic Lawsuit Against Public Participation.

events in question as an attempt by Dr. Platnick to manipulate the evidence is also completely inaccurate”: p. 38.

[42] Exhibit G contains excerpts from an examination for discovery of Dr. King in a parallel proceeding in which Dr. King admitted that he had been mistaken when he said that parts of his report had been removed without his knowledge and consent in the Carpenter Matter.

[43] Exhibit H is Dr. Platnick’s pleadings in a parallel litigation between him and Dr. Carpenter.

[44] Exhibit K is Dr. Platnick’s proposed Amended Statement of Claim for the underlying proceeding in this case.

[45] Exhibit L is an excerpt from KMI’s Statement of Defence in the parallel defamation proceeding commenced by Dr. Platnick against KMI. Approximately one week after Ms. Bent’s cross-examination on this s. 137.1 motion, KMI delivered its Statement of Defence, in which it pleaded that prior to publishing an article that reproduced Ms. Bent’s email of November 10, 2014, it had interviewed Ms. Bent, who had authorized republication.

[46] Exhibits N and R (the “KMI Letters”) are letters from counsel for the KMI defendants to Dr. Platnick’s counsel attesting to a telephone conversation that took place between Ms. Bent and Donald Horne, the Associate Editor of *Insurance*

Business Canada magazine, after the leak regarding a potential interview for publication. In those letters, the following information is stipulated by KMI: (i) “Ms. Bent did not object to or have any concerns” about the republication of her email; (ii) Ms. Bent did not discourage the republication, nor did she inform KMI that her email had been published on a private OTLA Listserv and that any leak was a serious professional and ethical breach of the terms and conditions of that Listserv; (iii) had KMI been aware of the aforesaid, it would not have proceeded with the republication; (iv) since Ms. Bent raised no objections or concerns, KMI believed it could proceed with the republication: Motion to Adduce Fresh Evidence, at p. 156.

[47] Prior to the hearing of these appeals, Dr. Platnick also sought leave to update his fresh evidence motion. In particular, he sought leave to adduce evidence that the parallel Carpenter litigation had been abandoned by Dr. Carpenter with no costs against him. Since Dr. Platnick’s initial motion to adduce fresh evidence was deferred to the panel hearing the appeals, the decision whether to allow Dr. Platnick to update that fresh evidence was also deferred to the panel hearing the appeals.

III. Analysis

[48] In order to properly assess Ms. Bent’s s. 137.1 motion, it is first necessary to evaluate Dr. Platnick’s motion to adduce fresh evidence. Indeed, the determination of the latter impacts the evidentiary record that ultimately informs the analysis of the s. 137.1 motion. Although I would admit part of Dr. Platnick’s fresh evidence, it is important to clarify that, just as a s. 137.1 motion is not a determinative adjudication

of the merits of a claim, my determination on admissibility or exclusion here does not bear on the evidence's ultimate admissibility at trial — in other words, my conclusions with respect to Dr. Platnick's motion to adduce fresh evidence are limited to considering admissibility in the context of this s. 137.1 motion.

A. *Motion to Adduce Fresh Evidence*

[49] This Court has relied on and affirmed the test from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775, as the proper test for assessing the admissibility of fresh evidence on appeal: see *R.P. v. R.C.*, 2011 SCC 65, [2011] 3 S.C.R. 819, at para. 50; *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 107; *United States of America v. Shulman*, 2001 SCC 21, [2001] 1 S.C.R. 616, at paras. 43-44; *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 2, [2000] 1 S.C.R. 44; *R. v. Warsing*, [1998] 3 S.C.R. 579.

[50] For fresh evidence to be admitted, the *Palmer* test requires consideration of the following four factors:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and

- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. [p. 775]

[51] In *Pointes Protection*, this Court expressly contemplates the “potentiality of future evidence arising”: para. 37. This is based on the expedited nature of s. 137.1 motions, which are required to be heard in a statutorily imposed short time frame. That is exemplified in this case, where Dr. Platnick had to submit his evidentiary record within 25 days after the notice of motion was filed. In this sense, as recognized in *Pointes Protection*, s. 137.1 motions are unlike summary judgment motions, where parties are expected to put their best foot forward; in other words, on a s. 137.1 motion, it is acknowledged that parties are under a mandated time constraint and are consequently limited in the evidentiary record they can put forward.

[52] This does *not*, however, give parties *carte blanche* to file motions to adduce fresh evidence. *Palmer* must be adhered to, and for this reason, as I note below, I would not admit all of the fresh evidence. It is important to note here, however, that this case is a transitional one: the considerable uncertainty surrounding s. 137.1 motions — due to a lack of judicial guidance with respect to both the test for withstanding a s. 137.1 motion, as well as the nature or comprehensiveness of the evidence required on a such a motion — militates in favour of granting this particular motion to adduce fresh evidence in part.

[53] Accordingly, I would admit both the Dua Letter (Exhibit B) and the KMI Letters (Exhibits N and R), and I would decline to admit the rest of the evidence that

Dr. Platnick included with his motion. Below, I briefly explain why I would specifically admit the Dua Letter and the KMI Letters in light of *Palmer*. I find that the other evidence is either not relevant to the decisive issues in these appeals or is non-probative; therefore, I need not elaborate any further on its exclusion.

(1) Due Diligence

[54] The Dua Letter could not have been adduced at an earlier time and is not being submitted now as a result of a lack of due diligence. Dr. Platnick's evidentiary record was filed in May 2016. The Dua Letter is dated November 15, 2017 and was received on November 20, 2017, well after the initial hearing on the motion, and five months after the oral argument at the Court of Appeal. Further, Dr. Platnick's affidavit (dated May 20, 2016) concerning the s. 137.1 motion demonstrates his due diligence in trying to obtain this evidence earlier. According to that affidavit, Dr. Dua did not respond to his telephone messages until May 17, 2016. While this allowed Dr. Platnick to enter Dr. Dua's final report in the record at the eleventh hour, it was an insufficient amount of time to obtain a letter from Dr. Dua herself akin to the one submitted to this Court.

[55] Likewise, the KMI Letters could not have been adduced at an earlier time and are not being submitted now as a result of a lack of due diligence. The Letters were exchanged well after the hearing of the s. 137.1 motion which took place on June 27, 2016 — indeed, the Letters from KMI are dated August 30, 2016, and September 20, 2016. Of course, the admissibility of the Letters does not depend

merely on when they came into Dr. Platnick's possession, but rather, depends on whether they could have been obtained prior to the hearing as a result of due diligence. In my view, they could not have been, for the reasons I explain below.

[56] In her Statement of Defence, Ms. Bent denied having ever given an interview to KMI's magazine. Thus, Dr. Platnick had no foundation for cross-examining her further on the subject on June 6, 2016. Following Ms. Bent's cross-examination, however, KMI filed its Statement of Defence on June 13, 2016, in which it stipulated that Ms. Bent had in fact given an interview to its magazine in some capacity. With this newly conflicting evidence, Dr. Platnick pursued the matter further through prompt correspondence with KMI (i.e. due diligence). It was that correspondence that finally gave rise to the KMI Letters.

[57] This state of affairs belies the motion judge's concluding observation that Dr. Platnick offered no "reasonable explanation for the failure to place" the KMI Letters "before the court prior to conducting his cross-examination of Ms. Bent": *Platnick v. Bent (No. 2)*, 2016 ONSC 7474, at para. 71 (CanLII). This constitutes an error in principle on the part of the motion judge.

[58] Although Dr. Platnick did not mention the reference to the interview in KMI's Statement of Defence at the hearing before the motion judge on June 27, 2016, the record reveals that Dr. Platnick's counsel was out of the country from June 19 until June 25, 2016, and had asked *repeatedly* for an adjournment of the hearing on account of his unavailability on those crucial dates immediately in advance of the

hearing (as well as on other grounds): see *Platnick v. Bent (No. 2)*, at paras. 3 and 6; Motion to Adduce Fresh Evidence, at pp. 22-23. Thus, I am not willing to hold this against Dr. Platnick.

[59] Dr. Platnick had only 25 days to put forward his record, yet the motion judge faulted him for not adducing this evidence earlier because, according to the judge, Dr. Platnick “knew a ‘showdown’ was imminent when the plaintiff announced [an] intention to bring summary judgment proceedings in January”: *Platnick v. Bent (No. 2)*, at para. 40. I note immediately that the motion judge erred here, as it was Ms. Bent, the defendant, who announced an intention to bring a summary judgment motion. Regardless, the point is still not valid. A summary judgment motion involves due process and procedural protections on which Dr. Platnick may have relied, and which are unavailable on s. 137.1 motions. This Court makes it clear in *Pointes Protection* that s. 137.1 motions do not have the evidentiary protections associated with summary judgment motions. Moreover, the motion judge’s evidentiary expectation was commensurate with requiring information that might only have been able to be elicited through examinations for discovery, such as Rule 31.10 motions (discovery of non-parties) or Rule 30.10 motions (production from non-parties) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, but examinations for discovery are also necessarily unavailable on expedited s. 137.1 motions.

[60] To the extent that the motion judge’s findings were inconsistent with the foregoing, then they were in error. It must not be forgotten that the due diligence

factor specifically is “not a rigid one” (*Kuczera (Re)*, 2018 ONCA 322, 58 C.B.R. (6th) 227, at para. 16) and has been held to be a “practical concept” (*Calaheson v. Gift Lake Metis Settlement*, 2016 ABCA 185, 38 Alta. L.R. (6th) 30, at para. 14) that is “context sensitive” (*R. v. 1275729 Ontario Inc.* (2005), 205 O.A.C. 359, at para. 29; see also *Elliott v. Sagl*, 2019 ONSC 2490, at paras. 36-38 (CanLII); D. J. M. Brown, with the assistance of D. Fairlie, *Civil Appeals* (loose-leaf), at pp. 10-19 to 10-21). As I discussed above, Dr. Platnick had to assemble his motion record within 25 days at a time when there was significant ambiguity surrounding s. 137.1 motions due to a lack of judicial guidance on the standard that must be met, as well as the nature or comprehensiveness of the record that must be filed, in order to withstand such a motion. This factors into my assessment.

[61] In light of the above, I am of the view that both the Dua Letter and the KMI Letters could not have been adduced at an earlier time and are not being adduced now as a result of a lack of due diligence.

(2) Relevance

[62] All three Letters are eminently relevant to the case at bar.

[63] The Dua Letter bears directly upon the defence of justification and whether that defence is valid. It also bears on whether Ms. Bent was reckless as to the allegation she made, insofar as it speaks to her failure to investigate an incident that had occurred three years earlier. This bears on Ms. Bent’s defence of qualified

privilege. Accordingly, the Dua Letter is directly relevant to the s. 137.1(4)(a)(ii) inquiry.

[64] Similarly, the KMI Letters bear directly upon the defence of qualified privilege and whether that defence is undermined by the fact that Ms. Bent authorized the republication of her allegations. Further, the KMI Letters bear on whether Ms. Bent can properly be held liable for the harm caused by republication by virtue of its foreseeability or her authorization, under the harm analysis required by s. 137.1(4)(b).

(3) Credibility

[65] The Letters are reasonably capable of belief and sufficient for consideration at what is a preliminary screening of Dr. Platnick's claim. This does not preclude Ms. Bent, however, from testing this evidence at trial, for example through cross-examination, as the ultimate determination of credibility is deferred to trial on a s. 137.1 motion: *Pointes Protection*, at para. 52.

[66] This Court has agreed with the proposition that, on a motion to adduce fresh evidence, an assessment of credibility is to be carried out against the whole background of the case and is not restricted to the motion itself; in other words, evidence may be credible in the sense that it is reasonably capable of belief when viewed in the context of other evidence relevant to that issue: *R. v. Stolar*, [1988] 1

S.C.R. 480; *Warsing*, at para. 52; *R. v. Moucho*, 2019 ONSC 3463, 53 M.V.R. (7th) 131, at para. 36.

[67] That is the case here, as the Dua Letter and the KMI Letters bolster a pre-existing predicate of facts, rather than raise the risk of manufacturing a new predicate not previously under consideration. More specifically, what I mean is that the Dua Letter confirms Dr. Platnick's narrative that he never "changed" Dr. Dua's report but only communicated with Dr. Dua to point out the internal discrepancy in her report. Likewise, the KMI Letters help to confirm Dr. Platnick's allegation that Ms. Bent gave an interview to *Insurance Business Canada* and thereby authorized republication.

[68] Lastly, "there is nothing to indicate that [this evidence] is not reasonably capable of belief, even though it was prepared at the respondent's request": *R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487, at para. 43.

(4) Probative Value

[69] If believed, the Letters could reasonably, when taken with the other evidence adduced, be expected to have affected the result. This is clear as they all relate directly to, and even contradict, the motion judge's findings. Further, they bolster the evidentiary record, such that the "basis in the record and the law" that Dr. Platnick must establish in order to succeed against a s. 137.1 motion becomes sufficiently legally tenable and reasonably capable of belief.

[70] For example, the Dua Letter is highly probative. The motion judge characterized Dr. Platnick's call to Dr. Dua as an inappropriate "intervention" (Sup. Ct. reasons, at paras. 44 and 111), saying that Dr. Platnick "succeeded in persuading [Dr. Dua] to produce an amended 'final' report" (para. 22 (emphasis added)). Therefore, the motion judge found that Ms. Bent's allegation that Dr. Platnick had "changed" Dr. Dua's decision from a marked impairment to a moderate one was substantially true and that the defence of justification was valid under s. 137.1(4)(a)(ii). However, the Dua Letter directly contradicts this finding: Dr. Dua says that Dr. Platnick called her seeking "clarification" and that she advised him that she had made a "typographical error". In fact, Dr. Dua expressly states that Dr. Platnick did not "pressure" her, "[n]or did he conduct himself in any inappropriate fashion". While the motion judge had the different reports before him, they showed only that *a* change had in fact been made. However, the reports did not indicate *why* Dr. Dua had changed her assessment. The Dua Letter illuminates *why* — while the motion judge characterized Dr. Platnick's actions as improper persuasion, the Dua Letter, written by the person who was supposedly the victim of that persuasion, says exactly the opposite. Thus, the Dua Letter, if believed, is highly probative regarding whether Dr. Platnick will be able to meet his burden of showing that there are grounds to believe that Ms. Bent's defence of justification is not valid.

[71] Likewise, the KMI Letters are highly probative. The motion judge found that Dr. Platnick's allegation that Ms. Bent had given an interview "was supported by no evidence whatsoever and appears on its face to be manifestly untrue": Sup. Ct.

reasons, at paras. 24-25. This was based on Ms. Bent's Statement of Defence, in which she "denie[d] providing an interview to *Insurance Business [Canada]* in respect of the Confidential Communication and/or authorizing the publication of the Confidential Communication to Donald Horne for an article": A.R., vol. II, at p. 22. The KMI Letters directly contradict this evidence and bolster the allegation that republication was either implicitly authorized by Ms. Bent or was reasonably foreseeable to her. Given this point, she could properly be held liable for republication. This is dispositive of the issues of whether Ms. Bent's defence of qualified privilege is undermined, rendering the defence not "valid", for the purposes of s. 137.1(4)(a)(ii), and of whether the harm suffered by Dr. Platnick was suffered "as a result" of Ms. Bent's expression under s. 137.1(4)(b).

(5) Conclusion on the Motion to Adduce Fresh Evidence

[72] Before concluding, I hasten to clarify that the motion judge's assessment of Dr. Platnick's fresh evidence in *Platnick v. Bent (No. 2)* (his decision addressing the admissibility of some of this evidence) is not entitled to deference here. Quite simply, the motion judge decided the motion for fresh evidence on the basis of an incorrect understanding of the nature of a s. 137.1 motion, as explained by this Court in *Pointes Protection*. Accordingly, to the extent that his assessment of the evidence was dependent on an incorrect understanding of s. 137.1, it is not entitled to deference. Even if it were, however, as I indicated above, his assessment was, with respect, in error.

[73] Thus, for all the foregoing reasons, I would admit the Dua Letter and the KMI Letters, as all of them satisfy the *Palmer* criteria for granting a motion to adduce fresh evidence. I will discuss these pieces of evidence at greater length in the reasons that follow.

B. *Section 137.1 Motion*

[74] Section 137.1 of the *CJA* is intended “to function as a mechanism to screen out lawsuits that unduly limit expression on matters of public interest through the identification and pre-trial dismissal of such actions”: *Pointes Protection*, at para. 16. However, in addition to protecting expression on matters of public interest, s. 137.1 must also “ensur[e] that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to pursue it”: para. 46. Applying the framework that this Court unanimously adopts in *Pointes Protection*, I ultimately reach the same conclusion as the Court of Appeal for Ontario: Ms. Bent’s s. 137.1 motion should be dismissed and Dr. Platnick’s defamation claim should be allowed to proceed.

[75] The relevant portions of s. 137.1 are reproduced for convenience below:

(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.

(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.

[76] As I explain in *Pointes Protection*, at para. 18:

In brief, s. 137.1 places an initial burden on the moving party — the defendant in a lawsuit — to satisfy the judge that the proceeding arises from an expression relating to a matter of public interest. Once that showing is made, the burden shifts to the responding party — the plaintiff — to satisfy the motion judge that there are grounds to believe the proceeding has substantial merit and the moving party has no valid defence, and that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression. If the responding party cannot satisfy the motion judge that it has met its burden, then the s. 137.1 motion will be granted and the underlying proceeding will be consequently dismissed. It is important to recognize that the final weighing exercise under s. 137.1(4)(b) is the fundamental crux of the analysis: as noted repeatedly above, the APR [*Anti-Slapp Advisory Panel: Report to the Attorney General*] and the legislative debates emphasized balancing and proportionality between the public interest in allowing meritorious lawsuits to proceed and the public interest in protecting expression on matters of public interest. Section 137.1(4)(b) is intended to optimize that balance.

[77] A motion judge's determination on a s. 137.1 motion will typically be entitled to deference upon appeal, absent reviewable error. Here, the motion judge's initial determination of Ms. Bent's s. 137.1 motion is entitled to no deference. This is on account of the fact that the motion judge committed three broad errors: he applied the wrong legal test on a s. 137.1 motion, misconstrued the law on defamation and its

defences, and misapprehended the evidence. Accordingly, as in *Pointes Protection*, I proceed on a standard of correctness unless the motion judge's findings are not tainted by such errors: para. 97; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8 and 36.

(1) Section 137.1(3) — Threshold Burden

[78] Ms. Bent's email communication constitutes an expression that relates to a matter of public interest, and Dr. Platnick's defamation proceeding arises from that expression. Therefore, I am in agreement with the motion judge and the Court of Appeal that Ms. Bent has met her threshold burden under s. 137.1(3).

[79] First, Ms. Bent's email is captured by the statutory definition of "expression" found in s. 137.1(2): "[i]n 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". As I say in *Pointes Protection*, this is an "expansiv[e]" definition: para. 25. Section 137.1(2) contemplates *any* communication, even if it is *non-verbal*, and even if it is made *privately*. Ms. Bent's email falls within this statutory definition.

[80] Second, the underlying proceeding clearly "arises from" that expression, since Ms. Bent's email is the foundation for Dr. Platnick's defamation proceeding. As in *Pointes Protection*, there is a "clear nexus" here between the proceeding and the expression: para. 102.

[81] The only real question for consideration is whether Ms. Bent's email relates to a matter of public interest. Here, I am of the view that it does. As stated in *Pointes Protection*, this Court favours a "broad and liberal interpretation" of public interest: para. 26.

[82] In a narrow sense, Ms. Bent's email is ostensibly about potential professional misconduct in insurance arbitrations and about ensuring that her OTLA colleagues "get the assessor's and Sibley's files".

[83] In a broader sense, however, Ms. Bent's email raises concerns regarding the truthfulness, reliability, and integrity of medical reports filed on behalf of insurers in the arbitration process. In turn, her email raises concerns regarding the integrity of the arbitration process itself and the proper administration of justice writ large. Further, the email is directed at a not insignificant number of individuals, who, more importantly, have a special interest in exactly that, as part of their broader mandate as members of the OTLA to steadfastly represent victims of motor vehicle accidents, a public interest in itself.

[84] Whether Ms. Bent's allegations or concerns are valid or not is beside the point, as "there is no qualitative assessment of the expression at this stage": *Pointes Protection*, at para. 28. In effect, an expression may very well be defamatory in tort, yet still relate to a matter of public interest for the purposes of s. 137.1(3).

[85] Therefore, I am satisfied on a balance of probabilities that Ms. Bent's email constitutes an expression that relates to a matter of public interest and that Dr. Platnick's defamation proceeding arises from that expression.

(2) Section 137.1(4)(a) — Merits-Based Hurdle

[86] Since Ms. Bent has met her burden on the threshold question, the burden now shifts to Dr. Platnick to show that there are grounds to believe that his defamation proceeding has substantial merit and that Ms. Bent has no valid defence to it.

[87] In *Pointes Protection*, this Court clarifies the fact that unlike s. 137.1(3), which requires a showing on a balance of probabilities, s. 137.1(4)(a) expressly contemplates a "grounds to believe" standard instead: para. 35. This 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: para. 39.

[88] I elaborate here that, in effect, this means that *any* basis in the record and the law will be sufficient. By definition, "*a* basis" will exist if there is a single basis in the record and the law to support a finding of substantial merit and the absence of a valid defence. That basis must of course be legally tenable and reasonably capable of belief. But the "crux of the inquiry" is found, after all, in s. 137.1(4)(b), which also

serves as a “robust backstop” for protecting freedom of expression: *Pointes Protection*, at paras. 48 and 53.

[89] The motion judge did not have the benefit of this Court’s reasons in *Pointes Protection*, and therefore erred in law by imposing on Dr. Platnick a higher standard of “compelling and credible information” in his s. 137.1(4)(a)(ii) analysis of whether there was no valid defence: Sup. Ct. reasons, at para. 3. As I mentioned above, the motion judge’s determinations are therefore not entitled to deference.

(a) *Section 137.1(4)(a)(i) — Substantial Merit*

[90] In *Pointes Protection*, this Court defined “substantial merit” as a “real prospect of success — in other words, a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff”: para. 49.

[91] I am of the view that Dr. Platnick’s defamation proceeding has substantial merit.

[92] Defamation is governed by a well-articulated test requiring that three criteria be met:

1. The words complained of were published, meaning that they were communicated to at least one person other than the plaintiff;

2. The words complained of referred to the plaintiff; and

3. The impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person.

(See *Torstar*, at para. 28; see also P.A. Downard, *The Law of Libel in Canada* (4th ed. 2018), at §1.2 to 1.14.)

[93] All three of these criteria are easily satisfied in the case at bar.

[94] First, the words complained of were published. Ms. Bent wrote an email and sent it to 670 OTLA members. Further, the words were arguably *republished* (in a legal sense) when *Insurance Business Canada* published its article containing Ms. Bent's email. I acknowledge that republication is a wholly separate issue. In order to give that issue its due weight, it is more appropriate to discuss republication at a point where it is more dispositive of a critical issue; accordingly, I will discuss *republishing* comprehensively when I assess the harm suffered by Dr. Platnick under s. 137.1(4)(b). Here, however, it is unnecessary to discuss republication, as an initial publication is sufficient to make out a defamation claim. And that is so in light of Ms. Bent's email.

[95] Second, the words complained of explicitly refer to Dr. Platnick. As I highlighted in the factual overview earlier, Dr. Platnick is specifically mentioned three times by name in Ms. Bent's email. For convenience, I reproduce the statements

in question below, as they are the statements that serve as the foundation for Dr. Platnick's proceeding and these appeals:

He also testified that he never participated in any "consensus meeting" and he never was shown or agreed to the Executive Summary, prepared by Dr. Platnick, which was signed by Dr. Platnick as being the consensus of the entire team.

This is not an isolated example as I had another file where Dr. Platnick changed the doctor's decision from a marked to a moderate impairment.

[96] Lastly, the words complained of were defamatory, in the sense that they would tend to lower Dr. Platnick's reputation in the eyes of a reasonable person. Here, there is evidence of actual reputational damage to Dr. Platnick, which is not even necessary at this stage, given that "actual harm to reputation is not required to establish defamation"; instead, there must be "a realistic threat that the statement, in its full context, would reduce a reasonable person's opinion of the plaintiff": *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 78. Further, the "plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability": *Torstar*, at para. 28.

[97] Ms. Bent's words cast aspersions on Dr. Platnick and allege professional misconduct on his part — she does not seem to dispute this. In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 118, this Court remarked specifically on the "particular significance reputation has for a lawyer", noting that it is of "paramount importance" and "the cornerstone of a lawyer's professional life". I see no principled reason why the legal profession is more deserving of reputational

protection than the medical profession, as they are both comprised of professionals who rely on their individual expertise to succeed. Indeed, in *Botiuk*, at para. 92, this Court suggested as much: “It should be recognized that these observations [regarding the legal profession] will be equally applicable to other professions and callings.” Thus, Ms. Bent’s allegations of *professional* misconduct must be taken especially seriously. By all accounts, an allegation of professional misconduct would tend to lower Dr. Platnick’s reputation in the eyes of a reasonable person.

[98] This is buttressed even further by evidence that within weeks of the impugned email, Dr. Platnick was receiving “mass cancellations”: A.R., vol. VI, at p. 15. He alleges a direct financial impact of \$578,949 as a result, and has filed an accountant’s report supporting that figure, which was generated in light of his previous earnings and the “blacklist” process that occurred after the publication of the defamatory words: p. 17. As I mentioned above, specific proof of harm is not necessary to establish a defamation claim, so I leave a more extensive analysis of the harm suffered by Dr. Platnick for consideration under s. 137.1(4)(b) where it is better suited, as the inquiry there depends on whether the harm is sufficiently serious to allow the proceeding to continue.

[99] For now, the foregoing is sufficient to show that the third criterion for a defamation claim is met: the impugned words were defamatory in the sense that they would tend to lower Dr. Platnick’s reputation in the eyes of a reasonable person.

[100] Ultimately, Dr. Platnick’s claim quite clearly satisfies the three criteria for making out a claim for defamation. His claim is legally tenable and supported by evidence that is reasonably capable of belief, such that it can be said to have a real prospect of success. Thus, there are grounds to believe that Dr. Platnick’s defamation claim has substantial merit under s. 137.1(4)(a)(i).

(b) *Section 137.1(4)(a)(ii) — No Valid Defence*

[101] Section 137.1(4)(a)(ii) requires Dr. Platnick to show that there are “grounds to believe” that Ms. Bent has “no valid defence” to his defamation proceeding. As this Court states in *Pointes Protection*, at para. 60, this inquiry “[m]irror[s]” the one under s. 137.1(4)(a)(i): in other words, Dr. Platnick must show that there are grounds to believe that Ms. Bent’s defences have “no real prospect of success”. In effect, “substantial merit” and “no valid defence” are “constituent parts of an overall assessment of the prospect of success of the underlying claim”: para. 59.

[102] This makes sense because it reflects how defamation actions, like the one here, are typically litigated. At trial, the plaintiff must first make a *prima facie* showing of defamation. This is what “substantial merit” captures: *Pointes Protection*, at para. 59. The burden then shifts to the defendant to advance a defence to escape liability: *Torstar*, at paras. 28-29. This is what “no valid defence” captures: *Pointes Protection*, at para. 59.

[103] Accordingly, as this Court sets out in *Pointes Protection*, at para. 56, s. 137.1(4)(a)(ii) “operates as a *de facto* burden-shifting provision”: the defendant must *first* put in play the defences it intends to present, and then the burden effectively shifts to the plaintiff, who bears the statutory burden. This calls for an assessment of whether there are “grounds to believe” that Ms. Bent has “no valid defence”. Dr. Platnick is, in effect, required to show that there is *a* basis in the record and the law — taking into account the stage of the proceeding — to support a finding that the defences Ms. Bent has put in play do not tend to weigh *more* in her favour. The logical syllogism is clear: (i) Dr. Platnick must show that there are grounds to believe that Ms. Bent’s defences have no real prospect of success (*Pointes Protection*, at para. 60); (ii) this requires a showing that there are grounds to believe that the defences do not tend to weigh more in favour of Ms. Bent (para. 49); (iii) in light of the definition of “grounds to believe”, this means that there must be a basis in the record and the law — taking into account the stage of the proceeding — to support a finding that the defences do not tend to weigh more in favour of Ms. Bent (para. 39).

[104] Ms. Bent has appropriately “put in play” the defences of justification and qualified privilege through her Statement of Defence: *Pointes Protection*, at paras. 56-57. I acknowledge that she also raised the defences of responsible communication and fair comment in her Statement of Defence. However, she seems to have since abandoned those defences, as they were not argued before this Court. Accordingly, I will consider only the defences of justification and qualified privilege that Ms. Bent has put in play, which I also take to be her two strongest defences.

[105] I am of the view that there are grounds to believe that neither of these defences is valid. In other words, I am of the view that there is *a* basis in the record and the law, taking into account the stage of the proceeding, to support a finding that the defences do not tend to weigh *more* in favour of Ms. Bent, acknowledging that the burden is on Dr. Platnick to make this showing.

[106] I proceed below to analyze the defences of justification and qualified privilege, respectively, and to discuss why there are grounds to believe that they are not valid. Before doing so, I wish to make clear that any conclusion I reach or finding I make concerning Ms. Bent's defences is expressly limited to this s. 137.1 motion.

(i) Justification

[107] Once a *prima facie* showing of defamation has been made, the words complained of are presumed to be false: *Torstar*, at para. 28. To succeed on the defence of justification, "a defendant must adduce evidence showing that the statement was substantially true": para. 33. The burden on the defendant is to prove the substantial truth of the "sting", or main thrust, of the defamation": Downard, at §1.6 (footnote omitted). In other words, "[t]he defence of justification will fail if the publication in issue is shown to have contained only accurate facts but the sting of the libel is not shown to be true": Downard, at §6.4.

[108] Of particular importance here is the fact that partial truth is not a defence. If a material part of the justification defence fails, the defence fails altogether:

R. E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States* (2nd ed. (loose-leaf)), at pp. 10-88 to 10-90 (“*Brown on Defamation*”). However, a defendant may justify only part of a libel “if that part is severable and distinct from the rest”: p. 10-89 (footnote omitted). This depends on the allegation being separate and self-contained rather than an “ingredient or part of a connected whole”: p. 10-90 (footnote omitted).

[109] Applied to the facts of this case, the “sting” of the words is an allegation of professional misconduct. In her email, Ms. Bent essentially alleges that Dr. Platnick either misrepresented or altered the opinions of other medical experts with a view to depriving a claimant of a catastrophic impairment classification to which he or she was entitled. In effect, she alleges dishonesty and serious professional misconduct. As mentioned above, Ms. Bent appears to accept that this is the “sting”, or “innuendo”, of the words in her email. Therefore, she would have to lead evidence that the allegation of professional misconduct is substantially true in order for her defence of justification to succeed at trial. Here, on a s. 137.1 motion, Dr. Platnick must show that there are grounds to believe that Ms. Bent has no real prospect of success in making that showing.

[110] In effect, then, the truth of just one of Ms. Bent’s statements will be insufficient for the defence to succeed. For example, even if her first allegation that Dr. Platnick misrepresented a medical consensus is true, Ms. Bent would still have to prove the truth of her second statement, that Dr. Platnick “changed” a doctor’s

decision. This is so because, in my view, there are grounds to believe that the statements are not severable, but instead are constituent parts of the same sting of professional misconduct.

[111] This is borne out not only by common sense inference but by Ms. Bent's own words. Indeed, Ms. Bent herself connected both statements, thereby arguably making them one single allegation of professional misconduct against Dr. Platnick. In her email, after the first statement, Ms. Bent wrote that "[t]his was NOT the only report that had been altered" and then, immediately prior to the second statement, wrote that "[t]his is not an isolated example as . . .". On its face, the aforementioned language inherently connects the first allegation to the second allegation as constituent parts of an overall allegation of professional misconduct. As Ms. Bent's own words make clear, she was in fact seeking to demonstrate a pattern of broader professional misconduct by Dr. Platnick. Ms. Bent herself connected the two statements, making them inseverable.

[112] Thus, I need not consider whether Ms. Bent's first allegation regarding the misrepresentation of a consensus is true (despite potentially convincing argument by Dr. Platnick that it was not),⁴ because I am satisfied that there is a basis in the

⁴ Dr. Platnick has provided this Court with evidence that the term "consensus" is a misnomer because the requirement to obtain a "consensus" and the signatures of the medical assessors is a vestige of an antiquated statutory regime that was legislatively repealed in 2006. The current *SABS* regime no longer requires a consensus, and Ms. Bent — being the president-elect of the OTLA and familiar with the *SABS* — would have known that Dr. Platnick was not actually misrepresenting the existence of a medical consensus. In fact, it might have been plainly understood that no medical consensus on *SABS* classification could have possibly existed given the unfamiliarity of the four medical assessors from Nova Scotia with Ontario's *SABS* regime (one of the medical assessors even stated that the *SABS* criteria he was mandated to use were "outdated" and not "appropriate"): A.R., vol. V, at p.

record and the law to support a finding that the two statements are connected and that Ms. Bent's second allegation that Dr. Platnick "changed the doctor's decision from a marked to a moderate impairment" is not substantially true; this is sufficient to foreclose her defence of justification under s. 137.1(4)(a)(ii).

[113] While not argued by either of the parties, and accordingly, the Court lacks any submissions on this point, s. 22 of the *Libel and Slander Act*, R.S.O. 1990, c. L. 12 appears to have modified the common law rule regarding partial justification.⁵ Setting aside concerns that this was not argued by either of the parties here, even if this provision were at issue, there would nonetheless be a basis in the record and the law to support a finding that the lack of truth behind the second allegation independently caused material injury to Dr. Platnick's reputation. First, the allegation that Dr. Platnick "changed" a doctor's decision might be seen as qualitatively more injurious than the allegation that Dr. Platnick misrepresented a purported consensus. Second, as I noted above, in light of the fact that Ms. Bent linked the two allegations together in her email, the allegations might be seen as part and parcel of a single charge — that there was a pattern of professional misconduct — rather than as two "distinct" charges.

182. Thus, there are grounds to believe that Ms. Bent's statement that Dr. Platnick misrepresented a medical consensus is not substantially true.

⁵ Section 22 of the *Libel and Slander Act* provides that "[i]n an action for libel or slander for words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges".

[114] I proceed to explain why there is a basis in the record and the law to support a finding that the allegation that Dr. Platnick “changed the doctor’s decision” is not substantially true, and that therefore the defence of justification cannot be considered to weigh more in favour of Ms. Bent such that it may be considered “valid” under s. 137.1(4)(a)(ii).

[115] First of all, I am in agreement with Doherty J.A. of the Court of Appeal, who aptly noted that Ms. Bent’s allegation that Dr. Platnick “changed” Dr. Dua’s decision can be interpreted in “at least two ways”: para. 75. First, it can be read as an allegation that Dr. Platnick *physically* changed the report, which is effectively tantamount to an allegation of fraud. Second, it can be read as an allegation that Dr. Platnick “*misrepresented* another doctor’s opinion as to the level of impairment that that doctor had found”: para. 75 (emphasis added). I add a third way that it might be read: as the motion judge found, the allegation that Dr. Platnick “changed” Dr. Dua’s decision might be interpreted as an allegation of improperly “*persuading*” Dr. Dua to change her decision in accordance with the “economic interest” of Dr. Platnick’s “client”: Sup. Ct. reasons, at para. 22.⁶

[116] I am of the view that there is a basis in the record and the law to support a finding that the defence of justification has no real prospect of success under any of

⁶ The motion judge referred to Dr. Platnick’s “client” in making this argument. It is unclear whether the motion judge was referring to the vendor company or the insurer, which are different companies. While the insurer has an economic interest in a non-catastrophic impairment designation, the vendor company has no such economic interest, as it is not a party to an insurance arbitration. Dr. Platnick is retained by the vendor company, not by the insurer. Further, the company might be more appropriately characterized as Dr. Platnick’s employer rather than as his “client”. It is therefore unclear whether the motion judge’s characterization is accurate in any sense, which evidences a misapprehension of the evidence that I hope to clarify by means of this footnote.

these interpretations. The evidentiary record before this Court provides a legally tenable basis for what happened that is reasonably capable of belief. Dr. Dua's initial report contained a classification of "Moderate impairment (Class 4)". As I remarked in the factual overview, this is internally inconsistent, as a "*Moderate Impairment*" is associated with a "Class 3" rating and a "Class 4" rating is associated with a "*Marked Impairment*". As she was meant to do, Dr. Dua sent her report to the vendor company. The vendor company contacted Dr. Platnick and asked him to talk with Dr. Dua, as "the vendor company was concerned by what appeared to be an internal inconsistency, if not contradiction": A.R., vol. VI, at p. 66. In fact, this was not the only issue with Dr. Dua's first report, as she had also assessed the victim based on a physical impairment even though she was supposed to base her assessment solely on a psychological or psychiatric impairment. According to Dr. Platnick, he asked Dr. Dua "to clarify the apparent inconsistency/contradiction discussed above" and "Dr. Dua was free to reach any conclusion she felt appropriate": p. 68. As stated in the factual overview above, the second, and final, version of Dr. Dua's report contained a classification of "Moderate impairment (Class 3)" following the conversation with Dr. Platnick. This report informed the final report that Dr. Platnick submitted to the vendor company as well, which was consistent with Dr. Dua's second version.

[117] This existing basis in the record is considerably strengthened, and even confirmed, by the Dua Letter, in which Dr. Dua says that Dr. Platnick called her and "identified three areas of concern for which he required clarification". Dr. Dua states

that she “inadvertently typed ‘Class 4’, when the *AMA Guides* designate ‘moderate impairment’ as Class 3”. She calls this a “typographical error” and says that she advised Dr. Platnick that she had “meant ‘Class 3’”: Motion to Adduce Fresh Evidence, at p. 37. Dr. Dua then “expressly confirm[s] that at no time did Dr. Platnick pressure” her to change her report: p. 38. Further, she adds that “[t]o suggest that Dr. Platnick changed my report is simply untrue”. As stated above, at paras. 48 and 65, I acknowledge that the Dua Letter is untested, in the sense that, for example, Dr. Dua has not been subject to cross-examination. Accordingly, this evidence might very well be contradicted at a trial on the merits of Dr. Platnick’s claim. Indeed, the ultimate assessment of this evidence’s credibility is deferred to a stage later than the one here: *Pointes Protection*, at para. 52. For the purposes of this s. 137.1 motion, the Dua Letter supplements the evidentiary record that pre-existed it, such that there is a sufficient basis in the evidentiary record to support a finding that Ms. Bent’s statement is not substantially true.

[118] Thus, as the foregoing demonstrates, there is *a* basis in the evidentiary record to support a finding that the allegation that “Dr. Platnick changed [a] doctor’s decision” is not substantially true. That basis is legally tenable and supported by evidence that is reasonably capable of belief: *Pointes Protection*, at para. 50. Indeed, Ms. Bent does not allege here that Dr. Platnick *physically* changed Dr. Dua’s report, and the above discussion makes clear that Dr. Platnick also did not *misrepresent* Dr. Dua’s report, nor did he improperly *persuade* her. In effect, there are grounds to

believe that Ms. Bent's allegation of professional misconduct is not substantially true. For this reason, the defence of justification is not valid under s. 137.1(4)(a)(ii).

[119] The motion judge erred in concluding otherwise. In finding that there was "compelling and credible evidence" that the defence of justification was "reasonably likely to succeed", the motion judge pointed to the fact that it was still important for Ms. Bent to alert her colleagues to the need to fully review medical files, and to the fact that Dr. Platnick should have disclosed that Dr. Dua had provided him a second version of the report: Sup. Ct. reasons, at para. 112. In addition to the fact that the motion judge employed the wrong legal test at the s. 137.1(4)(a)(ii) stage, the motion judge's assessment had no bearing on the defence of justification properly understood. On this point, I am in agreement with the Court of Appeal for Ontario, which found that neither of the issues adverted to by the motion judge had anything to do with whether Ms. Bent was justified in alleging specifically that Dr. Platnick had "changed" a doctor's decision: paras. 81-83.

[120] In conclusion, I find that there are grounds to believe that Ms. Bent's defence of justification has no real prospect of success. As I established above, she would in fact have to justify *both* of the statements she made, as both would appear to make up constituent parts of the "sting", which is that Dr. Platnick is guilty of professional misconduct. As I noted, there are grounds to believe that the statements are not severable, not only in light of a common sense inference that ties them to a single sting, but also in light of Ms. Bent's express language connecting them. Insofar

as there is a basis in the record to support a finding that Ms. Bent's second statement — that Dr. Platnick "changed [another] doctor's decision from a marked to a moderate impairment" — is not substantially true, and in light of my conclusion that such a basis exists, then the defence of justification is foreclosed *at this stage*. It must be borne in mind here that "grounds to believe" simply requires *a* (single) basis in the record and the law to support this finding. The Dua Letter provides such a basis in addition to the evidentiary record that existed prior to that letter.

(ii) Qualified Privilege

[121] An occasion of qualified privilege exists if a person making a communication has "an interest or duty, legal, social, moral or personal, to publish the information in issue to the person to whom it is published" *and* the recipient has "a corresponding interest or duty to receive it": Downard, at §9.6 (footnote omitted). Importantly, "[q]ualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself": *Hill*, at para. 143; *Botiuk*, at para. 78. Where the occasion is shown to be privileged, "the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff": *Hill*, at para. 144; *Botiuk*, at para. 79. However, the privilege is *qualified* in the sense that it can be defeated. This can occur particularly in two situations: where the dominant motive behind the words was malice, such as where the speaker was reckless as to the truth of the words spoken; or where the scope of the

occasion of privilege was exceeded (Downard, at §1.9; see also *Hill*, at paras. 145-47; *Botiuk*, at paras. 79-80).

[122] For this reason, a precise characterization of the “occasion” is essential, as it becomes impressed with the limited, qualified privilege, which in turn becomes the benchmark against which to measure whether the occasion was exceeded or abused.

[123] Here, there is a spectrum of possible characterizations for the occasion to which the privilege might attach. For instance, the language in Ms. Bent’s email indicates a potentially limited scope: “I wanted to alert you, my colleagues, to always get the assessor’s and Sibley’s files.” However, Ms. Bent has argued for a broader scope of privilege, indicating that she was “educating fellow plaintiff side personal injury lawyers about the need to obtain full documentary disclosure and advocating for MVA victims and the integrity of the automobile insurance dispute process by highlighting particular instances where insurer assessors have not provided independent and unbiased opinions”: A.R., vol. III, at p. 4. For its part, the OTLA Listserv itself limits the occasion insofar as its “Undertaking and Indemnity” Agreement (“Listserv Agreement”) limits what OTLA members have an interest or duty to send or receive. The use of the OTLA Listserv is “restricted to issues arising on ongoing files in relation to existing or contemplated litigation and for the purpose of obtaining counsel, advice and assistance in connection therewith”: A.R., vol. IV, at p. 48 (emphasis added). With respect to my colleague, it is important to consider this

entire excerpt in order to contextualize what “issues arising on ongoing files” must *relate to* in order for a communication to come within the expressly contemplated use of the Listserv: *contra*, para. 227.

[124] A question arises as to whether privilege even attaches to the occasion upon which Ms. Bent’s communication on the Listserv was made. Indeed, “the threshold for privilege remains high”: *Torstar*, at para. 37. Privilege is “grounded” not in “free expression values but in the social utility of protecting particular communicative occasions from civil liability”: para. 94. There are reasons to doubt that there is a compelling social interest in privileging all communications on a professional Listserv whose use is expressly “restricted to issues arising on ongoing files in relation to existing or contemplated litigation and for the purpose of obtaining counsel, advice and assistance in connection therewith”, and which includes an express prohibition against making even *potentially* defamatory remarks.⁷

[125] Nonetheless, I am willing to assume *arguendo* that qualified privilege does attach to the occasion here because, regardless of how the occasion is defined, there are grounds to believe that the privilege will be defeated and that the defence of qualified privilege is not valid under s. 137.1(4)(a)(ii). In particular, I am satisfied that there is a basis in the record and the law to support a finding that the scope of

⁷ At trial, a judge or jury might reasonably come to the conclusion that privilege does attach to the occasion upon which Ms. Bent’s communication was made. However, it is not necessary to decide this point on this s. 137.1 motion, so I do not endeavour to do so, and therefore I do not foreclose either conclusion.

Ms. Bent's privilege was exceeded and that the defence therefore does not tend to weigh *more* in her favour.

[126] I reiterate that the foregoing conclusion and any of the findings that I make concerning Ms. Bent's defences, including the ones that follow, are expressly limited to this s. 137.1 motion. None of my findings or conclusions should be interpreted as prejudging the merits of Ms. Bent's defences at trial. Indeed, it must not be forgotten that my assessment is tempered by the "grounds to believe" standard expressly imposed by s. 137.1(4)(a)(ii). Bearing this in mind, I turn now to an assessment of Ms. Bent's defence of qualified privilege and whether the scope of that privilege may have been exceeded, thereby defeating the defence, in the context of a s. 137.1 motion.

[127] At the outset, I note that my colleague is of the view that Ms. Bent has a valid defence of qualified privilege. With respect, as I explain further below, many of the points raised by my colleague may be more appropriately directed at the defence of justification. Nonetheless, I address her arguments here in the context of the defence of qualified privilege, as she does.

[128] Qualified privilege may be defeated "when the limits of the duty or interest have been exceeded": *Hill*, at para. 146; *Botiuk*, at para. 80. This is the case when the information communicated in a statement is not relevant to the discharge of the duty or the exercise of the right giving rise to the privilege, or when the information is not reasonably appropriate to the legitimate purposes of the occasion:

Downard, at §9.91; *Botiuk*, at para. 80; *Hill*, at paras. 146-47; *RTC Engineering Consultants Ltd. v. Ontario (Solicitor General)* (2002), 58 O.R. (3d) 726 (C.A.), at para. 18.

[129] First, I am satisfied that there is a basis in the record and the law to support a finding that the specific references made to Dr. Platnick were not necessary to the discharge of the duty giving rise to the privilege. In *Hill*, this Court focused on the language used by the defendant and found that it was “neither necessary nor appropriate”; the scope of the privilege was therefore exceeded: para. 156. Likewise, in *Botiuk*, this Court found that the scope of the privilege was exceeded because it was “unnecessary to defame Botiuk” by means of specific “libellous references” to him: para. 85. In other words, the plaintiff did not need to be named. Here, there is a basis in the record and the law to support a finding that Ms. Bent could have communicated her concerns regarding alterations to medical reports by insurers without naming Dr. Platnick specifically. If her goal was to alert her OTLA colleagues to “always get the assessor’s and Sibley’s files”, then one may wonder if it was necessary to single out Dr. Platnick by name, especially in such a way as to accuse him of professional dishonesty and misconduct. A finding could be made that the libelous references to Dr. Platnick were “neither necessary nor appropriate” to the duty or interest giving rise to the privilege. The Court of Appeal found likewise, writing that “the allegation could reasonably be seen as a gratuitous and inaccurate attack on Dr. Platnick’s character”: para. 92.

[130] My colleague comes to a contrary conclusion because she argues that the test is relevance, not necessity: para. 231. With great respect to my colleague, relevance is a *necessary* condition for a statement to be privileged, but not a *sufficient* one: *Hill*, at para. 146, citing *Adam v. Ward*, [1917] A.C. 309 (H.L.). The Court could not have been clearer in *Hill* and *Botiuk*: the scope of the privilege was exceeded because the comments in question were “neither necessary nor appropriate” and because the comments were “unnecessary”. Evidently, if a comment is not *necessary* to the discharge of the duty giving rise to the privilege, then the scope of the privilege has been exceeded: see *Rubin v. Ross*, 2013 SKCA 21, 409 Sask. R. 202, at para. 61 (leave to appeal refused, [2013] 3 S.C.R. x). While “[t]he defence is, necessarily, engaged only when someone is identified” (Abella J.’s reasons, at para. 238), it is precisely for this reason that a court asks whether it was *necessary* to the occasion attracting the privilege to identify that person. As I explained above, here there is a basis in the record and the law to support a finding that it may not have been necessary. After all, the occasion attracting the privilege may have been to “always get the assessor’s and Sibley’s files” (see Ms. Bent’s email; see also her Statement of Defence), not “that there was a doctor somewhere in Ontario whose reports they ought to distrust” (see Abella J.’s reasons, at para. 237).

[131] In addition, there is a basis in the record and the law to support a finding that Ms. Bent’s argument that the occasion of qualified privileged was not exceeded in light of the Listserv Agreement’s confidentiality clause, echoed by my colleague (at paras. 240-42), does not tend to weigh *more* in her favour. It is true that the

Listserv Agreement, which is signed by all members of the OTLA Listserv, contains a confidentiality clause requiring all Listserv information to be kept “strictly confidential”: A.R., vol. IV, at p. 48. However, there is a basis in the record and the law to support a few responses to such a defence. First, the confidentiality clause does not apply at large; rather, read in context, it applies to the expressed and restricted use of the Listserv itself — “litigation privilege”. Second, the Listserv Agreement contains an express “**PROHIBITION AGAINST DEFAMATORY MATERIAL**” (emphasis in original) that stipulates that members “will not send, re-send or disseminate any material that is or may be defamatory or otherwise actionable” (emphasis added). Accordingly, a finding could be made that Ms. Bent therefore breached the terms of the Listserv Agreement by making her defamatory communication, and that she cannot thereby also rely on a confidentiality clause found in the very agreement that she herself might be found to have breached. Thus, even though the Listserv Agreement contains a confidentiality clause, that clause must be read in the context of the use of the Listserv itself for the purposes of assessing the scope of the privilege; it might be found that the clause cannot apply to an expressly prohibited purpose. Third, the existence of the confidentiality clause may have no bearing on whether Ms. Bent’s specific references to Dr. Platnick were necessary to the occasion giving rise to the privilege: indeed, the Listserv’s express prohibition on even *potentially* defamatory remarks may suggest that the OTLA acknowledges that the posting of even *potentially* defamatory material is not necessary (or even *relevant*) to the duty encompassed within the particular occasion.

[132] Lastly, the record reveals a lack of investigation or reasonable due diligence by Ms. Bent prior to making her serious allegations. This Court's reasons in *Hill* are *à propos*: there, this Court wrote that "[a]s an experienced lawyer, [the defendant] ought to have taken steps to confirm the allegations that were being made . . . before launching such a serious attack on [the plaintiff's] professional integrity": para. 155. Thus, "[a]s a result of this failure, the permissible scope of his comments was limited and the qualified privilege which attached to his remarks was defeated": para. 155. This case may be considered analogous. Ms. Bent is an experienced lawyer, and it seems that she took no investigative steps at all to corroborate what was, in effect, an allegation of professional misconduct, and arguably tantamount to an allegation of fraud. Instead, she relied on her recollection of events that had occurred three years earlier, without attempting to communicate with Dr. Platnick or Dr. Dua and without even consulting her own notes and records: A.R., vol. XIII, at p. 6. This was a serious allegation, and this Court would be remiss, in assessing the defence of qualified privilege, in failing to take into account the seriousness of such an allegation.

[133] My colleague remarks that Ms. Bent held a "reasonable belief" that did not need to be "supplement[ed]": para. 239. This implies not only that Ms. Bent did not have to take *any* investigative steps whatsoever, but that she did not even need to *attempt* to do so. Respectfully, I must disagree. There is a basis in the record and the law to support a finding that Ms. Bent's belief, regarding a specific phrase, from a specific report, by a specific person, concerning a specific event, that had taken place

three years earlier, was *per se* unreasonable without *any* investigation being made to determine its veracity or to refresh her recollection. There is a basis in the record and the law to support a finding that Ms. Bent’s subjectively held belief is of no matter here — the law is manifestly clear that courts will strictly scrutinize a lawyer’s conduct because lawyers are “duty-bound to take reasonable steps to investigate”: *Botiuk*, at paras. 99 and 103; *Hill*, at para. 155; Downard, at §9.62; see the Law Society of Ontario’s *Rules of Professional Conduct*, rr. 3.1-1, 7.2-1, 7.2-4 and 7.5-1.

[134] Further, the truth of Ms. Bent’s allegations, and her “reasonable belief” in them, is an argument best directed at the defence of justification; it is *irrelevant* to the question of whether the comments exceeded the scope of any privilege: *contra*, Abella J.’s reasons, at paras. 232, 236 and 239. In any event, even given the information available to Ms. Bent at the time — and setting aside the fact that she was “duty-bound” to reasonably investigate the veracity of her defamatory allegations — there is a basis in the record and the law to support a finding that even her *belief* that Dr. Platnick had “changed the doctor’s decision” was not a reasonable one. I acknowledge that, at the time, Ms. Bent had only Dr. Dua’s first report, which contained a classification of “Moderate impairment (Class 4)”, and Dr. Platnick’s final report, which contained a classification of “Moderate impairment (Class 3)”, and that she had “no reason” to “suspect that *anything* had happened between” Dr. Dua and Dr. Platnick: Abella J.’s reasons, at para. 248 (emphasis in original). However, there were a number of inferences available to Ms. Bent based on the information she had: Dr. Platnick or Dr. Dua might have made a mistake, for example, or a

typographical error. Instead, Ms. Bent cast professional aspersions upon Dr. Platnick despite never having spoken to or met him. Thus, there are grounds to believe — even considering the imperfect information available to Ms. Bent at the time and without considering any duty to take steps to verify the allegation — that Ms. Bent’s belief may not have been a reasonable one. It is no defence to depend on her *belief* in the truth of her first allegation in order to establish a *belief* in the truth of her second allegation: *contra*, Abella J.’s reasons, at paras. 236 and 249. This would turn the defence of justification (to which my colleague’s argument is, respectfully, better suited) on its head.

[135] In light of the foregoing, and even assuming *arguendo* that Ms. Bent’s communication was protected under an occasion of qualified privilege, there is a basis in the record and the law, taking into account the stage of the proceeding, to support a finding that the scope of any qualified privilege was exceeded in this case. That basis is legally tenable and supported by evidence reasonably capable of belief, such that the defence cannot be said to weigh *more* in favour of Ms. Bent. Thus, there are grounds to believe that the defence of qualified privilege is not “valid”.

[136] I add that malice is an alternative way to defeat the defence of qualified privilege. Malice is not limited to an actual, express motive to speak dishonestly. Instead, it can be established by “reckless disregard for the truth”: *Hill*, at para. 145; *Botiuk*, at para. 79. Notably, an ostensibly honestly held belief may still be spoken recklessly and the privilege defeated if the belief was “arrived at without reasonable

grounds”: Downard, at §9.60 and 9.61. “The more serious the allegation in issue, the more weight a court will give to a failure by the defendant to verify it prior to publication as evidence of malice, in the sense of indifference to the truth”: §9.74 (footnote omitted). This is particularly true of lawyers, who are “more closely scrutinized” than a layperson: *Botiuk*, at para. 98. Lawyers are “duty-bound” to undertake a “reasonable investigation as to the correctness” of a defamatory statement, and “actions which might be characterized as careless behaviour in a lay person could well become reckless behaviour in a lawyer”: paras. 98-99, 103.

[137] With the foregoing in mind, I point out again that Ms. Bent is a lawyer who made a very serious allegation of *professional* misconduct against Dr. Platnick. I call it a serious allegation in the sense that this Court has previously recognized that a person’s *professional* reputation is deserving of special protection: *Hill*, at para. 118; *Botiuk*, at para. 92. It seems that Ms. Bent’s email was sent without any investigation, even in the simplest sense of communicating with Dr. Platnick or checking her own records and files from a case that had taken place three years earlier: C.A. reasons, at para. 92; A.R., vol. XIII, at p. 6. In fact, Ms. Bent had never spoken to or met Dr. Platnick, yet she alleged that he had falsified a report simply because she had received two reports with an apparent discrepancy between them. There is a basis in the evidentiary record to support a finding that in reality, Ms. Bent was not in any position to know what had gone on between Dr. Dua and Dr. Platnick. My colleague seems to agree when she notes that “there was no reason for [Ms. Bent] to suspect that *anything* had happened between [Dr. Dua and Dr. Platnick]”: Abella J.’s reasons,

at para. 248. If that is the case, then it is unclear what might have grounded Ms. Bent's serious allegation that Dr. Platnick "changed the doctor's decision". The record reveals that Ms. Bent's email was hastily sent within three days of the conclusion of the Carpenter Matter, and that no time urgency has been indicated which might have encumbered a minimal good faith effort to substantiate the veracity of her allegations. Thus, in light of the heightened expectation of reasonable due diligence that this Court has historically imposed on lawyers, Ms. Bent's privilege may be defeated simply on the ground that she was indifferent or reckless as to the truth of her defamatory statements.

[138] In any case, I conclude that, even assuming that qualified privilege attaches to the occasion upon which Ms. Bent's communication was made, there are grounds to believe that the defence is not valid under s. 137.1(4)(a)(ii) because it may be defeated by virtue of Ms. Bent having exceeded the scope of the privilege, and perhaps even by her reckless disregard for the truth (i.e. malice). My colleague would summarily dismiss Dr. Platnick's claim on this prong, definitively foreclosing even the opportunity for him to vindicate his reputation at a trial where ultimate assessments of credibility can be made and the aforementioned evidence can be properly tested. Instead, my colleague chooses to accept Ms. Bent's evidence over Dr. Platnick's at this early stage. With respect, this is not what is called for on a s. 137.1 motion. As this Court makes clear in *Pointes Protection*, Dr. Platnick needs to have established only a basis in the record and the law, taking into account the stage of the litigation, to support a finding that Ms. Bent's defences do not weigh

more in her favour. For the purposes of this motion, and for the reasons explained above, I am satisfied that there is such a basis here.

(3) Section 137.1(4)(b) — Public Interest Hurdle

[139] Section 137.1(4)(b) is the “crux” or “core” of the s. 137.1 analysis: *Pointes Protection*, at paras. 61-62. Indeed, the “open-ended nature of s. 137.1(4)(b) provides courts with the ability to scrutinize what is really going on in the particular case before them: s. 137.1(4)(b) effectively allows motion judges to assess how allowing individuals or organizations to vindicate their rights through a lawsuit — a fundamental value in its own right in a democracy — affects, in turn, freedom of expression and its corresponding influence on public discourse and participation in a pluralistic democracy.”: *Pointes Protection*, at para. 81.

[140] In particular, s. 137.1(4)(b) requires the plaintiff to show that

the harm likely to be or have been suffered by the [plaintiff] as a result of the [defendant]’s expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[141] In other words, Dr. Platnick must show on a balance of probabilities that he “likely has suffered or will suffer harm, that such harm is *a result* of the expression established under s. 137.1(3), and that the corresponding public interest in allowing

the underlying proceeding to continue *outweighs* the deleterious effects on expression and public participation”: *Pointes Protection*, at para. 82 (emphasis in original).

(a) *Harm Allegedly Suffered and Public Interest in Permitting the Proceeding to Continue*

[142] As a prerequisite to the weighing exercise contemplated by s. 137.1(4)(b), Dr. Platnick must make two primary showings: (i) the existence of harm and (ii) the fact that the harm was suffered *as a result* of Ms. Bent’s expression: *Pointes Protection*, at para. 68.

[143] First, is there harm likely to be or have been suffered by Dr. Platnick?

[144] General damages are presumed in defamations actions, and this alone is sufficient to constitute harm: *Pointes Protection*, at para. 71; *Torstar*, at para. 28. However, the magnitude of the harm will be important in assessing whether the harm is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression: *Pointes Protection*, at para. 70. General damages in the nominal sense will ordinarily not be sufficient for this purpose.

[145] I am of the view, and only for the purposes of deciding this s. 137.1 motion, that the harm here is extensive and quite serious, as Dr. Platnick has put into evidence an estimate of significant monetary harm that is more than just a bald

assertion: *Pointes Protection*, at para. 71. The motion judge erred when he characterized the harm to Dr. Platnick as “quite general and imprecise”: Sup. Ct. reasons, at para. 121. Dr. Platnick has estimated a direct financial impact of \$578,949 and has supported this figure with a copy of a report prepared by an accountant. This number was not simply one derived out of thin air. Dr. Platnick has put into the evidentiary record that he typically had between 20 and 30 insurers’ examinations booked per week and approximately 100 assessments booked per month. He has shown that after Ms. Bent’s November 2014 email, he had only 35 assessments booked in December 2014 and only 11 in January 2015. He states that he was informed by vendor companies he had been placed on a “blacklist” by insurance companies. As a result, his practice incurred “mass cancellations” with “entire days cancelled by multiple vendors”, which “had never occurred” in his 20 years of practice: A.R., vol. VI, at p. 15. Eventually, out of the 40 or so insurance companies in Ontario, all but one ceased using his services. Thus, in light of the foregoing, and the fact that neither a “definitive determination of harm” nor a “fully developed damages brief” is required, I am of the view that Dr. Platnick has sufficiently demonstrated the existence of substantial monetary harm supported by the evidentiary record here for the purposes of s. 137.1(4)(b): *Pointes Protection*, at para. 71.

[146] In addition, reputational harm is eminently relevant to the harm inquiry under s. 137.1(4)(b). Indeed, “reputation is one of the most valuable assets a person or a business can possess”: *Pointes Protection*, at para. 69 (citing “agreement” with the words of the Attorney General of Ontario at the legislation’s second reading). This

Court's jurisprudence has repeatedly emphasized the weighty importance that reputation ought to be given. Certainly, "[a] good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws": *Hill*, at para. 107; see also *Botiuk*, at paras. 91-92.

[147] The import of reputation is only amplified when one considers *professional* reputation. In *Hill*, this Court remarked specifically on the "particular significance reputation has for a lawyer", noting that it is the "cornerstone of a lawyer's professional life". As I mentioned earlier in these reasons, I see no principled reason to draw a distinction between lawyers and other professionals, such as doctors, when it comes to the protection of reputation. Both the legal profession and medical profession are comprised of professionals who rely on their individual expertise to succeed within their respective professions. This was expressly contemplated in *Botiuk*, where this Court wrote that "[i]t should be recognized that these observations [regarding the legal profession] will be equally applicable to other professions and callings".

[148] Thus, not only must the monetary harm pleaded by Dr. Platnick be considered in determining whether the harm is sufficiently serious, but so too must the reputational harm to Dr. Platnick's professional reputation be considered, even if it is not quantifiable at this stage: *Pointes Protection*, at para. 71. Indeed, the damaging effects that a defamatory remark may have on a plaintiff's "position and

standing” in the professional community exacerbate the harm suffered as a result: Downard, at §14.10; see also *Young v. Toronto Star Newspapers Ltd.* (2005), 77 O.R. (3d) 680 (C.A.); *Awan v. Levant*, 2016 ONCA 970, 133 O.R. (3d) 401. As “[t]he purpose of the general damages award is to compensate the plaintiff for loss of reputation and injury to the plaintiff’s feelings, to console the plaintiff, and to vindicate the plaintiff so that the plaintiff’s reputation may be re-established” (Downard, at §14.2 (footnote omitted)), the record supports the inference that Dr. Platnick’s general damages are significant, rather than merely nominal.

[149] Beyond harm to his professional reputation, Dr. Platnick has also explained that he has suffered humiliation, shame, disgrace, and embarrassment that have left him anxious, nervous, and sleep-deprived, all of which has had a devastating impact on his marriage and his relationship with his four children. These “intangible and subjective elements” factor into the assessment of the harm suffered by a plaintiff: *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104, at p. 111 (C.A.); see also Downard, at §14.12 (observing that “injured feelings or the psychological impact” of defamation are relevant to the assessment of damages). It must be recalled that for the purposes of s. 137.1(4)(b), harm need not be monetized, as both “monetary harm or non-monetary harm can be relevant to demonstrating” the existence of harm: *Pointes Protection*, at paras. 68-71.

[150] Ultimately, the question here relates to the *existence* of harm, not to whether that harm was justifiably inflicted or suffered. Once the existence of harm is

established, the next question depends on whether that harm was suffered *as a result* of the defendant's expression. The animating purpose of s. 137.1(4)(b) must not be forgotten: the point is for the plaintiff to show that they have a legitimate impetus for bringing their lawsuit, by virtue of a legitimate harm that they seek to remedy, in order to alleviate the apprehension that they are using litigation as a tool to quell expression and silence the defendant. That is not so in the case at bar.

[151] I therefore turn to the next question — whether the harm was suffered *as a result* of the expression: *Pointes Protection*, at para. 68. In this case, the answer to this question actually depends on the answer to two contingent sub-questions: (1) whether Ms. Bent can be held liable for harm that may have resulted from the subsequent leak and/or reproduction of her email — i.e. republication; and, if not, (2) whether sufficiently serious harm was caused by Ms. Bent's initial email, or whether the harm suffered is *solely* attributable to the subsequent republication of the email. Indeed, my colleague supports the motion judge's position that the "bulk of the harm . . . occurred because of the *leak* of the email": para. 256 (emphasis in original). The answer to the first sub-question is crucial to the resolution of the second sub-question: if the first is answered in the affirmative, and Ms. Bent *can* be held liable for the leak and/or reproduction of her email, then there is no need to distinguish the harm due to republication from the harm due to the initial publication, since Ms. Bent will be liable for all of it. Accordingly, I begin below by answering the first sub-question as to whether Ms. Bent can be held liable for republication in

the context of the “harm analysis” under s. 137.1(4)(b): *Pointes Protection*, at paras. 68-72.

[152] A defendant can be liable for each republication of their initial publication in at least three situations: (i) if the defendant has authorized the republication; (ii) if the republication is the “natural and probable consequence” of the defendant’s initial publication; and (iii) if the republication was foreseen or reasonably foreseeable by the defendant (Downard, §5.36).

[153] Here, to be clear, the republication in issue consists of both the leak of Ms. Bent’s email and the publication of the article in *Insurance Business Canada* that reproduced the email in its entirety. The question is whether Ms. Bent can be held liable for such republication and the harm that resulted from it.

[154] I am of the view that, for the purposes of s. 137.1(4)(b), and only for those purposes, Ms. Bent can be held liable for republication. It must be remembered that “no definitive determination of harm or causation is required” at the s. 137.1(4)(b) stage: *Pointes Protection*, at para. 71. Instead, the plaintiff must simply provide evidence for the court “to draw an inference of likelihood in respect of the existence of the harm and the relevant causal link”: para. 71.

[155] Here, republication was at least reasonably foreseeable to Ms. Bent. The statements she published are tantamount to an allegation of fraud, which bears directly on Dr. Platnick’s professional competence and reputation. Accepting the

common sense inference that there was “a very active rumour mill” (A.R., vol. VI, at p. 7) in the insurance industry, and in light of the nature of Ms. Bent’s serious allegations, I am of the view that it was reasonably foreseeable that the email sent by the OTLA’s president-elect to several hundred people involved in acting for claimants injured in motor vehicle accidents would “rapidly find a much broader audience”: C.A. reasons, at para. 107. Indeed, that is exactly what happened.

[156] My colleague, like the motion judge, relies on the confidentiality clause in the Listserv Agreement to defend that any leak of Ms. Bent’s email was not foreseeable. After all, according to Ms. Bent, the members of the Listserv had agreed that communications on the Listserv were to be kept “strictly confidential”. I addressed this argument earlier in these reasons in discussing the defence of qualified privilege. For the purposes of deciding this motion only, I am of the view that Ms. Bent may not be able to rely on a term of a Listserv Agreement that she herself appears to have expressly breached by communicating a defamatory remark in contravention of that Agreement. Further, the confidentiality clause must be read in the context of the entire Listserv Agreement, which circumscribes its use: see generally *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 57. The confidentiality clause cannot be read to protect defamatory communications prohibitively made. In any case, however, even if it is assumed that the leak of her email was not foreseeable due to the confidentiality clause, it seems that Ms. Bent was in fact fully aware of the leak when she spoke to *Insurance*

Business Canada regarding the article that reproduced her email. This leads me to my next point.

[157] I also find, solely for the purposes of deciding this motion, that the KMI Letters evidence Ms. Bent's implied, or even express, authorization to republish her email. Indeed, "[a]uthorization may be inferred" when a defendant speaks to a reporter and fails to impose limitations on the use of their words: Downard, at §5.14; *Brown on Defamation*, at pp. 7-61 to 7-70. Here, the KMI Letters indicate that Ms. Bent had a telephone conversation with the Associate Editor of *Insurance Business Canada* before the magazine published its article containing her email.⁸ During that conversation, Ms. Bent did "not object to or have any concerns" about republication, nor did she draw the Associate Editor's attention to the fact that any leak from the OTLA Listserv was a serious professional and ethical breach of the Listserv's terms and conditions. KMI attests that had Ms. Bent objected or made it clear that the email had been sent confidentially, it would not have proceeded with republication. I am of the view that this is sufficient in itself to hold Ms. Bent liable for republication for the purposes of s. 137.1(4)(b).

[158] I say "for the purposes of s. 137.1(4)(b)" because, as I have often emphasized in these reasons, my findings should not be taken as prejudging the merits of the underlying proceeding, and specifically here, the issue of republication.

⁸ The motion judge found that Dr. Platnick's allegation that Ms. Bent gave an interview "was supported by no evidence whatsoever and appears on its face to be manifestly untrue": Sup. Ct. reasons, at paras. 24-25. While he did not have the KMI Letters before him, to the extent that his s. 137.1(4)(b) analysis depended on that finding, it cannot be given deference.

Whether Ms. Bent ought ultimately to be held liable for republication is a question I do not purport to decide. Simply, in the context of this s. 137.1 motion, I am satisfied that consideration of the harm due to republication attributable to Ms. Bent is warranted under s. 137.1(4)(b) given the evidence put before this Court. Again, whether that evidence is ultimately accepted or believed at trial, after *viva voce* evidence is given, for example, is an entirely separate query that I do not purport to decide here, nor should these reasons be interpreted as definitively deciding the question of republication or harm.

[159] Regardless of the foregoing, “[c]ausation is not, however, an all-or-nothing proposition”: *Pointes Protection*, at para. 72. In effect, even if one accepts my colleague’s conclusion that Ms. Bent cannot be held liable for republication (at para. 259), and ergo the causal link between Ms. Bent’s email and some elements of the harm suffered by Dr. Platnick is tenuous, there is nonetheless a sufficient causal link under s. 137.1(4)(b) between the initial publication and other elements of the harm suffered by Dr. Platnick (see *Pointes Protection*, at para. 72). That harm is sufficiently serious on its own to establish a weighty public interest in permitting the proceeding to continue. The motion judge was also in error to find otherwise: Sup. Ct. reasons, at paras. 121-26.

[160] Indeed, Ms. Bent’s email was sent on November 10, 2014, and republication did not occur until December 29. It is reasonable to draw an inference of likelihood with respect to Dr. Platnick suffering substantial harm during those

49 days. For example, well before any republication, and within just a week or two of Ms. Bent sending her email, Dr. Platnick's insurance work began to dry up as the blacklisting process began. Indeed, "[t]he temporal connection suggests a causal connection": C.A. reasons, at para. 106. Additionally, common sense allows for the reasonable inference that, in light of the gravity of professional misconduct allegations, insurance companies would "distance themselves from the expert against whom those allegations were made": para. 106. I reiterate that "no definitive determination of harm or causation is required" at this stage: *Pointes Protection*, para. 71.

[161] Further, the reputational considerations and harm discussed earlier in these reasons apply equally here. In other words, the initial publication itself may have inflicted professional reputational harm on Dr. Platnick. The email was disseminated to 670 plaintiff-side personal injury lawyers whom Dr. Platnick, in the course of his work, would inevitably have to encounter and interact with. Although the majority of Dr. Platnick's work came from insurers, he had also worked on behalf of plaintiff-side firms in the past (including Lerner on multiple occasions); Ms. Bent's email and the implications of her allegations foreclosed that opportunity from arising in the future. That Ms. Bent held the post of president-elect of the OTLA and sent her email in that capacity may only have magnified the reputational harm suffered by Dr. Platnick: see Downard, at §14.13. Thus, contrary to the motion judge's position, supported by my colleague, that the "bulk of the harm . . . occurred because of the *leak* of the email", the email alone may have compromised

Dr. Platnick's professional reputation. As I have emphasized, such harm has to be taken seriously by this Court.

[162] In conclusion, as the foregoing demonstrates, the harm likely to be or have been suffered by Dr. Platnick as a result of Ms. Bent's expression lies close to the high end of the spectrum and, correspondingly, so too does the public interest in allowing his defamation proceeding to continue.

(b) *Public Interest in Protecting the Expression*

[163] In *Pointes Protection*, this Court finds that the public interest in protecting an expression can be determined by reference to the core values that underlie s. 2(b) of the *Canadian Charter of Rights and Freedoms*, such as the search for truth, participation in political decision making, and diversity in forms of self-fulfilment and human flourishing: para. 77. That said, in *Hill*, this Court noted that "defamatory statements are very tenuously related to the core values which underlie s. 2(b)": para. 106. In consistent fashion, this Court finds in *Pointes Protection* that there will be less of a public interest in protecting a statement that contains "gratuitous personal attacks" and that the "motivation behind" the expression will be relevant to the inquiry: paras. 74-75 (emphasis omitted).

[164] Accordingly, in determining the public interest in protecting Ms. Bent's expression, I need to consider the fact that she made a personal attack against Dr. Platnick, which cast doubt on his professional competence, integrity, and

reputation. The personal attack was launched by Ms. Bent even though she and Dr. Platnick had never met or had a single discussion. It bears on my analysis that Ms. Bent never reached out to Dr. Platnick to confront him or to investigate her allegations against him.

[165] Quite importantly, *Pointes Protection* also calls for consideration of the “chilling effect on future expression” and the “broader or collateral effects on other expressions on matters of public interest”: para. 80 (emphasis omitted); see also Abella J.’s reasons, at para. 262, with regard to the “considerable chilling effect” of permitting Dr. Platnick’s defamation lawsuit to proceed. Indeed, Ms. Bent has argued that if Dr. Platnick’s defamation proceeding is allowed to continue, it would “not only stifle” her own speech, but “also potentially deter others from speaking out against unfair and biased practices in the insurance industry and the difficulties encountered by seriously injured persons claiming the payment of benefits from their insurance companies”: A.R., vol. III, at p. 29.

[166] I agree with my colleague that this concern, if valid, would weigh in favour of the public interest in protecting the expression. To be sure, I do not deny that s. 137.1(4)(b) is intended to specifically protect expression that may bear on the integrity of the administration of justice. This is confirmed by the legislative history that animated s. 137.1 as a whole.

[167] However, with great respect to my colleague, she does not consider a crucial element of Ms. Bent’s expression. Permitting Dr. Platnick’s defamation claim

to proceed will deter others not from speaking out against unfair and biased practices, as my colleague argues, but from unnecessarily singling out an individual in a way that is extraneous or peripheral to the public interest. It will also deter others from making defamatory remarks against an individual without first substantiating, or *attempting* to substantiate, the veracity of their allegations. In this way, rather than *disincentivizing* people from speaking out against unfair and biased practices, it will *incentivize* them to act with reasonable due diligence and to tailor their expression so as to avoid needlessly defaming an individual who depends on their reputation for their livelihood.

[168] In my humble opinion, this is the appropriate balance, at the unique stage of a s. 137.1 motion, between freedom of expression and reputational considerations, which this Court has historically strived to optimize: good reputation “reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights”, and the protection of reputation “must be carefully balanced against the equally important right of freedom of expression” (*Hill*, at paras. 120-21).

[169] Thus, while Ms. Bent’s specific references to Dr. Platnick fall at the low end of the protection-deserving spectrum, her email interpreted broadly as pertaining to the administration of justice in Ontario falls closer to the high end. In conclusion then, I am of the view that, when considered as a whole, the public interest in protecting Ms. Bent’s expression lies somewhere in the middle of the spectrum.

(c) *Weighing of the Public Interest*

[170] As a reason to dismiss Dr. Platnick's proceeding under the weighing exercise, my colleague references Dr. Platnick's *other* lawsuits against *non*-parties to this action, as well as the quantum of damages Dr. Platnick has alleged, as apparent evidence of a "punitive or retributory purpose" which is the hallmark of a classic SLAPP suit": paras. 183, 185, 207 and 263.

[171] This line of reasoning by my colleague is, respectfully, unmoored from a proper s. 137.1(4)(b) analysis. This Court in *Pointes Protection* squarely rejects any inquiry into the hallmarks of a SLAPP: "the s. 137.1(4)(b) stage is fundamentally a public interest weighing exercise and not simply an inquiry into the hallmarks of a SLAPP" (para. 79). Respectfully, my colleague's references to the mere quantum of damages Dr. Platnick claims (at para. 263) cannot serve as a stand-alone proxy for finding that his lawsuit is motivated by a punitive or retributory purpose. As I discussed above, Dr. Platnick has supported his claim of significant harm — he is a successful, highly paid doctor, and Ms. Bent's allegations go to the heart of his professional reputation. There is simply no basis for inferring that Dr. Platnick's lawsuit is motivated by a punitive or retributory purpose based on the amount of damages sought from Ms. Bent. As to Dr. Platnick's *other* lawsuits and the *aggregate* damages alleged (Abella J.'s reasons, at paras. 183, 185 and 207), they are irrelevant to the inquiry on *this* motion, as there is no evidence that those lawsuits are abusive, frivolous, or vexatious. Accordingly, there is no basis to impute a punitive or retributory purpose to Dr. Platnick.

[172] In light of the open-ended nature of s. 137.1(4)(b), courts have the power to “scrutinize what is really going on in the particular case before them”: *Pointes Protection*, at para. 81. On its face, this is not a case in which one party is vindictively or strategically silencing another party; it is a case in which one party is attempting to remedy seemingly legitimate harm suffered as a result of a defamatory communication. This is not the type of case that comes within the legislature’s contemplation of one deserving to be summarily dismissed at an early stage, nor does it come within the language of the statute requiring such a dismissal.

[173] As I have discussed, the harm likely to be or have been suffered by Dr. Platnick lies closer to the high end of the spectrum, and so too then does the public interest in allowing the proceeding to continue. On the other hand, the public interest in Ms. Bent’s expression lies somewhere between the low and high ends of the spectrum.

[174] Thus, I am satisfied that Dr. Platnick has established on a balance of probabilities that the harm likely to be or have been suffered as a result of Ms. Bent’s expression is sufficiently serious that the public interest in permitting his defamation proceeding to continue outweighs the public interest in protecting Ms. Bent’s expression.

(4) Conclusion on the Section 137.1 Motion

[175] As these reasons have established, while Ms. Bent successfully meets her threshold burden under s. 137.1(3), Dr. Platnick successfully clears both the merits-based hurdle and the public interest hurdle under s. 137.1(4)(a) and s. 137.1(4)(b), respectively. For these reasons, I would dismiss Ms. Bent's s. 137.1 motion and allow Dr. Platnick's lawsuit in defamation against Ms. Bent and Lerner to proceed to trial.

[176] I hasten to reiterate here that a s. 137.1 motion is plainly not a determinative adjudication of the merits of a claim: *Pointes Protection*, at paras. 37, 50, 52 and 71. Nothing in these reasons can, or should, be taken as prejudging the merits of the action. Simply put, Dr. Platnick's claim is one that deserves a trial on the merits, and is not one that ought to be summarily screened out at this early stage.

IV. Conclusion

[177] The motion to adduce fresh evidence is allowed in part without costs.

[178] The appeals are dismissed.

[179] With regard to costs, as I said in *Pointes Protection*, the legislature expressly contemplated a costs regime for s. 137.1 motions. Indeed, s. 137.1(8) sets out a default rule that when a s. 137.1 motion is dismissed, neither party shall be awarded costs, unless a judge determines that "such an award is appropriate in the circumstances". Here, no such award would be appropriate: I do not take Ms. Bent's s. 137.1 motion to be an instance of frivolous motion practice to delay Dr. Platnick's

defamation claim against her; rather, Ms. Bent's use of s. 137.1 — especially given the substantial uncertainty due to the lack of judicial guidance at the time of serving the motion — was a *bona fide* use of this new mechanism. I would award no costs.

The reasons of Abella, Karakatsanis, Martin and Kasirer JJ. were delivered by

ABELLA J. —

[180] Maia Bent is a lawyer who represents accident victims in disputes against insurance companies. In two such disputes, Ms. Bent's clients sought benefits from their insurers for injuries sustained in motor vehicle accidents. The insurance companies hired medical experts to evaluate Ms. Bent's clients. They also retained a general practitioner, Dr. Howard Platnick, to summarize the results of the evaluations. Dr. Platnick prepared summary reports which were forwarded to Ms. Bent. His summaries concluded that Ms. Bent's clients were not entitled to the benefits they sought.

[181] Ms. Bent obtained the original reports of the medical experts who evaluated her clients and on which Dr. Platnick based his summaries. In both cases, Ms. Bent discovered significant discrepancies between Dr. Platnick's reports and those of the experts whose findings he purported to summarize. Some of the experts had concluded that Ms. Bent's clients were sufficiently impaired to qualify for the benefits they were seeking. Dr. Platnick's summaries attributed the opposite

conclusion to them and omitted findings from their reports that were favourable to Ms. Bent's clients.

[182] After both cases were resolved with the insurance companies, Ms. Bent sent a confidential internal email to members of the Ontario Trial Lawyers Association (OTLA), an organization of legal professionals who represent the interests of accident victims in automobile insurance disputes. The OTLA has raised concerns in various forums about biases in insurer medical examination reports. Ms. Bent is a former president of the OTLA and, at the time she sent the email, was the organization's president-elect.

[183] In her email, Ms. Bent described her experiences in the two cases involving Dr. Platnick, and advised her colleagues to routinely obtain the original expert reports and other supplementary disclosure in disputes with insurance companies. Her email was leaked to a wider audience. Dr. Platnick filed defamation suits against her and several other parties for almost \$50 million in damages. Ms. Bent brought a motion to dismiss his action against her under s. 137.1 of Ontario's *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[184] The motion judge, Dunphy J., found for Ms. Bent (2016 ONSC 7340, 136 O.R. (3d) 339). He concluded, among other things, that she had a valid defence of qualified privilege to the defamation action; that there was no evidence that she bore "any responsibility for the subsequent and unanticipated republication of the email to a broader audience"; and that the public interest in protecting her

communication outweighed the public interest in allowing Dr. Platnick's lawsuit to continue. The Court of Appeal disagreed with these conclusions and reinstated Dr. Platnick's defamation action (2018 ONCA 687, 426 D.L.R. (4th) 60).

[185] I would allow the appeals. Dr. Platnick's lawsuit — and the exorbitant amount of damages he is seeking — is precisely the kind of claim that has the effect of stifling expression on matters of public interest. Allowing his proceeding against Ms. Bent to continue would undermine the very purposes for which s. 137.1 was enacted.

Background

[186] Ms. Bent was called to the Bar in 1998 and is currently a lawyer at Lerner LLP. She acts for plaintiffs in personal injury actions.

[187] Dr. Platnick is a general practitioner who has been retained as an expert in several insurance disputes, mostly on behalf of insurance companies.

[188] Dr. Platnick and Ms. Bent were involved in two insurance proceedings. In the first, Ms. Bent acted for a client with serious physical health problems who had made "several suicide attempts". Her client claimed to have been "catastrophically impaired" during a motor vehicle accident. Victims who are catastrophically impaired are entitled to enhanced compensation from insurers based on criteria and guidelines

in the *Statutory Accident Benefits Schedule — Effective September 1, 2010*, O. Reg. 34/10, s. 1 (under the *Insurance Act*, R.S.O. 1990, c. I.8).

[189] A single finding of catastrophic impairment by a physician is sufficient for an insurer to accept the claim.

[190] Ms. Bent filed a claim with her client's insurer for enhanced benefits. The insurer retained several experts, including Dr. Platnick, to provide opinions on whether Ms. Bent's client was catastrophically impaired. Some of the experts clinically evaluated Ms. Bent's client. Dr. Platnick did not. His role was to summarize the findings of the other experts and, based on those findings, to provide his opinion on whether the criteria for catastrophic impairment had been met.

[191] One of the experts who clinically evaluated Ms. Bent's client, Dr. Varinder Dua, concluded that the client "ha[d] sustained a catastrophic impairment". She set out her findings in a report which the insurer forwarded to Ms. Bent.

[192] The insurer delayed in finalizing a decision on the catastrophic impairment claim. Ms. Bent protested, emphasizing her client's serious physical and mental health condition and noting that Dr. Dua had already made the catastrophic impairment finding necessary for the insurer to accept her client's claim. The delay persisted, prompting Ms. Bent to file a complaint with the Financial Services Commission of Ontario.

[193] A week later, the insurer accepted the catastrophic impairment claim, consistent with Dr. Dua's evaluation.

[194] One month after the insurer accepted the catastrophic impairment claim, because the complaint of delay was still outstanding, the Financial Services Commission of Ontario sent Ms. Bent a report prepared by Dr. Platnick for the insurer. Ms. Bent had not previously seen or been given Dr. Platnick's report.

[195] In his report, Dr. Platnick concluded that Ms. Bent's client did not meet the criteria for catastrophic impairment. Of particular note was Dr. Platnick's summary of Dr. Dua's report. Contrary to the conclusion in the report by Dr. Dua sent to Ms. Bent by the insurer, Dr. Platnick stated that Dr. Dua had not found the degree of impairment necessary for a catastrophic impairment designation. Other findings in Dr. Dua's report favourable to Ms. Bent's client were also omitted in Dr. Platnick's summary. At no point in the summary did Dr. Platnick indicate that he had talked to Dr. Dua, or suggest that Dr. Dua had prepared a subsequent report to the one she originally submitted to the insurer.

[196] In the second insurance proceeding in which Ms. Bent and Dr. Platnick were involved, Ms. Bent's client, Dr. Laura Carpenter, claimed insurance benefits on the basis of catastrophic impairment. To evaluate the claim, the insurer retained an assessment company (Sibley & Associates), which in turn hired Dr. Platnick and other experts. The other experts hired by Sibley clinically examined Dr. Carpenter. Dr. Platnick did not. His role was to review and summarize the clinical assessments

prepared by the other experts and, based on those reports, to provide his opinion on whether Dr. Carpenter met the criteria for catastrophic impairment.

[197] After the clinical evaluations of Dr. Carpenter by the experts were complete, Ms. Bent received two reports from the insurer prepared by Dr. Platnick: a “Catastrophic Impairment Determination” report and a “Catastrophic Determination Executive Summary” report.

[198] In these reports, Dr. Platnick stated that Ms. Bent’s client did not meet the criteria for catastrophic impairment. He described this finding as a “consensus conclusion” of four experts who had examined Dr. Carpenter, stating:

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

[199] After receiving Dr. Platnick’s reports, Ms. Bent obtained an order from the arbitrator presiding over the insurance proceeding, requiring disclosure of Sibley’s entire file. As a result, she received the original reports prepared by the medical experts who had examined and evaluated Dr. Carpenter, as well as correspondence between Sibley and those experts.

[200] The additional disclosure revealed that three of the four experts who Dr. Platnick had said were part of a “consensus conclusion”, had originally concluded that Dr. Carpenter was catastrophically impaired or made findings consistent with that

conclusion. The fourth said that Ms. Bent's client did not meet the criteria for catastrophic impairment. At the time Dr. Platnick submitted his summary report, the medical experts remained divided and no "consensus conclusion" existed among them about whether Dr. Carpenter was catastrophically impaired. Dr. Platnick's summary reports, however, did not include either the conclusions of the experts who were of the view that Dr. Carpenter had suffered catastrophic impairment, or other findings in their reports favourable to Ms. Bent's client.

[201] The additional disclosure obtained by Ms. Bent also included communications between Sibley and the medical experts who had clinically evaluated Dr. Carpenter. These documents exposed efforts to have the experts revise their reports and, in some cases, their conclusions, as to catastrophic impairment:

- Sibley sent an email to the psychiatrist on the assessment team, Dr. Mark Rubens, asking him to sign on to Dr. Platnick's summary report and the conclusion that Dr. Carpenter was not catastrophically impaired. Dr. Rubens refused, noting that Sibley was asking him to "sign a 'consensus statement' in which 'consensus' is quite clearly and explicitly contradicted", and describing the request as "profoundly offensive and insulting".
- Sibley sent an email to the psychologist on the assessment team, Dr. Myles Genest, suggesting that he delete certain references to Sibley's role in the assessment process and revise his answer to a question about Dr. Carpenter's

employment capacity. To “maintain independence” and to avoid “compromis[ing] the integrity” of the assessment, Dr. Genest refused to make the suggested changes. Sibley sent a follow-up email providing Dr. Genest with “samples from Dr. Platnick” for the purposes of “complet[ing] an addendum” to his report. Dr. Genest refused to make these additions. When provided with Dr. Platnick’s summary report, Dr. Genest told Sibley that he did not agree with Dr. Platnick’s conclusion that “there is no catastrophic impairment resulting from the collision”.

- A third doctor who had initially concluded that Dr. Carpenter’s degree of impairment was sufficient for a catastrophic impairment designation, was sent “revisions” to his original report. After receiving these revisions from Sibley, he revised his report, removed the relevant finding of impairment, and agreed to defer to the conclusion of the “lead physician”, Dr. Platnick.

[202] The matter proceeded to arbitration. The insurer, relying on Dr. Platnick’s reports, argued that Dr. Carpenter was not catastrophically impaired. Dr. David King, a neurologist who was one of the four experts Dr. Platnick said was part of the “consensus conclusion”, testified at the arbitration. He revealed that he had not participated in any consensus on whether Dr. Carpenter met the criteria for catastrophic impairment; that he had never seen Dr. Platnick’s report; and that portions of his own report had been omitted without his knowledge or consent.

[203] Later that same day, the insurer settled with Dr. Carpenter on generous terms, agreeing that she had been catastrophically impaired. The insurer also agreed to full payment of insurance benefits on an enhanced basis retroactively with interest and to fully indemnify Dr. Carpenter for her legal fees and disbursements. Ms. Bent described these terms as “virtually impossible to get on a settlement”.

[204] After the claim was settled, Ms. Bent sent a confidential email through a “Listserv” comprised exclusively of plaintiff-side personal injury lawyers who were members of the Ontario Trial Lawyers Association. These lawyers had all signed an undertaking to maintain the confidentiality of all information circulated on the Listserv:

CONFIDENTIALITY

I undertake to keep all LISTSERV information, opinions, and comments strictly confidential from all others, including OTLA members who are not LISTSERV Members, including my law firm partners, associates and staff.

I understand that other members of the OTLA rely on my undertaking to fellow members to maintain confidential[ity] in their decision to use the LISTSERVs.

[205] Ms. Bent’s email said:

Dear Colleagues,

I am involved in an Arbitration on the issue of catastrophic impairment where Sibley aka SLR Assessments did the multi-disciplinary assessments for TD Insurance. Last Thursday, under cross-examination the IE neurologist, Dr. King, testified that large and critically important

sections of the report he submitted to Sibley had been removed without his knowledge or consent. The sections were very favourable to our client. He never saw the final version of his report which was sent to us and he never signed off on it.

He also testified that he never participated in any “consensus meeting” and he never was shown or agreed to the Executive Summary, prepared by Dr. Platnick, which was signed by Dr. Platnick as being the consensus of the entire team.

This was NOT the only report that had been altered. We obtained copies of all the doctor[s’] file[s] and drafts and there was a paper trail from Sibley where they rewrote the doctors’ reports to change their conclusion from our client having a catastrophic impairment to our client not having a catastrophic impairment.

This was all produced before the arbitration but for some reason the other lawyer didn’t appear to know what was in the file (there were thousands of pages produced). He must have received instructions from the insurance company to shut it down at all costs on Thursday night because it offered an obscene amount of money to settle, which our client accepted.

I am disappointed that this conduct was not made public by way of a decision but I wanted to alert you, my colleagues, to always get the assessor’s and Sibley’s files. This is not an isolated example as I had another file where Dr. Platnick changed the doctor’s decision from a marked to a moderate impairment.

[206] Ms. Bent’s email was leaked from the Listserv and reached an advocacy group. It then found its way to a journalist at the “Insurance Business” magazine. The magazine published the email as part of a broader article about medical files being altered to suit insurers.

[207] Dr. Platnick sued, among others, the magazine, the magazine’s editor, the magazine’s associate editor, Ms. Bent, and Ms. Bent’s law firm, Lerner LLP, for

defamation. He claimed damages in the amount of \$16.3 million in each lawsuit, for a total of close to \$50 million.

[208] In his statement of claim in the action against Ms. Bent, Dr. Platnick alleged that she had inaccurately accused him of professional misconduct. He claimed that in the case involving Dr. Dua, he was accurately summarizing a second, follow-up report in which Dr. Dua had changed her conclusion on catastrophic impairment after a conversation with Dr. Platnick. In Dr. Carpenter's case, Dr. Platnick claimed that he used the term "consensus conclusion" with the expectation that such a consensus would emerge after the completion of his report. That was why he said he had attached an acknowledgement page with spaces for the signatures that Sibley was to obtain.

[209] Fifteen months after Dr. Platnick filed his statement of claim, Ms. Bent brought a motion under s. 137.1 of Ontario's *Courts of Justice Act* to dismiss the action. Section 137.1 allows for the expeditious dismissal of proceedings which arise from expression on a matter of public interest.

[210] The motion judge, Dunphy J., agreed with Ms. Bent. He concluded that:

- Ms. Bent's email addressed matters of "considerable importance to the administration of justice" and was sent to "underscore to other plaintiff-side lawyers the importance of obtaining production of the entire file in order to scrutinize expert reports";

- There was a clear “public interest in educating OTLA members about the risk of relying upon selective ‘executive summary’ reports that omit evidence favourable to claimants and potentially make misleading and false claims of being consensus reports”;
- Ms. Bent “reported fairly and accurately on the facts reasonably known to her”;
- There was no evidence to reasonably support the inference that Ms. Bent acted with malice in publishing the email;
- There was “no evidence to suggest that Ms. Bent bears any responsibility for the subsequent and unanticipated republication of the email to a broader audience”.

[211] Based on these findings, the motion judge held, among other things, that Ms. Bent had a valid defence of qualified privilege against the defamation claim, and that the public interest in protecting her expression outweighed the public interest in allowing Dr. Platnick’s claim to continue.

[212] The Court of Appeal allowed the appeal and reinstated Dr. Platnick’s action. The court held that a “reasonable trier” could find that the defence of qualified

privilege was invalid on the basis that Ms. Bent acted inappropriately or maliciously in writing that Dr. Platnick had previously “changed [a] doctor’s decision”. The court also disagreed with the motion judge’s conclusion on the public interest weighing test and his related finding that Ms. Bent could not reasonably have anticipated the dissemination of the email outside the Listserv.

Analysis

[213] The issue in these appeals is whether Dr. Platnick’s defamation action should be dismissed under s. 137.1 of Ontario’s *Courts of Justice Act*.

[214] Section 137.1 provides a mechanism for the pre-trial dismissal of lawsuits that unduly limit expression on matters of public interest (*1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, at para. 17). The goal of the legislation is to ensure that freedom of expression on matters of public interest is liberated from an aspic of fear over the costs and uncertainty of defending against a lawsuit (see Ministry of the Attorney General, *Anti-Slapp Advisory Panel: Report to the Attorney General* (2010), at pp. 8-10; see also Michaelin Scott and Chris Tollefson, “Strategic Lawsuits Against Public Participation: The British Columbia Experience” (2010), 19 *RECIEL* 45, at p. 45; Hilary Young, “Rethinking Canadian Defamation Law as Applied to Corporate Plaintiffs” (2013), 46 *U.B.C. L. Rev.* 529, at p. 562).

[215] This goal is expressly identified in the legislation:

137.1 (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.

(See also *Pointes Protection*, at para. 12.)

[216] These purposes are achieved by directing, through accelerated timelines,⁹ the expedited dismissal of proceedings which “aris[e] from” expression that relates to a matter of public interest:

137.1

...

(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.

...

137.3 An appeal of an order under section 137.1 shall be heard as soon as practicable after the appellant perfects the appeal.

[217] There is no dispute that Dr. Platnick’s defamation action was based on expression that relates to a matter of public interest. The target of Dr. Platnick’s

⁹ These timelines are set out in s. 137.2.

lawsuit was Ms. Bent's email to her OTLA colleagues, which addressed questions of significance to the administration of justice, particularly the independence, accuracy and impartiality of experts and third-party assessment companies retained by insurers. Section 137.1(3) is therefore satisfied and Dr. Platnick's defamation proceeding must presumptively be dismissed.

[218] Pursuant to s. 137.1(4), however, Dr. Platnick's proceeding may continue if he satisfies a judge that there are grounds to believe that his case has substantial merit, that Ms. Bent has no valid defence to the proceeding, *and* that the likely harm suffered by him is serious enough that it outweighs the public interest in protecting Ms. Bent's expression:

137.1

...

(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.

[219] Only if all three criteria are met by Dr. Platnick, is his proceeding allowed to continue.

[220] In my respectful view, Ms. Bent has a “valid” defence of qualified privilege and is therefore entitled to the relief mandated by s. 137.1(3), namely the dismissal of Dr. Platnick’s defamation action. Given this conclusion, it is unnecessary to consider whether she also has a valid defence of justification.

[221] In *Pointes Protection*, this Court clarified that a defence is “valid” if it has a “real prospect of success” (para. 60). To have a “real prospect of success”, a defence must be legally tenable, supported by evidence that is reasonably capable of belief, and have a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the person being sued (paras. 49-50 and 59-60). Dr. Platnick has the burden of showing that there is a sufficiently cogent basis in the record and the law to conclude “that the defence, or defences, put in play . . . can be said to have no real prospect of success” (para. 59).

[222] The defence of qualified privilege applies “where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it” (*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 143; *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, at para. 78, both quoting *Adam v. Ward*, [1917] A.C. 309 (H.L.), at p. 334). The focus is on the circumstances in which the communication was made. Qualified privilege can be lost if the communication exceeds the legitimate purposes of the privilege, or if the speaker was predominantly motivated by malice (*Botiuk*, at paras.

79-80). The focus at this stage is on the content of the communication, and on the conduct and motives of the speaker.

[223] In this case, the conclusion that Ms. Bent sent her email in circumstances protected by qualified privilege, is supported by evidence that is reasonably capable of belief and sufficiently compelling to give the defence the necessary likelihood of success (*Pointes Protection*, at paras. 59-60). Dr. Platnick has not provided a sufficient basis in the record and the law that shows otherwise. Ms. Bent was the incoming president of the OTLA, an organization whose members advocate for the fair treatment of accident victims in the insurance system and routinely act for them in legal disputes against insurers. As president-elect, Ms. Bent had a clear duty to inform OTLA members about selective and misleading expert reports which disadvantage the very individuals they advocate for and represent. The OTLA has raised concerns about this problem in public forums and consultations. Ms. Bent also had a duty to advise OTLA members of ways to protect their clients' interests against unfair practices by experts and assessment companies. These matters went to the heart of the OTLA's mandate — and, as a result, to Ms. Bent's role as president-elect.

[224] At the time Ms. Bent sent her email, there had already been significant public controversy over the neutrality of experts retained by insurance companies. Although all experts have a duty to act independently and impartially (*White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 S.C.R. 182, at para. 10), concerns have been raised for many years about experts and assessors who produce

selective or misleading reports that “may be the determining factor” in resolving a claim for insurance benefits (*MacDonald v. Sun Life Assurance Company of Canada*, 2006 CanLII 41669 (Ont. S.C.J.), at para. 100; see also paras. 101-3; *Burwash v. Williams*, 2014 ONSC 6828, at paras. 25-29 (CanLII); *Daggitt v. Campbell*, 2016 ONSC 2742, 131 O.R. (3d) 423, at paras. 27-30).

[225] Cunningham A.C.J. summarized the problem as follows in the Ministry of Finance’s *Ontario Automobile Insurance Dispute Resolution System Review: Final Report* (2014):

The problem is obvious. An expert retained by an insurer who supports claimants is unlikely to be retained again. [p. 23]

[226] These concerns came to the fore in the two insurance proceedings involving Ms. Bent and Dr. Platnick. Not only did Ms. Bent have a duty to share such concerns as the president-elect of the OTLA, she had a professional duty as a lawyer to participate in improving the administration of justice and to share best practices (see Law Society of Ontario’s *Rules of Professional Conduct*, rr. 2.1-2 and 5.6-1). It was arguably consistent with this duty for her to flag conduct by experts that had been the source of considerable public concern and controversy in her area of practice.

[227] Members of the OTLA Listserv — all plaintiff-side personal injury lawyers — unquestionably had a reciprocal duty as well as an interest in receiving Ms. Bent’s communication. Being alerted to questionable conduct by experts and

assessment companies — and advised of ways to guard against such conduct — was of professional significance to them and especially to their clients. I cannot see how Ms. Bent or her colleagues could possibly have waived their professional obligation to exchange such information by joining a Listserv. Whether Ms. Bent and her colleagues were under a duty to share information does not solely depend on *how* they ultimately chose to communicate. The very terms and conditions of the Listserv, moreover, clarify that it was a confidential forum participated in precisely to “obtai[n] counsel, advice and assistance” on issues arising on their files.

[228] Ms. Bent’s communication, therefore, was made by a person with a professional interest and duty to share the information with her colleagues, who had a corresponding interest and duty to receive it. This supports the conclusion that her defence of qualified privilege has a “real prospect of success” based on both the facts and the law.

[229] Qualified privilege can, however, be defeated if the communication exceeded the purposes of the privilege or if it can be shown that Ms. Bent was predominantly motivated by malice.

[230] A defendant cannot rely on qualified privilege if the information communicated is “not reasonably appropriate to the legitimate purposes of the occasion” (*Botiuk*, at para. 80; see also *Hill*, at paras. 146-47). A statement cannot be “reasonably appropriate” unless it is “*relevant and pertinent* to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the

privilege” (*Hill*, at para. 146 (emphasis added), citing *Adam v. Ward*, at p. 321). As

Professor Raymond E. Brown has noted:

Courts take a broad view of a connection between the statement and the privileged occasion; it need not be central to the topic or occasion but only relevant.

(*Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States* (2nd ed. (loose-leaf)), at p. 13-895; see also *Douglas v. Tucker*, [1952] 1 S.C.R. 275, at p. 286; *Netupsky v. Craig*, [1973] S.C.R. 55, at pp. 60-61; *McLoughlin v. Kutasy*, [1979] 2 S.C.R. 311, at p. 323; *Merit Consultants International Ltd. v. Chandler*, 2014 BCCA 121, 60 B.C.L.R. (5th) 214, at para. 30; *Wang v. British Columbia Medical Assn.*, 2014 BCCA 162, 57 B.C.L.R. (5th) 217, at paras. 99-100; *RTC Engineering Consultants Ltd. v. Ontario (Solicitor General)* (2002), 58 O.R. (3d) 726 (C.A.), at para. 18; *Chohan v. Cadsky*, 2009 ABCA 334, 464 A.R. 57, at paras. 105 and 108; *Laufer v. Bucklaschuk* (1999), 145 Man. R. (2d) 1 (C.A.), at para. 76; *Board of Trustees of the City of Saint John Employee Pension Plan v. Ferguson*, 2008 NBCA 24, 328 N.B.R. (2d) 319, at para. 9; *Cush v. Dillon*, [2011] HCA 30, 243 C.L.R. 298, at paras. 22-23.)

[231] Dr. Platnick argued that Ms. Bent exceeded the limits of qualified privilege because it was not “necessary” for her to identify him by name. The question, however, is whether Ms. Bent’s statements were relevant and “reasonably appropriate” in the circumstances, not whether they were strictly necessary (*Hill*, at para. 147; *Botiuk*, at para. 80). A necessity-based approach would have dangerous and restrictive implications for the defence of qualified privilege. It would effectively exclude from the defence statements containing specific examples of misconduct, since statements like that can almost always be stripped of detail and reconstructed without the “unnecessary” examples they previously contained. Courts, for good reason, do not apply this type of strict editorial scrutiny when evaluating claims of

qualified privilege (Brown, at pp. 13-888 to 13-906). As the British Columbia Court of Appeal magnetically noted, a “person speaking on a privileged occasion should not be regarded as a tightrope walker without a safety net, with the judge waiting underneath with bated breath hoping for a tumble” (*Wang*, at para. 99, quoting *Birchwood Homes Limited v. Robertson*, [2003] EWHC 293 (Q.B.), at para. 27 (BAILII); see also *Tsatsi v. College of Physicians and Surgeons of Saskatchewan*, 2018 SKCA 53, at para. 48 (CanLII)).

[232] In this case, it is hard to see how Ms. Bent could have exceeded the bounds of her duty to inform OTLA members of selective and misleading expert reports, by identifying an expert who she reasonably believed to have engaged in precisely that conduct.

[233] The facts Ms. Bent knew when she identified Dr. Platnick clearly connected him to the selective or misleading practices that Ms. Bent was duty-bound to report to her colleagues, or, for that matter, that her colleagues would have been duty-bound to report to each other, since those facts went to the heart of their ability to do their jobs for their clients. Not only did Dr. Platnick’s reports, on their face, misrepresent the conclusions of the experts who had clinically evaluated Dr. Carpenter, they omitted several findings the experts made in reaching conclusions that were favourable for Dr. Carpenter’s position.

[234] In the Carpenter arbitration, Dr. Platnick produced reports purporting to summarize the findings of the medical experts who evaluated Ms. Bent’s client.

Dr. Platnick concluded that the client was not catastrophically impaired and described this finding as a “consensus conclusion” of the assessment team. The disclosure obtained by Ms. Bent showed that no such consensus existed; the experts, in fact, were divided, and a single finding of catastrophic impairment would have provided sufficient grounds for the insurer to accept Dr. Carpenter’s claim.

[235] Nor was there a disclaimer or other qualifying statement in Dr. Platnick’s report indicating that it was a draft. Moreover, when contacted by Sibley to revisit their findings in light of Dr. Platnick’s report, two of the experts refused to endorse his conclusion or analysis. A third, Dr. King, testified at the arbitration that he had never seen Dr. Platnick’s report and had not played any role in the report’s preparation. This same doctor testified about alterations to his report made without his knowledge or consent.

[236] Dr. Platnick’s conduct in the Carpenter arbitration was consistent with his conduct in the prior proceeding involving Dr. Dua. In a similar context — a catastrophic impairment claim against an insurer which retained experts to conduct an assessment — Dr. Platnick had again produced a report which Ms. Bent reasonably viewed as misrepresenting the conclusions of a medical expert who had examined her client. At the time Ms. Bent sent the email, she only had the copy of Dr. Dua’s report sent to her by the insurer. She had no knowledge of a second, amended report, nor did she have any reason to believe that a second report had been produced. Not only was

there no reference to it in the report by Dr. Platnick, the insurer settled on terms consistent with Dr. Dua's first report.

[237] There is, therefore, solid evidentiary support for Ms. Bent's belief that Dr. Platnick had produced selective and misleading expert reports. Whether this belief was substantially true is the test for justification, a defence which is not the focus of these reasons. It is not the test for qualified privilege, where what matters is whether communicating her belief to members on the OTLA Listserv was relevant and reasonably appropriate in the circumstances. Given the compelling evidence in Ms. Bent's possession, it was clearly relevant and appropriate for her, in fulfilling her duty to protect her colleagues and their clients, to identify Dr. Platnick, a frequently-retained expert in whose cases it had proven to be especially important to obtain full disclosure of the insurer's files. Suggesting to her professional colleagues that there was a doctor somewhere in Ontario whose reports they ought to distrust, would have been a warning without content.

[238] It would defeat the purpose of qualified privilege to withhold the defence from Ms. Bent because she chose to identify Dr. Platnick by name. Qualified privilege exists to acknowledge the benefit of expression which is relevant to protecting the public interest, including protecting the public from the perpetuation of wrongdoing or injustice. Generic accounts of misconduct, which do not refer to specific persons (and are therefore not defamatory in the first place) do not require the protection of qualified privilege. The defence is, necessarily, engaged only when

someone is identified. It is precisely in these circumstances that the shield of qualified privilege is most important, to ensure that communication in the public interest is not inhibited by fear of a potential lawsuit (Brown, at pp. 13-22 to 13-35).

[239] Relying on *Hill* and *Botiuk*, Dr. Platnick also argued that Ms. Bent exceeded the purposes of the privilege by not exercising further investigative diligence before publishing her email. *Hill* and *Botiuk* represent very different circumstances. The defamatory remarks in *Hill* concerned serious allegations of impropriety against senior Crown counsel, delivered on the steps of Osgoode Hall with major media outlets present, before the completion of an ongoing investigation into counsel's conduct. When the remarks were made, there was little evidentiary support for them. The defamatory remarks in *Botiuk* were included in documents that many of the defendant lawyers endorsed without reading, and that included claims they knew to be untrue. In both cases, the need for further investigation was obvious at the time the remarks were made. Neither *Hill* nor *Botiuk* state that a privileged occasion is exceeded when a lawyer declines to supplement what is *already* a reasonable belief with a further investigation.

[240] Unlike the defendants in *Hill* and *Botiuk*, moreover, Ms. Bent's communication was sent to a "restricted constituency" (*Foulidis v. Baker*, 2014 ONCA 529, 323 O.A.C. 258, at para. 46). Ms. Bent sent her email while she was president-elect of the OTLA through a Listserv restricted to members of the OTLA who practiced plaintiff-side personal injury law — the precise group of people who

had either a duty or interest in receiving her communication. Members of the Listserv were bound by a wide-ranging undertaking to keep the information “strictly confidential”. The unequivocal undertaking is worth repeating:

CONFIDENTIALITY

I undertake to keep all LISTSERV information, opinions, and comments strictly confidential from all others, including OTLA members who are not LISTSERV Members, including my law firm partners, associates and staff.

I understand that other members of the OTLA rely on my undertaking to fellow members to maintain confidential[ity] in their decision to use the LISTSERVs.

[241] Ms. Bent’s email, moreover, ended with a disclaimer which highlighted that the message contained “legally privileged and confidential information” and that “any review, dissemination, distribution or copying of this communication is prohibited”.

[242] As lawyers, Listserv members were required by the *Rules of Professional Conduct* to “strictly and scrupulously fulfill” their undertakings (r. 5.1-6; see also r. 7.2-11). There was no reason for Ms. Bent to expect that Listserv members would breach these undertakings and, in so doing, breach their professional obligations. Nothing in the undertakings suggests that Listserv members were free to ignore their confidentiality obligations based on their personal views about whether a communication is “potentially defamatory”, or relates to “ongoing files”. Ms. Bent relied, rightly, on her colleagues honouring their professional responsibilities. The

fact that one of them did not, cannot be used to disintegrate the reality that she was complying with her own professional duty to protect her clients and those of her colleagues.

[243] All of this supports Ms. Bent's defence that she acted in compliance with the purposes of the privilege in that she provided "appropriate information to appropriate people" using an appropriate means of communication (*RTC Engineering*, at para. 18). Neither the record nor the law provides a basis that tends to support Dr. Platnick's position to the contrary (*Pointes Protection*, at para. 59).

[244] Qualified privilege can also be defeated, however, "if the dominant motive for publishing is actual or express malice" (*Botiuk*, at para. 79). Dr. Platnick argued that Ms. Bent was predominantly motivated by malice. Like the motion judge, I see no merit in this claim.

[245] This Court defined "malice" as follows in *Hill*:

Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes . . . "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth.

(para. 145, citing *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067, at p. 1099)

[246] Malice is determined by examining the “state of mind and motives of the defendant at the time of publication” (Brown, at p. 16-27; see also Peter A. Downard, *The Law of Libel in Canada* (4th ed. 2018), at pp. 188-89; *Jerome v. Anderson*, [1964] S.C.R. 291, at p. 299; *Hodgson v. Canadian Newspapers Co.* (2000), 49 O.R. (3d) 161 (C.A.), at para. 35). The inquiry focuses on the subjective attitude of the person making the communication, either towards the target of the communication or towards the truth (see Brown, at pp. 16-3 to 16-10). Malicious motives can include spite or ill-will towards the plaintiff, and acting with knowing or reckless disregard for the truth (*Smith v. Cross*, 2009 BCCA 529, 99 B.C.L.R. (4th) 214, at para. 34). The party alleging malice has the burden of proving it (*Hill*, at para. 144) and it is “not a burden that is easily satisfied” (Brown, at p. 16-204; see also *Martin v. Lavigne*, 2011 BCCA 104, 17 B.C.L.R. (5th) 132, at para. 44; *Cimolai v. Hall*, 2007 BCCA 225, 240 B.C.A.C. 53, at para. 29).

[247] To establish malice through recklessness, “the evidence must be sufficiently strong to transcend a finding of carelessness or negligence and demonstrate an indifference to truth or falsity” and thus “no honest belief in [the] truth” (Downard, at p. 183; see also *Laufer*, at para. 74; *Davies & Davies Ltd. v. Kott*, [1979] 2 S.C.R. 686, at pp. 697-98; *Korach v. Moore* (1991), 1 O.R. (3d) 275 (C.A.), at pp. 278-80; *Wells v. Sears*, 2007 NLCA 21, 264 Nfld. & P.E.I.R. 171, at para. 44; *Horrocks v. Lowe*, [1975] A.C. 135 (H.L.), at pp. 150-53, per Lord Diplock). It was further explained by Professor Brown as follows:

“Recklessness is . . . not to be confused with mere carelessness, impulsiveness or irrationality”. Courts have drawn “a distinction between honest belief formed by carelessness, impulsiveness or irrationality — which does not amount to actual malice — and a belief based on recklessness, or no belief in its accuracy at all, which does.” [Footnotes omitted; p. 16-114.]

[248] The Court of Appeal held that a “reasonable trier” could conclude that Ms. Bent acted with reckless disregard in mentioning the arbitration involving Dr. Dua, primarily on the basis that she was in “no position to know what had gone on between Dr. Dua and Dr. Platnick”. But there was no reason for her to suspect that *anything* had happened between them. As my colleague notes, Ms. Bent “had no reason to know of a second version of Dr. Dua’s report”. There was no mention of any such document by the person best-placed to draw it to counsel’s attention — Dr. Platnick — who omitted the existence of a second version in his report, along with any mention of his interactions with Dr. Dua. The insurer in Dr. Dua’s case, moreover, settled on terms consistent with Dr. Dua’s *first* report, leaving no reason for Ms. Bent to assume that a follow-up report had been produced with a different conclusion as to catastrophic impairment.

[249] Perhaps most significantly, Ms. Bent only referred to the incident involving Dr. Dua after going through a *second* arbitration, the one involving Dr. Carpenter, in which Dr. Platnick again produced a report which, on its face, misrepresented the catastrophic impairment determinations of the medical experts. There is simply no basis, in these circumstances, to conclude that Ms. Bent acted with carelessness, let alone reckless disregard or indifference to the truth.

[250] The Court of Appeal also emphasized Ms. Bent's failure to refer to her notes about the case involving Dr. Dua. Ms. Bent, however, fully explained why she had no reason to refer to her notes: she remembered the case clearly because her client was suicidal and there had been significant delay by the insurer. Dr. Dua's first report supports Ms. Bent's description about her client's serious condition. And the Financial Services Commission of Ontario noted that Ms. Bent's complaint of delay against the insurer was well-founded. There is therefore nothing in the record to support a finding of malice against Ms. Bent, either due to recklessness or on any other basis.

[251] A final point on malice. The motion judge concluded that there was no evidence to reasonably support the inference that Ms. Bent acted with malice in publishing her email, a conclusion fully supported by the record. It was his task to assess the evidence before him and, from his review of the record, to determine the likelihood of Dr. Platnick's establishing malice at trial. His conclusions are entitled to deference since, as this Court has said, appellate deference is not limited to proceedings involving *viva voce* testimony (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at paras. 24-25). "[N]umerous policy reasons" support a deferential stance to first-level decision-makers — including "[l]imiting the [n]umber, [l]ength and [c]ost of [a]ppeals", a central policy objective underpinning the s. 137.1 regime (paras. 16 and 32; see also *Courts of Justice Act*, s. 137.3; Ministry of the Attorney General, at pp. 5 and 18). Moreover, showing deference to the assessments of a motion judge that involve a review of the record, absent an error of law or palpable and overriding error

of fact, is the approach this Court has endorsed for summary judgment motions (*Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, at para. 81). I see no reason for having a different one for motions under s. 137.1.

[252] Based on the foregoing, Ms. Bent’s defence of qualified privilege has a “real prospect of success”, the standard this Court endorsed in *Pointes Protection*. As a result, Dr. Platnick’s defamation action must be dismissed.

[253] Nonetheless, there are aspects of the weighing test set out in s. 137.1(4)(b) worth exploring in light of my colleague’s conclusion that the weighing exercise favours Dr. Platnick.

[254] Section 137.1(4)(b) states:

(4) A judge shall not 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.

[255] The first part of the weighing exercise is the harm “likely to be or have been suffered” by the party bringing the proceeding. Harm must have occurred “as a result of” the expression of the party being sued.

[256] Ms. Bent's email was sent on a confidential Listserv to members of the OTLA. The bulk of the harm alleged by Dr. Platnick, however, occurred because of the *leak* of the email. The answer to whether the harm caused by the leak of the email was "a result of [Ms. Bent's] expression" depends on whether Ms. Bent could be held legally liable for the leak.

[257] As a general rule, "a person is responsible only for his or her own defamatory publications, and not for their repetition by others" (Brown, at pp. 7-51 to 7-61; see also *Crookes v. Newton*, [2011] 3 S.C.R. 269). There is an exception where the "republication is the natural and probable result of the original publication" (*Breeden v. Black*, [2012] 1 S.C.R. 666, at para. 20, referencing Raymond E. Brown, *The Law of Defamation in Canada* (1987), vol. 1, at pp. 253-54). The reasonable foreseeability of the leak of the email is therefore key.

[258] The Listserv was exclusively comprised of OTLA members all of whom were bound not only by a confidentiality undertaking not to disclose the information, but also by Ontario's *Rules of Professional Conduct*, which emphasize the importance of lawyers' abiding by their undertakings. To suggest that Ms. Bent ought to have foreseen that Listserv members — all lawyers — who were bound by a confidentiality undertaking would breach that undertaking in possible violation of their professional obligations, amounts to asserting that a lawyer cannot reasonably expect another lawyer to honour his or her undertaking to protect confidential or privileged information.

[259] This amounts to a presumption of professional misconduct. And, in effect, it suggests that lawyers can be held liable for the professional misconduct of colleagues whom they trusted, on reasonable grounds, to act in accordance with their professional duty to “strictly and scrupulously fulfill” their undertakings to protect confidential information. That, in my respectful view, would rupture the foundation of the expectations lawyers have in their communications with one another on behalf of their respective clients.

[260] Any harm resulting from the leak, therefore, was caused by unforeseen and unforeseeable communication by others, not by Ms. Bent sending the email to its intended audience of lawyers on the Listserv.

[261] The second part of the weighing exercise is the public interest in protecting Ms. Bent’s expression. Ms. Bent’s email addressed matters of critical importance to the administration of justice. Her experience in the two proceedings involving Dr. Platnick illuminated the practices of an expert who frequently acts for insurers and whose summary reports she reasonably believed did not accurately and fully represent the clinical evaluations conducted during the claims assessment process. Communicating this information to members on the OTLA Listserv — and advising them to always obtain full disclosure of insurers’ files — encouraged protective disclosure practices for lawyers and alerted them to be cautious in their dealings with assessors and with insurers’ experts.

[262] There is also a broader public interest in protecting Ms. Bent's expression. Permitting a \$16.3 million defamation lawsuit to proceed against her in these circumstances would produce a considerable chilling effect. Lawyers — or for that matter any professional — with reasonable grounds to believe they have seen or experienced misconduct, will be significantly inhibited in their ability to communicate that cautionary information to others, even on a confidential basis. There was, as the motion judge identified, evidence that Dr. Platnick's lawsuit has already had such a chilling effect.

[263] Amplifying the risk of a chilling effect is Dr. Platnick's excessive claim for damages in the amount of \$16.3 million, a clear reflection of the "punitive or retributory purpose" which is the hallmark of a classic SLAPP suit (*Pointes Protection*, at paras. 78-81). This informs why allowing his proceeding to continue would undermine the public interest by deterring future expression (paras. 80-81).

[264] This is not a question of encouraging the needless defamation of individuals or discouraging reasonable due diligence, as Dr. Platnick claims. It is a question of ensuring that the goals of the legislation are preserved, by protecting individuals from liability for holding others to account when they reasonably believe misconduct has occurred. There is no doubt that reputation should be protected from gratuitous attacks, but sometimes, as in this case, protecting expression on matters of public interest outweighs the harm to individual reputation. If the powerful vision of s. 137.1 set out in *Pointes Protection* is to be given meaningful effect, vindication of

reputation — a value engaged in all defamation cases — cannot be allowed to overwhelm the analysis and goals mandated by the statute.

[265] This brings us finally to Dr. Platnick’s motion to admit fresh evidence.

[266] Dr. Platnick has submitted a package of “fresh evidence” in a 214-page motion record, which includes an assortment of unsworn correspondence, pleadings in related lawsuits, and proposed amendments to those pleadings.

[267] Most of the material is clearly irrelevant and inadmissible.¹⁰ What is left are two unsworn letters sent by email from counsel for the Insurance Business magazine to counsel for Dr. Platnick. In these emails, counsel for the magazine conveys information from the magazine’s then-associate editor, who claims that he interviewed Ms. Bent prior to the magazine’s publishing her confidential communication in an article in its December 29, 2014 issue.

[268] There was no reference to an interview with Ms. Bent in the article.

[269] Dr. Platnick first tried to admit these emails after the hearing of Ms. Bent’s motion to dismiss his lawsuit on the merits and while Dunphy J.’s decision was under reserve. The motion judge refused to admit the evidence, describing the attempt to do so as a “clear abuse of process” (2016 ONSC 7474). The Court of

¹⁰ The letter from Dr. Dua has no relevance to whether Ms. Bent has a valid defence of qualified privilege.

Appeal noted that “the motion judge’s order involved the exercise of his discretion to control the proceedings before him and [Dr. Platnick] offers no basis upon which this court could properly interfere with the exercise of that discretion”.

[270] Before this Court, Dr. Platnick has renewed his attempt to admit the two emails as fresh evidence. To succeed, he must satisfy each element of the test in *Palmer v. The Queen*, [1980] 1 S.C.R. 759:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. [p. 775]

[271] If we admit into the 15-volume appeal record before this Court these 2 unsworn and untested emails, emails relating to issues that were, from the day Dr. Platnick brought his defamation action, live and in serious dispute but unchallenged and unexplored by him, and emails that were rejected as fresh evidence 4 years ago by the motion judge, then we are essentially declaring that the *Palmer* test does not apply in appeals of s. 137.1 motions before our Court. The emails, in my respectful view, are neither “fresh” nor “evidence”.

[272] The first requirement for the admission of fresh evidence under *Palmer* is that due diligence has been demonstrated, that is, whether Dr. Platnick *could have* obtained the emails prior to the hearing before Dunphy J. had he made reasonable efforts (*Palmer*, at p. 775; *R. v. Sipos*, [2014] 2 S.C.R. 423, at para. 29). The question is not, as Dr. Platnick claims, whether the emails were actually in his possession before the hearing.

[273] The unadorned chronology makes clear that no efforts, let alone reasonable ones, were made to get evidence about the disputed interview before the motion hearing. Dr. Platnick started his defamation action on January 27, 2015, 17 months before the hearing of Ms. Bent's motion to dismiss. Dr. Platnick himself put the issue of an interview in play in his statement of claim:

The defendant, Bent gave an interview to the Insurance Business Magazine to bring further attention to the defamatory communication and maximize the harm, injury, embarrassment and humiliation to the plaintiff and his family;

The defendants knew that the Insurance Business Magazine reached a large and particularly important audience for the plaintiff and that the on-line version of its article . . . was still widely accessible

[274] In her statement of defence, filed on March 31, 2015, Ms. Bent expressly denied giving such an interview:

. . . Ms. Bent denies providing an interview to *Insurance Business Magazine* in respect of the Confidential Communication and/or authorizing the publication of the Confidential Communication to Donald

Horne for an article appearing in the December 29, 2014 issue of *Insurance Business*.

[275] On April 27, 2016, Ms. Bent commenced the process to dismiss Dr. Platnick's action by way of a motion pursuant to s. 137.1. In her supporting affidavit, she once again denied giving an interview to the magazine.

[276] On April 28, 2016, following a scheduling hearing with the motion judge, the parties were given a hearing date and a timetable to file their materials. In none of his numerous objections to the timetable did Dr. Platnick's counsel mention the need for more time to pursue evidence about the existence of an interview.

[277] On June 6, 2016, Ms. Bent was cross-examined on her affidavit. The issue of the interview was not raised by Dr. Platnick's counsel. There is, in fact, no indication that he took steps to obtain relevant information or evidence about it from anyone at the magazine or its representatives in the two months between the filing of Ms. Bent's motion to dismiss and the hearing on June 27, 2016. Nor at any other time before then did he follow up on the obvious conflict in the pleadings about the existence of an interview.

[278] On June 13, 2016, the magazine filed its statement of defence in the related defamation proceeding started by Dr. Platnick for its republication of Ms. Bent's email. The claim was for \$16.3 million in damages. The statement of defence contained two sentences stating that the magazine's associate editor had sought and

obtained Ms. Bent's permission before publishing her email as part of an article in the magazine.

[279] When the hearing before Dunphy J. took place two weeks later on June 27, 2016, Dr. Platnick did not mention the reference to an interview in the magazine's statement of defence, let alone request an adjournment to pursue further evidence on that basis.

[280] It was not until July 5 — over three weeks after the magazine filed its statement of defence — that counsel for Dr. Platnick corresponded by email with counsel for the magazine. Two of the emails from these exchanges are the subject of Dr. Platnick's motion to admit fresh evidence. In them, counsel for the magazine claims that the magazine's associate editor told him that he sent an email to Ms. Bent attaching the article which referenced Dr. Platnick, and then had a discussion with Ms. Bent in which she acknowledged being the author of the email in the article and voiced no objection to its publication.

[281] On November 8, 2016, over four months after the motion hearing and while the decision was under reserve, Dr. Platnick sought to enter these emails into the record as fresh evidence. The motion judge denied the motion, stating:

The plaintiff had 18 months to pursue that issue before argument of the [s. 137.1](#) motion on its merits on June 27, 2016. The issue of the alleged "interview" given [b]y Ms. Bent and Ms. Bent's position with respect to it was plainly joined in the pleadings by March 31, 2015. It was also squarely raised in Ms. Bent's affidavit filed on this motion that that

affidavit was the object of cross-examination Dr. Platnick's failure to cross-examine on that issue reflects his own tactical choices but cannot form the basis of a last-minute request to open new avenues for resisting the making of an order under s. 137.1 of the *CJA*. Permitting such a late amendment would substantially frustrate the intent of s. 137.1(6) in my view and ought not to be permitted.

...

The fact of the matter is that (i) *all* of the fresh allegations are matters that were either known or readily discoverable by the plaintiff in the 18 months between his action being commenced and the hearing of the motion to dismiss it; and (ii) all or substantially all of the matters raised in the amended pleadings are addressed in the pleadings already or referenced in the record that was already before me on June 27, 2016. The proposed amendments can form no basis to request argument on the motion to be re-opened or the process to be started afresh.

...

Is it otherwise in the interests of justice that I allow the evidence to be filed at this stage? In my view it is not. To the contrary, allowing these two affidavits to be added to the record of a motion already fully-argued and taken under reserve would be a clear abuse of process. [Emphasis in original.]

(paras. 36, 38 and 72; see also paras. 44-46 (CanLII))

[282] No opportunity was ever taken — or sought — by Dr. Platnick to determine whether Ms. Bent gave either an interview to the magazine or her permission to publish the email. Dr. Platnick was served with Ms. Bent's motion to dismiss his lawsuit 15 months after filing his statement of claim. In that time, he took no steps to pursue evidence about an interview the existence of which he himself had raised in his pleadings. Even after Ms. Bent filed her motion to dismiss, Dr. Platnick made no efforts to obtain evidence about whether there had been an interview until

well after the conclusion of the hearing of the motion on its merits and then only by way of untested emails.

[283] Dr. Platnick has offered no reasonable explanation for why he did not pursue the contested issue of the existence of an interview.

[284] Dr. Platnick claims that he was only alerted to this issue after reviewing the magazine's statement of defence. But it is hard to see how the magazine's pleading brought something to his attention that he himself had raised in the statement of claim he had filed 15 months earlier. The fact that there are expedited timelines does not explain the absence of any efforts at any time to pursue the issue, or ask for an adjournment to do so.

[285] Dr. Platnick also argued that since Ms. Bent had denied having an interview with the magazine in her statement of defence, he had no reason to cross-examine her about it. But conflicts in the parties' pleadings are precisely the sorts of issues that are meant to be explored in cross-examination.

[286] Finally, Dr. Platnick argued that there was no judicial guidance on interpreting s. 137.1 when he prepared his motion record. But even on a plain reading of the legislation, Dr. Platnick had to be aware that he was required to prove that Ms. Bent had no valid defences and that he had suffered harm as a result of her expression. Given the nearly 1000-page record he submitted for the motion hearing, there is no doubt that Dr. Platnick understood the importance of providing evidence

on these issues. Yet even though he challenged the defences available to Ms. Bent on several grounds, he did not do so on the issue of the existence of an interview, the basis of his seeking to introduce fresh evidence. He clearly regrets his decision to leave this issue unexplored, but as the motion judge noted, “Regrets about arguments not made and evidence not led are part of the life of an advocate [D]ecisions must be made and hearings must end.”

[287] There is, in short, no evidence of anything approaching due diligence in this case.

[288] The importance of a finding of lack of due diligence varies by context (*Palmer*, at p. 775; Donald J. M. Brown, with the assistance of David Fairlie, *Civil Appeals* (loose-leaf), at pp. 10-19 to 10-21). In the context of a s. 137.1 motion, it seems to me that an approach is necessary that aligns with the purposes of the legislation. The timelines imposed by s. 137.2, the prohibition on amending pleadings without leave in s. 137.1(6), and the direction in s. 137.3 that appeals be heard “as soon as practicable”, are all reflections of the overarching goal of expediting proceedings. These are statutory directions, not inconveniences to be circumvented by the subsequent attempt to admit evidence a party could have discovered through reasonable efforts. It would “undermin[e] the rationale” of the legislative regime if parties could “ignore the obligation to produce evidence of merit before the trial court, and then rely on a fresh evidence application on appeal to defeat summary

dismissal” (*McDonald v. Brookfield Asset Management Inc.*, 2016 ABCA 375, at para. 21 (CanLII)).

[289] Aggravating this concern in the present case, is the fact that admitting the emails would require the Court to overturn the factual findings of the motion judge. The motion judge exercised his discretion not to admit the evidence on the basis that it was “readily discoverable” well before the motion hearing, and that Dr. Platnick had not offered a “*reasonable* explanation” for failing to place such evidence before the court at least by the time he cross-examined Ms. Bent (emphasis added). The motion judge explained at length why Dr. Platnick had not exercised due diligence in pursuing the emails which he now claims to be critical to resolving these appeals. The motion judge noted, correctly, that the possibility of an interview was “plainly joined in the pleadings” many months before the motion hearing; that Dr. Platnick had taken no steps to pursue evidence about the issue for 18 months; that he had failed to cross-examine on the issue; and that he had not sought leave to file any relevant evidence at the motion hearing even though the magazine had filed its statement of defence 2 weeks before the hearing started.

[290] Disregarding the findings of the motion judge would frustrate the goals of s. 137.1. Allowing parties a perpetual right to try to have previously-rejected evidence admitted will, with respect, encourage more attempts to “broaden the field of combat” on appeal (*Public School Boards’ Assn. of Alberta v. Alberta (Attorney General)*),

[2000] 1 S.C.R. 44, at para. 10) — the inverse of the legislature’s intent to ensure expedited proceedings under s. 137.1.

[291] Due diligence protects against dilatory evidence-gathering that interferes with the expeditious and fair resolution of proceedings. Concerns about fairness are heightened when, as here, a party makes no efforts to pursue a relevant issue raised in their own pleadings until *after* they have had the benefit of having their case tested at a hearing.

[292] Like the Court of Appeal, I see no basis for interfering with the motion judge’s exercise of discretion. I would, accordingly, refuse to admit the emails on the basis of lack of due diligence.

[293] The emails, in any event, do not represent “credible” evidence, that is, evidence “reasonably capable of belief”. They are unsworn and untested. In addition, the statements from counsel for the magazine about statements by the magazine’s associate editor, are double hearsay from a party embroiled in a \$16.3 million lawsuit against Dr. Platnick in which his “discussion” with Ms. Bent was a potentially decisive issue.

[294] Controversial, untested evidence on matters “that concern the immediate parties” and purport to “disclose who did what, where, when, how and with what motive or intent” should not be admitted either as fresh evidence, or as evidence,

period. The Court has refused to admit such evidence even where it related only to background legislative facts (*Public School Boards' Assn.*, at para. 16).

[295] The claims about the existence of an “interview”, moreover, are directly contradicted by the evidence properly in the record, and are uncorroborated by any objective evidence. The magazine article itself, for example, does not mention any communication with Ms. Bent, and there is no record of her being interviewed by anyone at the magazine.

[296] Finally, the emails cannot reasonably be expected to have affected the result of Ms. Bent’s motion to dismiss Dr. Platnick’s defamation case. Because they contain untested hearsay, the emails would not have been admissible for the truth of their contents (see *Bukshtynov v. McMaster University*, 2019 ONCA 1027, at paras. 24-25 (CanLII); Graham Underwood and Jonathan Penner, *Electronic Evidence in Canada* (loose-leaf), at pp. 13-13 to 13-16). And, in any event, they address almost none of the issues relevant to qualified privilege. They do not address whether Ms. Bent’s communication was made in circumstances attracting qualified privilege, nor do they assist in resolving whether sending that message to Listserv members was reasonably appropriate in the circumstances. They have negligible probative value in establishing Ms. Bent’s state of mind nearly two months before the republication of her email by the magazine, and are entirely consistent with Ms. Bent’s honest belief in the truth of her comments and the reasonableness of those beliefs.

[297] Even on the narrow issue of republication, the emails do not undermine the “real prospect” that Ms. Bent’s defence of qualified privilege will succeed at trial. At its highest, Dr. Platnick’s argument for how the evidence could be expected to affect the result is this: the emails *might* lead to admissible evidence at trial from the magazine’s associate editor about a possible discussion he had with Ms. Bent; which *might* be accepted by a trier of fact despite minimal corroboration and despite Ms. Bent’s denial of such a discussion; which *might*, depending on the details of the discussion, allow a trier of fact to infer that Ms. Bent implicitly authorized republication; which *might* result in Ms. Bent being held responsible for the content of an article which, in any event, was not published until after most of the harm alleged by Dr. Platnick had occurred. This speculative line of reasoning could not possibly have affected the motion judge’s decision to dismiss Dr. Platnick’s lawsuit.

[298] The admission of fresh evidence on appeal is an “exceptional” step (*R. v. M.(P.S.)* (1992), 77 C.C.C. (3d) 402 (Ont. C.A.), at p. 411). The *Palmer* criteria reflect a “broader judicial policy to achieve finality on the factual record at the trial level, with very limited exceptions” (*Public School Boards’ Assn.*, at para. 10; see also *Iroquois Falls Power Corp. v. Ontario Electricity Financial Corp.*, 2016 ONCA 271, 398 D.L.R. (4th) 652, at para. 49). The matters in issue between the parties are supposed to “narrow rather than expand as [a] case proceeds up the appellate ladder” (*Public School Boards’ Assn.*, at para. 10).

[299] Admitting the two emails would do exactly the opposite. It would require the Court to overturn the exercise of discretion by the motion judge, ignore Dr. Platnick's demonstrable lack of due diligence, and accept unsworn, untested, hearsay evidence, all to obtain information that would not, in any event, have affected the result of Ms. Bent's dismissal hearing. Such an outcome, in my respectful view, would not only frustrate the purposes of s. 137.1, it would inexplicably depart from our jurisprudence on the admission of fresh evidence.

[300] I would therefore dismiss the motion to adduce fresh evidence.

[301] I would allow the appeals with costs throughout.

*Appeals dismissed, ABELLA, KARAKATSANIS, MARTIN and KASIRER JJ.
dissenting.*

*Solicitors for the appellant Maia Bent: Winkler Dispute Resolution,
Toronto.*

*Solicitors for the appellant Lerner's LLP: Lax O'Sullivan Lisus Gottlieb,
Toronto.*

Solicitors for the respondent: Danson Recht, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Goodmans, Toronto; Maia Tsurumi, Vancouver.

Solicitors for the intervener Greenpeace Canada: Stockwoods, Toronto; Greenpeace Canada, Toronto.

Solicitors for the intervener the Canadian Constitution Foundation: McCarthy Tétrault, Toronto.

Solicitors for the intervener the Ecojustice Canada Society: Ecojustice Canada Society, Toronto; Ecojustice Environmental Law Clinic at the University of Ottawa, Ottawa.

Solicitors for the interveners the West Coast Legal Education and Action Fund, the Atria Women's Resource Society, the B.W.S.S. Battered Women's Support Services Association and the Women Against Violence Against Women Rape Crisis Center: Dentons Canada, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: St. Lawrence Barristers, Toronto.

Solicitor for the intervener the Canadian Broadcasting Corporation: Canadian Broadcasting Corporation, Toronto.

Solicitors for the intervener the Barbra Schlifer Commemorative Clinic: Birenbaum Law, Toronto; Torys, Toronto.

Solicitors for the interveners the Ad IDEM / Canadian Media Lawyers Association, the Canadian Journalists for Free Expression, CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, the Aboriginal Peoples Television Network and Postmedia Network Inc.: Linden & Associates Professional Corporation, Toronto.