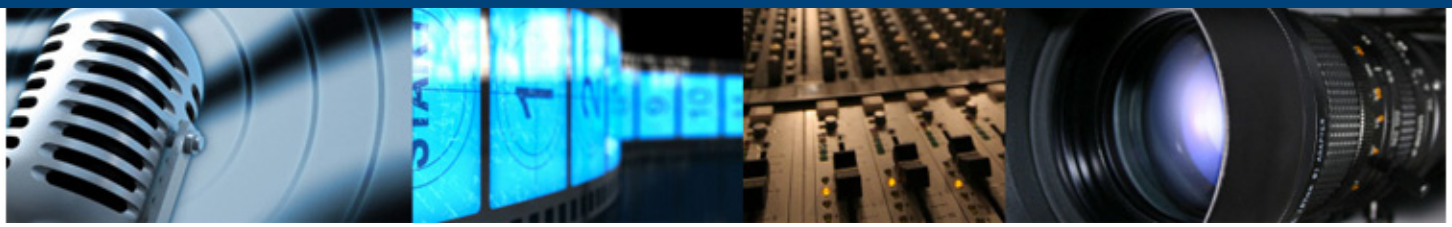




# Baglow v Smith - The Increasing Importance of Context in Defamation Claims

September 12, 2011 by Bob Tarantino

The recent decision of the Ontario Superior Court of Justice in *Baglow v. Smith* (2011 ONSC 5131) is notable for observers of Canadian defamation law because it demonstrates the continued advance of the tendency of courts to take full account of the context in which allegedly defamatory comments are made. At the risk of over-simplifying the matter, the court's decision can be summarized as this: there is something meaningfully different about online statements, particularly those which are made on political blogs and discussion forums, which militates that they be treated differently for purposes of defamation law. Put somewhat differently (and, again, with the qualification that this over-simplifies matters): impugning someone's name on the broadcast evening news is different from impugning their name on a blog.

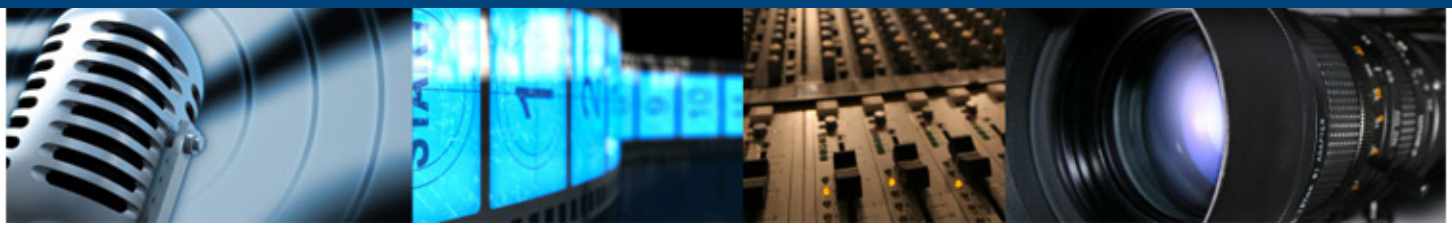
Omar Ha-Redeye has posted a lengthy and detailed discussion of the case over at slaw (Online Defamation on Political Blogs in Baglow v. Smith), and Matthew Nied has likewise put up a thoughtful post on his own blog which is well worth reading (Baglow v. Smith: Removing the Defamatory Sting From Online Debates on Blogs and Message Boards). The basic factual elements of the case are concisely explained by Nied as follows:

The plaintiff claimed that the defendants defamed him by making statements that exceeded the boundaries of their normally acrimonious political debate on the internet. The plaintiff complained that the defendants defamed him by branding him “one of the Taliban’s more vocal supporters” on an internet message board. The words complained of referred back to an ongoing discussion, largely on the plaintiff’s blog, where the parties had debated the validity of the trial of Omar Khadr. The parties had aggressively berated each other, and often employed colourful derogatory characterizations. Although the plaintiff had the opportunity to respond to the impugned statements on the internet message board, he did not do so. The defendants brought a summary judgment motion to dismiss the action on the basis that the statements were not defamatory or, alternatively, that the defence of fair comment applied.

(In the interests of full disclosure I should note that I am an online acquaintance of the plaintiff, having corresponded with him on a variety of topics over the years.)

The court dismissed the action, primarily on the basis of a (somewhat convoluted) determination that the statement was not capable of a defamatory meaning (i.e., "not capable of damaging the reputation of the plaintiff" [para. 58]) - but, significantly, the court also stated that "another contextual factor ... would further bolster this conclusion, namely that the alleged defamatory words were made in the context of an ongoing blogging thread over the Internet". While some have characterized the decision of Mr. Justice Annis in *Baglow v Smith* as consisting of a ratio (not defamatory) and obiter (took place in the context of an ongoing internet argument), I think the preferable reading is that both of the stated grounds for dismissing the action are part of the same analysis: the words are not defamatory precisely *because* they were uttered in the context of an online argument.

The reasoning in *Baglow v Smith* spends a significant amount of time attempting to describe/understand the milieu of online political blogging:





[64] More importantly to the issue of context, the blogging audience is expecting and would indeed want to hear a rejoinder of this nature where the parry and thrust of the debaters is appreciated as much as the substance of what they say.

[65] In essence, I am suggesting that the Court, in construing alleged defamatory words in an ongoing debate, should determine whether the context of the comment from the perspective of the reasonable reader or listener is one that anticipates a rejoinder, which would eliminate the possible consequence of a statement lowering the reputation of the plaintiff in their eyes.

[66] To some extent the Court is attempting to decide whether the debate should have gone forward, such that walking off the blogging stage, so to speak, is a form of "gotcha" contrary to the rules governing the debate.

[67] I realize that this sounds like a form of defence of mitigation of a defamatory comment. But I see it more as an uncompleted comment, something akin to a plaintiff arguing that he or she has been defamed by a question, when the response was what the audience was expecting.

... [70] Bringing an action on the comment in mid-debate runs contrary to the rules and has the effect of chilling discussion. If allowed, it places the opposing party in a defensive mode, rather than an offensive one, strategically putting that party at a disadvantage.

The court's approach in this regard is entirely consistent with the Supreme Court of Canada's decision in *WIC Radio Ltd. v. Simpson* (2008 SCC 40) and, latterly, with the approach described and argued in favour of in my recent article on defamation law (Chasing Reputation: The Argument for Differential Treatment of "Public Figures" in Canadian Defamation Law (48 OHLJ 595)).

Whether the decision is ultimately upheld (it has apparently been appealed), much like the question of whether it is the correct one (as Nied notes, the impugned statement was made on a message board which was an entirely different forum than where much of the earlier argument had taken place, though erring of the side of fluidity in the online environment is probably the preferable approach), is, I think less important than the disposition that it reveals on the part of the court. Here we have a court which is struggling to reconcile a strict liability tort with a highly malleable, almost entirely interactive technological venue. The court's analogizing of the online argument to an in-person debate is, it seems to me, quite appropriate, and at least as practical a lens for analyzing the matter as any other. Defamation law will only continue to be consistent with our evolving conceptions of reputation, and with expectations regarding free expression rights, if context continues to play an increasing role in the assessment of defamation actions.

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