

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Casses v. Canadian Broadcasting Corp.*,
2012 BCSC 18

Date: 20120110
Docket: S115272
Registry: Vancouver

Between:

Fernando Casses and Dr. Fernando Casses Inc.

Plaintiffs

And

**Canadian Broadcasting Corporation, Kathy Tomlinson, Enza Uda, Chris Doe, Kim Roe, Chris Poe,
Kim Yoe, Chris Sloe and Kim Loe**

Defendants

Before: The Honourable Madam Justice Hyslop

Reasons for Judgment

Counsel for the Plaintiffs:

R.D. McConchie

Counsel for the Defendants, Canadian Broadcasting
Corporation, Kathy Tomlinson and Enza Uda:

D.W. Burnett

Place and Date of Hearing:

Vancouver, B.C.
October 26, 2011

Place and Date of Judgment:

Vancouver, B.C.
January 10, 2012

[1] The plaintiff, Dr. Fernando Casses (“Dr. Casses”), and his professional corporation, Dr. Fernando Casses Inc., have commenced a defamation action naming the Canadian Broadcasting Corporation (“CBC”), Kathy Tomlinson, Enza Uda, and unknown individuals as defendants.

[2] I heard the plaintiff, Dr. Casses striking applications in Vancouver Registry Action Nos. S098449 (“Backer”), S098738 (“Cook”) and S099002 (“O’Diorne”) (collectively referred to as the “separate actions”).

[3] I was about to release my reasons in the separate actions when the plaintiffs brought this application seeking to strike paragraphs 1 to 7 inclusive of Division 2 of Part 1, and paragraphs 1 to 5 inclusive of Part 3 of Division 3 of the response to civil claim of the defendants of this action.

[4] The factual background is that of the separate actions. The cause of action is the same, which is defamation. The relief sought is the same, except the plaintiffs seek in their notice of civil claim:

- f. an Order requiring the defendants to permanently remove the defamatory expression complained of in this statement of claim from any electronic database where it is accessible, including without limiting the generality of the foregoing, the CBC Internet Websites;

[5] This relates to paragraph 41 in the notice of civil claim wherein the plaintiffs allege that the defendants:

... knew, intended, and expected the electronic versions of the September 08 2009 Website Article and the Libelous Broadcasts complained of ... would be republished by other persons on the Internet ...

[6] The publications, as in the separate actions, relate to the CBC’s program now identified in this action as “Go Public” broadcast locally on September 8, 9 and 10, 2009. The September 8, 2009 program was also broadcast nationally. The defendants complain that the website article published on September 8, 2009, was to the world and remains on the website at the time of starting this action.

[7] The allegations of defamation are the same as those seen on television in each of the separate actions and the words spoken by Ms. Tomlinson.

[8] Added to the plaintiffs’ claim is the identification of another patient of Dr. Casses who is also seated around the dining room table with the other individuals described in the separate actions. This person is now named and the words and images that she and her husband spoke are also a basis of the claim by the plaintiff as published by the defendants. That person is identified as Stephanie Aaslie and her husband Steig Aaslie.

[9] Dr. Casses alleges in each of the separate actions that the words of each defendant are defamatory, seeking to make each of them responsible for their own statements. Now, the plaintiffs in this action allege that the statements of Becker, O’Diorne, Cook and Aaslie are not separate and distinct, but in their totality, are the basis of the plaintiffs’ action for defamation against the defendants.

POSITIONS

The Plaintiffs

[10] The plaintiffs argue that the defendants' plea of justification or fair comment is a response to a separate sting not pled by the defendants.

[11] In the alternative, the plaintiffs argue that the defendants' pleadings are oppressive and should be struck.

[12] Alternatively, the plaintiffs allege that:

... the trial of the action is only concerned with the essential issues and their relevant evidence, and public policy and the interest of the parties requires that the trial should be kept strictly to the issues necessary for a fair determination of the dispute between the parties.

(Paragraph 16 under the heading "Impugned Elements" in the Notice of Application, filed November 18, 2011.)

[13] The plaintiffs argue that the mitigation paragraphs 6 and 7 of the response to notice of civil claim should be struck as it contravenes the rules of pleadings.

[14] Lastly, the plaintiffs argue that the defence raised by the defendants should be struck as lacking in particulars.

The Defendants

[15] The defendants argue that this striking application is substantially the same as the one in the separate actions.

[16] The defendants argue that the important differences between this striking application and the previous striking application in the separate actions are:

- 1) arguments relating to the third party standing issues that the defendants are of no consequence as the CBC is a defendant;
- 2) the argument about having separate actions versus this approach concedes that the trial should be heard together; and
- 3) the trial judge who hears this action and the separate actions is in a better position to determine those allegations sought to be struck, which will apply to the various issues. This, the defendants submit should not be done on a pleadings motion.

[17] The defendants also argue that once again, the plaintiffs are attempting to avoid and remove from the litigation the plaintiff's history of college complaints, negligence and unprofessional conduct, which the defendants allege was the purpose of the programs. The plaintiffs are choosing portions of the programs and websites without looking at them in their entirety.

[18] The defendants state:

5. Those Particulars are relevant, in each of the (now) four cases, to four different issues, namely; the public interest issue vis a vis the Responsible Communication defence; the Truth defence based on a proper and not cherry-picked meaning of the overall CBC stories; the factual foundation for the Fair Comment defence, and the plaintiff's directly relevant background and reputation relevant to damages. The plaintiff's bid to have a motions judge to parse those pleaded issues now is (it is submitted) misconceived, particularly given the "bound to fail" test that applies to a motion to strike.

[19] The defendants state that, as a result of starting this action, it makes it clear that the previous striking motion should be dismissed.

DISCUSSION

[20] The plaintiff seeks to strike all of the defendants' response to civil claim, leaving as admitted the description of the plaintiffs and defendants, dates of the broadcast and the admission that the broadcasts as described by the plaintiffs are reasonably accurate.

[21] If the court were to strike the pleadings as sought by the plaintiffs, the plaintiffs would take judgement and assess its damages and have ordered its additional relief.

[22] Unlike the separate actions, the plaintiffs allege that the defendants published the combined defamatory statements or remarks of the Backer children, Kyrstal Cook, Robin O'Diorne, and Stephanie Aaslie, as Dr. Casses providing negligent surgery and care, such as to cause the death of Edith Backer and to cause the other patients to suffer needless pain. Also, these statements and remarks mean that Dr. Casses concealed from these patients the complications from their surgery as well as negligently refusing to treat the complications. The patients allege that the meaning attributed to the words of the patients are that Dr. Casses caused them permanent damages or nearly death and in the case of perforations to certain patients, Dr. Casses caused "life threatening" infections.

[23] Dr. Casses alleges that the defamatory words of the patients or their relatives warranted Dr. Casses' medical licence be terminated or disciplinary actions by the College of Physicians and Surgeons of British Columbia (the "College").

[24] These meanings as interpreted by the plaintiffs to which the plaintiffs are holding the defendants accountable, known as "stings" are the issues to which this action should be confined. The plaintiffs' claim that the defendants have changed the scope of the plaintiffs' action to events which occurred to patients in Arizona many years ago, for which there were law suits and disciplinary actions taken by the Board of Medical Examiners in Arizona (Bomex) against Dr. Casses.

[25] Dr. Casses argues that the focus of his claim should remain only with the patients he has named and what they said relating to his medical treatment of them and what they suggest should happen as it relates to Dr. Casses' licence in British Columbia.

[26] The question is whether the defendants have introduced separate and distinct defamations in order to

defend that upon which the plaintiffs sue.

[27] In *McDonald's Corp ;v. Steel*, [1999] E.W.J. No. 2173 (C.A.), Lord Justice Pill sets out the test.

As a matter of law, the respondents were entitled to select what they chose for complaint and the appellants were not entitled to assert by way of justification the truth of separate and distinct defamatory statements not relied on. Whether a defamatory statement is separate and distinct from other defamatory statements contained in the publication is question of fact and degree in each case.- see *Polly Peck v. Trelford* [1986] Q.B. 1000 at 1032A-F and *Bookbinder v. Tebitt* [1989] 1W.L.R. 640 at 646H-647A. It does not matter to this point that the words relating to litter might not be textually severable from those relating to recycled paper provided that the statement is in substance distinct - see *Cruise v. Express Newspapers* [1999] 2WLR 327 adopting *United States Tobacco International v. B.B.C.* (unreported, C.A. 11.3.880. We agree with the judge that the litter charge is separate and distinct from any other charge made in the leaflet. The sting of the charge about recycled paper was that McDonald's lied about it and this had no bearing on the charge about litter. The sting about destroying rainforest is similarly distinct from any charge about litter. The respondents did not rely on the litter charge as defamatory in the proceedings.

[28] The case law demonstrates those events and activities that can or cannot be pled in defence. In my decision in the separate actions, I referred to the facts in *Pizza Pizza Ltd. v. Toronto Star Newspaper Ltd.*, [1998] O.J. No. 4702, *Prager v. Times Newspaper Ltd.*, [1988] 1 All E.R. 300 (CA), and *Cruise v. Express Newspapers plc*, [1999] Q.B. 931. I will not repeat them here.

[29] To further support their application the plaintiffs rely on *United States Tobacco International Inc. & Another v. British Broadcasting Corporation*, [1998] E.M.L.R. 816 (C.A.), *Tancic v. Times Newspaper Ltd.*, [1999] E.W.J. No.6510 and *Polly Peck (Holdings) plc v. Thelford*, [1982] 2 All E.R. 84, as examples of the defence using separate stings as justification on the sting pled by the plaintiff.

[30] In *Tancic*, the plaintiff Mr. Tancic's claim of defamation asserted that the articles that appeared in the newspaper in their ordinary and natural meanings were that he was a close associate and supporter of a Bosnian Serb leader who was responsible for war crimes and he gave money to the conservative party from his company's assets that the United Nations had frozen because of his close association with the Bosnian leader.

[31] The defence sought to insert into its plea of justification, alleging that the plaintiff had attempted to import oil into Yugoslavia in breach of UN sanctions with the assistance of an exiled prince from Libya living in London. The court concluded that these allegations had nothing to do with the original complaint or sting. The court's decision below was that "it was irrelevant or at best peripheral" [para.16]. Mr. Justice Brooke stated at para. 18

The judge relied on what he called the well known principle that a defendant should not be permitted to justify a different libel from the one complained of, even if the area of enquiry related to the same sector of the claimant's life or activities. He accepted the claimant's contention that the allegation now sought to be made was irrelevant to the legitimate plea in this case. He added:

"If I were wrong about that, it would be peripheral to the allegation and would not make very much difference to the strength or weakness of the defendant's case. "

[32] In *United States Tobacco*, the BBC broadcast a program about the plaintiff marketing a chewing

tobacco product which the program claimed was aimed at children, claiming that the government permitted such a marketing campaign. In fact, there was a contract between the company and the government that forbade such marketing practices. The program said that product was aggressively marketed to children in breach of the contract.

[33] In the program, the BBC also alleged that the tobacco product caused cancer; in particular, cancer to the mouth. *United States Tobacco* sued on the marketing complaint. The defence sought to rely on the cancer causing part of the broadcast to support justification. The court concluded that both were separate stings and struck out the sting relating to the product causing cancer.

[34] In *Marineland of Canada Inc. v. Niagara Action for Animals*, [2004] O.J. No. 3866 (S.C.), in a strike application the court concluded that the criticism of general conditions at Marineland were not a separate sting from the allegation that several animals died at Marineland, which the defence pled in response.

[35] This story broadcast by the CBC is not just about Cook, Aaslie, O'Diorne, and the late Mrs. Backer. The story is about other individuals who had complaints about Dr. Casses' surgical competence, some of which were addressed by the College or Bomex or the courts both in British Columbia or Arizona. The totality of these events is the focus of this broadcast and website which:

...raise troubling questions about the regulatory oversight of surgeons in BC given the history of quality concerns over Dr. Casses' surgeries and the negligence finding against him in Arizona before he came to practice in BC, 2) the BC College of Physicians did not find Dr. Casses at fault in some instances, but in others found he had fallen below the required standard of care, and 3) there were incidents where Dr. Casses did not adequately admit or treat complications after surgery."

(Paragraph 23 of Application Response.)

[36] The plaintiffs' and the defendants' meanings are different but this does not make them separate and distinct. The meanings alleged by the defendants relate to Dr. Casses' ability and history as a surgeon and his licensing and do not go beyond that. Whereas the plaintiffs' meanings relate only to the meanings of four individuals referred to above. It is open to the defendants to plead different or lesser meanings and to seek to justify those meanings. So long as "a defendant [is] entitled to plead by way of justification in support of any defamation meaning which the words complained of could reasonably bear" (*Pizza Pizza* para. 17).

[37] It cannot be said that the defence is bound to fail.

[38] The plaintiff seeks to strike the defendants' pleadings relating to mitigation. I repeat what I concluded in the separate actions. At this point in time this should be left to the trial judge.

[39] The plaintiffs allege that they argue that the defences of justification, fair comment and responsible communication in the response to civil claim "lack clarity, specificity and plead evidence" (paragraph 27 of notice of application). I repeat my conclusions in the separate actions.

[40] The plaintiffs' application is dismissed with costs to the defendants in any event of the cause.

“H.C. Hyslop J.”

HYSLOP J.