COURT OF APPEAL FOR ONTARIO

CITATION: Baglow v. Smith, 2012 ONCA 407
DATE: 20120614
DOCKET: C54350

Goudge, Sharpe and Blair JJ.A.

BETWEEN

John Baglow a.k.a."Dr. Dawg"

Plaintiff (Appellant)

and

Roger Smith a.k.a. "Peter O'Donnell", Connie Fournier and Mark Fournier

Defendants (Respondents)

Peter F. Burnet, for the appellant

Barbara Kulaszka, for the respondents Mark and Connie Fournier

Heard: March 13, 2012

On appeal from the order of Justice P. Annis of the Superior Court of Justice, dated August 30, 2011, with reasons reported at 2011 ONSC 5131, 107 O.R. (3d) 169.

R.A. Blair J.A.:

Overview

[1] Commentators engaging in the cut and thrust of political discourse in the internet blogosphere can be fervent, if not florid, in the expression of their views. This appeal arises out of such an exchange.

[2] Mr. Baglow owns and operates a blog called “Dawg’s Blawg” on which he posts left-wing opinions on various political and public interest issues using the pseudonym “Dr. Dawg.” Mark and Connie Fournier operate and moderate a message board called “FreeDominion”, a site described as a venue for expressing conservative viewpoints. Roger Smith, whose nom de plume in the blogosphere is “Peter O’Donnell”, is a right-wing commentator who comments frequently on FreeDominion and other blogs, including the appellant’s.[1] “Dr. Dawg” and “Peter O’Donnell” are vigorously critical of each other’s points of view.

[3] Mr. Baglow freely acknowledges that debates on political blogs can be “caustic, strident or even vulgar and insulting” at times. However, he maintains that Mr. Smith went too far in labelling him “one of the Taliban’s more vocal supporters” during one of their blogging altercations. The comment was posted on the Fourniers’ FreeDominion site on August 10, 2010, and was made during a robust exchange concerning Canada’s Conservative government and the validity of the detention of Omar Khadr – the young Canadian held by American authorities in Guantanamo Bay. Mr. Baglow objected to the commentary as being defamatory, and sued.

[1] Mr. Smith, who was self-represented, did not attend the hearing of the appeal on March 13, 2012, but the Court was advised he was content to rely on the submissions made by respondents’ counsel.

[4] On a motion for summary judgment, Justice P. Annis dismissed the claim. For the reasons that follow, I would allow the appeal and direct that the action proceed to trial.

Facts

[5] Although the appellant posts his views under the moniker “Dr. Dawg” and his blog is called “Dawg’s Blog,” his true identity as John Baglow is not hidden and is well-known among political bloggers. A retired public servant who earns his income through short-term contracts with a variety of clients, including government agencies, the appellant has published opinion pieces in newspapers, and is recognized in the political blogging world for his left-wing beliefs and frequent criticism of right-wing views and policies. He has actively opposed Canada’s engagement in the war in Afghanistan and has supported the repatriation of Mr. Khadr from Guantanamo Bay to Canada on the grounds that he is entitled to be treated as a child soldier and in accordance with the rule of law.

[6] The impugned remark was made during the back and forth that arose out of several postings written by the appellant on his own blog on August 8, 10 and 13, 2010. The motion judge had the entire record of that exchange before him, as do we. Without reciting the details of the electronic dialogue in its complete

detail, the following will provide the context and some insight into the flavour of the debate.

[7] In the first posting, entitled “Off with his head,” the appellant called for a federal election and referred to supporters of the Conservative government as “yokels with pitchforks,” his particular appellation for those holding right-of-centre views. He also posted a comment on blogger Jay Currie’s site, saying, “Most of us have had our fill of slack-jawed yokel government.”

[8] Mr. Smith picked up the “yokels with pitchforks” theme, apparently with some sense of relish as he subsequently adopted the moniker “Yokel with pitchfork” in other unrelated blog postings. In the exchange with “Dr. Dawg,” he posted a series of responses to the “Off with his head” commentary on Jay Currie’s blog over the next two days, “speaking,” as he said, “on behalf of slack-jawed yokels (he means western Canadians, right?)”. In the process, he raised the Omar Khadr issue:

> Yokels with pitchforks ... sounds like beer and popcorn to me. Where does Omar Khadr fit into your world view? Now I would say psychopath with a rifle there. But I understand he is on the short list for G-G in 2015 once you get rid of us yokels and such.

[9] After a further barbed exchange on Jay Currie’s blog, the appellant posted an entry on Dawg’s Blawg, entitled “The Gitmo Kanga-Ruse,” in which, amongst other things, he referred to the trial of Mr. Khadr as a judicial lynching and added some further Canadian flavour:

> And Stephen Harper and his minions, who have been praying for this moment to arrive, will be delighted ... Good luck with that. Parrish (the person presiding at the Khadr trial) is already twisting the hemp in his hands. And our own Prime Minister is part of the mob.

[10] Rising to the bait, Mr. Smith responded in kind:

> When you say "Canadian" you really mean Ontario Liberal. Why don't you secede and form your own country? Nobody else wants to share your country, you think that your town house socialist lifestyle is what everyone else wants, but it's not – and you should get over yourselves and stop supporting the 7th century religious fundamentalist Taliban who think it's cool to throw acid in women's faces if they don't obey their menfolk. Is that now a Canadian value too? I have zero sympathy for the Khadrs, the whole lot of them should be deported.
>
> In the moral sphere, you seek complicity with the recent murders of American aid workers under the spurious (if outrageous) charge of spreading Christianity, when you sign up to support Omar Khadr. I think such public declarations of support of Al Qaeda and the Taliban amount to treason, given that we are engaged in a war against them. It's really only because the war is contained and not likely to be lost on our soil that these normal laws do not apply, or shall I say, are not being applied. But the government of Canada would be quite within its legal rights to arrest the lot of you for treason.

[11] Not finished for August 10th, "Peter O'Donnell" wrote the complained of posting on the FreeDominion site under the heading "Hey yokels with pitchforks, there is no libertarian base." In it, he made the following remarks, including the allegedly defamatory statement that is bolded:

> I think Canada's long-simmering cultural war is about to go viral. I base this on two rather unrelated eruptions of Liberal/progressive angst ("why can't they see that we are their natural superiors?") in the past few days. On Monday, Liberal talking head Scott Reid, commenting on Harper's recent announcements concerning the long-term census, said he was pandering to the libertarian base, but that there is no libertarian base. I will return to that rather astounding claim but first, the other salvo in the offensive. Dr. Dawg's colourfully illustrated op-ed that describes the conservative base (for which nobody has claimed non-existence) amounts to "yokels with pitchforks." **This coming from one of the Taliban's more vocal supporters.** I suppose they are super-yokels with Kalashnikovs.

Later in the same posting, he continued:

> Now, as to yokels with pitchforks, just one thing about that ... we have the pitchforks for a reason, to keep mad dogs at bay. Or Bay and Bloor. We also have virtual control over western Canada where all the money is, so if you elitists down there in Ontari-ari-ario want to retire before you are 87 and avoid a total economic collapse, then it might be smart to stop insulting everyone in western Canada every time you get anxious about having to live in the adult world, and perhaps think less about who we are and more about who you are, as in TRAITORS (collaboration with the enemy being the essential nature of TREASON, and treason being your apparent lack of concern for our national security and the safety of our fighting forces in the field of battle). Or, perhaps you should just ship off to the nearest Al Qaeda training camp like your hero young Khadr did (with his traitor-family's blessing) and take up arms against the hated Western civilization that you so obviously detest.

[12] Apparently the appellant is prepared to live with the "traitor/treason" tag, but he objects to the statement: "This coming from one of the Taliban's more vocal supporters." He argues that it does not follow, simply because he opposes

the war in Afghanistan and supports the rights of Omar Khadr to a fair trial, that he is a supporter of the Taliban. Indeed, he considers himself to be a proud and patriotic Canadian who supports the Canadian Forces and has never argued that a victory by the Taliban would be a good thing. In fact, he has criticized the Taliban as a dangerous, theocratic and tyrannical regime in many comments and blog postings.

[13] Here, however, the issue is joined. Mr. Smith's response to a posting written by the appellant on FreeDominion on August 11 – where the appellant posted under the anonymous pseudonym, "Ms. Mew" – was succinct:

> I don't see how it's intellectually consistent to support Omar Khadr and say you're not supporting the Taliban.

[14] In the posting by "Ms. Mew" – a not too subtle play on his "Dr. Dawg" moniker – the appellant complained of, but republished, the allegedly defamatory statement and identified "Dr. Dawg" as "Baglow." As "Ms. Mew" he replied to the foregoing comment by Mr. Smith:

> Omar Khadr hasn't been convicted of anything. Supporting due process and the presumption of innocence are apparently the same thing as being a Taliban supporter. I hope Baglow sues your ass, quite frankly. You're utterly out of bounds on this.

[15] Mr. Smith had the last word, however. On August 11 he posted the following:

> The false angst about Omar Khadr is disgusting to many Canadians who remember what happened to dozens of our fellow citizens on 9-11 among the large international death toll, and what could easily have happened to any of us if we had been travelling in Bali, London or Madrid. Or Mumbai on business for that matter. People like the Khadrs relished those scenes and have chosen the path of terrorism, which is a cowardly and profoundly anti-democratic activity – even the Nazis had a state and wore uniforms. The new crop of fascists (and that's who you're supporting, my proggy friends, a bunch of Islamo-fascists) don't have the courage to wear real uniforms, or fight under any recognized code of military engagement for their demented goals. They choose entirely innocent groups of civilians as their targets.

[16] On August 11, the appellant sent an email to the Fourniers stating that he had been libelled as "one of the Taliban's most vocal supporters" and demanding the removal of the statement from their site. The respondents refused.

[17] The argument continued for a brief period following the appellant's third "Dawg's Blog" posting on August 13, in which, amongst other things, he accused Mr. Smith of McCarthyism. This generated a litany of additional responses from Mr. Smith along the same lines as outlined above concerning the effect of the terrorist activities of the Khadrs and their kind and equating support for Mr. Khadr with support for the Taliban and "the enemies of our country." The appellant closed the debate on August 13 with comments on his "They dare call it treason" posting, signing off with the suggestion: "You're out of your mind. Get help, Roger."

[18] I turn now to a discussion of the issues and why I say the matter must be remitted for trial.

Analysis

[19] As the Supreme Court of Canada has recently reaffirmed in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 28, in order to establish a claim for defamation a plaintiff must establish that:

a) the impugned words are defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;
b) the words in fact refer to the plaintiff; and
c) the words were published, i.e., that they were communicated to at least one person other than the plaintiff.

Once the plaintiff has established these elements, falsity and damage are presumed, and the onus shifts to the defendant to advance an appropriate defence to escape liability.

[20] Here, there is no dispute over (b) and (c). The respondents admit having published the impugned statement and it is acknowledged that the statement, although made in the context of a debate with "Dr. Dawg," was made in reference to the appellant. The issues in the action are whether the statement is defamatory, whether the defence of fair comment is open to the respondents

and, if the statement is defamatory and the defence does not apply, what are the appellant's damages.

[21] In addressing these issues the motion judge concluded, first, that summary judgment was appropriate because no genuine issue for trial arose with respect to any of the issues based on what he viewed as the complete record before him; secondly, that the impugned words were not capable of being defamatory of the appellant because they amounted to comment or a statement of opinion rather than a statement of fact, and therefore had a diminished tendency to lower the reputation of the appellant in the eyes of a reasonable reader; thirdly, that the impugned words were not in fact defamatory of the appellant because they lacked the sting of libel in the context of a political blog where insults were regularly treated as part of the give and take of debate; and finally, that in any event, the words complained of constituted a fair comment on a matter of public importance and that no malice had been proved.

[22] Respectfully, the motion judge erred in granting summary judgment in these circumstances. In my view, there ought to be a trial. For this reason, with one exception, I do not find it necessary to comment on his decision with respect to the substance of the defamatory claim and defences, except as needed to explain my logic for sending the matter back for trial.

[23] The issues raised in this action are all important issues because they arise in the relatively novel milieu of internet defamation in the political blogosphere. However, they are not issues that lend themselves to determination on a motion for summary judgment in circumstances such as this, in my view, particularly where the action is being processed in the simplified procedure regime.

[24] As the motion judge readily acknowledged, summary judgment has rarely been granted in defamation cases, probably because the courts have recognized that the threshold over which a statement must pass in order to be capable of being defamatory of a plaintiff is relatively low: see *Cherneskey v. Armadale Publishers Ltd*., [1979] 1 S.C.R. 1067, at p. 1095, and because the question whether a statement is in fact defamatory has long been considered the purview of a trier of fact. Whether impugned words are defamatory of an individual in fact is the type of decision better made on the basis of a full factual record with cross-examinations and possibly expert testimony. Indeed, until the *Judicature Act*, R.S.O. 1980, c. 223 was replaced by the *Courts of Justice Act* S.O. 1984, c. 11, actions for libel and slander were among a small group of claims that the law required to be tried by a jury, unless the parties consented to waive such a trial: see *Judicature Act*, s. 57.

[25] The motion judge concluded nonetheless that it was appropriate to grant summary judgment here, principally because “the factual foundation of the case is largely captured in the extensive materials taken from the parties’ blogs” and

because “there seems little in dispute of a factual nature that would be different were [the case] to proceed to trial.” On this basis, he concluded that there were no genuine issues for trial with respect to the following questions:

> (a) whether the statement complained of was capable of being defamatory of the appellant;
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> (b) whether, if the statement were capable of being defamatory, it was in fact defamatory of the appellant in the context and circumstances in which it was made;
>
> (c) whether the impugned statement constituted a statement of fact or a statement reflecting a comment or opinion; and
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> (d) whether the defence of fair comment provided a defence to the respondents, including whether malice was established.

[26] The motion judge did not have the benefit of this Court’s recent decision in *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, 108 O.R. (3d) 1, in which a new test for summary judgment – the “full appreciation” test – was articulated. The Court summarized that new test at paras. 54 and 55 as follows:

> The point we are making is that a motion judge is required to assess whether the attributes of the trial process are necessary to enable him or her to fully appreciate the evidence and the issues posed by the case. In making this determination, the motion judge is to consider, for example, whether he or she can accurately weigh and draw inferences from the evidence without the benefit of the trial narrative, without the ability to hear the witnesses speak in their

> own words, and without the assistance of counsel as the judge examines the record in chambers.
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> Thus, in deciding whether to use the powers in rule 20.04(2.1), the motion judge must consider if this is a case where meeting the full appreciation test requires an opportunity to hear and observe witnesses, to have the evidence presented by way of a trial narrative, and to experience the fact-finding process first-hand. Unless full appreciation of the evidence and issues that is required to make dispositive findings is attainable on the motion record - as may be supplemented by the presentation of oral evidence under rule 20.04(2.2) - the judge cannot be "satisfied" that the issues are appropriately resolved on a motion for summary judgment.

[27] In this case, the parties have put in play a scenario that, to date, has received little judicial consideration: an allegedly defamatory statement made in the course of a robust and free-wheeling exchange of political views in the internet blogging world where, the appellant concedes, arguments “can be at times caustic, strident or even vulgar and insulting.” Indeed, some measure of what may seem to be a broad range of tolerance for hyperbolic language in this context may be taken from the apparent willingness of the appellant to absorb the slings and arrows of the “traitor” and “treason” labels without complaint.

[28] Nonetheless, although the respondents come close to asserting – but do not quite assert – that “anything goes” in these types of exchanges, is that the case in law? Do different legal considerations apply in determining whether a statement is or is not defamatory in these kinds of situations than apply to the publication of an article in a traditional media outlet? For that matter, do different

considerations apply even within publications on the internet – to a publication on Facebook or in the “Twitterverse”, say, compared to a publication on a blog?

[29] These issues have not been addressed in the jurisprudence in any significant way. The responses may have far-reaching implications. They are best crafted on the basis of a full record after a trial – at least until the law evolves and crystallizes to a certain point – in my view. A trial will permit these important conclusions to be formulated on the basis of a record informed by the examination and cross-examination of witnesses and quite possibly with the assistance of expert evidence to provide the court – whose members are perhaps not always the most up-to-date in matters involving the blogosphere – with insight into how the internet blogging world functions and what may or may not be the expectations and sensibilities of those who engage in such discourse in the particular context in which that discourse occurs.

[30] Although made against a slightly different background – whether a statement made using a microphone at a public rally was in law a libel or a slander – the observations of this Court in *Romano v. D’Onofrio* (2005), 77 O.R. (3d) 583 confirm that novel questions of law or of mixed law and fact in defamation matters ought generally to be determined at a trial. At paras. 7 and 9, the Court, citing *R. D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.* (1991), 5 O.R. (3d) 778, observed that “‘matters of law which have not been settled fully in our jurisprudence should not be disposed of at this [interlocutory]

stage in the proceedings'" because they involve a "type of interpretative analysis [that] should only be done in the context of a full factual record, possibly including appropriate expert evidence."

[31] These considerations are particularly significant in relation to several of the issues here. First, whether the words "this coming from one of the Taliban's more vocal supporters" are in fact defamatory of the appellant depends upon a careful analysis of the context in which the statement was made, including not just a review of the electronic dialogue between "Dr. Dawg" and "Peter O'Donnell," which the motion judge had before him, but also an assessment of the two individuals and the view they took of the exchange – something that requires at least cross-examination on the positions they initially put forward. The analysis further requires a consideration of the view that a reasonable reader of the exchange may take of the exchange in the context, an issue that might well require some expert testimony for resolution as noted above. For similar reasons, I am not convinced that either the issue of whether the impugned words constitute "comment" or "fact" or the issue of malice in relation to the defence of fair comment can be resolved at this stage. They both require a delicate balancing of the factual context in its entirety for determination.

[32] On the issue of malice alone, I am not persuaded that the fact "Dr. Dawg" and "Peter O'Donnell" did not know each other personally and only communicated via the internet is dispositive. Determining actual and express

malice often requires that the trier of fact draw inferences from proved facts. Often, proof of malice is found beyond the four corners of the publication at issue.

[33] In the particular circumstances of this case, there is an additional reason why summary judgment is not appropriate. I mentioned above the importance of examination and cross-examination in building an appropriate record in these kinds of cases. The motion judge placed considerable emphasis on the fact that "the parties [had] chosen not to exercise their rights of cross-examination" on the affidavits filed. In this respect, he misapprehended the proceeding. The parties had no rights to cross-examine. This action was commenced under the Simplified Procedure provisions of Rule 76; cross-examination of a deponent on an affidavit is not permitted: rule 76.04(1).

[34] While acknowledging that there will be cases where summary judgment is appropriate in simplified rules cases, the Court in *Combined Air Mechanical* was nonetheless cautious about resort to such a remedy in such circumstances. At paras. 255-257 it said:

> When a judge is faced with a contested motion for summary judgment in a simplified procedure action that requires exercising the powers in rule 20.04(2.1), the judge will not only have to apply the full appreciation test, but will also need to assess whether entertaining the motion is consistent with the efficiency rationale reflected in the simplified procedures under Rule 76. We

> make two general observations that will inform this assessment.
>
> First, summary judgment motions in simplified procedure actions should be discouraged where there is competing evidence from multiple witnesses, the evaluation of which would benefit from cross-examination, or where oral evidence is clearly needed to decide certain issues. Given that Rule 76 limits discoveries and prohibits cross-examination on affidavits and examinations of witnesses on motions, the test for granting summary judgment will generally not be met where there is significant conflicting evidence on issues confronting the motion judge. While the motion judge could order the hearing of limited oral evidence on the summary judgment motion under rule 20.04(2.2), in most cases where oral evidence is needed, the efficiency rationale reflected in the rule will indicate that the better course is to simply proceed to a speedy trial, whether an ordinary trial or a summary one: see rules 76.10(6) and 76.12.
>
> Second, we are not saying that a motion for summary judgment should never be brought in a simplified procedure action. There will be cases where such a motion is appropriate and where the claim can be resolved by using the powers set out in rule 20.04 in a way that also serves the efficiency rationale in Rule 76. For example, in a document-driven case, or in a case where there is limited contested evidence, both the full appreciation test and the efficiency rationale may be served by granting summary judgment in a simplified procedure action.

[35] While the motion judge did have an extensive record before him in the form of the entirety of the exchanges between the parties, this was not sufficient in my opinion. It cannot be said that this is simply a “document-driven case,” or that this is a case involving “limited contested evidence,” as contemplated in the

passage above, such that “both the full appreciation test and the efficiency rationale may be served by granting summary judgment in a simplified procedure action.”

[36] No expert evidence was tendered concerning the expectations and understanding of participants in blogosphere political discourse. There was simply no evidence as to what the right-thinking person in this context would consider would lower the appellant’s reputation in the estimation of a reasonable reader; indeed, ladening the record with the possibly contentious type of expert evidence needed in a first-impression case of this nature, and then seeking summary judgment, would be counter to the rationale underlying the simplified procedure. The motion judge placed considerable weight on Mr. Smith’s explanation for the comments he made in arriving at the decision that the impugned statement involved comment rather than fact and was, therefore, (a) less likely to be taken as defamatory, and (b) the basis for a fair comment defence. Yet Mr. Smith was not cross-examined on the various important subtleties of that evidence, nor was he cross-examined on the issue of malice in the context of fair comment. These issues need to be threshed out at a trial.

[37] I mentioned that, with one exception, I would not deal with the decision of the motion judge on the merits of the defamation claim. One issue requires comment.

[38] In the process of arriving at his conclusions, the motion judge found that the impugned words were not defamatory because, having been made in the heat of what the motion judge saw as the modern-day equivalent to a live debate, a reasonable reader would have anticipated a rejoinder by the appellant, and in the absence of such a rejoinder, the statement could not be seen to have lowered the reputation of the plaintiff in the eyes of such a reader. I would not want the failure to deal with that conclusion to be taken as acceptance of it. That too, it seems to me, is an issue that needs to be fleshed out at trial, quite possibly, again, with the assistance of expert testimony.

Disposition

[39] For the foregoing reasons, I would allow the appeal, set aside the order below, and direct that the action proceed to trial.

[40] The appellant is entitled to his costs of the appeal, fixed in the total amount of $7,500 inclusive of disbursements and all applicable taxes.

[41] Costs below were fixed in the amount of $6,500 in favour of the respondents. I see no reason why the appellant should not be entitled to the costs below in the same amount.

"R.A. Blair J.A."
"I agree S.T. Goudge J.A."
"I agree Robert J. Sharpe J.A."

Released: June 14, 2012