COURT OF APPEAL FOR ONTARIO

CITATION: Warman v. Fournier, 2015 ONCA 873
DATE: 20151211
DOCKET: C58503

Sharpe, Cronk and Miller JJ.A.

BETWEEN

Richard Warman

Plaintiff (Respondent)

and

Constance Fournier, Mark Fournier, ~~Andrew Spencer (a.k.a. Droid 1963)~~,
Roger Smith (a.k.a. Peter O'Donnell), Jason Bertucci (a.k.a. Faramir),
Dan Lepage (a.k.a. SaskBigPicture), ~~Daniel Martin (a.k.a. Padraigh)~~,
Jon F. Klaus (a.k.a. Klinkxx) and
John Does 1 – 2 (a.k.a. conscience and HR-101)

Defendants (Appellants)

Barbara Kulaszka, for the appellants

James Katz, for the respondent

Heard: December 2, 2015

On appeal from the judgment of Justice Robert J. Smith of the Superior Court of Justice, dated February 27, 2014, sitting with a jury.

By the Court:

A. Introduction

[1] Following a civil libel trial by a judge and jury, the appellants were found liable to the respondent for defamation of character. The jury awarded the

respondent general, aggravated and punitive damages of $42,000. At the conclusion of trial, the trial judge granted a permanent injunction against the appellants, enjoining them from publishing in any manner any statements found by the jury to be defamatory of the respondent. He also awarded costs against the appellants, on a substantial indemnity scale, of $62,900.

[2] The appellants appeal from the jury's liability and damages findings, and from the injunctive relief and costs award granted by the trial judge.

[3] During oral argument, the appellants focused their submissions on five issues. They contend that:

i) the trial judge erred by:

   a) failing to determine, before the case was left with the jury, whether the statements alleged by the respondent to be defamatory and the innuendos allegedly arising from those statements were capable of bearing the defamatory meanings pleaded by the respondent;
   b) leaving the question of malice with the jury and misdirecting the jury on malice;
   c) granting a permanent injunction;
   d) awarding costs against the appellants on a substantial indemnity scale; and

ii) the jury's aggravated and punitive damages awards are unreasonable and irrational.

[4] For the reasons that follow, we conclude that all the appellants' grounds of appeal must be rejected.

B. Trial Judge's Alleged Errors

(1) Defamatory Meanings of Alleged Statements and Innuendos

[5] The appellants argue that the trial judge erred in law by failing to rule, prior to the submission of the case to the jury, on whether the defamatory statements and false innuendos pleaded were capable of bearing the defamatory meanings asserted by the respondent.

[6] We disagree, for two reasons.

[7] First, at trial, the appellants' counsel explicitly told the trial judge that her clients asked that all the alleged defamatory statements be put to the jury. She made no request of the trial judge for the ruling that the appellants now say was necessary. After taking this position, she neither objected to the form of the statements submitted to the jury nor to the trial judge's instructions on the statements and innuendo.

[8] Given this position and counsel's failure to object to the form of the questions submitted to the jury, it necessarily followed that the appellants were content that the alleged innuendos arising from the statements were a matter for the jury.

[9] Second, and importantly, it is clear from his instructions to the jury that the trial judge did decide that the statements at issue, together with the innuendos alleged, were capable in law of bearing the defamatory meanings alleged and he

instructed the jury accordingly. We have reviewed the statements and alleged innuendos and it is difficult to see how he could possibly have come to any other conclusion.

[10] The appellants must bear the consequences of their tactical decisions at trial. No error in the trial judge's instructions on this issue having been demonstrated, this ground of appeal fails.

(2) Malice

[11] The appellants submit that the trial judge further erred by failing to consider whether the evidence adduced at trial was sufficient to support a potential finding of malice. They maintain that the question of alleged malice should not have been left with the jury because there was no adequate evidentiary foundation for a finding of malice. They also argue that the trial judge misdirected the jury on malice by failing to tell the jury that the defence of fair comment in a libel action can be defeated only on proof that malice was the dominant motive for publishing the statements at issue.

[12] Again, we disagree.

[13] At trial, the appellants relied mainly on the defence of fair comment and, in respect of some of the statements in question, on the defence of justification. In the context of these defences, there was evidence at trial of the appellants' conduct that, if accepted by the jury, could ground a finding of malice. The

appellants did not ask the trial judge to rule that there was no evidence capable of supporting a finding of malice. A review of the record indicates that there was evidence capable of supporting a finding of malice and had the appellants asked for such a ruling, the trial judge would have had no choice but to put malice to the jury.

[14] We are also not persuaded that the jury was misdirected on the legal requirements for a finding of actual malice. The trial judge's initial instructions did not indicate that malice must be the dominant motive for publishing the impugned statements in order to anchor a finding of actual malice. However, the trial judge's recharge to the jury emphasized that actual malice includes the making of a statement for the dominant purpose of harming someone out of personal spite or ill-will. He told the jury, among other things: "Actual malice includes every unjustifiable dominant intent to inflict injury on the person defamed." In our view, as a result of the recharge, the jury could not have been under any misapprehension as to the controlling principles on the issue of malice.

[15] In these circumstances, where the question of malice is properly pleaded, admissible evidence going to proof of malice is adduced, and a correct instruction on malice is provided by the trial judge to the jury, as in this case, the determination of malice is a question for the jury. See for example, *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067, at p. 1090; *Davies & Davies Ltd. v. Kott*, [1979] 2 S.C.R. 686, at p. 694.

[16] This ground also fails.

(3) Permanent Injunction

[17] Nor are we persuaded that the trial judge erred, on the facts of this case, by granting permanent injunctive relief.

[18] The trial judge appropriately confined the scope of the injunction granted so as to restrain the appellants only from publishing any statements found by the jury to be defamatory of the respondent. Thus, the injunction is not overly broad. It only prevents future postings on the appellants' website if those postings repeat the defamatory content as found by the jury.

[19] The appellants argued that an injunction would prevent them from hosting an internet discussion forum, because they could not control what third parties posted to their site.

[20] We disagree. As counsel for the respondent argued, this fear rests on a misapprehension of the basis for liability of a forum host for libelous statements posted by a third party. Liability in that circumstance turns on whether the statements at issue have been deleted by the host after reasonable notice to delete has been given.

[21] Based on the appellants' conduct as established by the evidence at trial, the trial judge inferred that the appellants would continue to publish the same defamatory statements about the respondent on their website unless enjoined by

permanent court order from doing so. This inference was rationally supported by the record, including by the following:

- the appellants had refused, despite request therefor, to remove the defamatory statements from their website until approximately nine months after being served with the respondent's first notice of libel and seven months after the delivery of his statement of claim;

- the appellants continued to post the respondent's pleading and his second notice of libel on their website up to and after the commencement of trial;

- even after the jury verdict, the appellants posted a link on their website to a copy of the respondent's statement of claim; and

- the jury found that the appellants acted with malice. This finding supported the conclusion that similar malicious postings on the appellants' website could continue in the future.

[22] In these circumstances, we agree with the trial judge's conclusion, at para. 34 of his reasons:

> The continued publication of libellous material would cause irreparable harm to the [respondent's] reputation, and [the] prohibited material has already been found to constitute libel. I find that the balance of convenience favours the granting of an injunction because the terms of the proposed injunction would not prevent any of the defendants from engaging in political comment that was not defamatory, whereas the harm to [the respondent's] reputation would be substantial. Based on the fact that the jury found that the defendants made 41 statements which were defamatory of [the respondent], that they did so maliciously, and that they have refused to apologize

> or publish a retraction, I find that [the respondent] has met his onus of showing that an injunction should issue to prevent the defendants from publishing in any manner whatsoever any statements found to be defamatory of [the respondent] in this action….

[23] In our opinion, for the reasons given by the trial judge, the injunction granted was both warranted and appropriate.

(4) Costs Award

[24] We also reject the appellants' challenge to the trial judge's award of costs on a substantial indemnity scale.

[25] The trial judge based his award of substantial indemnity costs on his consideration of three factors: i) the respondent achieved a result at trial that exceeded his pre-trial offer to settle under r. 49 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194; ii) the jury found that the appellants acted with malice towards the respondent, and in a high-handed and egregious manner; and iii) the principles governing costs as detailed in r. 57.01(1) of the *Rules of Civil Procedure*.

[26] These factors amply justified an award of costs on a substantial indemnity scale. The trial judge made no error in principle in fashioning his costs award, nor is his award plainly wrong. As a result, appellate interference with the award is precluded: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27.

C. The Jury's Aggravated and Punitive Damages Awards

[27] A jury's award of damages, including aggravated or punitive damages, attracts considerable deference from a reviewing court. This is especially so in defamation cases. An appellate court is not entitled to substitute its own view on the proper amount of damages for the judgment of the jury unless the verdict is "so exorbitant or so grossly out of proportion to the libel as to shock the court's conscience and sense of justice": *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104 (C.A.), [1987] O.J. No. 236, at p. 110.

[28] The appellants point to no error in the trial judge's instructions on the nature and purposes of aggravated and punitive damages or on the circumstances in which such awards are reasonable and rational. The appellants make only bald assertions that their conduct was undeserving of an award of aggravated or punitive damages. They have not identified any error in the trial judge's instructions on these types of damages or any other basis for appellate intervention with the jury's damages awards.

[29] The jury concluded that the appellants had acted maliciously in publishing the defamatory statements in question. The jury's damages awards indicate, contrary to the appellants' contention, that it concluded that the appellants had acted in an oppressive and high-handed manner. We agree with the trial judge's

observation, at para. 4 of his costs reasons, that “there was ample … evidence on which the jury could have reached the conclusions that it did.”

[30] We see no basis upon which to disturb the jury’s awards of aggravated ($7,000) and punitive ($13,000) damages against the appellants.

D. Disposition

[31] For the reasons given, the appeal is dismissed. Leave to appeal costs is granted and the costs appeal is also dismissed. The respondent is entitled to his costs of the appeal, fixed in the amount of $23,000, inclusive of disbursements and all applicable taxes.

Released:

“RJS” “Robert J. Sharpe J.A.”
“DEC 11 2015” “E.A. Cronk J.A.”
“B.W. Miller J.A.”