
CANADA / JUDGMENT

Gichuru v. Pallai

2012 BCSC 693

COURT

Supreme Court of British Columbia

DECIDED

14 May 2012

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2012 BCSC 693 Gichuru v. Pallai

N THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gichuru v. Pallai,

2012 BCSC 693

Date: 20120514

Docket: S112532

Registry: Vancouver

Between:

Mokua Gichuru

Plaintiff

And

Mark Pallai, Smart Technologies Consultants Ltd. and Vladyslav Mayzel

Defendants

Corrected Judgment: The text of this judgment was correct at paragraph 60(d) where changes were made on May 30, 2012

Before: The Honourable Madam Ross

Reasons for Judgment

The Plaintiff:

Self-Represented

Counsel for the Defendants:

Daniel W. Burnett

Place and Date of Hearing:

Vancouver, B.C.

April 11, 2012

Place and Date of Judgment:

Vancouver, B.C.

May 14, 2012

Introduction

[1] This is an action for defamation. The plaintiff, Mokua Gichuru, alleges that the defendants, Mark Pallai, Vladyslav Mayzel and Smart Technologies Consultants Ltd., published a defamatory statement on the Discover Vancouver website in a thread entitled "End the hate and bullying rally", under the pseudonym "vanishome" (the "Defamatory Statement"). The Defamatory Statement is:

End the hate and bullying rally, just like the BCHRT 125 - Reasons for Decision and that Mokua Gichuru's complaint against Mark Pallai was dismissed!

[2] The defendants apply under Rule 9-7 of the Supreme Court Civil Rules for a dismissal of the plaintiff's claim. Mr. Gichuru took the position that the matter was not suitable for summary determination but, in the alternative, that the defendants had failed to make out the defence of fair comment.

Facts

[3] On August 8, 2007, Mr. Gichuru entered into a residential tenancy agreement with Palmar Properties Inc., of which Mr. Pallai is the principal, concerning the rental of a suite at the Highlands in Vancouver. Mr. Gichuru resided at the suite from August 31, 2007 to December 15, 2010.

[4] In August 2009, Mr. Gichuru filed a complaint with the British Columbia Human Rights Tribunal alleging that Mr. Pallai had discriminated against him in the tenancy on the basis of race and colour. The complaint arose from an exchange of e-mails between Mr. Gichuru and Mr. Pallai, as property manager, concerning noise complaints that, from Mr. Gichuru's perspective, were not being addressed.

[5] There were a series of applications related to the complaint:

- December 3, 2009, Mr. Gichuru applied to stay further consideration of the complaint pending completion of a trial of an action he had commenced against one of the tenants. The Tribunal denied the application for a stay - Gichuru v. Pallai, 2010 BCHRT 36;

· February 15, 2010, Mr. Gichuru applied to have Murray Geiger-Adams, the Tribunal Member, recuse himself from considering Mr. Pallai's application to dismiss the complaint. The application to recuse was dismissed in the same Reasons that dismissed the complaint - Gichuru v. Pallai (No. 2), 2010 BCHRT 125; and

· March 17, 2010, Mr. Gichuru sought costs against Mr. Pallai alleging improper conduct.

[6] Mr. Pallai's application to dismiss the complaint was granted by Reasons dated April 15, 2010 (2010 BCHRT 125). The Tribunal Member concluded that there was no reasonable prospect that Mr. Gichuru would be able to establish that there was a connection between any adverse treatment he experienced and the grounds raised in his complaint.

[7] On June 11, 2010, Mr. Gichuru filed a petition seeking judicial review of the dismissal of the Human Rights complaint. He later served Mr. Pallai with the petition as well as with an order to attend a hearing of a different Human Rights Tribunal complaint (No. 1645 - Gichuru v. Law Society of British Columbia).

[8] On October 18 and 19, 2010, there were a series of Internet postings which are referred to in the notice of civil claim but not alleged to be defamatory. These are as follows:

i. On October 18, 2010 the following statement was published on the Toronto Sun website (torontosun.com) under the pseudonym "Observer Drupal":

Did you know that Mokua Gichuru's complaint against Mark Pallai was dismissed?

Just for your information. More on the story here:

http://v.ww.11bc.leg.bc.ca/public/pubdocs/bcdocs2010/281249/2010/february/bchrt_36.pdf

ii. On October 18, 2010 the following statement was published on the Discover Vancouver website (discovervancouver.com) under the pseudonym "vanishome":

IN THE MATTER OF THE HUMAN RIGHTS CODE

R.S.B.C 1996 (as amended)

AND IN THE MATTER of a complaint before

the British Columbia Human Rights Tribunal

BETWEEN:

Mokua Gichuru

COMPLAINANT

AND:

Mark Pallai

RESPONDENT

Mokua Gichuru's complaint against Mark Pallai was dismissed!

iii. On October 18, 2010, the following response to the question "So if they had moved the speakers to the other side would that have been the end of this?" was published on the Discover Vancouver website under the pseudonym "vanishome":

There is a good chance at that!

iv. On October 19, 2010, an advertisement was published on the website Craigslist entitled "BCHRT 125 by Mark Pallai First Edition in Pristine Condition - \$99" in which the following statements were made:

For sale is a BCHRT 125 by Mark Pallai

It is a First Edition and is in Pristine Condition

BCHRT 125 -- Reason for Decisions and that Mokua Gichuru's complaint against Mark Pallai was dismissed!

email me if you have any questions

[9] The Defamatory Statement was posted on the Discover Vancouver website on October 21, 2010:

The opening post in the thread entitled "End the hate and bullying rally" read:

A well attended vigil

VANCOUVER/CKNW (AM980)

Devon Taylor

10/21/2010

A candlelight vigil brought over 500 people to downtown Vancouver's Emery Barnes Park to pay tribute to the 6 teens who recently took their own lives after being outed as gay.

The crowd showed their support by wearing purple and messages of hope and acceptance were delivered by various speakers.

Jen, from the Vancouver organization Out in Schools had a very clear message to the youth who are still in the closet, "For those who feel isolated, know that the attitudes of our world are constantly changing. Please live long enough to be there to see it. Get involved."

She also said that Out in Schools has reached over 18,000 students across BC and their goal is to continue educating youth across the Province about homophobia and bullying.

[10] Mr. Pallai deposed that he did not publish the Defamatory Statement, and that he did not post it on the website or anywhere else. He deposed that he did not ask or encourage anyone to do so and that he does not know who published the words. Finally, he deposed that prior to the commencement of the action, Mr. Gichuru never asked Mr. Pallai if he was responsible for the Defamatory Statement.

[11] Mr. Pallai deposed:

I do not know who made the posting, and I certainly did not ask or authorize anyone to do so. I had asked my friend Vlad Mayzel who deals with computers how I could deal with the fact that internet searches of my name turned up references to the plaintiffs allegation of racial discrimination against me. His suggestion was to post innocuous material named Mark Pallai in order to cause the references to the racial discrimination allegation to appear lower down on Google searches.

I never asked anyone or authorized anyone to post any negative statement about the plaintiff and I did not know anyone had posted anything potentially negative about the plaintiff until the plaintiff made an issue of it and drew my attention to the posting.

...

Although I did not publish or have anything to do with the publication of the posting, if a person were to interpret it as suggesting that the plaintiff is a bully, I agree with that opinion. It is a matter of genuine concern to me that a person such as the plaintiff can use a false allegation, made in official proceedings such as the human rights proceedings, to inflict such terrible allegations on another person with impunity.

I do not wish to cause harm to the plaintiff. I do not bear malice towards him. I simply wish that he would stop using litigation to harm me and leave me alone.

[12] Mr. Gichuru conducted an examination for discovery of Mr. Pallai. He adduced evidence from that discovery as part of his case in this application that included the following:

· Mr. Pallai saw the "Craigslist" posting on the Internet. He then asked Mr. Mayzel if he had posted it.

49 Q And why did you ask him if he put it on Craigslist?

A Um, because I didn't post it. I wanted to ask if he had posted it.

50 Q You had not posted it, but why did you choose him to ask if he had posted it? Why not somebody else?

A When --- when you made the false accusation of discrimination against you, and the BC Human Rights Tribunal dismissed it, when one would type my name into Google or Yahoo, up would pop, urn, I don't know if it's called a paragraph or a posting, and there was a reference there that said: "Mark Pallai," and then some words, and then "discrimination," and --- yeah, that concerned me.

...

75 Q So how does this tie into Mr. Mayzel?

A I was very concerned when I saw references to discrimination and my name. I asked Vlad what can be done and he suggested we put a lot more information about Mark Pallai on the computer, so we agreed that he would put more things about other Mark Pallais that were on the computer, so that when one pulls up 'Mark Pallai,' the reference to discrimination would be buried down deep in other pages.

76 Q So you paid him to do this?

A No.

77 Q He did this as a favour to you?

A Yes.

...

81 Q So to be clear, you asked him to find other Mark Pallais and post stuff about them on the Internet?

A No. There -- when you type in "Mark Pallai," there's other information, I suspect, about other Mark Pallais being like a track star or a professor, just to maybe repost more of those, so they show up higher.

...

107 Q Did you have a verbal conversation with Mr. Mayzel about Exhibit 4? By "verbal" I mean either in person or over the telephone.

A I -- if memory serves me right, I may have asked him about it via email and we may have discussed it by phone.

108 Q You're not sure if you discussed it by phone?

A If ---- if ---- if memory serves me right, I asked about it by email and we may have discussed it on the telephone.

109 Q Do you recall what was said during the telephone, or possible telephone conversation?

A I didn't want anything being put up on Craigslist with my name.

110 Q This was during a telephone conversation?

A I can't recall if it was by email or telephone.

111 Q And what was his response?

A I can't recall exactly, but I think he said he will cancel the ad.

[13] Mr. Gichuru also adduced e-mails marked as exhibits at Mr. Pallai's examination for discovery that are consistent with Mr. Pallai's evidence:

- October 6, 2010, to Mr. Mayzel - expressing concern that his name in Google searches is associated with racism and discrimination even though the case was dismissed.
- November 7, 2010, to Mr. Mayzel - "did you post the following?" followed by a reference to two posts including the Craigslist post.
- November 7, 2010, to Mr. Mayzel - "[please] let me see things before they are posted as now this CTV is right at the top and I don't like to see the word 'guilty' associated in the same sentence/area as mark pallai

also, the cr.Iist thing also highlights it

I'd rather just post a lot of stuff about mark pallai completely unrelated to that matter, etc.

ie. I sent you the following a while ago:"

...

[14] Mr. Mayzel is a personal defendant and the principal of the defendant Smart Technologies Consultants Ltd. Mr. Mayzel deposed that:

I never had any dealings with or contact with the plaintiff prior to this action. I knew Mark Pallai, and at one point he asked me if something could be removed from Google, and I told him that was difficult, but items on Google could show up lower in search results if other material was posted. I agreed as a favour to help do so, and as a favour, I asked a person who was doing some other work for me at the time to do so. I never instructed him or anyone else to post anything about the plaintiff.

[15] With respect to the Defamatory Statement he deposed that:

I did not write or authorize that posting, and I have never seen that posting on the internet and I do not know of anyone outside this lawsuit who has.

If the posting implied that the plaintiff was a bully, I have to say that even though I would never have posted or authorized any such thing, I agree with the opinion. A person who uses a human rights complaint to make a false public accusation of racism against someone else is in my opinion using the complaint process as a bully.

[16] Mr. Gichuru conducted an examination for discovery of Mr. Mayzel and adduced evidence on this application from that examination. That evidence included:

- with respect to the Craigslist posting:

164 Q When did you set it?

A Mark asked me about it once and then I asked the person who I thought that might have any relation to this. And at that time I took a look at it. I think. No. It's hard to tell exactly when. I don't know if I looked at it right away or later. So the subject -- the title looks very familiar; the rest, I don't know actually when I -- when I actually looked at it, but the title, yes, I remember very well.

· Mr. Mayzel identified the person who posted the Craigslist posting as Andrey Shkanov, a person he stated was employed by his firm from time to time as a contractor doing tasks such as cabling and computer repair.

· 187 Q Did you ask him why he posted it?

A Because I asked him to do something different, and he probably was too creative.

188 Q What did you ask him to do?

A I asked him to do it in his spare time, when he has nothing else to do, as a personal favour, to report some sports-related junk, so to speak, related to the name Mark Pallai.

...

190 Q So why did you ask Mr. Shkanov to re-post some sports-related junk to the name Mark Pallai?

A Mark asked me to post some sports stuff.

191 A When was this?

Q I don't remember. I should -- look in the email. You have those emails. If we look at it together -- we can take a look right - even right -now and you'll see them.

Q So you're saying there was email correspondence between yourself and Mark Pallai on this issue?

A Yes. Mark asked me to post it and I asked Andrey to just follow Mark's instructions.

...

· 205 Q What did you say to Andrey?

A I just informed him that I'm forwarding an email from Mark, Please re-post that sports stuff that Mark asked to post, That's all.

206 Q So how did Andrey end up posting Exhibit 17?

A I don't know.

207 Q Did you. ask him?

A Never.

208 Q You did not ask him why he posted Exhibit 17?

A I didn't ask why. As I told you, just a few minutes ago, I just assumed that he probably got too creative, but I never asked why.

209 Q Did it concern you that he posted Exhibit 17?

A Yes.

210 Q In what way did it concern you?

A It wasn't something he was asked to do.

· re Craigslist posting

226 Q So why did you send this email to Andrey?

A As soon as I found out that he posted something that he wasn't asked, I told him to stop posting anything.

Q How did you find out about this post?

A Mark asked me if I did it. I knew I didn't. But I asked Andrey, and he confirmed that he did. That concerned me and that's why I told him -- emailed him to stop any activity whatsoever.

...

· re: "End the hate" post

265 Q Do you know who posted this?

A No.

266 Q Have you asked Andrey if he posted this?

A No.

267 Q Why not?

A I didn't even know about its existence.

268 Q When did you first become aware of the existence of this posting?

A From my lawyer after you served me.

...

· 307 Q Did Mr. Pallai communicate his opinion to you that I'm a bully?

A No.

308 Q Did you communicate anything to Andrey suggesting that I'm a bully or full of hate?

A Absolutely not.

- [17] Mr. Gichuru adduced a series of invoices issued by Andrey Shkanov to Smart Technologies for work at \$10 per hour on various projects. In addition, he adduced a series of e-mail exchanges between Mr. Pallai and Mr. Mayzel that were consistent with the evidence Mr. Mayzel had given on his discovery concerning what Mr. Pallai had requested him to do, his instructions to Mr. Shkanov, and his instructions to Mr. Shkanov to cease all posting after Mr. Pallai questioned the Craigslist posting.
- [18] Mr. Gichuru adduced a printout of the profile of "vanishome" showing that that user had joined the Discover Vancouver forum on October 18, 2010, and made three postings, all concerning the Human Rights complaint, including the Defamatory Statement. There is no evidence linking "vanishome" to the Craigslist posting.
- [19] Mr. Gichuru has taken steps to add Mr. Shkanov as a defendant in the action. It appears that Mr. Shkanov now resides in Israel. On February 27, 2012, Mr. Gichuru obtained an order for substitutional service of Mr. Shkanov. The order provided Mr. Shkanov with 42 days to appear. To date he has not responded.

Suitability

- [20] Rule 9-7 provides in part:

Application

- (2) A party may apply to the court for judgment under this rule, either on an issue or generally, in any of the following:
- (a) an action in which a response to civil claim has been filed;

Judgment

- (15) On the hearing of a summary trial application, the court may
- (a) grant judgment in favour of any party, either on an issue or generally, unless
- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
- (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
- [21] Mr. Gichuru submits that the matter is not suitable for summary determination because it will not be possible for the court to find the necessary facts, and in any event, it would be unjust to do so. He submitted that there are not sufficient facts before the court to determine the action, that the court cannot make the necessary findings of fact and is unable to determine matters of credibility on the basis of affidavit and discovery evidence. Finally, he submitted that Mr. Shkanov, a key participant in the defamation, has yet to be added as a defendant.

Sufficiency of Facts - Publication

[22] Mr. Gichuru did not submit any evidence that anyone read the Defamatory Statement and in general did not address submissions with respect to the issue of publication. Mr. Gichuru's explanation was that he thought that the only issue at the summary trial would be the defence of fair comment. It should be noted that Mr. Gichuru is a lawyer.

[23] The defendants' notice of application includes the following:

2. The defendants did not publish or authorize publication of the alleged defamatory posting. There is no evidence from the defendants or the plaintiff that anyone outside the lawsuit has ever read the posting. The defendants do not concede they are publishers or that the posting had the defamatory meaning.

...

Onus on a Summary Trial

1. This application is by way of summary trial pursuant to Rule 9-7, and notwithstanding that it is brought by the defence, it places a burden on the plaintiff to discharge his onus or have his action dismissed. [citing *Miura v. Miura* (1992), 66 B.C.L.R. (2d) 345 (C.A.) at 352]

[24] In my view, Mr. Gichuru was put on notice that he would be required to discharge the onus of proof on the plaintiff in a defamation action at the summary trial by the defendants' notice of application. It is clear that a plaintiff cannot frustrate an application for judgment by summary trial by failing to adduce evidence, and then arguing that the facts cannot be found. In *Brown v. Douglas*, 2011 BCCA 521, Madam Justice Newbury, for the court discussed this proposition at paras. 29 and 30 as follows:

I should also advert briefly to an argument made by the plaintiffs at the oral hearing of this appeal - that the summary trial judge should not have proceeded at all under R. 18A in the face of their lack of evidence as to what counsel referred to as "proof of damages". (As seen above, the phrase "evidence of quantum" would have been more accurate.) It was said that in the circumstances, the summary trial judge should have dismissed the defendants' motion for judgment and permitted the plaintiffs to address this matter on a later occasion. In this regard, the plaintiffs cited the comments of this court in *Placer Development Ltd. v. Skyline Explorations Ltd.* (1985) 67 B.C.L.R. 366, where Taggart J.A. described three options available to counsel faced with an application brought against his or her client under R. 18A. These options were:

1. He may agree that the case is an appropriate case for a summary trial and he may decide to seek judgment on the merits in favour of his client.
2. He may decide that it is a wholly inappropriate case for summary trial and he may decide to oppose the application for summary trial on the basis of material already filed and on the basis of additional material including affidavits that tend to show that the case is inappropriate for disposition under the rule.

3. He may decide that the case is an inappropriate case for summary trial but he may decide to file affidavits and other material tending to show that while it is not an appropriate case for summary trial, if there is to be a summary trial the judgment should be in favour of his client. [At 384-5.]

The Court went on to observe that the language of what was then R. 18A(3) - more latterly, R. 18A(11) and now R. 9-7(11) - clothes the judge with a "broad discretion" to refuse to proceed where the judge is unable to find the facts necessary to decide the issues of fact or law or if it would be unjust to decide the issues.

The authorities are clear, however, that (as counsel for the plaintiffs acknowledged at the hearing of this appeal) counsel acting on behalf of the respondent to an application for summary judgment who takes the second course described in Placer "runs a risk". This is the risk that the court will not agree that the case is not appropriate for summary trial and may give judgment against his or her client. This point was made in *Inspiration Management*, supra, where the Chief Justice observed at 214 that "There is no room in the proper construction of R. 18A for a respondent's veto." The point was also made at greater length in *Anglo Canadian Shipping Co. v. Pulp, Paper and Woodworkers of Canada, Local 8* (1988) 27 B.C.L.R. (2d) 378. There a plaintiff had sued for judgment under R. 18A, giving the defendant two months' notice of its application. The defendant did not examine the plaintiff for discovery within that period and on the day scheduled for trial, argued that it had been prevented from exploring arguments it might wish to make with respect to mitigation. The trial judge nevertheless granted judgment to the plaintiff under R. 18A and awarded damages of some \$42,000. On appeal, this court rejected the defendant's argument that judgment should not have been granted. Lambert J.A. stated:

In my opinion, the summary trial procedure contemplated by R. 18A cannot be open to being frustrated by one of the parties delaying the pre-trial procedures until it is too late for the summary procedure to use them effectively.

I am not suggesting that there was any intentional delay in this case. But it must be the case that if adequate notice is given to an opposing party that a summary trial application is going to be brought on, there then falls on that party an obligation to take every reasonable step to complete as much of the pre-trial procedures as is necessary to put him into the best mastery of the facts that is reasonably possible before the summary trial proceedings are heard. He cannot, by failing to take those pre-trial procedures, frustrate the benefits of the summary trial rule.

... In my opinion, it is not in this case appropriate that the judgment be set aside, on the ground that sufficient facts were not available to one of the parties to lay before the court on the summary trial application. [At 381-2.; emphasis added]

Anglo Canadian Shipping has been cited and applied by this court on many occasions: see, e.g., Everest Canadian Properties Ltd. v. Mallmann 2008 BCCA 275 at para. 34; Gilmour Estate v. Parchomchuk 2011 BCCA 207 at para. 19; Dixon v. British Columbia Snowmobile Federation 2003 BCCA 174 at para. 5; Strathloch Holdings Ltd. v. Christensen Bros. Foods Ltd. (1997) 29 B.C.L.R. (3d) 341 (C.A.) at para. 12.

[25] In my view, Mr. Gichuru cannot use his own failure to adduce evidence to discharge the plaintiff's onus of proof to provide a basis for the court to conclude that it lacks sufficient evidence to determine the matter summarily. To do otherwise would be to create a "respondent's veto" inconsistent with the proper application of the Rule.

Credibility

[26] As noted, Mr. Gichuru submitted that the matter was not suitable for summary determination because credibility was in issue and that it could not be determined without viva voce evidence. He did not, however, apply to have the defendants cross-examined on their affidavits.

[27] However, the evidence given by the defendants in their affidavits is consistent with their evidence on discovery adduced by Mr. Gichuru as part of his case. He asserts that they should not be believed; however, he has chosen to adduce their evidence as part of his case. Moreover, the e-mail exchanges between Messrs. Pallai and Mr. Mayzel that Mr. Gichuru has introduced are consistent with their evidence.

[28] Mr. Gichuru has submitted that Mr. Shkanov's evidence is missing and that it will contradict the evidence of Messrs. Pallai and Mayzel. However, this is pure speculation, in any event, if so, his evidence would then be inconsistent with the documents created at the relevant time that Mr. Gichuru has made part of his case. Those documents are consistent with the evidence of Messrs. Pallai and Mayzel.

[29] In the present case, I have concluded there is no material contradiction in the evidence that would necessitate a viva voce hearing to resolve, nor is the evidence of Mr. Shkanov required in the circumstances.

Additional Party

[30] Mr. Gichuru submitted that the court can infer that Mr. Shkanov was the person who posted the Defamatory Statement and that he has taken steps with reasonable dispatch to join Mr. Shkanov as a party. He submitted that it would be unfair to decide the issue without his evidence. However, the evidence that Mr. Gichuru has adduced from the discoveries is to the effect that if Mr. Shkanov posted the Defamatory Statement, he did not do so pursuant to any instructions from Mr. Mayzel or Mr. Pallai. In the circumstances, in my view, it would not be unjust to proceed with their application at this time.

- [31] I am satisfied that it is possible to determine the issues on the basis of the evidence before the court on this application. Discovery of documents and examination for discovery has been completed with respect to the present defendants. While Mr. Gichuru is still in the process of adding Mr. Shkanov as a defendant, it does not appear on the basis of the evidence filed by all the parties that his participation is necessary in order to determine the liability of the present defendants. This is a case in which the litigation costs of a full trial will likely far outstrip any award. The matter is not complex.
- [32] I have concluded that it is possible for the court to find the facts necessary to resolve the matters at issue on this application and that it would not be unjust to do so. I find that this matter is suitable for summary determination.

Has the Plaintiff Discharged his Onus - Publication

- [33] It is well established that the onus of proof does not shift in a proceeding conducted as a summary trial. In *Miura v Miura* (1992), 66 B.C.L.R. (2d) 345 (C.A.), Mr. Justice Wood, for the court stated the rule as follows at para. 14:

...the onus of proof does not shift simply because a trial is conducted summarily under Rule 18A. As in an ordinary trial, the party asserting the affirmative of an issue must prove it on a balance of probabilities.

- [34] As stated by McLachlin C.J. in *Grant v. Torstar Corp*, 2009 SCC 61 at para. 28, in a defamation action the onus is on the plaintiff to establish the following:

A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that 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; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.

- [35] Thus in this summary trial, the onus was on Mr. Gichuru to establish publication. There are two aspects to publication: an act on the part of the defendant; which communicates the defamatory expression to a third party, see *R.D. McConchie & D.A. Potts, Canadian Libel and Slander Actions*, (Toronto: Irwin Law, 2004) at pg. 257-258.
- [36] I conclude that Mr. Gichuru has not met his onus with respect to either aspect of publication. With respect to the first aspect of publication, the evidence is that neither Mr. Pallai nor Mr. Mayzel posted the Defamatory Statement. They did not ask anyone else to publish it. They do not know who did post the statement.

- [37] A principal may be liable of defamatory statements made by an agent if the agent was acting within the scope of the agency at the time of publication, see *Lapointe v Summach*, 2001 BCSC 805. However in this case, assuming that Mr. Shkanov is the person who posted the Defamatory Statement, the evidence does not establish that he was acting within the scope of his agency in so doing.
- [38] The evidence is that Mr. Pallai was concerned to have his name associated with the terms "discrimination" and "racism" in a Google search. He requested Mr. Mayzel to re-post other material so that the posting concerning the Human Rights complaint would be buried farther down the search responses. Mr. Mayzel passed this request on to Mr. Shkanov. In my view, the posting of the Defamatory Statement cannot be said to fall within the scope of that agency. There was no request to post anything about the plaintiff, or the Human Rights complaint. Indeed the task was to bury the association of Mr. Pallai with the Human Rights complaint in search results.
- [39] With respect to the second aspect, proof that the defamatory statement was read by someone other than the plaintiff is necessary in the case of material posted on the Internet. As Justice Abella noted in *Crookes v. Newton*, 2011 SCC 47 at para. 14, there is no deemed publication:
- In British Columbia, pursuant to the Libel and Slander Act, R.S.B.C. 1996, c. 263, publication is deemed to have occurred in certain situations. There is, however, no such presumption in relation to material published on the Internet.
- [40] The defendants adduced evidence given by Mr. Gichuru at his examination for discovery that he did not know of anyone other than the parties and their counsel who had read the allegedly defamatory post. Mr. Gichuru adduced no evidence to the contrary at the summary trial in relation to this issue.
- [41] In the result, I conclude that Mr. Gichuru has not met his onus of proof to establish that the defendants, or any of them, published the Defamatory Statement. On that basis the action is dismissed.

Fair Comment

- [42] In the event that I am incorrect in that conclusion, I will address the defence of fair comment. The elements of the defence of fair comment were set out by Justice Binnie in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para. 28, as follows:

...I repeat and endorse the formulation of the test for the fair comment defence set out by Dickson J., dissenting, in *Cherneskey* as follows:

- (a) the comment must be on a matter of public interest;
- (b) the comment must be based on fact;

- (c) the comment, though it can include inferences of fact, must be recognisable as comment;
- (d) the comment must satisfy the following objective test: could any [person] honestly express that opinion on the proved facts?
- (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice.

Public Interest

[43] The first element of the defence of fair comment is that the comment is to be directed to a matter of public interest. Public interest was defined in *Torstar* as follows at paras. 104-106:

In *London Artists, Ltd. v. Littler*, [1969] 2 All E.R. 193 (C.A.), speaking of the defence of fair comment, Lord Denning, M.R., described public interest broadly in terms of matters that may legitimately concern or interest people:

There is no definition in the books as to what is a matter of public interest. All we are given is a list of examples, coupled with the statement that it is for the judge and not for the jury. I would not myself confine it within narrow limits. Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment. [p. 198]

To be of public interest, the subject matter "must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached": *Brown*, vol. 2, at pp. 15-137 and 15-138. The case law on fair comment "is replete with successful fair comment defences on matters ranging from politics to restaurant and book reviews": *Simpson v. Mair*, 2004 BCSC 754, 31 B.C.L.R. (4th) 285, at para. 63, per Koenigsberg J. Public interest may be a function of the prominence of the person referred to in the communication, but mere curiosity or prurient interest is not enough. Some segment of the public must have a genuine stake in knowing about the matter published.

Public interest is not confined to publications on government and political matters, as it is in Australia and New Zealand. Nor is it necessary that the plaintiff be a "public figure", as in the American jurisprudence since *Sullivan*. Both qualifications cast the public interest too narrowly. The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence.

- [44] In the present case the subject matter of the comment is generally a complaint initiated by Mr. Gichuru to the Human Rights Tribunal, and the comment alleges indirectly that the process was being used by Mr. Gichuru as a form of bullying. In my view, the public has a genuine interest in the matters adjudicated on by the Human Rights Tribunal and in any contention that the process of the Tribunal was being used by a party as a form of bullying.
- [45] Mr. Gichuru submitted that he conducted an Internet search which disclosed that no one but the author of the post was making posts on the subject of his use of the Human Rights complaint as a form of bullying. He submitted that since there are no other posts on the subject, it follows that the matter is not of public interest. However, the test relates to the subject matter of the statement at issue, not the frequency of publication about the subject. I find that the matter was one of public interest.

Based on Fact

- [46] The second element is that the comment must be based upon facts that are sufficiently stated or otherwise known as stated in WIC Radio at para. 31:

It is true that "[t]he comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made"; Brown, vol. 2, p. 15-36, and Gately on Libel and Slander (10th ed. 2004), at para. 12.12. What is important is that the facts be sufficiently stated or otherwise be known to the listeners that listeners are able to make up their own minds on the merits of Mair's editorial comment.

- [47] Mr. Gichuru submits that the facts were not sufficiently stated. In that regard it is not necessary to set out all the facts upon which a comment is based. Facts that are in the public arena do not have to be stated so long as they are identified, see *Ross v. New Brunswick Teachers' Association*, 2001 NBCA 62.
- [48] Mr. Gichuru complains that the posting provided no information about the nature of his Human Rights complaint; however the posting does reference the number of the decision, which was a public document. Moreover, no fact was omitted that would undermine the accuracy of the facts expressed, see *Creative Salmon Company Ltd. v. Staniford*, 2009 BCCA 61.
- [49] I find that the statement was based upon facts that are sufficiently stated or otherwise known.

Comment Identifiable as Comment

- [50] In WIC the test for comment was set out as follows at para. 26:

In *Ross v. New Brunswick Teachers' Assn.* (2001), 201 D.L.R. (4th) 75, 2001 NBCA 62, at para. 56, the New Brunswick Court of Appeal correctly took the view that "comment" includes a "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof". Brown's *The Law of Defamation in Canada* (2nd ed. (loose-leaf)) cites ample

authority for the proposition that words that may appear to be statements of fact may, in pith and substance, be properly construed as comment. This is particularly so in an editorial context where loose, figurative or hyperbolic language is used (Brown, vol. 4, at p. 27-317) in the context of political debate, commentary, media campaigns and public discourse. See also, R. D. McConchie and D. A. Potts, *Canadian Libel and Slander Actions* (2004), at p. 340.

[51] In my view, it is clear that the terms "bully" and "hate" are matters of comment in this context.

Could Anyone Honestly Express that Opinion on the Proved Facts?

[52] As noted above, the test with respect to this element is objective. Although evidence of honest belief is not required, in the present case Messrs. Pallai and Mayzel have sworn that although they did not write or authorize the posting, they do agree with the opinion expressed that Mr. Gichuru was using the Human Rights complaint as a bully.

[53] Mr. Gichuru has submitted, citing WIC Radio, that the comment is not relevant to the facts to which it is addressed and is "merely invective", which exceeds the latitude allowed by the test. In my view, the relevant facts to which the comment is addressed are as set out in 2010 BCHRT 125. I have read the Reasons for Decision and concluded that a person could honestly express the opinion stated. The comment falls within the ambit of the defence of fair comment.

Malice

[54] Mr. Gichuru has submitted that fair comment is not available because the defendants were motivated by malice. He submits that previous comments made about him by Mr. Pallai evidence a personal animosity. In his submission the defendants were acting with the improper motive of retaliating against him for having filed a Human Rights complaint and other personal matters when they published the statements.

[55] In *Smith v. Cross*, 2009 BCCA 529, Madam Justice Kirkpatrick, for the court, described malice in the context of fair comment as follows at paras. 31-34:

The defence of fair comment is also defeated by malice, and malice "for the purpose of defeating the defence of qualified privilege is the same as malice for the purpose of defeating the defence of fair comment." (*Creative Salmon Company Ltd. v. Staniford*, 2009 BCCA 61, 307 D.L.R. (4th) 518 [Creative Salmon] at para. 32).

The term "malice" is more expansive than the everyday meaning of a desire to harm another. Brown at 16.3(2) suggests the alternate language of "bad faith". This Court summarized the definition in *Creative Salmon* at para. 37:

In *Botiuk* at para. 79, malice was defined to include "ill will" and "any indirect motive which conflicts with the sense of duty created by the occasion [in the case of qualified privilege]". The definition of malice stated by Mr. Justice Dickson in *Cherneskey* at 1099, and adopted by Mr. Justice LeBel in *WIC Radio* at para. 102, includes "spite or ill will" and "any indirect motive or ulterior purpose".

The Supreme Court of Canada summarized the law of malice and qualified privilege in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129 at para. 145:

Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes, as Dickson J. (as he then was) pointed out in dissent in *Cherneskey*, *supra*, at p. 1099, "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created. See, also, *Taylor v. Despard*, [1956] O.R. 963 (C.A.). Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth. See *McLoughlin*, *supra*, at pp. 323-24, and *Netupsky v. Craig*, [1973] S.C.R. 55, at pp. 61-62.

In *Canadian Libel and Slander Actions* (Toronto: Irwin Law, 2004) at 299, R.D. McConchie and D.A. Potts reduce this statement to a helpful framework for the categories under which a finding of malice can be made. A defendant is actuated by malice if he or she publishes the comment:

- i) Knowing it was false; or
- ii) With reckless indifference whether it is true or false; or
- iii) For the dominant purpose of injuring the plaintiff because of spite or animosity; or
- iv) For some other dominant purpose which is improper or indirect, or also, if the occasion is privileged, for a dominant purpose not related to the occasion.

More than one finding can be present in a given case (McConchie and Potts at 299).

[56] In the present case, there is no suggestion that the statement was false or made with reckless indifference to the truth. The facts upon which the comment was based are true. The fact that dislike or ill will is present is not sufficient to establish malice. As Madam Justice Koenigsberg noted in *Simpson v. Mair and WIC Radio Ltd.*, 2004 BCSC 754 at paras. 81-83:

In determining whether malice can defeat fair comment, the law cautions that the court must be able to find that malice was the dominant motive for the offending editorial.

The New Brunswick Court of Appeal decision in *Ross*, *supra* at paras. 113-116, malice sufficient to undermine the defence of fair comment was rejected, even though the defendant had admitted to hating *Ross*' writing, had made "profane and denigrating" remarks about *Ross* and had showed a very savage cartoon.

The court quoted with approval from *Brown*, *supra*:

It is the Defendant's primary or predominant motive in publishing the defamatory remark that is determinative. 'Incidental gratification of personal feelings is irrelevant.' ...Dislike and ill will may be present but actual malice may be entirely wanting. The fact that a defendant is annoyed, or dislikes the plaintiff, or even contemptuous of him, and takes special delight in offending or embarrassing him, and pleasure in the effect of the publication, or that he was angry and rude, or indignant and resentful, and welcomed the opportunity to expose him, will not defeat a privilege if it is otherwise exercised for a proper purpose.

[57] In the present case, the uncontradicted evidence of Mr. Pallai and Mr. Mayzel, which I accept, is that neither posted the Defamatory Statement, nor instructed it to be posted. Mr. Pallai asked Mr. Mayzel to re-post sports related articles on the Internet about Mark Pallai in order to reduce the prominence on Google searches of the connection of Mr. Pallai to the Human Rights complaint filed by Mr. Gichuru. Mr. Mayzel passed that request on to Mr. Shkanov. When they learned of the publication of the "Craigslist" posting, instructions were given to Mr. Shkanov to cease making any postings. I find that Mr. Gichuru has not established that either Mr. Pallai or Mr. Mayzel acted with malice.

[58] Mr. Gichuru cites *Wilson v. Switlo*, 2011 BCSC 1287, as authority for the proposition that the malice of an agent is imputable to the principal and submits that any malice of Mr. Shkanov would be attributable to Messrs Pallai and Mayzel. However, in *Wilson*, Mr. Justice Punnett notes at para. 478:

Malice is that of an individual and the malice of one party does not "infect" another. It must be proven against each defendant. Where there is a joint publication, the express malice of one defendant does not taint his or her co-defendant (*Sun Life Assurance Co. of Canada et al. v. Dalrymple*, [1965] S.C.R. 302 at 310).

[59] In my view, consistent with the general test for publication and agency articulated in *Lapointe v. Summach*, the malice of the agent is imputable to the principal if the agent was acting within the scope of the agency at the time of publication. In the present case, I have concluded that if Mr. Shkanov was the author of the Defamatory Statement, he was not acting as the agent of either of the defendants when he posted the statement. The posting of the statement was outside the scope of his agency.

Conclusion

[60] In the result I have concluded:

- (a) that it is possible for the Court to find the facts necessary to resolve the matters at issue on this application and that it would not be unjust to do so;
- (b) that this matter is suitable for summary determination;
- (c) that Mr. Gichuru has failed to discharge the plaintiff's onus to prove publication; and
- (d) that in any event, the defendants have established the defence of fair comment.

[61] The defendants' application for summary judgment is granted. The action is dismissed.

[62] The parties are at liberty to make submissions concerning costs, in which case notice is to be given with the Court within 30 days of the filing of this judgment.

"Ross J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/12/06/2012BCSC0693cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/gichuru-v-pallai-2012-bcsc-693>

Prepared on 28 October 2026 · Esheria