

CANADA / JUDGMENT

Robbins v. Pacific Newspaper Group Inc. et al.

2006 BCSC 575

COURT

Supreme Court of British Columbia

DECIDED

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2006 BCSC 575 Robbins v. Pacific Newspaper Group Inc. et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Robbins v. Pacific Newspaper Group Inc. et al.,

2006 BCSC 575

Date: 20060410

Docket: S013496

Registry: Vancouver

Between:

Anthony Robbins

Plaintiff

And

Pacific Newspaper Group Inc., Southam Publications Inc.

The National Post Company, Victoria Times Colonist

Group Inc., Neil Reynolds, Jeff Lee, Conrad Black, Kenneth Whyte,

Alan Allnutt, Murdoch Davis, John, Charles Lynch,

Gary Sir John Carlsen, III (aka: Gary "Sir John" Carlson, III),

John Doe, Jane Doe, Richard Roe, Jane Roe, Alex Doe, Alice Doe,

Peter McMartin, Global Communications Limited, Pamela Martin and Ted Chernecki

Defendants

Before: The Honourable Mr. Justice Williamson

Reasons for Judgment

Counsel for the Plaintiff

R.W. Lusk, Q.C.

R. McConchie

. McConchie

Counsel for the Defendant Media Group

R. Anderson

S. Dawson

Gary Sir John Carlsen, III

Appearing on his own behalf

Date and Place of Trial/Hearing:

March 20,21,22, 2006

Vancouver, B.C.

- [1] This is an action in defamation. The trial took place in Vancouver from June 20 to July 28 of 2005. The plaintiff succeeded, in part, and was awarded \$20,000 jointly and severally against the print media defendants, and \$500 against the individual defendant Gary Sir John Carlsen, III.
- [2] The plaintiff now seeks costs. The media defendants, however, say that it is they who should be awarded costs. Prior to entering into submissions with respect to those costs, the plaintiff seeks an order ruling an affidavit sworn by counsel for one time defendant John Charles Lynch ("Lynch") inadmissible in these proceedings. He also seeks other orders related to that affidavit.
- [3] In a second preliminary application, the media defendants ask this court to reopen the case to correct an error alleged to be on the face of the reasons.

The Disputed Affidavit

- [4] At the commencement of the trial, June 20, 2005, Lynch was a defendant. However, on June 24, 2005, during the trial, counsel for Lynch read an apology. Once that apology had been read, counsel for the plaintiff discontinued the action as against Lynch.

- [5] The plaintiff also sought to file a copy of that apology as evidence against the media defendants.
- [6] However, on July 5, 2005, after submissions from the plaintiff and the media defendants, I ruled that the apology which was read into court, as well as an earlier more limited apology which was included in an amended statement of defence, were not admissible against the media defendants. In so ruling, I observed that a party may decide to call further evidence in which case the apology might become evidence. That did not happen. I note this exchange took place before the close of the plaintiff's case.
- [7] The disputed affidavit attaches a "statement" which sets out the events leading to the settlement of the action by the plaintiff against Lynch. It is a detailed recording of the negotiations between Lynch's counsel and the plaintiff's counsel.
- [8] Nowhere in that affidavit is there evidence that Lynch has expressly waived any privilege which he might have with respect to these settlement negotiations. The plaintiff, also in an affidavit, has stated expressly that he has not waived his privilege.
- [9] In short, the plaintiff says all of this material is privileged.
- [10] The media defendants concede that settlement negotiations are generally privileged. However, they say the affidavit is admissible. They submit that when the plaintiff attempted during the trial to have the apology admitted as evidence against the media defendants, he did so without disclosing fully to the court the terms of the settlement agreement. This, they submit, was an attempt to mislead the court and such a course of action is conduct relevant to the court's consideration of costs.
- [11] The media defendants emphasize the plaintiff's submission at trial. However, as noted above, during the trial I ruled that the apology, unless tendered in the usual manner through viva voce testimony, was not evidence at the trial.
- [12] The media defendants also observe that the documents attached to the affidavit concerning the settlement are not marked without prejudice. However, counsel agree that while that is a factor it is not determinative of the issue of privilege.
- [13] The media defendants submit there are three reasons why the negotiations leading up to the settlement agreement and the settlement agreement itself are not privileged. First, they say that the fact that part of the agreement was that the apology was to be read into the trial amounts to "an evidentiary arrangement" which is an exception to the privilege over settlement negotiations. Second, they say that the plaintiff and Lynch have expressly and by conduct waived the privilege. Finally, they say that s. 11 of the Libel and Slander Act, R.S.B.C. 1996, c. 263 makes the settlement agreement relevant.

Evidentiary Arrangement

- [14] The media defendants, among other cases, point to *Middelkamp v. Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276, 96 D.L.R. (4th) 227 (C.A.) and *British Columbia Children's Hospital v. Air Products Canada Ltd.* (2003), 11 B.C.L.R. (4th) 28, 224 D.L.R. (4th) 23, 2003 BCCA 177.
- [15] In *Middelkamp*, McEachern C.J.B.C., speaking for the majority, said at paras. 19 and 20 the following:
- [19] ...I find myself in agreement with the House of Lords that the public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as "blanket", prima facie, common law or "class" privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.
- [20] In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served.
- [16] The learned Chief Justice went on to state that there are exceptions to the general rule and that an obvious one would be where the parties are agreeing that certain evidence would be furnished in connection with the litigation.
- [17] In *British Columbia Children's Hospital*, Hall J.A., speaking for the majority, noted at para. 36 that evidentiary arrangements could be the proper subject for an order of disclosure, and therefore an exception to any privilege:

...because such arrangements could cast light on the quality of the evidence or the motivation of the witness giving the evidence. The nature of the arrangements could therefore affect the weight a court might give to the evidence...

- [18] That is not the situation here. There was an agreement that an apology would be read into court. After that apology was read into court, counsel for the plaintiff sought leave to discontinue the case against Lynch. While the plaintiff sought to have that apology considered evidence against the media defendants, I ruled that it could not be so considered unless it was called in the normal way, through a witness, and unless the defendants were given the opportunity to cross-examine. Such a cross-examination, if it need be said, could affect the weight that one might give to that evidence. In other words, was what was said in the apology true?

- [19] However, that was the end of the matter. Nobody attempted to call any evidence with respect to the apology. The media defendants, who had submitted successfully that the apology could not be considered evidence against them without testimony from a witness, appeared to have been content when it was ruled that it was not evidence against them. There was no "weighing" of the apology; no consideration of Lynch's motivation was necessary.
- [20] If the media defendants thought it necessary to question the veracity of the apology, or to investigate Lynch's motivation, it was open to them to call evidence. At the time of the ruling the plaintiff's case was not closed. At any time during the subsequent case for the media defendants it was open to them to call Lynch or his counsel. They did not do so.
- [21] Thus, we are not in a situation in which the plaintiff and one defendant made an agreement about evidence which was called against another defendant in exchange for a settlement.

Waiver

- [22] The media defendants say that by their conduct Lynch and the plaintiff waived any privilege they might have had over the settlement discussions or agreement. I am not persuaded.
- [23] As noted above, there is no evidence that Lynch expressly waived his privilege. Plaintiff's counsel has stated expressly that his client has not waived his privilege. What have they done that might amount to a waiver? What they did was read the apology into the record of the trial. That step, however, was limited in its effect to justifying the discontinuation against Lynch.
- [24] Nevertheless, the defendants say the delivery by Lynch's lawyer of the statement and the settlement agreement to their counsel in July of 2005, and the subsequent delivery to them of the affidavit which is the subject of this application, are evidence Lynch waived his privilege.
- [25] Further, they say the plaintiff's attempt to have the apology admitted as evidence against them amounts to waiver by the plaintiff.
- [26] In *Lowry v. Canadian Mountain Holidays Ltd.* (1984), 59 B.C.L.R. 137 (S.C.), Finch J., as he then was, stated at p. 143:

It is, in my view, preferable to look at all the circumstances of the case, and to ask whether the defendants' conduct in disclosing that part of the report...can be taken to mislead either the court of another litigant, so as to require the conclusion that privilege over the rest of the report has been abandoned.

- [27] I conclude, upon a review of all of the circumstances, that there is not enough evidence to conclude upon a balance of probabilities, that either Lynch or the plaintiff waived privilege.

The Libel and Slander Act

- [28] Section 11 of the Libel and Slander Act reads as follows:

11 At the trial of an action for a libel contained in a newspaper or other periodical publication or in a broadcast, the defendant may give in evidence in mitigation of damages that the plaintiff has already recovered, or has brought action for, damages, or has received or agreed to receive compensation in respect of a libel to the same effect as the libel for which the action has been brought.

[29] The apology that was read into court concluded with the statement that Lynch had "committed to make a substantial contribution to a charity of Tony Robbins choice".

[30] The media defendants say that this demonstrates that the plaintiff, echoing the words of s. 11 quoted above, has already recovered or has agreed to receive compensation for the libel. I am not persuaded that in a defamation case a contribution to a charity of the plaintiff's choice amounts to the sort of compensation contemplated by that section.

Relevance and Necessity

[31] I turn to the case of *Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*, (2005), 40 B.C.L.R. (4th) 245, 249 D.L.R.(4th)416, 2005 BCCA 4, in which Finch C.J.B.C., speaking for the Court, stated at para. 19 and 20:

[19] However, the test for discharging the burden to establish an exception [to the blanket privilege for settlement communications] should not be set too low. The public policy behind settlement privilege is a compelling one. It is so compelling that even threats arising in the context of settlement negotiations may not justify an exception: *Unilever*, supra, at pages 2449-2450.

[20] To establish an exception in this case, the defendant must show that a competing public interest outweighs the public interest in encouraging settlement. An exception should only be found where the documents sought are both relevant, and necessary in the circumstances of the case to achieve either the agreement to the parties to the settlement, or another compelling or overriding interest in justice.

[32] I conclude that in the circumstances of this case the introduction of the documents concerning the negotiations leading up to an agreement and the agreement which led to the apology is not necessary.

[33] The material before me discloses that prior to the submissions made by counsel with respect to whether the apology was evidence against the media defendants, the media defendants were in possession of all of the material concerning those negotiations, including the agreement itself. In other words, as I observed above, they had that information before they opened their case. They could have raised that issue during their case. It was not necessary to leave the matter to now.

[34] I add that it would place a chill on settlement negotiations in defamation actions if the law were that every time an apology by one defendant was read in open court not as evidence against any other party, but justifying a discontinuation against that particular defendant, all

of the negotiations and agreements leading up to that step were thereby disclosable to all other parties. The public policy with respect to encouraging settlements would be "thwarted", a word to describe this effect quoted with approval by Thackray J.A. at para. 23 of *Heritage Duty Free Shop Inc. v. Canada (Attorney General)* (2005), 40 B.C.L.R. (4th) 152, 10 C.P.C. (6th) 103, 2005 BCCA 188.

- [35] For all of the above reasons, I conclude that the disputed affidavit is inadmissible on the application for costs.

Reopening the Case

- [36] The media defendants say that there is an error on the face of the reasons handed down in this matter November 28, 2005. They point to two paragraphs in that judgment, paras. 59 and 60. They read as follows:
- [59] This leaves the final alleged defamatory expression, that the plaintiff was guilty of such gross misconduct towards his ex-wife Becky that she was compelled to seek the protection of a court restraining order. To use the exact words, the article states Robbins' first wife sought a restraining order against him "to prevent him from using their joint company's funds to buy lavish gifts for his new girlfriend including breast implants".
- [60] I find that to suggest a man's conduct is such that his wife needs the protection of a court restraining order is defamatory. The media defendants did not seek to justify this assertion...
- [37] The media defendants submit that these two paragraphs amount to a finding on the plain and literal meaning of the words rather than a conclusion based upon their inferential meaning. They point out that the pleading was that the relevant words were understood to bear, and were intended to bear, certain defamatory meanings "by their inferential meaning".
- [38] I am not persuaded. It is misleading to lift two paragraphs out of 135 and say they suggest that the court was determining literal meaning rather than inferential meaning.
- [39] The heading, immediately before para. 54, is "the 'not admitted' inferential meanings". Paragraph 54 then commences with the statement that "I turn to the remaining three alleged inferential meanings...". Paragraphs 55 and following then deal with the first two of those alleged inferential meanings, and paras. 59 and 60 deal with the third not admitted inferential meaning.
- [40] Further, the conclusion set out in para. 80 is that:
- ... read as a whole, the article defamed Robbins by leaving readers with the inference that Robbins ... acted in such a way towards his first wife that she had to seek a restraining order
- [41] I have no doubt this is a conclusion concerning an inferential meaning as that expression was used in the pleadings.

Summary

[42] I conclude that the disputed affidavit is not admissible on the application for costs. I conclude that there is no error in the judgment requiring a reopening of any matter.

"L.P. Williamson, J."

The Honourable Mr. Justice L.P. Williamson

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