Court of Appeal for Saskatchewan
Docket: CACV2671

Citation: *Canadian Broadcasting Corporation v Whatcott*, 2016 SKCA 17
Date: 2016-02-10

Between:

Canadian Broadcasting Corporation

Appellant
(Respondent)

And

William Gary Whatcott

Respondent
(Plaintiff)

Before:	Ottenbreit, Caldwell and Herauf JJ.A.
Disposition:	Appeal allowed in part
Written reasons by:	The Honourable Mr. Justice Caldwell
In concurrence:	The Honourable Mr. Justice Ottenbreit The Honourable Mr. Justice Herauf
On Appeal From:	2015 SKQB 7, Weyburn
Heard:	17 November 2015
Counsel:	Matthew Woodley for the Appellant Thomas A. Schuck for the Respondent

Caldwell J.A.

I. INTRODUCTION

[1] The Canadian Broadcasting Corporation [CBC] appeals from the decision of a Court of Queen's Bench Chambers judge to grant summary judgment in favour of William Gary Whatcott in his defamation action against the CBC. While the CBC concedes the judge was entitled to exercise his discretion to grant summary judgment, it asks us to set aside the judgment on the basis of certain errors of law and fact committed by the judge. Having reviewed the matter, I would reverse the judge's findings of actual malice and his assessments of damages arising therefrom and, while I find no cogent basis to set aside the finding of defamation, I would nevertheless intervene and reduce the general damages awarded in this matter to a nominal amount.

II. BACKGROUND

[2] In October 2011, the CBC published a news segment on *The National* and on its website dealing with Mr. Whatcott's appeal of this Court's decision in *Whatcott v Saskatchewan (Human Rights Tribunal)*, 2010 SKCA 26, 346 Sask R 210, allowed in part 2013 SCC 11, [2013] 1 SCR 467. That decision dealt with findings by the Saskatchewan Human Rights Commission to the effect that Mr. Whatcott had violated s. 14 of *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, by disseminating certain pamphlets.

[3] The televised news segment included a short pan of one of Mr. Whatcott's pamphlets, but one that was not part of the record in his appeal to the Supreme Court. The pamphlet in question [Pamphlet] set out lyrics to a song that Mr. Whatcott had modified so that it was entitled "Kill the Homosexual". On the reverse side of the Pamphlet, Mr. Whatcott had purported to disclaim or exculpate himself from liability for its inflammatory content, suggesting that he did not truly advocate the murder of homosexuals. This so-called "exculpatory statement" did not appear in the CBC news segment.

[4] On this basis, Mr. Whatcott sued the CBC for defamation, alleging the showing of the Pamphlet in the news segment would cause viewers to believe he had advocated the murder of

homosexuals. The judge agreed and, following Mr. Whatcott's summary judgment application, awarded him $20,000 in general damages. In addition, having found the CBC had acted with actual malice, the judge awarded Mr. Whatcott $10,000 in aggravated damages. He declined to award punitive damages.

[5] While acknowledging the judge had a wide degree of latitude under Rule 7-5 of *The Queen's Bench Rules* to make these determinations and the findings of fact that underpin them, the CBC appeals from the judge's decision, alleging he erred by:

(a) unreasonably concluding that the news segment bore the defamatory meaning alleged by Mr. Whatcott;

(b) unreasonably drawing inferences on the extent of publication because such inferences were not supported by the evidence;

(c) unreasonably concluding the CBC had been motivated by actual malice because that was not supported by the evidence; and

(d) awarding aggravated damages in the circumstances.

III. STANDARD OF REVIEW

[6] Before beginning the analysis of this appeal, I would quickly address the applicable standards of appellate review. The CBC has conceded the judge was entitled to exercise his discretion to grant summary judgment under Rule 7-5, which would have attracted a deferential standard as noted in *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87. However, when it comes to the exercise of the judge's enhanced fact-finding powers under Rule 7-5, given the evidence here was in affidavit and video form only, I see no reason to deviate from the standard of *reasonableness* for findings of fact and inferences of fact as enounced in *Valley Beef Producers Co-operative Ltd. v Farm Credit Corp.*, 2002 SKCA 100 at paras 117-118, 223 Sask R 236, and in *Great Sandhills Terminal Marketing Centre Ltd. v J-Sons, Inc.*, 2008 SKCA 16 at para 27, 307 Sask R 295. The standard of review of an award of damages was set out in *Woelk v Halvorson*, [1980] 2 SCR 430 at 435-36, namely, an appellate court may only interfere with an assessment of damages if: (i) the assessment is wholly erroneous; (ii) the assessment was not based upon any

evidence; or (iii) the assessment was based on a mistaken or wrong principle. A standard of correctness must be invoked when reviewing the judge's decisions on questions of law (see *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235). On these standards, I turn to consider the grounds of appeal.

IV. ANALYSIS

A. Defamatory meaning

[7] Under the first ground, the CBC alleges the judge erred by finding a reasonable viewer of its news segment would have concluded Mr. Whatcott had advocated the killing of homosexuals. It says the judge erred by focusing his analysis on only the part of the news segment that had showed the Pamphlet and then considering whether the balance of the segment had somehow reversed or changed the defamatory meaning that had arisen from briefly showing the Pamphlet. It asserts this approach is wrong in law because a judge who considers the defamatory meaning of a publication must consider the meaning that arises from the publication viewed *as a whole* and *in context* (see Raymond Brown, *Brown on Defamation*, loose-leaf (2015-Rel 1) vol 1 (Toronto: Carswell, 1999) at 5-44 to 5-45 [*Brown*]).

[8] The CBC says the judge should have put himself in the shoes of a reasonable viewer who sees the whole news segment broadcast in the context of his or her everyday life. In this analysis, it says the reasonable person is "of fair, average intelligence, who is thoughtful and informed … and who, in [his or her] evaluation of the imputation, entertain[s] a sense of justice and appl[ies] moral and social standards reflecting the views of society generally" (*Brown* at 5-77 to 5-78). And, the CBC notes, in examining a publication, a judge is to "avoid putting the worst possible meaning on the words" (see *WIC Radio Ltd. v Simpson*, 2008 SCC 40 at para 56, [2008] 2 SCR 420, and *Jiang v Sing Tao Daily Ltd.*, 2014 ONSC 287 at para 32).

[9] The CBC says when the analysis of its news segment is carried out in this way, the reasonable person seeing it would *not* have understood Mr. Whatcott to have advocated violence against homosexuals. It submits the words "Kill the Homosexual" cannot be viewed in isolation from their context—*i.e.*, as part of a song or poem. That is to say, it suggests the reasonable viewer of its news segment would have understood the words displayed were part of a whole

pamphlet, which had not been broadcast in its entirety. A reasonable viewer, seeing the news segment as a whole, therefore would not have concluded Mr. Whatcott had been advocating murder.

[10] I find little merit to the CBC's allegation of reversible error in this regard. It is clear the judge had the proper framework in mind when he came to assess whether the news segment was defamatory. Furthermore, the judge particularly considered and rejected the interpretation of the news segment that the CBC has put forward in this Court (see *Whatcott v Canadian Broadcasting Corporation*, 2015 SKQB 7 [*Whatcott v CBC*] at paras 48-50). While the defamatory nature of the news segment is open to some interpretation, I cannot conclude that the judge's interpretation of it as defamatory was either unreasonable or borne of an error of law:

> [52] … In my view, by focusing the camera's attention on the phrase "kill the homosexual", as it appeared in the Alberta flyer, and doing so early on in the broadcast, the defendant conveyed the impression that the plaintiff's activism was considerably more extreme than it actually was. Indeed, it conveyed the impression that the plaintiff's views extended to inciting violence against homosexual people. Despite the fact that the focus on these words was no more than five seconds long, I am satisfied that it was long enough to have injured the plaintiff's reputation in the estimation of reasonable viewers. While the rest of the broadcast did nothing to support or reinforce this impression, it also did nothing to reduce it or to diminish the injury.
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> [53] … No part of the news story pertained to the content of the Alberta flyer. It was not one of the flyers at issue before the court, and it played no obvious role in the true focus of the story, which centered on the debate between freedom of speech and protection against hate literature.
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> [54] … The law recognizes, as I believe it must, that a person's words can be restated in a context that distorts the author's intended meaning. Where the distortion creates a defamatory meaning, liability will follow, subject to any defences that otherwise arise.
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> …
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> [57] … I am satisfied that, when viewing the broadcast as a whole, the selective presentation of the plaintiff's words from the Alberta flyer, conveyed the impression that plaintiff's views extended to inciting violence against homosexuals. I also have no difficulty concluding that this presentation would tend to lower the plaintiff's reputation in the eyes of a reasonable person, and, as such, is defamatory. I also reject the defendant's submission that the words are capable of a lesser defamatory meaning.

[11] I would dismiss this ground of appeal. As the judge's finding that the news segment had defamed Mr. Whatcott is not subject to appellate reversal, I turn now to consider the CBC's grounds for its appeal from the awards of damages that were made in this case.

B. Extent of publication

[12] This second ground of appeal pertains to the judge's assessment of the quantum of general damages. The CBC concedes the judge properly identified those factors relevant to an award of general damages in the circumstances, including the scope or extent of publication.

[13] However, when it came to his assessment of general damages, despite observing the absence of evidence with respect to the scope of publication, the judge made a finding that the CBC had broadcast the news segment to at least as many viewers as had seen the broadcasts in *Myers v Canadian Broadcasting Corporation* (1999), 54 OR (3d) 626 (CA) [*Myers CA*]. This, the CBC says, is an unreasonable finding because it is based on no evidence at all. Moreover, the error overrides the quantum of general damages awarded in this case because the judge used that unreasonable conclusion as the rationale for awarding greater general damages.

[14] There is considerable merit to the CBC's submissions in this regard. First, it was improper for the judge to have drawn inferences as to viewership based on the evidence adduced in a different 16-year-old case. Moreover, the two cases were not comparable. The *Myers CA* matter involved multiple broadcasts in 1996 of a promoted, one-hour feature on a current affairs programme; whereas, this case involves a single broadcast in 2011 of a four minute news segment on *The National*, with the segment also later appearing on the CBC website. At the trial level, in *Myers v Canadian Broadcasting Corporation* (1999), 47 CCLT (2d) 272 (Ont Sup Ct), the judge found an initial broadcast of one million viewers, with subsequent broadcasts of 200,000 each. In *Myers CA*, the appellate court said the audience had been 1.4 million viewers over five broadcasts of the programme. These are very different circumstances than those before the Court; but, we cannot know just how different they are because there is simply no evidence before the Court as to how many or how few people had seen the televised broadcast in this case or had visited the webpage that had displayed the news segment.

[15] As there was *no evidence* before the judge as to the scope or extent of publication, he erred by unreasonably assessing the extent of publication as being "at least" equal to that found in *Myers CA*. Even though summary judgment rules imbue judges with enhanced fact-finding powers, the findings and inferences made under those powers must be *reasonable*—they must be grounded in at least some evidence that is before the court. Here, the judge's assessment of the

extent of publication amounted to pure speculation, which he improperly bolstered by reference to the evidence adduced in another, entirely unrelated case.

[16] In my assessment, the reasoning of Popescul C.J.Q.B. in *Vellacott v Laliberte*, 2012 SKQB 23, 390 Sask R 120, would have applied equally well to the circumstances of this case:

> [30] Significantly, there is no evidence respecting the extent of the audience that may have heard the defamatory statement. How many persons were technically able to pick up the broadcast? How many persons were likely watching that broadcast? What time did it air? Was it rebroadcast? It is difficult to know, without evidence on the point, how many people were likely to have heard the remarks. Presumably some people were watching. But how many? Fifty, five hundred, fifty thousand?
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> [31] Damages will be increased where it is proven that the defamatory comments were widely broadcast. See *Hill v. Church of Scientology of Toronto, supra*, at para. 184. Here, the evidence is that the defamatory words were spoken on a local cable television program with an unknown audience. The lack of evidence respecting the size of the audience is significant and directly contributes to a damage award that is considerably less than might otherwise be the case should it have been proven that the broadcast audience was extensive. It is safe to assume that some people would have been watching– but how many is unknown. However, although it may have been helpful to have more evidence in certain areas, the case must be decided upon the evidence that is before the Court and not on what is absent.…

[17] The point here is that the summary nature of these proceedings did not displace the onus on a plaintiff to make out its case against the defendant. Knowing that onus, Mr. Whatcott elected to proceed to summary judgment in the absence of any evidence as to the scope of publication. The consequences of that election must lie at his feet. It was not for the judge to fill in the gaps with speculation.

[18] As the judge's assessment of the extent of publication was not based upon any evidence, I would set it aside. Moreover, there is no reasonable basis upon which to make a finding in this case about the extent of publication of the news segment. As such, that factor should have had but a nominal impact on the assessment of general damages. I would, therefore, set aside the $20,000 general damages award as well.

C. Finding of actual malice

[19] The third ground of appeal also relates to damages, but more particularly to the basis for *increasing* the award of general damages and for awarding aggravated damages. That is, the judge found the CBC had acted with *actual malice* toward Mr. Whatcott in its publication of the

news segment. Late in his reasons, after rejecting Mr. Whatcott's suggestion that he take judicial notice of the fact the CBC actually entertained malice toward Mr. Whatcott, the judge said this:

> [79] Having said the foregoing, I am satisfied that there is some credible evidence from which the court can properly draw an inference of actual malice. In this respect, it is clear that the defendant had the Alberta flyer in its possession for a sufficient period of time that it was able to film and broadcast the front page. Hence, the defendant's staff was aware, or should have been aware, of the entire contents of the Alberta flyer, including the disclaimer. They would also have known that the document was not one of the flyers at issue before the Supreme Court of Canada, and had virtually nothing to do with legitimate news story it was presenting. Despite this knowledge, the defendant chose to present the Alberta flyer in the manner it did. Under such circumstances, I find the defendant demonstrated actual malice. As such, not only is this a consideration in the assessment of general damages, it also justifies an award of aggravating damages.

This is a finding of mixed fact and law, but the findings of fact upon which it is based are unreasonable; moreover, the judge incorrectly determined those facts amounted to malice at law. I will explain.

[20] The general principles governing the awarding of aggravated damages in a defamation case are found in *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130:

> [188] Aggravated damages may be awarded in circumstances where the defendants' conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libelous statement. The nature of these damages was aptly described by Robins J.A. in *Walker v. CFTO Ltd.*, *supra*, in these words at p. 111:
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> > Where the defendant is guilty of insulting, high-handed, spiteful, malicious or oppressive conduct which increases the mental distress--the humiliation, indignation, anxiety, grief, fear and the like--suffered by the plaintiff as a result of being defamed, the plaintiff may be entitled to what has come to be known as "aggravated damages".
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> [189] These damages take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct. Like general or special damages, they are compensatory in nature. Their assessment requires consideration by the jury of the entire conduct of the defendant prior to the publication of the libel and continuing through to the conclusion of the trial. They represent the expression of natural indignation of right-thinking people arising from the malicious conduct of the defendant.
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> [190] If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff. See, for example, *Walker v. CFTO Ltd.*, *supra*, at p. 111; *Vogel*, *supra*, at p. 178; *Kerr v. Conlogue* (1992), 65 B.C.L.R. (2d) 70 (S.C.), at p. 93; and *Cassell & Co. v. Broome*, *supra*, at pp. 825-26. The malice may be established by intrinsic evidence derived from the libelous statement itself and the circumstances of its publication, or by extrinsic evidence pertaining to the

> surrounding circumstances which demonstrate that the defendant was motivated by an unjustifiable intention to injure the plaintiff. See *Taylor v. Despard, supra,* at p. 975.

[21] As the plaintiff, Mr. Whatcott had the onus of proving the CBC had acted with actual malice. In *Brown*, the author notes (at 16-183 to 16-188):

> The burden of proving actual malice is on the plaintiff, or the person who asserts it, including the fact that it was the predominant motive, and he or she must prove it on the basis of a balance of probabilities. It is not a burden that is easily satisfied. The court will not allow dishonesty of purpose to be lightly inferred. The onus on the plaintiff is a heavy one. "Suspicion, surmise and accusations are not enough." The court will require some substantial evidence of express malice and not permit a mere surmise or scintilla to defeat the privilege. It is not sufficient merely to show a possibility of its presence or that the circumstances are consistent with malice. Proof by way of circumstantial evidence is permissible only if the desired inference is shown to [be] the more probable of the conclusions to be drawn.

[22] Chief Justice Popescul made this same point in *Vellacott v Laliberte*:

> [34] In order to find that the plaintiff is entitled to aggravated damages, the plaintiff must prove that the defendant was motivated by actual malice that increased the injury to the plaintiff.
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> [35] The plaintiff must prove his case. While one might suspect that the defendant may have been motivated by malice when making statements alleging sexual misconduct against a member of Parliament, with a religious background, on the eve of an election, there is no proof that the defendant was so motivated.

[23] The judge here correctly articulated the law and the onus of proof. He further correctly observed that "[t]he existence of actual malice depends on evidence from which proof can be identified or inferences drawn." However, he failed to realise that the inferences he had drawn in this regard were unsupported by the evidence that was before him.

[24] In particular, there was no evidence as to whether or for how long the CBC had had access to the Pamphlet. Certainly, the judge could infer from the evidence that the CBC had, at some point, acquired footage of the front page of the Pamphlet. But, Mr. Whatcott had adduced no evidence—nor had he sought to compel any evidence from the CBC—regarding whether or how long the CBC had had the Pamphlet in its actual possession or whether it had believed the Pamphlet was part of the record in the Supreme Court hearing. There was no evidence before the judge regarding the awareness of any CBC employee of the so-called "exculpatory statement" on the reverse page of the Pamphlet. There was no evidence suggesting the CBC employees who were responsible for the news segment were even the same employees who had acquired footage

of the Pamphlet. None of the judge's inferences were available to the judge on the scant evidence that was before him.

[25] Moreover, even if these inferences had been open to judge, they are insufficient at law to amount to proof of actual malice on the part of the CBC. I say this because these inferences—even if they were reasonable—simply do not support that determination on balance. All that could be said of the evidence before the judge is that the CBC had published a defamatory news segment about Mr. Whatcott. That finding of defamation attracts a presumptive award of general damages. If aggravated damages are claimed, the onus rests with the plaintiff to adduce evidence sufficient to establish that actual malice existed. But, the mere fact the CBC had published a defamatory news segment does not serve to *increase* the measure of general damages or to justify an award of aggravated damages. The malice necessary for an award of aggravated damages is not here established by intrinsic evidence derived from the libelous statement itself and the circumstances of its publication.

[26] Given that the CBC is a corporate entity, the determination of whether it had entertained actual malice requires an examination of the state of mind of at least one of the CBC employees who had participated in the publication of the news segment (see *Bevis and Karela v CTV Inc.*, *Burns and Kelly*, 2004 NSSC 246 at para 12; *McKearney v Petro-Canada Inc.*, 1994 CanLII 3072 (BCSC) at para 10; *Akinleye v East Sussex Hospitals NHS Trust*, [2008] EWHC 68 (QB) (UK) at para 25; and *Webster v British Gas Services Ltd.*, [2003] EWHC 1188 (QB) (UK) at para 30). It was therefore incumbent upon Mr. Whatcott to find an individual who could be said to have been responsible for the news segment—and for whom the CBC was itself responsible—who had the requisite malicious state of mind. In this case, extrinsic evidence of this nature was essential to demonstrate the CBC had been motivated by an unjustifiable intention to injure Mr. Whatcott. And, without it, the judge could not reasonably infer the CBC had been motivated by actual malice.

[27] In a defamation action against a corporation, the law provides the plaintiff with an opportunity to question corporate representatives regarding their motivations, actions or subjective states of mind. In this way, a plaintiff is able to adduce the kinds of evidence that a judge may rely on to conclude that actual malice existed on the part of a corporation. Here,

Mr. Whatcott elected to proceed to summary judgment in the absence of such evidence. The expediency of that process does not displace the onus or burden of proof. And, again, the consequences of that election must lie at his feet.

[28] In sum, I find it was a reversible error for the judge to have found actual malice on the part of the CBC without any evidence to support that finding. I would set aside the finding of actual malice as unreasonable and borne of an error of law.

D. Aggravated damages

[29] There is no basis whatsoever for an award of aggravated damages in this case. The judge's decision to award same was borne of reversible errors of fact and law and must be set aside. I will briefly explain my reasoning.

[30] As noted earlier in these reasons, aggravated damages are contingent upon a court finding that the conduct of the defendant amounted to actual malice and that it increased the injury to the plaintiff (see *Hill v Church of Scientology of Toronto*, at paras 188-190; see also, *Duke v Puts*, 2004 SKCA 12 at para 101, 241 Sask R 187).

[31] I have said I would reverse the finding of actual malice. For that reason alone, the award of aggravated damages too must fall. But, even if there had been evidence in this case upon which to ground a finding of actual malice, there was simply no evidence that that malice had in fact increased or aggravated Mr. Whatcott's damages in any way whatsoever. The judge recognised this:

> [73] As for the personal impact on the plaintiff, his affidavit was conspicuously thin on the point. At the most, the plaintiff says he has suffered personal embarrassment and humiliation, but he describes no facts or particulars to support his statement. There is no evidence that he has been ostracized or shunned by people with whom he had previously associated, and no evidence of any physical or emotional health issues resulting from the defamation. In short, *there is no evidence on this factor that would support a significant award of damages.*
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> [Emphasis added]

[32] It would seem that—even on the judge's assessment of it—the evidence before the judge was insufficient to justify a significant award of general damages. Given this assessment, the evidence could not reasonably be said to have supported an award of aggravated damages.

Moreover, having reviewed the record, I agree with the judge's assessment of the evidence of damage in this case. There is simply no evidence upon which to quantify or begin to assess the level of damages in this case. For this reason, although the Chambers judge's finding of defamation attracts a presumptive award of damages, the absence of evidence of the effect of the defamation that occurred here limits that to an award of *nominal* damages only.

V. DISPOSITION

[33] The appeal is allowed in part. The finding of defamation is not subject to appellate reversal. The judge's findings with respect to the extent of publication and actual malice are set aside, as is the award of aggravated damages. The award of compensatory general damages is reduced to the nominal amount of $1,000. Since the CBC was substantially successful, it shall have its costs in this appeal in the usual manner.

"Caldwell J.A."

Caldwell J.A.

I concur. "Ottenbreit J.A."

Ottenbreit J.A.

I concur. "Herauf J.A."

Herauf J.A.