Date: 19970930 Docket: CA 133145

NOVA SCOTIA COURT OF APPEAL
Cite as: MacDonald v. Callaghan, 1997 NSCA 145

Chipman, Pugsley and Bateman, JJ.A.

BETWEEN:	)	
	)	
WILLIAM ANGUS MACDONALD	)	The Appellant appeared
	)	in person
Appellant	)	
	)	
- and -	)	
	)	
JEFFREY CALLAGHAN	)	Ronald A. Pink, Q.C. and
	)	Leanne W. MacMillan
Respondent	)	
	)	
	)	
	)	Appeal Heard:
	)	September 30, 1997
	)	
	)	
	)	Judgment Delivered:
	)	September 30, 1997

THE COURT: The appeal is dismissed with costs as per oral reasons for judgment of Chipman, J.A.; Pugsley and Bateman, JJ.A., concurring.

The reasons for judgment were delivered orally by:

CHIPMAN, J.A.:

The appellant brought an action against the respondent for damages for defamation. At the conclusion of the appellant's case the trial judge, Mr. Justice Nathanson, granted a motion by the respondent for non-suit, pursuant to **Civil Procedure Rule** 30.08. The appellant appeals to this Court from that decision.

The appellant had testified at the trial that the respondent spoke the alleged defamatory words before three named persons. In his decision, Mr. Justice Nathanson found that these persons were acting as the Atlantic Regional Discipline Committee of the Canadian Union of Postal Workers to which both the appellant and the respondent belonged. He found that that Committee handed down a decision finding that the appellant was guilty of three breaches of the Union Constitution. Mr. Justice Nathanson also found that the appellant appealed that decision and then later withdrew his appeal.

Mr. Justice Nathanson granted the motion of non-suit on two bases:

(1) that the court had no jurisdiction because the appellant failed to exhaust his internal remedies provided in the Constitution of the Canadian Union of Postal Workers; and,

(2) that the words spoken, even though they may be defamatory were spoken on an occasion of qualified privilege.

In our opinion, it is only necessary to address the second ground on which Mr. Justice Nathanson dismissed the appellant's action.

In rendering his decision, Mr. Justice Nathanson said:

> The defendant also cites a number of cases in which the courts have applied the concept of qualified privilege to statements made at union meetings of various sorts. In this regard, I refer to **Hay v. The Australian Institute of Marine Engineers,** [1906] 3 C.L.R. 1002 (H.C.); **Myroft v. Sleight** (1921), 90 L.J.K.B. 883; and **Collerton v. MacLean et al.**, [1962] N.Z.L.R. 1045 (S.C.). These cases persuade me to conclude that I should hold that this particular defamatory statement, made before a union Disciplinary Committee by the defendant, who had an interest or duty in making the statement, was an occasion of qualified privilege. I further hold that this is a complete defence to the plaintiff's claim.

Having reviewed the record and read and heard the submissions of the appellant and of counsel for the respondent, we are satisfied that Mr. Justice Nathanson did not err in finding that the words complained of were spoken on an occasion of qualified privilege.

In **Manning, et al. v. Hill** (1995), 126 D.L.R. (4th) 129 (S.C.C.), Cory, J. speaking on behalf of six of the seven judges hearing the appeal said at p. 170:

> [143] Qualified privilege attaches to the occasion upon which the communication is made, and not the communication itself. As Lord Atkinson explained in *Adam v. Ward*, [1917] A.C. 309 (H.L.) at p. 334:
>
> > . . . a privileged occasion is . . . an occasion

> where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.
>
> This passage was quoted with approval in *McLoughlin v. Kutasy* (1979), 97 D.L.R. (3d) 620 at p. 624, [1979] 2 S.C.R. 311, 8 C.C.L.T. 105.

The consequence of a finding that the words complained of were spoken upon an occasion of qualified privilege is that the speaker is not liable unless there is proof that there was express malice. Lord Finlay expressed the principle in **Adam v. Ward** (1917), A.C. 309 at p. 318 as follows:

> Malice is a necessary element in an action for libel, but from the mere publication of defamatory matter malice is implied, unless the publication was on what is called a privileged occasion. **If the communication was made in pursuance of a duty or on a matter in which there was a common interest on the party making and the party receiving it, the occasion is said to be privileged**. This privilege is only qualified and may be rebutted by proof of express malice. **It is for the judge, and the judge alone, to determine as a matter of law whether the occasion is privileged**, unless the circumstances attending it are in dispute, in which case the facts necessary to raise the question of law should be found by the jury. . . .

The appellant did not tender any evidence at the trial to show express malice on the part of the respondent. In such circumstances, Justice Nathanson rightly dismissed the appellant's action on the ground that upon the facts led by the appellant in evidence and the law, no case had been made out.

The appeal is dismissed with costs which are fixed at 40% of the trial costs, plus disbursements to be taxed.

Chipman, J.A.

Concurred in:

Pugsley, J.A.

Bateman, J.A.