NOVA SCOTIA COURT OF APPEAL

Citation: *Southam Inc. v. Butler*, 2002 NSCA 149

Date: 20021126
Docket: CA 182778
Registry: Halifax

Between:

Southam Inc., as publisher of ***The Daily News***
and Parker Barss Donham

Appellants

v.

D. Wayne Butler and Lee Keating

Respondents

Judge(s):	Roscoe, Bateman & Saunders, JJ.A.
Appeal Heard:	November 26, 2002, in Halifax, Nova Scotia
Held:	Appeal dismissed as per oral reasons for judgment of Saunders, J.A., Roscoe & Bateman, JJ.A. concurring.
Counsel:	Alan V. Parish, Q.C., for the Appellants W. Dale Dunlop, for the Respondents

Reasons for judgment:

[1] This is an appeal from the decision of Justice J. E. Scanlan, sitting in Chambers, where he dismissed the appellants' application taken pursuant to *Civil Procedure Rules* 21.03 and 25 to strike the respondents' defamation claim as not disclosing a cause of action.

[2] The appellants argued then and again before this court that because Messrs. Butler and Keating consented to appearing on the television program *The Fifth Estate*, broadcast November 17, 1999, and being identified as former staff members of the Shelburne School for Boys, who were accused of assaulting former residents of the school, they were precluded from recovering damages for defamation against Mr. Donham and the newspaper which published his articles, said to have damaged the reputation of these two gentlemen by explicitly referring to them and how they were portrayed in that broadcast.

[3] In some situations consent to publication is a complete answer to a claim of defamation. Brown, *The Law of Defamation in Canada* (Second Edition Toronto: Carswell 1999), c. 11-1 correctly states the rule:

> Consent is an absolute defence to an action for liable and slander. The general rule is that "a plaintiff may not recover for a publication to which he has consented, or which he has authorized, procured or invited." If a plaintiff consents to the publication of the defamatory remarks about which he or she complains, there is no action for defamation.

[4] However, it is important to remember that each publication of a libel gives a distinct and separate cause of action. See, for example, *Gatley on Libel and Slander*, 9th ed. (London: Sweet & Maxwell, 1998) at p. 471:

> Consent, as in other areas of the law of tort, is a narrow defence. Thus, it has been held not to apply where the publication was not substantially the same as that to which the plaintiff consented ... The mere submission by the plaintiff of a matter to public discussion neither authorises a defamatory response, nor even gives rise to any qualified privilege, unless he has been party to an attack on the defendant which justifies a public reply.

[5] Justice Scanlan applied these principles to what lay at the heart of this case with a clarity that bears repeating:

> In the present case there is an admission that both Keating and Butler did consent to the Fifth Estate interviews. If that were the program of which they were now complaining there would be no question that consent would vitiate any action for liable or slander in relation to that program. The issue however is not whether they consented to that program or to being identified in that program. The issue more clearly is whether or not the comments in the Donham article of November 21 and earlier articles were defamatory of these plaintiffs. I am not satisfied that the fact the plaintiffs consented to appearing on a nationally broadcast t.v. program amounted to a license or consent to the defendants to publish whatever they wished in relation to these two plaintiffs. When an individual consents to being identified as a member of any particular group it does not give free reign to those who might choose to defame them.

[6] We see no basis for, and therefore decline appellants' counsel's invitation in argument to absolve, as it were, the appellants from liability relating to the articles that preceded the impugned November 21, 1999 article written by Mr. Dunham.

[7] We find no error in Justice Scanlan's decision and would not disturb it. The appeal is dismissed with costs of $1,500. to the respondents collectively, payable to the respondents forthwith.

Saunders, J.A.

Concurred in:

Roscoe, J.A.

Bateman, J.A.