

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Bevis and Karela v. CTV Inc., Burns and Kelly 2004 NSSC 246

Date: 2004 09 24

Docket: S.H. 177818

Registry: Halifax

Between:

Kerry Bevis and Rasim Karela

Plaintiffs

and

CTV Inc., carrying on business as ATV/CTV,
Constable Rick Burns and Constable Bob Kelly

Defendants

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Dates Heard: September 20th, 21st, 22nd, 23rd, 24th, 27th, 28th, and 29th, 2004

Counsel: J. Walter Thompson, QC and Warren Zimmer, for the plaintiffs
James P. Boudreau, for the defendant ATV/CTV Inc.
Lori Rasmussen, for the defendants Constables Burns and Kelly

Moir, J. (Orally):

[1] Mr. Bevis and Mr. Karela sued CTV Inc. in defamation on account of a broadcast aired through the ATV network to the Maritimes on 16 September 2001 at 6:00 and at 11:00 and possibly the next morning. The broadcast shows a gentleman, now identified as Mr. Bevis, being arrested at gunpoint on the roadside in Little Bra D'or. We see the gentleman from a distance at a brown Volkswagen Station Wagon, arms raised against the roof of the cab, being pat searched then handcuffed. The officer has his gun pointed or at his side throughout. The footage shows another suspect, clearly Mr. Karela, put under arrest and standing with hands cuffed behind. These shots are part of a broadcast which said:

With all the attention focused on investigating the terrorist attack in New York and Washington, a dramatic arrest at gunpoint this afternoon by R.C.M.P. in Cape Breton.

The events unfolded at four o'clock in North Sydney. Two men in separate vehicles were pulled over by police shortly after they got off the ferry from Port aux Basques, Newfoundland. One was driving a van, the other a Volvo. Sources tell ATV news the pair were being watched by police because of the terrorist attack in New York, Tuesday, but the R.C.M.P.'s Wayne Noonan said that is not true. Noonan admits the men are suspicious but in no way connected to the incidents in New York or Washington.

Unknown to ATV's cameraman/reporter on site or its editor/anchorman in Halifax, the police released Mr. Bevis and Mr. Karela within minutes with an apology for having made false arrests. They were released well before the first broadcast, let alone the second. However, ATV did not follow up. Further, ATV did not have "sources" telling its reporter or its editor that "the pair were being watched by police because of the terrorist attack in New York". What they had was a telephone call from one person who refused to identify himself. ATV had no idea where he was calling from. He claimed to have "inside information". His information was false.

[2] The case has been tried before a jury. There are some issues I have to decide before counsel present their closing arguments and I give instructions. These include whether the evidence has met the threshold for leaving a claim for aggravated damages to the jury and whether there is sufficient evidence from which the jury could conclude that the broadcast was referable to Mr. Bevis. This decision deals with those issues.

[3] Identification. Unlike the shots of Mr. Karela, the shots of Mr. Bevis that got broadcast are all from a distance. ATV submits that one cannot tell who is being

arrested in Mr. Bevis' position and therefore an element of defamation is unsupported by any evidence.

[4] At p. 298 of the 2nd ed. of Brown, the authors describe the first element of defamation this way:

In an action for defamation, it is the plaintiff's reputation that must be adversely affected. Therefore, in order to recover, the plaintiff must plead and prove that he or she is the one to whom the defamatory statement refers, that is, it must be shown to have been published "of and concerning" the plaintiff. The defamatory publication "must refer to some ascertained or ascertainable person, and that person must be the plaintiff." It must be understood by reasonable persons to refer to the plaintiff. The test in every case is whether the ordinary sensible person to whom the words were published would understand them as referring to the plaintiff.

[5] As with many aspects of defamation law, the judge has a preliminary obligation to superintend the evidence of identification before the case is turned over to the jury.

It is explained this way in Brown at p. 336:

The initial question in each of these cases is whether or not the language used in the publication is capable of referring to the plaintiff. This is a question of law for the trial judge to decide. Once a judge has determined that the publication is reasonably capable of referring to the plaintiff, it is then for the jury to decide whether or not it did, in fact, refer to him or her, and whether the persons testifying that they understood the words to refer to the plaintiff were right in that belief. In that regard, the jury should consider all the surrounding circumstances including the words themselves, the mode of communication, the identity of the defendant and the character of knowledge he or she would be expected to have, and the general or special audience to which the words were directed.

[6] So, I must decide whether the broadcasts made by ATV that evening in September 2001 are capable of referring to the plaintiff. In my assessment they are.

[7] Having watched a tape of the broadcast played numerous times during trial on three different television sets and having observed Mr. Bevis while he was on the stand, I now readily recognize the person being arrested as Mr. Bevis. Whether he is recognizable to someone who watches the broadcast once, twice, possibly a third time is for the jury to determine. Based on my experience the image is capable of connecting the broadcast to Mr. Bevis. Also, I agree with Mr. Thompson's submission that in a jury trial appropriate deference is due to the choice that has been made of seven judges rather than one. Perceptions vary; the ability to perceive vary; the jury has the advantage of seven different perceptions.

[8] The following from Isaacs J. of the High Court of Australia has been quoted in numerous authorities as referred to at p. 301 of Brown:

The test of whether words that do not specifically name the plaintiff refer to him or not is this: Are they such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to? That does not assume that those persons who read the words know all the circumstances or all the relevant facts. But although the plaintiff is not named in words, he may, nevertheless, be described so as to be recognized; and whether that description takes the form of a word-picture of an individual or the form of a reference to a class of persons of which he is or is believed to be a member, or any other form, if in the circumstances the description is such that a person hearing or reading the alleged libel would reasonably believe that the plaintiff was referred to, that is a sufficient reference to him.

Although that test was formulated in reference to print media, I believe it offers a sound statement of what the jury must decide in this case. Are the broadcasts and the circumstances such as would lead persons acquainted with Mr. Bevis reasonably to believe he was the person shown being arrested?

[9] In addition to their own viewing of the tape and of Mr. Bevis, the jury will be entitled to consider whether those who knew Mr. Bevis was travelling that day with the clearly identified Mr. Karela would make the connection that the other arrest involved Mr. Bevis. Further, the plaintiffs called Mr. Bevis' wife and two neighbours all of whom said they readily recognized Mr. Bevis on television that night. Mr. Boudreau submits for ATV that their testimony is beyond credulity. Since I myself can recognize Mr. Bevis on the tape after numerous viewings, it seems those who

knew him well could identify him on a single viewing. It is for the jury to decide whether they accept the testimony given by these witnesses.

[10] In conclusion, I find there is sufficient evidence from which the jury could conclude that the broadcast depicts the plaintiff, Kerry Bevis.

[11] *Malice*. Proof of malice can defeat a defence of qualified privilege, which does not concern us here. The theory is that a defamatory publication is *ipso facto* malicious, referred to unhelpfully as legal malice. This legal malice is, so the theory goes, negated when the publication is on an occasion of qualified privilege. It can be restored, and the defence defeated, upon proof of actual malice. However, a seemingly stringent standard has to be met before the subject can be left to the jury. At least as regards qualified privilege “the question of malice should not be put to the jury unless the trial judge is of the opinion that the evidence advanced raises a probability of its existence”: *Davies and Davies Ltd. v. Knott*, [1979] 2 S.C.R. 686 at p. 694. Here there is no defence of qualified privilege. The jury must, however, find malice or no malice because there is a claim for aggravated damages. It must make that inquiry if it finds defamation. In a previous case, I held that the threshold is the same as it is respecting malice in answer to a defence of qualified privilege.

Also, Mr. Thompson for the plaintiffs, is content that I should make the assessment based on that same threshold.

[12] Malice involves the state of mind of the defendant at the time of the alleged defamation. The present question requires a subjective inquiry. The corporate state of mind at issue must be assessed in light of the minds and actions of corporate employees. Mr. Paul Pickrem was stationed in Sydney and he is responsible for the entire video report. He was the reporter on site. He filmed the arrests and he edited the footage. Mr. Peter Mallette is stationed at Halifax and he is responsible entirely for the voice broadcast from its composition to its delivery as anchor. Someone else was responsible for the subsequent broadcast or broadcasts according to Mr. Mallette's discovery evidence. Someone else was responsible for any follow-up on the story, according to Mr. Mallette's discovery evidence.

[13] Mr. Thompson submits there are three stings to the alleged defamation. The primary sting connects Mr. Karela and Mr. Bevis to the September 11th atrocities. The secondary sting applies even if one allows that the closing lines effectively absolve Mr. Karela and Mr. Bevis from the connection set up by the headline and the "sources". Secondly, the sting is that the men are criminals worthy of arrest under

gunpoint, handcuffing and police custody. The third sting is that they are “suspicious” people. There is, in Mr. Thompson’s submission, a racist overtone at play in reference to the first sting. Mr. Karela is a Kosovar. He is Muslim. In Kosovo his people had to endure Serb bigotries that treated Albanians and Kosovars as aliens in their own lands. They were told they were Turks and should go to Muslim Turkey. In Canada, he has been falsely arrested at gunpoint on reports that told of a middle-eastern person, linking Mr. Karela with others we might think he looks like, terrorists from the Middle East who defamed Muslims by having the perversity to do what they did in the name of Islam. Mr. Bevis looks Northern European. In editing the footage, Mr. Pickrem chose no close ups of Mr. Bevis although he had some remarkable shots of Mr. Bevis as he drove by before the arrests and when he made faces through a squad car window after the arrests. The footage shows Mr. Karela clearly with his darker complexion and his Mediterranean looks. Further, a close up of Mr. Karela being put in the squad car accompanies the words “because of the terrorist attack”. There is no evidence from Mr. Pickrem as to his motives or anything else. He did not testify. Mr. Mallette did not testify either. The plaintiffs tendered his discovery transcript and ATV was content to rely on that.

[14] For ATV, Mr. Boudreau's position is everything in the broadcast is true. Except, that would have to be, for the plural "sources". For ATV, the story was the gunpoint arrest and the World Trade Centre in New York had nothing to do with it, as Sargent Noonan was reported to have said. As for motive, Mr. Mallette said in his discovery:

We ran it because it was a dramatic event that unfolded, you know, in the climate post-September 11th. Our tip was that these gentlemen were being watched because of September 11th. We had it confirmed from the police that, yes, these individuals were suspicious. But we also went on the air and quoted the police by saying that they had nothing to do with September 11th. That did not take away from the drama that unfolded at the side of the road when these guys were brought out of their cars at gunpoint. That seldom happens in our part of the world. I mean, in considering what had happened – I mean, there were – I don't need to explain to you what had happened the previous week. That's why we ran the story.

Elsewhere in his discovery, Mr. Mallette said the unidentified caller from the unknown place had a credible voice.

[15] Respectfully, I do not think the truth or otherwise of the report can be established from its parced sentences and phrases taken one by one in insolation. Later I will be instructing the jury in how it is to go about construing a television broadcast alleged to be defamatory. I have asked for counsels' comments but I expect to do my best to instruct the jury that they must construe the broadcast in full context

and in light of the way television operates as expressed in *Vogel v. Canadian Broadcasting Corp.*, [1982] B.C.J. 1565 (SC) and *Leenen v. Canadian Broadcasting Corp.* (2000), 48 O.R. (3d) 656 (SC) affirmed by (2001) 54 O.R. (3d) 612 (CA). These recognize the viewers do not have the same opportunity with television as does the reader of a newspaper to pour over the report with a critical mind. So a statement like the quote from Sargent Noonan may not have sufficient impact to dislodge any defamation apparent from the headline and the reference to what “sources” have said and the video of the arrests.

[16] It is necessary for me to reach my own assessment of the alleged defamatory language and pictures in order to go on and determine whether the threshold has been met for charging the jury on malice. In my assessment the most probable conclusion from the evidence is that the broadcast says to the public that Mr. Bevis and Mr. Karela are suspected terrorists. The components for that interpretation include: the general context including the atrocity in New York a few days earlier and the reports of an Arab and Muslim connection; the first headline of the broadcast; the police investigation of Mr. Bevis and Mr. Karela in connection with the atrocity as attributed to “sources”; the statement that a police spokesman “admits” that the men are suspicious though not in connection with that particular atrocity; the footage of the

arrests; the coincidence of the line about an investigation in connection with the atrocity and a close-up of Mr. Karela; and Mr. Karela's Mediterranean looks.

[17] It will be for the jury to decide what the broadcast signified. Counsel will put their opposing arguments to the jury in that regard. My assessment does not matter except that it is necessary step in determining the present issue. I find the most probable meaning is that Mr. Bevis and Mr. Karela are suspected terrorists. As of 6:00 on 16 September 2001 that was false. As of 11:00 on 16 September 2001 that was false. On the morning of 17 September 2001, when there might have been another broadcast, that was false. Malice may be based upon a finding of reckless disregard for the truth. Mr. Mallette said at discovery that he checked his report three times with the police spokesperson, Sargent Noonan. Clearly, the admission attributed to Sargent Noonan is an accurate reflection of his statement. That does not, however, detract from the defamatory affects of Sargent Noonan's statement that the men are suspicious. Nor was it Sargent Noonan who put that word in the context of terrorist attacks. The evidence tending to show recklessness on the part of ATV corporately includes the following: (1) ATV had one source only. It did not know who the source was. It did not know where the source was located. It had no way of contacting the source. (2) ATV did not report any of the foregoing to the public when

it made its attribution concerning the New York atrocity. (3) Although Mr. Mallette's journalistic skills indicated the anonymous source had a credible voice, ATV almost immediately discovered information that seemed to contradict what the source had said to them. The anonymous source provided "inside information" to the effect that Mr. Karela and Mr. Bevis were under surveillance in connection with the New York atrocity. However, when Mr. Pickrem arrived at the Ferry Terminal the police told him they had not been on the ferry and, as events unfolded, it became clear that the police were looking for the brown Volvo, not that they had it under surveillance. (4) The statement in the broadcast that ATV had "sources", in the plural, was false. (5) Perhaps there was not time to follow up before the 6:00 broadcast. There certainly was plenty of time before ATV chose to rebroadcast the story at 11:00. The slightest journalistic follow-up would have revealed the truth.

[18] These components in the evidence together with the singling out of Mr. Karela's face for the broadcast lead me to conclude that the evidence meets the standard for having the jury determine the issue of malice.