

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Bevis and Karela v. CTV Inc., Burns and Kelly 2004 NSSC 247

Date: 2004 09 27

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. Karela and Mr. Bevis sued Constable Kelly and Constable Burns in assault and battery and false arrest and in false imprisonment. They also sued for damages under subsection 24(1) of the Constitution for breach of Charter rights. Both claims arise from an arrest and a detention at Little Bra D'or in Cape Breton.

[2] For the officers, Ms. Rasmussen contends that subsection 24(1) damages are not available without proof of malice, bad faith, recklessness or gross negligence. She also contends that damages under section 24(1) cannot be awarded where damages are to be assessed for breach of common law rights on the same set of facts.

[3] This decision will only summarize my reasons. I may expand on it if a copy is ordered before I sign the final order.

[4] Although the weight of authority is with the proposition, I do not agree with those authorities which hold that malice, bad faith, recklessness or gross negligence is a condition for an award of damages under subsection 24(1). I see

nothing in the language of the Charter to imply such a limitation on the plain meaning of the words of subsection 24(1). Further, the absence of clear words or necessary implication to such an effect is consistent with the purpose of the Charter as described by Dixon, J. as he then was in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

[5] I do not agree either that recovery based on liability for a Charter violation should be precluded where the same recovery may be based on liability for a violation of common law civil rights. Both are sources of liability and I see nothing in the Charter to make liability under it secondary to liability at common law. However, I do agree with those authorities that hold that separate assessment of damages would be duplicitous and would lead to double recovery.

[6] The fundamental principle of damages for torts is *restitutio in integrum*. The common law torts, even the intentional torts, lead to compensation designed to restore the person to the position they would have been had there been no tort. We do not usually compensate according to rights. We compensate for harm. In the case of the intentional torts applicable in this action, harm is presumed. But the harm is the same, whether is it compensated on account of assaults, the batteries,

the false imprisonment or the false arrest. And the harm is the same, it seems to me, whether it is compensated on the basis of a constitutional violation.

[7] Subsection 24(1) is conscious of the common law remedies. It has to be taken as conscious of the fundamental principle of tortious damages. I realize there is some authority at common law for compensating a loss of right per se. Those ancient authorities have to be evaluated in light of *restitutio* where an intentional tort and a violation of the Constitution arise on the exact same set of facts. I see great difficulty in applying the principle in compensating violation of the common right and not in compensating the violation of the constitutional right.

[8] Consequently, I take the view that the intentional torts and the Constitution provide independent sources of liability in this case but not independent bases for compensation. The compensation will be the same for the same harm.

[9] As with the intentional torts, harm should be assumed for breach of the rights to liberty, freedom from arbitrary arrest and freedom from arbitrary detention. I do not believe that failure to advise of the right to counsel should involve presumed harm. It is the gateway to other rights but it is useful only when

the person passes the gate. Here, there could have been no exercise of the right to counsel even if the advice was given as the officers contend it was.

[10] It follows that there will only be one jury question respecting general damages for both the civil and the constitutional wrongs. I will instruct the jury briefly on the admitted bases for liability but I will instruct them to compensate singularly for the harm as a whole. The same goes for aggravated damages.

J.