Hansra v. Joss

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

J.S. Harvey J.

Heard: April 1, 2021.

Judgment: April 29, 2021.

Docket: M231634

Registry: New Westminster

[2021] B.C.J. No. 926 | 2021 BCSC 805

Between Gurdarshan Singh Hansra, Plaintiff, and Tanya Irene Joss, Tamara More, Sarah Walsh, Olena Baturina, Swadden and Company, David Feng, and Insurance Corporation of British Columbia, Defendants

(60 paras.)

Counsel

Counsel for the Plaintiff: B. Yu.

Counsel for the Defendants Tanya Joss, David Feng and ICBC: D. Reid.

Counsel for Defendants Tamara More, Sarah Walsh, Olena Baturina and Swadden and Company: W. MacLeod, S. Field.

Reasons for Judgment

J.S. HARVEY J.

1 The defendants apply to strike the plaintiff's claim as having no reasonable prospect of success, pursuant to Rule 9-5(1)(a) of the *Supreme Court Civil Rules*.

2 The defendants, Swadden and Company, Tamara More, Sarah Walsh, and Olena Baturina

(collectively, the "Law Firm"), comprise the legal team that represented the defendant, Tanya Irene Joss, in a negligence claim commenced by the plaintiff, Gurdarshan Hansra. The Law Firm is represented by separate counsel.

3 Ms. Joss, the Insurance Corporation of British Columbia, and David Feng, who is the adjuster handling the claim (collectively, the "Other Defendants"), are represented by separate counsel. However, both sets of defendants assert the plaintiff's claim is bound to fail.

4 In an amended notice of civil claim (the "ANOCC"), Mr. Hansra alleges the Law Firm, while acting on instructions from the Other Defendants, "caused a 'Rule 7-5 letter' to be delivered via courier to 16 individuals related to the Plaintiff's employment" that contained defamatory statements about the plaintiff (the "Rule 7-5 Letter").

5 In the Rule 7-5 Letter, one of the questions posed to the recipients, question 38 (the "Defamatory Statement"), reads as follows:

> Q Were you aware that Mr. Hansra was arrested in 2010 because a truck he was driving was found to have over 50 kilograms of cocaine inside it?
>
> a. If so, did this influence his employment with your company?
>
> b. If so, How?

6 The plaintiff notes that the Defamatory Statement fails to set out the fact that he was acquitted of any and all charges. He alleges the Defamatory Statement implies that he is a drug dealer associated with a criminal lifestyle and is unsavoury or of shady character.

7 It is acknowledged by the defendants that the contents of the Defamatory Statement were delivered to 16 individuals associated with the plaintiff's employment by mail, and then later published and filed in an affidavit before the Supreme Court of British Columbia and accessible for the public to view.

8 The plaintiff alleges the Other Defendants, who instructed the Law Firm to publish the Defamatory Statement, are thus "liable by agency".

9 The ANOCC goes on to allege a number of aggravating factors and also alleges the additional tortious conduct of: intentional interference with economic relations; conspiracy; and intentional infliction of emotional distress.

10 It is acknowledged by the Law Firm that the Rule 7-5 Letter was sent to the 16 individuals and/or companies named in the ANOCC, and that they were former employers and/or current employers of the plaintiff prior to his involvement in the motor vehicle accident ("MVA") that occurred in 2015.

11 For the purposes of this application only, all of the defendants accept that the Defamatory Statement was capable of the alleged defamatory meaning, but assert that the publication is protected by absolute privilege regardless of whether malice is demonstrated. Accordingly, the defendants say the action is bound to fail.

Background

12 The plaintiff has been a long-haul trucker since 1993. He was involved in an MVA on March 5, 2015 and commenced an action against the other driver involved, Tanya Irene Joss, for damages. As part of the claimed damages, the plaintiff sought damages for past and future economic loss. His claim remains extant.

13 Well prior to the MVA, in July 2010, the plaintiff, together with a co-driver, Mr. Bao, was hired to transport a shipment of products across Vancouver in a sealed truck to Brampton, Ontario. During the course of their travels, they were stopped in Manitoba for a routine traffic inspection. The police officer asked to inspect the vehicle and, in doing so, located 51 kg of cocaine in the interior of the truck. Both the plaintiff and Mr. Bao were charged with possession of cocaine for the purpose of trafficking.

14 In a trial which ended on March 7, 2014, both of those accused were acquitted of all charges.

15 According to the plaintiff, in affidavit material filed in this proceeding, the criminal charges and his acquittal were not common knowledge within his community and, in particular, within the trucking community that generally provides him work. The subject matter of his arrest and charges were never discussed with any of the employers or former employers who received the Rule 7-5 Letter.

16 The plaintiff further deposes in this proceeding that the South Asian trucking community is small and insular. It is sensitive to allegations of drug trafficking. The plaintiff alleges anybody receiving an inquiry containing information as was in the Rule 7-5 Letter would, without anything more, conclude that the plaintiff was involved in drug trafficking.

17 The Law Firm was engaged to defend the plaintiff's claim against Ms. Joss. One of the issues arising in the MVA action was the plaintiff's capacity to work following the MVA and into the future.

18 When the plaintiff was discovered, only passing reference was made to the criminal charges. He was not asked questions about the impact of those charges upon his employment from the date of the charges to the date of the MVA.

19 The trial of the MVA action was scheduled to be heard by a jury commencing on January 6, 2020.

20 On November 18, 2019, Tamara More, an employee of the Law Firm, prepared and forwarded the Rule 7-5 Letter, which was delivered by courier to the former employers of the plaintiff. The Rule 7-5 Letter contained questions pertaining to the plaintiff's employment.

21 On behalf of the defendants, collectively, it is noted that a key line of inquiry for pretrial investigation by defense counsel was for issues relating to the plaintiff's past employment, including any gaps or variation therein which might affect his pre-accident and thus post-accident expectation of earnings.

22 Through both documentary and oral discovery in the MVA action, the defendants learned of the persons or companies for whom the plaintiff had worked. Corporate online searches provided the identity of individuals who are listed as officers and/or directors of the corporate employers.

23 According to the defendants' material, timely responses were not received from 13 of the recipients. Thereafter, the Law Firm filed an application on behalf of Ms. Joss seeking an order for pretrial examination of those 13 individuals. As part of the materials in support of the application, the Rule 7-5 Letter was appended, including the Defamatory Statement contained in question 38.

24 The application never went forward, but was apparently served upon those individuals who failed to respond.

25 One of the named individuals, Meh Khan, deposed in an affidavit in this proceeding that she received "some letters from Swadden and Company". One letter had several questions about the plaintiff. The other letter demanded that her and her husband attend at an office in downtown Vancouver for questioning. She attended the Law Firm's office to answer questions but the Law Firm, or its representative, declined to conduct the interview.

26 Ms. Khan went on to state she believed she was required to be there and did in fact attend at 10:30 a.m. at the offices of the Law Firm, who then "unilaterally cancelled the meeting. They did not notify us beforehand that it was cancelled".

27 The plaintiff asks me to infer the Law Firm never had an intention to interview the recipients of the Rule 7-5 Letter. According to the plaintiff, the Rule 7-5 Letter's sole purpose was to taint the evidence of the plaintiff's past employers.

28 The trial of the negligence action has not yet proceeded.

29 With that history in mind, this action was commenced, and then later amended to include a number of other claims as outlined above. The plaintiff, rightly, concedes that if the action founded in defamation has no reasonable prospect of success because of the application of absolute privilege, then the other causes of action set out in the ANOCC are equally doomed to failure.

Position of the Parties

30 Both sets of defendants argue the action is bound to fail given the circumstances surrounding the publication of the material alleged by the plaintiff to be defamatory. Both argue the occasions of publication are covered by absolute privilege.

31 The plaintiff argues that the defendants acted with malice and that the Rule 7-5 Letter, particularly the Defamatory Statement, was an effort to tamper with witnesses and thus undermine the legal process. As such, the plaintiff argues the defence of absolute privilege has no application to the facts before me.

32 The plaintiff concedes that if absolute privilege applies here, then it is available to all defendants, not only the Law Firm, and applies to all of the causes of action alleged, including the additional torts alleged in the ANOCC.

The Legal Grounds

33 The application by both defendants is brought under Rules 9-5(1)(a)(b) and (c) of the *Supreme Court Civil Rules*. Rule 9-5(1) provides:

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

34 The defendants acknowledge the test for striking out a claim as disclosing no reasonable cause of action proceeds on the basis that the facts pleaded are true. That said, facts pleaded based purely on assumptions or speculation, or which are incapable of proof, need not be assumed to be true: *Kindylides v. John Does*, 2020 BCCA 330 at para. 34.

35 In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, the Supreme Court stated:

> [17] The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.
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> ...
>
> [19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

36 Questions of law may be decided under Rule 9-5(1)(a) if, on a proper analysis of the law, it is plain and obvious that the claim cannot succeed: *Greater Vancouver (Regional District) v. British Columbia*, 2009 BCSC 577 at para. 31, aff'd 2011 BCCA 345.

37 All defendants argue that they are provided immunity against the claim set out in the ANOCC based on the doctrine of absolute privilege. That doctrine provides protection against suits arising from statements made in court proceedings and communications made in the course of an inquiry with respect to, or in preparation for, those proceedings.

38 Accordingly, the defendants argue it is plain and obvious that the claims in the ANOCC are doomed to fail. As conceded by the plaintiff, absolute privilege is not limited in application to actions for defamation, but applies equally to any cause of action when the public interest in protecting the integrity of the judicial process will be impaired by permitting such claims to proceed: *Duncan v. Lessing*, 2018 BCCA 9 [*Duncan*].

39 By way of response, the plaintiff questions the propriety of sending out a "demand pursuant [to] Rule 7-5" and, in particular, referencing his earlier criminal charges, without noting that those charges resulted in his acquittal.

40 The plaintiff notes in *Duncan*, the Court was cautious to expand the doctrine of absolute privilege to proceedings involving the *Privacy Act*, R.S.B.C. 1996, c. 373. The plaintiff pointed out the following passage from *Duncan* beginning at para. 70:

> [70] Malicious prosecution is another cause of action that can be brought against counsel in relation to their conduct of litigation: *Nelles v. Ontario*, [1989] 2 S.C.R. 170.
>
> [71] The challenge of reconciling the absolute privilege doctrine with non-defamation claims was addressed by the Ontario Court of Appeal in *Amato v. Welsh*, 2013 ONCA 258. In that case, absolute privilege was set up by litigation counsel as a defence to a claim by the lawyers' client for alleged breach of fiduciary duty and the duty of loyalty based on statements made or omitted by the lawyers while representing different clients in a quasi-judicial proceeding. The lawyers accepted that the absolute immunity did not bar claims in professional negligence, but argued that a claim could not be based on statements made or omitted to be made during the hearing.
>
> [72] The Court of Appeal refused to strike the claims. Cronk J.A. pointed out that "the boundaries of the absolute privilege doctrine are not firmly set" and that "its scope and application continue to evolve" (at para. 68).
>
> [73] I agree with Cronk J.A. that the scope and application of the absolute privilege doctrine are not settled. The doctrine clearly applies to claims in defamation brought against counsel for anything said during the course of judicial proceedings, inside or outside court, in order to protect the integrity of the justice system. The doctrine applies to statements by all participants in the litigation process, but is particularly important in its application to litigation counsel because of the need to ensure that counsel are not impeded from the vital role of zealously advocating on behalf of their clients without fear of liability for doing so.

41 With that in mind, the Court of Appeal in *Duncan* rejected the claim against a lawyer who disclosed confidential information, based on the statutory exclusion under s. 2(3)(b) of the *Privacy Act*, rather than the common law doctrine of absolute privilege. In doing so, the Court of Appeal affirmed the principles set out in *Hamouth v. Edwards & Angell*, 2005 BCCA 172 [*Hamouth]*, to which I will later refer.

42 The plaintiff suggests I should infer an improper motive on the Law Firm's part, in light of: (1) the short timeline given to the plaintiff to reply to the Rule 7-5 application; (2) the fact that the application never proceeded; and (3) the failure of the Law Firm to interview Ms. Khan when she presented at their offices in response to the Rule 7-5 Letter.

43 To that submission I note: (1) the authorities, notably *Hamouth*, provide that malice does not vitiate absolute privilege (and I make no finding as to malice); (2) the application not going forward may well have been tactical; and (3) I find it more likely than not that Ms. Khan, in anticipation of the order sought in the application that did not proceed, attended without ever having been ordered to do so. In that circumstance, no court reporter would have been available and an examination would have been inappropriate.

44 Further, counsel for the plaintiff suggests that the application, at best, is premature as defence counsel refused to engage in document disclosure prior to the hearing of this application.

45 The plaintiff argues document production is an essential step before a "summary trial application".

46 While agreeing with that proposition, this is a not a summary trial. It is an application to strike prior to trial as disclosing no reasonable prospect of success.

47 The applicants note that where absolute privilege exists, as is argued in the case here, actions founded on communications subject to absolute privilege should be dismissed or "throttled at the birth": *McDaniel v. McDaniel*, 2009 BCCA 53 at para. 43.

48 Hence, I give no credence to the suggestion this application is premature. The parties are agreed as to the appropriate test for dismissal, that is, assuming the facts pleaded are true, whether it is "plain and obvious" that the claim will not succeed. Document disclosure will add little, if anything, to the consideration of this application.

49 The plaintiff also disputes the assertion by the defendants that the pretrial circumstances of the plaintiff, and in particular his 2010 criminal charges, were an essential line of inquiry given the production of the plaintiff's income tax returns from 2010 setting out his income. In the negligence action, the plaintiff produced a number of reference letters from former employers attesting to his qualities as a good and reliable worker.

50 The plaintiff argues the Rule 7-5 Letter amounts to witness tampering and referenced *Coulter v. Ball*, 2003 BCSC 1186, aff'd 2005 BCCA 199 [*Coulter*], wherein an ICBC adjuster put various misstatements about the plaintiff's case to various witnesses in attempt to contaminate evidence.

51 Here, the circumstances are different. The Defamatory Statement cannot be seen in the same light as the adjuster's efforts in *Coulter* to mislead and sway potential witnesses through a false narrative. In any event, the remedy for such egregious behaviour is special costs: *Coulter* at para. 23.

52 I was referred to a specific section of *Coulter* noting the Court's disapproval of the conduct of the adjuster, which at para. 23 reads:

> [23] I do not agree that in order to conclude that there has been reprehensible conduct in relation to a witness's evidence in the context of an application for special costs the Court must conclude that the witness has actually altered his or her evidence as a result of the actions of the party or the party's agent. In my view, the proper focus is on the conduct of the party or the agent of the party. The question is - is that conduct worthy of rebuke? An

> effort to contaminate the evidence of a witness is, in my view, conduct worthy of rebuke and remains so whether or not the effort met with success.

53 I agree with defendants' submission that any overreach in the conduct of the litigation by the defendants, if found at trial in the negligence action, could result in a heightened award of costs. That, however, does not affect the application or existence of absolute privilege as is asserted by the defendants here. Nor should it be taken that I conclude the Rule 7-5 Letter was unnecessary to the proper conduct of the litigation.

54 The defendants argue the Rule 7-5 Letter, and in particular the Defamatory Statement, was made in the course of an inquiry with respect to the plaintiff's claim for wage loss, past and prospective. However, the plaintiff argues it was an attempt to malign him and "witness tamper" with prospective witnesses who, upon learning of the criminal charges in 2010, might give less favourable evidence concerning the plaintiff's future job prospects with them as employers.

55 In arguing that malice defeats, or can defeat, the assertion of absolute privilege, the plaintiff relied on passages from *Dechant v. Stevens*, 2001 ABCA 39 [*Dechant*], which was wrongly cited at 2001 BCCA 39, to the following effect:

> [49] Understanding the facts surrounding the alleged defamatory statements is key in determining whether the occasion could constitute a step in the discipline proceeding. For instance, in the case of judicial proceedings, the mere fact of an ongoing law suit does not attract absolute privilege for every statement made to anyone during the course of the law suit. It is the occasion on which the statements are made that attracts the privilege. The statement must be made within a step recognized as affording the privilege. A statement made during an examination for discovery would be privileged, but if defamatory statements are repeated outside of the discovery room and in circumstances not part of the judicial proceeding, those statements would not receive the benefit of the privilege. Thus, facts and how they fit in the particular process are critical.

56 *Dechant*, in fact, is an Alberta Court of Appeal decision based on legislative enactments, specifically the *Legal Professions Act*, S.A. 1990, c. L-9.1. In any event, the decision is not binding on me. Here, the B.C. Court of Appeal has adopted as correct the principles from *Munster v. Lamb* (1883), 11 Q.B. 588 (Eng. C.A.), which were cited and applied in *Hamouth* at para. 37.

57 In *Hamouth,* beginning at para. 37, the Court states:

> [37] Granting absolute privilege to lawyers when they act in the course of their duties to their clients is for the public benefit. It frees lawyers from fear that in advocating their client's cause they will be sued if what they say on behalf of a client is found not to be true. The principle was stated broadly by Brett, M.R., in *Munster v. Lamb* (at pp. 603-604):

> If upon the grounds of public policy and free administration of the law the privilege be extended to judges and witnesses, although they speak maliciously and without reasonable or probable cause, is it not for the benefit of the administration of the law that counsel also should have an entirely free mind? Of the three classes - judge, witness, and counsel - it seems to me that a counsel has a special need to have his mind clear from all anxiety. A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider, whether the facts with which he is dealing are true or false. What he has to do, is to argue as best he can, without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform. For, more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. The rule of law is that what is said in the course of the administration of the law, is privileged; and the reason of that rule covers a counsel even more than a judge or a witness. To my mind it is illogical to argue that the protection of privilege ought not to exist for a counsel, who deliberately and maliciously slanders another person. The reason of the rule is, that a counsel, who is not malicious and who is acting bona fide, may not be in danger of having actions brought against him. If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct.

[38] The principle was stated in more modern language in *Big Pond Communications 2000 Inc. v. Kennedy* (2004), 236 D.L.R. (4th) 727 at para. 19 (O.S.C.J.):

> Counsel have a professional duty to pursue their client's interests, within the law, to the fullest extent possible. At times, a lawyer finds himself or herself advocating unpopular causes. Our system of justice depends upon courageous lawyers undertaking cases that may be distasteful to the public at large, and to the lawyer personally. Nonetheless, the Bar does so, often without thanks from society that does not appreciate the importance of this task. But it is this professional responsibility to argue the law that ensures our democratic freedoms continue. Our system of law would be rendered ineffectual if counsel was required to look behind them for fear of a lawsuit as a result of presenting his client's case. This is the mischief that the privilege seeks to prevent.

[39] These principles apply to these lawyers. They are entitled to the protection of absolute privilege because they were acting in the course of their duties to their client in the course of a quasi-judicial proceeding.

[40] In writing the letters to Mr. Hamouth's brokers, the lawyers were protected by absolute privilege. It follows that Mr. Hamouth's statement of claim discloses no reasonable claim against the law firm.

> [41] I would allow the appeal, set aside the order appealed from, and order that the statement of claim as against Edwards & Angell be struck out and the action against them dismissed.

See also: *Caron v. A.*, 2015 BCCA 47 at para. 16.

58 I find similar circumstances here. In writing to the former employers of the plaintiff, the Law Firm was acting in the course of pursuing its client's interest and thus is protected by absolute privilege. The second publication, the filed pleadings underlying the application to examine the former employers, is similarly protected by absolute privilege.

59 Finally, the defendants assert, and the plaintiff acknowledges, that absolute privilege applies equally in respect of the alleged tortious claims, including the plaintiff's claim of intentional interference with economic relations, conspiracy, and intentional infliction of emotional distress: *Peak Innovations Inc. v. Pacific Rim Brackets Ltd.*, 2009 BCSC 1034 at paras. 47-48.

60 In the result, I conclude the plaintiff's action is bound to fail as against all of the named defendants. The applications are allowed and the action is dismissed.

J.S. HARVEY J.

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