SUPREME COURT OF YUKON

Citation: *Senft v. Vigneau*, 2019 YKSC 23

Date: 20190508
S.C. No. 17-A0120
Registry: Whitehorse

BETWEEN

ANGELA R. SENFT AND MICHAEL E. SENFT

PLAINTIFFS

AND

AUDREY VIGNEAU AND SUSAN HERRMANN

DEFENDANTS

Before Chief Justice R.S. Veale

Appearances:
Gary W. Whittle and
Megan E. Whittle — Counsel for the plaintiffs
David F. Sutherland, Q.C. and
Meagan Hannam — Counsel for the defendants

ORAL REASONS FOR JUDGMENT

INTRODUCTION

[1] VEALE C.J. (Oral): Counsel for the defendants makes an application with respect to a jury trial of 13 days duration between January 28 and February 13, 2019.

[2] The jury rendered a General Verdict against the defendants on February 13, 2019, finding defamation and malice which defeated the defence of fair comment.

[3] The jury awarded general damages, special damages, aggravated damages and punitive damages against both defendants.

[4] Defence counsel at trial raised no objection to the verdict. Counsel for the plaintiffs applied for judgment, defence counsel did not object and judgment was granted on the terms of the Verdict. No formal judgment order has been filed.

[5] Counsel for the defendants applies for a ruling by me, as trial judge, that as a matter of probability that one or both of the defendants were not actuated by actual malice to the extent of being their dominant motive for the publication sued upon. As the jury charge did not address the probability of malice prior to putting malice to the jury, counsel for the defendants submits that such a ruling would complete the record and assist the Court of Appeal in its deliberations.

[6] Counsel for the defendants have filed a notice of appeal but seek this ruling before the appeal is heard.

[7] Counsel for the plaintiffs oppose the application as judgment has been granted without objection by defence counsel at trial who are no longer representing the defendants. Counsel submits that there is no jurisdiction to make such a ruling at this time, approximately three months after judgment. Counsel for the plaintiffs submit that even if there were jurisdiction, it would be a miscarriage of justice to interfere with the jury verdict at this time. The plaintiffs apply for the entry of the Orders for Judgment.

ISSUES

[8] These oral reasons will address the following issues:

1. is there jurisdiction to make the order applied for?
2. if there is jurisdiction, should the evidence be reviewed to determine if the evidence raises the probability of malice on the part of the defendants?

DISCUSSION

[9] I am of the view that there is ample authority that a judge has the jurisdiction to re-open a trial after judgment has been granted but before the Order has been filed. See *R. v. Hummel*, 2002 YKCA 4, at paras. 14 and 25, and *P.S. Sidhu Trucking Ltd. v. Yukon Zinc Corp.*, 2016 YKSC 40. However, the issue is somewhat exceptional in this case based on the judgment in *Davies & Davies v. Kott*, [1979] 2 S.C.R. 686. In that case, the issue was whether the trial judge made an error in finding some evidence of express malice as a matter of law and putting the matter to the jury to determine the issue of malice as a matter of fact.

[10] The ruling of McIntyre J. of the Supreme Court of Canada in *Davies* is found at p. 696:

> I cannot accept the argument that the Court of Appeal did not review the evidence in detail. While I accept as correct Lord Porter's words referred to above and those of Spence J. last quoted, they do not mean that one piece of evidence of whatever weight may be sufficient to overcome the presumption against malice raised by the privilege. One piece of evidence may be sufficient provided that it is by itself of sufficient weight to raise a probability of the existence of malice.
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> A review of the evidence in this case led the trial judge to conclude that there was some evidence of malice. As I have said, in this he was applying the wrong test. The question for his determination was whether there was sufficient evidence to raise a probability of malice. I agree with the Court of Appeal in its findings that no such evidence did exist. … (my emphasis)

[11] The purpose of this somewhat unique situation is to protect the legitimate interests of the defendants' freedom of speech even though their language may be violent or excessively strong. The difference in the relationship of judge and jury with

respect to malice defeating the defence of fair comment was clarified by McIntyre J. in *Davies,* at p. 693,as follows:

> The relationship between a judge and a jury in dealing with issues of fact is generally clear and well established. Ordinarily a judge sitting with a jury is not concerned with the weight of evidence. If he concludes that there has been adduced admissible evidence going in proof of the fact in issue, he must leave it to the jury. It is then the function of the jury upon weighing the evidence to accord it such effect as it may consider appropriate. This rule while one of general utility must be modified in a case of this kind. Where words are spoken on occasion of qualified privilege, the question of malice should not be put to the jury unless the trial judge is of the opinion that the evidence adduced raises a probability of its existence. (my emphasis)

[12] Although *Davies* refers to qualified privilege, there is ample authority that the ruling applies to the defence of fair comment.

[13] The question of the timing of the ruling of the trial judge is addressed by the Saskatchewan Court of Appeal in *Loos v. Robbins*, [1987] S.J. No. 237 (Sask. C.A.). In that case, the trial judge, on the close of the case presented by the plaintiffs, dismissed the plaintiff's case and discharged the jury. He found that there was qualified privilege and that there was not sufficient evidence of malice to negate or rebut the evidence of qualified privilege.

[14] Gerwing J.A., for the Court of Appeal, concluded that the plaintiff had not shown on a probability of evidence that there was malice.

[15] He quoted, with approval, two paragraphs from *Gatley on Libel and Slander (7th Ed.)* at p. 343:

> 792.Plaintiff must adduce probability of malice at least. In order to enable the plaintiff to have the question of malice submitted to the jury, it is necessary that the evidence should raise a probability of malice and "be more consistent with its existence than with its non-existence." "It is not sufficient if it falls short of that and is consistent only with a

> mere possibility. To direct a jury to consider mere possibilities in such a case would be practically to destroy the protection which the law throws over privileged communications.
>
> 794.Time of submission. The submission that there is no evidence of malice to go to the jury is invariably made at the close of the plaintiff's case. But the judge is not bound to give his ruling then: under the present practice he has a discretion whether he will rule at the close of the plaintiff's case, or whether he will defer ruling on the matter until after he has heard the evidence for the defendant. Indeed, he can, if he wishes, defer his ruling until the jury have given their verdict. Such a course is often convenient, for if the Court of Appeal should think that the judge's ruling was erroneous the advantage is gained that it is unnecessary to send the case back for trial before another jury. If the judge allows the case to go to the jury, and the jury return a verdict for the plaintiff, the judge is nonetheless entitled to enter judgment for the defendant if he is then of opinion that there is no evidence of malice, or that the evidence of malice is so weak that the verdict in the plaintiff's favour would be set aside by the Court of Appeal as unreasonable. (my emphasis)

[16] *Gatley* clearly states that the trial judge is entitled to enter judgment for the defendant if he is of the opinion that there is no evidence of malice, or that the evidence of malice is so weak that the verdict in the plaintiff's favour would be set aside by the Court of Appeal as unreasonable.

[17] I note that the trial judge in *Loos* heard the application at the close of the plaintiff's case and not after the jury verdict.

[18] There are three cases which touch on the issue of timing of the trial judge's decision on whether there was sufficient evidence to raise a probability of malice.

[19] In *Creative Salmon Company Ltd. v. Staniford*, 2009 BCCA 61, the British Columbia Court of Appeal addressed the issue of when malice can defeat the defence of fair comment which is a cornerstone of free speech in Canada. In order to defeat the

defence of fair comment the Court of Appeal ruled that malice must be the dominant or overriding motive (para. 42).

[20] However, *Creative Salmon* is an appeal of the decision of a trial judge sitting alone that was reviewed by the Court of Appeal. Mr. Justice Tysoe made the following comment in his decision, on this issue of whether to send the case back for a new trial:

> [44] Malice is a state of mind. Only the trier of fact can determine Mr. Staniford's state of mind when he published the two press releases. This Court cannot look to the evidence and make its own finding in this regard.
>
> [45] Although the reason given by the trial judge does not constitute malice at law, it is my view that on the basis of the evidence before the trial judge it would be open to a trier of fact to make a finding of malice against Mr. Staniford. Hence, it would not be appropriate for this Court to dismiss Creative Salmon's claim.
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> [46] As a result, neither of the courses of action advocated by the parties is open to this Court. Although it is regrettable in view of the added expense, I believe there must be a new trial unless Creative Salmon is successful on either of its other two grounds for sustaining the trial judge's decision. (my emphasis)

[21] It is on the basis of this reasoning that counsel for the defendants submits that I should review the evidence and provide my decision for the Court of Appeal of Yukon that will hear an appeal in this matter on several grounds.

[22] In *Stuart v. Hugh*, 2011 BCSC 426, Verhoeven J. presided in a jury trial on damages for slander. Following the close of evidence and before the charge to the jury, the defendants applied for a ruling among others, on the question of probability of malice. Verhoeven J. proceeded to leave the case with the jury and reserve on the question of law about the probability of malice. The jury dismissed the case and Verhoeven J. gave his Reasons for Judgment, although moot, in the event that there might be an appeal. He said this by way of explanation:

> 42 Following the close of evidence and before the charge to the jury, the defendants applied for rulings that the slanderous words pleaded were spoken on an occasion of qualified privilege, and that there was insufficient evidence to demonstrate a probability of malice which would overcome the qualified privilege; therefore, there was no case to go to the jury.
>
> 43 In an oral ruling delivered February 18, 2011, I decided that the occasion on which the words were spoken was one of qualified privilege. However I reserved my decision on the question of probability of malice. In the result, I allowed the malice issue to go to the jury for decision.
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> 44 As I explained in my ruling just given, the jury decided that the plaintiff failed to prove that the words alleged were spoken. Accordingly, they were not required to decide the malice issue. Therefore, this ruling is apparently moot. Once again, I render it only against the possibility of an appeal. (my emphasis)

[23] Verhoeven J. concluded his probability analysis as follows:

> 59 Mr. Hugh acknowledged that the words as pleaded would have been, to his knowledge, false. On the basis of Mr. Hugh's knowledge of the falsity of the words, and on the assumption of a jury verdict concluding that the words were in fact spoken, and on the further assumption that the jury would find that the words were in fact defamatory, then in a purely hypothetical sense I would conclude that there was a probability of malice. On that basis, the issue of malice was properly left with the jury. I emphasize, however, that the jury made no such findings. On the verdict of the jury, Mr. Hugh did not say the words alleged. There was no defamation and no malice.

[24] In *Warman v. Fournier*, 2015 ONCA 873, the Ontario Court of Appeal addressed the issue of whether the evidence in a judge and jury case was capable of supporting a finding of malice. In that case, the jury awarded general, aggravated and punitive damages. The appeal raised a number of alleged errors including the failure of the trial judge to rule that that there was no adequate evidentiary foundation for a finding of malice that should have been put to the jury.

[25] The Court concluded:

> 13 At trial, the appellants relied mainly on the defence of fair comment and, in respect of some of the statements in question, on the defence of justification. In the context of these defences, there was evidence at trial of the appellants' conduct that, if accepted by the jury, could ground a finding of malice. The appellants did not ask the trial judge to rule that there was no evidence capable of supporting a finding of malice. A review of the record indicates that there was evidence capable of supporting a finding of malice and had the appellants asked for such a ruling, the trial judge would have had no choice but to put malice to the jury.
>
> 14 We are also not persuaded that the jury was misdirected on the legal requirements for a finding of actual malice. The trial judge's initial instructions did not indicate that malice must be the dominant motive for publishing the impugned statements in order to anchor a finding of actual malice. However, the trial judge's recharge to the jury emphasized that actual malice includes the making of a statement for the dominant purpose of harming someone out of personal spite or ill-will. He told the jury, among other things: "Actual malice includes every unjustifiable dominant intent to inflict injury on the person defamed." In our view, as a result of the recharge, the jury could not have been under any misapprehension as to the controlling principles on the issue of malice.
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> 15 In these circumstances, where the question of malice is properly pleaded, admissible evidence going to proof of malice is adduced, and a correct instruction on malice is provided by the trial judge to the jury, as in this case, the determination of malice is a question for the jury. See for example, *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067, at p. 1090; *Davies & Davies Ltd. v. Kott*, [1979] 2 S.C.R. 686, at p. 694. (my emphasis)

[26] Counsel for the plaintiffs submitted that a summary of principles governing the re-opening of a judgment are applicable as set out in *Atkinson v. McMillan*, 2010 YKSC 13, at para. 3:

> 1. It is not the purpose of the discretion to reopen to make available to a litigant an alternative method of appeal.

> 2. The discretion to reopen may be properly exercised where the trial judge is satisfied that the original judgment is in error because it overlooked or misconstrued material evidence or misapplied the law.
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> 3. This power must be "exercised sparingly" to avoid fraud and abuse of process.
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> 4. The underlying rationale for the unfettered discretion is to prevent a miscarriage of justice.
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> 5. In general, reconsideration of an issue is not an alternative to an appeal.
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> 6. The burden of persuasion rests with the applicant, who must show that a miscarriage of justice would probably occur unless the issue is reconsidered and decided in his favour.

[27] These principles, in my view, are more applicable to trials by judge alone.

DISPOSITION

[28] I am satisfied that I have the jurisdiction to decide this issue of whether I should give reasons on whether the evidence in this case raises the probability of malice. The order granting judgment to the plaintiffs has not been entered. This Court should exercise its discretion sparingly. In the case at bar, it is the non direction of the jury charge on the probability of malice that may be an error. However, that issue will be squarely before the Court of Appeal.

[29] The case law previously discussed is distinguishable from the facts before me as each case involved some reference to the issue of probability of malice before putting the question of malice to the jury. *Stuart v. Hugh* is the case which comes closest to the facts at bar. However, Verhoeven J. was clear that the issue was addressed and he exercised his discretion to decide the matter after the jury verdict, presumably to avoid a delay in putting malice to the jury.

[30] The case at bar is distinguishable because there was no reference at all to the issue of probability of malice.

[31] So, in the case at bar, it is not an issue of completing the record as in *Stuart v. Hugh.* Rather, in my view, it is an issue of correcting or amending the record which I do not consider to be appropriate.

[32] I am alive to the fact that Justice Tysoe was of the view that the Court of Appeal could not address the issue of malice as it is an issue of "state of mind". If that is correct and the Court of Appeal finds an error in that regard, then it may necessitate the ordering of a new trial, which would quite frankly be a financial catastrophe for the litigants should they continue to retain lawyers, as only lawyers can conduct a jury case of this factual and legal complexity.

[33] However, in my view, it is simply too late for me to review the evidence which would require a complete transcript in circumstances in which the issue of probability of malice was never raised or addressed in any way.

CONCLUSION

[34] The application is dismissed. I order that the two Orders for Judgment, one for each defendant, be filed, subject to defence counsel submissions, if any, on their terms. An application for settlement of the Orders may be made in case management.

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VEALE C.J.