IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Sabo* v. *Attorney General of Canada et al.*,
2004 YKSC 30

Date: 20040423
Docket No.: S.C. No. 03-A0074
Registry: Whitehorse

Between:

DANIEL SABO

Plaintiff

And

ATTORNEY GENERAL OF CANADA / HER MAJESTY THE QUEEN IN RIGHT OF CANADA, and MARK RADKE, and GOVERNMENT OF THE YUKON, and SHERI HOGEBOOM and RODERIC P. HILL

Defendants

Before: Mr. Justice R.S. Veale

Appearances:

Daniel Sabo	On his own behalf
Gary W. Whittle	For the Attorney General of Canada and Mark Radke
Zeb Brown	For the Government of Yukon, Sheri Hogeboom and Roderic P. Hill

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mr. Sabo has commenced a defamation action against multiple defendants. The action arises out of allegations that Mr. Sabo made verbal threats to lawyers representing the governments of Canada and the Yukon during discussions relating to another court action. The essence of Mr. Sabo's claim is that these allegations were

e-mailed by another government employee to all the staff in a government department. Mr. Sabo denies making any threats.

[2] The lawyer representing Canada brings an application to strike the amended pleadings on the grounds that it discloses no reasonable claim under Rule 19(24)(a).

[3] The precise issue is whether defamation pleadings must set out the exact words said to be defamatory. The amended statement of claim sets out the words contained in the e-mail but not the actual words that were said that resulted in the e-mail.

FACTS

[4] The application to strike out the amended statement of claim is brought on behalf of the defendant Mark Radke and the Attorney General of Canada.

[5] Mr. Sabo is a self-employed placer miner who has filed a civil action No. 01-A0226 against officials employed by Natural Resources Canada and others on another matter (the other action).

[6] Roderic P. Hill, a manager in the department of Energy, Mines and Resources of the government of Yukon, is the defendant alleged to have written the e-mail.

[7] The defendant Mark Radke is a lawyer representing Canada in the other action. The defendant Sheri Hogeboom is a lawyer representing the Yukon in the other action. Both the governments of Canada and the Yukon are defendants in the defamation action.

[8] The relevant portions of the amended statement of claim are as follows:

> 4. On June 02, 2003, the Defendant Roderic P. Hill published by e-mail to all Environmental Management Resources (EMR) staff in the Yukon Territory, in which Roderic P. Hill made false, misleading, and

defamatory statements of and concerning the plaintiff, the particulars of which are:

a) Mr. Sabo has previously made verbal threats to the federal lawyer Mark Radke, which were reported to the RCMP, and he has also uttered threats in the presence [of] our lawyer Sheri Hogeboom. Ms. Hogeboom's assessment is that we should be concerned about the potential for confrontation between this individual and our staff.

b) Tomorrow (June 3) motions will be made to the court to have some of the defendants removed from the case, and to have the case dismissed. It is possible that if his case is dismissed that he might become angry. I suggest that everyone be vigilant in case this individual presents himself at one of our offices.

c) The court appearance starts at 10:00 a.m., and so any potential threat might come at around noon or thereafter.

5. In their natural and ordinary meaning, the false and defamatory statements complained of herein, particularized above, were meant and understood to mean that the plaintiff committed a criminal offence of uttering threats to Mark Radke and Sheri Hogeboom.

6. By **innuendo**, the words complained of herein, impute, and are understood to mean that;

a) the plaintiff is mentally unbalanced, violent, dangerous, and,

b) a physical threat to these three defendants, and, or, any recipient of said email.

7. The false and defamatory statements also establish a potentially volatile atmosphere between the plaintiff and agents of the Crown in the application of laws and regulations regarding the Land Claims process and the Placer Mining Act, the particulars of which are;

a) the financial chaos to the plaintiff caused by each and every defendant named in S.C. No. 01-A0226, has jeopardized the plaintiff's ability to continue earning his livelyhood (*sic)* placer mining, which in turn has jeopardized the plaintiff's future ownership of said mining property and primary residence, located on Category "A" Settlement land

b) the plaintiff will then be homeless, destitute, and facing potential persecution in removal proceedings.

8. Mark Radke was fully aware of the matters particularized above in paragraph 7 a),b), and in the event of said removal proceedings the

defamatory statements complained of, and imputations thereof, pre-emptively portray the plaintiff in the worst light possible.

9. The Plaintiff denies each and every allegation of making threats, or uttering threats, to Mark Radke or Sheri Hogeboom.

10. The overall tone and negative import contained within the entire context of said defamatory email is that the Plaintiff is mentally unbalanced, violent and a physical threat to these Defendants and EMR staff throughout the Yukon.

11. The defamatory statements and negative import described herein have caused and continue to cause severe damage to the plaintiff's state of mind and personal reputation, as well as emotional upset to himself, friends and family.

12. The **Cause of Action** lies in the Defendant's defamatory statements to police, to all EMR staff (Environmental Management Resources), and to unknown others, which were motivated by malice in law, the particulars of which include but are not limited to the following:

    a) The Defendant Mark Radke had conveyed defamatory statements imputing the commission of a crime, knowing the allegations were false, and causing Defendant Roderic Hill to make similar allegations knowing they were false and knowing Defendant Roderic Hill had not witnessed the events or conversations referred to in his June 02nd 2003 email.

. . .

[9] In reply to a demand for particulars, Mr. Sabo stated that he has no knowledge of the words used by Mr. Radke.

THE ISSUE

[10] The issue to be determined is whether Mr. Sabo's amended statement of claim should be struck out as against Mr. Radke and Canada for failing to plead the exact words said by Mr. Radke that resulted in the publication of the e-mail.

THE LAW

[11] The essential requirement for a cause of action in defamation are:

1. That the words about which the plaintiff complains are defamatory,

2. That they referred to the plaintiff, and

3. That they were published to a third person.

See Raymond E. Brown, *The Law of Defamation in Canada*, 2nd ed. (Toronto: Carswell, 1999).

[12] The *Defamation Act,* R.S.Y. 2002, c. 52, contains the following relevant sections:

> **2** An action lies for defamation and may be brought without alleging or proving special damage.
>
> **3** In an action for defamation the plaintiff may allege that the matter complained of was used in a defamatory sense, specifying the defamatory sense without alleging how the matter was used in that sense, and the pleading shall be put in issue by the denial of the alleged defamation; and, if the matters set forth, with or without the alleged meaning, show a cause of action, the pleading is sufficient.

[13] It is also clear that publication may be done by some other person. (See *Brown* at page 1-27).

[14] Rule 19(24) provides for striking out claims as follows:

> 19(24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, 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 or the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[15] Although it was not referred to by counsel, there is also Rule 19(12) which applies specifically to libel and slander actions. It states:

> 19(12) In an action for libel or slander,
>
> (a) where the plaintiff alleges that the words or matter complained of were used in a derogatory sense other than their ordinary meaning, the plaintiff shall give particulars of the facts and matters on which the plaintiff relies in support of that sense, and
>
> …

[16] In applications to strike out a pleading as disclosing no reasonable claim, the court assumes the facts alleged in the pleading are true. No other evidence should be considered. The court must determine if it is "plain and obvious" that the pleading discloses no reasonable claim.

[17] In *Hunt* v. *Carey Canada Inc.*, [1990] 2 S.C.R. 959 at para. 33, Wilson J. added:

> … if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

ANALYSIS

[18] Counsel for Canada and Mr. Radke submitted that Mr. Sabo's claim should be struck out because it does not set out the actual defamatory words attributed to Mr. Radke. Mr. Sabo states that he does not know the words that passed between Mr. Radke and Mr. Hill, nor the words that were allegedly reported to the R.C.M.P.

[19] Counsel for Canada and Mr. Radke relied upon the general principle that the exact words must be pleaded in a defamation action so as to permit the defence to know the precise case against it. See *Shannon* v. *King*, [1931] 2 W.W.R. 913 (B.C.C.A.) and *Lougheed* v. *Canadian Broadcasting Corp*, [1979] 3 W.W.R. 334 (Alta C.A.). Counsel for Canada cited two cases in particular that supported the application of the general principle that the exact words of defamation are required.

[20] In *Rosen* v. *Alberta Motor Assn. Insurance Co.,* [1994] 1 W.W.R. 719 at para. 8, Fruman J. concluded that the Court of Appeal in Lougheed did not derogate from the general rule requiring specific words to be set out. She struck out a statement of claim where the defamatory statements were said to be "words to the effect that" the Plaintiffs were liars, arsonists, have committed perjury and arson and have attempted to defraud the insurance companies. She concluded that the plaintiffs were relying upon inferences and engaging in a fishing expedition. She also found that the plaintiffs' pleadings gave no indication that they were acting in good faith or that the words had been published. The pleadings gave no indication of the date, times or people by whom and to whom the statements were made. This case can be distinguished in that Mr. Sabo has pleaded the date, the person who published the alleged defamation, the persons to whom the

alleged defamation was published as well as the content of the alleged defamation in the e-mail.

[21] In *McNabb* v. *Equifax Canada Inc.* [1999] M.J. No. 503 (Man. Q.B.), Beard J. struck a statement of claim as it did not use the word “defamation” in the claim and there was no direct quote of the alleged defamatory statement and no reference to the basis for alleging publication by the defendants. The case is distinguishable from the facts pleaded before me as McNabb Sr. heard the actual words claimed to be defamatory but did not plead them. In the case of Mr. Sabo, he did not hear the words allegedly said by Mr. Radke to Mr. Hill who published the e-mail.

[22] Mr. Sabo relies upon *Magnotta Winery Ltd.* v. *Ziraldo* (1995), 25 O.R. (3^{d}) 575 (Ont. Ct. (Gen. Div.)) at para. 14 where Lane J. stated:

On these authorities, it is open to the court in a limited set of circumstances to permit a plaintiff to proceed with a defamation action in spite of an inability to state with certainty at the pleading stage the precise words published by the defendant. The plaintiff must show:

> - that he has pleaded all of the particulars available to him with the exercise of reasonable diligence;
>
> - that he is proceeding in good faith with a prima facie case and is not on a “fishing expedition”; normally this will require at least the pleading of a coherent body of fact surrounding the incident such as time, place, speaker and audience;
>
> - that the coherent body of fact of which he does have knowledge shows not only that there was an utterance or a writing emanating from the defendant, but also that the emanation contained defamatory material of a defined character of and concerning the plaintiff;
>
> - that the exact words are not in his knowledge, but are known to the defendant and will become available to be pleaded by discovery of the defendant, production of a document or by other defined means, pending which the plaintiff has pleaded words consistent with the information then at his disposal.

[23] *Magnotta Winery Ltd.* v. *Ziraldo* case is more in line with the less stringent test for determining the validity of a pleading set out in the following quote from Brown, *supra*, at p 19-24 and 19-25:

> The more modern rule is to permit a plaintiff to plead and prove words that are substantially but not precisely the same as those which were spoken. It is not necessary for the plaintiff to plead or allege verbatim the exact words; it is sufficient if they are set out with reasonable certainty. Not every word must be proved if the variance or omission does not substantially alter the sense of the meaning of the words set out in the pleading. The test is whether the claim is pleaded with sufficient particularity to enable the defendant to understand whether the words have the meaning as alleged or some other meaning, and to enter whatever defences are appropriate in light of that meaning. It is impossible to require absolute precision in the pleading of oral communications; it is sufficient if there is certainty as to what was charged. If the words proved are substantially to the same effect as those used in the pleading, the pleading should stand.

[24] Counsel for Canada and Mr. Radke submit that Mr. Sabo does not come within the *Magnotta Winery Ltd.* v. *Ziraldo* exception because he did not exercise “reasonable diligence” by questioning the R.C.M.P. on the exact wording used by Mr. Radke in his report to them. In my view, that imposes too great a burden on Mr. Sabo. In any event, it would not reveal the exact words spoken or written to Mr. Hill, the alleged publisher of the defamation. Mr. Sabo cannot be expected to plead the words that passed between Mr. Radke and Mr. Hill as he has no knowledge of them.

[25] Mr. Sabo has pleaded the date of the email, the person who published it and the staff to whom it was communicated. He has also pleaded the specific contents of the

email that he alleges is defamatory. In my view, that is enough to allow Canada and Mr. Radke to determine the facts alleged and what defences are available to them.

[26] Although the amended statement of claim may be somewhat novel giving rise to a potentially strong statement of defence, I do not find that it contains a radical defect.

[27] The application to strike out the statement of claim and other documents is dismissed. Costs may be spoken to if necessary.

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VEALE J.