Court of Appeal File No.: C59074

COURT OF APPEAL FOR ONTARIO

BETWEEN:

JOANNE ST. LEWIS

Plaintiff
(Respondent)

and

DENIS RANCOURT

Defendant
(Appellant)

NOTICE OF CONSTITUTIONAL QUESTION

May 12, 2015

Dr. Denis Rancourt
(Appellant)

The appellant, Denis Rancourt, intends to question the constitutional validity and applicability of the common law test or rule for making permanent injunctions against defendants following rulings in civil lawsuits for defamation, and intends to claim remedies under subsection 24(1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Ontario.

The question is to be argued on Friday, June 26, 2015, at 10:30 AM, at the Court of Appeal for Ontario, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

The court confirmed that the appeal is filed and perfected, by letter dated April 30, 2015, which was received by the appellant on May 5, 2015.

There are three constitutional issues:

(1) Barring pleaded defences at trial:

The appellant claims that his s. 2(b) *Charter* right of freedom of expression was infringed or denied when, in this defamation action, the trial judge instructed the jury "there is no defence for you to consider".

(2) Permanent injunction for unknown expression:

a. Is the common law test for making a permanent injunction — against a defendant following a ruling in civil lawsuit for defamation — constitutional?
b. The appellant claims that his s. 2(b) *Charter* right to freedom of expression is infringed or denied by the permanent injunction ordered against him.

(3) Chill from costs of trial:

The appellant claims that his s. 2(b) *Charter* right of freedom of expression was infringed or denied by the order for costs of the trial, and that such costs in a defamation case are unconstitutional.

The following are the material facts giving rise to the constitutional questions:

<u>Barring pleaded defences at trial</u>

1. In his opening statement to the jury, the defendant/appellant explained his fair comment defence and described the evidence in support of the fair comment defence. He also explained his limitation period defence, and the main question of fact about the limitation period (When did the plaintiff reasonably become aware of the blog?).

2. During the first day of evidence at trial, the plaintiff/respondent entered all the evidence needed for the defendant's fair comment defence, while the defendant was in the courtroom at trial.

3. At the start of the second day of evidence at trial, the defendant expressly left the trial, without abandoning his defence. He also sent an email to the court expressing that he had not abandoned his defence, and this email was acknowledged on the trial record by the trial judge.

4. In this defamation case:
   (a) The defendant duly filed a statement of defence that was never struck
   (b) The defendant duly participated in all the (many) pre-trial motions
   (c) The defendant duly participated in all the pre-trial hearings
   (d) The defendant was present in court for all or part of 9 of the 15 trial days, including: trial motions, voir dires, opening statements to the jury, evidence of the plaintiff, jury's verdict, and motion for permanent injunction, while otherwise expressly choosing to be absent from the trial
   (e) The defendant never said he was abandoning his defence, and expected the defences to be put to the jury
   (f) The defendant told the court in writing during trial that he was not abandoning his defence, and this message was acknowledge on the trial record by the trial judge
   (g) The trial judge never made a finding that the defendant had abandoned his defence
   (h) There was never a finding in default
   (i) A full trial was held, even though the defendant expressly chose to be absent after the first day of evidence and until the jury verdict

5. During the charge to the jury, the trial judge said "The defendant here has not introduced any evidence establishing a defence. Therefore, there is no defence for you to consider.", and no questions were asked of the jury about the fair comment defence, or about the limitation defence.

6. The jury found that the two blogposts complained of were defamatory, and did not admit any defences.

Permanent injunction for unknown expression

7. After the jury verdict, the plaintiff made a motion at trial for a permanent injunction. The defendant argued that the requested permanent injunction was a violation of s. 2(b) of the *Charter*.

8. The trial judge used the common law test ("test") for making a permanent injunction after a finding of defamation, which is expressed in *Astley* as:

> Permanent injunctions have consistently been ordered after findings of defamation where either (1) there is a likelihood that the defendant will continue to publish defamatory statements despite the finding that he is liable to the plaintiff for defamation; or (2) there is a real possibility that the plaintiff will not receive any compensation, given that enforcement against the defendant of any damage award may not be possible

***Astley v. Verdun*, 2011 ONSC 3651 (CanLII), at para. 21**

9. The constitutionality of the said common law test has never been reviewed by an appellate court in Canada.

10. In the entire time since the 2011 publishing of the two impugned blogposts to the present, the defendant/appellant has never written a single word that was not within the four corners of the two impugned blogposts. There is not an iota of evidence that the defendant made different defamatory comments or opinions of the plaintiff/respondent than the stings contained in the two blogposts complained of in the Statement of Claim.

11. There is no evidence that in the four years since 2011 the defendant ever tried to contact the plaintiff. There is no evidentiary basis for a restraining order.

12. The impugned permanent injunction order includes:
    (a) a permanent bar against quoting any of the "statements the jury has found to be defamatory", irrespective of the context;
    (b) a permanent bar against making any unknown "defamatory statement about the Plaintiff";
    (c) an obligation to provide unknown "reasonable assistance" to the plaintiff in obtaining "removal or take down" from non-parties;
    (d) a restraining order prohibiting "contacting or communicating with the Plaintiff".

Chill from costs of trial

13. In his reasons for the permanent injunction, the trial judge found:

> The possibilities of payment of the costs, or the award of damages that the defendant suggests exist are, frankly, pure fantasy. There is no reasonable prospect he will be able to pay.

14. Costs of trial were determined after trial, by written submissions.

15. The entire legal costs of the private plaintiff/respondent are paid in full by the non-party University of Ottawa.

16. The unemployed and self-represented defendant provided affidavit evidence, with documentary exhibits, to prove that he is impecunious.

17. The total unpaid damages and costs ordered against the defendant/appellant to date is more than $1 million, including costs of trial of $444,895.00.

18. There is a judicial finding in the case (motions judge Kane J.) that conduct during the litigation of the plaintiff's lead counsel was "one of many causes of delay in getting this action on to trial thereby leading to more motions and additional costs."

19. The entire claim is against two (2) blogposts (published February 11, 2011, and May 18, 2011) on the defendant's personal blog "U of O Watch", hosted on the free blog provider "Blogger.com". The second blogpost is a comment about the first blogpost.

20. The plaintiff herself is a nationally recognized law professor and expert. The professional colleagues of the plaintiff are lawyers, law professors, and law students — persons one would expect to have discerning minds, and who are not susceptible to comments made in non-professional language on the personal blog of a fired professor (the defendant).

21. No actual damage to the plaintiff's reputation was claimed, and there is virtually no evidence of any actual damage to reputation:
    - there was no loss of employment
    - there were not fewer invitations to speak at events or conferences
    - there were no demotions and there was no loss of promotion opportunities
    - there were not fewer requests to author studies or reports

- there was no loss of professional status
- there was no loss of memberships on boards or committees
- there were no increased rejections to publish academic work
- there was not more difficulty in obtaining research funding
- no professional privileges were denied by the employer
- there was not less demand for the Plaintiff's work from her employer
- there was not more difficulty in hiring research assistants
- there was no reported avoidance by the community

The following is the legal basis for the constitutional questions:

Barring pleaded defences at trial

22. At the final hour, in the charge to the jury, the trial judge barred the jury from considering any defences, by not putting the defences to the jury, and by stating to the jury:

> "The defendant here has not introduced any evidence establishing a defence. Therefore, there is no defence for you to consider."

23. This is a violation of the trial judge's duty to uphold the constitution, and it is an infringement or denial of the defendant's s. 2(b) *Charter* right to freedom of expression, which is not justified in a free and democratic society: One cannot have a trial, not make a determination of default or abandonment, and bar defences at the final hour in the charge to the jury in a defamation case where more than sufficient evidence supporting the defences was entered to make a determination.

Permanent injunction for unknown expression

24. The said "test" *prima facie* offends the values of a free and democratic society because only individuals with the backing of significant financial resources can enter the fray of discourse on matters of public interest. The critics without money are permanently barred from unknown expression, with the possible consequence of imprisonment.

25. The guiding principle described by the Supreme Court of Canada

> The law of defamation does not forbid people from expressing themselves. It merely provides that if a person defames another, that

> person may be required to pay damages to the other for the harm caused to the other's reputation.
>
> ***Grant v. Torstar Corp.*, [2009] 3 SCR 640, 2009 SCC 61 (CanLII), at para. 2**

is being replaced by deterrents including jail for those who cannot pay. On the other hand, an impecunious person who continues defaming the same individual despite a judgement designed to deter or who has already defied an interim injunction (Astley) is clearly not a credible person who can cause significant reputation damage. Why then, in the *Charter* context, would there be a need to threaten such a person with jail or put them under house arrest (*Astley*) for internet postings, without the plaintiff ever being required to show actual harm to reputation?

26. The provisions of ordering no future unknown defamations (as in the instant case) and of ordering not to make any future statement about the plaintiff are particularly problematic because exactly the same established principle as for interim injunctions is relevant to the circumstances: in a democratic society the courts will virtually never impose prior restraints on unknown expression, not knowing if the alleged or presumed future defamation would be protected by law.

> The granting of injunctions to restrain publication of alleged libels is an exceptional remedy granted only in the rarest and clearest of cases. That reluctance to restrict in advance publication of words spoken or written is founded, of course, on the necessity under our democratic system to protect free speech and unimpeded expression of opinion. <u>The exceptions to this rule are extremely rare</u>. [Emphasis added]

***Canada Metal Co. Ltd. et al. v. Canadian Broadcasting Corp. et al.*, 1975 CanLII 661 (ON DC), 2nd para.**

27. The appellant will submit that the said principle is even more important in the case of a *permanent* injunction, which does not have a procedural time limitation.

<u>Chill from costs of trial</u>

28. Whereas costs do not normally give rise to a suppression of a Charter right or freedom, in a defamation case there are special circumstances that can attract Charter scrutiny of costs, regarding the s. 2(b) guaranteed freedom of opinion and expression.

29. Most directly, and as is illustrated in the instant case, large ordered costs that cannot be paid have become part of the “test” being applied for awarding permanent injunctions that directly suppress even unknown expression of a defendant, with possible consequences of imprisonment. The trial judge, here, did apply the said “test”.

30. Less directly, if a plaintiff has the luxury to spend unlimited resources and hires expensive lawyers in pursuing a defamation action, and if the losing defendant, who did not have a matching budget, must pay in proportion to the resulting extravagant costs, then this creates an excessive chill in society whereby no person of ordinary means can dare to criticize wealthy individuals or professionals backed by wealthy institutions.

31. Thus, only wealthy individuals and those backed by corporations with insurance policies, such as written and cartoon editorialists with major media corporations, are able to criticize professional and government workers who have employers willing to fund defamation claims for criticisms of the work done by the individual claimants. This discrimination on the basis of financial power, arising from the costs mechanism responsible for the said excessive chill, defeats the goals of an inclusive democratic society and circumvents *Charter* protection for opinion and expression.

32. Criticism on matters of public interest is a rough trade. Few material criticisms of a professional's work and political motives do not have a tendency to reduce the reputation of the professional. Likewise, sting is an essential communicative element of a fundamental criticism. This is why defamation is protected by law in many circumstances, and with the fair comment defence in particular. Sophistry such as "your expression is not suppressed, just don't defame", is just that — sophistry. When combined with risks of asymmetrically large costs or jail, it becomes more than academic sophistry; it becomes antithetical to a free and democratic society.

33. The appellant will submit that applying the costs practice of awarding costs in proportion to the actual costs of the plaintiff's side is contrary to *Charter* values and is harmful to society, in the circumstances of this case.

34. Furthermore, the costs order, in the circumstances of this case, is in violation of Canada's obligations under the *International Covenant on Civil and Political Rights*.

General comment No. 34, *International Covenant on Civil and Political Rights*, Human Rights Committee, 102nd session, CCPR/C/GC/34, at paragraph 47, regarding defamation law: "Where relevant, States parties should place reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party."

May 12, 2015

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Appellant

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RCP-E 4F (April 11, 2012)

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Plaintiff (Respondent) Defendant (Appellant)

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COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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