Court File No. 398/94

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)

BETWEEN:

PANIOTE KATSIAPIS

Plaintiff

- and -

THE NORTH BAY NUGGET,
BOB HULL, and MARCEL LeMARCHE

Defendants

PLAINTIFF'S FACTUM

PART I - FACTS

1. In the course of reporting on a lengthy murder trial, the defendants reported on evidence given by a Crown witness during that trial that suggested that the plaintiff had paid the accused to murder the victim and that the plaintiff's meat-packing plant would be used to dispose of the body. The Crown witness (who had already pleaded guilty to his part in the murder) also suggested at trial that the accused had threatened him that the plaintiff was a member of the "Greek mob" and would "get" the witness if he did not participate in the murder. That evidence was never presented by the Crown in order to suggest that the plaintiff was, in fact, involved with organized crime or was in fact paying the accused to commit the murder. Nor did the police ever make any such suggestion, based on their investigation. Finally, the Crown never suggested that the threat was indeed true, but merely that the accused had made it to the witness.

2. During the course of the lengthy trial, the plaintiff sought to intervene in some way so as to minimize the damage to the plaintiff's reputation being done by the witness's allegations as reported by the defendants. The plaintiff was denied any such opportunity and the plaintiff was unable to take any steps during the length of the trial to redeem his reputation that was being damaged in a small community where he was a well-known and respected businessman.

3. The defendants' reporting on the trial damaged the plaintiff's reputation by unfairly and inaccurately presenting those proceedings to its readers, which reports published to its readership at large the defamatory allegations of the witness. In reporting on these court proceedings, the defendants failed to accurately summarize the evidence given in court and the presentation of that evidence to its readers was unfair to the plaintiffo fairly present that evidence to the reader because, *inter alia*, their reports (including sensationalising headlines and cutlines to stories) conveyed to the ordinary reader that there was some substance to the witness's allegations that the plaintiff was a member of the "Greek mob", that the plaintiff had paid the accused to kill the victim, and that the plaintiff was threatening to "get" the witness if he did not cooperate. The reports failed to present to the reader the fact that neither the Crown nor police ever believed these allegations of the Crown's chief witness to be true, that even the witness himself doubted the threat he alleged had been made to him that the plaintiff would "get" him, and that cross-examination showed the witness had changed his story several times and only added the reference to the plaintiff at a late stage.

4. When the plaintiff finally did get an opportunity to deny the allegations made by the witness, the defendants failed to report those denials with any prominence, failed to report that the Crown (whose key witness had made the allegations) did not cross-examine the plaintiff or challenge his position in any way. The overall result was to leave the ordinary reader with the impression that the allegations against the plaintiff were of some legitimacy, when in fact they had been completely discredited.

5. Both during and after the trial, the plaintiff's lawyers communicated to the defendants the damage that was being done to the plaintiff's reputation by the inaccurate and unfair reports, and requested that the defendants take steps to repair that damage. Despite various proposals by the plaintiff for a reasonable statement of explanation or contradiction, the defendants refused or neglected to publish any such statement, evenin the form of a letter to the editor submitted by the plaintiff's lawyer in North Bay.

6. The facts upon which the court should decide the motion for summary judgment are set out in more detail in the plaintiff's affidavit submitted in response to the defendants' motion.

Affidavit of Paniote Katsiapis, sworn December 4, 1997

PART II - ISSUES & PLAINTIFF'S POSITION

7. There are four issues raised in this proceeding:

(1) Should the defendants' motion for summary judgment be granted?

(2) Are the words complained of protected by a qualified privilege at common law as "fair and accurate" reports of judicial proceedings?

(3) If the defence of qualified privilege is made out, is that privilege defeated because either the words complained of were published maliciously by the defendants, or the conduct of the defendants was otherwise such as to exceed the legitimate purpose of the privilege?

(4) Are the words complained of protected, pursuant to the *Libel and Slander Act*, by an absolute privilege attaching to reports of judicial proceedings because:

(a) they constitute "fair and accurate" reports of judicial proceedings;

and (b) the defendants published a "reasonable statement of explanation or contradiction" by or on behalf of the plaintiff?

8. The plaintiff submits that these questions should be answered as follows:

(1) The defendants' motion for summary judgment should be denied, as there are numerous disputed questions of fact that must be put to the jury;

(2) The words complained of do not constitute "fair" and "accurate" reports of the judicial proceedings in question and therefore are not protected by either a common law or statutory privilege;

(3) In the alternative, if it is found that the reports in question are "fair" and "accurate", then the defendants' qualified privilege at common law is defeated by their malice or other conduct that exceeded the scope of the privilege; and

(4) Even if it is found that the reports in question are "fair" and "accurate", then the defendants are still unable to avail themselves of the absolute privilege granted by statute, because they refused or neglected to publish a "reasonable statement of explanation or contradiction" by or on behalf of the plaintiff.

PART III - ARGUMENT

A. MOTION FOR SUMMARY JUDGMENT

ISSUE #1: Should the defendants' motion for summary judgment be granted?

9. In the case at bar, there remain fundamental questions of disputed fact that must be put to the triar-of-fact for determination. In *Burnett v. C.B.C. (No. 2)*, the court confirmed that questions which must go to the jury include:

(i) the defamatory meaning of the words complained of;

(ii) whether the defendant's report of judicial proceedings constitute a "fair and accurate report", which condition the defendants mustprove in order to claim the protection of both the common law and statutory privileges for reports of judicial proceedings; and

(iii) if the defendant makes out the defence of qualified privilege, whether the defendant's conduct was malicious or otherwise such that it exceeds the scope of that privilege.

Burnett v. C.B.C. (No. 2) (1981), 48 N.S.R. (2d) 181 (S.C.) (QL).

10. Other authorities confirm that these are questions for the jury:

(i) Words referring to the plaintiff

The question of whether the words refer in fact to the plaintiff is a matter for the jury or for a judge sitting as a judge of fact, but as a prior question it has always to be ascertained whether there is any evidence upon which a conclusion that they do so refer could reasonably be reached.

Fraser v. Sykes (1974), 39 D.L.R. (3d) 321 (S.C.C.)

(ii) Defamatory Meaning

A defendant's motion for summary judgment dismissing a defamation action must fail where the words complained of are possible or capable of an interpretation that they defame the plaintiff.

Black v. Canadian Newspapers Co. (1991), 6 C.P.C. (3d) 324 (Gen. Div.)

If the words complained of are capable of both a defamatory meaning and an innocent meaning, the judge must still put them before the jury, as it is a question of fact for the jury as to what meaning the words did in fact convey.

Jones v. Skelton, [1963] 3 All E.R. 952 at 963 (P.C.).

(iii) Fairness and accuracy of reports

Whether a report of a judicial proceeding is fair and accurate is a question of fact, properly within the determination of the jury. If there is any evidence of unfairness, the question ought to be left to the jury.

Cowie v. Robinson (1928), 62 OLR 351 at 357 (C.A.)

Allen v. John Fairfax & Sons Ltd., [1971] 1 N.S.W.L.R. 773

at 780 (C.A.)

Goldsbrough v. John Fairfaix & Sons Ltd. (1934), 34 S.R. (N.S.W.) 524 at 528.

Kimber v. The Press Association (1892), [1893] 1 Q.B. 65 at 74 (C.A).

Cobb v. Oklahoma Pub. Co., 140 P. 1079 at 1081-82 (1914).

The publication of a report of judicial proceedings "is not privileged unless the Jury believe it is a fair, accurate, and *bona fide* report. If they believe that it is so, then undoubtedly their verdict must go for the defendant. I cannot withdraw the case, because the defendant says this is privileged occasion and that there is nothing to go to the Jury. Before I can hold that, the Jury must answer the preliminary question.
Bonney v. Thomas, [1881] S.A.L.R. 15 at 18.

A judge may withdraw the issue of fairness and accuracy of the report from the jury only if a jury's decision in favour of the plaintiff would be set aside as perverse.

Kingshott v. Associated Kent Newspapers Ltd., [1991] 1 QB 88 at 99 (CA)

(iv) Whether privilege is lost

While the question of whether an occasion is privileged is a question for law for the court to decide, when malice can defeat the privilege, its absence or presence is a question of fact for the jury.

Joyce v. Globe Newspaper Co., 245 N.E. 2d 822 (1969)

Cobb v. Oklahoma Pub. Co., 140 Pac. 1079 (1914)

A defendant's motion for summary dismissal of a defamation action, arising out of hearsay statements made in course of litigation, must fail where there is a genuine issue for trial on the defence of qualified privilege.

Larche v. Middleton (1989), 69 O.R. (2d) 400 (H.C.J.).

(v) Damages

The quantum of damages for defamation is a matter to be determined by the jury.

Broome v. Cassell & Co., [1972] AC 1027 at 1065-67 (H.L.)

11. The plaintiff also submits that it is a question of fact for the jury to determine whether the defendant printed a "reasonable statement of explanation or contradiction", which publication is a prerequisite to claiming the absolute privilege for reports of judicial proceedings under the Libel & Slander Act s. 4. Although there appears to be no reported case considering this proposition, the plaintiff submits that, like the "fairness" and "accuracy" of a report, the question of whether the defendant published a "reasonable" statement (or whether the defendant refused to publish a "reasonable" statement proposed by the plaintiff) is a question of fact that should be left to a jury.

12. In order to grant the defendant's motion for summary judgment, the court must be satisfied that there is "no genuine issue for trial" with respect to the plaintiff's claim.

Rule 24.04(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended.

13. In the case of a defendant's motion for summary dismissal of the plaintiff's claim, the test of there being "no genuine issue for trial" has also been articulated as requiring that the defendant prove:

> that *no facts* exist on which "a reasonable jury, properly instructed, might found a verdict."
>
> *St. Pierre et al. v. Bernardo* (1988), 26 CPC (2d) 97 (Ont HCJ)
>
> or,
>
> that the plaintiff's case has "no chance of success" or that is "plain and obvious that the action cannot succeed".
>
> *Prete v. Ontario (Attorney General)* (1993), 16 O.R. (3d) 161 at 170 (C.A.), leave to appeal to S.C.C. refused 110 D.L.R. (4th) vii.

14. The onus of proving there is no genuine issue for trial is upon the defendants.

1061590 Ontario Ltd. v. Ontario Jockey Club (1995), 21 O.R. (3d) 547 (C.A.)

15. The court's function on a motion for summary judgment is not to resolve an issue of fact but to determine whether a genuine issue of fact exists. As a general rule, a trial is required where there is an issue of credibility. The defendant "must" prove that "it [is] *clear* that a trial is unnecessary."

Irving Ungerman Ltd. v. Galanis (1991), 4 OR (3d) 545 at 551 (C.A.).

Filion v. 689543 Ontario Ltd. (1994), 68 O.A.C. 389 (Div. Ct.)

16. In assessing whether to grant the defendants' motion for summary dismissal of the plaintiff's claim, the court must also consider the importance of the trier-of-fact in defamation cases, and that granting the defendant's motion for summary judgment will remove from the jury questions which ought properly to be decided by it.

> Actions for libel have traditionally been tried by juries. The defences of "absolute privilege" and "qualified privilege" are not new. Past juries have dealt with them; juries in 1987 are at least as capable of following judicial instructions as their forebears.... The cases indicate to me that the trend is to extend rather than limit a party's right to a jury trial outside the exclusions set out in s. 121 of the *Courts of Justice Act, 1984*.
>
> *Sussman v. Eales* (1987), 61 O.R. (2d) 316 at 318-319 (Supr. Ct.)

17. Where the plaintiff has properly sought a jury trial, those questions should not be removed from the jury by granting a motion for summary judgment unless the defendant can meet the high threshold of showing "no genuine issue for trial" or that the plaintiff's claim has "no chance of success". The court should be loathe to determine issues in a summary fashion.

> *Horton v. Joyce* (1990), 45 C.P.C. (2d) 69 (Ont. H.C.J.)

18. The B.C. Supreme Court was unwilling to grant a motion for summary judgment where to do so was to remove from the trier-of-fact these questions which properly should be put to it:

> If there is evidence to go to the jury in a case in which notice for trial by jury has been given and not struck out...,the court cannot deprive a plaintiff of his right to have his case tried by a jury.... Another way of looking at the point is to say that, if the court were to grant [summary] judgment..., it would, in fact, be striking out the notice for trial by jury in circumstances where [the Rule] gives the court no right to do so."

Pentecost v. Kowal (1987), 11 B.C.L.R. (2d) 340 (S.C.) (QL), aff'd (1988), 22 B.C.L.R. 374 (C.A.) (QL).

19. It is inappropriate for a court to make a preliminary determination on a question of law when facts which underpin the question are in dispute, and evidence as to those facts should be heard at trial.

Barnes et al v. Townships of Kaladar, Angelsea, and Effingham (1985), 52 O.R. (2d) 283 (H.C.J.).

Costs of motion for summary judgment

20. A party who fails on a motion for summary judgment shall be penalized by solicitor and client costs payable forthwith unless there was a reasonable basis for bringing the motion.

Rule 20.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 190 as amended.

B. PRIVILEGE FOR REPORTS OF JUDICIAL PROCEEDINGS

21. The defendants claim that the words complained of are protected as reports of judicial proceedings by both an absolute statutory privilege under the *Libel & Slander Act*, and by a qualified privilege at common law.

22. In order to succeed in their claim for either privilege, the defendants must show the

words complained of constitute "fair and accurate" reports "without comment".

Kimber v. Press Association, Ltd. [1893], 1 Q.B. 65 at 68 (C.A.)

Gazette Printing Co. V. Shallow (1908), 41 S.C.R. 339

Libel & Slander Act, R.S.O. 1990, c. L.12, s. 4(1)

23. The plaintiff submits that the defendants cannot establish the "fairness" and "accuracy" of their reports.

ISSUE #2: Are the words "fair" and "accurate" reports of judicial proceedings and therefore protected by a qualified privilege at common law?

24. As summarized in a leading case on the issue of privileged reports, there are several principles that must be considered in determining whether a report of judicial proceedings is fair or accurate:

(1) the report should not be coloured or garbled;

(2) libel may be found in headlines, and headlines are only priviileged when they give a fair idea of the article which follows, which must itself be a fair and accurate report;

(3) the fairness and accuracy of a report must be measured by its "natural and probable effect" upon the mind of "the average reader";

(4) undue emphasis may given to part of the publication, which may not be remedied by the remainder;

(5) the failure to report all the facts or a fair summary of all the fact may lead to an inference of unfairness and inaccuracy;

(6) a journalist has no greater rights of privilege than any other citizen;

(7) the report must be a substantially fair account of what transpired;

(8) the defendants bear the burden of proving, on balance of probabilities, all the elements of common law or statutory privilege.

Bennett v. Sun Publishing Co. [1972] 4 WWR 643 (BCSC)

25. In assessing the fairness and accuracy of a report, the jury must look at the whole of the reports. In the words of the judge's summation to the jury in an early case from the United Kingdom:

> ... if you are of the opinion that, *looking at the whole of these communications*, they do not contain a fair, honest, and faithful representation of what passed under the proceedings of that trial, but that, yielding to the impressions of the moment or with the idea of making his articles as taking, as attractive, and as effective as possible, the writer has gone beyond the legitimate bounds of privilege, and that on these considerations he has stated that which is unfair and prejudicial to the man about whom he was writing... you are bound to say so by your verdict.
>
> *Risk Allah Bey v. Whitehurst* (1868), 18 L.T. 615 at 619 (Q.B.)

26. A report must be both "fair" and "accurate", and these have separate meanings.

> The word "fair" includes the following meanings: "free from moral stain; unblemished; free from bias, fraud or injustice; equitable; legitimate."
>
> The word "accurate" includes the following meanings: "executed with care; precise; correct."
>
> *Bennett v. Sun Publishing Co.*, [1972] 4 WWR 643 at 655 (B.C.S.C.)
>
> See also:
>
> *McGrath v. Wellington Publishing Co. Ltd.*, [1932] G.L.R. (N.Z.) 181 (S.C.)
>
> *Federal Capital Press of Australia Pty. Ltd. v. Edwards* (1992),1 08 F.L.R. 118 at 125 (A.C.T.S.C.).

Accuracy

27. An accurate report of judicial proceedings is one that is a substantially correct account of the proceedings that took place in open court. A report is substantially correct if the report carries no greater sting in terms of its libelous impact than what occurred in court.

> *Tedlie v. Southam Co. (No. 3)*, [1950] 2 W.W.R. 633 (Man K.B.).
>
> *Reeves v. American Broadcasting Co.*, 719 F.2d 249 (4th Cir 1988) (Virginia)

Mastandrea v. Lorain Journal, 583 N.E. 2d 984 (1989)

> The doctrine of the authorities is that the report must in effect be a fair and impartial report of what took place with reference to its effect on plaintiff's character... The report is fair and impartial so far as the plaintiff is concerned, if a *verbatim* report of the proceedings would have the same effect on his character as the report made. The only interest the plaintiff has in the accuracy of the report is that it shall be so far accurate as not to be more injuries to him than a verbatim report would be."
>
> *Boogher v. Knapp*, 11 S.W. 45 at 47 (1889), per Brace J.

28. The test of whether a report is "accurate" is an objective one and does not incorporate subjective considerations such as the intention or good faith of the reporter or publisher.

> A report is to "be measured by the natural and probable effect it would have on the mind of the average reader".
>
> *Handelsman v. San Francisco Chronicle*, 11 Cal. App. 3d 381, 90 Cal. Rptr. 188 at 191 (1970)

> "[T]he most important question remains the overall impression which would have been obtained by the ordinary reasonable observer."
>
> *Federal Capital Press of Australia Pty. Ltd. v. Edwards* (1992), 108 F.L.R. 118 at 126 (A.C.T.S.C.)

29. In order to be accurate, the report must give the reader the chance to make up his or her own mind, in that it must put the reader in the same position as if he or she had been present in court to observe the proceedings:

> The privilege given to reports of proceedings in Courts is based upon this, that, as every one cannot be in Court, it is for the public benefit that they should be informed of what takes place substantially as if they were present.
>
> *Furniss v. Cambridge Daily News Ltd.* (1907), 13 T.L.R. 705 at 706 (C.A.).

30. An inaccurate account prevents the reader from making his or her own assessment as if she or he had been present, and is therefore not protected by any privilege (either statutory or common law) because it conveys an incorrect understanding of the proceedings.

> It is obvious that a partial account of what takes place in a court of justice may be the exact reverse of putting the person to whom the publication is made in the position as if he were present himself. *If the evidence of a witness containing matter defamatory to an individual were published, and the cross-examination which showed the witness to be a person unworthy of belief were suppressed, it would obviously be a partial and inaccurate account of what took place*; and if a learned Judge's judgment or summing up to a jury did not, in fact, give reasonable opportunities to the reader to form his own judgment as to what conclusions should be drawn from the evidence given, I think the publication of such partial, and in that respect, inaccurate representations of the evidence might be the subject of an action for libel to which the supposed privilege in what was said by the Judge would be no answer.
>
> *MacDougall v. Knight*, (1889) 14 App. Cas. 194 at 200 (H.L.) [emphasis added]

Fairness

31. Fairness of reporting requires impartiality, in the sense of providing a balanced report. The reporter is not entitled to selectively publish only those facts which she or he pleases, or to leave the reader with an unbalanced view of the plaintiff by virtue of having read the reports. The fairness of the report is to be assessed by the jury.

"The real meaning of the rule is that an abridged or condensed report of judicial proceedings must be fair, not garbled so as to produce misrepresentation nor by suppression of some portion of the proceedings giving an entirely false and unjust impression to the prejudice of the plaintiff. But such questions are matters for decision at the trial and are not relevant to be discussed on demurrer.

Allen v. John Fairfax & Sons Ltd., [1971] 1 N.S.W.L.R. 773 at 780 (C.A.)

"It is obvious, that, if it were allowable to pick out and select particular parts of a judicial proceeding, the privilege would be liable to the most grievous abuse, and that under the colour and pretence of communicating to the public useful and necessary information, which is the legitimate ground for investing such publications with peculiar and extraordinary means of protection, the reputation of individuals would be subjected to most unjust and unmerited calumny."

Folkard, *The Law of Slander and Libel* (5th ed, 1891), cited in Brown, *The Law of Defamation in Canada*, 2d ed, at p. 14-18, fn. 99.

32. While the defendant need not publish all the facts,

"a publisher cannot claim immunity if the facts which tell against the libeled party are selected and those which tell in his favor are omitted"

Cobb v. Oklahoma Pub. Co., 140 Pac. 1079 at 1083 (1914)

and,

"[t]he failure to report all the facts or a fair summary of all the facts may lead to an inference of unfairness and inaccuracy."

Bennett, per Anderson J. At 656

and

> "[i]f...there is a substantial misrepresentation of a material fact prejudicial to the plaintiff's reputation, the report must be regarded as unfair and the jury should be so directed."
>
> *Thom v. Associated Newspapers Ltd.*, [1964] 64 S.R. (N.S.W.) 376 at 380

33. A report will not be "fair", and will therefore not be privileged, if it gives undue emphasis or prominence to inculpatory facts while minimizing those that might explain or qualify them.

> *American Pub. Co. v. Gamble*, 90 S.W. 1005 at 1008 (1906)

34. It has therefore been held that a report will not be fair if its content or emphasis inaccurately conveys to the reader the incorrect imputation of criminal culpability to the plaintiff, by reporting the prosecution's opening statement so as to suggest that all the prosecution's allegations have been proven, or by failing to indicate that such allegations were challenged or weakened by evidence given during the trial.

> *Burnett & Hallamshire Fuel Ltd. V. Sheffield Telegraph & Star Ltd.*, [1960] 1 W.L.R. 502 at 504-505.

> An article purporting to be a report of proceedings in a Court of Justice and consisting mainly of questions put in cross examination suggesting corrupt practice on the part of [a party] but omitting some of his answers in explanation cannot be a fair and accurate report of such proceedings.
>
> *Thompson v. Truth and Sportsman Limited*, (1933) 34 S.R. (N.S.W.) 21 (headnote) (P.C.)

See also:

> *Bowler v. Pogonoski (No. 2)*, [1967] 1 N.S.W.R. 249 at 252-53.
>
> *Bunker v. James* (1980), 26 S.A.S.R. 286

35. An article is not fair when it assumes the truth of the depositions and the guilt of the person accused and includes untrue statements set up as statements of fact

Mitchell v. Victoria Daily Times (1944), 60 B.C.R. 39 at 45 (S.C.)

36. This same principle of "fairness" requires that, if the defendant publishes libels reported in the judicial proceedings, he or she must also report the evidence or other facts contradicting those libels, and if a person is acquitted of a charge, the reporter must not

report that acquittal as if the court or jury were mistaken.

Rumney v. Walter (1892), 8 T.L.R. 256 (Q.B.)

Risk Allah Bey v. Whitehurst (1868), 18 L.T. 615 (Q.B.)

37. Similarly, in order to leave an unfair impression with the reader, where a party has not yet had an opportunity to respond to an allegation before the proceeding is discontinued, in order for the report to be deemed fair, a newspaper must report the reason for the discontinuance and any actions taken with respect to it.

Gobbart v. West Australian Newspapers, [1968] W.A.R. 113 (S.C.).

38. This policy interest in ensuring that reports do not leave unfair impressions finds expression in the *Restatement (Second) of Torts*:

> "It is not necessary to report the entire judicial proceedings at once if, in reporting on a daily basis, the newspaper, after reporting the defamatory parts, does not fail to publish further proceedings that might vindicate the person defamed."
>
> *The Restatement (Second) of Torts*, s. 611, comment f

39. Given the requirement that a report of judicial procedings be fair, and that the whole of the proceeding be considered in assessing the reports' "fairness", if there are facts that could not (for some reason) be reported through the trial and the absence of those facts before the reader leaves the reader with an unfair or inaccurate view of the

plaintiff, then after the proceedings, the defendant must report those matters which tend to contradict other, previously reported matters defamatory of the plaintiff.

Kimber v. The Press Assoc. [1893] 1 Q.B. 65 (C.A.).

Lewis v. Levy, (1858) 120 E.R. 610.

40. In assessing the fairness and accuracy of the reports, the headlines preceding the reports must be considered, as these may leave an incorrect impression or a misleading emphasis to the report that means the privilege is lost. Headlines are privileged "only when they are a fair index of a truthful report" which follows.

Bennett v. Sun Publishing Co., supra at 655-66

Mitchell v. Victoria Daily Times (No. 3) (1944), 60 B.C.R. 39 (S.C.)

Wesolowski v. Armadale Publishers Ltd. (1980), 3 Sask. R. 330 (Q.B.)

41. In the case at bar, the defendants published a headline ("Restaurant payoff") and a cutline ("No reason to lie") which unfairly and inaccurately summarize the evidence given at trial. This headline and cutline unfairly and inaccurately conveyed to the reader an undue prominence and legitimacy to the allegation by the Crown's witness that the plaintiff was connected to organized crime and was paying the accused to commit murder.

ISSUE #3: If the reports are protected by qualified privilege, has that privilege been lost because either the words complained of were published maliciously or the defendant's conduct has otherwise been such as to exceed the scope of the privilege?

42. If the defendants succeed in establishing the fairness and accuracy of the reports complained of, the privilege that protects those reports at common law is only a *qualified* privilege, in the sense that it may be defeated if the plaintiff shows that the report was made with *malice* or the defendant's conduct was otherwise such as to defeat its privilege.

Kimber v. The Press Assn. Ltd., [1893] 1 Q.B. 65 (C.A.)

Hill v. Church of Scientology (1995), 30 C.R.R. (2d) 189 (S.C.C.)

43. Malice is made out where the defendants published the words complained of knowing that said words were false, or recklessly as to whether the words were false. As was stated by the Supreme Court in *Hill v. Church of Scientology*:

> Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes, as Dickson J. pointed out in dissent in *Cherneskey* [(1979), 7 C.C.L.T. 69 (S.C.C.)], "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created: see, also, *Taylor v. Despard*, [1956] O.R. 963 (C.A.). Malice may also be established by showing that the defendant spoke dishonestly, *or in knowing or reckless disregard for the truth*: see *McLoughlin* [*v. Katusy* [1979] 2 S.C.R. 311], and *Netupsky v. Craig*, [1973] S.C.R. 55 at pp. 61-62.

44. Finally, the plaintiff submits that, as set out by the Supreme Court of Canada in *Hill v. Church of Scientology*, *supra*, the defendants' qualified privilege is lost because the conduct of the defendants was highhanded and careless, and exceeded the legitimate scope of the privilege claimed.

> Qualified privilege may also be defeated when the limits of the duty or interest have been exceeded... As Earl Loreburn stated at pp. 320-321 A.C. in *Adam v. Ward, supra*;
>
> > ...the fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that is not relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected.
>
> In other words, the information communicated must be reasonably appropriate in the context of the circumstances existing on the occasion when that information was given.
>
> *Hill v. Church of Scientology*, *supra*.

45. In *Hill v. Church of Scientology*, the defendant was found to have lost the qualified privilege protecting his statements repeating the content of documents filed with the court because his

> ...conduct far exceeded the legitimate purposes of the occasion. [...] While it is not necessary to characterize Manning's conduct as amounting to actual malice, it was certainly *high-handed* and *careless*. It exceeded any legitimate purpose the press conference may have served. His conduct, therefore, defeated the qualified privilege that attached to the occasion.
>
> *Hill v. Church of Scientology*, *supra* at 235

46. For the reasons set out above and in the plaintiff's affidavit made in response to the defendants' motion for summary judgment, the plaintiff submits that the defendants' reports of the

court proceedings were made with malice or were otherwise made in high-handed and careless fashion, such that any privilege attaching to those reports was lost. The defendants' knew that the allegations made against the plaintiff were false and not supported by the Crown, the police, or other evidence given at trial, that in fact the credibility of the allegations had been seriously undermined at trial, and were reckless as to the falsity of these allegations. Nonetheless, they published those allegations without any attempt to fairly or accurately balance their reports so as to not damage the plaintiff's reputation as well-known and respected local business and North Bay citizen, and then, after the conclusion of the trial, refused or neglected to print any reasonable statement that would repair the damage caused by those reports.

ISSUE #4: Can the defendants claim an absolute privilege pursuant to statute: requirement of a "reasonable statement of explanation or contradiction"

47. By statute, a newspaper may claim an *absolute* privilege with respect to fair and accurate reports of judicial proceedings *unless* the newspaper has refused or neglected to insert in the newspaper in which the report complained of appeared a *reasonable statement of explanation or contradiction* by or on behalf of the plaintiff.

> 4(1). A *fair and accurate report without comment* in a newspaper or in a broadcast of proceedings publicly heard before a court of justice, if published in the newspaper or broadcast contemporaneously with such proceedings, is *absolutely privileged* unless the

> defendant has refused or neglected to insert in the newspaper in which the report complained of appeared or to broadcast, as the case may be, a *reasonable statement of explanation or contradiction* by or on behalf of the plaintiff. [emphasis added]
>
> *Libel and Slander Act*, R.S.O. 1990, c. L.12, s. 4(1)

48. The plaintiff submits that the defendant North Bay Nugget did not publish a "reasonable statement of explanation or contradiction" by or on behalf of the plaintiff, and therefore cannot avail itself of this absolute privilege under the statute.

49. As a matter of law, neither a request by the plaintiff for a retraction, nor for an apology, constitute a request for a statement of explanation or contradiction.

> *Khan v. Ahmed* [1957] 2 Q.B. 149.
>
> *Hansen v. Nugget Publishers Ltd.* (1927), 61 O.L.R. 239 (C.A.).

50. However, there are appear to be no reported cases interpreting this requirement under s. 4(1) of Ontario's *Libel and Slander Act*, and no reported cases interpreting the equivalent provisions in the defamation statutes of other provinces.

51. The plaintiff submits that its communications with the defendants included a request that the *North Bay Nugget* publish a statement of explanation or contradiction by him or on his behalf, and that the defendants refused or neglected to publish any such reasonable statement. Certainly the

statement that was eventually published, after several proposed statements from the plaintiff, was not to the plaintiff's satisfaction (which fact was known to the defendants). Furthermore, the plaintiff submits that whether the statement was not "reasonable", and that therefore the defendants may not avail themselves of the the protection afforded by s. 4(1) of the *Libel and Slander Act*.

52. The plaintiff submits that, as the defendants bear the onus of proving all the requisite elements of the statutory privilege, it falls to the defendants to prove that the statement they eventually published was "reasonable".

Bennett v. Sun Publishing Co, supra.

Kimber v. The Press Association, supra.

IV. ORDER REQUESTED

53. The plaintiff respectfully requests an order:

(a) dismissing the defendants' motion for summary judgment, with costs payable forthwith on a solicitor and client basis; and

(b) granting judgment in favour of the plaintiff with damages, interest and costs as requested in the Statement of Claim.

All of which is respectfully submitted

_____ Charles M. Campbell
Solicitor for the Plaintiff