

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Casses v. Canadian Broadcasting Corporation*,
2013 BCCA 200

Date: 20130501

Docket Nos.: CA039665; CA039666; CA039667; CA039668

Between:

Fernando Casses and Dr. Fernando Casses Inc.

Appellants
(Plaintiffs)

And

**Canadian Broadcasting Corporation,
Kathy Tomlinson, Enza Uda**

Respondents
(Defendants)

- and -

Docket: CA039666

Between:

Fernando Casses and Dr. Fernando Casses Inc.

Appellants
(Plaintiffs)

And

Robin Lee Patricia O'Diorne

Respondents
(Defendants)

And

Kathy Tomlinson and the Canadian Broadcasting Corporation

Respondents
(Third Parties)

- and -

Docket: CA039667

Between:

Fernando Casses and Dr. Fernando Casses Inc.

Appellants
(Plaintiffs)

And

Krystal Lee Cook

Respondent
(Defendant)

And

Kathy Tomlinson and the Canadian Broadcasting Corporation

Respondents
(Third Parties)

- and -

Docket: CA039668

Between:

Fernando Casses and Dr. Fernando Casses Inc.

Appellants
(Plaintiffs)

And

**Douglas Backer, Caroline Mitchell
and Elizabeth Watkins**

Respondents
(Defendants)

And

Kathy Tomlinson and the Canadian Broadcasting Corporation

Respondents
(Defendants)

Before: The Honourable Mr. Justice Low
The Honourable Madam Justice D. Smith
The Honourable Madam Justice A. MacKenzie

On appeal from: Supreme Court of British Columbia, January 10, 2012
(*Casses v. Backer*, 2012 BCSC 17, Vancouver Registry No. S098449; *Casses v. CBC*, 2012 BCSC 18, Vancouver Registry No. S115272)

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Place and Date of Hearing: Vancouver, British Columbia
January 9, 2013

Place and Date of Judgment: Vancouver, British Columbia
May 1, 2013

Written Reasons by:

The Honourable Madam Justice D. Smith

Concurred in by:

The Honourable Mr. Justice Low

The Honourable Madam Justice A. MacKenzie

Reasons for Judgment of the Honourable Madam Justice D. Smith:

I. Introduction

[1] Pleadings in defamation proceedings are subject to a number of common law principles and therefore must be crafted with care. Before us are four appeals from orders of Madam Justice Hyslop dismissing the applications of the plaintiffs-appellants, Dr. Fernando Casses and his professional corporation Dr. Fernando Casses Inc. (collectively “Dr. Casses”), to strike the defences pleaded by the defendants-respondents: (i) the named defendants in three defamation actions (the “Personal Defendants”); and (ii) the Canadian Broadcasting Corporation and a CBC journalist, Kathy Tomlinson, (collectively “CBC”) in a fourth defamation action.

[2] In the court below, Dr. Casses applied to strike each of the responses to civil claim, in which the defendants pleaded certain imputed meanings (i.e., a “sting”) from the words complained of (i.e., the alleged defamatory statements of the Personal Defendants), and pleaded the defences of justification, fair comment and responsible communication in the context of those imputed meanings. In support of his motion, Dr. Casses claimed that the imputed meanings as pleaded by the defendants raise new allegations that are “separate and distinct” from those alleged by him in his respective statements of claim. Dr. Casses also applied to strike the defendants’ pleadings on mitigation of damages claiming that they offend the common law principle that permits only the general reputation of a plaintiff (and not specific acts of alleged misconduct) to be pleaded.

[3] The traditional common law approach to the pleading of defences in defamation actions restricted a defendant to pleading a defence based on the imputed meaning (the sting) ascribed to the words complained of by the plaintiff. In *Polly Peck (Holdings) plc and others v. Trelford and others*, [1986] 2 All E.R. 84 (C.A.), the English Court of Appeal concluded that unduly restricting the scope of a defendant’s pleadings in this manner did not provide a fair and balanced approach. In the result, the court expanded the scope of the pleadings rule to permit a defendant to rely on the context of the publication as a whole in order to plead an

alternative or different imputed meaning from the imputed meaning pleaded by the plaintiff. This different or alternative meaning is typically described as a “common sting”.

[4] The court In *Polly Peck* tempered this expansion by limiting the different meaning that a defendant may plead to one that is “reasonably capable of bearing” from the alleged defamatory statements (*Polly Peck* at p. 102). In other words, the imputed meaning of the words complained of as characterized by the defendant, while different, must be similar in character to the imputed meaning of the words complained of by the plaintiff; the different meaning pleaded by the defendant may not raise a separate and distinct sting (i.e., a new libel) in which “the imputation defamatory of the plaintiff’s character in the one is different from the other” (*Polly Peck* at p. 94).

[5] Writing for the court, O’Connor L.J. summarized this new approach to pleadings of defences in defamation actions at p. 102:

In cases where the plaintiff selects words from a publication, pleads that in their natural and ordinary meaning the words are defamatory of him and pleads the meanings which he asserts they bear by way of false innuendo, the defendant is entitled to look at the whole publication in order to aver that in their context the words bear a meaning different to that alleged by the plaintiff. The defendant is entitled to plead that in that meaning the words are true and give particulars of the facts and matters on which he relies in support of his plea It is fortuitous that some or all of those facts and matters are culled from parts of the publication of which the plaintiff has not chosen to complain.

Where a publication contains two or more separate and distinct defamatory statements, the plaintiff is entitled to select one for complaint, and the defendant is not entitled to assert the truth of the others by way of justification.

Whether a defamatory statement is separate and distinct from other defamatory statements contained in the publication is a question of fact and degree in each case. The several defamatory allegations in their context may have a common sting, in which event they are not to be regarded as separate and distinct allegations. The defendant is entitled to justify the sting, and once again it is fortuitous that what is in fact similar fact evidence is found in the publication.

...

In all cases it is the duty of the court to see that the defendant, in particularising a plea of justification or fair comment, does not act oppressively. Whether the particularisation of the plea is oppressive depends

not only on the facts of each case, but also on the attitude of the plaintiff. I say this because a plaintiff can limit the extent and cost of inquiry at trial by making timely admissions of fact.

[6] *Polly Peck* was adopted by the Ontario Divisional Court in *Pizza Pizza Ltd. v. Toronto Star Newspapers Ltd.* (1998), 167 D.L.R. (4th) 748. There, Mr. Justice Sharpe, writing for the divisional court, articulated a three-fold rationale for the new approach: a trier of fact should not be limited to a finding that the meaning of the sting is as pleaded by the plaintiff (para. 18); the plaintiff should not have the exclusive right to define the issue for trial (para. 19); and fairness dictates that the defendant be given the opportunity to provide a full explanation for its position because to hold otherwise would constitute “an unacceptable limitation of freedom of expression and freedom of the press” (para. 20). The Ontario Court of Appeal affirmed this ruling and fully adopted the reasons of Justice Sharpe: (2000), 187 D.L.R. (4th) 761.

[7] In my view this Court should also adopt *Polly Peck*. The central issue raised by Dr. Casses in each of the four appeals is whether the chambers judge erred in her application of the principles from *Polly Peck*, and in particular, in concluding that based on the context of the publications as a whole, the defences as pleaded raised a different but permissible common sting.

[8] Dr. Casses also submits the chambers judge erred in refusing to strike the defendants’ pleadings on mitigation of damages, which include allegations of specific prior acts of professional misconduct by Dr. Casses. He argues that the mitigation pleadings, as they now exist, offend the common law pleadings rule on this issue.

[9] Lastly, Dr. Casses advances a new argument on appeal. He submits that the CBC has impermissibly pleaded an alternative meaning to the words complained of that is more serious or injurious than the imputed meanings he has pleaded. In advancing this argument, he invites this Court to adopt recent jurisprudence from the Supreme Court of Australia that introduced a further limitation to the *Polly Peck* expansion. As this ground of appeal is raised as a matter of first instance in this

Court, I would decline to address it in the absence of an evidentiary record that includes findings as to the degree of seriousness or injurious effect of the imputed meanings and a considered analysis of the issue from the court below.

[10] For the reasons that follow, I would dismiss the appeals. I am not persuaded the chambers judge erred in her analysis. With respect, I agree that the defences as pleaded (including the imputed meanings of the words complained of) raise a different but not separate and distinct sting from Dr. Casses's pleadings. I also agree that, in the circumstances of these actions, the chambers judge did not err in adjourning the application to strike the defendants' pleadings on mitigation of damages to the trial judge as it raises an issue concerning the admissibility of evidence which is best suited for determination by the trial judge.

II. Factual Background

[11] There are four underlying actions in defamation that are the source of two companion decisions of the chambers judge under appeal. See *Casses v. Backer*, 2012 BCSC 17, and *Casses v. Canadian Broadcasting Corporation*, 2012 BCSC 18.

[12] In all four actions the plaintiffs-appellants are Dr. Fernando Casses, a medical doctor and surgeon who carries on a medical and surgical practice in Quesnel, B.C., and his practice-related company, Dr. Fernando Casses Inc.

Casses v. Backer

[13] In *Casses v. Backer*, the Personal Defendants are two former patients of Dr. Casses (Cook in S098738 and O'Diorne in S099022) and a family member of a former patient of Dr. Casses (Backer in S098449).

[14] The Personal Defendants, along with several other former patients and defendants in other actions commenced by Dr. Casses, had participated in an interview with CBC during which they made statements about Dr. Casses's unprofessional treatment of them (Cook and O'Diorne) or their family member (Backer) while they were under his care. In particular, they claimed that they or their

family member suffered needlessly and were damaged permanently, and that Dr. Casses refused to acknowledge and/or failed to address serious complications from his surgeries upon them. During the interview, while the defendants were making their statements, there was a voice-over by Ms. Tomlinson that said:

These patients and their families think there is a pattern of Dr. Casses not admitting to or treating his surgical complications ...

One death and four close calls are represented here. They feel their complaints to BC's College of Physicians and Surgeons weren't taken seriously enough.

[Emphasis added.]

[15] Dr. Casses commenced separate libel actions against each of the three Personal Defendants. They were the only individuals in the CBC interview who, in the case of the defendant Cook, had not filed a complaint with the College of Physicians and Surgeons of B.C. (the "College"), or whose complaints, in the case of the defendants O'Diorne and Backer, did not result in a finding of fault by the College against Dr. Casses. The remaining interviewees, whose complaints were confirmed by the College or who had commenced negligence actions against Dr. Casses (which have since been settled), were not sued by Dr. Casses.

[16] The chambers judge summarized the relationship between Dr. Casses and the respective Personal Defendants as follows:

Action No. S098449

[9] The defendants in this action are the children of the late Edith Backer, who was a patient of Dr. Casses. The defendants made certain statements concerning the medical care that Dr. Casses provided to their mother, blaming him for their mother's death.

Action No. S098738

[10] Dr. Casses operated on Ms. [Cook's] toe. Ms. [Cook] blames Dr. Casses for the infection that occurred after surgery which she alleges led to the amputation of her toe.

Action No. S099002

[11] Ms. O'Diorne was a patient of Dr. Casses, who performed surgery on her. She states that during the surgery he nicked her bladder causing her medical complications which he failed to address.

[17] In his amended statements of claim, Dr. Casses pleads that the statements made by each of the Personal Defendants were false, malicious and libellous, and conveyed a sting that his professional conduct was negligent, deliberately harmful, deceitful or dishonest. He pleads the following meanings that he alleges are conveyed by the Personal Defendants' defamatory statements (the "Dr. Casses Meanings"):

- (a) The plaintiffs negligently performed surgery on their patient [Backer/O'Diorne/Cook] thereby causing her to suffer needless pain;
- (b) The plaintiffs negligently performed surgery on their patient [O'Diorne/Cook] thereby causing her permanent damage;
- (c) The plaintiffs negligently performed surgery on their patient [Backer/O'Diorne/Cook] thereby [causing her death/ creating a terrible mess of her internal organs and related physiology and nearly causing her death/ requiring amputation of her big toe, respectively];
- (d) The plaintiffs dishonestly and deceitfully concealed from their patient [Backer/O'Diorne/Cook] serious complications arising from the surgery they performed on her;
- (e) The plaintiffs deliberately refused / failed to acknowledge or treat serious complications arising from the surgery they performed on their patient [Backer/O'Diorne/Cook] or alternatively the plaintiffs negligently failed to do so;
- (f) The plaintiffs deliberately and deceitfully did not or failed to [reveal and/or treat] [serious perforations and/or post surgical infections caused by/arising from] the surgery they performed on [Backer/O'Diorne/Cook];
- (g) [Dr. Casses's] aforesaid conduct concerning his patient [Backer/O'Diorne] warranted severe disciplinary sanction by the College of Physicians and Surgeons of British Columbia; and/or
- (h) One or more of the above.

[18] In their respective statements of defence, the Personal Defendants each deny the statements they made were false, malicious or defamatory. They allege that it was CBC that published and broadcast the impugned words and they plead the defences of justification and fair comment. They also deny their conduct caused damage to Dr. Casses's reputation and plead that if their statements were defamatory and Dr. Casses suffered damage to his reputation, those damages are nominal "as [Dr. Casses's] reputation was already affected by public complaints, broadcasts, and law suits, which are unrelated to the [Personal Defendants]".

[19] The Personal Defendants issued third party notices to CBC, the publisher of the interview. CBC had published the interview: (i) as part of a televised series of CBC news broadcasts that were aired on September 8, 9, and 10, 2009; (ii) in a CBC website article that included video clips of the three news stories; and (iii) in some internet publications (the “Publications”).

[20] In its response to the third party notices, CBC admits the Publications and claims the right to defend the main actions against the Personal Defendants based on Rule 3-5(12) of the *Supreme Court Civil Rules*, which provides:

A third party who has filed a response to third party notice may, within the period for filing and serving a response to the third party notice, file and serve on all parties of record a response to civil claim to the plaintiff’s notice of civil claim, raising any defence open to a defendant.

[21] CBC denies the statements by the Personal Defendants were false, malicious or defamatory, and pleads the defences of justification, fair comment and responsible communication. It claims the interview was only a small part of a much larger story about Dr. Casses that raised concern over the adequacy of the licensing and oversight duties of the College in light of the number of complaints about Dr. Casses’s alleged unprofessional or substandard treatment of former patients both in Arizona (where he had previously practiced) and in B.C.

[22] In the broader context of the background information disclosed in Publications, CBC pleads a different meaning conveyed by the statements of the Personal Defendants (the “CBC Meanings”):

(a) [The Personal Defendants] ...together with numerous other cases in British Columbia about Dr. Casses’s surgery, raise troubling questions about the oversight and licensing of Dr. Casses in British Columbia, given his history of quality assurance concerns, suspension, unprofessional conduct and negligence in Arizona before coming to British Columbia and being licensed to practice in British Columbia.

(b) In the British Columbia cases, including [the Personal Defendants], there were cases in which the [College] did not find fault with Dr. Casses, other cases in which he was found to have fallen below the required standard of care, and other cases in which there has been no ruling one way or the other.

- (c) There were incidents in which Dr. Casses did not adequately admit or treat complications after surgery.

[23] In support of its pleaded imputed meanings, CBC provided a list of particulars that included: two malpractice actions brought by former patients against Dr. Casses in Arizona, one of which resulted in a jury award of \$1 million against Dr. Casses; the decision by the Arizona Board of Medical Examiners (BOMEX) to suspend Dr. Casses's license if he did not surrender it; comments from the Vice Chairman of BOMEX that he "was just horrified ... as I recall there were a large number of very poor surgeries ..."; the admission of Dr. Casses to the College despite the lawsuits, suspension proceedings, and his admission to BOMEX of substandard professional conduct in Arizona; and details of the nine complaints from former patients against Dr. Casses to the College and the outcomes to the extent known.

[24] In the alternative, CBC pleads mitigation of damages (the "Mitigation Pleadings") as follows:

If these Defendants are liable for any damages, which is denied, those damages are mitigated by:

- a) the Particulars of truth pleaded herein, to the extent proven;
- b) directly relevant background information going to the Plaintiff's reputation namely the Particulars above, as though fully repeated here; and
- c) the Plaintiff's bad reputation, resulting from his public suspension and negligence in Arizona and negligence claims against him and complaints, to the extent they were publically available.

Casses v. CBC

[25] In the fourth underlying action, Dr. Casses sued CBC directly as a defendant. He did so after his motion to strike in the Personal Defendants' actions had been heard by the chambers judge but before her reserved decision on that motion was rendered. The action against the CBC raises the same issues as those in the other three actions in which CBC, as a third party, has pleaded the same defences open to the Personal Defendants. Given that CBC has taken the lead in all the actions, the

CBC Meanings are the focus of these appeals on the issue of whether they convey a common or separate and distinct sting.

III. The Chambers Judge's Reasons

[26] Dr. Casses applied to strike the defences pleaded pursuant to Rule 9-5 of the *Supreme Court Civil Rules*. Rule 9-5 provides that “[a]t any stage of a proceeding, the court may order to be struck out ... the whole or any part of a pleading ... on the ground that (a) it discloses no reasonable claim or defence...”.

[27] The chambers judge began her analysis by reviewing the well established legal test for striking pleadings: based on the assumption that the facts pleaded are true, is it “plain and obvious” that the claim as pleaded is bound to fail? (See paras. 26-29 in *Casses v. Backer* where the chambers judge reviewed *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at p. 980; *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 15; and *Chapman v. Canada; Westwick v. Canada*, 2003 BCCA 665 at paras. 12-13.)

[28] The judge framed the central issue at para. 26 (*Casses v. CBC*): “The question is whether the defendants have introduced separate and distinct defamations in order to defend that upon which the plaintiffs sue.” In other words, do the CBC Meanings plead a different but common meaning, or a separate and distinct meaning, from the Dr. Casses Meanings?

[29] In *Casses v. Backer*, the judge found:

[67] In each of these actions, Dr. Casses is isolating the comments of the defendants, choosing their remarks over other interviewees because their complaints had either never been reviewed by the College or no finding made by the College. In *Pizza*, the plaintiff chose only the remarks of one franchisee and not the whole publication, which was about how the *Pizza*'s franchisees were treated by the plaintiff. Similarly, others, and not just the Backer children, Ms. Cook and Ms. O'Diorne, had similar remarks and complaints concerning Dr. Casses.

[68] This leads to the question as to whether the statements made by the defendants in each of these actions are a separate sting - I think not. These publications were about the College's lack of oversight and their licensing of Dr. Casses, given the number of complaints by former patients, including all

of the defendants, findings by the College of substandard professional conduct which occurred not only in British Columbia, but also in Arizona prior to his being licensed in British Columbia.

[Emphasis added.]

[30] After referring to *Prager v. Times Newspaper Ltd.*, [1988] 1 All E.R. 300 (C.A.) and *Cruise v. Express Newspapers Plc.*, [1999] Q.B. 931 (C.A.), the judge concluded at para. 75: “It cannot be said that the third party pleadings are bound to fail.”

[31] In *Casses v. CBC*, the judge found:

[35] This story broadcast by the CBC is not just about [The Personal Defendants]. The story is about other individuals who had complaints about [Dr. Casses’s] surgical competence, some of which were addressed by the College or [BOMEX] or the courts both in British Columbia or Arizona. The totality of these events is the focus of this broadcast and website which:

“... raise troubling questions about the regulatory oversight of surgeons in BC given the history of quality concerns over [Dr. Casses’s] surgeries and the negligence finding against him in Arizona before he came to practice in BC, 2) the BC College of Physicians did not find Dr. Casses at fault in some instances, but in others found he had fallen below the required standard of care, and 3) there were incidents where Dr. Casses did not adequately admit or treat complications after surgery.”

(Paragraph 23 of Application Response)

[36] The plaintiffs’ and the defendants’ meanings are different but this does not make them separate and distinct. The meanings alleged by the defendants relate to [Dr. Casses’s] ability and history as a surgeon and his licensing and do not go beyond that. Whereas the plaintiffs’ meanings relate only to the meanings of four individuals referred to above. It is open to the defendants to plead different or lesser meanings and to seek to justify those meanings. So long as “a defendant [is] entitled to plead by way of justification in support of any defamation meaning which the words complained of could reasonably bear” (*Pizza Pizza* para. 17).

[Emphasis added.]

[32] At para. 37 the judge concluded: “It cannot be said that the defence is bound to fail.”

[33] In regard to the Mitigation Pleadings, in *Casses v. Backer* the judge held:

[83] Dr. Casses seeks to strike out facts which go to mitigation. Dr. Casses and the third parties by their positions, agree that the admission of evidence should be left to the trial judge at the time of the trial.

[84] In *Quizno's [Quizno's Canada Restaurant Corp. v. Kileel Developments Ltd.]*, 2008 ONCA 644] Mr. Justice Blair comments:

[16] Pleadings are not the appropriate stage in an action to engage at large in what is essentially a trial judge's exercise for determining the *admissibility of evidence at trial* - i.e., weighing the probative value versus prejudice of facts. That exercise is not particularly well-suited to *defining issues for trial*, something which is for the parties to decide ...

[34] On this issue, the judge concluded: "I agree that the admission of evidence should be left to the trial judge" (para. 85 in *Casses v. Backer*).

[35] In *Casses v. CBC*, the judge concluded: "I repeat what I concluded in the separate actions. At this point in time this should be left to the trial judge" (para. 38).

IV. Issues on Appeal

[36] Dr. Casses submits that the chambers judge erred in law in two respects:

1. By failing to find that the CBC Meanings are impermissibly separate and distinct from the Dr. Casses Meanings and therefore should be struck along with the associated defences of justification, fair comment and responsible communication; and
2. By failing to find that the Mitigation Pleadings contravene the common law rules of pleading matters in a defamation action and therefore should be struck.

V. Discussion

i. Common vs. Separate and Distinct Sting

[37] A party who seeks to strike pleadings on the basis that they are bound to fail faces a stringent test. In this case, Dr. Casses must demonstrate that it is plain and obvious the defences as pleaded are "bound to fail". That test can only be met if Dr. Casses can establish that the Personal Defendants and CBC have pleaded separate and distinct imputed meanings, rather than different but common imputed

meanings in regard to the alleged defamatory statements of the Personal Defendants.

[38] Characterization of a sting (as common or separate and distinct) begins by identifying the range of reasonable meanings that may be inferred from the alleged defamatory words. This process does not permit a plaintiff to “use a blue pencil on words published of him so as to change their meaning and then prevent the defendant from justifying the words in their unexpurgated form” (*Polly Peck* at p. 96). As was noted in *Polly Peck*, whether a meaning is separate and distinct, or merely different, from that alleged by the plaintiff is a question of fact and degree.

[39] In *Carleton Communications Plc v. News Group Newspapers Ltd.*, [2001] EWCA Civ 1644 at para. 18, Lord Justice Latham, for the majority, adopted the language from *Berezovsky v. Forbes Inc.*, [2001] EWCA Civ 1251 (at para. 16) in describing this issue as “a matter of impression”, “an exercise in generosity not in parsimony”, and one that “once fairly performed ... will not be second guessed on appeal ...”. Relying on *Polly Peck*, he observed (at para. 21):

But it seems to me that the law clearly requires the court to look at the broad context of the publication in which the words complained of appear.... In doing so, the court is not concerned with niceties of textual analysis, but with the real world of the ordinary reader’s understanding.

[40] Dr. Casses submits the chambers judge erred when she failed to find that the CBC Meanings were separate and distinct from the Dr. Casses Meanings because she failed to identify the “true common sting” between the parties’ respective imputed meanings. He argues that CBC has raised separate and distinct allegations about what occurred between him and some former patients in Arizona and B.C., the truth of which, even if proven, cannot establish the truth of the allegations made by the Personal Defendants. In other words, he says CBC may not rely on what occurred between him and former patients in Arizona and B.C. as a defence to his libel claims against the Personal Defendants and CBC.

[41] With respect, I do not agree. In my view this submission fails to apply the principles from *Polly Peck* which require a court, before characterizing a sting as

common or separate and distinct, to examine any broader context that may be derived from the whole of a publication, in order to determine whether the words complained of are capable of bearing the meaning ascribed to them by a defendant.

[42] In commencing three separate actions against only those individuals who either did not file a complaint with the College or whose complaints did not result in findings of fault by the College, Dr. Casses, has employed the rejected “blue-pencil” approach to defamation pleadings in what I would infer to be an attempt to artificially narrow the scope of the underlying actions. The broader context provided by the Publications, including similar complaints (of professional misconduct), by similar persons (former patients in both B.C. and Arizona), and similar findings (as to Dr. Casses’s professional conduct) by BOMEX, a civil jury, and the College, many of which are uncontentious, is material to assessing the validity of the defences pleaded. The relevance of this additional contextual information is evident from the observation by Lord Brooke J. in *Polly Peck* where he noted “[t]he defendant is entitled to justify the sting, and once again it is fortuitous that what is in fact similar fact evidence is found in the publication.” Absent that context, the Personal Defendants would be denied the opportunity of providing a complete explanation for their respective statements and CBC would be denied the opportunity of providing the necessary foundation for its larger story about the adequacy of the regulatory oversight and licensing of Dr. Casses’s surgical practice. To preclude such an investigative inquiry would have a chilling effect on the fundamental values of freedom of expression and freedom of the press in Canadian society.

[43] Dr. Casses submits that the broader context provided by the Publications is irrelevant to the discrete issue of whether the statements of the Personal Defendants are defamatory. However, when the statements of the Personal Defendants are considered in the context of similar complaints by former patients, from different jurisdictions in which Dr. Casses has operated a surgical practice, with similar findings of liability against Dr. Casses, the CBC Meanings appear at this stage of the actions to be ones that are reasonably capable of being borne from the alleged defamatory statements of the Personal Defendants. While the CBC Meanings are

different from the Dr. Casses Meanings, they cannot in my view be said to be separate and distinct in the sense that they raise new allegations that are different in character from those alleged in the Dr. Casses Meanings.

[44] In my view the chambers judge correctly identified the common imputed meanings in the underlined passages of para. 68 in *Casses v. Backer* (referred to in para. 29 above) and in para. 36 in *Casses v. CBC* (referred to in para. 31 above). I find no error in her finding of a common sting and in her determination that the defences pleaded by the Personal Defendants and CBC are not bound to fail.

ii. The Mitigation Pleadings

[45] The common law pleadings rule on mitigation of damages in libel actions is based on the rule in *Scott v. Sampson* (1882), 8 Q.B.D. 491, [1881-1885] All E.R. Rep. 628 (Div. Ct.). There, the court held that evidence of general bad reputation was admissible to mitigate a plaintiff's damages claim for loss of reputation but evidence of particular acts of misconduct was not. However, a defendant who intends to lead evidence of a plaintiff's general bad reputation must plead the particulars of that claim, which often will include particular instances of bad conduct. If the particulars relate to an aspect of the plaintiff's general reputation that is relevant to the alleged defamatory comments, they may be pleaded; if they are unrelated they will be inadmissible as irrelevant: *Scott v. Sampson* (1882); *Plato Films Ltd. v. Speidel*, [1961] 1 All ER 876 (H.L.); and Raymond E. Brown, *The Law of Defamation in Canada*, 2d ed. (Scarborough: Carswell, 1994) at 19.4(6). Where the line may be drawn between those particulars that are related and relevant to the issue of general reputation, and those particulars that are unrelated and irrelevant to an individual's general reputation, is often not easily discernible at the pleadings stage of an action.

[46] In *Plato Films* a defendant was permitted to adduce evidence "which tends to justification" to mitigate damages for injury to the plaintiff's reputation. In support of that ruling Lord Radcliffe stated (at pp. 884 I – 885 A-D):

What, then, do we mean when we say that we affirm the principle of *Scott v. Sampson*, that general evidence of bad reputation is admissible but that evidence of particular facts tending to show the character and disposition of the plaintiff is not? I have not been able to find that the authorities supply any satisfactory answer to this. To begin with, there is a fallacy in supposing that some general phrase can govern the variety of situations that a libel can create, in particular in supposing that the admissible evidence ought to be the same, whether the libel is very particular or very general or whether the plaintiff is a public figure, whose reputation is largely based on notorious incidents, favourable or unfavourable, or a private individual whose affairs may well escape the burden of notoriety altogether. These considerations lead me to the opinion that it would be wrong to hold that general evidence of reputation, which must mean reputation in that sector of a plaintiff's life that has relevance to the libel complained of, cannot include evidence citing particular incidents, if they are of sufficient notoriety to be likely to contribute to his current reputation. Such incidents are, after all, the basic material on which the reputation rests, and I cannot see the advantage to anyone of excluding the better form of evidence in favour of the worse. It remains true that the issue is not whether the incidents actually happened but whether it is common report that they did. If it is, that seems to me the best available evidence of a plaintiff's reputation. ... [Emphasis added.]

[47] Similarly, in *Burstein v. Times Newspapers Ltd.*, [2000] EWCA Civ 338, Lord Justice May, writing for the majority of the English Court of Appeal, explained:

[40] The questions which the judge had to consider in the present case were essentially procedural case management questions. Although questions relating to the admissibility of evidence may raise issues properly characterised as issues of law, not only is the admissibility of evidence procedural, but the authorities to which I have referred show that the admissibility or otherwise of evidence of reputation in reduction of libel damages is heavily affected, if not determined, by questions of procedural fairness and of case management. It will, generally speaking, normally be both unfair and irrelevant if a claimant complaining of a specific defamatory publication is subjected to a roving inquiry into aspects of his or her life unconnected with the subject matter of the defamatory publication. It is also in accordance with the overriding objective that evidence should be properly confined, both in its subject matter and its duration, to that which is directly relevant to the subject matter of the publication. ...

[41] Considering the decision as to admissibility which the judge had to make in the present case in the first instance as a matter of case management and of what is just, I consider that some parts of the particulars on which the defendants wanted to rely should have been admitted. There was a background context to the defamatory publication. To keep that away from the jury was, I think, to put them in blinkers. To determine the relevant background context and to confine it properly, it is necessary to start with the defamatory publication itself. ...

[42] In my view, permitting the defendants to rely on the directly relevant background context in the way in which I have described would not offend

anything said in *Scott v. Simpson* or *Plato Films v. Speidel* ... For practical purposes, every publication has a contextual background, even if the publication is substantially untrue. In addition, the evidence which *Scott v. Sampson* excludes is particular evidence of general reputation, character or disposition which is not directly connected with the subject matter of the defamatory publication. It does not exclude evidence of directly relevant background context. To the extent that evidence of this kind may also be characterised as evidence of the claimant's reputation, it is admissible because it is directly relevant to the damage which he claims has been caused by the defamatory publication.

...

[47] In my view ... it is not permissible to advance an unsustainable defence of justification and thereby, under the guise of particulars of justification, seem to rely on particulars which *Scott v. Simpson* and *Plato Films v. Speidel* would not permit. That, however, does not prevent a defendant from frankly accepting that there is no proper plea of justification, by seeking to rely in reduction of damages on particulars which *Scott v. Simpson* and *Plato Films v. Speidel* do not exclude. If this were not so, there is a danger that the jury would be required to assess damages in blinkers, in ignorance of background context directly relevant to the damage which the claimant claims has been caused by the defamatory publication. ...

[48] This Court has followed the reasoning from *Burnstein* in *Ager v. Canjex Publishing d.b.a. Canada Stockwatch*, 2005 BCCA 467, 46 B.C.L.R. (4th) 1 at para. 60, where Madam Justice Saunders, writing for the Court, stated:

[60] In my view, the reasoning in *Burnstein* is persuasive. To the extent that the factors relied upon in mitigation of damages were otherwise particularized in the statement of defence, that they were supported by evidence, and that they are directly connected to the subject matter of the defamatory publication, they were factors to be considered in the assessment of damages.

[49] Dr. Casses submits that the Mitigation Pleadings impermissibly cross the line from related and relevant particulars of general reputation to unrelated and irrelevant particulars of past specific incidents. He contends the chambers judge erred in refusing to strike those pleadings and finding that the admissibility of such evidence based on its probative value should be left to the trial judge.

[50] Dr. Casses's submissions raise two distinct issues: (1) whether the Mitigation Pleadings provide directly related and relevant background information; and (2) whether the Mitigation Pleadings should nonetheless be struck, even if relevant,

on the basis that they are of little probative value. As to the second issue, Mr. Justice Blair, writing for the court in *Quizno's Canada Restaurant Corp. v. Kileel Developments Ltd.*, 2008 ONCA 644, offered the following "parameters":

[15] A court may strike out portions of a pleading, even where the allegations are relevant, if the applicant can establish that they are of marginal probative value and their probative value is outweighed by their prejudicial effect. Before doing so, a judge must balance the rights of the parties on the particular facts of the case and must consider carefully the extent to which the particulars attacked are necessary to enable the defendant to prove its case and their probative value in establishing that case: [citations omitted]. Where allegations in question are relevant and material, the court should exercise this power with considerable caution

[16] Pleadings are not the appropriate stage in an action to engage at large in what is essentially a trial judge's exercise for determining *the admissibility of evidence at trial* – i.e., weighing the probative value versus prejudice of facts. That exercise is not particularly well-suited to *defining issues for trial*, something which is for the parties to decide.

[51] The particulars pleaded by the respondents in support of the Mitigation Pleadings in my opinion relate directly to the content of the complaints about Dr. Casses's surgical practice (both in B.C. and Arizona) and the responses of regulatory bodies to those complaints (to the extent that they were known). This background information provides a similar context to the one in which the alleged defamatory statements by the Personal Defendants were made. The similarity of the allegations (many of which are uncontentious) is directly relevant to the issue of Dr. Casses's general reputation as raised by the Mitigation Pleadings for the assessment of damages. I am not persuaded the chambers judge erred in following the cautious approach recommended by Blair J.A. in *Quizno's*, by adjourning the assessment of the probative value of the particulars pleaded to the trial judge. Implicit in this ruling is the finding that, at the pleadings stage of the litigation, the Mitigation Pleadings and the particulars pleaded in support of them are not bound to fail.

VI. Disposition

[52] In the result, I would dismiss the appeals.

“The Honourable Madam Justice D. Smith”

I AGREE:

“The Honourable Mr. Justice Low”

I AGREE:

“The Honourable Madam Justice A. MacKenzie”