CITATION: Baglow v. Smith, 2011 ONSC 5131
COURT FILE NO.: 10-49803
DATE: 20110830

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
JOHN BAGLOW a.k.a. "Dr. Dawg"	)	
Plaintiff (Responding Party)	)	Peter F. Burnet, for the Plaintiff / Responding Party
– and –	)	
ROGER SMITH a.k.a. "Peter O'Donnell", CONNIE FOURNIER and MARK FOURNIER	)	
Defendants (Moving Parties)	)	Barbara Kulaszka, for the Defendants / Moving Parties
	)	**HEARD:** July 21, 2011

REASONS FOR JUDGMENT

ANNIS J.

Overview

[1] This is a summary judgment motion to dismiss an action in defamation involving political bloggers on the Internet.

[2] The plaintiff, someone who believes that Omar Khadr is being tried contrary to international law, claims that the defendants have exceeded the boundaries of their normally acrimonious debate and defamed him by Mr. Smith stating on the Fourniers' blog that he is "one of the Taliban's more vocal supporters".

[3] The defendants disagree that the statement is defamatory; or if it is, the defence of fair comment applies.

[4] They seek an order pursuant to Rule 21.01(1)(b) for summary judgment dismissing the statement of claim as raising no genuine issue for trial.

[5] I agree with the defendants on both submissions. They are, therefore, entitled to summary judgment dismissing the action.

[6] The reasoning explaining this decision follows.

Facts

[7] The following facts are taken from the plaintiff's factum:

> The plaintiff, a resident of the City of Ottawa, is the owner and operator of an Internet blog site known as "Dawg's Blawg". The plaintiff and occasional guest bloggers post commentary on political and other issues of public interest. The plaintiff holds progressive, left-wing opinions and perspectives and frequently criticizes right-wing views and policies, which he often refers to generically as "conservative". The plaintiff has long been opposed to Canada's continued military engagement in Afghanistan and has argued frequently against both its wisdom and efficacity.
>
> The defendants, Mark Fournier and Connie Fournier, operate and moderate a blog message board called FreeDominion. These defendants describe FreeDominion as a venue for the expression of "conservative" viewpoints; however, the plaintiff states it is an extremely right-wing venue that often features strident views expressed by, or in support of, nativists, anti-immigrants, anti-Palestinians and anyone who questions any aspect of the war on terror in Afghanistan. The plaintiff further states FreeDominion has attracted the support and causes of individuals who express racist views or who are openly and viscerally anti-Muslim, purportedly on the grounds of defending their right to free speech.
>
> The defendant, Roger Smith, is a resident of the City of Burnaby in the Province of British Columbia. He is an active blogger who frequently posts comments on political blogs from a conservative or right-wing perspective.
>
> On August 11, 2010, the defendant, Roger Smith, posting under the pseudonym Peter O'Donnell, posted a lengthy comment on FreeDominion which, *inter alia*, referred to the plaintiff as "one of the Taliban's more vocal supporters". The plaintiff objected to the comment as being defamatory and requested that the defendant Fourniers remove it from FreeDominion, which the Fourniers refused to do. The offending comment can still be accessed in the archives of FreeDominion.
>
> The defendant, Roger Smith, has admitted uttering the words complained of and the defendant Fourniers have admitted that it was posted on their blog site, FreeDominion, and that they have refused to remove it.

Although the plaintiff posts under the moniker “Dr. Dawg”, he does not attempt to hide his true identity, which is well-known and frequently referred to in the Canadian political “blogosphere”, a term that encompasses dozens or perhaps hundreds of blogs in Canada. In comments on blogs and in published articles, the plaintiff is frequently referred to by his real name and moniker at the same time. He has never taken any measures to conceal his true identity.

The plaintiff is a retired public servant, but he currently earns his income through short-term contracts with a wide number of clients, including unions, the Federal Government and the Conference Board of Canada. He has published opinion pieces in newspapers like The National Post, a conservative newspaper. The plaintiff alleges there is a reasonable likelihood of damage to his reputation if it became generally believed that he supported enemies of the Canadian Forces. The internet search engine, Google, shows almost 74,000 internet “hits” or references to the plaintiff when his real name is entered, many of them identifying him as “Dr. Dawg”.

The plaintiff agrees that debates on political blogs can be at times caustic, strident or even vulgar and insulting.

Despite his opposition to the war in Afghanistan, the plaintiff considers himself to be a proud and patriotic Canadian who supports the Canadian Forces, and he has never argued that he hopes they would be defeated or harmed by the Taliban. Nor has he argued that victory by the Taliban would be a good thing for Afghanistan or anywhere else. He has criticized the Taliban as a dangerous, theocratic and tyrannical regime in many comments and blog posts.

A large part of the affidavits of the defendants in support of the within motion address the case of Omar Khadr, a Canadian being held by American forces at Guantanamo Bay, and the plaintiff submits that a reasonable person reading the affidavits of the defendants would conclude the defendants equate support for repatriating a Canadian citizen to Canada with vocal support for the Taliban. The plaintiff admits that he has argued in support of repatriating Omar Khadr from Guantanamo Bay to Canada and has criticized the Canadian Government for not doing more to effect this. The basis of the plaintiff’s objection is that Mr. Khadr was captured by American Forces when he was fifteen years old and is thus covered by the United Nations Convention of the Rights of the Child and especially Section 7 of the Optional Protocol to that Convention. In other words, he argues the continued detention of Omar Khadr is contrary to international law.

Furthermore, the affidavits of the defendants dwell at length on the fact that, following the publication of the allegedly defamatory words on FreeDominion, the plaintiff published short comments of FreeDominion under the moniker "Ms. Mew" suggesting they were defamatory. The plaintiff did so because he was angry and upset, but denies he was trying to conceal anything. The moniker "Ms. Mew" was clearly a counterpoint to "Dr. Dawg" and, as all parties admit, any blog owner and administrator can quickly identify the source of a comment by verifying the Internet Protocol address of a commenter. Concealment would only have been effective if the plaintiff had posted from another computer or internet account, which he did not do.

[8] In addition, the following facts are taken from the defendants' factum, except where additions are noted.

The impugned words were contained in post entitled "Hey yokels with pitchforks, there is no libertarian base" which the defendant Smith admits writing using his pseudonym "Peter O'Donnell". It did not identify the plaintiff by his real name, but by his anonymous blog identity, that of "Dr. Dawg." However, almost immediately following it, another anonymous poster "Ms. Mew" did identify the plaintiff's real identity and republished the alleged defamatory words.

The argument between the plaintiff and Smith mainly took place on the plaintiff's "Dawg's Blawg" in three blogs written by the plaintiff, entitled "Off with his head" (published Sunday, August 8, 2010), the "Gitmo Knaga-Ruse" (published Tuesday, August 10, 2010) and "They dare call it treason" (published Friday, August 13, 2010). Under the last two blogs by the plaintiff, Smith left extensive comments the same or very similar to the impugned commentary he made on FreeDominion on Tuesday, August 10, 2010.

The chronology of the argument was as follows [repetitious paragraphs are not included, while additional posting comments considered relevant by the Court are noted in square brackets]:

(a) August 7, 2010 – Blogger Jay Currie speculates on a summer federal election.

(b) August 8, 2010 – "Dr. Dawg" leaves a comment on the Jay Currie blog, saying, in part, "*The sooner, the better. Most of us have had our fill of slack-jawed yokel government*."

(c) August 8, 2010 – "Dr. Dawg" writes a blog entitled "Off with his head" in which he calls for a federal election and calls supporters of the Conservative government "*yokels with pitchforks*." In addition, under the title is a photograph of Prime Minister Harper wearing a Crown and a chain around his neck bearing the letters "PM". Further comments include: "*It's nothing less than our civic duty to run this horrific gang of subliterate hoodlums out of office, by any means necessary and as soon as possible, to get the hands moving clockwise again. ... As for the rest of*

us, who says we can't pick up a torch or a pitchfork ourselves when the occasion demands?"

(d) August 9, 2010 on Jay Currie's blog – "Peter O'Donnell" leaves a comment which starts with "*Speaking on behalf of slack-jawed yokels (he means western Canadians, right?) …*"

(e) August 9, 2010 on Jay Currie's blog – "Peter O'Donnell" leaves a comment replying to "Dr. Dawg" saying in part: "*There's some truth to this, methinks (post on Dawg's blog) … Yokels with pitchforks … sounds like beer and popcorn to me. Where does Omar Khadr fit into your world view? Now I would say psychopath with a rifle there. But I understand he is on the short list for G-G in 2015 once you get rid of us yokels and such.*"

(f) August 10, 2010 on Jay Currie's blog - "Peter O'Donnell" replies to "Dr. Dawg" in part that "*It won't take long for the "yokels with pitchforks" metaphor to jump the shark from being anti-CPC to being anti-western (which it probably is meant to be anyway, Ontarians always want to run everything in Canada).*"

(g) August 10, 2010 on Jay Currie's blog – "Dr. Dawg" replies directly to "Peter O'Donnell's" posting, saying: "*No need to weep grievance-mongering tears of woe about the Western Alien Nation. We have sufficient yokels right here in Ontario, thanks. They're the ones who phone up Lowell Green, no slouch in the yokel department himself.*"

(h) August 10, 2010 on Jay Currie's blog – "Peter O'Donnell" replies to "Dr. Dawg" saying: "*Yep, Ontario yokels, used to be one myself, think of them as future western Canadians … hopefully they will get out here before they need your permission to leave. Keep slingin' pal, the majority is building with every heave of the pail.*"

(i) August 10, 2010 – The plaintiff writes a blog on his own "Dawg's Blawg" entitled "The Gitmo Kanga-Ruse" in which he calls the trial of Omar Khadr a judicial lynching.

[Note, this includes statements such as "*And Stephen Harper and his minions, who have been praying for this moment to arrive, will be delighted. ... Good luck with that. Parrish (the person presiding at the Khadr trial) is already twisting the hemp in his hands. And our own Prime Minister is part of the mob.*"]

The defendant Smith writes a series of comments under the blog including:

When you say "Canadian" you really mean Ontario Liberal. Why don't you secede and form your own country? Nobody else wants to share your country, you think that your town house socialist lifestyle is what everyone else wants, but it's not – and you should get over yourselves and stop supporting the 7th century religious fundamentalist Taliban who think it's cool to throw acid in women's

faces if they don't obey their menfolk. Is that now a Canadian value too? I have zero sympathy for the Khadrs, the whole lot of them should be deported.

In the moral sphere, you seek complicity with the recent murders of American aid workers under the spurious (if outrageous) charge of spreading Christianity, when you sign up to support Omar Khadr. I think such public declarations of support of Al Qaeda and the Taliban amount to treason, given that we are engaged in a war against them. It's really only because the war is contained and not likely to be lost on our soil that these normal laws do not apply, or shall I say, are not being applied. But the government of Canada would be quite within its legal rights to arrest the lot of you for treason.

(j) August 10, 2010 – On FreeDominion, "Peter O'Donnell" writes the complained of posting with the heading "*Hey yokels with pitchforks, there is no libertarian base*", which includes the words [sentences in square brackets are included in the same comment]:

[*I think Canada's long-simmering cultural war is about to go viral. I base this on two rather unrelated eruptions of Liberal/progressive angst ("why can't they see that we are their natural superiors?") in the past few days. On Monday, Liberal talking head Scott Reid, commenting on Harper's recent announcements concerning the long-term census, said he was pandering to the libertarian base, but that there is no libertarian base.*] *I will return to that rather astounding claim but first, the other salvo in the offensive, Dr. Dawg's colourfully illustrated op-ed that describes the conservative base (for which nobody has claimed non-existence) amounts to "yokels with pitchforks."* ***This coming from one of the Taliban's more vocal supporters.*** *I suppose they are super-yokels with Kalashnikovs.*" [Complained of words are in bold]

[*"We also have virtual control over western Canada where all the money is, so if you elitists down there in Ontari-ari-ario want to retire before you are 87 and avoid a total economic collapse, then it might be smart to stop insulting everyone in western Canada every time you get anxious about having to live in the adult world, and perhaps think less about who we are and more about who you are, as in TRAITORS (collaboration with the enemy being the essential nature of TREASON, and treason being your apparent lack of concern for our national security and the safety of our fighting forces in the field of battle). Or, perhaps you should just ship off to the nearest Al Qaeda training camp like your hero young Khadr did (with his traitor-family's blessing) and take up arms against the hated Western civilization that you so obviously detest."*]

(k) August 11, 2010 – On FreeDominion, writing under the anonymous pseudonym "Ms. Mew" as a supposed neutral third party, the plaintiff republished the complained of words "*This coming from one of the Taliban's more vocal supporters*" and identified "Dr. Dawg" as being the plaintiff, saying: "*Baglow has already won one legal action against a similar libellous claim. This will make two.*"

(l) August 11, 2010 – Replying to "Ms. Mew", the defendant "Peter O'Donnell" writes in part: "*I don't see how it's intellectually consistent to support Omar Khadr and say you're not supporting the Taliban*."

(m) August 11, 2010 – In further reply to "Ms. Mew", the defendant "Peter O'Donnell" says that suing other bloggers is bad form and that "*I would also point out that the one shred of respect I do have for Dawg (whose sock-puppet informs us is Baglow) is that he will debate issues on third-party blogs and not just hide in his own clubhouse the way many liberals do. For example, he made the yokels with pitchforks argument on his own blog, but came over to Jay Currie's blog, where conservative-libertarian thought prevails generally, to argue his points (and take a mighty drubbing for his troubles). I think we need more of that in Canada …*"

(n) August 11, 2010 – As "Ms. Mew", the plaintiff writes in reply to this message: "*Omar Khadr hasn't been convicted of anything. Supporting due process and the presumption of innocence are apparently the same thing as being a Taliban supporter. I hope Baglow sues your ass, quite frankly. You're utterly out of bounds on this*."

(o) August 11, 2010 – The defendant "Peter O'Donnell" replies to "Ms. Mew" in part as follows: "*The false angst about Omar Khadr is disgusting to many Canadians who remember what happened to dozens of our fellow citizens on 9-11 among the large international death toll, and what could easily have happened to any of us if we had been travelling in Bali, London or Madrid. Or Mumbai on business for that matter. People like the Khadrs relished those scenes and have chosen the path of terrorism, which is a cowardly and profoundly anti-democratic activity -- even the Nazis had a state and wore uniforms. The new crop of fascists (and that's who you're supporting, my proggy friends, a bunch of Islamo-fascists) don't have the courage to wear real uniforms, or fight under any recognized code of military engagement for their demented goals. They choose entirely innocent groups of civilians as their targets*."

(p) August 11, 2010 – The plaintiff, writing as "Ms. Mew" replies to the defendant "Peter O'Donnell" by identifying him as being Roger Smith.

Issues

(1) Whether the defendants have established that there is no genuine issue for trial that the impugned words are capable of establishing a threshold of defamation?

(2) If so, whether there is no genuine issue for trial that the defence of fair comment should apply?

Summary Judgment and Defamation

[9] The plaintiff correctly points out that summary judgment has rarely been granted in defamation cases.

[10] This is probably because it is recognized that "the threshold which a statement must pass in order to be defamatory is at a low level", per Dickson J. in *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067 at p. 1095.

[11] The test most often applied speaks only of a "tendency" to injure a reputation to determine whether a statement is defamatory. It is described in R.F. Hueston and R.A. Buckley, *Salmond on the Law of Torts*, 21st ed. (London: Sweet and Maxell, 1996) at p. 140:

> A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him or her in the estimation of right-thinking members of society generally and in particular to cause him or her to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem. The statement is judged by the standard of an ordinary right-thinking member of society. Hence the test is an objective one.

[12] Nevertheless, nothing prevents a case of defamation that raises no genuine issue from being dismissed by way of summary judgment.

[13] The Court is required to determine whether the issues between the parties can be properly and justly be resolved without a trial. If so, in the interests of justice the Court must decide the matter on the motion.

[14] Whether words complained of are capable of conveying a defamatory meaning is a question of law: see *Color Your World Corp. v. Canadian Broadcasting Corp.* (1998), 38 O.R. (3d) 97 (C.A.) at para. 39, citing *Gatley on Libel and Slander*, 8th edition, at p. 64. As a legal issue, the task of assessing threshold defamatory remarks lends itself to consideration in a summary judgment motion.

[15] Under the modified Rules, the Court has expanded forensic powers pursuant to Rule 20.04(2) to weigh the evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence where it is appropriate to do so in the interests of justice.

[16] While the legal onus remains with the moving party, the responding party must put his best foot forward to demonstrate the existence of a real issue necessitating a trial and cannot simply rest on allegations or denials.

[17] The Court is therefore entitled to assume that the record contains all the evidence which the parties would present if the case were to proceed to trial: see *Dawson v. Rexcraft Storage and Warehousing Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).

[18] The jurisprudence to date in respect of the new amendments clearly imposes an enhanced duty on judges to carefully review cases of this nature where the existence of a genuine issue is far from clear. It is fair to say that the courts are required to exercise their gatekeeper function more assiduously in summary judgment matters than was previously the case.

[19] In *Healey v. Lakeridge Health Corp.*, [2010] O.J. No.417 (S.C.J.), affirmed on appeal [2011] ONCA 55, Perrell J. stated as follows:

> 22 Rule 20.04 (2.1) is a statutory reversal of the case law that had held that a judge cannot assess credibility, weigh evidence, or find facts on a motion for summary judgment. Further, under rule 20.04 (2.2), a judge for the purpose of weighing the evidence, evaluating credibility, and drawing inferences may order that oral evidence be presented by one or more parties, with or without time limits on its presentation.
>
> 23 Placed in the context of the other amendments to Rule 20, the purposes of the change from "no genuine issue for trial" to "no genuine issue requiring a trial" in the test for a summary judgment are: (1) to make summary judgment more readily available; and (2) to recognize that with the court's expanded forensic powers, although there may be issues appropriate for trial, these issues may not require a trial because the court has the power to weigh evidence on a motion for summary judgment. [Emphasis added]

[20] In particular, this matter lends itself to consideration via summary judgment because the factual foundation of the case is largely captured in the extensive materials taken from the parties' blogs.

[21] In such circumstances, this is a case that would be well suited for consideration by summary judgment without regard to the recent amendments to Rule 20: see *Healey v. Lakeridge Health Corporation et al.* (2011), 103 O.R. (3d) 401 (C.A.), at para 76:

> In my view, given the nature of the issues, the extensive evidentiary record provided the motion judge with a sufficient basis to decide that there was no genuine issue for trial. In these circumstances, it is unnecessary to consider the effect of the recent amendments to Rule 20.

[22] Affidavits have been filed, but the parties have chosen not to exercise their rights of cross-examination. In my judgment, there seems little in dispute of a factual nature that would be different were it to proceed to trial.

[23] On a practical basis, the motion should probably be dispositive of the matter when the evidence appears uncontroversial, except for the inferences that the Court concludes a reasonable reader should draw from it.

Analysis

(i) What is the Defamatory Meaning of the Words Complained of in their Full Context and are they Capable of Establishing a Threshold of Defamation?

Statement of Fact or Opinion

[24] The starting point is to determine whether in regard to "its pith and substance", the complained of the words are a statement of fact rather than a comment or opinion.

[25] The distinction between fact and opinion is relevant, not only to the issue of fair comment, but also because it impacts on the tendency of a statement to lower the reputation of the plaintiff.

[26] This was pointed out by Lebel J. in dissent in *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420, at paras. 71 and 72, citing Raymond E. Brown, *The Law of Defamation in Canada*, vols. 2 and 4, 2nd ed., looseleaf (Scarborough, Ont.: Carswell, 1994).

> Although distinguishing facts from comment may sometimes be difficult, a comment is by its subjective nature generally less capable of damaging someone's reputation than an objective statement of fact, because the public is much more likely to be influenced in its belief by a statement of fact than by a comment. I therefore agree with the following observation of R.E. Brown:
>
> > If the expression of opinion by the defendant on facts which are true are reasonably understood by those to whom they are published as opinions, and nothing else, they say nothing derogatory about the plaintiff which does not already inhere in the facts that have been recited. It is those facts that are damning, either to the plaintiff because the opinion expressed is so consistent with the true facts which are recited and approximate the subjective opinion of those to whom they are published, or to the defendant because they are so inconsistent with the recited facts and with the subjective opinion of those to whom they are published. In the former case, the reputation of the plaintiff is not adversely affected by the publication of the opinion; in the latter case it is the defendant who is defamed by his or her own foolish words rather *than* the plaintiff.
>
> There is no doubt that a comment may be defamatory. It must simply be borne in mind that just because someone expresses an opinion does not mean that it will be believed and therefore affect its subject's reputation.

[27] The plaintiff complains that the defendants defamed him by branding him “one of the Taliban’s more vocal supporters”. It is common ground that the Court should consider the publication as a whole and not dwell or concentrate on isolated passages in determining whether it is defamatory: see Brown, *supra*, at p. 198.

[28] The words complained of, although appearing somewhat out of place in the blog entitled “Hey yokels with pitchforks, there is no libertarian base”, referred back to an ongoing thread in which the two sides debated the validity of the trial of Omar Khadr.

[29] The plaintiff claims that the words complained of are a statement of fact that misrepresents him as a supporter of the Taliban when this is not true. This is described in his factum, which I repeat below for ease of reference.

> Despite his opposition to the war in Afghanistan, the Plaintiff considers himself to be a proud and patriotic Canadian who supports the Canadian Forces, and he has never argued that he hopes they would be defeated or harmed by the Taliban. Nor has he argued that victory by the Taliban would be a good thing for Afghanistan or anywhere else. He has criticized the Taliban as a dangerous, theocratic and tyrannical regime in many comments and blog posts.

[30] I do not agree that the words complained of are a statement of fact.

[31] Binnie J. discussed the distinction between an imputation of fact versus comment in *WIC Radio, supra,* at paras. 26 and 27. The case bears some similarity to this one, except that those comments were not made on an internet blog. I consider the distinction important, as will be discussed below.

> The pleaded innuendo that Simpson was so “hostile toward gay people to the point that she would condone violence toward gay people” (Trial reasons, at para. 19, emphasis added; emphasis in original deleted), is framed as an inference (“would condone violence”) from a factual premise, (i.e. was so “hostile toward gay people”). In *Ross v. New Brunswick Teachers’ Association* (2001), 201 D.L.R. (4th) 75, 2001 NBCA 62 at para. 56, the New Brunswick Court of Appeal correctly took the view that “comment” includes a “deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof.” Brown’s *Law of Defamation in Canada* (2nd edition, (loose-leaf)) cites ample authority for the proposition that words that may appear to be statements of fact may, in pith and substance, be properly construed as comment. This is particularly so in an editorial context where loose, figurative or hyperbolic language is used (Brown, volume 4, at page 27-317) in the context of political debate, commentary, media campaigns and public discourse. See also R.D. McConchie and D. A. Potts, *Canadian Libel and Slander Actions* (2004), at page 340.

> The respondent on this appeal did not challenge the view that Mair's imputation that Simpson "would condone violence toward gay people" was a comment not an imputation of facts (factum at para. 40). I agree that the "sting" of the libel was a comment and it would have been understood as such by Mair's listeners. "What is comment and what is fact must be determined from the perspective of the reasonable viewer or reader," *Ross* per Daigle C.J. N.B. at para. 62. Mair was a radio personality with opinions on everything, not a reporter of the facts. The applicable defence was fair comment. On that point, I agree with the trial judge.

[32] Although Binnie J.'s comments were made in the context of the defence of fair comment, the conclusions distinguishing fact from opinion apply equally to a determination of whether a statement is defamatory. They are also particularly relevant to political commentators as in this matter.

[33] Binnie J. describes how the factual premise (hostility towards gays) led to a distinct defamatory attribution of unlawful behaviour to the plaintiff (would condone violence).

[34] In its pith and substance, when the defendant Smith's statement is considered in its context of an on-going thread on an internet blog, it is properly understood as a comment about the impact of the application of the plaintiff's views in terms of supporting the Taliban.

[35] Accordingly, the alleged defamatory attribution of the plaintiff (supporter of the Taliban) is the comment portion of the defendant Smith's unstated factual premise that the plaintiff's views on due process have the effect of supporting the Taliban.

The Comments would not Impugn the Reputation of the Plaintiff

[36] I start by noting that declaring someone a supporter of the Taliban is at the absolute borderline of a comment that could be said to diminish the esteem of the plaintiff in the minds of readers of a political blog where insults are regularly treated as part of the debate.

[37] I could probably stop here by simply adopting Binnie J.'s words that the comment has no "sting" despite the plaintiff's protestations to the contrary. Being a supporter of the Taliban does not approach expressing an opinion that the plaintiff would use violence to support her views clothed in the invective employed in *WIC Radio, supra*. But accepting the low threshold of a comment being capable of defamation, I go on.

[38] Having determined that the impugned statement is a comment, it is well to bear in mind the words of R.E. Brown cited above that an expression of opinion on facts which are true, which are understood to be published as opinions, say nothing derogatory about the plaintiff which does not already inhere in the facts that have been recited.

[39] The comment of Brown I find to be a form of the defence of justification which is not pleaded, although it is certainly arguable here that the underlying facts are substantially true in their application to the plaintiff.

[40] Instead, I conclude that the opinion expressed by the defendant lies at the heart of the debate between the factions represented by the parties and whether the underlying facts are true or not, readers following the blog would understand the comment as being one side of the debate.

[41] These comments arise as an argument in the age-old debate whether the ends (e.g. deterring resort to child soldiers by the Taliban) can justify the means (e.g. running roughshod over due process in judging a child responsible for crimes).

[42] The term "support" as applied to the Taliban encompasses both sides of the debate as meaning either moral or effective (the results of their actions) support.

[43] The plaintiff's position is not that he morally supports the Taliban, but only that he desires to see Omar Khadr treated in accordance with the rule of law, in particular international law, as he states in his factum.

> The basis of the plaintiff's objection is that Mr. Khadr was captured by American Forces when he was 15 years old and is thus covered by the United Nations Conventions on the Rights of the Child and especially s. 7 of the Optional Protocol to that Convention. In other words, he argues the continued detention of Omar Khadr is contrary to international law.

[44] Conversely, Mr. Smith's opinion is that the plaintiff effectively supports the Taliban by the consequences of putting his views into action. I would describe the expanded comment of Mr. Smith (in my own words) as follows:

> The application of the plaintiff's views that Omar Khadr should not be tried in accordance with international law has the effect of supporting the Taliban, e.g. by not deterring their use of child soldiers who kill Canadian or American soldiers.

[45] This further distinguishes this case from that in *WIC Radio, supra*, where there was no "definitional" ambiguity in the words used.

[46] It should also be recalled that the Court is to avoid putting the worst possible meaning on the words: *Color Your World Corp* at pp. 106-7, and *Scott v. Fulton* (2000), 73 B.C.L.R. (3d) 392 at paras. 13-15.

[47] That the defendant Smith was referring to the effects of the plaintiff's views supporting the Taliban is evident from the further remarks made in the post containing the alleged defamatory words. The essential thrust of these comments should not be lost in the scandalous language accompanying it, which is typical of that resorted to by both sides in the debate:

> (...collaboration with the enemy being the essential nature of TREASON, and treason being your apparent lack of concern for our national security and the safety of our fighting forces in the field of battle) or, perhaps you should just ship off to the nearest Al Qaeda training camp like your hero Young Khadr did (with his traitor-family's blessing) and take up arms against the hated Western civilization that you so obviously detest. [Emphasis added]

[48] The defendant Smith is commenting on the alleged effects of the plaintiff's views (i.e., the results of “your apparent lack of concern”) that would permit Omar Khadr to fight Canadians (“ship off to the nearest Al Qaeda training camp like your hero Young Khadr”).

[49] His comment on the plaintiff ignoring the consequences of his views is further demonstrated in the brief exchange that the parties had after publication of the alleged defamatory comment.

> Post by Peter O’Donnell 08/11/10 1:26 pm
> I don’t see how it’s intellectually consistent to support Omar Khadr and say you’re not supporting the Taliban […]
>
> Post by Ms. Mew 08/11/10 1:56 pm
> Omar Khadr hasn’t been convicted of anything. Supporting due process and the presumption of innocence are apparently the same thing as being a Taliban supporter. I hope Baglow sues your ass, quite frankly. You’re utterly out of bounds on this. [Note that the plaintiff was using the moniker of Ms. Mew rather than Dr. Dawg in this thread]

[50] Mr. Smith asks what the inconsistency is in saying that you support Omar Khadr but that you do not support the Taliban. In accordance with a definition of support that focuses on the consequences of one’s actions, effectively supporting Omar Khadr going free is tantamount to supporting the Taliban, whether or not the plaintiff intends this or morally supports the Taliban.

[51] The plaintiff’s rejoinder similarly puts forward the "illegal means" side of the debate. A supporter was not someone who argues for the presumption of innocence and procedural protections for Mr. Khadr.

[52] It is also worth noting that neither side attempts to engage the point of the other. For example, the plaintiff makes no attempt to answer Mr. Smith’s question querying the inconsistency in supporting Omar Khadr and supporting the Taliban.

[53] We are left with both sides simply advancing what they mean by supporting the Taliban. Tactically they wish to focus attention and anchor debate around their position and not the opponent’s which would require them to truly debate whether the ends can justify the means.

[54] The fact that the parties are engaged in ongoing debate over what it means to support the Taliban is recognized in the plaintiff's attempt to explain the distinction between his situation and that when the late Jack Layton, former leader of the NDP, was described as “Taliban Jack”.

> Secondly, the handle “Taliban Jack” does not necessarily imply conscious support, but rather suggests giving an unintentional and unplanned advantage to the Taliban. I respectfully submit the words spoken by Mr. Smith cannot be given such an interpretation and imply conscious support for a political group at war with Canadian Forces. [Emphasis added]

[55] I frankly fail to see the distinction in not implying “conscious support” when applied to “Taliban Jack” giving an advantage to the Taliban and to the statement that the plaintiff is a vocal supporter of the Taliban.

[56] But more importantly, the plaintiff's comment is understood as being part of the ongoing debate between the two factions represented by the parties' views. No reasonably informed Canadian would conclude that Mr. Layton was defamed by being called Taliban Jack, understanding that this was simply a catchy label attached to him by conservatives to showcase what they consider the weakness of the liberal argument in this political debate.

[57] Reasonably informed readers of these blogs would understand labelling the plaintiff a supporter of the Taliban as performing the same function and would not consider the comment capable of lessening the reputation of the plaintiff.

Removing the Sting in Internet Blogging

[58] Although I am satisfied that the words complained are not capable of damaging the reputation of the plaintiff, I am of the view that there is another contextual factor that would further bolster this conclusion, namely that the alleged defamatory words were made in the context of an ongoing blogging thread over the Internet.

[59] Internet blogging is a form of public conversation. By the back and forth character it provides an opportunity for each party to respond to disparaging comments before the same audience in an immediate or a relatively contemporaneous time frame.

[60] This distinguishes the context of blogging from other forms of publication of defamatory statements. One exception could be the live debate, of which blogging constitutes the modern written form.

[61] I am not suggesting that defamation can never occur in a live debate. I do say however, that the live debate forum should be considered as a contextual factor to determine whether the statement is defamatory in so far as whether it is complete.

[62] An example that does not in any manner reflect the Court’s views on these issues, but which might serve to explain how derogatory, even defamatory remarks are expected to be parried in a live debate so as to remove the “sting of the libel” and attenuate any threats of diminution of reputation might be as follows:

> Mr. Smith knows full well that I abhor what the Taliban stand for. His calling me one of their supporters because I think they should be entitled to due process in accordance with International law would be like me calling him (some derogatory descriptor, e.g. “a Nazi fascist”) because he wants to trample the rights that Canadians cherish, etc. [Example provided by the Court]

[63] Given that the plaintiff pleads his belief that “there is a reasonable likelihood of damage to my reputation if it became generally believed that I supported the enemies of the Canadian Forces”, it seems that the tendency of the comment to lower his reputation, particularly

when arising in the form of a comment in a debate, could have been quickly nipped in the bud by a simple rejoinder in the fashion described above. This would have had the additional benefit of allowing him to score some points of his own.

[64] More importantly to the issue of context, the blogging audience is expecting and would indeed want to hear a rejoinder of this nature where the parry and thrust of the debaters is appreciated as much as the substance of what they say.

[65] In essence, I am suggesting that the Court, in construing alleged defamatory words in an ongoing debate, should determine whether the context of the comment from the perspective of the reasonable reader or listener is one that anticipates a rejoinder, which would eliminate the possible consequence of a statement lowering the reputation of the plaintiff in their eyes.

[66] To some extent the Court is attempting to decide whether the debate should have gone forward, such that walking off the blogging stage, so to speak, is a form of "gotcha" contrary to the rules governing the debate.

[67] I realize that this sounds like a form of defence of mitigation of a defamatory comment. But I see it more as an uncompleted comment, something akin to a plaintiff arguing that he or she has been defamed by a question, when the response was what the audience was expecting.

[68] The plaintiff did not take the opportunity to deny that he supported the objectives of the Taliban. His only rejoinder is described above in the form of Ms. Mew's comments.

[69] The fact that he shifted to another moniker and did not reveal his identity as Dr. Dawg, I also consider to be some indication of his desire perhaps to frame the alleged defamation as it stood, without any comeback on what he actually stood for.

[70] Bringing an action on the comment in mid-debate runs contrary to the rules and has the effect of chilling discussion. If allowed, it places the opposing party in a defensive mode, rather than an offensive one, strategically putting that party at a disadvantage.

[71] This was all the more so where the blog is used to aggressively berate the other side, score points employing colourful derogatory characterizations, e.g. the plaintiff calling the defendant Connie Fournier the "Free Dominatrix" or referring to the opposition as "yokels with pitchforks", or to undermine their logic and indeed their standing by superior debating skills.

[72] Binnie J.'s remarks in *WIC Radio* at para. 15, although in regard to fair comment seem relevant herein:

> When controversies erupt, statements of claim often follow as night follows day, not only in serious claims (as here) but in actions launched simply for the purpose of intimidation. "Chilling" false and defamatory speech is not a bad thing in itself, but chilling debate on matters of legitimate public interest raises issues of inappropriate censorship and self censorship. Public controversy can be a rough trade, and the law needs to accommodate its requirements. [Emphasis added]

[73] A statement is not derogatory when made in a context that provides an opportunity to challenge the comment and the rules of the debate anticipate a rejoinder, unless the statement is wholly outside the scope of the debate or otherwise so outrageous as to prevent meaningful argument from continuing.

[74] The comment of the defendant Smith was on topic and generally consistent with the language and positions taken in the on-going debate. Accordingly, in no sense was it one that would have had any different effect on the plaintiff's reputation from other derogatory remarks made throughout the blogs. Like those comments, it should have been answered to remove the sting, if any, and to comply with expectations of readers of these blogs.

[75] For all of the foregoing reasons, I conclude that the comment that the plaintiff was a vocal supporter of the Taliban is not capable of conveying a defamatory meaning.

(ii) Does the Law of Fair Comment Apply to the Allegedly Defamatory Statement?

[76] In addition to the foregoing comments, I conclude that even if there was a genuine issue that the comments were capable of being considered defamatory, there is no genuine issue that they were protected by the law as fair comment.

[77] McLachlin C.J. described the law governing fair comment in *Grant v. Torstar Corp*., [2009], 3 S.C.R. 640 at para. 31 as follows:

> As reformulated in *WIC Radio*, at para. 28, a defendant claiming fair comment must satisfy the following test: (a) the comment must be on a matter of public interest; (b) the comment must be based on fact; (c) the comment, though it can include inferences of fact, must be recognizable as comment; (d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?; and (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice. *WIC Radio* expanded the fair comment defence by changing the traditional requirement that the opinion be one that a "fair-minded" person could honestly hold, to a requirement that it be one that "anyone could honestly have expressed" (paras. 49-51), which allows for robust debate. As Binnie J. put it "[w]e live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones" (para. 49).

[78] Given my analysis above, which made reference to the facts and analysis of Binnie J. in *WIC Radio* that pertained to fair comment, I have no difficulty finding that there is no genuine issue with respect to the first four requirements described above as necessary to show fair comment. The only further area requiring consideration is whether there is no genuine issue that the defendant's comments were actuated by express malice.

[79] In *McVeigh v. Boeriu*, [2011] B.C.J. No. 554 at para. 71, Ker J. adopted the following framework to assist in determining whether express malice can be made out:

> In *Canadian Libel and Slander Actions* (Toronto: Irwin Law, 2004) at 299, R.D. McConchie and D. A. Potts reduced this statement to a helpful framework for the categories under which a finding of malice can be made. A defendant is actuated by malice if he or she issues the comment:
>
> a. Knowing it was false; or
> b. With reckless indifference whether it is true or false; or
> c. For the dominant purpose of injuring the plaintiff because of spite or animosity; or
> d. For some other dominant purpose which is improper or indirect, or also, if the occasion is privileged, for a dominant purpose not related to the occasion.
>
> More than one finding can be present in a given case (McConchie and Potts at 299).

[80] At trial the plaintiff has the onus of proving that the comments were actuated by express malice for there to be a genuine issue for trial. It would seem to me that the onus to demonstrate a genuine issue concerning malice of the plaintiff should similarly shift to the responding party in a summary judgment motion, as it would in trial.

[81] Accordingly, it would be plaintiff's requirement to demonstrate that there was a genuine issue for trial that the defendants' comments were actuated by express malice. Even was this not the case, I conclude that the defendants have discharged their onus to show no genuine issue concerning malice.

[82] The only evidence relevant to this issue is found in plaintiff's affidavit at paragraph 9:

> I further believe that the Defendants had as their motive to discredit and embarrass me, and possibly to damage my public reputation. I am advised by my solicitor, and do very believe, that a judicial determination of whether this can be proven true or not can only be based on the *viva voce* evidence and cross examination at a trial. There appear to be serious issues of credibility in this action respecting what the Plaintiff, Roger Smith, meant by the impugned words, what the motives of the defendants were and what context they appeared in.

[83] I am not aware of any issues of credibility in respect of Mr. Smith. Had there been any, I would have expected cross-examination on his affidavit.

[84] In any event, the plaintiff largely contradicts his view of the evidentiary basis that the Court should use to judge this matter. He describes the foundation for his own contemptuous views towards the defendants as follows:

> With respect to paragraph 7, I do not deny that the Defendants and I are ideological adversaries and opponents in the blogosphere. I do not know the defendants personally, and so my derision, scorn and contempt for them can only be for their opinions and actions as evidenced by their postings.

[85] I am in agreement with the plaintiff's statement, which should have mutual application to all parties engaged in this political debate. There is nothing in the blogging threads which would suggest that there was any personal or inherent express malice on the part of the defendants directed at the plaintiff, as opposed to the mutual contempt of the parties for each other's opinions and actions as evidenced by their postings.

[86] The defendants would be entitled to rely upon the defence of fair comment should their statement be found to be defamatory.

Conclusion

[87] The within action is dismissed with costs to the defendants in both the action and the motion.

[88] The defendants may make submissions on costs within ten (10) days of release of this decision. They should be directed to my attention via the office of the trial coordinator. The plaintiff will have a right of reply within ten (10) days thereafter.

Mr. Justice Peter Annis

Released: August 30, 2011

CITATION: Baglow v. Smith, 2011 ONSC 5131
COURT FILE NO.: 10-49803
DATE: 20110830

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JOHN BAGLOW a.k.a. "Dr. Dawg"

Plaintiff (Responding Party)

– and –

ROGER SMITH a.k.a. "Peter O'Donnell", CONNIE FOURNIER and MARK FOURNIER

Defendants (Moving Parties)

REASONS FOR JUDGMENT

Annis J.

Released: August 30, 2011