COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Brissette v. Cactus Club Cabaret Ltd.*,
2017 BCCA 200

Date: 20170525

Docket: CA43574

Between:

Dwight Brissette

Appellant

(Plaintiff)

And

Cactus Club Cabaret Ltd., Cactus Café Coal Harbour Ltd.,

Katrina Coley and Regina Novikov

Respondents

(Defendants)

Before: The Honourable Chief Justice Bauman

The Honourable Mr. Justice Tysoe

The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia
dated March 16, 2016 (*Brissette v. Cactus Club Cabaret Ltd.*,
2016 BCSC 459, Vancouver Docket S135953)

Counsel for the Appellant: A. McConchie

Counsel for the Respondents: R.S. Anderson, Q.C. and R. Safartabar

Place and Date of Hearing:	Vancouver, British Columbia April 10, 2017
Place and Date of Judgment:	Vancouver, British Columbia May 25, 2017

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Chief Justice Bauman

The Honourable Mr. Justice Savage

Summary:

Appeal from the dismissal of a defamation claim after a summary trial. The defamatory statement was made by a night manager while working in a restaurant. The summary trial judge dismissed the action on the bases of the defences of justification and qualified privilege. The appellant alleges the matter was not appropriate for determination at a summary trial. Held: Appeal dismissed. It was clearly appropriate for the judge to have decided the issues relating to the defence of qualified privilege on a summary trial application. The judge did not err in holding the defence was made out and was not defeated. That was sufficient for the dismissal of the action.

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

[1] The appellant, Dwight Brissette, appeals from the dismissal of his defamation claim against the respondents after a summary trial pursuant to Rule 9-7 of the *Supreme Court Civil Rules*. Mr. Brissette says the matter was not appropriate for determination at a summary trial, and requests that it be remitted to the Supreme Court for a conventional trial with *viva voce* evidence.

[2] The defamatory statement was alleged in Mr. Brissette's notice of civil claim to have been made by the respondent, Regina Novikov, while she was working as the night manager at the Cactus Club Café in Coal Harbour in downtown Vancouver on June 24, 2013. In the alternative, he claimed that a similar defamatory statement was made by the respondent, Katrina Coley, while she was working as a server at the Cactus Club on the same evening. Mr. Brissette did not pursue the alternate position at the summary trial or on this appeal.

[3] Mr. Brissette attended at the Cactus Club on that day from about 5:30 p.m. to 10:30 p.m. with a group of approximately ten work colleagues and business associates. They sat at a table on the patio and ordered alcohol, appetizers and dessert. Ms. Coley was the server for the table.

[4] Although there were surveillance video cameras throughout the restaurant, none of them had an unobstructed view of the table at which the Brissette party was seated, but the time stamps on the videos did assist the parties in pinpointing the timing of the relevant events.

[5] At 9:54 p.m., after taking an order from Mr. Brissette while standing beside him, Ms. Coley leaned forward in the direction of the table to take an order from one of the other guests in the party. Ms. Coley asserts that, while she was leaning forward, Mr. Brissette placed his arm on the side of her back, and his hand then slid down the side of her dress to the side of her buttocks where it rested for about a second. Mr. Brissette denies that he touched Ms. Coley or had any form of physical contact with her. His co-worker, Jimmy Byrd, deposed that he did not see Mr. Brissette touch or have any form of physical contact with Ms. Coley.

[6] In her affidavit in support of the summary trial application, Ms. Coley deposed that she went inside the restaurant after leaving the table at 9:58 p.m., found her shift leader, Alexine Hurley, told Ms. Hurley that a guest had behaved inappropriately toward her, grabbed her butt and referred to her as "Kitty-Kat" – Ms. Coley swore that Mr. Brissette and other guests at the table started calling her "Kitty-Kat" after one of the guests said his granddaughter's nickname was "Kitty-Kat"; Mr. Brissette denies calling her "Kitty-Kat", and deposed that one of the guests simply said that his granddaughter had the same first name as Ms. Coley and had the nickname "Kitty" – and Ms. Hurley responded that she would notify the Cactus Club's night manager, Ms. Novikov.

[7] Ms. Coley, Ms. Hurley and Ms. Novikov were gathered at a server station inside the restaurant at approximately 10:15 p.m. Ms. Coley deposed that she repeated to Ms. Novikov what she had said to Ms. Hurley. Ms. Novikov deposed that Ms. Coley told her that a male patron had made her feel very uncomfortable and had conducted himself inappropriately toward her, including asking if he could call her "Kitty-Kat" and placing his hand on her lower back and slowly sliding it down and touching her butt. Ms. Novikov also deposed that the video surveillance showed Ms. Coley raising her right arm and making a downward swooping motion at the time Ms. Coley was telling her this. Mr. Brissette says on appeal that the video shows Ms. Coley making a motion with both of her arms and bringing her hands together, which is not consistent with Ms. Coley demonstrating the motion allegedly made by him.

[8] Ms. Novikov deposed she instructed Ms. Coley to serve the table's outstanding order, to inform them that further orders would not be taken from them and to request they end their meeting. Ms. Novikov then followed Ms. Coley onto the patio.

[9] What was said between Ms. Coley and the patrons at the table is disputed. Ms. Coley deposed she told the party that the time for last call for alcohol on the patio had passed and that the restaurant wanted the party to move along. She swore that Mr. Brissette began to argue with her, saying that she had told them they could stay and drink all evening if they ordered food. In his affidavit, Mr. Brissette deposed that Ms. Coley said his party was required to move inside the restaurant, to which he replied that she had told him his party could stay on the patio as long as food was ordered, and he asked her to talk to her manager and see if they could stay out a little longer.

[10] Ms. Novikov then walked up to the table and stood near the end of the table where Mr. Brissette was seated. What transpired between Ms. Novikov and the members of the table is disputed to some extent. Ms. Novikov deposed she said that she would like to elaborate on what Ms. Coley meant to say but, before she could continue, Mr. Brissette rose to his feet, shouted that she had better explain quickly and walked aggressively past her, requiring her to step backwards. Mr. Brissette and his co-worker, Mr. Byrd, both deposed that Ms. Novikov did not make statements to that effect and that Mr. Brissette did not walk aggressively past her. Neither Mr. Brissette nor Mr. Byrd stated in their affidavits what Ms. Novikov did say when she first approached the table. Mr. Brissette does concede he said "this is bullshit" as he got up from the table and walked past Ms. Novikov on his way to the washroom.

[11] Ms. Novikov deposed that, after Mr. Brissette left the table, one of the guests in the party asked why they could not have any more drinks. She responded by explaining that Ms. Coley did not feel comfortable serving the party because the man who had just left the table had touched her and referred to her in an inappropriate manner and that the restaurant was asking the meeting be brought to a conclusion. Mr. Byrd denied that anyone asked why they could not have more drinks. He deposed Ms. Novikov told the party they had to leave the restaurant because there had been "inappropriate touching, fondling of the waitress … by the man who was sitting right here" (referring to Mr. Brissette).

[12] The Brissette party left the restaurant after Mr. Brissette returned from the washroom. There was disputed evidence as to interactions between Mr. Brissette and two other employees of the Cactus Club when the bill was being paid and when Mr. Brissette came back to the restaurant and asked to talk with Ms. Coley.

[13] There was also expert evidence before the summary trial judge with respect to the effect of the alcohol Mr. Brissette had consumed during the evening. He deposed that he drank 45 ounces of wine and one two-ounce shooter of tequila, but maintained that he was not inebriated or intoxicated, and that he was talking clearly and coherently. Ms. Coley and another Cactus Club employee deposed that Mr. Brissette appeared to be inebriated by the latter part of the evening.

[14] The expert engaged by the respondents calculated Mr. Brissette's theoretical blood alcohol content on the basis of what he had consumed. She also gave her opinion as to the effect of the consumption of alcohol on one's vision, reaction time, fine motor control, coordination and judgment.

[15] At the summary trial, the respondents put forward two defences to Mr. Brissette's defamation claim. First, they said the statement by Ms. Novikov was justified in the sense that it was substantially true. Second, they said Ms. Novikov made her statement on an occasion of qualified privilege, and the privilege had not been defeated by malice on her part.

[16] The summary trial judge issued written reasons (indexed as 2016 BCSC 459) in support of her order dismissing Mr. Brissette's claim. She discussed the issue of whether the matter was suitable for determination on a summary trial and concluded that the record in the case (which included examinations for discovery of Ms. Coley, Ms. Novikov and Mr. Brissette) was robust and that a full trial was not necessary. The judge reviewed the affidavit evidence, including disputed evidence on a number of collateral matters that I have not included in the above summary.

[17] After discussing the legal framework for defamation claims, the judge considered the credibility of the parties. She held that the employees of the Cactus Club were, in all probability, accurate and she identified deficiencies in the evidence of Mr. Brissette and Mr. Byrd. The judge concluded that the allegation made by Ms. Coley, and repeated to the Brissette party by Ms. Novikov, was true. The defence of justification had, therefore, been made out, and the action was dismissed.

[18] In the event she was wrong, the judge went on to consider the defence of qualified privilege. In that regard, she first concluded that Ms. Novikov's statement was made on an occasion of qualified privilege and she then dealt with Mr. Brissette's position that Ms. Novikov was actuated by malice. The judge rejected Mr. Brissette's theory that Ms. Coley had never told Ms. Novikov she had been inappropriately touched and that Ms. Novikov made up the allegation because she was offended when Mr. Brissette said "this is bullshit" and brushed past her. As the judge found malice had not been proven, the defence of qualified privilege was not defeated, and the action was dismissed on that basis as well.

Discussion

[19] The predecessor to Rule 9-7 of the *Supreme Court Civil Rules*, Rule 18A of the *Rules of Court*, was added in 1983 (B.C. Reg 178/83, s. 3) to introduce into British Columbia the mechanism of a summary trial. It authorized judges to decide actions (or issues within an action) in appropriate cases without receiving *viva voce* testimony of witnesses. Instead, judges could make decisions on the basis of sworn evidence in affidavits, documents attached to affidavits, and other written materials such as admissions, answers to interrogatories, expert opinions and transcripts of examinations for discovery and cross-examinations on affidavits. The two prerequisites to the use of the summary trial procedure were that the court was able to find the facts necessary to decide the issues of fact or law and that the court was of the opinion that it would not be unjust to decide the issues.

[20] The use of the summary trial procedure was encouraged by the majority of the five-justice division of this Court in the seminal decision of *Inspiration Management Ltd. v. McDermid St. Lawrence Limited* (1989), 36 B.C.L.R. (2d) 202, 36 C.P.C. (2d) 199 (C.A.). Until this decision, Rule 18A applications were not receiving consistent application, and some judges were adopting an extremely cautious approach. On behalf of the majority, Chief Justice McEachern made the following comments in an effort to settle the practice to be followed (at 213):

> In my judgment, it must be accepted that while every effort must be made to ensure a just result, the volumes of litigation presently before our courts, the urgency of some cases, and the cost of litigation do not always permit the luxury of full trial with all traditional safeguards in every case, particularly if a just result can be achieved by a less expensive and more expeditious procedure.

[21] Chief Justice McEachern said the following about the issue of whether it will be unjust to decide the issues (at 214):

> In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

He did caution that a judge should not decide an issue of fact or law solely on the basis of conflicting affidavits even if the judge prefers one over the other, but he pointed out that other admissible evidence may assist the judge in resolving the conflicts.

[22] The summary trial procedure has served the British Columbia judicial system well over the past 34 years. Its use should continue to be encouraged, and trial judges should not be timid in considering its suitability to decide the action or issues within the action. This is particularly so in light of two developments in the past number of years relating to the concept of proportionality.

[23] The first development was the introduction of proportionality in the *Supreme Court Civil Rules* when they were brought into force effective July 1, 2010. Rule 1-3(2) directs that, in considering the object of the *Rules* to secure the just, speedy and inexpensive determination of a proceeding on its merits, the court is to consider conducting the proceeding in ways that are proportionate to the amount involved, the importance of the issues and the complexity of the proceeding.

[24] The second development was the decision of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, containing comments of general application that are germane to British Columbia. The decision related to Ontario's summary judgment rule (the equivalent in name of the summary judgment rule contained in Rule 9-6 of the *Supreme Court Civil Rules*, but with the additional recent powers given to Ontario judges of weighing evidence and evaluating credibility). Madam Justice Karakatsanis discussed the need for a shift in culture in view of the concerns regarding access to justice:

[28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible – proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

[29] There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

[25] In my view, the introduction of the summary trial rule in 1983 started a shift in culture in British Columbia. However, current concerns about access to justice highlight the need for the shift in culture to continue in this Province, with a focus on proportionality.

[26] The two prerequisites under the previous Rule 18A continue under the current Rule 9-7. The court must be able to find the facts necessary to decide the issues of fact or law and the court must be of the opinion that it would not be unjust to decide the issues. Proportionality will primarily be of importance in considering the factors relevant to the issue of whether it would be

unjust to decide the matter on a summary trial application, but there may be occasions when proportionality is relevant to the issue of whether the court is able to find the facts necessary to decide the issues of fact or law (for example, the court could in an appropriate case order cross-examination on key affidavits under Rule 9-7(12) rather than dismissing the summary trial application on the basis that a conventional trial is needed).

[27] As noted in *Inspiration Management*, the court should not decide an issue of fact or law solely on the basis of preferring one conflicting affidavit over another. This was recently reiterated in *Cory v. Cory*, 2016 BCCA 409 at para. 10: there must be documentary evidence, evidence of independent witnesses or undisputed evidence that undermines the affidavit of one of the parties on critical issues or some other basis for preferring one affidavit over another.

[28] In the present case, the respondents presented two defences for adjudication at the summary trial – justification and qualified privilege. Success on either one of these defences was sufficient to have the defamation claim dismissed. Whatever debate reasonable people may have as to whether the record was sufficient for the summary trial judge to have made the finding of fact that, despite Mr. Brissette's denial, he touched Ms. Coley in the manner in which she deposed and whether it was unjust for the summary trial judge to decide an issue having an adverse impact on Mr. Brissette's reputation, it is my view that it was clearly appropriate for the judge to have decided the issues relating to the defence of qualified privilege on a summary trial application.

[29] The defence of qualified privilege was described in the following terms in Raymond E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, loose-leaf, 2d ed. (Toronto: Carswell, 1994) vol. 4 at §13.1(1):

A communication is protected by a qualified privilege if it is fairly made on a privileged occasion by a person in the discharge of some public or private duty, or for the purpose of pursuing or protecting some private interest, provided it is made to a person who has some corresponding interest in receiving it. The duty may be either legal, social or moral. The test is whether persons of ordinary intelligence and moral principle, or the great majority of right-minded persons, would have considered it a duty to communicate the information to those to whom it was published.

[Footnotes omitted.]

This passage has been cited with approval, in whole or in part, by many Canadian courts, including this Court in *Merit Consultants International Ltd. v. Chandler*, 2014 BCCA 121 at para. 29.

[30] *Gatley on Libel and Slander*, 11th ed. (London: Sweet & Maxwell, 2008) gives the following example of an occasion of qualified privilege (at §14.21):

Where a person is asked a question about a matter by or on behalf of someone who appears to have a legitimate interest in knowing the answer, the law has recognised that he is

under a duty to answer, and that the occasion is privileged; so long as he speaks honestly, he is protected, and the law will not usually inquire into the reasonableness or otherwise of his beliefs.

[Footnotes omitted.]

[31] As the name of the defence indicates, the privilege is not absolute. In *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, 126 D.L.R. (4th) 609, Mr. Justice Cory described the two ways in which the privilege can be defeated:

[79] … It may be defeated in two ways. The first arises if the dominant motive for publishing is actual or express malice. Malice is commonly understood as ill will toward someone, but it also relates to any indirect motive which conflicts with the sense of duty created by the occasion. Malice may be established by showing that the defendant either knew that he was not telling the truth, or was reckless in that regard.

[80] Second, qualified privilege may be defeated if the limits of the duty or interest have been exceeded. In other words, if the information communicated was not reasonably appropriate to the legitimate purposes of the occasion, the qualified privilege will be defeated. …

[32] In addition to the two ways of establishing malice set out in para. 79 of *Botiuk*, malice may also be shown if the defamatory statement was made with the dominant purpose of injuring the plaintiff because of spite or animosity or for some other dominant purpose that is improper or not related to the occasion: *Smith v. Cross*, 2009 BCCA 529 at para. 34.

[33] On the evidence of Ms. Novikov, one of the patrons at the patio table asked her why they could not have any more drinks. Mr. Brissette had left for the washroom at that point and was not in a position himself to challenge this evidence, but Mr. Byrd denied that anyone asked this question. The summary trial judge did not expressly resolve this conflict, but she implicitly accepted the evidence of Ms. Novikov. In finding that it was an occasion of qualified privilege, the judge stated that Ms. Novikov began speaking "when some of the attendees began asking why they could not continue and after Mr. Brissette declared that it was 'bullshit' and left the table" (para. 171).

[34] The judge had considered Mr. Byrd's credibility when dealing with the justification defence, and concluded that she preferred the evidence of the employees of the Cactus Club over his evidence. In that regard, she relied on the fact that he presented a more sanitized version than Mr. Brissette because he did not refer to Mr. Brissette saying "this is bullshit" or to him swearing to another Cactus Club employee (which Mr. Brissette admitted), and Mr. Byrd referred to Ms. Novikov having used the word "fondled" when no other evidence supported this assertion (and when he did not use that word when he first told Mr. Brissette what Ms. Novikov had said).

[35] In my view, there was an additional deficiency in Mr. Byrd's evidence. He deposed that he had no recollection of anyone at the table taking a photograph of Ms. Coley. The evidence of both Ms. Coley and Mr. Brissette is that one of the guests at the table took a photograph of the two of them (and it is shown on the video occurring approximately three minutes prior to the alleged inappropriate touching by Mr. Brissette). If Mr. Byrd was not sufficiently observant to

have noticed the photograph being taken or his consumption of alcohol hindered his recollection of it, it is reasonable to infer that he also may not have heard or remembered someone at the table asking why they could not have any more drinks.

[36] I therefore conclude it was not an error on the part of the judge to make the finding of fact on a summary trial application that someone at the table did ask Ms. Novikov why their party could not have more to drink. In accordance with the above passage from *Gatley on Libel and Slander*, the occasion of Ms. Novikov's subsequent statement was privileged because she was answering a question of someone who had a legitimate interest in knowing the answer.

[37] It is also my opinion that, even if one accepts the evidence of Messrs. Brissette and Byrd with respect to the events preceding Ms. Novikov's statement, it would still have been made on an occasion of qualified privilege. While restaurants are generally privately owned, they extend licences to the general public to enter the premises and to stay while food and beverages are being ordered and consumed. As long as the patrons are not causing a disturbance and the table is not required for other incoming guests, restaurants generally allow patrons to stay at their table as long as they continue to order and consume food and beverages. If the restaurant tells the patrons to leave or to move to a different table, in accordance with the objective test set out in *Mann v. International Association of Machinists and Aerospace Workers*, 2012 BCSC 181 at para. 86, persons of ordinary intelligence and moral principle would consider it a social or moral duty for the restaurant to communicate the reason for it. This is particularly so if the patrons question why they are being told to leave or move.

[38] On Mr. Brissette's evidence, Ms. Coley told his party that they would have to move inside the restaurant. He did not accept what she was saying and asked her to talk to her manager and see if they could stay out on the patio longer. Mr. Brissette did not depose what Ms. Novikov said when she approached the table, but he was obviously questioning or challenging the decision of the restaurant when he said "this is bullshit" as he got up from the table on his way to the washroom. In those circumstances, the great majority of right-thinking persons would consider the restaurant to have a duty to explain why the party was being asked to move.

[39] Mr. Brissette says, if the statement of Ms. Novikov was made on an occasion of qualified privilege, the privilege was defeated in each of the two ways described in *Botiuk*. He asserts Ms. Novikov was actuated by malice and the limits of the duty on the Cactus Club created by the occasion were exceeded.

[40] Mr. Brissette's position is that Ms. Novikov made up the allegation of inappropriate touching because he was rude to her when he got up from the table. The summary trial judge dealt with this position in the following manner:

[174] I do not accept Mr. Brissette's theory that Ms. Novikov was so offended by his brushing past her and saying "bullshit" that she made up the allegation that he had inappropriate[ly] touched Ms. Coley. This defies belief. She had not met Mr. Brissette before June 24, 2013, and has not had any dealings with him since. As Ms. Novikov points out: she has experienced rude behaviour from customers on several past occasions. She considered Mr. Brissette[']s conduct

towards her to have been "very rude." In spite of that, she says that she did not take his conduct personally or find his conduct upsetting. She brushed it off and carried out her duties in what she considers a professional manner. She says she does not bear on Mr. Brissette any spite or ill will. She says that she spoke with him and his party for no purpose or motive other than to carry out her duties as manager of the Cactus Club.…

[41] In my view, it was open to the judge to reject Mr. Brissette's claim of malice on the summary trial application. There was no conflicting evidence that precluded the judge from making the necessary finding of fact with respect to the alleged malice. Ms. Coley deposed that she told Ms. Hurley and Ms. Novikov that she had been inappropriately touched by a customer at the table, and both Ms. Hurley and Ms. Novikov confirmed her evidence. While there was evidence disputing that Mr. Brissette did inappropriately touch Ms. Coley, there was no evidence contradicting Ms. Coley or Ms. Hurley as to what Ms. Novikov was told. Ms. Novikov had no reason to doubt the truth of what she was told, and there was no reason for her to have made it up. She specifically denied having any spite or ill will towards Mr. Brissette, and there is no evidence undermining her denial.

[42] Mr. Brissette submits the limits of the duty on the Cactus Club were exceeded because the information communicated by Ms. Novikov was not reasonably appropriate in the context of the circumstances. There was evidence from Ms. Coley's examination for discovery that, in accordance with the policy of the Cactus Club, the time for last call for drinks on the patio was 10:30 p.m. and the patio closed at 11:00 p.m. Mr. Brissette says the appropriate response of Ms. Novikov was to have told this information to the Brissette party because it would have accomplished the same result. This point was not addressed by the summary trial judge, presumably because it was not raised in Mr. Brissette's written response to the Cactus Club's summary trial application.

[43] In my opinion, this submission has no merit. Whether one accepts Ms. Coley's evidence (the time for last call on the patio had passed and the restaurant wanted the party to move along) or Mr. Brissette's evidence (the party was required to move inside the restaurant), what Ms. Coley said to the table did not accomplish the result of the party leaving the restaurant or moving inside the restaurant. On Mr. Brissette's own evidence, he did not accept this explanation and asked Ms. Coley to talk to her manager. When Ms. Novikov reached the table, Mr. Brissette continued to challenge the explanation by saying "this is bullshit". On the evidence accepted by the judge, one of the other patrons asked Ms. Novikov why they could not have any more drinks. It was appropriate in these circumstances for Ms. Novikov to tell the party the true reason they were being asked to leave the restaurant. There was no obligation on Ms. Novikov to tell a lie.

[44] I conclude the judge did not err in holding on a summary trial application that the defence of qualified privilege was made out and was not defeated.

Conclusion

[45] I would dismiss the appeal.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Mr. Justice Savage"