ROBBINS v. CANADIAN BROADCASTING CORP.[1]

DAMAGES — TELEVISION PROGRAMME — LETTER OF CRITICISM — INVITATION BY EMPLOYEE OF BROADCASTER INCITING LISTENERS TO WRITE OR TELEPHONE TO THE WRITER — DELIBERATE WRONGFUL ACT — RESPONSIBILITY OF EMPLOYER ARTICLES 1053 - 1054 C.C.

The cardinal rule amongst commercial broadcasters and telecasters is to do nothing to offend the audience. This is not surprising in view of the relationship between the advertiser and the listener or viewer who is, after all, a potential customer. The Canadian Broadcasting Corporation, however, being a Crown corporation relying largely upon government financial support for its continuing existence is not subject in the same way to the influence of advertisers in what it says and does. Nevertheless, the freedom inherent in the C.B.C.'s position should make it all the more careful to observe its legal responsibility not to cause harm to its viewers through any of its actions. This sense of responsibility was virtually non-existent almost three years ago when the master of ceremonies on a popular television show disclosed to the audience the name and address of a viewer who had criticized the programme.

The result of this ill-considered action was brought to light in the Superior Court in the case under consideration. The plaintiff, Dr. Robbins, was a practicing physician. He had at that time been in practice for forty years and held a number of prominent positions in Montreal medical circles. The defendant, the C.B.C., was a body corporate carrying on radio broadcasting and television service in Canada, where it enjoys a monopoly of the latter except for a few cities.

Plaintiff, on 16th January, 1956, wrote to the producer of a programme called TABLOID, criticizing the programme and two of its performances in particular and enclosed a newspaper clipping containing criticisms of the programme by a newspaper television critic. Dr. Robbins closed his letter with the following:

> I wonder if the Tabloid Quartette will read this letter along with some of the others they get from Viewers.

Many may remember the broadcast of TABLOID during which the late Dick MacDougal, then Master of Ceremonies on the programme, read Dr. Robbins' letter describing it as not being "a very pleasant addition to tonight's programme." He then went on to suggest that Dr. Robbins be "cheered up" by the viewers, and for this purpose his address was flashed on the screen twice.

As the facts disclosed, on the night of the broadcast,

> ... within 15 minutes after the invitation to "cheer up" the plaintiff was given... his telephone started ringing and continued until late that evening when he and

[1] *Robbins v. Canadian Broadcasting Corp.* (1958), 12 D.L.R. (2d) 35, [1958] S.C. 152. (Page references used are to the D.L.R. version.)

> his wife had to take the telephone off the receiver to get some peace. Further, it so continued for three days, until the situation became so intolerable at his home that he had to go to the telephone company and have them disconnect his number and have them give him another number. His Telephone Answering Service was also swamped with calls. Plaintiff spoke about the hostile messages he had received. Some of the language was so crude he did not want to repeat it in Court.[2]

Other methods of "cheering up" the plaintiff included sending C.O.D. food parcels to his home and ordering taxicabs to go to his address. The Doctor also received 102 letters, some of them "disgusting and abusive." He suffered severe emotional disturbance as a result of these incidents and for several weeks after was in no condition to practice. He suffered from insomnia for a considerable period of time after the incident.

Finding for the plaintiff, Associate Chief Justice Scott points out that "the uncontradicted testimony of the plaintiff stands as to what happened to him... The only reasonable inference to draw from all this is that the Producer and Master of Ceremonies knew this was likely to happen."[3] Whether or not they *knew* it was likely to happen, it is clear that they desired something to happen and that they were instigators of the damage caused to the plaintiff. These "positive acts" and the "imprudence" of the defendant's employees establish its fault and its responsibility to the plaintiff under art. 1053 of the Civil Code.

The case is of interest for several reasons, one of which is the unusnal factual situation itself. Both sides admitted their inability to find any case similar to it. It is of further interest because of the testimony given by a psychiatrist. Although members of that profession are often called as expert witnesses in criminal proceedings, they seldom appear in civil matters. The plaintiff called a psychiatrist to testify to the effect an invitation such as that extended by MacDougal would have on the viewing audience. The witness established that in a large audience (at the time estimated by another witness to be about 200,000 persons in the Montreal arca alone) there were bound to be "a large number who were just marginal in their ability to control themselves" when invited to abuse the person whose name and address was given to them. The subsequent events made it quite clear that such was indeed the case.

Doubtless the psychiatrist was competent to testify as to the existence of such "marginal people"; but was this evidence of positive value to the plaintiff's case? The fact that certain people did take up the invitation in a way which was damaging to Dr. Robbins is clear from other evidence. What did the psychiatrist's testimony add in showing that, psychologically. they were bound to do so? The psychiatrist continued that the C.B.C. should have been aware of the fact that the "marginal" minority would have reacted in an abusive manner. Such testimony, however, appears beyond his competence. A more appropriate witness on the subject of customary knowledge in the broadcasting industry would have been someone expert in the field of broadcasting.

Similarly, the statements of a member of a firm engaged in estimating the

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[2]At p. 41.
[3]At p. 41.

number of viewers and listeners to C.B.C. programmes seem to be irrelevant. This witness established that a large number of people were watching TABLOID at the time. The actual number of viewers was surely of no importance, as long as the plaintiff suffered damages as a result of the actions of a few of them. Or can a principle be deduced from the case that if the actual number of viewers had been smaller, the defendant's liability would not have been as great? Such a conclusion does not appear to be a valid one inasmuch as liability in the past seems to have been based upon the actual damage suffered and not upon the number of "agents", potential or otherwise, in a position to effect the damage.

This case provides an unusual example of "chain of fault." If, in spite of MacDougal's invitation to the listeners, no one had decided to disturb Dr. Dr. Robbins, there would have been no delictual damages suffered. In his declaration, plaintiff does not allege that the actual words used by MacDougal were, in themselves and apart from the mischief which they sparked, defamatory or injurious to him. It must be remembered, too, that the Doctor himself suggested that MacDougal read his letter over the air, and therefore seemed prepared to accept the consequences which that act alone would have engendered. The fault of the C.B.C. was not the direct cause of the damage but was the cause of further fault by other persons which in the end caused the damage. There is an interesting question as to whether or not plaintiff might have had an alternative action against the actual individuals who telephoned and wrote him. There might be situations where this alternative would be useful to the plaintiff although in the present case it is obvious that the C.B.C. was the convenient defendant.

In finding for the plaintiff, the Associate Chief Justice based his assessment of damages upon the principles laid down by the Supreme Court of Canada in *Chaput v. Romain*,[4] and determined that the total sum of $3,000 would compensate for damages suffered. In his original declaration, plaintiff claimed for the following damages:

Loss of earnings resulting from the deprivation of the use of his telephone service and the telephone answering service and from the impairment of his health and his nervous condition	$7,000
Pain, suffering, annoyance, humiliation, invasion of privacy and loss of enjoyment of life	$3,000

On a motion for particulars by defendant on the question of damages, plaintiff revised the breakdown of damages claimed and the following appeared in his amended declaration:

Loss of income from his professional practice in the period while he was deprived of his telephone	$1,000
Loss of income from his professional practice in the future because of such deprivation	$5 000
Loss of professional income by reason of impairment of health	$1.000
Pain and suffering	$1,000
Annoyance, humiliation and invasion of privacy	$1.000
Loss of enjoyment of life	$1,000

[4] *Chaput v. Romain* 1 D.L.R. (2d) 241, 114 Can. C.C. 170, [1955] S.C.R. 834.

The $3,000 assessment seems reasonable but it is unfortunate that the Court did not specify the extent to which the individual items claimed as damages were considered justified. The reliance on the *Chaput* case does not help in this regard and indeed seems to be unusual in the light of the distinction to be drawn between the circumstances of the two cases. In the earlier case the Supreme Court considered the problem of moral damages and laid down the principle that even if no pecuniary damages are suffered as a result of a delict or quasi-delict, a right may exist, nevertheless, to moral damages. Such moral damages were distingushed from those of a punitive nature which lie exclusively within the jurisdiction of the Criminal Courts, and were described as comprising all infringements upon extra-patrimonial rights, such as the right to liberty, to honour, to one's name, or to the freedom of conscience and speech. In the *Chaput* case the appellant had suffered from the false imputation that he had been engaged in committing a criminal offence.

Aside from the fact that Dr. Robbins did not suffer any such infringements, it is plain that the Supreme Court considered moral damages to be quite distinct from delictual damages. Since the plaintiff's claim in this case was based upon delictual damages and not upon moral damages, it is not clear why the principle of the *Chaput* case was applied. This is particularly evident in the light of the fact that the plaintiff had claimed quite substantial and tangible damages arising from loss of income.

This case provides another example of the inherent flexibility provided by art. 1053; the basic principle of civil responsibility subsists and operates with no difficulty whatsoever despite the novelty of the surrounding circumstances.

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