

Hill v. Church of Scientology

[Indexed as: Hill v. Church of Scientology of Toronto]
 S. CASEY HILL v. CHURCH OF SCIENTOLOGY OF TORONTO and
 MORRIS MANNING

Ontario Court of Appeal
 Griffiths, Catzman and Galligan J.J.A.

Heard - December 6-10, 1993.
 Judgment - May 10, 1994.

Defamation - Nature of defamation - Parties in action for defamation - Crown and Crown agents - Defamation action by Crown official - Court recognizing importance of protecting officials assuming responsibilities of public office.

Defamation - Nature of defamation - Charter of Rights and Freedoms - Defamation action by Crown official - Crown official taking action in personal capacity - Charter not directly applicable to such private disputes - Development of common law in spirit of Charter not warranting usurpation of legislative function by doctrinal change - Canadian Charter of Rights and Freedoms.

Defamation - Privilege - Qualified privilege - Nature of qualified privilege - Privilege not applicable to recital of allegations contained in documents not yet read or referred to in open court.

Defamation - Damages - Scope of discretion of jury in making award - Jury awarding compensatory, aggravated and punitive damages totalling \$1.6 million - Award not so large or grossly out of proportion to libel as to warrant interference by appeal court.

Defamation - Practice - Costs - Defendants ordered to share costs equally - Majority of trial time and damages relating to one defendant only.

At a press conference in front of Osgoode Hall, the defendant M, wearing his barrister's gown, made serious allegations against the plaintiff, a Crown law officer in the employ of the Ministry of the Attorney General of Ontario. In making these statements, M was acting as counsel for the defendant Church of Scientology, and his observations were widely published in the media. M stated that the plaintiff had aided and abetted others in breaking a court order concerning the sealing of documents and that he had aided and abetted other Crown counsel in misleading a judge, conduct seriously disruptive of the proper course of justice and deserving of serious criminal sanctions by way of a motion for contempt. All of these allegations were unfounded, and while contempt proceedings were initiated, they were dismissed upon a motion for non-suit.

The plaintiff then commenced proceedings for libel against M and the Church. He was awarded compensatory damages of \$300,000 plus aggravated and punitive damages in the sums of \$500,000 and \$800,000, respectively, payable by the Church only. Judgment was entered, plus prejudgment interest and costs. Leave was granted to the plaintiff to amend his statement of claim so that the amounts claimed for aggravated and punitive damages would conform to the jury's award. A defence request that the jury's award be disregarded as unreasonably high was rejected.

Canadian Centre of International P.E.N., and Canadian Magazine Publishers Association.

Robert P. Armstrong, Q.C., and Kent E. Thomson, for respondent S. Casey Hill.

Lori R. Sterling, for Intervenor Attorney General of Ontario.

(Doc. CA C11706)

1 May 10, 1994. Per curiam: – The focal point of this libel action was a press conference conducted on September 17, 1984 by the appellant, Morris Manning, accompanied by representatives of the appellant, the Church of Scientology of Toronto (“Scientology”), and its counsel, Clayton Ruby. Morris Manning, wearing his barrister’s gown on the steps of Osgoode Hall, read from and commented upon allegations contained in a notice of motion which Scientology intended to use to commence contempt proceedings against the respondent, Casey Hill. The notice of motion alleged, among other things, that Casey Hill had breached orders of the Supreme Court of Ontario and had misled a judge of that court and requested that he be fined or imprisoned.

2 The allegations against Casey Hill were totally untrue and without foundation. Casey Hill commenced this action for damages for libel against Morris Manning and Scientology. Following a trial before Mr. Justice Carruthers and jury [reported (1992), 7 O.R. (3d) 489 (Gen. Div.)], the jury on October 3, 1991 found Morris Manning and Scientology jointly liable for general damages in the amount of \$300,000 and Scientology alone liable for aggravated damages of \$500,000 and punitive damages of \$800,000. Scientology and Morris Manning are appealing from this judgment.

3 The intervenors are professional writers, journalists and magazine publishers (the “Writers and Publishers”) who were granted leave to intervene with respect to certain issues by order of Associate Chief Justice Morden. The Attorney General of Ontario is also intervening pursuant to s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, to make submissions relating to the constitutional issues raised in this appeal.

4 Although Morris Manning abandoned the defence of justification a few days before trial, Scientology continued to assert this defence and withdrew it only after the trial and on the eve of this appeal.

THE FACTS

1. *The Seizure of Scientology Documents*

5 In 1984, Casey Hill was employed as counsel with the Crown Law Office, Criminal Division. In 1983 he gave advice to the Ontario Provincial Police (“O.P.P.”) in connection with a search warrant obtained on March 1, 1983 authorizing a search on March 3 and 4, 1983 of the premises of Scientology located on Yonge Street in Toronto. Pursuant to this warrant, the O.P.P. seized about 250,000 documents, comprising around 2,000,000 pages of material. These documents were stored in approximately 850-920 boxes at an O.P.P. building in Toronto. Immediately following the seizure, Scientology retained Clayton Ruby to represent it and to bring a motion to quash the search warrant and to seek the return of the seized documents.

2. *The Sealing Orders*

6 Litigation relating to the warrant commenced on March 7, 1983 and was ongoing throughout 1983 and 1984. In the course of this litigation, Mr. Justice Osler ruled on July 11, 1984 that solicitor and client privilege applied to 232 of the documents which he had reviewed. He ordered that those documents remain sealed pending further order of the court.

7 Throughout the period of litigation concerning the seized documents, Casey Hill had regular contact with Clayton Ruby and other counsel for Scientology by telephone, through correspondence, in meetings and during attendances in court. Agreements were reached between Casey Hill and Clayton Ruby and, in general, matters were resolved in a spirit of co-operation. Casey Hill would convey the resolution of those matters to members of the O.P.P. who were responsible for the seized documents. To the extent that matters were not resolved on consent, Clayton Ruby and Casey Hill would proceed with contested motions and have those matters decided by the court.

3. *Scientology’s Marriage Act Application*

8 In March of 1983, Charles Campbell was retained by Scientology to make an application to Rosemarie Drapkin, Deputy Registrar General of the Ministry of Consumer and Commercial Relations, requesting that Reverend Earl Smith of Scientology be granted the authorization to solemnize marriages pursuant to s. 20(2) of the *Marriage Act*, R.S.O. 1980, c. 256. By letter dated August 22, 1984, Rosemarie Drapkin wrote to Charles Campbell concerning the

application and advised that she had "reviewed certain documents relating to the Scientology organization which were seized pursuant to the search warrant" issued on March 1, 1983. Attached to the letter was a list of 89 documents which had been seized and which Rosemarie Drapkin stated she had reviewed. It was this letter that raised the concern of Scientology and its legal advisers.

4. *The Application before Mr. Justice Sirois*

9 Kim Twohig, a solicitor in the Civil Division of the Crown Law Office, (which operates separately from the Criminal Division) became involved with Scientology in March, 1984 when Scientology commenced an application for judicial review of Rosemarie Drapkin's failure to approve the application for authority to solemnize marriages.

10 Kim Twohig understood that certain Scientology documents had been seized and it was her opinion that the information contained in some of those documents might be of use to Rosemarie Drapkin in making her decision whether to grant Scientology authority to solemnize marriages. Kim Twohig approached Casey Hill concerning access to the seized documents. She contemplated bringing an application under s. 446(5) [now s. 490(15)] of the *Criminal Code* for an order permitting Rosemarie Drapkin to examine the documents. She testified that Casey Hill made it very clear within moments of her first discussion that he had instructed the police officers who had custody of the seized documents not to allow anyone to see the documents without a court order.

11 Casey Hill testified that he told Kim Twohig that there was a motion outstanding before Osler J. for an order quashing the search warrant. He explained to her that there had been several interim rulings and stated that "this was probably the type of case where the judge hearing such an application would want notice given to Scientology". Casey Hill also provided Kim Twohig with copies of factums which had been filed with Osler J. during the search warrant proceedings. The front cover of the Crown's factum referred to an application brought by Scientology for a sealing order and, on the third page of the factum, there was a specific reference to an earlier sealing order granted by Linden J. Casey Hill told Kim Twohig that once the necessary materials were prepared and served, he would likely be in a position to give the consent to the application required under the *Criminal Code* on behalf of the Attorney General.

12 During the last week of July, 1984, Casey Hill travelled to Nassau for the purpose of meeting with the Attorney General of the Bahamas in respect of an ongoing criminal investigation. While he was in the Bahamas, Casey Hill contacted his office by telephone and,

while he was on the telephone, Kim Twohig, who was working in a nearby office, asked to speak with him. Kim Twohig explained that a sense of urgency had arisen in relation to the application for an order granting Rosemarie Drapkin access to the seized documents because a date had been fixed with the court to hear Scientology's application for judicial review and counsel were directed to deliver their factums and any affidavit material prior to September 9, 1984. Casey Hill testified that he told Kim Twohig that her application would have to be served on the Crown Law Office, Criminal Division in the usual fashion and that a counsel in that division would look at it.

13 Kim Twohig prepared the necessary materials for an application under the *Criminal Code* including a notice of motion, an affidavit of Rosemarie Drapkin, and a form of consent of the Attorney General. The consent was signed by James Blacklock of the Crown Law Office, Criminal Division.

14 The application was filed in Weekly Court without notice to Scientology. Kim Twohig attended at Weekly Court on July 30, 1984 with Jerome Cooper, a solicitor with the Ministry of Consumer and Commercial Relations. The Weekly Court office had misplaced the motion materials and, accordingly, the matter had not been listed for hearing. The file was located later that day and transferred to Mr. Justice Sirois in Chambers. A consent order was issued the following day by Sirois J. without submissions having been made by counsel.

15 Kim Twohig agreed in her testimony that she, rather than Casey Hill, made the decision not to provide notice to Scientology of her application under the *Criminal Code*. She testified that in so doing she proceeded on the assumption that the presiding judge would determine whether notice to Scientology was necessary or appropriate. She stated that she certainly would have abided by any order requiring that Scientology be provided with notice. When Kim Twohig realized later that the order might provide access to documents ordered sealed, she was very upset at what she had done through inadvertence.

5. *Casey Hill's Role in the Sirois Application*

16 On the evidence, it is abundantly clear that Casey Hill played no part in the compilation of the materials filed in support of the application before Sirois J. and he had no opportunity to inspect those materials before they were filed with the court. He had nothing to do with the execution or filing of the consent to the order in question on behalf of the Attorney General of Ontario. He was not advised in early August of any difficulties associated with the order nor was he aware of the scope of the order which granted Rosemarie Drapkin access to all of the documents that had been seized in the raid on Scientology in March, 1983.

- 17 Subsequently, on September 5, 1986, Hughes J. set aside the order of Sirois J. and stated:

In the interests of justice, in my view, the Church of Scientology, whose property was in question and which had been a party to the proceedings sealing up the documents, should have been served, and it is appropriate under the circumstances to set the order aside.

- 18 Casey Hill testified that he heard nothing further concerning Rosemarie Drapkin until late August, 1984, when he received a telephone call from Det. Insp. Ormsby, the senior officer of the O.P.P. responsible for the investigation of Scientology. Casey Hill was told that Rosemarie Drapkin had attended at the O.P.P. building in which the seized documents were maintained with the order of Sirois J. which, on its face, appeared to grant Rosemarie Drapkin access to all of the seized documents, including documents which had been sealed. Det. Insp. Ormsby indicated that no access whatsoever had, in fact, been given to Rosemarie Drapkin in respect of the sealed documents. Casey Hill told Det. Insp. Ormsby that he had acted entirely properly in not granting Rosemarie Drapkin access to sealed documents.

6. To What Documents Did Rosemarie Drapkin Gain Access?

- 19 The sealing procedure adopted by Scientology did not permit officers of the O.P.P. to determine which documents had actually been sealed. Representatives of Scientology brought documents over which they wished to assert privilege to an O.P.P. officer who, without reading, marking, inspecting or recording the documents, would make a photocopy of each one for Scientology only and then place the original in a sealed envelope.

- 20 On the evidence, it is clear that Rosemarie Drapkin never had access to actual sealed documents. What she, in fact, gained access to was a small number of unsealed copies of the sealed documents. One possible explanation for this is that, in many instances, multiple copies of the same documents were seized by the O.P.P. (the "multiple copies theory"). One copy of a particular document which was located in one box may have been sealed by a representative of Scientology whereas other copies of the same document located in a different box may not have been sealed.

7. The Investigation by Scientology

- 21 When Charles Campbell, as counsel for Scientology, received Rosemarie Drapkin's letter of August 22, 1984, he immediately spoke with Clayton Ruby and representatives of Scientology and with Kim

Twohig. He obtained copies of the documents listed in Rosemarie Drapkin's letter from Kim Twohig. He also sent someone to search the court files to obtain copies of the documents relied upon by Kim Twohig in obtaining the order of Sirois J. Shortly thereafter, Kim Twohig was advised that certain of the documents listed in Rosemarie Drapkin's letter of August 22, 1984 were subject to a claim of privilege by Scientology. Kim Twohig testified that she made immediate arrangements to have each of the documents in question returned to the O.P.P.

- 22 Charles Campbell replied to Rosemarie Drapkin's letter of August 22, 1984 by letter dated August 27, 1984 which stated in part:

The documents relied upon by yourself include solicitor client correspondence and materials which appear to be held not only improperly but also held contrary to Court Order.

- 23 Charles Campbell sent Clayton Ruby the list of documents which Rosemarie Drapkin claimed to have reviewed. Clayton Ruby wrote a letter dated August 28, 1984 to George W. Taylor, Solicitor General of Ontario, with a copy to Casey Hill, expressing shock that Rosemarie Drapkin had reviewed sealed documents and declaring:

Surely, this makes a mockery of the judicial process, when we are left spending day after day at great expense to the Court system arguing and obtaining rulings on the issue of what is privileged and what is not, when all the while the Police are acting as if there were no rule of law and as if there were no Court hearing pending. They are simply ignoring solicitor/client privilege and making a mockery of the courts. They acknowledge, formally, through the Office of the Attorney-General, that they are sealing material and then blithely ignore their undertaking.

Hundreds of searches are carried out in Ontario on the basis that the Police agree to seal material pending the Court resolution of assertions for solicitor/client privilege in the documents seized. How could anyone believe the O.P.P. after this? What kind of respect do they have for the legal profession or for the rights of ordinary citizens to consult with their lawyers in confidence?

This is a shocking intrusion upon the civil liberties of ordinary Canadians.

He concluded as follows:

I ask for a full investigation and for disciplinary action against everyone involved. I will then consider what further steps I ought to take. May I have your reply within seven days.

- 24 Prior to writing the above letter, neither Clayton Ruby nor Charles Campbell nor anyone acting on behalf of Scientology made