GRADE 9 MOCK TRIAL

STUDENT HANDBOOK

WHAT HAPPENED...

Bruce Opolsky is a wrestler for the Burdett Lake high school wrestling team. He is not the best on his team, but has worked hard and recently won the "Most improved player award." On April 23, 2017 Bruce applied to Lani Chu, the co-coordinator of Graykes Overnight camp, for a job as a camp counsellor at their summer sports camp.

On May 12, 2017 a group of students, led by Tahiya Jaswal, created a Facebook group for their school newspaper, the *Burdett Lake Bugle*. One of the discussion threads on the group's site was called "Bruce is a cheater."

In the initial post, Tahiya Jaswal, the editor of the newspaper, wrote an 'exposé' about Bruce. In it she wrote:

"Bruce is a cheater. he takes the easy way out of everything. He paid Kiran to finish his English report and he cheated during his chemistry final. I'm sure he doesn't come by anything honestly. He doesn't even know how to work – I bet he's on steroids."

After Tahiya's post, a number of other students commented as well. Jordan Pasha wrote:

> "I totally agree. He's cheated off my work in class. The 'roids probably make his tackles and flips more forceful but his brain cells useless!"

The newspaper's group is available to all students in the Burdett Lake high school Facebook network. The "Bruce is a cheater" discussion thread came up on the newsfeed for all members of Facebook from Burdett Lake high school.

Burdett Lake is a small high school and most students know Bruce. Last year Bruce Opolsky placed second at Provincials for wrestling. There are also other students named Bruce in the school.

The wrestling coach heard about the Facebook posts and made Bruce Opolsky take a urine analysis test. He was benched while the coach waited for the results. In addition, Lani Chu heard about the Facebook posting through her daughter, a student at Burdett Lake. Based on the posting, Lani denied Bruce Opolsky the summer camp counsellor job because she didn't feel that he was a trustworthy candidate.

After these events (and a clean bill of health from the wrestling coach), Bruce Opolsky sued Tahiya Jaswal and Jordan Pasha for defamation. In his lawsuit, Bruce Opolsky asked for the following in damages:

» $2,500 for lost wages as a camp counsellor

» $5,000 for general damages

ALBERTA

Provincial Court

BETWEEN:

BRUCE OPOLSKY

Plaintiff

- and –

TAHIYA JASWAL and JORDAN PASHA

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Alberta lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the rules of civil procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Alberta.

If you are served in another province or territory of Canada or in the United states of America, the period for serving and filing your statement of defence is forty days. if you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the rules of civil procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Dated: September 1, 2017

Issued by: _____

Local registrar
10th Floor
500 Legal Avenue
Calgary, Alberta
ALA 2B2

TO:
TAHIYA JASWAL
111 Main Street
Calgary, Alberta
ALA 2B2

AND TO:
JORDAN PASHA
403 Centre Road
Calgary, Alberta
ALA 2B2

The Claim

1. The Plaintiff claims against the defendants:

a. General damages for defamation in the amount of $5,000.00;

b. Lost wages in the amount of $2,500.00;

c. Interest from the date that notice was given to the defendants until Judgement pursuant to the *Courts of Justice Act*, RSO 1990, c. c-43;

d. Costs of this action on a substantial basis; and

e. Such further and other relief as this honourable court deems just.

The Parties

2. The plaintiff, Bruce Opolsky ("Bruce"), is an individual who resides in the city of Calgary in the province of Alberta and attends Burdett Lake high school ("Burdett"). He is a wrestler for the Burdett school team.

3. The defendant, Tahiya Jaswal ("Tahiya"), is an individual who resides in the city of Calgary in the province of Alberta. She also attends Burdett, and is the editor of the school newspaper.

4. The defendant, Jordan Pasha ("Jordan"), is an individual who resides in the city of Calgary in the province of Alberta. He also attends Burdett.

The Libel

5. On May 12, 2017, Tahiya created a discussion group on the website "Facebook" for the Burdett school newspaper. One of the discussion threads on the group's site was called "Bruce is a cheater" (the "thread"). The thread is defamatory of the plaintiff in its entirety as well as in the following statements written by Tahiya:

> *"Bruce is a cheater. He takes the easy way out of everything. He paid Kiran to finish his English report and he cheated during our Chemistry final. I'm sure he doesn't come by anything honestly. He doesn't even know how to work – I bet he's on steroids."*

6. Each of these defamatory statements referred to the plaintiff and could be understood to refer to the plaintiff. Each statement was false and defamatory of the plaintiff.

7. The words in the thread meant and were understood to mean in their natural and ordinary meaning that:

1. The plaintiff was a cheat and dishonest in his academics;
2. The plaintiff was dishonest in his athletics; and
3. The plaintiff owes his performance on the school wrestling team to steroids.

8. The statements written and posted on the thread by the defendant, Jordan, are also defamatory of the plaintiff:

> *"I totally agree. He's tried to cheat off my work in class. The 'roids probably make his tackles and flips more forceful but his brain cells useless!"*

9. The defendant, Tahiya, is responsible for publishing the defamatory statements in her capacity as the editor of the school newspaper and as the owner of the Facebook group.

The Damages

10. The defamatory postings disparaged the character of the plaintiff in the community and throughout the province.

11. The newspaper's Facebook group is available to all the students in the Burdett Facebook network. The "Bruce is a cheater" discussion thread came up on the newsfeed for all members of Facebook from Burdett.

12. The defendants knew or ought to have known that the plain meaning and innuendo of the words were defamatory and libelous of the plaintiff and that the words, their meaning and the innuendo were untrue.

1. As a result of the publication of the postings the plaintiff has been greatly injured in his character, credit and reputation and has been held up to public scandal, ridicule and contempt. The defendants' conduct has caused the plaintiff great distress, embarrassment, loss of reputation, humiliation and financial loss.

2. The postings disparaged the reputation and competence of the plaintiff in his intended profession, wrestling. In addition, as a result of the defamatory postings, the plaintiff suffered a loss of employment as a camp counselor.

3. The defendants acted out of malice towards the plaintiff and with the deliberate intention of discredited his reputation and holding him up to public scandal, ridicule and contempt.

The Trial

13. The plaintiff proposes that the trial of this action be heard with a jury in Calgary.

Date issued: October 1, 2017

The Litigator LLP
456 Centre Street
Calgary, Alberta
ALA 2B2

J. lawyerly, LL.B.
Lawyer for the plaintiff

ALBERTA

Provincial Court

BETWEEN:

BRUCE OPOLSKY

Plaintiff

- and –

TAHIYA JASWAL and JORDAN PASHA

Defendants

STATEMENT OF DEFENCE OF THE DEFENDANTS

TAHIYA JASWAL and JORDAN PASHA

1. The defendants admit paragraphs 2, 3 and 4 of the statement of claim.

2. The defendants deny the remainder of the statement of claim and specifically, deny that the plaintiff is entitled to the relief claimed in paragraph 1.

3. The defendant Tahiya Jaswal admits that she created the private Facebook discussion thread entitled “Bruce is a cheater,” and that she wrote the statements in paragraph 5 of the statement of claim.

4. The defendant Jordan Pasha admits that she created the private Facebook posting that began with the line “I totally agree.”

5. The Facebook website permits the owner and approved members to post comments in the discussion threads and to create same. Reader comments often take the form of a conversation or debate.

6. Facebook provides an opportunity for users to correct or challenge assertions made by the author of the original posting, material that is quoted from other sources or to add information that expands the discussion.

7. The defendants plead that opinions and facts posted on Facebook are subject to revision, correction and refutation by other members.

9. The defendants deny that the words complained of bear or are capable of bearing the meanings set out in paragraph 7 of the statement of claim.

10. In the alternative, insofar as the words complained of consist of expressions of opinion they were fair comment made honestly in good faith and without malice.

11. These defendants say that the words were published in good faith without malice on an occasion of qualified privilege in that the defendants had a legitimate interest and duty to publish the words to the Burdett Lake high school group, which had a corresponding interest in receiving that information.

12. These defendants state that the words complained of were published as an incident of the Freedom of expression guaranteed by sections 1 and 2 of the *Charter of Rights and Freedoms*.

13. The defendants deny that the plaintiff has been injured or suffered any loss or damages as alleged, and puts the plaintiff to the strict proof thereof. If the plaintiff has suffered any loss or damage it is the result of the actions of the plaintiff, the full details of which are known to the plaintiff and not to these defendants.

14. The defendants plead and rely upon section 9 of the *Defamation Act*, R.S.A. 2000, c. D-7

15. These defendants submit that this action be dismissed with costs on a substantial indemnity basis.

Date issued: October 10, 2017

THE LEGAL EAGLES LLP
Barristers & Solicitors
Calgary, Alberta
ALA 2B2

A. Justice, , LL.B.
Solicitor for the defendants,
Tahiya Jaswal and
Jordan Pasha

WHAT IS DEFAMATION?

Defamation or defaming another person can occur when someone makes an untrue statement about someone else that harms that persons reputation in the community. When the statement is written, it is referred to as libel. a spoken statement is called slander.

For an untrue statement to be libel or libelous, it must meet three criteria:

1. It must be published
2. It must have caused harm to lower the plaintiff's reputation in the community
3. It must be untrue

DEFENCES TO A CLAIM OF DEFAMATION?

If the plaintiff has established these three criteria, the person who published the statement can provide a defence to defamation. In Canada there are common defences to defamation:

Truth/ Justification: if the defendant can prove that the statement is true, then the harm to the reputation is related to the plaintiff's own actions, not the publishing of the statement. Each individual word does not need to be proven true, rather the statement must be substantially true in respect to their defamatory meaning. For example, if a newspaper reports that a business owner participated in insider trading, and can show that the person was found guilty of insider trading, then the newspaper article didn't create the harm – the insider trading created the harm.

Fair Comment: a person may have a defence to defamation if the statement is an issue of public importance or debate. If the person has an honest belief in the statement and is participating in the debate on a matter of public interest, he or she might not be responsible for any harm caused. This is the important defence that safeguards freedom of expression on political and social issues and on any subject of public interest.

- A defence of fair comment can only succeed if the following conditions apply:
  - A court must accept that the words are recognizable as an expression of "comment" or opinion. "Comment" may include any statement of conclusion, inference, or observation that in context can be recognized as an evaluation, critique, or commentary;
  - Comment must be based on facts and the stated facts must be true. The defendant has the burden of proving that the facts are true. The facts must be set out in the published material or must be sufficiently referred to in the text so that they are made known to the reader;
  - The comment must satisfy the following objective test: could any person honestly express the opinion on the proved facts?;
  - The subject matter of the "opinion" must be one that is of "public interest";

The defence of fair comment is defeated if the plaintiff proves that the defendant was actuated by "actual malice". In some cases that proceed to trial on the defence of fair comment the key issue is often whether the words are "recognizable" as an expression of opinion. The fair comment defence fails if the court decides that the words are merely a "bare statement of fact". An untrue statement of fact cannot be protected by fair comment.

Privilege: sometimes someone will make a statement in court or in the legislature that hurts someone's reputation. However, statements made in these environments are said to be privileged. M

Responsible Communication on a Matter of Public Interest: this defence was established for media as a way to balance the *Charter* right to Freedom of Speech, the flow of information, and give room for minor error in reporting. A segment of the community must have genuine interest in the matter, it must be responsible journalism, and it covers publishing information in any medium. Considerations for responsible communication: the seriousness of the allegation, the urgency of the matter, the reliability of the source of information, and if the plaintiff's side of the story was sought and published.

ROLES IN THE COURTROOM

The Judge: This person is required to listen to all the evidence presented during a trial and make a decision. This person is expected to give reasons for a particular decision. If the trial includes a jury, this person must summarize information for the jury and give jury members instructions about how to apply the law correctly.

Juror: This person is an ordinary community member who listens to evidence and the witness testimony at trial. The judge tells this person what the laws are and how they should be used. This person will try to decide with others whether the plaintiff has proven their case.

The Plaintiff: This is the person bringing a complaint to the court in a civil case and this person is looking for money. This person must prove the case against the person they are suing**.**

The Defendant: In a civil case, this is the name given to the person being sued. Even though this person does not start the case, they can defend their case to argue against the other side.

The Court Reporter: This person's job is to take down everything that everyone says in court to keep a written record of everything that is said in the courtroom.

The Court Services Officer: This person's job is to keep order in the court and to make sure that everyone is safe in the courtroom. This person wears a uniform. The judge can ask this person to remove people from the courtroom who are disturbing or acting disrespectfully towards the court.

The Court Artist: This person's job is to sketch what is taking place in the courtroom because in Canadian courts, cameras are not allowed in trial level courtrooms. This person's sketches might appear in the newspaper or on the news on TV.

The Plaintiff's Lawyer: This person acts for the person bringing a complaint before the court in a civil action. This person will present the case and will ask the witnesses questions.

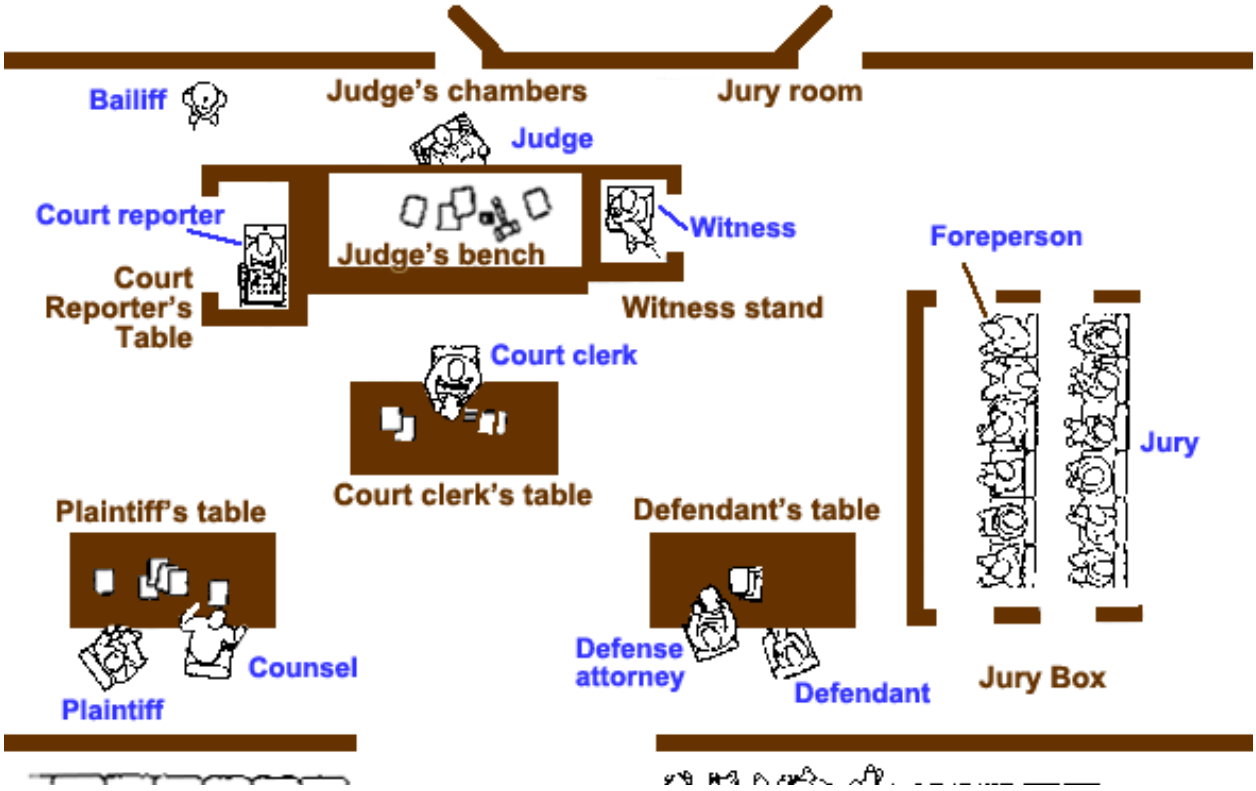
The Defendant's Lawyer: In a civil trial, this person's job is to act for the person being sued and defending themselves. This person will present the case and will ask the witnesses questions.

The Court Clerk: This person's job is to help the judge and to keep the courtroom running smoothly. This person asks witnesses to take an oath to tell the truth, opens and closes the court.

The Witness: This person will swear an oath to tell the truth and will then listen to questions and give answers for the judge and the jury to hear. This evidence will help a judge or jury decide the outcome of the case.

The Press: This person's job is to watch what happens at a trial and write news stories for the public. This person takes notes during the trial and writes stories for newspapers, TV news shows or webpages.

The Spectator: This is a person is a member of the public who watches what is happening in court. In Canada, everybody is allowed to sit and watch what is happening in most courts, as long as they obey some simple rules.



Client Interview

Lawyers Name: _____ Date:_____

Who is Your Client – Character's name: _____ Student's name: _____

Your client has come to you asking for legal advice. Before you can advise them you must find out what problems they have had. Interview your client and fill out their answers on the form.

What is your client's problem?			
Can you break the problem into three smaller problems or issues?	1	2	3
Who caused each problem?			
What happened? (when, where, how)			
To find out all the facts, who else should you talk to?			
Can you think of the legal name for the problem? If not, ask for help.			

CIVIL LAW MOCK TRIAL: ROLE PREPARATION

OJEN ROEJ
ONTARIO JUSTICE EDUCATION NETWORK
RÉSEAU ONTARIEN D'ÉDUCATION JURIDIQUE

For each OJEN Civil Law Mock Trial, there are three packages:

- **Mock Trial Scenario**
- **Role Preparation Package**
- **Justice Sector Volunteer Package**

Youth need the **Scenario** and **Role Preparation** packages.

Justice sector volunteers/ teachers/organizers need all three packages.

PREPARING FOR A MOCK TRIAL

Mock trials are designed to help you learn more about the justice system. Many of you may have some idea about what a trial is from what you have seen on television or in movies. Some of what you have seen might be accurate, but a lot of what is shown in court-room dramas is not. In an actual trial many witnesses say things that are not planned, and lawyers have to think quickly on their feet.

Now is your moment to try out playing one of the many important roles in the civil trial process. Get into character and have fun with it. Those of you who are lawyers and witnesses will have a lot of work to do up front. Others who are judges, jury members, and court staff will play an important role on the day of the trial.

DIFFERENCES BETWEEN CIVIL AND CRIMINAL TRIALS

There are many differences between civil and criminal trials. The type of trials usually seen on television and in movies are criminal. In criminal trials, the Crown Attorney (or prosecutor) acts as an agent for the government to try someone accused of a crime (such as robbery or murder). In a criminal trial, the Crown must convince the judge or jury that the accused is guilty beyond a reasonable doubt.

Civil trials on the other hand revolve around a dispute between two (or sometimes more) parties called the plaintiff and the defendant. Here, the courts are stepping in to try to resolve a private dispute. The goals of civil law are to:

- Compensate (with money) a victim of a private wrong;
- Condemn unfair or unjust conduct;
- Punish the person that injured the other person; and
- Deter other people from acting this way in the future.

Unlike criminal trials, which address the innocence or guilt of someone accused of a crime, civil trials address whether one party is liable, or responsible, for the injury of another party. In determining whether a party is liable, the judge or jury must be convinced on a balance of probabilities. This is known as the standard of proof. To meet the "balance of probabilities test," the judge or jury must think it is more likely than not that the party is responsible for the damage caused. This standard is not as high as in criminal trials where the standard of proof is beyond a reasonable doubt. In criminal trials, the burden of proof is on the Crown to prove their case beyond on a reasonable doubt, while in civil trials, the plaintiff is responsible for proving his/her case on a balance of probabilities (i.e. the burden of proof is on the plaintiff).

Although juries are rarely used in civil trials, they may be used in certain cases. A civil jury consists of six jurors rather than twelve jurors as in criminal juries. Unlike a criminal trial where all members of the jury must agree on a verdict, a civil jury only needs five of the six jurors to agree on a decision. The primary role of the jury is to determine whether or not damages should be owed to the plaintiff.

OVERVIEW OF A CIVIL ACTION

In Ontario, the Superior Court of Justice hears most civil proceedings. These civil matters are governed by the Rules of Civil Procedure which include a set of standardized forms that the plaintiff and defendant must complete in order to initiate proceedings.

Some civil proceedings also occur in courts other than the Superior Court of Justice, which have their own rules and procedures. For example, the Divisional Court, a branch of the Superior Court of Justice, hears some civil appeals from a broad range of administrative tribunals in Ontario. The Small Claims Courts, another branch of the Superior Court, also hears civil matters for damages under $25 000.

BRINGING A CLAIM

In order to begin a civil action, the plaintiff must prepare a statement of claim, a legal document which contains all of the important facts and information about the plaintiff's case. The plaintiff must then submit the statement of claim to the court and pay a fee to begin a lawsuit. The plaintiff must give a copy of the statement of claim to each defendant included in the lawsuit so that the defendant(s) know that a lawsuit has been filed against them and what the lawsuit is about.

DEFENDING A CLAIM

After a defendant is served with a statement of claim, there are several options for how to proceed. If the defendant agrees to pay the plaintiff some or all of the requested damages, both parties may agree to settle the case before it gets to court. Most cases get settled outside of court because going to trial is very expensive. If the defendant chooses to contest the allegations, a statement of defence must be prepared explaining why the defendant is not responsible (liable) for the damages being requested by the plaintiff.

DISCOVERY

The next step in the civil procedure is known as discovery. Discovery allows both parties to be informed of the opposing party's evidence before going to trial. Parties must agree on a Discovery Plan if they wish to obtain evidence through the discovery process. Discovery has two main steps: documentary discovery and examinations for discovery.

During documentary discovery, both parties must disclose all of their documentary evidence to each other through a sworn affidavit of documents, which lists all documents in their possession that relate to the case. For example, this might include a contract between the two parties, letters, cheques, invoices, and also any relevant videos, recordings, and electronic information, such as email. There can be serious consequences if a party fails to disclose a relevant document, and parties are still obliged to disclose any new documents that may come up after documentary discovery.

Examinations for discovery allow parties to meet and ask each other questions, under oath, before the trial begins. The maximum time limit each party has to examine persons for discovery is seven hours, regardless of the number of persons to be examined for discovery.

In response to lengthy and costly discoveries, when the parties have not agreed on a Discovery Plan, the court must look at the amount of time and money spent on a case in proportion to the importance and monetary value of the case. The court will consider costs and work involved in the production of documents and restrictions will be placed on overall document production and length of oral examination of witnesses.

SETTING AN ACTION DOWN FOR TRIAL

Once both parties are ready, they have their case 'set down for trial'. This tells the court that both parties are ready for trial and scheduling begins. Both parties are required to file their trial record which includes copies of the pleadings and any orders previously made in the case.

PRE-TRIAL CONFERENCE

Parties must have a pre-trial conference with a judge before a trial is held. A pre-trial is an opportunity to discuss matters such as settling the case, simplifying the issues related to the case, and how long the hearing is expected to last. This allows for the narrowing of issues and facts to be proved, and encourages the parties to settle.

TRIAL

Civil trials may proceed before a judge alone, or before a judge and jury. Unless a statute says otherwise, a party may request that the case be heard by a jury by filing a jury notice.

At the start of the trial, each party is given an opportunity to present their case in an opening statement. Both parties provide evidence by calling witnesses to testify and entering relevant documents or objects, known as exhibits, into evidence. At the end of the trial, each party makes closing arguments about the evidence heard during the proceedings and how the law applies to their case.

TIME CHART FOR A CIVIL LAW MOCK TRIAL

Clerk calls to order, calls case and counsel introduces themselves	**2 mins**
Plaintiff's opening statement	**3 mins**
Defendant's opening statement	**3 mins**
PLAINTIFF'S CASE:	
Plaintiff's direct examination of plaintiff witness # 1	**4 mins**
Defendant's cross-examination	**4 mins**
Plaintiff's direct examination of plaintiff witness # 2	**4 mins**
Defendant's cross-examination	**4 mins**
DEFENDANT'S CASE	
Defendant's direct examination of defendant witness # 1	**4 mins**
Plaintiff's cross-examination	**4 mins**
Defendant's direct examination of defendant witness # 2	**4 mins**
Plaintiff's cross-examination	**4 mins**
CLOSING ARGUMENTS	
Plaintiff's closing arguments and legal submissions	**3 mins**
Defendant's closing arguments and legal submissions	**3 mins**
Judge instructs jury (*if there is a jury. If not, judge deliberates and renders a verdict - 12 minutes*)	**2 mins**
Jury deliberates and gives verdict (*if there is a jury*).	**10 mins**
Judge gives feedback and discusses civil trial process, etc.	**10 mins**

COURTROOM ETIQUETTE AND PROTOCOL

The courtroom is a formal setting, and there are some specific etiquette rules to follow that may not be familiar to you. Here are some pointers:

- When facing the judge, counsel for the plaintiff usually sits at the table to the left and counsel for the defendant sits at the table to the right.
- When the judge enters, all counsel, and everyone else in the courtroom, must stand-up. Counsel then bow to the judge. Sit down when the clerk instructs everyone to do so.
- When you are getting ready to address the judge, either stand at your table, or by the podium (if there is one). Wait until the judge seems ready to proceed. The judge may nod or may say that you can proceed. If you are not sure, ask the judge if you may proceed.
- The first counsel to address the court should introduce his colleague. For example, you might say "[name] appearing for the plaintiff; my colleague [name] is also appearing for the plaintiff" or "my friends [name] and [name] appear for the defendant".
- Every other counsel should introduce themselves again before starting to address the court.
- If it is not your turn to address the judge, pay attention to what is happening. Take notes that you can use during your submissions or closing statements.
- Try not to distract the judge. If you need to talk with your co-counsel, write a note.
- Stand every time you are addressing or being addressed by the judge.
- When making arguments, do not say "I believe…." or "I feel…." when starting your argument. You should say "I submit that…."
- Refer to your co-counsel as "my colleague" or "my co-counsel". Opposing counsel should be referred to as "my friend" or "counsel for [position or name of the client]".
- Address the judge formally. Refer to each judge as "Justice" or "Your Honour".
- Do not interrupt the judge, and if a judge interrupts you stop immediately, and wait until they are finished before replying. Never interrupt or object while an opposing counsel is addressing the judge. Wait until you are specifically asked by the judge to respond to a point argued by opposing counsel.

- If the judge asks you a question, take your time to think about it before replying. If you do not hear the question, or are confused by it, ask the judge to repeat or restate the question. If you do not know the answer, say so. Once a question has been answered, pick up from where you were before the question.

REMEMBER TO:

» Speak clearly

» Use an appropriate volume

» Try not to say "um", "ah" or "okay"

» Do not go too fast

ROLE PREPARATION FOR PLAINTIFF AND DEFENDANT LAWYERS

As the **plaintiff's lawyer** you represent the victim who is suing.

As the **defendant's lawyer** you represent the person who is being sued.

During the trial, lawyers for both sides:

- Make opening and closing statements;
- Conduct direct examination of your own witnesses; and
- Conduct cross-examinations of the other side's witnesses.

The plaintiff's lawyer will make an opening statement and call witnesses first. The defendant's lawyer follows with an opening statement and witnesses.

The plaintiff's lawyer presents closing arguments first. The defandant's lawyer goes second.

WHAT IS AN OPENING STATEMENT?

The opening statement gives a brief overview of your case.

HOW TO PREPARE AN OPENING STATEMENT

- Thoroughly review the statement of claim, the statement of defence, and your witnesses' fact sheets.
- Select which facts should be included in the opening statement. Include the central facts to your case that are not likely to be challenged by the other side.
- Stick to facts. The facts are what will paint the picture for the judge.
- The purpose of an opening statement is to tell the judge and/or jury what they will hear in the course of the trial. It is best to stick to uncontested facts.
- When giving the opening arguments, try to speak in short, clear sentences. Be brief and to the point.
- Have notes handy to refresh your memory.
- Remember that the opening statement is very brief but gives an overview of your case.

WHAT IS A DIRECT EXAMINATION?

Direct examination is when one side puts a witness in the witness box to give evidence to support its case.

The purpose of a direct examination is to have the witness tell the court, in a clear and logical way, what the witness observed.

HOW TO PREPARE FOR DIRECT EXAMINATION:

- Write down all the things that your side is trying to prove.
- Read the witness' testimony carefully, several times over.
- Make a list of all the facts in the witness' testimony that help your case.
- Put a star beside the most important facts that you must make sure that your witness talks about. For example an important fact for the Plaintiff might be that your witness saw the event at issue first-hand.
- Create questions to ask the witness that will help the witness tell a story:
- Start with questions that will let the witness tell the court who s/he is ("What is your name? What do you do? How long have you worked in that job?")
- Move to the events in question ("What were you doing on the night in question? Where were you? When did you first hear there was a problem?")
- Move to more specific questions ("What did you see? What did you do after that happened?)
- Remember to keep your questions short and to use simple language.
- Remember not to ask leading questions. A leading question is a question that suggests the answer.
- An example of a leading question is "was the man six feet tall and about 25-years old?"
- Instead you might ask: "please describe what the man looked like." Or, "how old was he? And how tall?"
- When your witness is in the witness box, do not be afraid to ask a question twice, using different words, if you do not get the answer you were expecting.

WHAT IS CROSS-EXAMINATION?

Cross-examination is when the lawyer for the other side gets to ask your witness questions.

There are two basic approaches to cross-examinations:

1. To get favourable testimony. This involves getting the witness to agree to facts that support your case.
2. To discredit the witness. This approach is used so the judge or jury will minimize or disregard evidence or comments that do not support your case.

HOW TO PREPARE FOR CROSS-EXAMINATION

- Make a list of all the facts in the witness' testimony that help your case.
- Put a star beside the facts you must make the witness talk about and get the witness to admit those facts.
- If there are a lot of facts that don't help your case, can you find a way to challenge the witness' credibility? For example can you show that the witness made a mistake, did not see things clearly, or has a reason for not telling the truth?
- All of your questions should be leading. You don't want to give the witness a chance to explain. You just want the witnesses to answer "yes" or "no."
- Depending on what the witnesses' say you might need to come up with different questions on the spot during the trial, to make sure you cover everything.

WHAT IS A CLOSING STATEMENT?

This is your last opportunity to communicate to the judge or jury.

The closing statement should logically and forcefully summarize your side's position and the legal arguments/reasons why you are entitled to win.

HOW TO PREPARE CLOSING STATEMENTS

Write down your key arguments and summarize the important facts that you want to stick in the judge and jury's mind. You can urge the judge and jury to accept your client's view of the evidence.

The closing statement should be similar to your opening statement to some degree.

When delivering the closing arguments, try to speak in short, clear sentences. Be brief and to the point.

You can only refer to evidence that actually was given at trial. This may mean you have to re-write your closing arguments to some degree during the trial if evidence you were expecting to come out did not actually do so.

Where a witness for the other side admitted something important to your case, point that out in your closing statement. For example: "The witness says she identified Mr. Smith as the man who ran away. However, she admitted that she was standing far away when she saw Mr. Smith run away. She admitted that it was dark out. There is a real doubt that the witness actually could have identified anyone, let alone someone she had never met before, in the circumstances."

Check with the lawyer writing the opening statements for your side, to make sure that both the opening and closing statements are very similar, and cover the same facts.

ROLE PREPARATION FOR JUDGE

A judge's role is to:

- Be a referee and explain the law to the jury.
- Make procedural rulings.
- If a lawyer objects to a question by another lawyer, decide whether or not the witness must answer the question.
- At the end of the trial, summarize what the law and evidence is relating to this case.
- If it is a jury trial, instruct the jury who then decides if the accused is liable and how much the plaintiff should be awarded in damages.
- If it is not a jury trial, the judge decides whether the accused is liable and, if so, how much the plaintiff will be awared in damages.

ROLE PREPARATION FOR JURY

A jury's role is to:

- Listen to all of the evidence without making any decisions until the end of the trial about the liability of the defendant.
- Listen to the judge describe the evidence and what the law is.
- Elect a Foreperson (spokesperson) to head the jury and give their final decision.
- Talk about the evidence with other jurors behind closed doors. Based on the evidence, decide whether or not damages should be awarded.
- Come up with a decision that at least five of the six jurors agree on.

ROLE PREPARATION FOR COURT CLERK

Your role is to help the judge to make sure that the trial runs smoothly. You will:

1. Open the court
2. Swear in the witnesses
3. Adjourn the court for a recess
4. Close the court

1. HOW TO OPEN THE COURTS:

When all participants are in their places, you will bring in the judge and say:

Order in the court, all rise please. The Honourable Judge [name] presiding.

After the judge has entered and sat down you say:

Court is now in session, please be seated.

2. HOW TO SWEAR IN WITNESSES:

If either one of the lawyers calls a witness during the trial then ask them to enter the witness box (closest to the reporter) and you will swear them in by saying:

Will you please state your name for the court? Please spell your first and last name.

A witness can either affirm (promise) or swear on a holy book, to tell the truth. Ask the witness:

Do you wish to affirm or swear on a holy book?

If the witness chooses to affirm, you ask:

Do you solemnly affirm that the evidence you are about to give, shall be the truth, the whole truth and nothing but the truth?

If the witness chooses to swear on a holy book, you ask:

Do you swear that the evidence you are about to give shall be the truth, the whole truth and nothing but the truth, so help you God?

3. HOW TO ADJOURN THE COURT FOR A RECESS:

After both the applicant and respondent have made their closing arguments, the judge may recess before giving their ruling.

When the judge is ready to adjourn, s/he will announce that the court is going

to recess for _____ minutes (usually 10 or 15 minutes but the judge will say the length of the break).

When ready to adjourn, you stand and say:

All rise please. Court is in recess for _____ minutes.

When the Judge is ready to return, you enter the courtroom and say:

Order in court all rise.

When the judge has sat down you say:

Court is now reconvened. Please be seated.

4. CLOSING THE COURT:

After the lawyers have made their closing arguments and the Judge and/or Jury has given its decision, then the Court is closed and you will say:

All rise please. Court is adjourned for the day.

ROLE PREPARATION FOR COURT ARTIST

In Canadian Courts, cameras are not allowed in the trial level courtroom. Your job is to sketch what is taking place in the courtroom for record keeping and for reporting to the public. Perhaps your sketches might appear in the newspaper or on TV news.

Divide up the roles so that one of you is:

- Sketching the witnesses.
- Sketching the plaintiff's and defendant's lawyers in action.

ROLE PREPARATION FOR MEMBERS OF THE PRESS

Things for you to think about reporting on:

- What is the name of the case?
- Who are the people involved?
- Which court is the trial taking place in?
- Is it a judge and a jury or just a judge?
- Is there a publication ban in place?
- Why is a trial taking place?
- What is the defendant accused of doing?
- What are the key facts?
- What is the outcome / decision?
- Is there anything you want to ask the plaintiff and defendant's lawyers about after the hearing?
- Are there any other things you want to say in general in your article about these particular types of proceedings?
- Why would the public be interested in hearing about this case? Is there a public interest element to the case?

BAGLOW v SMITH

SUMMARY ARTICLE

snIP/ITs

Insights on Canadian Technology and Intellectual Property Law
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Defamation in the Blogosphere: Baglow v Smith

By Roland Hung and Kevin Stenner on March 9th, 2015

Posted in Defamation

Overview

In introduction to *Baglow v. Smith*, 2015 ONSC 1175 ["***Baglow***"], an action for defamation involving political bloggers, Madam Justice Polowin described political debate in the Internet blogosphere as, "rude, aggressive, sarcastic, hyperbolic, insulting, caustic and/or vulgar." She further stated that, "it is not for the faint of heart." *Baglow* is a case around the alleged defamation of the plaintiff through a blog post by one of the defendants. The plaintiff felt that the blog post went "too far" and sought to hold the blog post author, and the moderators of the message board, liable for defamation.

Facts

The following is a summary of the facts as laid out by Justice Polowin:

> The plaintiff, Dr. Baglow, is the owner and operator of an Internet blog site known as "Dawg's Blawg" on which he posts left-wing opinions and commentary on political and public interest issues.
>
> The defendants, Mark and Connie Fournier, are a married couple who moderate a message board on the Internet called "Free Dominion". They describe Free Dominion as a venue for the expression of "conservative" viewpoints.
>
> The defendant, Roger Smith, whose pseudonym in the blogosphere is "Peter O'Donnell", is a conservative or right-wing commentator who comments or posts frequently on Free Dominion and other blogs including Dawg's Blawg. On August 10, 2010, Mr. Smith, posting under the pseudonym Peter O'Donnell, posted a lengthy comment on Free Dominion which, among other things, referred to the plaintiff as "one of the Taliban's more vocal supporters". The plaintiff objected to this comment as being defamatory and requested that the defendant Fourniers remove it from Free Dominion, which they refused to do.

As a result of the Fournier's refusal to remove the post, Dr. Baglow brought an action for defamation against Mr. Smith and the Fourniers.

History

This matter first appeared in court in 2011 when the defendants brought a motion for summary judgment before Justice Annis, *Baglow v. Smith*, 2011 ONSC 5131. Justice Annis granted the motion for summary judgement on the grounds that there was no genuine issue for trial as to whether the comments were capable of being considered defamatory. Further, he found that even if there was a genuine issue for trial as to whether the comments were capable of being considered defamatory, the defendants would be entitled to rely on the defence of fair comment. The plaintiff appealed this decision to the Court of Appeal, *Baglow v. Smith*, 2012 ONCA 407, and was successful in that appeal.

In the decision, the Court of Appeal held that since there has been little consideration on the questions of:

> do different legal considerations apply in determining whether a statement is or is not defamatory in these kinds of situations than apply to the publication of an article in a traditional media outlet… [and] [f]or that matter, do different considerations apply even within publications on the Internet…

these questions would be best determined in a full trial.

Trial Decision

At trial, the Fourniers took the position that the impugned words were written, posted and thus published by Mr. Smith. According to the Fourniers, they functioned only as the administrators of the forum and should not be considered to have published the impugned words for the purposes of liability for defamation.

The Fourniers, however, conceded that they were publishers of the post according to the definition provided by the Supreme Court of Canada in *Crookes v Newton*, 2011 SCC 47 ["***Crookes***"]:

> To prove the publication element of defamation, a plaintiff must establish that the defendant has, by any act, conveyed defamatory meaning to a single third party who has received it. … Traditionally, the form the defendant's act takes and the manner in which it assists in causing the defamatory content to reach the third party are irrelevant. … There are no limitations on the manner in which defamatory matter may be published. Any act which has the effect of transferring the defamatory information to a third person constitutes a publication.

However, the Forniers took the position that a message board operator is analogous to the publisher of a hyperlink, as in *Crookes,* and that both technologies are neutral platforms. The Forniers argued that:

> holding a message board and its operators liable as publishers for postings by the hundreds of people who post on it daily is an unconstitutional violation of the guarantee of freedom of expression. Operators of forums will be forced to either immediately take down a posting upon complaint or face liability as publishers for writings which they did not write, edit or otherwise have knowledge. Essentially they are requesting this Court to make a finding, as was made by the Supreme Court of Canada in Crookes, that the provider of an interactive computer service should not be liable for user-generated content from third parties.

Madame Justice Polowin disagreed with the Forniers and held that:

> It is the position of the Fourniers that the simple provision of software to enable a message board or forum is equivalent to the provision of a hyperlink. The message board itself, the software, is

> content neutral. In my view this position is disingenuous and ignores reality. A message board or forum is set up precisely to provide content to its readers. Its whole purpose is to provide content.
>
> The Fourniers are the moderators and administrators of Free Dominion. They decided to set up a politically conservative venue in 2001 on the Internet. … The Fourniers are not mere passive bystanders. They make posts themselves and participate in threads.
>
> In my view the reasoning in Crookes is not applicable to the circumstances that present in this case. Moreover I am mindful, as indicated in the Supreme Court of Canada case law set out above, that the law of defamation involves a delicate balance between two fundamental values: the worth and value of an individual's reputation, which the law of defamation seeks to protect, and the freedom of expression, which the law of defamation inherently limits. The evidence reveals in this case that almost all of the individuals who post or comment on Free Dominion do so anonymously. To adopt the position of the defendants would leave potential plaintiffs with little ability to correct reputational damage and would impair that delicate balance. Therefore I find the impugned words to have been published by both the Fourniers and Mr. Smith.

Nonetheless, in the end, Justice Polowin dismissed the action in favour of the defendants on the basis of the defence of fair comment.

Significance

Despite being a decision by a lower Ontario court, *Baglow* may prove to be a significant decision in three ways. First, *Baglow* creates a precedent whereby the moderator or creator of an online message board may be held liable for defamation for posts made by a third party. It will be interesting to see how far this is extended, as in *Baglow*, the moderators were relatively active on their site. It is unclear how this decision would apply to an absent or disengaged site moderator. Also, it is unclear how this would apply to social media or media sharing websites where at least hundreds of thousands of comments are posted each day. Are the site moderators responsible for these?

Second, the Court's refusal to expand on *Crookes* may be significant. In *Baglow,* the Court refused to consider a message board to be analogous to a hyperlink as a message board is created for the purpose of providing content to its readers. It will be interesting to see how courts apply this to other online platforms such as 'comment boxes' on websites or the sharing of another's entry on social media. In addition, it may be argued that a hyperlink and message board should be analogous as it would seem that a hyperlink is also created for the purpose of providing content to its readers.

Third, the Court suggested that the anonymity of a blog poster may be of importance. Justice Polowin stated that, "[t]he evidence reveals in this case that almost all of the individuals who post or comment on Free Dominion do so anonymously. To adopt the position of the defendants would leave potential plaintiffs with little ability to correct reputational damage." This suggests that future courts might only choose to find moderators liable of defamation for third party posts where the identity of the poster is unknown.

Tags: Baglow, blogs, defamation

snIP/ITs

UPPAL v DILER

CASE

2012 CarswellOnt 9909
Ontario Superior Court of Justice

Uppal v. Diler

2012 CarswellOnt 9909, [2012] O.J. No. 2713, 222 A.C.W.S. (3d) 1088

Sanjay Uppal, Plaintiff and Samuray Diler, Defendant

J. Sebastian Winny J.

Heard: June 15, 2012
Judgment: June 18, 2012
Docket: Cambridge 714/11, 714D1/11

Counsel: Dr. Sanjay Uppal, for himself
Ms Samuray Diler, for herself

Subject: Torts; Civil Practice and Procedure

ACTION by dentist for damages for defamation.

***J. Sebastian Winny J.*:**

1 This is an internet defamation action brought by a dentist against his former patient. Dr. Uppal claims damages of $22,000 from Ms. Diler. After hearing the evidence and argument the court reserved judgment. For the following reasons, judgment is granted to Dr. Uppal for damages of $22,000 plus interest and costs.

2 In a defendant's claim, Ms. Diler claimed damages of $25,000 from Dr. Uppal. At the start of trial, the defendant's claim was dismissed with reasons to follow and those reasons are provided below.

Background

3 Dr. Uppal is a dentist who was licensed in 2001 and has practised in Cambridge since 2003. Ms. Diler came to him as a patient in 2004 and certain treatment was provided by him between March and July of that year.

4 Some time after that treatment, there was a complaint by Ms. Diler to the Royal College of Dental Surgeons of Ontario. The parties did not lead evidence concerning the substance and history of those proceedings, after I expressed the view that such evidence was rendered inadmissible by s. 36(3) of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18. While certain documentation arising from those proceedings was attached to the pleadings, none of that evidence was admitted at trial and I have neither reviewed nor considered that material for purposes of this judgment since it is not in evidence before me. I mention the point only because it is part of the history between the parties and it explains to some extent why there is no evidence of other contact between these parties from July 2004 to February 2010 almost six years later (apart from the prior proceeding in this court).

5 Dr. Uppal's allegations of defamation arise from a number of separate communications by Ms. Diler to a variety of parties other than Dr. Uppal. They start with an email on February 10, 2010, they include a YouTube posting later that month and they conclude with a number of emails in December 2011.

6 As is common in Small Claims Court, neither party presented any legal authorities. I will provide a brief review of the law which I have applied. Then I will review the evidence of the allegedly defamatory statements and set out my conclusions as to each of them. [1] Lastly, I will explain my assessment of damages.

Legal Principles

7 Ms. Diler advanced an unpleaded allegation that because all of the subject communications were made as exercises of her right to freedom of expression, there could be no liability for defamation. However, binding appellate authority holds that the common law of defamation is consistent with the constitutionally-enshrined value of freedom of expression: see *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.); *Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640 (S.C.C.). The short answer to Ms. Diler's submission is that her right to freedom of expression ends where her exercise of that right does damage to Dr. Uppal in a way that is protected by the law of defamation.

8 Ms. Diler's main theme in closing argument, though also advanced on an unpleaded basis, was that there could be no defamation because she had no intention to defame Dr. Uppal. Her submission neglects binding appellate authority that intent to injure is not an element of the tort of defamation. As was stated by the Supreme Court of Canada in *Grant v. Torstar Corp.*, *supra*, at para. 28:

> [28] A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words are defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damages are presumed, though this rule has been subject to strong criticism: [citation omitted]... The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.

9 In any event I find as a fact that Ms. Diler did intend to harm Dr. Uppal. She engaged in a deliberate, prolonged and spiteful campaign to harass and damage the subject of her vitriol. That finding is relevant to the issue of damages but not liability.

10 The defendant's other main theme in closing argument, also unpleaded, was that all of the subject communications should be viewed as customer complaints and should not result in liability for defamation. Allowing that Ms. Diler is self-represented, I interpret that submission as reliance on the doctrine of qualified privilege and I will consider that issue even though it is unpleaded. Qualified privilege arises from the occasion, where the defendant had an interest in making or a duty to make the impugned communication and the person in receipt of the communication had a corresponding interest in or duty to receive it: see *Hill*, *supra*, at para. 143. I am aware of no authority for the proposition that a customer complaint is an occasion giving rise to a defence of qualified privilege and as a matter of principle I would reject such a proposition in the circumstances of this case.

11 Even if qualified privilege could be said to apply to any of the subject communications, and I find it could not, that privilege is defeated by malice and it is also defeated if the communication extends beyond the bounds of the occasion: see *Hill*, *supra*, at para. 146-147. I find that any such privilege would be defeated in this case on both grounds. Ms. Diler was at all times motivated by malice and the communications she made exceeded what was reasonably necessary to make a customer complaint.

12 On the other hand, if what Ms. Diler meant to imply by her latter submission was that the communications were just customer complaints and would not therefore be taken seriously or have defamatory effect, I reject that submission based on my findings of fact. A similar argument was rejected in *Barrick Gold*, *infra*, at para. 37. The short answer to her submission is that customer complaints are not exempted from the law of defamation.

13 In my view the real issues in this case are whether the subject communications were defamatory and if so, what are the appropriate damages.

14 The nature of a defamatory statement, as set out in *Grant v. Torstar Corp.*, *supra*, at para. 28, is a statement which would tend to lower the plaintiff's reputation in the eyes of a reasonable person. Another and often-cited definition is

that which was approved by Abella J.A. (as she then was) in *Color Your World Corp. v. Canadian Broadcasting Corp.* (1998), 38 O.R. (3d) 97 (Ont. C.A.), leave to appeal denied [1998] S.C.C.A. No. 170 (S.C.C.):

> 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...

15 The question whether a communication is defamatory calls for a fact-specific analysis requiring consideration of the entire context of the communications, as was emphasized in *Baglow v. Smith*, 2012 ONCA 407 (Ont. C.A.), which like this case involved internet defamation.

16 With the definition of defamation set out above, I proceed now to review the evidence of the communications giving rise to the plaintiff's claim.

Review of Subject Communications

17 Ms. Diler sent an email on February 10, 2010 (Exhibit 1, first page). It was addressed to the general mailbox of Dr. Uppal's practice, which is accessed or accessible to all staff and dentists. The email is entitled "Terrible dental work of sanjay uppal". Before attaching some photographs of the interior of a mouth, its content is this: [2]

> To Whom it May concern,
>
> I was an old patient of sanjay uppal. In the past he did 2 works on my mouth and for one of them I complaint about him to College and than HPARB.
>
> I think his mistakes are more serious than my first complaint. That is why I see a definite need for a second complaint and than probably I am going to take sanjay uppal to the court.
>
> Sanjay uppal's dental work is the worst ever I have seen. If you wanna see the picture of his work I attached the picture of his fillings here, which I might also put on a youtube or some other domain for everybody to see. This man hurt my teeth health in a very terrible manner.
>
> Please let me know your lawyer name and address to me if you have one, because I am going to take you to the court definitely.
>
> S. Diler

18 I find that email is defamatory. Its plain meaning is to demean Dr. Uppal's abilities as a dentist; to label him as worthy of professional discipline. It was communicated to a number of people other than Dr. Uppal. It was not even addressed to him. I find it was directed to people other than him on purpose. Any and all recipients were threatened with legal action. It is not just a complaint as the defendant argued. It is the start of a smear campaign which by its nature was motivated by spite and therefore malice.

19 I pause here to note that Ms. Diler has no qualifications in dentistry. She claims to be qualified as a professional engineer although she made no claim to possessing that qualification under Ontario law. In any event an engineering background is no basis to presume sufficient knowledge of dentistry to criticise Dr. Uppal as she did in that email and subsequently. I note that no expert or other evidence was tendered by Ms. Diler and there was no attempt by her to prove what it was that Dr. Diler failed to do properly, or to suggest how his treatment compared to that of other dentists.

20 A particularly interesting aspect of Ms. Diler's presentation at trial was her attempt to rely on a photograph which she said she took herself of the interior of her mouth. It appeared to be one of the same photographs attached to that

initial email. When I asked her for particulars about the photograph and I explained that some idea of the date it was taken or at least the timeframe in which it was taken would be required before the court could possibly comprehend its relevance, if any, to this case, she was unable to respond meaningfully. She said it was after the plaintiff treated her but she could not say when or how long after the treatment - other than it was after she discovered the problem she perceived with Dr. Uppal's work. That would tend to place the photographs several years after the treatment. It defied credulity to suppose that the defendant, who obviously possessed some intelligence and had an engineering background, would have failed despite her almost decade-long campaign against Dr. Uppal, to keep track of the date or timeframe of photographic evidence which she had obviously created for the express purpose of supporting that campaign.

21 The fact is that there is before this court no evidence capable of supporting any criticism of Dr. Uppal's professional services. Therefore, quite apart from the legal presumption that defamatory statements are false until the defendant proves otherwise, the defendant has gone no distance whatever towards proving otherwise. I find as a fact that all of her criticisms of Dr. Uppal, to the extent they purport to be factual at all, are false.

22 Her second email was dated February 11, 2010 (Exhibit 1, second page). It is addressed the same way as the previous one. It includes the following statements: "Why sanjay uppal did this to me? Because this man, I lost one tooth and other now in a bad condition. I would like to know why sanjay uppal did such a terrible job in my mouth. Is it because of money?...Is it because of some kind of discrimination, such as because I am immigrant, has a disability, etc. Or, Simply sanjay uppal is a very bad dentist..."

23 I find that email is defamatory, just like the first one.

24 Ms. Diler's next email dated February 12, 2011 (Exhibit 1, third page) was entitled "sanjay should not practice dentistry" and consisted of the following (in capitals):

> SANJAY UPPAL SHOULD NOT PRACTICE DENTISTRY
>
> HE SHOULD NOT
>
> HE CANNOT EVEN DO A SIMPLE FILLING
>
> I AM GOING TO SEND PICTURES OF HIS WORK TO EVERYWHERE
>
> HE HURT MY HEALTH

25 Since Ms. Diler produced no photographs at trial other than the single photograph mentioned above and dated years after Dr. Uppal's treatment, I infer and find as a fact that she has and never had any pictures of his work. All she had was a picture or pictures of her mouth, taken by herself, sufficiently long after Dr. Uppal's treatment that they bore no relevance to his treatment and did not depict any aspect of this treatment.

26 Like the first two emails, the third is defamatory although more so than its predecessors since it expressly challenges the plaintiff's competence to be a member of his chosen profession.

27 Ms. Diler admitted to the internet postings alleged by Dr. Uppal. They were postings on the YouTube site of which printoffs (3 pages) were entered as Exhibit 2. The first page is entitled "short dental movie by sam hitchcock" and the counter indicates that there had been 21 views as of its date. The second page is entitled "Sanjay Uppal - terrible dental work (filling) of Cambridge Ontario dentist Sanjay uppal". There is a photograph of the interior of a mouth and the counter indicates 94 views.

28 There are a number of posted comments by an author identified as "irisdilek". I find they were posted by the defendant, whose last name I note incidentally is contained as an anagram within that moniker. The comments include "this is the filling I got in 21st century in Ontario. Canada. Highly developed country in technology. That is not fair to

me. NO."; "Wow this is bad dental work"; "Cambridge Ontario dentist Sanjay Uppal did this very bad filling in a patient tooth. I post this video here to show how his work is bad."

29 The third page is entitled "dental horror movie by sam hitchcock" and includes the statement "Sanjay Uppal - terrible dental work..." The counter shows 13 views.

30 It appears the defendant uploaded the YouTube material on about February 13, 2010. Dr. Uppal had discovered it after Ms. Diler's email advice of her intentions in that regard. He had a lawyer write to YouTube asking that it be removed, on February 16, 2010. YouTube complied within a few days. Further links to the same material were discovered a few days later and also were removed by YouTube (see Exhibit 3).

31 Dr. Uppal's lawyer sent a cease and desist letter to Ms. Diler on February 16, 2010 (Exhibit 4). There was no response.

32 Dr. Uppal alleges that Ms. Diler engaged in further defamation at some kind of public protest she initiated. In her evidence she admits that she considered and planned such a protest and/or march, but denies actually implementing such a plan. I find that no such protest is proved to have occurred and there is no evidence of any defamation having occurred at such an event.

33 In an email sent after Dr. Uppal had applied unsuccessfully to the Ontario Court of Justice for a peace bond against Ms. Diler, she sent an email to the general mailbox at his practice on March 3, 2011 (Exhibit 5, bottom of first page and over to second page), stating "I am free to protest you". The email concludes with this: "You are a horror of a dentist. I will promote you like that: Dentist of horrors.:) Thanks to justice hehehehe."

34 I am satisfied that that email when read in the context of the entire campaign, is defamatory. It also adds to the ample evidence of malice on the part of Ms. Diler. Her use of a smileyface and her sarcastic reference to the justice system amply demonstrate her attitude of contempt towards Dr. Uppal's rights and towards the justice system.

35 Ms. Diler was adamant during her evidence that she is very proud to have no criminal record. She is very fortunate in that regard. Particularly after she faced Dr. Uppal's application for a peace bond against her, there could be no doubt of her awareness that he did not welcome her continued campaign against him. Quite frankly her conduct after that point in time, and probably beforehand also, constitutes numerous offences of criminal harassment against Dr. Uppal. But since this court has no jurisdiction over the criminal law, my comments on that subject are *obiter dicta*.

36 On July 9, 2011, Ms. Diler sent an email to Dr. Uppal, to the general mailbox of his practice, to his partner and to an employee of the Royal College of Dental Surgeons of Ontario (Exhibit 5, last page). She states her intention to protest Dr. Uppal because "in that manner I can raise awareness to his bad dentistry and hurting 2 of my teeth..." I find that email is defamatory.

37 On July 14, 2011, Ms. Diler posted a message on the website of the Association of General Dentists (Exhibit 6). It was addressed to Dr. Uppal but of course Ms. Diler was already aware of two of his email addresses, plus the general address of his practice and of course his place of business, phone number and fax number. She tried to tell this court that she thought the AGM was a proper body with which to make a complaint, but I simply don't believe her. She was continuing her campaign to smear Dr. Uppal by spreading her defamatory statements to a variety of parties.

38 The message of July 14, 2011 included the following: "1. First sanjay attacked my teeth. 2. He made me very uncomfortable by acting inappropriately, who does something like that to a disabled woman..." I find that email is defamatory.

39 On August 9, 2011 Ms. Diler sent a particularly vitriolic e-missive (Exhibit 7, first page), addressed to the same recipients as that of July 9, 2011. It included the following: "sanjay is also so much unethical. Who makes a disabled woman uncomfortable like that... not much men would do such a thing. He is terrible ever. He is so repulsive as a dentist

as a man everything he does so much disgusting. I cannot imagine how dangerous this man called sanjay uppal. He is so unethical, leave the rest alone. He is hitting disabled woman and than trying to get away with it. One of the most Terrible man, sanjay uppal, I have ever come across in my 40 years of life."

40 That email is defamatory and is the worst to date. It is particularly reprehensible for Ms. Diler to use her self-described disability as a tool in her smear campaign. Whatever disability she may have [3] has nothing at all to do with Dr. Uppal's treatment of her in 2004. She simply added that item to the arsenal deployed in her attack on Dr. Uppal's reputation. I note that to her credit, Ms. Diler was very clear in her evidence that Dr. Uppal never touched her in any inappropriate way. As to that specific aspect of her evidence, I believe her. Therefore I find that Ms. Diler was lying when she gave the impression to all the recipients of her email dated August 9, 2011 that he had assaulted her. It follows that mendaciousness also formed part of the just-mentioned arsenal.

41 Also defamatory is her next email to the same list of recipients, dated August 12, 2011 (Exhibit 7, second page). It includes the following: "You don't want somebody like sanjay as your dentist, as your neighbour, as somebody around you. He is bad. So unethical, so rude and so selfish of course he comes with a low self esteem problem."

42 Ms. Diler made no attempt to prove the truth of her statements about the plaintiff's ethics. I find those statements utterly groundless, and more to the point, defamatory.

43 Dr. Uppal had a different lawyer write another cease and desist letter dated September 23, 2011 (Exhibit 8). There was no meaningful response. [4]

44 Ms. Diler sent what appear to be 11 emails in mid-December 2011 to a variety of parties, including one sent to the Attorney General of Ontario (Exhibit 9). Some of their contents are as follows:

> I am lucky to be out with [only] one tooth death other is severely damaged.
>
> Most people, kids and women scare of him, that is his first impression.
>
> sanjay is so overweight he did not able to care about his body how can he care about my tooth.
>
> Sanjay Uppal's communications skills are very weak, he is not social neither. He is rude. He is scaring even existing customers, his medical knowledge is so untrustable, yet already obsolete...
>
> never seen in last 18 years of my career such a desperate dentist ever.
>
> This guy sanjay is out to harm / hurt somebody severely he is a violent guy. Our relationship directly started he hurt me with his dental treatment so badly.
>
> SANJAY UPPAL NEEDS HELP FROM A SOUND MEDICAL TEAM.
>
> Sanjay Uppal is an extremely dangerous guy. My view won't change for the rest of my life. If ever I SEE THIS GUY I call 911.
>
> But who knows his behaviour can escalate to harm me physically which he did already in the past by damaging one of my tooth and killing the other tooth. All of these incidents is scaring me. Yet this sanjay uppal acted flirtatiously to me even though he is married and has 3 kids... I am so scared of my life. Please be informed. He is a huge guy and I am a little tiny woman.

5

45 I find that all of the emails which I have just quoted were defamatory.

46 To summarize, I find that Ms. Diler engaged in a deliberate campaign to harass Dr. Uppal and to smear him in the eyes of a variety of parties associated with the practice of his profession. The duration of her campaign as reflected in the evidence was from February 2010 to December 2011, a period of almost two years. All of this was six years and more after she was his patient for a brief time in 2004, and after her complaint to the Royal College of Dental Surgeons of Ontario was determined. By my count, I have found 19 separate acts of defamation on the part of Ms. Diler.

Damages

47 Dr. Uppal made no attempt to prove that special damages were suffered as a result of the defamatory statements made by Ms. Diler. As such the damages assessment is a matter of general damages. As held in *Hill*, *supra*, and *Grant v. Torstar Corp.*, *supra*, general damages for defamation are presumed once the fact of defamation is established.

48 As was stated in *Hill*, *supra*, at para. 164, it has long been held that general damages for defamation are "at large" - meaning they are a matter peculiarly within the discretion of the court. The suggestion of a maximum amount or cap on such awards was rejected in *Hill*, *supra*, at para. 168. Justice Cory observed that in 27 reported libel decisions from 1987 to 1991 the average award was $30,000, and in 24 reported judgments from 1992 to 1995 the average award was under $20,000. In *Hill*, *supra*, the plaintiff was a Crown attorney and a jury's award of $300,000 for general damages was upheld despite it being ten times the larger of those two averages taken from prior reported cases.

49 In this case, as in *Hill*, *supra*, the plaintiff is a professional and the defamatory statements are an attack on his professional reputation. There may be significant aggravating factors in the case of Mr. Hill (as he then was) compared to that of Dr. Uppal, but there is at least that one significant common factor. In any event I would not suggest that the damages in the case at bar should be assessed at anywhere close to $300,000.

50 Like this case, *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.), involved internet defamation or "cyber libel". Blair J.A., for the majority, held that defamation when published on the internet should be distinguished from defamation by other media since the internet is potentially accessible from virtually all places on Earth, and its anonymous nature increases the risk that information posted on it may be taken seriously. The defamation in that case involved "a systemic, extensive and vicious campaign of libel... over an extraordinarily lengthy period", and involved hundreds of defamatory postings (see para. 3). A motions judge had assessed general damages at $15,000 but the Court of Appeal found that assessment to be inordinately low and increased those damages to $75,000.

51 I find *Barrick Gold*, *supra*, to be of considerable assistance in situating the case at bar within the existing jurisprudence. Among other things, Blair J.A. reviews a number of considerations in the assessment of general damages which I find applicable here. I consider the following factors, among others, in assessing the general damages in this case:

- the evidence that Ms. Diler's communications were in fact read by users of the internet (para. 17)
- a presumed element of lost professional income (para. 26)
- the defendant's failure to retract or apologize (para. 35)

52 In this case there are 19 instances of defamation and they were part of a deliberate campaign by Ms. Diler to harass and smear Dr. Uppal, with particular emphasis on damaging his professional reputation. This campaign took place over approximately two years and was characterized by lies and particularly vicious and personal denigration of Ms. Diler's chosen victim in a variety of respects. I accept Dr. Uppal's evidence that this campaign has affected him personally and emotionally as well as professionally. It has been a very difficult ordeal for him and his family.

53 Based on my findings of fact and considering the authorities cited above, I would assess Dr. Uppal's general damages for defamation at $45,000. [6] But since his claim is for only $22,000, I grant judgment in that amount, together with prejudgment interest.

54 Dr. Uppal did not ask for punitive damages and since his claim has been allowed in full any such award would have no effect on the net result.

Defendant's Claim

55 At the start of trial, several concerns were raised by the court with Ms. Diler concerning whether there could or should be a trial of her defendant's claim. She agreed that a dismissal of her claim was appropriate and I granted that order for the following reasons.

56 Ms. Diler's defendant's claim was issued on January 31, 2012. It consists of a rambling narrative setting out a series of allegations or at least complaints about Dr. Uppal which in the result fail to disclose any reasonable cause of action. As such the pleading was properly struck out under rule 12.02(a) of the *Small Claims Court Rules*, O.Reg. 258/98.

57 To the extent that her allegations attacked Dr. Uppal's professional competence as a dentist, albeit without actually pleading negligence or any particulars of negligence, they were a repetition of her allegations in a prior proceeding in this court by Ms. Diler against Dr. Uppal. That action was dismissed on motion under rule 12.02: see *Diler v. Uppal*, [2010] O.J. No. 1903 (Ont. S.C.). A second action based on those same allegations was an abuse of process and was barred by the doctrine of *res judicata*. There was no basis to permit those issues to be litigated a second time and as noted above Ms. Diler conceded that her defendant's claim should be dismissed.

58 Thirdly, Ms. Diler had failed to pay a costs order dated January 13, 2012, by which I required that she pay $200 to Dr. Uppal within 30 days, and she had failed to pay a costs order of McGill D.J. dated February 17, 2012, requiring that she pay $100 within 30 days. A motion by her to set aside those costs orders was dismissed by Holub D.J. on March 16, 2012, and still she had failed to pay those costs. In submissions at trial Ms. Diler said she was impecunious but that does not in itself justify a failure to comply with court orders to pay costs compensation to the other party: *Tarion Warranty Corp. v. 1486448 Ontario Inc.*, [2012] O.J. No. 1930 (Ont. C.A.).

59 Last but by no means least, Ms. Diler was recently the subject of a vexatious litigant order made by Justice Broad: see *Diler v. Heath*, [2012] O.J. No. 2447 (Ont. S.C.J.). His Honour ordered in relevant part that no action could be commenced or continued by Ms. Diler except by leave of a judge of the Superior Court of Justice pursuant to s. 140(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. No such leave to continue her defendant's claim in this court was sought by Ms. Diler and accordingly she had no standing to continue her claim.

60 In these circumstances I found it just, and indeed inevitable, that Ms. Diler's defendant's claim should be dismissed summarily. She agreed to that disposition. Costs of the defendant's claim were reserved and are addressed below.

61 In theory the court could also have struck out Ms. Diler's defence to Dr. Uppal's claim, based on the same non-payment of costs and based on *res judicata*, issue estoppel or abuse of process as to at least parts of her defence. The vexatious litigant order did not preclude her right to defend against a claim however. Based on *Tarion Warranty Corp. v. 1486448 Ontario Inc.*, *supra*, it did not necessarily appear just to strike her defence or perhaps adjourn the case based on her failure to pay the two modest costs orders in question. And since read generously, her defence could be interpreted to plead relevant defences in response to Dr. Uppal's defamation claim, it was not clear that the dismissal of the prior proceeding between these parties should preclude Ms. Diler from defending against this present action. Trial of the plaintiff's claim therefore proceeded.

Costs

62 In my view an award as compensation to Dr. Uppal for inconvenience and expense under rule 19.05 is indicated. I award costs of the plaintiff's claim to Dr. Uppal in the amount of $500 under rule 19.05, $100 for preparation of pleadings and $175 for court fees, for a total of $775. I award costs of the defendant's claim to Dr. Uppal in the amount of $500

under rule 19.05, $100 for preparation of pleadings and $40 for court fees, for a total of $640. The previous costs orders remain payable.

Closing Remarks

63 Ms. Diler has been at war with Dr. Uppal for 8 years. It is time for her campaign to end. Ms. Diler has been fortunate not to have been charged before now with criminal harassment pursuant to s. 264 of the *Criminal Code*, R.S.C. 1985, c. C-46. Such charges could still be laid for her repeated communication with Dr. Uppal during the past two years. If she were to consider repeating such behaviour going forward, I caution her to consider the danger (above and beyond further civil liability) to which she would be exposing herself. The caselaw dealing with criminal harassment - which I believe Ms. Diler is capable of looking up - is full of examples of convictions based on significantly less dramatic and persistent behaviour than that which she has displayed over the past two years.

64 While the Small Claims Court has no jurisdiction to grant an injunction against her future repetition of the misconduct which I have found her to have displayed in the past, she may nevertheless find it wise to avoid any actions remotely capable of triggering liability under the criminal law. In addition, further civil liability for further actionable conduct could be visited upon her. In any event she is now liable to Dr. Uppal for the judgment in this case.

Action allowed.

Footnotes

1 I will not review every single email in evidence. Some of them are not defamatory and much of their content adds nothing material to those which I have specifically referred.

2 Throughout these reasons I reproduce Ms. Diler's statements verbatim and I will refrain from use of the designation "sic" to indicate where I have reproduced a spelling, grammatical or other errors from the original, because they would be unduly numerous.

3 Despite her reliance on a self-professed disability, there is no evidence that she is under disability nor did Ms. Diler disclose what disability she had in mind. Previously she brought a motion asking for an order appointing the Public Guardian and Trustee as her representative in this proceeding, but that motion was dismissed by Holub D.J. on March 30, 2012 after she failed to appear.

4 An email response from Ms. Diler was tendered, but Ms. Diler objected and I ruled the document inadmissible based on settlement privilege. Had that document been admitted, its content would not have assisted the defendant's case.

5 That is the email which was sent to the Attorney General, among other addressees.

6 This court has no jurisdiction over a claim for damages in excess of the monetary limit, but there is no limit over the court's power to assess the damages which are proved by the evidence. It is the amount claimed and the amount which may be awarded which are circumscribed by the monetary jurisdiction. The authorities on that point are reviewed in *Lock v. Waterloo (Regional Municipality) (c.o.b. Grand River Transit)*, [2011] O.J. No. 4898 (Ont. Small Cl. Ct.), at para. 19-22.

MURPHY v LAMARSH ET AL

CASE

1970 CarswellBC 115
British Columbia Supreme Court

Murphy v. LaMarsh

1970 CarswellBC 115, [1970] B.C.J. No. 50, 13 D.L.R. (3d) 484, 73 W.W.R. 114

Murphy v. LaMarsh et al

Wilson, C.J.S.C.

Judgment: February 9, 1970

Counsel: *C. R. Maclean*, for plaintiff.
M. R. Taylor, for defendants.

Subject: Torts

***Wilson, C.J.S.C.*:**

1 The plaintiff Murphy was formerly employed as a radio newsman in the press gallery at Ottawa reporting for his radio station the doings of Parliament and the Government of Canada and general political news, including the public and private actions of politicians who were in the public eye.

2 The defendant Julia (more usually called Judy) LaMarsh is the author of, and the defendant McClelland and Stewart Limited is the publisher of, a book of political reminiscences called *Memoirs of a Bird in a Gilded Cage*, first published in 1968.

3 The first edition of this book, 10,000 copies, contained statements about the plaintiff which he says are defamatory and upon which this lawsuit is based. It is necessary to cite the impugned passage in full, from pp. 151, 152 and 153:

> A brash young radio reporter, named Ed Murphy (heartily detested by most of the Press Gallery and the members), had somehow learned that Maurice Lamontagne (then Secretary of State, and a long-time friend and adviser of the Prime Minister) had purchased furniture but had not paid for it. It sounded like an odd enough situation but what made it appear sinister was the fact that the furniture had been purchased from Futurama Galleries, a Montreal firm which was owned by a couple of gamblers, named Sefkind, who had disappeared in the wake of the Quebec Government's inquiry into bankruptcy. Futurama Galleries had gone into bankruptcy with Lamontagne's debt still showing on its books, and no payments had been made for furniture nor interest in over two years. Again, the hue and cry was raised over what might be — or might have been. A minister might have so compromised him self by being party to such an unusual 'credit' arrangement that he could be pressured into paying off the debt by trading some special treatment from the Government for his debtors or their associates. What that 'special treatment' might be was never specified, but it must be granted that it isn't inconceivable that there could be some.
>
> Maurice Lamontagne has a very lively, young-seeming wife, who likes nice things. As a university economist, I doubt that he had ever earned much money. He certainly had not while he was a full-time adviser to Pearson, in Opposition, when he began to buy his furniture. As a minister, his salary was, of course, much improved, but there were many demands upon it (although not so many as upon most Quebec ministers, who were expected to be pretty lavish with constituents' wedding presents and other similar gifts at Christmas or graduations; his wealthy predecessor in the riding of Outremont-St. John, now Senator Romuald Bourque, continued to look after the riding as though he were still its member, leaving Lamontagne free of those usual financial commitments). However, Maurice and his wife, Jeannette, liked to live comfortably and to entertain their friends well. He furnished a home in Ottawa

> for them, buying all his furniture from Futurama, then noted for the type and quality of furniture they sold. It would not, I think, be unusual for any firm to extend credit, even in such large amounts, for any reasonable period of time. After all, a minister's income is fairly assured, and fairly substantial (although unlike a private business arrangement, everyone knows what a minister is paid), and no minister could permit word to get around that he wasn't paying his bills, so men in public life are normally fairly good credit risks. (That is the way I bought my own furniture for my Ottawa apartment, entirely on credit, even as a private member of Parliament, and I paid it off without any difficulty to myself or worry to my Ottawa suppliers. The difference in Lamontagne's case, of course, is that most people pay regularly until their balance is paid, and the public, which buys furniture most often upon credit arrangements, knows that heavy interest is ordinarily charged.) In Lamontagne's case, when the firm went bankrupt and the matter became public, over two years after his first purchases, he had not paid anything. The exposure of the matter was, of course, acutely embarrassing, because it drew attention to his personal financial situation (completely, when he gave a statement of the whole sorry deal to the press and the House), and no one likes to have to do that. But Lamontagne considered that there was not much else to be concerned about, and he felt, and I think still feels, that he was hounded out of office for doing something that was not reprehensible. For he was indeed hounded out. Although the Prime Minister appeared to stand by him for nearly a year, until he had run again and been re-elected in late 1965, gaining some personal vindication, Pearson had been trying to force his resignation during much of that period. René Tremblay was caught in the furniture scandal too, although perfectly innocently. He had also bought furniture from Futurama in November, 1963, but he had not received full delivery at first and refused to pay the balance until full delivery might be made. He did pay the whole account only three months later, in February 1964. There could be no supportable suggestion that he had compromised himself.

4 In subsequent editions (25,000 copies) the words "heartily detested by most of the Press Gallery and the members" were deleted and they are also omitted from a paperback edition of which 50,000 copies are being circulated by another publisher.

5 The passage just cited ("heartily detested by most of the Press Gallery and the members") is alleged to be libellous. The plaintiff also claims that the latter part of the extract cited, considered in its context, imputes to the plaintiff a disreputable action, the hounding of Mr. Lamontagne out of office, and is therefore libellous.

6 Miss LaMarsh was Member of Parliament for Niagara Falls from 1960 to 1968 and was, from 1963 to 1968, a Minister in a Government headed by Mr. Lester Pearson as Prime Minister and consisting of members of the Liberal political party.

7 Miss LaMarsh's memoirs were, her publisher tells me, expected to be a lively and colourful account of her political career. A good deal of the book fits readily into that definition and if Mr. Murphy's head is left bloody it is not the only one.

8 The first question is whether or not it is libel to say of a man in Mr. Murphy's occupation that he was "heartily detested" by most of his colleagues and by most Members of Parliament.

9 Plaintiff's counsel has not argued that the word "brash" is defamatory. I have given some thought to this conception — that the word "brash" is the governing word in the sentence and that the words "heartily detested by most of the Press Gallery and the members" are only inserted to reflect the reaction of those persons to Mr. Murphy's brashness. I have come to the conclusion that this interpretation of what Miss LaMarsh has said will not stand analysis — the statement, in parenthesis, that Mr. Murphy was heartily detested is an independent clause, emphasized by the parenthesis, and not clearly related to the quality of brashness. I do not say that brashness cannot arouse detestation. "Brash", in Canada bears, I think, more the American meaning stated in *Webster's Dictionary*, 1966 of "bumptious", "tactless", "loudly assertive", rather than the English meaning given in the *Oxford Dictionary* of "bold", "rash" or "impudent". But I do not think Miss LaMarsh has asserted that Mr. Murphy is detested because of his brashness; I think she has merely said he is detested by majorities of two groups of people.

10 These are the people best placed to know and value him, his associates in the press gallery and the Members of Parliament with whom he must associate and about whom he writes.

11 Ordinarily a libel is more specific than the one alleged here. A shameful action is attributed to a man (he stole my purse), a shameful character (he is dishonest), a shameful course of action (he lives on the avails of prostitution), a shameful condition (he has the pox). Such words are considered defamatory because they tend to bring the man named, according to the classic definition, into hatred, contempt or ridicule. The more modern definition, given by Lord Atkin, in *Sim v. Stretch*, 52 T.L.R. 669, 80 Sol J 703, [1936] 2 All ER 1237, at 1240, is words tending "to lower the plaintiff in the estimation of right-thinking members of society generally." Perhaps "words likely to cause a man to be detested" might also, although not an all-inclusive definition, fit into the class of defamatory words.

12 The difference between this and other cases I have read or tried is that no shameful action or characteristic or condition is directly attributed to Mr. Murphy. It is only said of him that he is heartily detested. A fairly careful search of authority has revealed to me no case in which the libel alleged has been couched in such terms — an allegation of bad repute without some direct supporting charge of wrongdoing or bad character.

13 It is obvious that any decision as to whether or not such words as were used here are libellous must be approached with care. Under proper circumstances I think it must generally be open to writers to express of certain persons opinions as to their popularity or unpopularity, perhaps to say they are by some classes of people liked or disliked. The words used, the circumstances, the person who comments, the person upon whom the comment is made, must all be considered. It may be permissible, for instance, in certain circumstances, to say of a politician that he is losing his popularity, even though such words will certainly not help him in his career and may well hurt him.

14 The first thing to consider is the nature of the operative word "detested" and this was much discussed at the trial. The *Oxford Dictionary* gives to the word "detests" the meanings "hate", "abominate", "abhor", "dislike intensely". *Webster's Dictionary*, I think, is more up to date in its definitions when it says, "Detest indicates very strong aversion but may lack the actively hostile malevolence associated with hate."

15 I would say, for instance, that Hamlet hated, or thought he ought to hate Claudius, the murderer of his father and the defiler, as Hamlet thought, of his mother but that he detested Polonius as a sycophant and a tedious moralizing bore ("These tedious old fools": Act II scene 2).

16 But "detest" remains a strong word. While it may express the feeling one has toward a boor, a bore or a braggart, it may also express the feeling one has toward an unscrupulous reporter, a reporter whose actions have displayed bad character. I do not think that the reasoning in *Capital & Counties Bank v. Henty* (1882) 7 App. Cas. 741, 52 LJQB 232, applies here. The words used are not, as in that case, capable of a harmless meaning and alternatively and rather vaguely of a bad meaning, so that the harmless meaning should be preferred. They are disparaging in any sense, more disparaging in one sense than the other and it seems to me that in those circumstances, where it is clear that right-thinking persons can and probably will properly interpret them as defamatory, there must be liability. The tendency to defame is there.

17 No wrong or evil is directly attributed to Mr. Murphy but it is said of him that most men who have most to do with him in his occupation heartily detest him. I have no doubt that the ordinary reader, who is not perhaps inclined to such an analysis of words as I have here attempted would, after reading this, think "There must be something wrong or bad about this man Murphy to make these people detest him." Since I think this is the test to be applied, I think the words are defamatory. The effect is the same as would have resulted if it had been said, "He bears a bad reputation among his associates."

18 The witnesses Charles Lynch and John Webster, speaking as reporters, think otherwise. I am basing my opinion on my conception of what the legendary "right-thinking man" would take the words to mean and I would not want to exclude either witness from that class. I have no reason to doubt the honesty or the correctness of their evidence as reflecting their own opinions. But I must remember that neither Mr. Lynch nor Mr. Webster is an ordinary everyday reader of

books attaching to the words in question their conventional effect. Mr. Lynch says that he would, as an employer of newsmen, be interested in a man described as heartily detested by most of the press gallery (which he calls a competitive jungle) and the House, because detestation is a price, a mark of success in press gallery writing, and political approval a warning of failure. Mr. Webster says that to be disliked by a politician may be a badge of honour to a reporter. This evidence has a considerable bearing on the question of damages, which I shall come to later. But the esoteric meaning attached by these initiates to the effect of detestation is not one that would spring to the mind of the ordinary citizen who reads the book, and it is from that level that I must form my opinion.

19 I should deal with one case relied on by the defendant, *Robinson v. Jermyn* (1814) 1 Price 11, 145 ER 1314. The defendants were proprietors of or subscribers to a room called "the Cassino" which they frequented, presumably for social purposes. They posted a regulation of the Cassino reading thus, "The Rev. John Robinson, and Mr. James Robinson, inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room." They were sued by the Rev. Robinson for libel. Thomson, C.B. said at p. 16:

> The demurrer to these pleas involves the material question, whether the publication of the words laid in the declaration are properly the subject matter of an action, and whether, under the circumstances, they amount to a libel. The words are, 'The Rev. John Robinson and Mr. James Robinson, not being persons that the proprietors or annual subscribers think it proper to associate with, are excluded this room.' It seems to me to be a material allegation in this declaration that the plaintiff was officiating minister, but there is certainly nothing affecting him in his clerical character in these words. It then goes on to state, that the words were published in one of the written regulations of the room. Now the principal ground on which this action can be supported is, that it does in substance contain an averment, that these plaintiffs were not fit for common association — that they were not proper persons for general society; and nothing will help this declaration, unless it can be collected from it, that such an insinuation was the object of the words. Now it does not seem to me, that such an imputation can be inferred. It seems merely that these defendants did not think that the plaintiffs were proper persons to be associated with by them; but that may proceed from other causes than such as must appear on the face of the declaration, to have been insinuated, to constitute a libel. There might be reasons assigned not at all affecting the moral character of the plaintiffs; for the defendants may not have thought them agreeable or sociable. They may have considered them troublesome and officious; or, for some other such reasons, improper for their society.

20 I think this case is clearly distinguishable. The defendants were, in the first place, stating their own opinion, not purporting to report that of other persons. The words were not defamatory. They merely indicated a disinclination by the subscribers to associate with certain persons. It is true that here, as there, the opinion in question was that of a certain body of people, not of society generally. But it seems to me that the mild assertion by persons directly interested of a disinclination to associate with certain other persons is a far cry from a bold statement that a man is heartily detested by most of his associates. If, in this case, Miss LaMarsh had expressed her own detestation of the plaintiff I would have thought little of it but it is a different matter when she attributes, without foundation, detestation of Mr. Murphy to his associates.

21 The defence does not plead that the words written are true but does plead that they are fair comment, that they merely state an opinion.

22 One may properly ask "fair comment on what?". The comment is not an opinion on the quality of his reporting, in the nature of fair literary criticism, it is a bald statement, irrelevant to the subject under consideration. It adds nothing to Miss LaMarsh's argument. It is a gratuitous, defamatory observation delivered publicly and serving no purpose in the context which contains it.

23 I do not assert that a statement as to the popularity or unpopularity of an individual, as to whether he is liked or disliked, may not in certain circumstances be a statement of opinion. But where an allegation is made that a man is heart ily detested by the majorities of two bodies, I think one has a statement of fact rather than opinion. I do not see how the statement can be classed as comment fair or unfair because comment must, according to the authorities, be based

on a substratum of fact, and no facts are given here to justify the comment. Such evidence as I have heard negatives the idea that Murphy was detested as alleged and indicates that Miss LaMarsh made no inquiries to ascertain whether or not he was detested in the gallery and the House.

24 There was no express malice in what Miss LaMarsh wrote. The real object of the whole passage was not to defame Mr. Murphy but generously to defend Mr. Lamontagne and Mr. Tremblay, her former associates. I accept her statement that she scarcely knew Murphy and that her mention of him was casual. It was also careless because she made no inquiries to establish the truth of her statement.

25 I find the innuendo that Murphy hounded Mr. Lamontagne out of public life unfounded. In so far as Miss LaMarsh may be said to have accused any one person of hounding Mr. Lamontagne out of public life her accusation is, I think, directed at a much more eminent figure.

26 I now come to consider damages. To what extent has Mr. Murphy suffered as a result of the defamation?

27 On the surface he appears to have prospered. He is a featured performer on what is known as a "hot line" or open-line radio programme. He sits in a studio before a microphone surrounded by telephones. He introduces subjects for discussion — some of his listeners telephone him and discuss the subjects, agreeing or disagreeing with Mr. Murphy's views. Or a listener may, by telephone, raise a subject upon which Mr. Murphy, and other listeners, may express views. I am assured by Mr. Webster, an acknowledged expert, that controversy is an important and desirable element in these discussions.

28 I have wondered a little about Mr. Murphy's conduct since bringing this action. One would think that a man who felt he had been libelled would desire to restrict the circulation of that fact and avoid drawing attention to it. But Mr. Murphy told, as he says, the news media that he had commenced an action and that Miss LaMarsh was to be served with the writ on the day she was served. As a result reporters and photographers were present, Mr. Murphy himself was present, at the Georgia Hotel when the writ was served on Miss LaMarsh and headlines and photographs of the service of the writ on Miss LaMarsh consequently appeared on the front page of the *Vancouver Province*. This appears to me strange conduct for a man who thought he had been wronged and who might reasonably have considered at that stage the possibility that a retraction might be made and that his suit might be settled without further publicity.

29 Again, Mr. Murphy's employer during and after the trial, which attracted a great deal of newspaper and radio publicity, published large newspaper advertisements of its radio station with photographs of Mr. Murphy and the assertion "Murphy stirs things up." The statement that the publication of these advertisements contemporaneously with the reports of the trial was entirely accidental is one to be taken with more than a grain of salt. Conceding that Mr. Murphy himself did not publish these advertisements, there is still left an impression that the lawsuit has not been hurtful to Murphy professionally.

30 Mr. Ross, a highly respected member and former president of the press gallery, said that a statement that a newsman was detested by most of the gallery and members would count against that newsman with him. I believe him, but I must say without, I hope, too much cynicism, that I am inclined also to consider the contrary opinion of Mr. Lynch, who is engaged, *inter alia*, in the business of hiring and firing newsmen. I think that contentiousness is part of the essence of the sort of reporting Mr. Murphy has done and that what harm might be done Mr. Murphy by the libel among professional people of Mr. Ross's way of thinking would be compensated for by the good that might be done him among employers of Mr. Lynch's and Mr. Webster's way of thinking. Furthermore, I doubt that a statement of this kind by a retired politician in a book containing other polemic matter, some of it directed at pressmen (p. 15, drunken newspapermen; p. 19, scruffy newsmen; p. 55, snide editorial; p. 57, a reporter thoroughly disliked; p. 161, reporters awaiting a chance to cloak their reports with parliamentary immunity against libel suits) would be given great weight one way or the other by an experienced employer of reporters.

31 I revert to the conduct of his present employer as the best guide to damage done to Murphy professionally and state that the employer's advertisement, during the publicity of the trial, of Mr. Murphy as a man who "stirs things up" does not suggest that Mr. Murphy has been injured in his profession.

32 I have in mind that the objectionable passage was, so soon as the writ was issued, deleted from later editions of the book.

33 But I have said that Murphy's name has been tarnished in the mind of the ordinary reader, and this by a casual and careless mis-statement. While I think that his actual monetary loss in the conduct of his profession is inconsiderable, I still feel that he is entitled to be compensated for damage done to his name in the minds of ordinary readers and (*vide* Pearson, L.J. in *McCarey v. Assoc. Newspapers Ltd.* [No. 2] [1965] 2 Q.B. 86, at 104, [1965] 2 W.L.R. 45, [1964] 3 All ER 947) the injury to his feelings. But I think that the libel is not of a major kind and that the damage is not great because the ordinary reader, unacquainted with Murphy, will probably have forgotten the passage complained of by the time he has turned the next page. I fix his damages at $2,500. Both defendants are liable for their joint tort. Costs will follow the event.

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MARIKA PROPERTY MANAGEMENT v CAPPUCCITTI

CASE

1997 CarswellOnt 551
Ontario Court of Justice, General Division

Marika Property Management Inc. v. Cappuccitti

1997 CarswellOnt 551, [1997] O.J. No. 241, 22 O.T.C. 258, 68 A.C.W.S. (3d) 848

Marika Property Management Inc. and Mary Khan, Plaintiffs v. Santi Cappuccitti, Defendant

MacKenzie J.

Judgment: January 22, 1997
Docket: Brampton 95-CQ-64364

Counsel: *Mr. D.A.J. D'Oliviera*, for the plaintiffs.
No one for the defendant.

Subject: Torts

***MacKenzie J.*:**

1 The plaintiffs in this libel action are Marika Property Management Inc., an Ontario business corporation engaged in the business of property management on behalf of condominium corporations, and Mary Khan, a businesswoman who is the principal of such corporation ("Khan"). The defendant is the originator and publisher of documents being a form of a newsletter described as the Woodland Manor Monitor ("the Monitor").

2 The plaintiffs claim that the publication of these writings contained material and information which defamed the plaintiffs and the plaintiffs accordingly seek damages against the defendant in respect of such conduct. The defendant failed to defend this action, was noted in default and in the result, he is deemed to admit the truth of all allegations of fact made in the statement of claim, pursuant to the *Rules of Civil Practice*, Rule 19.02(1)(a).

3 Pursuant to the provisions of such Rule, the defendant is deemed to admit the following:

1. He was the author and publisher of the Monitor;

2. That in or about the month of January, 1995, he published in the Monitor the following words:

(A) Why High Cable Rates?

Cable subscribers will be paying a whopping $60.87 a month at P.C.C. 143 without a choice in the matter! Cable subscribers will have their present contract of $22.76 a month canceled [sic] and a new deal signed for $38.11 a month by the board of directors of P.C.C. 143.

The $15.35 increase is not necessary. The board of directors with the support of Mareka Property Management are refusing the soon to be announced Rogers Cable group rate of $25.82 per month, and signing a new contract for an individual subscription rate that will add $15.35 a moth to their monthly cost.

Owners at Woodland Manor *will not get a reduction* of the monthly maintenance fee equal to the $22.76 a month group rate for cable service now paid. The new $38.11 rate charge will be in addition to the $22.76 making the new cost to householders a hard to accept $60.87 a month!

The individual subscriber rate will permit individual subscribers to cancel cable service to their unit. Without the option of erecting a TV antenna or a satellite dish, the owner who refuses the extra charges will be shut out of the customary television service.

Mary Khan of Mareka Property Management has been hinting at the rate change for many months without making a commitment on paper. Above the strident complaints of owners who attended the past public meeting, the new deal is here without an explanation.

Individual owners are organizing a protest to stop the ever increasing costs of living at the Woodland Manor.

(B) Double Jeopardy

Getting a cheque out of P.C.C. No. 143 takes years! The board of directors of P.C.C. No. 143 owed one of the unit owners the deductible for an insurance damage claim. After repeated requests, the board of directors discussed the debt but never got around to issuing the cheque and mailing it out.

Repeated requests to Mary Khan of Mareka Property Management and to Ms. Gina Haltzworth the P.C.C. No. 143 treasurer received no response. The only avenue was to take it to Ontario General Division Court.

On November 17th, 1994, Judge Watson decided that half way between the $1,000.00 claimed by the unit owner and the $500.00 offered by the board of directors was fair, and signed a judgment for $750.00. He did not attach an order for costs because the corporation lawyer was far costlier than the self representation by the condominium owner.

The bank account of P.C.C. No. 143 was garnisheed and a cheque was promptly remitted to Ontario General Division Court in Mississauga.

In response to this judgment, Mary Khan of Mareka Property Management and the board of directors want authority to change the By-Laws to permit the board to charge the cost of legal litigation back to any owner who takes the board to court. The owner will have to pay twice even when he is in the right.

(C) Mortgage Mystery

The recently begun repairs and changes to the Woodland Manor have been costly and of the type that will impress real estate salesmen. An adequate explanation of the cost of the work and the mortgage to pay for it has never been put on paper for the information of the owners of P.C.C. 143.

The tragedy is that the work was started before the mortgage had been applied for. Mary Khan of Mareka Property Management had to send out a letter telling the owners of P.C.C. No. 143 that the bank wanted proof that the mortgage was authorized by 80% of the owners. There is no evidence available that this was done honestly.

Mary Khan of Mareka Property Management is quick to threaten the owners of P.C.C. No. 143 that without the mortgage, each of the owners would have to pay a special assessment as high as $8,000.00.

If the Mystery of the Woodland Mortgage is never revealed, many of the owners of P.C.C. No. 143 will be interested to learn it.

(D) Phony Security

The best way to sell security is to scare people. Instead of shutting doors, leave them open to intruders. This is what seems to be the case at P.C.C. No. 143.

> The doors of lobby A and B have been closed at 10:00 p.m. each evening for many years this forced all entrance to the building at lobby B which had the watchful television camera taping all entries and exits. Mareka Property Management discontinued this practice. The additional traffic opportunity was felt immediately to the disadvantage of the owners of P.C.C. No. 143.
>
> The solution was provided by mary Khan of Mareka Property Management with additional cameras, a new lock system and a security person patrolling at night. It seems an expensive alternative to locking four doors each night. The board of directors accepted the suggestion and has paid for it handsomely.
>
> The quality of security is so low that a gentle push of the hand will get you past the garage doors every time. This is not the kind of electronic security the board of directors has paid for, or is it?

3. That in or about the month of April, 1995, in a further issue of the Monitor, he published the following words:

> **(A) Liens are Extra Money**
>
> A recent notice sent out by Don Francis says that the board of directors of P.C.C. 143 has failed to collect $56,308.00 of maintenance fees from unit owners. This would provide a legitimate reason to put a lien on a unit.
>
> On closer inspection, many of the liens placed on units are of a nuisance nature. Bad bookkeeping has landed the board of directors in court because they would not believe the canceled [sic] cheques proffered by the unit owner to explain the error.
>
> When you register 85 liens in a 175 unit complex, you have forced a lot of homeowners into power of sale situations.
>
> The Ontario Condominium Act permits the placement of a lien on the second day of the month. If you are one day late, you can be liened. For a $50.00 fee, Mary Khan of Mareka Property management will charge you a $300.00 fee for placing a lien on your property. A neat $250.00 profit on each. When you do it 85 times, it gets you $14,500.00 extra!
>
> The tragedy is that one of the favourite lien times are around Christmas time.

4. That the words in paragraphs 2 and 3 above referred to and were understood to refer to the plaintiffs;

5. That the publication of these words resulted in injury to the credit, reputation and business of the plaintiffs and brought them into ridicule and contempt;

6. That the defendant published the words in question out of malice and spite towards the plaintiffs.

4 The case was called for hearing before me on the 14th of January, 1997, as an assessment for damages. In the circumstances of default by the defendant, I proceeded to deal with the case by proceeding to hearing of the claim with oral evidence being presented by the plaintiff pursuant to Rule 19.05(3). As a result of the oral evidence received at such hearing, the plaintiff has established on a balance of probabilities the following facts:

1. The defendant persisted in publishing and distributing defamatory materials in the so-called newsletters despite written warnings contained in letters by counsel for the plaintiffs;

2. That the defendant had competed with the plaintiffs to bid and obtain the property management contract in respect of Peel Condominium Corporation No.143 (Woodland Manor) of the January, 1995 newsletter;

3. The defendant had verbally expressed to an employee of the plaintiff corporation an attitude of personal animosity and malice towards Mary Khan;

4. That notwithstanding a purported written retraction by the defendant of the libelous statements in the January and April, 1995 issues of the Monitor, the defendant published after the issuance of the Statement of Claim a further issue which was defamatory of the plaintiffs;

5. The defendant published and caused to be distributed the Monitor not only to the unit owners of the Woodland Manor Condominium (No. PCC 143) but also to unit owners of another condominium corporation managed by the plaintiffs and to the Association of Condominium Managers of Ontario;

6. As a result of such publication and distribution, Khan received numerous inquiries not only from unit holders of both the condominium corporations but also from the management of the Association of Condominium Managers of Ontario, the thrust of which inquiries went to the defendant's allegations of incompetence and lack of integrity on the part of the plaintiffs;

7. A 5-year management contract of the plaintiff corporation with Woodland Manor Peel Condominium Corporation No. 143 was terminated in December of 1996, some 3 1/2 years prior to its expiry date, and that the billings lost as a result of such termination were approximately $168,000.00 on the basis of gross monthly billings of $4,000.00 a month, with a net pre-tax profit of $50,400.00 over the unexpired term of the contract.

Issues

5 1. Whether the published writings by the defendant constitute a libel of the plaintiffs.

6 2. If so, what damages flow to the plaintiffs from such conduct.

The Law

7 A broad statement of the test to be utilized in determining whether words are capable of a defamatory meaning is that defamation is the dissemination of information that tarnishes the good name of a person, causing his or her standing in the community to be impaired or causing him or her to be pitied. The focus of defamation is that the meaning conveyed by the subject words should hurt or harm the reputation of the person being disparaged, having regard to the circumstances of the communication. In determining the effect of the allegedly defamatory words, the courts have adopted as a test the natural and ordinary meaning which would be reasonably attributed to such words by ordinary sensible people without special knowledge and who are neither unusually suspicious nor unusually naive (*Lewis v. Daily Telegraph*, [1964] A.C. 234, at page 259).

8 I am satisfied that the natural and ordinary meaning that is reasonably attributable to the words published by the defendant hurts the reputation of both plaintiffs thereby causing harm to reputations for honest dealings and integrity, particularly in the business community in which both plaintiffs operate. I am further satisfied that the defendant acted in his publication of the defamatory words out of malice and spite against the plaintiffs and particularly Khan. I therefore find that the writings published constitute a libel of the plaintiffs.

9 I now turn to the issue of quantification of damages.

10 A useful summary of the nature of damages in defamation actions can be found in *The Law of Defamation in Canada* (2nd ed.) (1994), R. Brown, in Vol. 2, page 25-2:

> In every action for libel, and in actions for slander *per se*, damages are presumed. Actual injury does not have to be proved. Where the slander is not actionable *per se*, a plaintiff can recover only if special damages are shown. The award may be compensatory or, in appropriate cases, punitive. Compensatory damages are either general or special. In addition to providing compensation for the injury to the plaintiff's reputation, they may include such injuries as mental suffering, anguish, embarrassment, humiliation in any actual or anticipated pecuniary loss or social disadvantage. In assessing damages the court may consider the character and conduct of both plaintiff and

> defendant, together with the nature and character of the defamatory publication, the extent of its circulation and the principles under which it was made.

11 Compensatory damages are awarded primarily to compensate a plaintiff for the harm caused to his or her reputation and further for any hurt or injured feelings that the publication of the libel may have caused. General damages arise by inference of law and require neither special allegation nor proof. However, actual or special damages do not arise by inference of law and, as they are intended to compensate the plaintiff for the loss suffered as a natural and approximate result of the defamatory words, they must be proven at trial.

12 The essence of aggravated damages was stated in the majority judgment in *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, *per* Cory J., page 1205, as follows:

> Aggravated damages may be awarded in circumstances where the defendants' conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous [defamatory] statement...
>
> These damages take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct.

13 It should be noted that like general damages or special damages, aggravated damages being compensatory in nature require consideration by the trier of the conduct of the defendant prior to the publication of the libel and continuing through to the conclusion of trial. If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice which increase the plaintiff's injuries or the mental distress and humiliation of the plaintiff arising from the libellous conduct.

14 The nature of punitive damages was also canvassed in *Hill v. Church of Scientology, supra, per* Cory J. at page 1208:

> Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

15 Applying the foregoing principles to the facts of the present case, I assess the plaintiffs' damages as follows:

> 1. The plaintiffs are awarded general damages in the amount of $65,000.00, comprising actual damages arising out of lost profits from the termination of the corporate plaintiff's contract with Peel Condominium Corporation No. 143 in the sum of $45,000.00 (after deducting a contingency factor of 10% of the established loss of $50,000.00) and the sum of $20,000.00 for injury and hurt to the reputation of both plaintiffs with respect to business integrity and honesty;
>
> 2. The plaintiffs are awarded the sum of $20,000.00 as aggravated damages on the basis of the defendant's actual malice and his republication of the libel, both in the context of a purported retraction and apology and of further republication to the Association representing the plaintiff's business peers. The court, however, is not persuaded that the defendant's conduct is of such an egregiously outrageous nature so as to warrant the assessment of punitive damages, having regard to the test in *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104, (C.A.).

16 The plaintiffs shall have their costs herein which I hereby fix in the amount of $8,500.00, inclusive of disbursement and applicable taxes.

1997 CarswellOnt 551, [1997] O.J. No. 241, 22 O.T.C. 258, 68 A.C.W.S. (3d) 848

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