COURT OF APPEAL FOR ONTARIO

CITATION: Awan v. Levant, 2016 ONCA 970
DATE: 20161222
DOCKET: C59810

Feldman, Simmons and Rouleau JJ.A.

BETWEEN

Khurrum Awan

Plaintiff (Respondent)

and

Ezra Levant

Defendant (Appellant)

Iain MacKinnon, for the appellant

Brian Shiller and Angela Chaisson, for the respondent

Heard: May 16, 2016

On appeal from the judgment of Justice Wendy M. Matheson of the Superior Court of Justice, dated November 27, 2014, with reasons reported at 2014 ONSC 6890.

Feldman J.A.:

A. INTRODUCTION

[1] The appellant published nine posts to his online blog, which the trial judge found were libellous of the respondent. Any defences that might have been available were negated by the trial judge's finding that the appellant was motivated by malice. She awarded $50,000 in general damages and $30,000 in aggravated damages. The appellant appeals both the finding that the blog posts were libellous and the quantum of the damages award.

B. FACTS

[2] The statements that form the basis of this litigation arose out of a hearing before the British Columbia Human Rights Tribunal ("BCHRT"), which itself arose out of a protracted dispute between Maclean's magazine on one side, and the respondent and some of his colleagues on the other. To understand the defamation claim, it is first necessary to set out the history leading to the human rights complaint.

(1) The Maclean's Article and Meeting

[3] On October 23, 2006, Maclean's magazine published a cover story entitled "The future belongs to Islam". The article was an excerpt from a book by journalist Mark Steyn entitled *America Alone*. The sub-headline captures the central theme of the piece: "The Muslim world has youth, numbers and global

ambitions. The West is growing old and enfeebled, and lacks the will to rebuff those who would supplant it. It's the end of the world as we've known it."

[4] The respondent became aware of the article shortly thereafter from a press release by the Canadian Council on American Islamic Relations, which expressed concern about the content of the article.

[5] At the time the article was published, the respondent was a student at Osgoode Hall Law School. Following discussions with some friends and colleagues, a group of four law students (Naseem Mithoowani, Muneeza Sheikh, Ali Ahmed and the respondent) decided to approach Maclean's with their concerns.

[6] The students contacted various Muslim organizations for support, and ultimately decided to work with the Canadian Islamic Congress ("CIC").

[7] The respondent had prior involvement with the CIC. He had served as a Youth Chapter President, written papers, and testified before government committees on behalf of the CIC. He had also received a modest scholarship from the organization, in exchange for performing 150 hours of community service for the CIC.

[8] When one of the students requested a meeting to discuss their concerns, Maclean's agreed.

[9] Prior to the meeting, the students met to discuss their strategy. They decided to ask for publication of a reply article in Maclean's by a mutually acceptable author. The students also planned to ask for a donation to a charitable organization in the area of race relations. They discussed an amount between $5,000 and $10,000.

[10] The meeting took place on March 30, 2007. In attendance along with the students were Julian Porter, Q.C., counsel for Maclean's, Ken Whyte, Editor-in-Chief, and Mark Stevenson, Deputy Editor.

[11] The meeting began with the students presenting their concerns and their proposal for resolving them. After a few minutes, Mr. Whyte spoke up and disagreed with the students' characterization of the article. He noted that the author was a reputable journalist and the article itself was nuanced. He also added that after the article was published, Maclean's published several letters to the editor in response.

[12] The meeting ended abruptly after Mr. Whyte said that he would rather go bankrupt than print an article by an author of the students' choice.

(2) Subsequent Events and Media Coverage

[13] Following the meeting, the students regrouped and discussed how to respond.

[14] The students' first response was in April 2007. Since Maclean's was a Rogers publication, they wrote to Ted Rogers. Brian Segal, President and CEO of Rogers, responded, indicating that Rogers would not interfere with the editorial views expressed by its magazines. He also stated that the article raised issues that were legitimate matters for publication in a national magazine.

[15] The students responded to Mr. Segal, stating that they would go public with their concerns if attempts to resolve the matter were unsuccessful.

[16] Believing their concerns had not been addressed, the students launched a series of human rights complaints. This decision proved to be controversial and resulted in significant criticism in the media. Many commentators were of the view that the Maclean's article was well-suited to public dialogue and if the students were concerned about its contents, they ought to have entered that dialogue.

[17] The complaint to the Ontario Human Rights Commission was prepared by the respondent and was brought by the four students as complainants. The other two other complaints, to the Canadian Human Rights Commission and the British Columbia Human Rights Commission, were brought by Dr. Mohamed Elmasry who was the President of the CIC at the time, as a complainant. The students were not complainants in those two complaints.

[18] Faisal Joseph, a lawyer at the London office of Lerners LLP, agreed to assist by acting *pro bono* for the complainants at the Ontario and British Columbia tribunals.

[19] On December 4, 2007, Mr. Joseph spoke at a press conference about the failed attempt to resolve the issue with Maclean's. He said that the students were seeking equal space to respond to what they perceived as an Islamophobic article.

[20] Maclean's responded immediately with a statement on its website by Mr. Whyte to clarify what occurred at the meeting. It stated that Maclean's was willing to consider a reasonable request for a response, but did not consider the students' proposal for an article written by an author of their choice to be a reasonable request for response.

[21] It was at this point that the students realized there were different perceptions of what happened at the March 2007 meeting. According to the students, they were unaware that Maclean's was willing to consider a reasonable response.

[22] The students responded with a press release on December 7, 2007, released under the auspices of the CIC, which said that at the meeting with Maclean's, they asked for a "balanced response from a mutually acceptable author" and attempted to discuss a resolution. The respondent was quoted in the

press release as saying that “Mr. Whyte’s recent statement suggesting that he offered to consider a reasonable request, but we wanted to pick an author of our choice, is a complete fabrication.”

[23] In the following months, the respondent co-authored several letters to the editor and articles that appeared in major Canadian newspapers: the Globe and Mail (December 8, 2007); the National Post (December 20, 2007 and May 10, 2008); the Ottawa Citizen (December 21, 2007); the Montreal Gazette (February 24, 2008); and the Waterloo Record (April 18, 2008).

[24] In these letters, the students discussed the meeting with Maclean’s. They emphasized that at the meeting, the students proposed that Maclean’s publish a response from a mutually acceptable author. According to them, Maclean’s rejected this proposal.

[25] The students held another press conference on April 30, 2008, and issued a press release the same day where they reiterated their position that in the meeting, Maclean’s had refused to publish a response of any kind, and they also offered to settle the matter with Maclean’s if it would publish a mutually acceptable response from an agreed-upon author.

(3) Human Rights Proceedings

[26] Both the Ontario and Canadian Human Rights Commissions decided against proceeding with the complaints. The British Columbia Human Rights Commission held a hearing, but it dismissed the complaint.

[27] The British Columbia hearing took place from June 2 to 6, 2008. The witnesses who testified for the complainants were the respondent, one of the complainants, Dr. Habib, and three expert witnesses. Dr. Elmasry did not testify. The respondents (Rogers Publishing Ltd. and Maclean's publisher Ken MacQueen) called no evidence.

[28] At the time of the hearing, the respondent was working as a law clerk to the Ontario Superior Court, and had secured an articling position at the Lerners firm in Toronto.

[29] It was at this stage that the appellant entered the picture. The appellant attended the hearing for the first two days and live-blogged its events. These blog posts form the subject matter of the respondent's libel claims.

[30] At the time of the hearing, the appellant was known to be a harsh critic of human rights commissions. His publication, the Western Standard, had been the subject of two complaints under Alberta human rights legislation, both of which were ultimately dismissed.

[31] As a result of the appellant's experiences with human rights commissions, he commenced a campaign to, in his words, "denormalize" them. He published a book in 2008 describing his "ordeal" with the Alberta human rights commission, and at trial, called human rights commissions "kangaroo courts". The appellant was particularly critical of the British Columbia Human Rights Tribunal.

[32] The appellant also had connections to the subject matter of the Maclean's complaint. He knew Mr. Steyn and held him in high regard. Mr. Steyn wrote regularly for the appellant's publication and ultimately contributed the foreword of the appellant's book. The appellant also admired Mr. Whyte of Maclean's.

[33] Further, the appellant held strong views about one of the complainants in the British Columbia proceeding, Dr. Elmasry. Dr. Elmasry was a controversial figure who, in 2004, had made a televised statement suggesting that all adult Israelis were valid targets of violence. The appellant frequently wrote about Dr. Elmasry and referred to him as a "Jew-hating bigot".

[34] At the beginning of the hearing, the Tribunal chair asked counsel to introduce themselves. Mr. Joseph identified himself as counsel for the complainants and no one else was so identified.

[35] The respondent was the first witness who testified. His testimony began on the first day of the hearing and finished on the second. With one exception, the respondent did not return to the hearing after his testimony.

[36] According to Mr. Joseph, the respondent was a fact witness who was there to testify about what happened at the Maclean's meeting since neither of the complainants in the British Columbia proceeding had been present at the meeting.

[37] In cross-examination, Mr. Porter, who was acting for Maclean's at the hearing, suggested to the respondent that the students had never said "mutually acceptable" during the meeting. The respondent agreed, saying that they were unable to raise this during the meeting because it ended abruptly.

(4) June 2008 Blog Posts

[38] It was during Mr. Porter's cross-examination of the respondent that the appellant posted the majority of the blog posts that form the subject matter of this action. The first post, entitled "Khurrum Awan is a Serial Liar", was published on June 3, 2008, the second day of the BCHRT hearing, at 2:56 p.m. It was shortly followed by six other blog posts:

- "Awan the liar, part 2" (3:01 p.m.)
- "Awan the liar, part 3" (3:04 p.m.)
- "Awan the liar, part 4" (3:08 p.m.)
- "Awan the liar, part 5" (3:12 p.m.)
- "Awan the liar, part 6" (3:17 p.m.)
- "Awan the liar, part 7" (3:28 p.m.)

[39] The blog posts were all fairly short. Although the content varied, they generally stated that the respondent was lying about whether the students asked Maclean's at the meeting to publish a response from a mutually acceptable author. They also stated that the respondent was engaged in a "shakedown".

(5) The Libel Action

[40] The respondent did not sue for defamation in 2008. However, the controversy was resurrected the following year. On June 4, 2009, the appellant wrote another blog post entitled "Awan the liar, part 8", following a letter to the editor that the respondent and Ms. Mithoowani wrote to the Toronto Star in response to an article written by the appellant. This blog post was longer than the ones posted during the June 2008 hearing before the BCHRT and included links to the previous seven posts.

[41] Some of the content of this post (particularly the accusations that the respondent was a liar) was similar to the earlier posts. However, in this post, the appellant made additional remarks. He referred to Dr. Elmasry as an "anti-Semite-in-chief" and said the respondent was Dr. Elmasry's protégé. Near the end of the post, the appellant discussed the respondent's testimony before the BCHRT. He wrote that the respondent was co-counsel for the complainant and a witness. The appellant described this behaviour as "the definition of conflict of interest."

[42] The respondent served a libel notice, dated July 14, 2009. Following that, he commenced the present action.

[43] On January 21, 2010, the appellant published a ninth blog post. This post is entitled “Mark Steyn’s would-be censor sues me -- and I’m going to fight back”. The statement of claim was amended to include this blog post in the libel action.

[44] This blog post repeats many of the earlier statements about the respondent’s purported lies and “shakedown” of Maclean’s. The appellant refers to the respondent as a friend of “the notorious anti-Semite Greg Falton”. The appellant said he would “quote a Jew now, just because it will irritate Awan.” He also wrote of “illiberal Islamic fascists” who were “waging war against our values.”

C. DECISION BELOW

[45] The trial judge began by rejecting the appellant’s argument that because of his reputation as someone who is provocative and controversial, none of the words complained of were defamatory. She held that an ordinary, right-thinking member of society would readily regard several of the statements as defamatory.

[46] The trial judge then reviewed each of the nine blog posts that formed the subject matter of the action. She concluded that the posts included many defamatory statements, including:

- The respondent was a dishonest person and a liar;
- The respondent tried to “shake down” Maclean’s;

- The respondent was incompetent, unethical, and unfit to be a lawyer;
- The respondent was an anti-Semite;
- The respondent was in a conflict of interest at the BCHRT hearing;
- The respondent used the courts to bully his opponents; and
- The respondent had extreme, intolerant views.

[47] Having established that the blog posts were defamatory, the burden shifted to the appellant to establish a defence. At trial, the appellant relied to varying degrees on the defences of justification, fair comment, and qualified privilege. His main defence was fair comment on a matter of public interest.

[48] In *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 28, the Supreme Court of Canada set out the requirements for the fair comment defence:

> (a) the comment must be on a matter of public interest;
>
> (b) the comment must be based on fact;
>
> (c) the comment, though it can include inferences of fact, must be recognisable as comment;
>
> (d) the comment must satisfy the following objective test: could any [person] honestly express that opinion on the proved facts?
>
> (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice. [Parenthetical notes in original; emphasis removed.]

[49] The respondent conceded that the blog posts were on a matter of public interest. The other factors were in dispute.

Findings by the Trial Judge

[50] First, with respect to the repeated statements calling the respondent a liar, the trial judge held that these were statements of fact, rather than comments. She noted that the words were stated as fact in a purported report of the hearing and were not recognizable as comment. Further, the word “liar” appeared in the headlines and people might read only the headline, which contained no supporting facts. Further, a number of the underlying facts that would support the liar comment were not proved to be true, so that the defence of fair comment could not succeed in any event.

[51] Alternatively, the trial judge held that even if these statements were comments, the defence of fair comment would fail because the appellant failed to prove that the respondent lied deliberately, which was necessary to prove that he was in fact a liar.

[52] Similarly, the trial judge found the accusations of anti-Semitism were not stated as matters of opinion but as a fact. She held that based on the evidence at trial, the appellant failed to prove that the respondent is or was an anti-Semite.

[53] Third, the trial judge determined that the appellant’s statement that the respondent was in a conflict of interest and co-counsel at the BCHRT hearing

arose from factual errors, and that the respondent was not counsel at the hearing. As the factual underpinnings of the allegation must be true for the defence of fair comment to apply, the trial judge concluded that the defence was not established.

[54] Next, the trial judge found that the references to a “shakedown” could be defended on the basis of fair comment. She concluded that the public interest requirement was established, the imputation was based on true facts, the comment was recognizable as such, and it was a view that could be honestly held.

[55] Any defence of fair comment is defeated by malice on the part of the person making the comment. The trial judge found that there was ample evidence demonstrating malice by the appellant. She found that the malice arose from the appellant’s strongly held animus towards Dr. Elmasry, which was visited on the respondent in the blog postings. She noted that the appellant made little or no effort to check his facts or with one exception, make corrections when he learned of his mistakes. She found these considerations supported a finding of malice.

[56] Since malice defeats the defences of fair comment and qualified privilege, the trial judge concluded that the defence of fair comment that had been established with respect to certain statements was defeated.

[57] In awarding damages, the trial judge noted that the respondent was in a vulnerable stage of his career when the posts were published. She held that the statements were extremely serious as they went to the heart of the respondent's reputation as a lawyer and member of society. She also considered the lack of mitigation by the appellant. On the other hand, she noted that the readership could have been quite modest and there was other negative media coverage at the time the blog posts were published which could also have affected his reputation.

[58] After assessing all these considerations, the trial judge awarded $50,000 in general damages.

[59] With respect to aggravated damages, the trial judge found that the appellant's behaviour was motivated by malice, which increased the injury to the respondent. She awarded $30,000 in aggravated damages.

[60] The trial judge declined to award punitive damages. She ordered that the defamatory words be taken down from the appellant's website.

D. ISSUES

[61] The appellant challenges a number of the trial judge's findings and asks that this court set aside the judgment or reduce the amount of damages awarded. He raises the following six issues:

1) Is less deference owed to a trial judge's findings of fact when a *Canadian Charter of Rights and Freedoms* right such as freedom of expression is at stake?

2) Did the trial judge err in holding that when the appellant called the respondent a liar, that was a statement of fact and not opinion and that the appellant had to prove that the impugned lie was made deliberately by the respondent?

3) Similarly, did the trial judge err in holding that the allegation that the respondent is one of a group of anti-Semites is a statement of fact and not comment or opinion?

4) Did the trial judge err in finding that the respondent did not act as co-counsel at the BCHRT hearing?

5) Did the trial judge err in law by finding that the appellant was actuated by malice against Dr. Elmasry and that that malice vitiated the fair comment defence?

6) Did the trial judge err in the calculation of general damages and in also awarding aggravated damages?

E. ANALYSIS

(1) Standard of Review

[62] The appellant makes the overall submission that a less deferential standard of review of a trial judge's factual findings should be accorded on appeal where the *Charter* right to freedom of expression (s. 2(b)) is engaged. He refers to the decision of the Supreme Court of Canada in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at paras. 47-51, where the court commented

on the relationship between the *Charter* protection of free expression and defamatory communications on matters of public interest:

> The guarantee of free expression in s. 2*(b)* of the *Charter* has three core rationales, or purposes: (1) democratic discourse; (2) truth-finding; and (3) self-fulfillment. These purposes inform the content of s. 2*(b)* and assist in determining what limits on free expression can be justified under s. 1.
>
> …
>
> Of the three rationales for the constitutional protection of free expression, only the third, self-fulfillment, is of dubious relevance to defamatory communications on matters of public interest. This is because the plaintiff's interest in reputation may be just as worthy of protection as the defendant's interest in self-realization through unfettered expression. We are not talking here about a direct *prohibition* of expression by the state, in which the self-fulfillment potential of even malicious and deceptive expression can be relevant, but rather a means by which individuals can hold one another civilly accountable for what they say. *Charter* principles do not provide a licence to damage another person's reputation simply to fulfill one's atavistic desire to express oneself. [Citations omitted; emphasis in original.]

[63] This guidance from the Supreme Court explains that the protection of free speech is not intended to be at the expense of a wrongfully defamed person's ability to obtain a civil remedy for the tort of libel. The two rights live together under our law and are to be interpreted and applied by judges at both the trial and appeal levels. I cannot see any basis for applying a less deferential standard of review to the findings of fact of a trial judge in this context than in any other.

(2) Statements of Fact versus Opinion or Comment

[64] The appellant's main defence in this action was fair comment on a matter of public interest. The appellant was blogging from a human rights tribunal hearing on a matter that had been the subject of much public comment: Mark Steyn's article in Maclean's, the backlash to it coordinated by the respondent and his colleagues, and Maclean's response to that backlash. The appellant used an aggressive, no-holds-barred writing style. The trial judge found that a number of things the appellant said about the respondent were defamatory. On appeal, the appellant submits that the trial judge erred by rejecting his defence of fair comment.

a) Fact versus Comment - Calling the Respondent a Liar

[65] One of the defamatory statements made in every blog post was the description of the respondent as a "liar" or a "serial liar". The trial judge found that those words were factual statements, not comments, and that the appellant was therefore required to prove that the respondent had an intention to deceive. She also stated that even if those words were comments, the appellant was required to prove as a foundational fact that the respondent made an incorrect statement deliberately. The appellant challenges these findings.

[66] The trial judge made the finding in the context of the first blog post, which reads in full:

> **Khurrum Awan is a serial liar**
>
> Julian Porter himself was at the meeting where Khurrum Awan and his junior Al Sharptons tried to shake down Ken Whyte and Maclean's for cash and a cover story.
>
> Porter asked Awan point blank if the CIC's proposed "counter-article" was to be "mutually acceptable" to Whyte or of the CIC's own choosing.
>
> After obfuscating for a few rounds, Awan acknowledged that he never in fact offered a "mutually acceptable" article -- that was simply an after-the-fact lie, a little bit of taqqiya that Awan et al. has told the press.
>
> Awan admitted that he made no such offer of a mutually acceptable author. It was to be the CIC's own choice.

[67] The word "taqqiya" was hyperlinked in this blog post to an article entitled "Islamic Tactics of Taqqiya teaches [*sic*] Muslims to Practice Deception, Fraud and Double Standards to Spread Islam". The trial judge accepted that on the evidence before her, "taqqiya"[1] at least means deception, and is defamatory.

[68] The appellant's position at trial was that his characterization of the respondent as a liar was based on the respondent's testimony at the BCHRT hearing, compared to the prior signed or by-lined publications by the group of students, including the respondent. In those letters to the editor and press releases, the students stated that at the meeting their request was that Maclean's publish a responding article written by a "mutually acceptable author". They

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[1] The trial judge noted that the word is more usually spelled "taqiyya".

refuted Mr. Whyte's version of the Maclean's meeting where he said that the students' proposal was for a five-page article by an author of their choice.

[69] However, on his cross-examination at the BCHRT hearing, the respondent agreed with Mr. Porter that the students never said "mutually acceptable" at the meeting. The respondent said they never had a chance to propose the terms of a response because both Mr. Whyte and Mr. Porter made it clear that Maclean's was not interested in publishing one.

[70] It was in response to this testimony that the appellant called the respondent a liar in his first blog, and repeated it in his subsequent blog posts.

[71] In her reasons, at para. 124, the trial judge concluded that:

> [T]he reasonable reader of this blog post would regard the use of the words "liar" and "lie" as statements of fact. Quite simply, they are stated as fact. They are stated as fact in a purported report of an ongoing hearing. Those words are not recognizable as comment in the blog post, readily distinguishable from facts, as would be required to assert that they are comment.

[72] As support for her conclusion, the trial judge relied on two further factors. She noted that while not determinative, it was relevant that the appellant did not preface his remarks by saying "in my view" or "I come to the conclusion that". She also found it relevant that the word "liar" was used in the headline, which might be the only thing some people would read. The headline contained none of the supporting facts that were in the blog post itself.

[73] Finally, the trial judge concluded that because the statements were fact and not comment, or alternatively, as the basis for the statement if it was a comment, the appellant had to prove that the respondent's incorrect statements in all the press releases and letters had been made deliberately. On that issue, she found, based on the trial evidence, that it was only upon being cross-examined by Mr. Porter at the BCHRT hearing, that the respondent's "memory (or lack thereof) crystalized on this point."

Discussion

[74] In *WIC*, under the heading, "Distinguishing Fact from Comment", Binnie J. outlined the test to be applied and explained his conclusion, at paras. 26 and 27:

> In *Ross v*. *New Brunswick Teachers' Assn.* (2001), 201 D.L.R. (4th) 75, 2001 NBCA 62, at para. 56, the New Brunswick Court of Appeal correctly took the view that "comment" includes a "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof". Brown's *The Law of Defamation in Canada* (2nd ed. (loose-leaf)) cites ample authority for the proposition that words that may appear to be statements of fact may, in pith and substance, be properly construed as comment. This is particularly so in an editorial context where loose, figurative or hyperbolic language is used in the context of political debate, commentary, media campaigns and public discourse.

[75] In the leading libel decision of *Keays v. Guardian Newspapers Ltd.*, [2003] EWHC 1565 (Q.B.D.), Eady J. explained that as motives are generally incapable

of proof, a statement on a matter of public interest that suggests a motive will likely be a comment rather than a fact, at paras. 49 and 50:

> Anyone who chooses to enter the public arena invites comment and often this will include scrutiny of and comment about motives. Such persons cannot expect as of right to be taken at face value. It is sufficient protection in such circumstances for personal reputation that any adverse comments should be made in good faith, and that the words should be subjected, at the appropriate stage, to the objective test of whether the inferences or deductions *could* be drawn by an honest person with knowledge of the facts. [Emphasis in original.]

[76] In my view, based on these principles, calling someone a liar when discussing a matter of public interest or discourse would more likely be found to be a comment rather than a fact. However, in this case it was open to the trial judge to conclude that the appellant's characterization of the respondent as a liar was stated as a matter of fact, not comment. She properly instructed herself that the distinction between what is fact and what is comment must be determined from the perspective of a "reasonable reader" (*WIC*, at para. 27). She was also mindful that context is important to the analysis. She concluded that the appellant's description of the respondent as a liar was stated as a fact in the context of a report of a hearing, and that it was not recognizable as comment. Nor did the appellant add words such as "in my view" to suggest that the words were intended as comment. I see no basis for this court to interfere with the trial judge's conclusion.

[77] In any event, even if the appellant's characterization of the respondent as a liar was comment, not fact, the defence of fair comment would fail. As the trial judge found, the appellant failed to prove the truth of many of the underlying statements contained in the blog post, such as the reference to "taqiyya" (deception), and the statement that the students said at the meeting that the author of the proposed response was to be of the CIC's own choice. Also, any potential defence of fair comment was defeated by the finding of malice. The trial judge found that the appellant was motivated by malice. As I will explain, there is no basis for this court to interfere with that finding.

b) Fact versus Comment - Calling the Respondent an Anti-Semite

[78] The eighth blog post came about a year after the BCHRT hearing, following a back-and-forth exchange between the appellant and the respondent in the Toronto Star. This blog opened with the following three paragraphs:

> I've been blogging for about a year and a half, and by far the most enjoyable days of it were the ones I spent live-blogging Mark Steyn's show trial at the B.C. Human Rights Tribunal last June.
>
> I didn't enjoy the trial, of course -- it's not joyful to witness the Canadian legal system be brought into disrepute. I sat in a court house crowded with journalists who were stunned by the sham they were watching. As the Vancouver Sun's Ian Mulgrew wrote at the time, "The B.C. Human Rights Tribunal is murdering its own reputation". Yet the three kangaroos running the show were oblivious to the scandal they were participating in. Or they knew, but they just didn't give a damn.

> One of the reasons I enjoyed blogging from that trial was that it was the first time that the anti-Semites at the Canadian Islamic Congress had to face cross-examination for their conduct. Their anti-Semite-in-chief, Mohamed Elmasry -- who had boasted on national TV that all adult Israelis were legitimate targets for terrorist murders -- refused to take the witness stand, the coward. But bizarrely, his young protege, a Toronto law student named Khurrum Awan, took the stand in his place.

[79] The trial judge found that calling the respondent an anti-Semite was defamatory. In a brief paragraph in the reasons, the trial judge found that the statement was not stated as a matter of opinion, and that the appellant had not proved at trial that the respondent was an anti-Semite. She noted that in cross-examination, the appellant did not say that the respondent was an anti-Semite but relied on his connections to Dr. Elmasry and the CIC, although the words complained of were specific to the respondent.

[80] The appellant submits that the trial judge erred by finding that calling the respondent an anti-Semite in the context of the human rights proceeding, because of his association with Dr. Elmasry, was a statement of fact that had to be proved true, rather than a comment or opinion to which the defence of fair comment could apply.

Discussion

[81] I accept this submission. Unlike in her fact versus opinion analysis of the "liar" statements, the trial judge did not apply the reasonable person test, nor did

she consider whether the statement was a conclusion or judgment formed by the appellant based on the respondent's association with Dr. Elmasry. She also did not consider that it was stated in an editorial blog discussing a controversial matter of public interest.

[82] Applying that test, in my view, it is clear that a reasonable reader of the appellant's blog would understand that the appellant was stating his view of the respondent, based on his association with Dr. Elmasry and Dr. Elmasry's public statements, including that all adult Israelis are legitimate targets of violence. The respondent had numerous connections with the CIC, and coordinated with the CIC and Dr. Elmasry to prepare for the meeting at Maclean's and to bring the BCHRT complaint with Dr. Elmasry as a complainant.

[83] A similar conclusion that the characterization of comments as anti-Semitic was a matter of opinion, was reached by the court in *Shavluk v. Green Party of Canada*, 2010 BCSC 804, aff'd 2011 BCCA 286, at paras. 71-72. The defendant characterized comments made by the plaintiff as anti-Semitic and the court concluded the characterization was an opinion.

[84] Calling someone prejudiced will normally be a conclusion or opinion based on the person's conduct or statements. Justice Binnie observed in *WIC* that "the cases establish that the notion of 'comment' is generously interpreted" (para. 30). A defendant must then prove that the comment could be honestly expressed,

that it was based on true facts and that it met all the other criteria for the defence of fair comment on a matter of public interest. The characterization as comment gives the greatest scope for freedom of expression and the preservation of *Charter* values, while giving full legal protection to the important interest of individuals in their reputation as part of their dignity and self-worth.

[85] Although the trial judge erred in her characterization of the appellant's blog statement that the respondent was an anti-Semite as a statement of fact rather than opinion, the defence of fair comment cannot apply if the statement was made, as the trial judge found, with malice. I will discuss that issue after addressing the third ground of appeal.

(3) Asserting that the Respondent was Co-Counsel at the BCHRT Hearing and a Witness and Therefore in a Conflict of Interest

[86] This ground of appeal relates to the allegation in the eighth post that the respondent was in a conflict of interest by acting as an articling student and co-counsel at the BCHRT hearing, while also being called as a witness. The appellant relied on the evidence that the respondent was seen sitting at the counsel table with Mr. Joseph and the trial judge's finding that the respondent was briefly at the counsel table helping with photocopies, as the factual basis for his comment that the respondent was in a conflict of interest.

[87] However, the trial judge found that the underlying fact of the comment was that the respondent was acting as co-counsel, and that fact was not true. The trial judge found that the respondent was not co-counsel. She based that finding on the evidence that at the opening of the hearing, Mr. Joseph identified himself as the only counsel on the record. The two other students were identified as assisting, but the respondent was not. The trial judge did not consider the respondent's role helping with photocopies as elevating him to the role of co-counsel. She also found that because the appellant was a lawyer, his readers would understand him to be using the term co-counsel with its legal meaning. In any event, even as only a descriptive term, co-counsel would not have only the limited role of helping with photocopies.

[88] The standard of review accorded by a court of appeal to a trial judge on findings of fact is a deferential one. The appellant is effectively asking the court to find that the trial judge made a palpable and overriding error in her finding on this issue or misperceived the evidence. In my view, the trial judge was entitled to come to the conclusions she did based on the record. There is no basis to interfere.

(4) Finding of Malice

[89] The trial judge's finding of malice was critical to her conclusion that the appellant libelled the respondent, and to her assessment of damages.

[90] First, the finding of malice defeated the defence of fair comment to the extent it was available on the findings of the trial judge or where it potentially could have applied to the statement that the respondent was an anti-Semite.

[91] In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, the Supreme Court described malice in the context of a claim for libel as follows, at para. 145:

> Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes, as Dickson J. (as he then was) pointed out, "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created. Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth. [Citations omitted.]

[92] The trial judge also referred to *WIC*, where Binnie J. noted that proof of objective honest belief will not negate a finding of malice if the trial judge finds that subjective malice was the dominant motive of a particular comment (para. 53).

[93] The trial judge found that the appellant was motivated by express malice against Dr. Elmasry, and that he viewed the respondent and Dr. Elmasry "for all intents and purposes, as one and the same." The trial judge referred to the eighth blog post as intrinsic evidence that the appellant equated the respondent with Dr. Elmasry. Here, although the appellant had a reason to dislike Dr. Elmasry and to believe that the respondent was aligned with his views, the trial judge concluded

that the appellant's dominant motive in making the disparaging comments was malice.

[94] The trial judge also found that the appellant made numerous errors in his blog posts that spoke to malice by showing a reckless disregard for the truth. He did little or no fact-checking, his reports of the hearing were not accurate, and with one exception, he did not correct inaccurate facts that he learned about.

[95] The appellant challenges the trial judge's conclusion that he was motivated by malice against the respondent. First, he says that it was an error for the trial judge to transpose any ill-will he might have borne against Dr. Elmasry to his feelings regarding the respondent, whom the appellant did not know. Nor did the respondent plead in his statement of claim that the appellant's malice against him was transposed from Dr. Elmasry. Second, the trial judge ignored the appellant's testimony that his purpose or motive in publishing his blog was to give his unique perspective on human rights commissions. This was substantiated by his history of criticism of them. Third, the trial judge erred by finding that his negligence in failing to correct the blog posts amounted to malice when he had an honest belief in what he said.

[96] The force of the appellant's submission is that the trial judge was mistaken when she concluded that he was motivated by malice. However, this was a finding of fact. The respondent pled malice. Based on the record, the trial judge

concluded that the appellant transferred his animosity toward Dr. Elmasry to the respondent. The trial judge was entitled to make that finding. She was well-aware of the appellant's long-held view that human rights tribunals should not be adjudicating issues of free speech and that he wanted to report on the BCHRT hearing on his blog from that perspective. However, she concluded that his dominant motive was ill-will. Finally, the trial judge's finding that the appellant's failure to correct errors was evidence of malice reflected her conclusion that this conduct was not a mere mistake or negligence on his part. Although the appellant may believe that the trial judge misunderstood his motives, her findings were based on her view of the record. There is no basis to interfere.

(5) Damages

[97] As the respondent brought this action under the simplified rules, the trial judge was cognizant that the maximum possible damage award was $100,000. She also noted that awards of general damages in libel cases should be relatively modest.

a) General Damages

[98] The trial judge awarded $50,000 in general damages. She took into account: that the respondent was at an important juncture in his legal career and that his job search after his articling term was up may have been impacted by the online posts that were easily accessible through Internet search tools; that the

defamatory statements were serious, undermining his reputation both professionally and personally; and that the extent of the publication could not be known because the posts were made online.

[99] She also considered the appellant's argument that the respondent's reputation could also have been harmed by the public criticism of his role in approaching Maclean's, but rejected it as an important factor because the other criticism mainly focused on freedom of the press, not dishonesty or the other imputations the appellant made. The trial judge also took into account the appellant's reputation as a right-wing provocateur as a factor favouring a lower damages award because it would affect the impact of his statements. The trial judge also noted that the appellant had done nothing to mitigate or reduce the respondent's damages, such as publishing an apology or retraction.

[100] On this appeal, the appellant argues that the damage award was too high, challenging some of the findings by the trial judge. In particular, he argues that the respondent in fact enjoys an excellent reputation in the community, having won a Saskatchewan Future 40 award in 2013 recognizing "up and comers" in various fields.

[101] I would not give effect to this ground of appeal. A trial judge's assessment of damages is accorded significant deference on appeal. She is not required to mention every factor that may have affected the calculation. She was well-aware

of the respondent's circumstances and cautioned herself to make a relatively modest award.

b) Aggravated Damages

[102] The trial judge also added $30,000 for aggravated damages. The appellant submits that the trial judge erred by awarding aggravated damages, which duplicated the general damages award and resulted in double counting.

[103] The trial judge recognized that like general damages, aggravated damages are also compensatory in nature. In *Hill*, at paras. 188-189, Cory J. explained the rationale for an award of aggravated damages 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 statement. The nature of these damages was aptly described by Robins J.A. in *Walker v. CFTO Ltd.*, *supra*, in these words at p. 111:
>
> > Where the defendant is guilty of insulting, high-handed, spiteful, malicious or oppressive conduct which increases the mental distress -- the humiliation, indignation, anxiety, grief, fear and the like -- suffered by the plaintiff as a result of being defamed, the plaintiff may be entitled to what has come to be known as "aggravated damages".
>
> These damages take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct. Like general or special damages, they are compensatory in nature. Their assessment requires consideration by the

> jury of the entire conduct of the defendant prior to the publication of the libel and continuing through to the conclusion of the trial. They represent the expression of natural indignation of right-thinking people arising from the malicious conduct of the defendant.

[104] Justice Cory also acknowledged the likelihood of some overlapping factors when assessing both types of damages. He stated, at para. 183, "[t]here will of necessity be some overlapping of the factors to be considered when aggravated damages are assessed."

[105] This potential for overlap and therefore double counting is controversial and has led some to call for the abolition of separate awards of aggravated damages in defamation actions. See Brown, at pp. 25-79 to 25-84, where the author states that "[a] separate award of aggravated damages is a pernicious development in the law; it is absurd in theory and mischievous in practice." He notes that an overlapping of factors will necessarily occur where aggravated damages are recognized as just another aspect of compensatory damages, and there is also considerable overlap with punitive damages, which similarly require evidence of malicious conduct. See also *Brown v. Cole* (1998), 61 B.C.L.R. (3d) 1, leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 614 and *Campbell v. Tremblay*, 2010 NLCA 62, 305 Nfld. & P.E.I.R. 1.

[106] The Ontario Law Reform Commission also recommended abolishing a separate award for aggravated damages in all damage awards. Ontario Law

Reform Commission, *Report on Exemplary Damages* (Toronto, 1991) at pp. 27-30, 103.

[107] In this case, the trial judge noted a number of factors that led her to increase the damages award under the heading “aggravated damages”, including:

- the appellant was motivated by malice;
- the respondent’s injury was increased because of the malice;
- the repetition of the word “liar” in the headlines of the blogs and the fact that the headlines would show up in Internet searches by potential employers;
- the references to lying in later blogs and including hyperlinks in the eighth blog back to the others;
- the failure to correct most of the errors; and
- the fact that the appellant was a lawyer himself made him more aware of the serious ramifications of his allegations on the professional reputation of the respondent.

[108] I agree that some of the listed factors were also the factors that founded the award of general damages, such as calling the respondent a liar, and doing so in the headlines, and the effect on his job prospects because of Internet dissemination. However, some overlap was contemplated by Cory J. in *Hill*. The

trial judge made no error by awarding $80,000 to fully compensate the respondent for the damages she found that he suffered from the malicious conduct of the appellant, whether the amount included for aggravated damages is viewed separately or as part of the general damages award.

F. RESULT

[109] I would dismiss the appeal. As agreed by the parties, I award costs of the appeal to the respondent fixed at $15,000 inclusive of disbursements and HST. I would not interfere with the costs order made below.

Released: December 22, 2016 (“K.F.”)

“K. Feldman J.A.”
“I agree. Janet Simmons J.A.”
“I agree. Paul Rouleau J.A.”