DEFAMATION
AND DAMAGES

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DEFAMATION AND DAMAGES
LARGE DEFAMATION AWARDS IN CANADA

INTRODUCTION

This is a review of defamation damage awards in Canada with a special focus on recent awards in British Columbia.

The first edition of this review was prepared in 2001. At that time the objective was to look back six years to assess the impact of the very large $1.6 million damage award in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 in 1995. Following that judgment there had been about half a dozen other very large awards across Canada up to 2001 including a $950,000 award in the Ontario case of *Leenen v. C.B.C.* (2001), 48 O.R. (3d) 656; (2001), 54 O.R. (3d) 612 (C.A.). That series of high level awards raised the prospect that damages in defamation cases in Canada would generally escalate.

The past ten years have seen five notably high awards in defamation cases in British Columbia which have ranged between $200,000 and $400,000. But a full review of all cases since 2001 shows that the majority of defamation cases that proceed to trial and result in damage awards in British Columbia fall within a range between $10,000 and about $80,000. Awards at the higher end of the usual range – between $100,000 and $150,000 – are still relatively infrequent. This pattern of awards is consistent with our review in 2001.

Looking back over fifteen years it is clear that the spate of very large awards in the late 1990s has not translated into any across-the-board increase in damages in defamation cases. Large awards remain relatively rare in British Columbia and across Canada. We have looked to see if the impact of electronic (Internet/email) technology has triggered any change in damage trends. Our previous review included only one large damage award that involved electronic media: the $875,000 judgment in *Southam Inc. v. Chelekis*, 2000 BCCA 112 which concerned publication of an investment newsletter by e-mail and on the Internet. Defamation cases involving publication by website and e-mail are now common. Of seven awards of $150,000 or more in British

Columbia during the past eight years, four of them involved the Internet or e-mail as the principal mode of publication. But so far the decided cases do not show that the Internet has had any significant impact on the overall level of damages.

This review is heavily focused on the monetary amount of defamation awards. But the important aim of this discussion is to identify in a practical way the crucial factors that guide the courts in assessing damages. These are practical questions because many of these factors are entirely within the control of a litigant defendant, even after material has been published that gives rise to a threat of legal proceedings. The emphasis in this review is on risk management.

The question can be asked: what are the characteristics that tend to turn a defamation case into a "worst case" situation?

VERY LARGE AWARDS: 1995 TO 2000

It is useful to begin with a series of very large awards from the period 1995 – 2000. These cases are still part of the framework for any damage assessment in significant defamation cases, and they are still frequently cited:

A TELEVISED PRESS CONFERENCE: 1.6 MILLION – *HILL V. CHURCH OF SCIENTOLOGY OF TORONTO*, [1995] 2 S.C.R. 1130

In 1995, the Supreme Court of Canada upheld a jury award totalling $1.6 million against the Church of Scientology of Toronto and the Church's lawyer. This is the largest defamation judgment ever awarded by a Canadian court. The award of general damages against the two Defendants was $300,000. In addition the Supreme Court of Canada upheld the jury's award of an additional $500,000 aggravated damages and a further $800,000 punitive damages.

The facts of the case were unusual. There was evidence before the jury that the Defendant Church had systematically spread information that it knew to be false, about the Plaintiff, in a deliberate attempt to destroy his reputation. In the crucial incident false information was distributed to a press conference, with the intended result that it was disseminated to a mass audience. The Supreme Court of Canada described the conduct of the Defendant

Church as "a continued attempt at character assassination". While the facts are extreme, the judgment clearly extended the boundaries of damages awards in defamation cases. The $300,000 general damages award has been cited in numerous cases since.

PROFESSIONAL REPUTATION: $465,000 – *BOTIUK V. TORONTO FREE PRESS PUBLICATIONS*, [1995] 3 S.C.R. 3

The 1995 decision of *Botiuk v. Toronto Free Press Publications* was a non-jury case from Ontario. The trial judge's $465,000 award of damages (general damages of $140,000 and $324,000 loss of income) was upheld by the Supreme Court of Canada. The Defendants published documents that falsely alleged that the Plaintiff, a lawyer and prominent member of the Ukrainian-Canadian community, had misappropriated money. Several of the Defendants continued to repeat the libel after the start of litigation.

The *Botiuk* case and *Hill v. Church of Scientology of Toronto* were both decided by the Supreme Court of Canada in 1995, within a few months of each other. One was an appeal from a non-jury award, the other a jury verdict. In *Hill v. Church of Scientology of Toronto* Canada's highest court also considered, and rejected, a legal challenge based on the Charter of Rights and Freedoms to some of the central principles of defamation law in Canada. The court rejected arguments that the law of defamation in Canada places unreasonable and unfair burdens on Defendants.

The Supreme Court of Canada expressly rejected the proposition that a "cap" should be placed on defamation awards that would place a maximum monetary limit on damage awards in libel cases.

ELECTRONIC TECHNOLOGY: $875,000 – *SOUTHAM INC. V. CHELEKIS*, 2000 BCCA 112, 73 B.C.L.R. (3D) 161

The decision of *Southam Inc. v. Chelekis* illustrates the potential for high damages awards in cases that do not involve traditional mass media. Damages totalling $875,000 were awarded against the Defendant Chelekis, publisher of a Florida-based newsletter. From his office in Florida, Chelekis distributed reports about Canadian junior stocks. His method of operation was described in a press report quoted by the B.C. Court:

> He is one of the new breed of investment newsletter writers using cheap desktop publishing equipment to spread his views around the world in newsletters, faxes, E-mail, wire services and over the Internet.

Chelekis distributed false reports that attacked the Plaintiff Baines, an investigative journalist who covered companies listed on the Vancouver Stock Exchange. The reports were initially published in the Bull & Bear, a Florida based specialty business publication. Several of the reports were republished by Market News, a Vancouver-based distributor of business information. Market News distributed the reports by electronic communication to private subscribers, and also was found to have transmitted the reports to other business news distributors, including Bloomberg. By means of these channels, the reports achieved worldwide distribution.

In the same action, general damages of $250,000 were awarded by the trial judge against Vancouver-based Market News and its owner for their part in this chain of republication. Market News appealed the amount of this award. In refusing to reduce the $250,000 award (which it said "may be ... on the generous side"), the B.C. Court of Appeal took into account the "enormity" of the false allegations against the Plaintiff contained in the material that Chekelis had provided to Market News, and the failure of Market News to investigate the allegations to verify the truth of the statements before republishing them.

Southam Inc. v. Chelekis was one of the first cases that demonstrated how electronic technology makes it possible for an individual to achieve worldwide distribution of defamatory material, with devastating consequences in terms of damages.

NEWSPAPER FRONT-PAGE STORY: $780,000 – *HODGSON V. CANADIAN NEWSPAPERS CO.* (2000), 49 O.R. (3D) 161 (ONT. C.A.)

The Ontario Court of Appeal in *Hodgson v. Canadian Newspapers* affirmed the decision of an Ontario trial judge who awarded a total of $780,000 plus interest against the Globe and Mail newspaper for general damages, aggravated damages, and special damages arising out of a series of articles which libelled a senior municipal official in a suburban Toronto municipality. The decision of the

trial judge (July 3, 1998 39 O.R. (3d) 235) had been for the slightly higher total of $880,000, including $400,000 general and aggravated damages, $380,000 special damages arising out of the fact that as a result of the publication of the libel the Plaintiff lost his job, and $100,000 punitive damages. The Appeal Court upheld the damages assessment, except for the punitive damages award of $100,000 which it set aside.

In a front page headline story in 1991, the newspaper had alleged that the Plaintiff, in recommending to the municipal council that it purchase a piece of land from a prominent developer to construct a highway overpass, deliberately withheld from council information that would have shown that the municipality had the right under a subdivision agreement to obtain the land for free. The newspaper alleged (it was untrue) that the Plaintiff was a personal friend of the developer. The defamatory implication was that he had breached his duty to favour a friend.

The case required 78 days of trial.

Although the Ontario Court of Appeal upheld the damages award (except for the punitive damages) the court at the conclusion of its judgment sounds a cautionary note about what it described as "a steady escalation in the level of libel damage awards" since the 1995 decision in *Hill v. Church of Scientology of Toronto*. The court observed that in view of the $380,000 special damages awarded to the Plaintiff because of the impact of the articles on his employment income, the additional $400,000 award of general and aggravated damages was "very high". The Ontario court comments on the risk posed by excessive libel damage awards, citing a statement from a recent decision in the Court of Appeal in England:

> A series of jury awards in sums wildly disproportionate to any damages conceivably suffered by the Plaintiff has given rise to serious and justified criticism of the procedures leading to such awards.

Despite these reservations, the Ontario Appeal Court declined to reduce the general and aggravated damages awarded by the trial judge in the *Hodgson v. Globe and Mail* case. The court noted that

as a general rule the standard of review of libel awards by an appeal court is "so stringent as to offer little prospect of success". Nevertheless, the court concludes by saying that "this judgment" should not "be read as condoning or encouraging similar awards".

TELEVISION JOURNALISM: $200,000 – *MYERS V. C.B.C. ONTARIO* (1999), 47 C.C.L.T. (2D) 272; (2001) 54 O.R. (3D) 626 (C.A.)

On November 19, 1999 the Ontario Supreme Court awarded $200,000 in damages against the C.B.C. for defamatory statements made about the Plaintiff, a cardiologist, during an hour-long episode of the program Fifth Estate. The audience was about one million viewers.

The C.B.C. broadcast was an investigative story about a heart medication. Medical research had raised some questions about the safety of the medication. The Plaintiff, a highly regarded academic specialist, had participated in a Government organized meeting in Ottawa to discuss what steps should be taken to caution doctors across Canada about the risks of prescribing the drug. The C.B.C. obtained a transcript of the meeting. In preparing its program, the television broadcaster quoted out of context selected fragments of the transcript in such a way that the Plaintiff appeared as though he favoured the drug industry over the lives and welfare of heart patients. The broadcast falsely portrayed the Plaintiff as a person who knew the medication was killing thousands of patients and did not care.

The C.B.C.'s defence of fair comment failed. The court found at paragraph 146 that:

> In this case, I find that the selectivity of the reporting does establish malice. In pursuit of a sensational story about a potentially serious drug regulation issue, the Fifth Estate took clips and excerpts of remarks made by a leading cardiologist out of their complex context and presented them in a simplified, "good guy bad guy" format.

In fixing damages, the court took into account the reputation of the Defendant, the C.B.C. It was a media source that was "considered reliable in Canada." The prestige and apparent authority of the

source of the libel is a factor that supports a high award, because people are more inclined to believe that the allegations are true. The judge also took into account that the C.B.C.'s conduct was malicious: the judge concluded that the program content showed that there had been an element of ill will towards the Plaintiff among those who prepared the programme. An appeal to the Ontario Court of Appeal was dismissed.

TELEVISION JOURNALISM: $950,000 – *LEENEN V. C.B.C.* (2001), 48 O.R. (3D) 656; (2001), 54 O.R. (3D) 612 (C.A.)

In addition to the above award, in a separate defamation action another medical researcher and world recognized expert in the field of hypertension, Dr. Frans Leenan, recovered $950,000 damages against the C.B.C. and other Defendants involved in the production of the same Fifth Estate program. The Plaintiff was asked to serve on a committee formed by the Health Protection Branch on the use of the medication which, early research indicated, might increase the risk of heart attack in hypertension patients. Dr. Leenen, like many senior researchers, was also a member of the advisory board of a major pharmaceutical company.

The trial judge found that the broadcast falsely conveyed the innuendo that the Plaintiff supported the prescribing of "killer drugs", that he was in a conflict of interest and was receiving a pay-off or kickback from a drug company, and that he negligently or deliberately ignored information about the drug in question, allowing him to downplay the medical risks, all for the advantage of the drug manufacturer.

In assessing damages, the trial judge took into account the "sensationalized manner" in which the program was presented. It was a "slanted, one-sided" production. The judge refers, for example, to a conversation between the television producer and a C.B.C. interviewer who was preparing to ask the plaintiff some questions. The producer tells the interviewer to ask her question with her "famous sneering feeling". The judge found that this was evidence showing the "disdain" that the defendants wanted the viewers to have towards Dr. Leenen. In another segment, the plaintiff was shown "fumbling because he did not have his glasses". The trial judge comments that this unflattering segment,

repeated twice, could only have been intended to reduce the plaintiff's standing and credibility in the mind of the viewer.

The trial judge awarded $400,000 general damages, $350,000 aggravated damages against the C.B.C. and other Defendants involved in the broadcast, and $200,000 punitive damages. The Ontario Court of Appeal dismissed an appeal of this decision.

BRITISH COLUMBIA: VERY LARGE AWARDS: 2001 TO 2011

Since 2001 in British Columbia there have been five "very large awards" in defamation cases. The phrase "very large award" has no recognized usage in the way our courts decide these cases. It is merely a description used here to identify damage assessments that significantly exceed the usual range of awards. The higher end of the more conventional level of awards in British Columbia is about $150,000.

INVESTMENT NEWSLETTER: $200,000 – *AGER V. CANJEX PUBLISHING LTD.*, 2003 BCSC 891; 2005 BCCA 467

The plaintiff was a geophysicist who worked in the exploration and development of mineral resource properties. The defendants included the publishers of *Stockwatch*, a Vancouver publication which reports daily on stock trading information to subscribers. In February 2000 *Stockwatch* published a number of articles that related to the acquisition of a mining property by a company whose shares were publicly traded. Test results after acquisition of the mineral property showed that the property did not contain any significant amounts of gold. The share value collapsed. Among other things, the articles refer to the plaintiff as "the vendor of the salted property". The implication, which was not proven to be true, was that the plaintiff and others had knowingly transferred a worthless mining property to the company. The trial judge awarded general damages of $200,000, plus a total of $100,000 aggravated damages – for a total judgment of $300,000.

The published articles concerning the collapse of the value of the mining shares attracted enormous and sensational attention in the mining and investment communities in which the plaintiff made

his livelihood. This was an instance of publication to a special audience. The evidence at trial showed that the publication was distributed to only 150 subscribers who received hard copies, but there were over 12,000 Internet subscribers.

The trial decision was appealed to the BC Court of Appeal. The appeal on liability was dismissed but the Appeal Court did set aside the award of aggravated damages. The total award was therefore reduced to $200,000. The Court of Appeal noted that before an award of aggravated damages can be justified there must be a finding that the defendant was motivated by "actual malice". The trial judge did not expressly make a finding of "actual malice". The trial judge had based his award of aggravated damages on the fact that the defendants had persisted in a defence of truth until five weeks before the trial, and furthermore the defendants had failed to withdraw the defamatory parts of the articles from Internet access. This case raised the point that unlike conventional media, Internet publication remains accessible in the public domain unless positive steps are taken to delete the offending material.

The Court of Appeal commented at paragraph 82 on the fact that the stories continued to be posted on the defendant's Internet website for a prolonged period after the complaint was made:

> Lastly, in awarding aggravated damages the trial judge referred to the continued presence of the offending articles on the company's Internet website. The Internet is a growing new medium of communication. The trial judge correctly identified the articles' continued presence on the website as a matter of serious concern. It justifies the injunction granted.
>
> However, in my view, retention of the articles on the website is not synonymous with actual malice. Absent a finding of express malice, as is here the case, it follows from my earlier discussion that this factor does not support the award of aggravated damages.

This does not mean that in future a failure to delete defamatory material in a timely way from a website will not provide grounds

for aggravated damages – especially if there is evidence that the failure to delete is deliberate and wilful.

The resulting damage award remaining after the appeal was therefore $200,000.

MUNICIPAL OFFICIAL DEFAMED: $285,000 – *CLARK V. EAST SOOKE RURAL ASSOCIATION ET AL*, 2004 BCSC 1120

This serious defamation claim arose out of the approval process for a land development project. Some local residents strongly opposed the project. The plaintiff was a municipal official who held the position of Chairman of the Capital Regional District. The Regional District had a role in planning and approving land development. The developer sought approval for a particular project. A local group (including the defendants) organized the "East Sooke Rural Association" to oppose the project. The association published a newsletter that, among other things, made an allegation that the plaintiff had covertly accepted campaign donations from the developer, with the implication that this influenced the outcome of the development application. The allegations, which turned out to be completely untrue, implied the commission of what would have been a criminal offence. The newsletter contained other factual statements about the plaintiff's actions which were shown to be untrue, and which portrayed him as favouring the interest of developers. The contents of the newsletter were not protected by fair comment.

The trial judge assessed substantial damages against the defendants: $100,000 general damages against all members of the defendants' group jointly and severally, and an additional $25,000 against one of the defendants for a related publication. Awards of aggravated damages were made against individual defendants of $75,000, $50,000, $25,000 and $10,000. The total amount of damages was $285,000. The content of the allegations was obviously very serious. But the judge appears to have also attached considerable weight to the fact the defendants persisted right up to the end of the trial in not only asserting the truth of their allegations (which were found to be wholly without foundation) but the defendants also alleged, and publicly declared, that the plaintiff's purpose in bringing his action was to intimidate the

defendants so that there would be no disclosure of his supposed improper relationship with the developer. The defendants brought a counter-claim alleging that the plaintiff's action was brought for an improper purpose.

In assessing damages the trial judge made the following comment:

> And finally, the probability that the libel, driven underground, will emerge from its lurking place at some future date. Mr. Clark must be able to point to a sum awarded sufficient to convince the bystander of the baselessness of the charge levied against him by these defendants.
>
> [underlining added]

The trial judge was evidently persuaded that the persistence of the defendants' charges of misconduct could only be adequately addressed by a monetary award that would leave no doubt in the minds of bystanders that the allegations were baseless.

VINDICTIVE CAMPAIGN ON INTERNET: $400,000 – *NEWMAN ET AL. V. HALSTEAD ET AL.*, 2006 BCSC 65

The eleven plaintiffs were all persons associated with a school district, including nine school teachers, a retired trustee, and a parent of a former student in a public school. The defendant was a member of the local community who used e-mails, Internet websites and chat rooms to make a series of very serious allegations about alleged misconduct by the plaintiffs.

The defendant did not appear at trial. The court found that she had conducted what amounted to a "vindictive campaign" against the plaintiffs. The total award of about $400,000 was made up of a number of separate awards in favour of each of the plaintiffs, including three claimants who received between $100,000 and $150,000 each, and other plaintiffs receiving smaller awards between $15,000 and $20,000 each. The exceptional factors in this case include the fact that the allegations were made persistently, over a prolonged period of time; the campaign was on the Internet and by e-mail; the allegations against the plaintiffs were unfounded; and the charges were knowingly false or characterized

by a reckless indifference to whether they were true or not. The defendant was wilful in her conduct, and there was never any apology or retraction.

The result in this case affirmed what is clear in law but has been slow to gain general public recognition and acceptance: the Internet is not a "no law" space, and individuals or organizations who use the Internet for a campaign of vilification will face very substantial damages.

WEBSITE DEFAMATION: $257,500 – *WEGO KAYAKING LTD. ET AL. V. SEWID ET AL.*, 2007 BCSC 49

The two corporate plaintiffs operated small businesses which offered recreational kayak tours in the vicinity of Johnstone Strait at the northeast coast of Vancouver Island. The trial judge noted that kayak tourism relies heavily on the Internet to attract customers. The defendant Sewid, a member of the local Kwa Ka'wakwa First Nation, offered cultural tours in the same area. The defendants operated a website which purported to describe other local kayak tour companies as either "good kayak companies" or "bad kayak companies". The defendants' website listed the plaintiffs as "bad" operators, and alleged on the website that the plaintiffs had no respect for the environment and that they treated First Nations people poorly. The court noted that the website allegations by the defendants were ongoing and systematic.

There was evidence at trial that over several seasons the website operated by the defendants had a significant impact on the number of customers obtained by the tour operators. The trial judge awarded $100,000 in the case of one plaintiff and $150,000 to the other together with punitive damages of $2,500 and $5,000 respectively. The court found that the website publication was intended to harm the business of the claimants, either by removing them as competitors or inducing them to do business with the claimants. The court also noted that the defendants did not remove the offending material until compelled to do so by an interim injunction. This website publication therefore resulted in total damage awards to the two plaintiffs of $250,000 plus the small additional amounts for punitive damages.

NEWSPAPER STORY: $210,000 – *MANNO V. HENRY*, 2008 BCSC 738

A community newspaper carried a news story under the headline: "Violence increasing with added grow-ops". The story described increasing numbers of illegal marijuana growing operations in British Columbia and made explicit reference to the problem of violent robberies ("grow rip") in which thieves attempt to steal the illegal crops from the operators. The story identified a property owned by the plaintiffs as one of several locations where attempted grow-op thefts had occurred. The newspaper published a photograph that showed three members of the plaintiff's family apparently being questioned by the police after the reported theft. The articles indicated that the family members "did not cooperate with the police". The trial judge found that the story, including the headline, photograph and caption would convey to the ordinary reader that *the residents of the property had been carrying on a criminal marijuana growing operation*, and that they had failed to cooperate with the police as a means of covering up their illegal activities.

There was no marijuana growing operation on the property. The family members were innocent of any wrongdoing. There had been an attempted robbery at the property, but the two interlopers had fled. The newspaper did not advance a defence of truth with respect to the published allegation about the marijuana growing operation. It did plead truth, unsuccessfully, to the imputation that family members had refused to cooperate with the police.

The story was republished on the newspaper's website and remained accessible until seven months after the initial publication.

The main defence on behalf of the newspaper was that the article did not identify any of the family members so as to give rise to liability for defamation. The address of the property was given, and three of the family members were clearly visible in the published photograph. The court found that while the family members were unnamed, there was sufficient information in the article to lead reasonable persons to understand that the plaintiffs were the persons referred to as the "residents" of the property. In assessing damages, the court took into account that a defence of "truth" was not pleaded in relation to the grow-op imputation, but the judge

noted that the defendants "nevertheless continued to raise at trial implications of unsavory activity" on the part of one family member, which the judge stated was not warranted by the evidence. There was no apology. There was evidence that there had been negotiations between the parties over the content of the apology, but in the final result no apology was published. In this case the judge makes clear that "had an apology been published I would have given it effect in reducing the plaintiffs' damages". The judge awarded general damages to each of five family members, ranging from $30,000 to $55,000 each – totalling $210,000. There was no award to a sixth member of the family on the ground that she was not shown in the photograph and nor did other evidence establish that readers would have connected her to the property.

At trial there were additional awards totalling $100,000 in aggravated damages. The total trial judgment was therefore over $300,000.

The remaining individual awards to each plaintiff are well within the mid-range of "usual" damage awards in British Columbia. This case points to the risk that a single publication may affect the reputation of each member of a large group – and where that occurs each individual may have a right to recover damages.

ACROSS CANADA: OTHER VERY LARGE AWARDS: 2001 TO 2011

In other Provinces across Canada since 2001 there have been relatively few very large awards in defamation cases. Two of these large awards are decisions from Ontario. A third case is *Young v. Bella*, [2006] 1 S.C.R. 108, a jury award from Newfoundland upheld by the Supreme Court of Canada in 2006. The Newfoundland case is noteworthy not only because of the size of the award. It is significant because while it involved injury to reputation, the claim was based not on defamation but was successfully advanced as a claim in negligence.

ATTACK ON COFFEE FRANCHISOR: $500,000 — *SECOND CUP LTD. V. EFTODA* (2006), 41 C.C.L.T. (3D) 111 (ONT. S.C.J.)

The defendants issued seven defamatory fliers which falsely alleged that Second Cup, a coffee franchisor, was one of the "most unprincipled" franchisors operating in Canada and alleging exploitation, deception and fraud. The defendants engaged in a campaign of contacting franchisees and issuing defamatory statements against Second Cup and its executives, and encouraging franchisees to sue the franchisor. Second Cup was put to enormous expense to defend the allegations. The defendants refused to retract or apologize. The court described the defamation as a "vicious war of vituperative attacks". Addressing the appropriate level of damages, the court noted at paragraph 40:

> It has been observed that a company cannot be injured in its feelings and therefore damages may be small in commercial terms, unless the defendants' refusal to retract or apologize makes it possible to argue that the only way in which the reputation of the company can be vindicated in the eyes of the world is by way of a 'really substantial award of damages'. (see: *Walker v. CFTO* (1987), 59 O.R. (2nd) 104 at para. 26 (*per* Robins J.A. for the Court) quoting with approval from Carter-Ruck, *Libel and Slander* (3rd Edn.) 1985 at pp. 156-157).

The *Second Cup* case is an instructive example of how the courts may assess a very high level of damages to compensate a corporate plaintiff, especially in a case of a business like a franchisor that "exists on its reputation":

> I am satisfied that 'a really substantial award of damages' is required in this instance, having regard for the defendants' complete lack of retraction and apology and the need to clearly demonstrate to the community the vindication of the plaintiff's reputation. In view of the fact that Second Cup exists on its reputation, defamatory statements such as are present in this case serve to erode the confidence of the public, no less because it is a corporation rather than an individual (para. 44).

INTERNET DEFAMATION AND EXTORTION CAMPAIGN: $400,000 - *REICHMANN V. BERLIN ET AL*, 2002 CARSWELLONT 2278, [2002] O.J. NO. 2732 (ONT. S.C.J.)

The plaintiff was a successful businessman. The defendants over a period of three and a half years used seven different websites to disseminate false allegations that the plaintiff attempted to cheat an innocent man out of a multi-million dollar inheritance. Imputations were of the most serious kind that alleged dishonest and dishonorable conduct. The background was that two of the defendants had been involved in a lawsuit with a third party concerning an inheritance. The defendants lost that lawsuit and wrongfully blamed the plaintiff for their loss. They demanded compensation from the plaintiff and threatened to disseminate their false accusations if their demands were not met.

The judgement was awarded following an undefended trial which the court heard oral and documentary evidence on liability and quantum. The court awarded $250,000 general damages and the court also awarded $50,000 against each of the defendants for aggravated damages, and a further $50,000 punitive damages against each defendant. The conduct of the defendants was malicious because it was motivated by a desire to extract money from the plaintiff. The total judgment was $400,000.

ERRONEOUS REPORT OF CHILD ABUSE: $839,400 – *YOUNG V. BELLA*, [2006] 1 S.C.R. 108

This $839,400 jury award in Newfoundland included $430,000 nonpecuniary damages, as well as future loss of income in the amount of $314,000 and past loss of income of $47,000. The claim was not based on defamation. It was based on the tort of negligence, including negligence causing economic loss.

The plaintiff was a student at Memorial University taking courses towards her goal of being admitted to the School of Social Work. In a term paper submitted to her professor she included reference to a “case study” relating to sexual abuse. The case study was taken from a textbook but a footnote providing the source was not included in the essay. The professor speculated that the case study was perhaps a personal confession by the student of having sexually abused children that she had babysat. The professor failed

to seek any clarification from the student. Instead she reported the matter to the Director of the School of Social Work, and thereafter a report was sent to the Child Protection Services, to the RCMP, and to at least ten social workers in various communities. The student's career plans were ruined. More than two years passed before the plaintiff even discovered that the reports existed which falsely portrayed her as suspected of child abuse.

This decision provides a caution that circulation of injurious reports that cause injury to reputation may in certain circumstances be based on negligence. The significance of this is that some defences available in defamation, such as qualified privilege, are not available to a claim based on negligence. The Supreme Court of Canada acknowledged that "*the possibility of suing in defamation does not negate the availability of cause of action in negligence where the necessary elements are made out.*" Generally speaking a claim of negligence can only be advanced where a relationship between the defendant and claimant (in this case between a professor and her student) is sufficiently close that it gives rise to a duty to take reasonable care that information being distributed is accurate.

This result follows the approach in *Spring v. Guardian Assurance plc* [1994] 3 All E.R. 129, (H.L.), where the English Court decided in the case of a letter of reference sent by an employer concerning a former employee that the relationship between employer and employee was sufficiently close to give rise to a duty of care, and damages were awarded in that case based on negligence rather than defamation. That approach has been followed in other decisions across Canada, including British Columbia.

SUMMARY

The past ten years confirms that very large damages in defamation cases in British Columbia are relatively rare. We can count only five cases since 2001 in which the damage awards were $200,000 or higher.

In contrast most damage awards for defamation in this Province remain between $10,000 to $40,000 at the lower end of the range and up to $150,000 at the higher end of what we have referred to in this review as the "conventional range". The overwhelming majority of assessments fall within the "low" ($10,000 to $40,000) and "mid-level" ($60,000 to $80,000) range, with relatively few at the higher level ($100,000 to $150,000).

As to what explains the wide differences in the level of damages, the seriousness of the wrongful imputation (the content of the defamatory words) is one factor. But rarely does the content alone explain the level of damages.

The scope of publication is another well recognized factor. Mass media dissemination (and distribution by Internet) is a key factor that may - and in many cases will - escalate damages.

But a third cluster of factors – which appears to be most significant in moving cases to the highest level of damages - concerns the *conduct and motives of the defendant* both during and after publication and even after the commencement of litigation. In cases where there is a persistent, willful and repeated pattern of publishing known falsehoods (or publishing statements with reckless indifference to whether they are true or not) the highest level of damages is more likely to result. Other instances of very high levels of awards have been made where defendants by their conduct even after the start of litigation have tended to aggravate the injury, humiliate or insult the claimant: in such cases the courts have acknowledged that only a very high level of damages may be sufficient to achieve the "vindication" of reputation which is one of the key purposes of a damages award in a defamation case.

Three of the recent very large awards in British Columbia (*Ager v. Canjex Publishing Ltd.* (2005*), WeGo Kayaking Ltd. v. Sewid* (2007), and *Newman v. Halstead* (2006)) involved electronic

media. But caution must be taken in assuming that Internet and e-mail has generally escalated the level of damages. During the past ten years there have been many other defamation decisions involving the Internet and e-mail. In the vast majority of those cases there is nothing to suggest that publication by Internet or e-mail has resulted in a significantly higher level of damages than exists in other cases. Electronic media offers a potentially very large audience, and a large audience can increase the injury to reputation. But the mere fact of publication by electronic media in the absence of other aggravating factors has not generally lead to a higher level of damages. In the forthcoming second and third parts of this review of damage awards in defamation cases we will take a more detailed look at the more conventional range of damage awards, and we will look specifically at cases involving Internet and e-mail.

The level of damages in many cases is determined by how a defendant responds and handles the matter after a complaint is first received. Decisions made immediately after the complaint and even decisions taken after the start of litigation can significantly affect the level of damages.

NOTES

MAJOR DEFAMATION AWARDS IN CANADA: 1995 TO 2000

There were two other very large awards shortly after *Hill v. Church of Scientology of Toronto* not mentioned above. In 1997 damages of $705,000 were assessed in the Alberta case of *A.T.U. v. I.C.T.U.*, [1997] 5 W.W.R. 662 (Alta. Q.B.). That case arose out of a campaign by the defendant transit union to convince Greyhound employees, whose bargaining unit was the plaintiff union, to join the defendant. The publications in question were by newsletters and leaflets. The large award is explained, in part, by the fact that there were five plaintiffs – the union, the union local, and three individual union leaders. The largest single award was to one of the individual plaintiffs, who recovered $100,000 general and $50,000 punitive damages.

In *Hiltz and Seamone Co. v. Nova Scotia (Attorney General)* (1999), 173 N.S.R. (2d) 341 (N.S.C.A.) the Nova Scotia Supreme Court awarded $300,000 in damages ($200,000 general damages and $100,000 punitive damages) against the Nova Scotia government for a libel published by an employee of the Provincial Department of Environment. That decision was affirmed on appeal.

ACROSS CANADA: OTHER VERY LARGE AWARDS: 2001 TO 2011

In *3 Pizzas 3 Wings Ltd. v. Iran Star Publishing*, 2003 CarswellOnt 6703, the Ontario Court awarded $750,000 damages in favour of a corporate plaintiff and $75,000 to an individual plaintiff. The judgment was taken in default. Brief reasons for judgment indicate only that the defendants carelessly published untruths knowing that it would significantly harm the business reputation of the plaintiffs. In view of the limited available information on this claim it is not included in the discussion above.

Grant v. Torstar Corp., [2009] 3 S.C.R. 640, is a very important recent decision by the Supreme Court of Canada that develops a new defence referred to as “responsible communication on matters of public interest”. The result of this decision is to modify defamation law in Canada with respect to media or other published communications when the subject matter is one of “public

interest". In this case the claim arose out of a story published in the Toronto Star in 2001 relating to the approval process that permitted the construction of a golf course on private land. At trial a jury awarded general, aggravated and punitive damages totalling $1.475 million dollars against the newspaper defendants. Following appeals to the Ontario Court of Appeal and the Supreme Court of Canada, the jury award at trial was set aside. A new trial was ordered. While this award was set aside as a result of the appeal process, it is an indication of the potential for high level damages in defamation cases. The appeal judges did not address the appropriateness of the amount of the damages.

KINDS OF DAMAGES

"Aggravated damages" are a type of compensatory damages, although they are not awarded in every case:

"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 were aptly described by Robins J.A. in *Walkers 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".

(*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, paragraphs 188 and 189)

Aggravated damages are only awarded where there is finding that the Defendant was motivated by actual malice.

Another category of damages is "punitive damages", which are more rarely awarded in defamation cases:

> "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 <u>compensate</u> the

> plaintiff, but rather to punish 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 matter".

(*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, paragraph 196)

DEFENCES AVAILABLE IN DEFAMATION CLAIMS

All cases discussed in this review are examples of defamation actions that proceeded to trial and resulted in findings of liability against the Defendants with resulting damages awards.

In the same period, there have been many other defamation claims that went to trial where the claims were ultimately dismissed at trial or after appeal. Any balanced view of the risks to persons involved in communications must take into account the application of important defences in defamation cases and how those defences operate.

Defence of Truth

Truth (also referred to as "justification") is a complete defence. However it is an exacting defence and operates under rigorous rules. If a statement conveys a defamatory meaning there is a presumption that the words are untrue. The burden of proof is on the defendant to call evidence that establishes the words are accurate. A wholly unfounded plea of truth – and especially where it is maintained unsuccessfully through to the end of trial – can result in a higher level of damages.

Qualified Privilege

Qualified privilege provides a complete defence (even with respect to a defamatory statement that turns out to be untrue) provided the defendant can establish that the communication was made on an occasion of qualified privilege. An occasion of qualified privilege exists when the defendant has a duty or interest to communicate information to the recipient and the recipient has a corresponding "legitimate" interest to receive the information. The underlying principle is that full and candid communication should be encouraged and protected in certain situations. The key requirements are as follows:

- The occasion must be one of qualified privilege. A court must be satisfied that the defendant had a duty – *legal, social, or moral* - to make the communication and that the recipients had a legitimate reason to receive

the information. Qualified privilege can also arise in other situations including when a person is responding to an "attack" on his own reputation or interests.

- The communication must have been made without malice. If a defendant's *dominant motive* in communicating information was "vindictiveness" or a desire to humiliate or injure (rather than to discharge a duty or need to communicate information) then there will be a finding of "actual malice" and the defence of qualified privilege will fail. In many cases absence of malice is established by showing that the defendant "honestly believed" the truth of the statement. A finding that a statement was made with "reckless indifference" as to whether it was true or not can result in a finding of actual malice. Once it is established that the occasion is one of qualified privilege, the burden of proving actual malice is on the plaintiff.

- It can turn out that *some of the recipients* of a communication did have the necessary "legitimate interest" to receive the material but that copies were distributed to other persons who had no proper interest. In that situation an award of damages will be limited to the injury caused by circulation of the material to persons who had no legitimate interest to receive it.

- As a practical matter in handling sensitive information, effective risk management focuses on who (inside or outside an organization) should receive material that contains potentially defamatory content. And even after a complaint is received there can be real advantages in taking immediate steps to prevent republication or further distribution of material until the merits of a complaint can be considered.

Fair Comment

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.

The defence of fair comment was the subject of a recent decision by the Supreme Court of Canada in *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420 (an appeal from British Columbia) where one of the key elements of the defence was broadened. Formerly the law required that the comment must be an honest expression of the defendant's own opinion. It is now sufficient for the defence to satisfy the court that the comment is one that "any person" could honestly express on the proven facts.

Responsible communication on a matter of public interest

As a result of the recent decision of the Supreme Court of Canada in *Grant v. Torstar Corp.*, 2009 SCC 61 a new defence is available in defamation cases in certain situations. The new defence will

have particular application in circumstances where the media or other persons publish information to the general public, and where the facts turn out to be untrue. Provided the subject matter of the publication meets a test of being of “public interest” and the defendant exercises due diligence prior to publication to ensure that the facts are accurate, there may be a complete defence. This new defence is known as “responsible communication on matters of public interest”. This is a significant expansion of the protection available to defendants because, formerly, the defence of fair comment only applied where the complained of words were recognizable as expressions of “comment” or opinion. The new defence applies even to factual statements that turn out to be untrue. But the defence will only be available provided the defendants can establish that they acted responsibly in attempting to verify the information. The degree of care required to meet that test will depend on the seriousness of the allegation, the public importance of the matter, the urgency of the matter, the reliability of the source(s), and may take into account other factors including whether the claimant’s side of the story was included in the report.