Citation: Chartier v Bibeau, 2022 MBCA 5
Date: 20220117
Docket: AI21-30-09623

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice William J. Burnett
Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre

BETWEEN:

MARCEL CHARTIER	)	***S. J. Thliveris*** *and* ***S. W. Cannon*** *for the Appellant*
(Plaintiff) Respondent	)	***R. L. Tapper, Q.C.*** *and* ***S. R. McEachern*** *for the Respondent*
- and -	)	
SERGE BIBEAU	)	*Appeal heard:* ***September 27, 2021***
(Defendant) Appellant	)	*Judgment delivered:* ***January 17, 2022***

BURNETT JA

[1] A civil jury awarded the plaintiff general damages in the amount of $500,000 for defamation. Civil jury trials in Manitoba are rare. Awards for defamation in that amount are virtually non-existent.

[2] One day at lunch the defendant told two of the plaintiff's business acquaintances, Darshan Kaila (Kaila) and his son, that the plaintiff stole from him and was a thief. The two acquaintances continued to do business with the plaintiff, and the plaintiff admitted that he suffered no actual loss as a result of the defendant's comments.

[3] The defendant does not dispute the jury's decision that he made the defamatory comments, but he says that the quantum of damages is unreasonable.

[4] The plaintiff cross appeals the jury's failure to award punitive damages.

[5] For the reasons that follow, the appeal is allowed, the jury's award of $500,000 is replaced with an award of $50,000 for general and aggravated damages, and the cross appeal is dismissed.

Factual Background

[6] The plaintiff is a commercial real estate broker and developer and has been in the commercial real estate business for 45 years.

[7] The plaintiff and the defendant were friends and had numerous real estate and investment dealings over many years.

[8] The defendant had earned $10 to $15 million from those investments, and possibly as much as $20 million.

[9] In 2009, the plaintiff and his son, Derrick Chartier (Derrick), presented an investment opportunity (the IKEA development) to the defendant. The initial concept was that the plaintiff, the defendant and Derrick would each invest $1.25 million in the IKEA development and that profits or losses would be shared equally among them. The defendant was described as a silent investor.

[10] In 2015, the parties met to discuss the distribution of profits. The defendant was dissatisfied with the extent of the financial information

provided, and there was a dispute over a marketing fee charged to the defendant, which was subsequently refunded to him.

[11] Ultimately, the defendant received approximately $2.67 million in profits from his investment in the IKEA development, in addition to the return of his initial investment of $1.25 million.

[12] In the summer of 2016, the defendant met with David Lester (Lester), who was the senior commercial account manager of a local credit union. Both the plaintiff and the defendant were customers of the credit union. At trial, Lester testified that the defendant told him the plaintiff and Derrick had stolen money from him in relation to the IKEA development and that the defendant may have called them thieves. No claim was advanced by the plaintiff in relation to these comments.

[13] Prior to trial, the defendant had moved for an order preventing Lester from testifying at trial. The trial judge agreed that the comments made to Lester were not actionable as they were statute-barred and were similar fact evidence, but he concluded:

> . . .
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> Applying the applicable test, I am satisfied that there is a clear nexus between the similar fact evidence and the allegations made that are actionable in paragraph 7 of the statement of claim. The allegations of what was said to . . . Lester and to . . . Kaila are virtually identical. The defendant denies making this statement to Kaila and in an affidavit sworn in these proceedings, he denies making that statement to "anyone". In my view, the evidence in question is admissible not to show that the defendant had propensity to make the statement, but it is admissible to attack his credibility concerning whether he ever made the statement.

> . . . In my view, the probative value of this evidence outweighs the potential for prejudice in light of the defence advanced in this case. However, an appropriate limiting instruction will be provided to the jury so that they understand the use that can be made of the similar fact evidence.
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> . . .

As noted in his pre-trial ruling, the trial judge provided a limiting instruction in his final charge to the jury.

[14] In the summer of 2017, the defendant met with Kaila and his son at a restaurant. Kaila and his son are friends and business acquaintances of the plaintiff. The defendant told them that the plaintiff was a thief and stole money from him in relation to the IKEA development. These comments form the basis of the present claim.

[15] There was no evidence of further publication of the defamatory comments. In cross-examination, the plaintiff admitted that he was not aware of an actual loss or loss of business opportunities as a result of the comments, but he said that it affected his reputation in his business, and affected him personally and from a health standpoint.

[16] In his statement of defence, the defendant denied making the defamatory comments. Shortly before trial, he amended his statement of defence and alleged, in the alternative, that the alleged comments "were in fact in relation to the action(s) of Derrick . . ., the [p]laintiff's son, and not the [p]laintiff himself."

[17] At trial, the defendant testified that he did not tell Kaila or his son that the plaintiff was a thief or that the plaintiff stole money from him. He also denied that he had made similar comments to Lester.

[18] The trial judge provided counsel with his proposed charge to the jury for their input. Significantly, no objection was taken in this appeal to the content of the charge.

[19] The jury was asked to respond to six questions. The jury found that the defendant told Kaila and his son that the plaintiff was a thief, that he told them that the plaintiff stole money from him in relation to the IKEA development, that the words were spoken on or after November 6, 2016 and that the words were defamatory. The jury assessed damages at $500,000, but did not award punitive damages.

[20] Counsel for the defendant agreed that costs calculated in accordance with Class 4 of the Court of Queen's Bench tariff (the tariff) were appropriate "[g]iven the award".

Fresh Evidence Motions

[21] At the appeal hearing, each party made a motion to introduce fresh evidence.

[22] The plaintiff moved to introduce fresh evidence of a secretly recorded, post-trial conversation between the defendant and his sister and another conversation between plaintiff's counsel, the defendant's sister and a third party. In the first conversation, the defendant allegedly made further defamatory comments regarding the plaintiff and threatened to shoot him.

[23] In response, the defendant moved to introduce fresh evidence of the context to the recorded conversations, the reason why they were made and an ultimatum by his sister described in other court proceedings as "an effort by [his sister] to blackmail him." The defendant's motion is contingent upon the plaintiff's fresh evidence being admitted. The defendant says that his fresh evidence directly impacts the probative value and weight which should be given to the plaintiff's fresh evidence.

[24] This Court has determined that the test in *Palmer v The Queen*, [1980] 1 SCR 759 is the test to be applied in civil appeals where there is a motion to admit fresh evidence, unless the proposed evidence challenges the validity of the trial process (see *Beaulieu et al v Winnipeg (City of) et al*, 2021 MBCA 93 at paras 28, 56). There is no such challenge in the present case, and the *Palmer* test therefore applies.

[25] The four requirements set out in *Palmer* are (at p 775):

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> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases [citation omitted].
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> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
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> (3) The evidence must be credible in the sense that it is reasonably capable of belief.
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> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
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> . . .

[26] In *Beaulieu*, Steel JA considered these requirements and concluded (at para 56):

> The overarching test is whether it is in the interests of justice to admit the further evidence. This is a discretionary decision on the part of the court and is determined on a case-by-case basis, with consideration of the unique content and facts of any individual case.

[27] At the hearing of this appeal, this Court reserved its decision and indicated that it would consider the fresh evidence proposed by both parties for the purpose of determining whether it would be admitted. As stated in *R v Stolar*, [1988] 1 SCR 480 (at pp 491-92):

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> . . . In this way, the Court of Appeal has the opportunity to consider the question of fresh evidence against the whole background of the case and all the other evidence in the case. It is then in a position where it can decide realistically whether the proffered evidence could reasonably have been expected to affect the result of the case. If, then, having heard the appeal, the court should be of the opinion that the evidence could not reasonably have affected the result, it would dismiss the application for the introduction of fresh evidence and proceed to a disposition of the appeal. . . .
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> . . .

[28] Having considered the fresh evidence in the context of the entire record, the plaintiff's motion for fresh evidence can be summarily dismissed.

[29] I begin by observing that the proposed fresh evidence is unclear and confusing on its face, and it is of questionable relevance. The defendant has not appealed the jury's finding that he made the defamatory comments, and the jury's decisions with respect to general and punitive damages were

predicated on the defendant's comments to Kaila and his son. Moreover, the credibility and admissibility of the evidence are far from certain. Finally, and perhaps most importantly, I am not persuaded that the plaintiff's fresh evidence would affect the award for general damages or the decision not to award punitive damages.

[30] As the defendant's motion was contingent on the success of the plaintiff's motion, both motions for fresh evidence are dismissed.

Issues and the Parties' Positions

[31] The defendant asks this Court to set aside or reduce the quantum of general damages awarded by the jury. If the quantum is reduced, he seeks a reduction in the costs awarded to accord with the tariff.

[32] The defendant argues that the award is so inordinately large that it shocks the conscience and amounts to an injustice. He submits that the quantum is divorced from the factors governing the calculation of damages in defamation matters, and in particular, the mode and extent of publication.

[33] According to the defendant, the defamatory comments were comments made in passing to two individuals, a small audience by any measure; the plaintiff suffered no actual loss in business because of the comments; and the impact of the comments was negligible, especially given that the persons to whom the comments were uttered still conduct business with the plaintiff.

[34] The defendant submits that the general damage award should be in the range of $500 to $5,000.

[35] The plaintiff's position is that, absent an error in the charge to the jury, this Court cannot analyze the reasoning behind the award but is limited to consideration of the amount in question. He maintains that the amount is appropriate in the circumstances, as the jury was entitled to take into account the outrageous conduct of the defendant up to and at trial. The plaintiff argues that general damages contain an element of aggravated damages and that significant aggravating factors existed.

[36] The plaintiff cross appeals the jury's failure to award punitive damages on the basis that a reasonable jury, properly instructed, ought to have concluded that an award of punitive damages was required to punish the misconduct of the defendant; that such misconduct was a marked departure from the ordinary standards of decent behaviour and was deliberate and intended to cause harm to the plaintiff; and that the plaintiff suffered serious harm to his personal and business reputation as a result of the misconduct.

[37] The plaintiff says that the jury clearly found intentional, as opposed to accidental, defamation which necessarily attracts punitive damages in order to deter the defendant or any other like-minded person from the behaviour apparent in this case. He submits that the damages awarded by the jury should be doubled by an award of punitive damages in the same amount.

[38] In response, the defendant submits that the jury was specifically instructed by the trial judge as to the nature of punitive damages and that deference is owed to the jury's decision not to award such damages.

Standard of Appellate Review

[39] In *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130, the Supreme Court of Canada described the standard of appellate review where the sole issue is whether the question of the jury's damage award can stand (at paras 158-59):

> Jurors are drawn from the community and speak for their community. When properly instructed, they are uniquely qualified to assess the damages suffered by the plaintiff, who is also a member of their community. This is why, as Robins J.A. noted in *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104 (C.A.), at p. 110, it is often said that the assessment of damages is "peculiarly the province of the jury." Therefore, an appellate court is not entitled to substitute its own judgment as to the proper award for that of the jury merely because it would have arrived at a different figure.
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> The basis upon which an appellate court can act was very clearly enunciated by Robins J.A. in *Walker*, *supra*. He stated at p. 110 that the court should consider:
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> > . . . whether the verdict is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate or, put another way, whether the verdict is so exorbitant or so grossly out of proportion to the libel as to shock the court's conscience and sense of justice.
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> [emphasis added]

[40] Two months later, the Supreme Court of Canada, in *Botiuk v Toronto Free Press Publications Ltd*, [1995] 3 SCR 3, observed (at para 107):

> Perhaps the cautionary note expressed in *Hill* bears repeating. Namely, that appellate courts should, for the reasons expressed in *Hill*, proceed with restraint and caution before making any variation in assessments of damages in libel cases.

Analysis

The Appeal

[41] In *Hill*, the Supreme Court of Canada identified six factors to be taken into account in assessing general damages for defamation: (1) the plaintiff's conduct, (2) their position and standing, (3) the nature of the defamatory statement, (4) the mode and extent of publication, (5) the absence or refusal of any retraction or apology, and (6) the conduct of the defendant "from the time when the libel was published down to the very moment of [the jury's] verdict" (at para 182). The jury is also required to "take into account the evidence led in aggravation or mitigation of the damages" (*ibid*).

[42] In his charge to the jury, the trial judge told the jury that these were the factors that they were entitled to take into consideration when assessing general damages.

[43] Given the standard of review, appellate courts have been generally reluctant to interfere with jury decisions fixing the quantum of damages in defamation cases. In those cases where there has been appellate intervention, it has often resulted from incorrect jury instructions. Here, no objection was taken to the content of the trial judge's charge to the jury. As was the case in *Hill* (at para 157):

> . . . [The defendant does] not contend that the trial judge made any substantive error in his careful directions to the jury. Thus, there is no question of misdirection of the jury or of its acting upon an improper basis or of any jury consideration given to wrongfully admitted or excluded evidence. The sole issue is whether the quantum of the jury's award can stand.

[44] In my view, notwithstanding the absence of misdirection or other error, this is the exceptional case which meets the test for appellate intervention described in *Hill*.

[45] I do not accept the defendant's submission that the defamatory comments were relatively minor. The plaintiff's business rests on trust and integrity, and the defendant's comments that the plaintiff was a thief and stole funds from him were extremely serious and utterly false allegations. As Blair J observed in *131843 Canada Inc v Double "R" (Toronto) Ltd*, 1992 CarswellOnt 437 (Ct J (Gen Div)), such allegations (at para 13):

> . . . go to the heart of a person's integrity, and to my mind, are analogous to allegations of fraud. They are "allegations of improper conduct seriously prejudicial to the character or reputation of a party". . . .

[46] However, when one considers the mode and extent of publication and the absence of any actual harm (as distinct from implicit harm) to the plaintiff's reputation and standing, the jury's award of $500,000 is wholly disproportionate and shockingly unreasonable (see *Young v Bella*, 2006 SCC 3 at para 64).

[47] The defamatory comments were made orally on one occasion to two people. This was not a case of widespread or repeated publication of defamatory statements in the print media, radio, television or on the internet, and there was no actual effect on the plaintiff's reputation or business interests (see *Cable Assembly Systems Ltd v Barnes*, 2019 ONCA 1013 at para 20). The persons to whom the defamatory comments were made clearly did not believe them and continued to do business with the plaintiff.

[48] It is widely accepted that defamation cases are fact-sensitive and unique and that there is little to be gained from a detailed comparison to other decisions (see, for example, *Hill* at para 187; and *Soliman v Bordman*, 2021 ONSC 7023 at para 208). However, having considered more than 50 recent decisions where damages were awarded for reputational harm, it is readily apparent that the present award is well beyond the "maximum limit of a reasonable range" (*Hill* at para 159) for the damage suffered by the plaintiff. (See the attached appendix for a list of the cases considered.)

[49] While the facts in this case are relatively straightforward, the quantification of damages is much less so. As has been observed on many occasions, there is no mathematical formula to determine an appropriate quantum of damages. I am fully aware of the defendant's conduct before and during the litigation, as well as his failure to apologize. I am also aware of the need for judicial restraint and caution before making any variation in the assessment of damages in this case. Having said all of that, it is my view that $50,000 for general and aggravated damages would be at the upper end of a reasonable range in the present circumstances, and I would therefore award this amount.

Cross Appeal

[50] Defamation is the intentional publication of an injurious false statement (see *Hill* at para 170), but the fact that a defamatory statement was made intentionally is not, by itself, sufficient to attract punitive damages. In *Hill*, the Supreme Court of Canada stated (at para 196):

> Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive

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

[51] I am not persuaded that the defendant's conduct in the present circumstances was "so malicious, oppressive and high-handed" (*ibid*), or so egregious or truly outrageous to warrant punitive damages.

[52] In my view, a compensatory award of $50,000 for general and aggravated damages is "adequate to achieve the objectives of retribution, deterrence and condemnation in the circumstances of this case" (*Cable Assembly Systems* at para 20).

[53] The cross appeal is therefore dismissed.

Conclusion

[54] The quantum of damages fixed by the jury was so inordinately high that it was an erroneous estimate of the damage done to the plaintiff (see *Kazakoff v Taft*, 2018 BCCA 241 at para 42, referencing *Lines v W & D Logging Co Ltd*, 2009 BCCA 106 at para 9, leave to appeal to SCC refused, 33155 (29 October 2009)). The appeal is therefore allowed. The jury's award of $500,000 is replaced with an award of $50,000 for general and aggravated damages, and the plaintiff shall have tariff costs appropriate to that award.

[55] The cross appeal is dismissed.

[56] The defendant will have his costs in this Court.

W. J. Burnett JA

I agree: C. J. Mainella JA

I agree: John M. Lee JA

APPENDIX

Manitoba (by year)

Pathak v Shapira, 2019 MBQB 73
Rashedi v Johar, 2019 MBQB 145
The College of Pharmacists of Manitoba v Jorgenson, 2020 MBQB 88

Alberta (by year)

Kent v Martin, 2016 ABQB 314
Engel v Edmonton Police Association, 2017 ABQB 495
Cicalese v Saipem Canada Inc, 2018 ABQB 835
Elkow v Sana, 2020 ABCA 350
Luan v ADP Canada Co, 2020 ABQB 387
Huff v Zuk, 2021 ABCA 60
Alberta Computers.com Inc v Thibert, 2021 ABCA 213

British Columbia (by year)

Pritchard v Van Nes, 2016 BCSC 686
Austin v Lynch, 2016 BCSC 1344
Seikhon v Dhillon, 2017 BCSC 2525
Nazerali v Mitchell, 2018 BCCA 104, leave to appeal to SCC refused, 38113 (9 August 2018)
Kazakoff v Taft, 2018 BCCA 241
Wood v Jaffer, 2018 BCSC 85
Hee Creations Group Ltd v Chow, 2018 BCSC 260
Salager v Dye & Durham Corporation, 2018 BCSC 438
Somani v Jilani, 2018 BCSC 1331
Hall v Razutis, 2019 BCCA 341
Holden v Hanlon, 2019 BCSC 622
Rook v Halcrow, 2019 BCSC 2253
Hudson v Myong, 2020 BCSC 517
Marion v Louie, 2021 BCSC 424
Port Alberni Shelter Society v Literacy Alberni Society, 2021 BCSC 1754

New Brunswick

Zed v White et al, 2019 NBCA 86

Nova Scotia

Marson v Nova Scotia, 2017 NSCA 17

Ontario (by year)

Awan v Levant, 2016 ONCA 970, leave to appeal to SCC refused, 37453 (8 June 2017)
Brent v Nishikawa, 2016 ONSC 4297
Senator Tobias Enverga Jr v Balita Newspaper et al, 2016 ONSC 4512
Cana International Distributing Inc, cob as Sexy Living v Standard Innovation Corporation, 2016 ONSC 7197, rev'd in part 2018 ONCA 145
McNairn v Murphy, 2017 ONSC 1678
Nassri v Homsi, 2017 ONSC 4554
Paderewski v Skorski, 2017 ONSC 6594
Door 2 Door Movers Inc v Rankin, 2018 CarswellOnt 19296 (Sup Ct J)
Hampton Securities Limited v Dean, 2018 ONSC 101
Magno v Balita, 2018 ONSC 3230
AA v BB and CC, 2018 ONSC 4173
Rutman v Rabinowitz, 2018 ONCA 80, leave to appeal to SCC refused, 38048 (9 August 2018)
Grochowski v Young, 2019 ONSC 326
Zoutman v Graham, 2019 ONSC 2834
Paramount v Kevin J Johnston, 2019 ONSC 2910
Emeny v Tomaszewski, 2019 ONSC 3298
United Ventures Fitness Inc v Twist, 2019 ONSC 3613
Oliveira v Oliveira, 2019 ONSC 4400
Wilson v Wilson, 2019 ONSC 5726
Cable Assembly Systems Ltd v Barnes, 2019 ONCA 1013
Skafco Limited v Abdalla, 2020 ONSC 136
Theralase Technologies Inc v Lanter, 2020 ONSC 205
Ahmed v DePaulis, 2020 ONSC 2550
Duncan v Buckles, 2020 ONSC 3219
Groh v Quocksister et al, 2021 ONSC 3226

Kuehl v Ross, 2021 ONSC 4251
Soliman v Bordman, 2021 ONSC 7023

Saskatchewan (by year)

Graham v Purdy, 2017 SKQB 42
Houseman v Harrison, 2020 SKQB 36
Zwarych v Lalonde, 2020 SKQB 68

Yukon (by year)

Gagnon v Firth, 2017 YKSC 26
Simon v Poirier, 2019 YKSC 56