CITATION: Awan v. Levant, 2014 ONSC 6890
COURT FILE NO.: CV-09-00386377
DATE: 20141127

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
KHURRUM AWAN	)	Brian G. Shiller and Angela Chaisson, for the Plaintiff
	)	
Plaintiff	)	
	)	
	)	
– and –	)	
	)	
	)	
EZRA LEVANT	)	Iain A.C. MacKinnon, for the Defendant
	)	
Defendant	)	
	)	
	)	
	)	
	)	**HEARD:** March 3-7, 10-11, April 7, 2014

REASONS FOR DECISION

JUSTICE W. MATHESON

[1] This libel action challenges nine publications by the defendant on his blog: ezralevant.com. These blog posts generally relate to the events leading up to and including a hearing of the British Columbia Human Rights Tribunal in 2008.

[2] The plaintiff was one of a group of students who had concerns about an article published in Maclean's magazine, and attempted to redress those concerns through different avenues including through available human rights legislation. The defendant is a commentator on issues of concern to him, including the role of human rights commissions. He targeted the plaintiff for criticism not just on that issue, but also because of the plaintiff's connections with the then President of the Canadian Islamic Congress ("CIC"), an individual against whom the defendant bears substantial ill-will.

[3] The plaintiff claims that the words complained of in the nine blog posts are false and defamatory of him. Although other defences were also pleaded, the defendant relied mainly on

the defence of fair comment, and to a limited degree the defences of justification (i.e., truth) and qualified privilege. The defendant also takes the position that due to his reputation as an outspoken provocateur and troublemaker, none of what he said would be understood as defamatory in any event.

[4] The plaintiff seeks damages and an order requiring that the posts be taken down from the defendant's website, where they have remained since being posted in 2008, 2009 and 2010.

The parties

[5] The plaintiff Khurrum Awan is a lawyer, currently practising in Saskatchewan. When the events giving rise to this litigation began, he was a law student at Osgoode Hall Law School in Toronto. The plaintiff testified that he is a practising Muslim, and at the relevant time had a general interest in law, politics and human rights.

[6] The defendant Ezra Levant is an outspoken political commentator, journalist and blogger. At all material times, Levant has been the owner of ezralevant.com. He is the sole author of the blog postings that are at issue in this action. He is also a lawyer and has maintained his licence to practise law in Alberta since 2000.

Events giving rise to the British Columbia hearing

[7] The course of events began with a cover story entitled "The future belongs to Islam" in the October 23, 2006 edition of Maclean's magazine. The article was an excerpt from a book by Mark Steyn entitled *America Alone*.

[8] The plaintiff became aware of the article at about the time it was published. He learned of it from a press release of the Canadian Council on American Islamic Relations ("CCAIR"), which expressed concern about the content of the article.

[9] The plaintiff testified that when he read the article he was pretty shocked by the central theme that Muslims were to be feared by virtue of their numbers and the rate they were multiplying in Western societies. He believed that the article treated Muslims as an undifferentiated group with an agenda for a bloody takeover of Western societies. He thought that the notion that there were moderate Muslims who were ordinary loyal citizens was undermined by the article.

[10] The plaintiff discussed the article with friends and colleagues at Osgoode Hall Law School and a related legal clinic. Four law students came together over their concerns about the article, specifically the plaintiff, Naseem Mithoowani, Muneeza Sheikh and Ali Ahmed.

[11] The plaintiff and one of the other students, Ms. Mithoowani, testified at trial. They gave a consistent account of the steps the students took leading up to a meeting with Maclean's that took place on March 30, 2007. This evidence was not significantly challenged.

[12] The four students were concerned that Muslims were unfairly portrayed in the article. Before taking action, they looked into a number of things, dividing the work between them. They wanted to find out whether the article was the only one of its type in Maclean's. They researched that question, and concluded that Maclean's had published about twenty other articles with what they believed was similar content, in the prior two or three years, and no articles with a different perspective. They looked at potential avenues of legal redress. They determined that Maclean's was not a member of a press council. That avenue for complaint was therefore closed. They ultimately decided to approach Maclean's and ask that it publish a response to the article.

[13] The students thought they would not have credibility on their own and therefore canvassed national Muslim organizations for support, including at least the CCAIR, the Muslim Association of Canada and the CIC. Ultimately, they decided to work with the CIC.

[14] One of the other students contacted Maclean's and asked for a meeting to discuss their concerns. Ms. Mithoowani testified that she was surprised that Maclean's agreed to a meeting and she thought it was a positive step.

[15] The four students then got together to decide what they wanted to present to Maclean's at the meeting. They decided on an initial pitch and expected that it would be the starting point for a negotiation. That starting point was as follows: they planned to ask for the publication of an article of equal length and prominence by a mutually acceptable author who was a credible, prominent Muslim, expressing a contrary view than that expressed in the article. They also planned to ask for a donation to a charitable organization in the area of race relations, but thought that they would probably drop that request in the course of the negotiation. They discussed the amount of $5,000 to $10,000.

[16] In preparation, the students also decided which of them would speak to each specific part of their presentation. The plaintiff had responsibility for speaking about the problematic messages in the article. Ms. Sheikh had responsibility for speaking about the students' proposed remedy. At a much later stage, what was said at the meeting about this latter topic would come to be a significant area of dispute, especially with respect to the proposed author. With respect to their plan, I find that the students intended to propose a mutually acceptable author.

[17] Thus, the students discussed and reflected on the issues. They did research into Maclean's' track record. They sought support, expecting that they alone would not be taken seriously. They did not move precipitously. This resulted in delay. They did not approach Maclean's until about five months after the article had been published. This significant delay did not assist them in their dialogue with Maclean's.

Maclean's meeting

[18] The meeting took place on March 30, 2007. While the students wanted to be properly prepared, they did not see it as the type of meeting that required that they wear suits or take

notes. They were taken by surprise when they arrived at the meeting to discover that Maclean's counsel, Julian Porter, Q.C., was in attendance, along with Ken Whyte (Editor-in-Chief) and Mark Stevenson (Deputy Editor). They were intimidated by the circumstances. Ms. Mithoowani testified that in hindsight they were naïve. I agree.

[19] Of the seven people present at the meeting, only three testified at trial – the plaintiff, Ms. Mithoowani and Mr. Porter. Of the seven people present at the meeting, only Mr. Porter took notes.

[20] Mr. Porter had little independent recollection of the meeting, but he remembered a few specific remarks. He testified largely using his notes. He frankly agreed that his notes were not comprehensive. He did not catch everything, but he was trying to be accurate. I found Mr. Porter to be a credible witness, fairly testifying about what he did and did not recall occurred at the meeting, and what was recorded in his contemporaneous notes.

[21] Not surprisingly, the students were nervous, although this did not come through to Mr. Porter. He found them organized and articulate.

[22] At trial, much of what transpired at the meeting was the subject of consistent testimony by the plaintiff, Ms. Mithoowani and Mr. Porter.

[23] As planned, the plaintiff began by speaking about why the article caused them concern. As planned, Ms. Sheikh spoke about the students' proposal. Ms. Sheikh's part of the presentation included a request for a responding article of equal length and prominence by a credible, well-known and prominent Muslim. The proposal also included a request for a donation to an organization in the area of race relations.

[24] With respect to the charitable donation, the plaintiff's and Ms. Mithoowani's evidence is that no sum was mentioned. I accept that evidence, which is consistent with Mr. Porter's evidence and notes. The notes say a "substantial" amount. If a specific sum had been mentioned, I conclude that it would have been noted by Mr. Porter.

[25] After only a few minutes, Mr. Whyte spoke up, disagreeing with the students' characterization of the article. He noted that the article was a book excerpt. He said that Mark Steyn was a reputable journalist. He said the article was nuanced and it did distinguish between groups. He said that shortly after the article, Maclean's had published many letters to the editor received in response to the article.

[26] Mr. Porter asked the students what laws they had looked at, to which they responded that they had looked at human rights codes and hate speech law. There is a dispute, however, about who brought up the subject first. Based upon Mr. Porter's testimony and his notes, I conclude that the topic was first raised by the students, but Mr. Porter confirmed in his testimony that the students did not actually threaten legal action.

[27] The dialogue continued but it was a difficult, tense and relatively short meeting. It ended abruptly after a statement by Mr. Whyte to the effect that he would rather go bankrupt than publish the requested article. Mr. Porter specifically recalls the statement made, and I accept his recollection. Mr. Whyte said, forcefully, "I would rather go bankrupt than print an article by an author of your choice." This is consistent with Mr. Porter's notes, which say, "I'd rather go out of business than write article by a person of your choice."

[28] Ms. Mithoowani then attempted to ask what Maclean's would be prepared to do, but was cut off by Mr. Porter saying his client had made his position clear.

[29] About eight months later, when Maclean's first took a public position about what transpired at the meeting, it became apparent to the students that there were disputes about what was said by both sides at the meeting. In December of 2008, Maclean's issued a statement that said, among others things: (1) that Maclean's had said it would consider a reasonable request; and, (2) that the students' proposal was for an article by an author of their choice.

[30] On the first issue, the plaintiff and Ms. Mithoowani testified that no such offer was made by Maclean's at the meeting, although they were asked if they wanted to submit a letter to the editor. This is consistent with Mr. Porter's notes. There is no evidence before me that the offer of a reasonable response was made at the meeting.

[31] On the second issue, Ms. Mithoowani testified that Ms. Sheikh did say "mutually acceptable" author. Mr. Porter did not recall that being said. His notes mention "author of choice", but Mr. Porter does not now independently recall that being said either. The plaintiff's evidence at trial was that he did not recall reference to either an author of the students' choice or a mutually acceptable author. However, he testified that he had a better recollection of what he said than what the other students said at the meeting, and he did not speak on this topic.

[32] I conclude that the meeting was a significant failure of communication. Neither side effectively communicated what they had planned to propose. If Ms. Sheikh did say "mutually acceptable" it was clearly not heard. If Maclean's did say they were prepared to consider a "reasonable response", as later stated by Mr. Whyte in his press release, it was clearly not heard. I conclude on the evidence before me that both proposals were planned and intended in good faith, and neither effectively made. This is perhaps not surprising in what was clearly a tense, emotional and very brief meeting that came to an abrupt end. In final argument, counsel to the defendant fairly conceded that the two groups could have left the meeting with different, but honestly held, senses of what transpired. I conclude that that is what took place.

Events after Maclean's meeting

[33] After the meeting, the students were shell-shocked and believed that they had not been given a chance to convey their concerns. They regrouped at the coffee shop across the street and decided to do legal research and write to Ted Rogers, given that Maclean's was a Rogers publication.

[34] In April of 2007, the plaintiff wrote to Mr. Rogers, requesting a meeting in order to resolve the matter. Like most if not all of the formal communications that came later, this letter expressly stated that it was on behalf of all four students. This was confirmed by Ms. Mithoowani, who testified that the plaintiff was not the leader of the group. They were all more or less equal. They continued to share the work depending on who had time to deal with it, and all material was circulated to all of them for comments before it went out. They would each review it, if they had time. I accept her evidence, which was unshaken in cross-examination.

[35] The students heard back from Brian Segal, President and CEO of Rogers, who indicated that Rogers did not interfere with editorial views expressed by its magazines. He also stood behind Maclean's, indicating that the article raised issues that were legitimate for a national magazine. The plaintiff wrote back on behalf of all four students, indicating that given their unsuccessful attempts to resolve the matter, they thought they should go public with their concerns.

[36] In what would turn out to be a very controversial decision, the students decided to pursue relief through human rights legislation. Ironically, while their original objective was in furtherance of freedom of expression, their perceived attack on the article and the venerated Maclean's magazine resulted in their portrayal as attacking that very freedom.

[37] The students became the subject of a firestorm of criticism. Many people believed the article was well-suited to public dialogue and to Maclean's, and the students ought to have simply entered that public dialogue. They could have written a letter to the editor, for example, as many others did. To many, their chosen course was an attack on free speech. However, that controversy is not the focal point of the words complained of in this action. The plaintiff has not sued as a result of that criticism of him.

[38] After the exchange of correspondence with Rogers, the plaintiff prepared a complaint to the Ontario Human Rights Commission and the other three students reviewed it. All four students were complainants. Complaints to the Canadian Human Rights Commission and the British Columbia Human Rights Commission were also prepared. While the plaintiff did not prepare them directly, they were largely copied from his Ontario complaint. The students were not the complainants in those complaints. Most significantly for this case, Dr. Mohamed Elmasry, the then President of the CIC, was a complainant in the other two complaints.

[39] The students then looked for counsel who would assist them on a *pro bono* basis. They canvassed a number of counsel. Ms. Mithoowani knew Faisal Joseph, a senior London trial lawyer with the Lerners LLP law firm. She articled at Lerners in London and Mr. Joseph was her articling principal. The plaintiff did not know Mr. Joseph, but he had been hired to article at Lerners in Toronto once his clerkship was complete and he was invited to attend the opening of the new London office. The plaintiff went to the opening with Ms. Mithoowani, and met Mr. Joseph. They approached him in the parking lot after the event and asked for his help.

[40] Mr. Joseph testified at trial. He testified that he was initially reluctant to become involved because of the hostile climate toward Muslims at that time. However, he ultimately decided to take on the matter because of his background as President of the Islamic Centre and in other roles. He knew Maclean's had Mr. Porter as its counsel. He testified that the students were in over their head. He did not think it was a fair fight. He initially got involved in Ontario only but was later contacted by the CIC and the second British Columbia complainant, Dr. Habib, to act for them in British Columbia.

[41] On December 4, 2007, there was a press conference at which Mr. Joseph spoke about the complaints and the failed attempt to resolve the issues with Maclean's. He said that the complainants were seeking equal space to respond to what they felt was an Islamophobic and unfair article.

[42] Mr. Whyte then issued the statement setting out his position about the meeting with the students. He indicated that the students had asked for an opportunity to respond to the story and that Maclean's had said it would consider a reasonable request bearing in mind that it had already run many responses to the article in its letters section. Mr. Whyte described what had been requested and said, "We told them we didn't consider that a reasonable request for response. When they insisted, I told them I would rather go bankrupt than let somebody from outside of our operations dictate the content of the magazine. I still feel that way."

[43] The suggestion that Maclean's had offered a reasonable response came as a surprise to the students. They did not recall it being mentioned at the meeting. There is no evidence before me that it was. Nor was it mentioned in the letter from Mr. Segal after the meeting. This was also the first time the students realized that there was an issue about whether their planned approach to the selection of the author had been effectively communicated at the meeting.

[44] The law students responded by a press release dated December 7, 2007. They attempted to discuss a resolution again, given the statement by Maclean's that it would consider a reasonable response. They offered to settle the matter. This overture was not taken up by Maclean's.

[45] In the December 7, 2007 and later public statements by the students, they described what they asked for at the Maclean's meeting, including a response from a mutually acceptable author. This appeared in letters to the editor several times between the December 7, 2007 press release and the British Columbia Human Rights Tribunal ("BCHRT") hearing in June of 2008. These letters were prepared by whichever student had time, and circulated to the others for comment, and the others would comment if they had time. Each stated that they were on behalf of all four students. The evidence before me does not establish any intention to deceive on the part of any of the students in relation to these public statements.

Humans rights proceedings

[46] The Ontario Human Rights Commission decided against proceeding with the students' complaint, concluding that it did not have jurisdiction. The Canadian Human Rights Commission also decided against proceeding with the complaint made to it.

[47] The British Columbia human rights legislation implemented a regime under which the Commission could not refuse a timely complaint within its jurisdiction. A respondent could apply to dismiss a complaint prior to a hearing, but this was not done in this case. Maclean's filed a substantive response to the complaints. The British Columbia complaints therefore moved forward to a hearing.

Levant's connections with the BCHRT proceedings

[48] The defendant had several strong connections with the subject matter of the BCHRT hearing. At the time of the hearing, he was pursuing a campaign against human rights commissions. His publication – the Western Standard – had been the subject of two complaints under the Alberta human rights legislation, which were ultimately dismissed. Those complaints arose following the publication, in the Western Standard, of the Danish cartoons – controversial cartoons depicting the Prophet Muhammad. The defendant testified that he decided to publish eight of the cartoons because no one else was publishing them and they were newsworthy. In January of 2008 he had been the subject of what he described as an interrogation regarding those complaints.

[49] The defendant testified that as a result of the Alberta human rights proceedings against him he began to do a lot of reading and writing regarding human rights commissions. He was on a mission to "denormalize" them. He believed he could offer a unique perspective because he was a lawyer and had been personally involved in the human rights system. He devoted considerable time to that project starting in January of 2008. He testified that he wrote his book *Shakedown* in 2008, a book in which he described "his ordeal" and his views on human rights commissions. In his publications tendered at trial, and in his trial testimony, he repeatedly described them as "kangaroo courts".

[50] The defendant was particularly critical of the BCHRT that heard the complaint against Maclean's. He described it as one of the most abusive tribunals. He described it as a third-rate troika of radical activists.

[51] The defendant had a number of other connections to the matters at issue in the BCHRT hearing. He knew Mark Steyn and held him in high regard. Mr. Steyn had written for the defendant's publication on a regular basis. Ultimately, Mr. Steyn wrote the Foreword for the defendant's book *Shakedown*. The defendant was a fan of Mr. Steyn's book *America Alone*. He was also an admirer of Mr. Whyte of Maclean's.

[52] Significantly, the defendant also had strong views about Dr. Elmasry, who was one of the British Columbia complainants. The trial evidence showed Dr. Elmasry to be a highly

controversial figure. In 2004, he had made statements on a television show to the effect that all adult Israelis were valid targets. As a result, he was condemned by many for endorsing terrorism against Israeli civilians. The defendant frequently wrote about Dr. Elmasry, repeatedly calling him a Jew-hating bigot, among other things.

[53] At trial, the defendant attempted unsuccessfully to prove a very close relationship between the plaintiff and Dr. Elmasry. The plaintiff certainly had connections with him. He had prior involvement with the CIC in 2007 and earlier, and therefore had contact with him. The plaintiff had received a modest scholarship from the CIC, in return for which he was obliged to perform 150 hours of community service for the CIC. His CIC activities had included becoming Youth Chapter President, writing papers and testifying before government committees. But, as of 2008, the plaintiff was not even a member of the CIC. The plaintiff was unaware of Dr. Elmasry's statements on the above television show at the relevant time. At trial, he not only distanced himself from Dr. Elmasry generally, but rejected his controversial views.

[54] The trial evidence does not establish that the plaintiff had the close relationship with Dr. Elmasry alleged by the defendant, or that the plaintiff shared the controversial views highlighted by the defendant.

[55] Although the students had requested the involvement of the CIC, it did not play a major role in the students' plans. They developed their own strategies before and after the Maclean's meeting. They decided to pursue a remedy in the Ontario human rights regime. They retained counsel for their Ontario complaint. They did involve the CIC, however, and received support on things like their media communications.

[56] As the human rights proceedings unfolded outside Ontario, Dr. Elmasry presumably became more involved in that he was a personal complainant. The students' role diminished. The trial evidence did not establish significant interaction between them. When it came to the British Columbia proceedings, the students were involved but no longer had a decision-making role. Nor did the trial evidence establish that the students were communicating with Dr. Elmasry about the strategy for the conduct of the hearing.

[57] It became apparent in his trial testimony that the defendant assumed that all that transpired with respect to Maclean's was Dr. Elmasry's doing. It was also apparent that the defendant held considerable ill-will toward Dr. Elmasry and as a result the CIC. Much of what the defendant wanted to talk about at trial related more to Dr. Elmasry than to the plaintiff. I conclude that the defendant visited his ill-will on the plaintiff, in the absence of Dr. Elmasry, at the BCHRT hearing.

BCHRT hearing

[58] The BCHRT hearing took place from June 2 to June 6, 2008. The plaintiff testified. One of the complainants testified – Dr. Habib. The other complainant – Dr. Elmasry – did not testify. The other evidence called on behalf of the complainants consisted of the testimony of three

expert witnesses. The respondents called no evidence. Mr. Levant attended for the first two days of the hearing, and "live-blogged" from the hearing.

[59] At the time of the hearing, the plaintiff was just completing his articles as a clerk of the Ontario Superior Court. He was not, then, a lawyer.

[60] There is a transcript of the BCHRT hearing, which I prefer as an accurate account of what transpired to the extent that it records relevant events. With one exception, there is no significant dispute about what transpired during the actual hearing. The exception relates to the role of the plaintiff at the hearing, which is relevant to certain of the words complained of regarding conflict of interest in which the plaintiff is called "co-counsel".

[61] At the outset of the hearing, the Tribunal chair asked counsel to introduce themselves. Mr. Joseph identified himself as counsel for the complainants. No one else was identified as counsel. Ms. Mithoowani and Ms. Sheikh identified themselves as assisting Mr. Joseph. The plaintiff was not. Later on, when the subject of the witnesses was raised, Mr. Joseph identified the plaintiff as a witness. There is no question that the plaintiff was the first witness at the hearing. His testimony began on the first day of the hearing, and finished on the second. For the bulk of the time that he was in the hearing room, he was in the witness box. After his testimony the plaintiff spoke with the other students in another room, and then left. He came back only once, at the end of the week, to meet someone for a meal. At that point, he heard some of the closings. He did not attend the majority of the hearing.

[62] The plaintiff testified that when he was not in the witness box, he sat in a chair behind Mr. Joseph, not at the counsel table. This is consistent with a statement made by one of Maclean's counsel that is recorded in the transcript. Before the plaintiff began his testimony, Maclean's counsel stated that the plaintiff was sitting "back there". The plaintiff also testified that on one occasion he helped the other students staple some documents.

[63] The defendant testified that he saw the plaintiff sitting at the counsel table and assisting the other students in dealing with photocopies. As well, the defendant called a reporter from the National Post to testify about where the plaintiff was sitting. Although the reporter had no specific recall, he had written a story published June 3, 2008, that said, among other things, that all three students sat at the counsel table on the prior hearing day. He also wrote a story the following day that stated the students were handing Mr. Joseph documents to be introduced into evidence and filling his water. These references are not to specific students. Obviously the plaintiff, while in the witness box, was not doing those things for Mr. Joseph.

[64] I conclude that the plaintiff was at the counsel table at some point when he was not testifying, albeit briefly, and also sat in the chairs behind counsel used by witnesses.

[65] As a matter of fact, I find that the plaintiff was not counsel on the hearing. He was not a lawyer at all, let alone was he counsel. Mr. Joseph was counsel. This fact was made clear at the outset of the hearing, in response to specific questions from the Tribunal chair.

[66] Nor was the plaintiff assisting counsel in any significant way. This too was identified at the outset of the hearing in response to specific questions from the Tribunal chair. Only the other two students were identified as assisting Mr. Joseph. The plaintiff was identified as the first witness.

[67] Based on his trial testimony, I am left with no doubt that only Mr. Joseph was in charge. He was not collaborating with any of the students regarding the strategy for the case or who would be called as witnesses.

[68] It was Mr. Joseph's decision to call the plaintiff as the first witness. The scope of the testimony was also his decision. He testified that the plaintiff was a fact witness regarding what happened at the Maclean's meeting. Neither complainant could address that subject. Mr. Joseph testified that it was a bonus that he could ask the plaintiff about other issues such as his concerns about the article. The plaintiff was not substituting for Dr. Elmasry.

[69] The plaintiff was cross-examined by Mr. Porter at the BCHRT hearing, on behalf of Maclean's. This was a somewhat unusual situation in that Mr. Porter was, in addition to being a senior and distinguished counsel, also a witness to what transpired at the Maclean's meeting. I conclude that his cross-examination, in the circumstances, would have particular force. Mr. Porter put to the plaintiff that he had never said "mutually acceptable" at the meeting. The plaintiff agreed with Mr. Porter. He said that they did not have a chance to get to that because Mr. Whyte made it clear Maclean's was not interested in a response. Based upon the trial evidence, I conclude that this was the first time the plaintiff's memory (or lack thereof) crystalized on this point.

[70] After the plaintiff's evidence was complete, he left the hearing room and was talking with the other two students. They said he was mistaken. They said Ms. Sheikh had said "mutually acceptable" at the Maclean's meeting. The plaintiff indicated that he did not remember it. Mr. Joseph was in the room during this discussion, but decided not to return to the issue in the hearing. He had already told the Tribunal he was not calling the other students in his case in chief.

[71] That part of Mr. Porter's cross-examination marks the beginning of the series of blogs complained of in this action. All but one of the posts complained of in this action were posted starting at that point of the cross-examination and following, with headlines as follows:

(1) "Khurrum Awan is a serial liar";

(2) "Awan the liar, part 2";

(3) "Awan the liar, part 3";

(4) "Awan the liar, part 4";

(5) "Awan the liar, part 5";

(6) "Awan the liar, part 6";

(7) "Awan the liar, part 7".

[72] The defendant did not say the other three students were liars, even though all the prior publications he relies upon as lies were joint statements of all four of them. He did so even though it was the plaintiff who was, as the defendant put it at trial, finally telling the truth. Yet he focused on the plaintiff only. I return to this point below.

[73] The BCHRT Reasons for Decision were issued on October 10, 2008: *Elmasry v. Roger's Communications Ltd.*, 2008 BCHRT 378, 64 C.H.R.R. D/509. The complaints were dismissed. The Tribunal concluded that both Dr. Habib and Mr. Awan were deeply offended by the article and many would share their view. The Tribunal further found that the article contained numerous factual, historical and religious inaccuracies about Islam and Muslims. However, it found that the complainants had not met their burden of demonstrating that the article rose to the level of "detestation, calumny and vilification" necessary to breach s. 7(1)(b) of the *Human Rights Code*, R.S.B.C. 1996, c. 210.

[74] The plaintiff did not sue for defamation in 2008. He had student debt and wanted to get on with his articling job at Lerners. This action was precipitated by a further post by the defendant in June of 2009. The plaintiff and Ms. Mithoowani had written a letter to the editor of the Toronto Star in response to an article written by the defendant. On June 4, 2009, the defendant posted: "Awan the liar, part 8". It was a more lengthy post, and included hyperlinks to all the above-listed earlier posts. It is also complained of in this action.

[75] A libel notice was then served on the defendant, who posted it on his blog with a further article. The defendant began a fundraising campaign for his legal expenses, with the assistance of Mr. Steyn. This action was then commenced, and a further post at that time is complained of.

Analysis

[76] As set out by the Supreme Court of Canada in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 28, the plaintiff in an action for defamation is required to prove three things to obtain judgment and an award of damages:

(1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;

(2) that the words in fact referred to the plaintiff; and,

(3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.

[77] If these elements are established on a balance of probabilities, falsity and damage are presumed: *Grant*, at para. 28.

[78] In this case, there is no dispute about the second or third requirements, based upon a request to admit delivered in relation to this action. The words complained of in fact referred to the plaintiff and were published by the defendant. However, there is a dispute about whether or not the first requirement has been satisfied, specifically whether the impugned words were defamatory.

Whether the words complained of are defamatory

[79] The defendant makes a general assertion that none of the words complained of were defamatory due to the defendant's reputation. Mr. Levant's counsel submitted at trial that readers of Mr. Levant's blog would not take all of his comments about the plaintiff "at face value" and would be "well aware of Mr. Levant's penchant to stir controversy and make outlandish comments at times." The defendant was described as having the reputation of "someone who is provocative, makes controversial comments and can be a troublemaker."

[80] It is well accepted that a defamatory statement is one that has a tendency to lower the reputation of the person to whom it refers in the estimation of right-thinking members of society generally, and in particular, to cause him or her to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem: *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, at para. 62; *Color Your World v. Canadian Broadcasting Corp*. (1988), 38 O.R. (3d) 97 (C.A.), at para. 14, as cited in *Manson v. John Doe No. 1*, 2013 ONSC 628, at para. 21.

[81] The statements are judged by the standard of an ordinary right-thinking member of society. Hence, the test is an objective one: *Color Your World*, at para. 14.

[82] In this case, the impugned words include numerous meanings that would, in the ordinary course, be readily regarded as defamatory. The defendant has said, over and over again, that the plaintiff is a liar. This alone would tend to lower the plaintiff's reputation among ordinary right-thinking members of society. It obviously bears the meaning that the plaintiff is dishonest, and casts doubt on his integrity, the most important attribute of any lawyer: *Botiuk*, at para. 69. Honesty and integrity are no less important for a law student who is about to embark on a career as a lawyer.

[83] Other impugned words imply that the plaintiff is incompetent and is an anti-Semite. These are but examples. While I will go through the impugned words in more detail below, they certainly include words that would ordinarily carry defamatory meanings.

[84] In denying that the impugned words carry defamatory meanings in this case, the defendant seeks to align himself with the minority view of Justice LeBel in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420. I am not persuaded that Justice LeBel's view applies here.

[85] *WIC Radio* involved a "shock jock" radio talk show hosted by a well-known and sometimes controversial commentator. The respondent was a widely known social activist who was also outspoken and whose public speeches were replete with references to war. At the

Supreme Court, the issue of defamatory meaning was conceded. Justice Binnie, who wrote for the majority, stated as follows at para. 45:

> [The appellants'] editorial about [the respondent] clearly defamed her. Attributing to [the respondent] bigotry of the type associated with Hitler and a couple of notoriously racist Governors in the Southern United States at the height of the desegregation crisis would, I think, tend to lower her in the opinion of right-thinking people (some might call it a "smear"), and the appellants were right to concede the point in this Court. [Emphasis added.]

[86] Justice Binnie observed that both courts below found that the impugned words were defamatory and said that conclusion was "plainly correct": *WIC Radio*, at para. 56.

[87] Unlike the rest of the Court, Justice LeBel was "not convinced" that the appellants' comments were *prima facie* defamatory: *WIC Radio*, at para. 66. He concluded that although associating the respondent's bigotry with Hitler would clearly be defamatory if taken at face value, he did not believe that the audience would have taken the shock jock's comments at face value. In Justice LeBel's view, the statement taken in full context posed no realistic threat to the respondent's reputation: *WIC Radio,* at paras. 76-78.

[88] There are certainly similarities between the reputation of the defendant and that of the "shock jock" radio talk show host in *WIC Radio*. However, those similarities do not necessarily lead to the conclusion that Mr. Levant's impugned words are not defamatory. Justice LeBel's minority view was very much based on the specific words complained of and context of that case, not all of which applies here.

[89] I agree with and follow the approach reflected in the decision of Justice Binnie in *WIC Radio*. The impugned words in *WIC Radio* were plainly defamatory. They were not saved from that conclusion because of the known characteristics of the speaker. Nor is the defendant here saved from defending his words by his reputation alone.

[90] I do not rule out the possibility that some speech may be so widely known to be false or unbelievable that its otherwise defamatory meaning is lost. However, that is not the case before me.

Defences

[91] When the above three requirements are met, falsity and damage are presumed. The onus shifts to the defendant to establish a defence in order to escape liability: *Grant,* at para. 29.

[92] The defendant relies to varying degrees on the defences of justification, fair comment and qualified privilege. Malice must also be addressed because the defences of fair comment and qualified privilege, if established, are defeated by malice. The plaintiff bears the burden of proof with respect to malice.

Justification

[93] The defence of justification simply means that the impugned statement or statements are substantially true: *Grant,* at para. 33. The burden is on the defendant prove truth, and if proved it provides a complete defence.

Fair comment

[94] The fair comment defence has a number of requirements that must be met by the defendant, set out by the Supreme Court of Canada in *WIC Radio,* at para. 1 , as follows:

(1) the comment must be on a matter of public interest;

(2) the comment must be based on fact;

(3) the comment, though it can include inferences of fact, must be recognizable as comment; and,

(4) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?

[95] The plaintiff concedes that the blog posts at issue are matters of public interest.

[96] The law of fair comment has been developed in a manner consistent with the values underlying freedom of expression. The worth and dignity of each individual, including his or her reputation, is an important value underlying the *Canadian Charter of Rights and Freedoms* and is to be weighed in the balance with freedom of expression, including freedom of the press: *WIC Radio*, at para. 2.

[97] As put by Justice Binnie in *WIC Radio,* at para. 2: "An individual's reputation is not to be treated as regrettable but unavoidable road kill on the highway of public controversy, but nor should an overly solicitous regard for personal reputation be permitted to 'chill' freewheeling debate on matters of public interest."

[98] Comment includes a deduction, inference, conclusion, criticism, judgment, remark or observation that is generally incapable of proof: *WIC Radio*, at para. 26. 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: *WIC Radio,* at para. 26, citing Brown, *The Law of Defamation in Canada*, 2nd ed., loose-leaf (Toronto: Carswell 1994).

[99] The comment must explicitly or implicitly indicate, at least in general terms, what are the facts upon which the comment is being made. The facts must be sufficiently stated or otherwise known to the readers so that the readers are able to make up their own minds on the merits of the

comment. If the factual foundation is unstated or unknown, or turns out to be false, the fair comment defence is not available: *WIC Radio*, at para. 31.

[100] It is through the true facts provided or otherwise known to the reader that readers can arrive at their own conclusions and assess the publisher's opinion. A bald comment asserted where it cannot be understood as an inference is likely to be treated as fact: Brown at p. 15-55, 15-87.

[101] It is not necessary that all the facts be included in the publication if there is enough information to identify the basis upon which the comment is being made. The facts must, however, be known to the reader. They may have been previously put forward to the reader by the defendant or others, or be common knowledge: Brown at pp. 15-49 to 15-55.

[102] The comment need not be fair in the ordinary sense. Even if exaggerated, outrageous and ridiculous, the comment may be protected provided that the above requirements are met: *WIC Radio*, at paras. 4, 49. Indeed, the comment may be rude, prejudiced, extreme, vitriolic, severe, vehement, exaggerated or even fantastic, provided that the other requirements of fair comment are met: Brown, at pp. 15-75 to 15-77.

[103] The defence of fair comment is defeated by malice – that is, an indirect or improper motive not connected with the purpose for which the defence exists: *WIC Radio*, at para. 1.

Qualified privilege

[104] A fair and accurate report of judicial or quasi-judicial proceedings is protected by the defence of qualified privilege, subject only to malice. I agree that the June 2008 hearing was a quasi-judicial proceeding within the meaning of this qualified privilege.

[105] The plaintiff disputes the availability of this privilege to the media. The argument advanced by plaintiff's counsel confuses the above qualified privilege with other circumstances within which a qualified privilege may arise. Other types of qualified privilege are available in defamation law, outside the context of reports on judicial or quasi-judicial proceedings.

[106] The plaintiff seeks to rely upon the law regarding the qualified privilege that arises where a defendant had a duty to make the statement and the recipient of the information a corresponding interest to receive it. This type of qualified privilege was asserted in *Grant v. Torstar*, which had nothing to do with the qualified privilege that attaches to fair and accurate reports of judicial and quasi-judicial proceedings. In turn, the comments made by the Court in that case about the unavailability of that privilege to the media are of no assistance here.

[107] The plaintiff also relies upon *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, which again did not involve a report on a hearing. However, even outside that context the Court did recognize a qualified privilege associated with a fair and accurate report of a court document – a qualified privilege that is available to the media: at paras. 153, 154 and 209. This decision is an

extension of, and not inconsistent with, the qualified privilege for fair and accurate reports on judicial and quasi-judicial proceedings.

[108] I conclude that the privilege is available, subject to its criteria being met.

[109] The test for fairness and accuracy is an objective one. It is summarized in Brown, at pp. 14-25 to 14-26, as follows:

> The report must give a complete and fair summary of the judicial proceedings. It must capture the substance of the proceeding measured by the natural and probable effect on the ordinary and average reader and viewer. It must not carry a greater sting in terms of its libelous impact than what occurred in court. The question is "whether the report substantially alters the impression which its recipient would have gained had he or she been present during the proceedings." …[Citations omitted]

[110] With respect to the first requirement – that the report must be accurate – the report must not misstate the facts. However, the report does not have to be accurate in every respect, so long as the language used has substantially the same import: Brown, at pp. 14-28, 14-52 and 14-53.

[111] The obligation to be fair brings in different criteria than those that apply to fair comment. In the context of a report on proceedings, fairness includes the notion of impartiality – it must be a balanced report. It must be just and impartial to the person about whom the report is being made: Brown, at p. 14-36.

[112] There is some room for literary licence provided that the report is fair. However, the addition of comments that have no foundation of fact and have the effect of holding the plaintiff up to public ridicule and contempt may result in loss of the privilege: Brown, at pp. 14-28, 14-41. Further, if the conduct of the defendant is high-handed and careless, exceeding the legitimate purpose of the occasion, the privilege may be lost even if not published maliciously: *Hill*, at para. 156.

Impugned words

[113] I will now proceed to consider each of the impugned blog posts in turn.

[114] The first seven blog posts at issue were posted on the second day of the hearing – June 3, 2008. They were posted in quick succession, making it more likely that the readers would have seen more than one of them if they were following the blog at that point in time. I have therefore taken into account the prior posts when considering whether the facts relied upon by the defendant would be known to readers, rather than looking at each post in isolation.

First post complained of

[115] The first blog post at issue is entitled "Khurrum Awan is a serial liar" and the entire post is complained of, as follows:

> **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.

[116] It is alleged that these words meant and were understood to mean that the plaintiff is a dishonest person and a liar. These meanings are both obvious and defamatory. These meanings would tend to lower the plaintiff's reputation among ordinary right-thinking members of society.

[117] It is also alleged that the use of the word "taqqiya" meant and was understood to mean that the plaintiff believed that it was permissible to lie and use deceit in order to further Islamic objectives. Based on the trial evidence, taqqiya (more usually spelled taqiyya) at least means deception, and is defamatory.

[118] The defendant testified that he used hyperlinks to provide the factual basis for his words. In this instance, the word "taqqiya" was hyperlinked to an article entitled "Islamic Tactics of Taqqiya teaches Muslims to practise Deception, Fraud and Double Standards to spread Islam". At trial, the defendant attempted to minimize this choice of hyperlink by saying he was doing his posts very quickly and at a later stage used a more authoritative link for taqqiya in another post. However, the original link was not changed.

[119] There are several factual errors in this post. For example, Mr. Porter's question is mis-described. Nor was the plaintiff asked about the CIC in this line of questioning. And the plaintiff did not testify that the author was to be the CIC's own choice, or the students' choice.

[120] The defendant relies upon the defences of fair comment, justification and qualified privilege to defend this post. The main defence advanced is fair comment. The defendant

submits that the above meanings are comment, based upon the plaintiff's hearing testimony coupled with the prior publications of the students in which they said, among other things, that their proposal included a mutually acceptable author.

[121] In error, the post says that the plaintiff admitted that "he" made no such offer of a mutually acceptable author, where he actually testified about the students as a group. The difference is significant. There are no prior statements that the plaintiff personally made that statement in any event. However, I will move to the broader context because the reasonable reader may well have understood this reference to be to the student group, not just the plaintiff. In that case, there were prior conflicting statements.

[122] This leads to the question of whether the words "liar" and "after-the-fact lie" are factual statements or comment. In final argument, counsel to the defendant submitted that they are comment, and further submits that the defendant need not prove the underlying fact of an intention to deceive. I disagree on both fronts.

[123] What is comment and what is fact must be determined from the perspective of a "reasonable reader": *WIC Radio*, at para. 27. And it must be determined in the specific context of the words complained of. Comment must be recognizable as such – the opinion must be expressed in such a way that the reader can readily distinguish what is asserted as fact and what is claimed as comment: Brown, at pp. 15-39.

[124] I conclude that the 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. Further, while the use of "opinion-like" words such as "in my view" or "I come to the conclusion that" are not determinative, it is relevant that there are no such words in this blog post: *Vigna v. Levant*, 2010 ONSC 6308, [2010] O.J. No. 5250, at para. 62; *WIC Radio*, at para. 58.

[125] It is also relevant that the word "liar" appears in the headline. Some people may read the headline only, which contains no supporting facts. This is particularly the case where, as the plaintiff testified, these headlines appear in Google searches. The searches mainly repeat the headline and do not present the whole post. This underscores my conclusion that the reference to "liar" in the headline is a statement of fact.

[126] At trial, in a different context, the defendant agreed that an incorrect factual statement was not necessarily a lie. He was asked whether Mr. Joseph and Ms. Mithoowani were both lying when they testified about where the plaintiff sat during the BCHRT hearing. They had both given testimony contrary to the defendant's evidence. When asked if they were lying, the defendant said no. He said they either did not recall or were wrong. This exposes the defendant's error in this case. Showing someone made an incorrect statement (as the defendant

asserts those two witnesses did) is not enough to call them liars. You must also prove that the incorrect statement was made deliberately.

[127] In my view, these were statements of fact, but alternatively I would also conclude that the defence of fair comment fails because the defendant has failed to prove the requisite foundational facts. Either way, the defendant must prove not only that the plaintiff had previously made an incorrect statement but also that he did so deliberately. A mistake or failure of memory or even inadvertence is insufficient. The defendant has failed to establish that either the plaintiff, or for that matter any of the students, had an intention to deceive when they made the prior statements that included a reference to a mutually acceptable author.

[128] The defences of justification and fair comment therefore fail with respect to the defamatory statements: "liar" and "after-the-fact lie", as well as the deception contemplated by "taqqiya".

[129] The defendant also relies on qualified privilege, as a fair and accurate report of a judicial or quasi-judicial proceeding. However, that defence was only put forward with respect to certain isolated statements in the post, not including the statements regarding lies and deception.

[130] Even if qualified privilege were advanced as a defence for those statements, the blog is not a fair and accurate report of what transpired at the BCHRT hearing. The statement that the plaintiff is a liar, or words to that effect, was not made at the hearing. Further, the plaintiff did not make conflicting statements at the hearing about what was actually said at the Maclean's meeting. Nor was there testimony at the hearing to the effect that either the plaintiff in particular or the students as a group had made false statements intending to deceive others about what transpired at the Maclean's meeting. The testimony did not expose the facts based upon which the reasonable attendee of the hearing would fairly conclude that the plaintiff was a liar or engaged in deceit.

[131] Although not determinative of the issue, this is consistent with the finding of the Tribunal in its reasons for decision. It expressly found that the plaintiff's evidence was consistent and not shaken on cross-examination.

[132] I therefore conclude that the imputations complained of that the plaintiff is dishonest and a liar or engaged in taqqiya are not protected by qualified privilege.

[133] There remains the reference to "junior Al Sharptons" and "tried to shake down" Mr. Whyte. Plaintiff's counsel submits that this part of the blog meant or was understood to mean that the plaintiff is an extortionist. Whether it goes that far aside, I agree that these words are defamatory.

[134] At trial, the defendant testified that his reference to "junior Al Sharptons" referred to what he described as Rev. Sharpton's practice of filing or threatening a complaint of racial discrimination and offering a resolution, often including a substantial financial payment. In his writings, the defendant has made far more extreme comments about Rev. Sharpton.

[135] This aspect of the post is defended based upon fair comment. The defendant relies upon the subject matter of the complaint about the article, and the facts that the students asked for a cover story and cash, specifically a charitable donation, and made reference to avenues of legal redress, including a human rights complaint.

[136] I conclude that the defence of fair comment applies. The public interest requirement is conceded. The defamatory imputation is based upon true facts. Although the students did not expressly threaten litigation, the discussion about avenues of potential legal redress was sufficient to imply potential legal action. As well, money was requested, albeit not for the students personally. The comment is recognizable as such, and it is a view that the defendant honestly held. As for the last requirement, remembering that for fair comment the comment may be extreme, vitriolic, exaggerated and severe yet still be protected, I conclude that a person could honestly express that view based upon the true facts.

Second post complained of

[137] The second blog post is entitled "Awan the liar, part 2" and the underlined words are complained of:

> **Awan the liar, part 2**
>
> Now Porter is showing Awan various letters that Awan sent to Maclean's. The fool was stupid enough to put his shakedown demands in writing.
>
> And Porter is showing that Awan demanded that Maclean's submit to the CIC's choice. No "mutually acceptable" anything. That qualifier was added later by Awan the Liar, to appear more reasonable to the Gentile press.
>
> It reminds me of Yasser Arafat, who would preach peace when speaking in English to Western journalists, and preach terrorism to his own constituency when speaking in Arabic.
>
> That's Awan: reasonable to the media; a junior Al Sharpton when dealing with Ken Whyte.
>
> No wonder Awan had trouble finding employment following his clerkship.

[138] This post repeats certain of the defamatory meanings found in the first blog post and my reasons for that post also apply here. It also introduces meanings that the plaintiff is incompetent, unethical and not fit to be a lawyer. These additional meanings are defamatory. They would tend to lower the plaintiff's reputation among ordinary right-thinking members of society.

[139] There are more factual errors in this post. This post relates to a portion of Mr. Porter's cross-examination where he was questioning the plaintiff about the correspondence with Messrs. Rogers and Segal after the March 30, 2007 meeting. At the hearing, there was no reference to the "CIC's choice". Further, the question of authorship of the article proposed by the students is not addressed in the correspondence, one way or the other. It was wrong to say that Mr. Porter was showing, through the letters, that the plaintiff demanded that Maclean's submit to the CIC's choice.

[140] And the letters that were being shown to the plaintiff did not make reference to the students' request for money. The defendant admits that error. What the defendant opined was a "shakedown" was not put in writing. The defendant made no effort to look at the letters to see what they did say, either before or after his post. This was characteristic of the lack of fact-checking with respect to the posts complained of in this action.

[141] Similarly, the defendant erred in his last sentence – the plaintiff had not had trouble finding employment, quite the contrary. He had already been hired as an articling student at Lerners and was about to start that job. The defendant made no effort to check the defendant's employment status before, or after, this post. And he did not change the post once he learned of his error.

[142] The defendant cannot rely on fair comment in relation to the statement about having trouble finding employment since they are not based on true facts. The defendant disputes the remaining meanings complained of, saying that nothing in the post is capable of meaning that the plaintiff is unethical or not fit to be a lawyer. I disagree. The post bears the meanings that the plaintiff is incompetent and tells lies to suit his audience, which meanings in turn suggest he is unethical and not fit to be a lawyer. And, as discussed above, those meanings have not been successfully defended.

Third post complained of

[143] The third blog post complained of is entitled "Awan the liar, part 3". Only the headline is complained of. The post reads as follows:

> **Awan the liar, part 3**
>
> Did I just hear a flicker in Awan's voice? Is he really going to cry?
>
> He should, if only as a legal strategy. He has already emasculated himself with a two-hour psychotherapy session; why not go the whole mile. I'm sure it would work with the Troika.
>
> Porter is putting Awan's own words to him; Awan is pulling a Richard Warman: he "can't remember". I suppose it's better than lying under oath, but not much.

[144] My reasons from the first blog post regarding the statement "liar" and the asserted defences also apply here.

Fourth post complained of

[145] The fourth blog is entitled "Awan the liar, part 4" and the whole post is complained of:

> **Awan the liar, part 4**
>
> Awan wrote a letter to a Rogers executive Brian Segal. It was part of his Sharptonian adventure in shaking down Rogers.
>
> Bad idea. It didn't work. I met Segal yesterday. He comes across as a gentleman businessman, but I get the feeling he's good with a bowie knife.
>
> Segal didn't pay a dime.
>
> But that's not why Awan's letter was so stupid.
>
> It was stupid because now we have a written track record of Awan's shakedown. It's being read back to him in court. He's being asked where the phrase "mutually agreeable" exists. It doesn't.
>
> Now Awan is trying to explain away that lie. Uh, it isn't working. I'd go with the crying strategy.

[146] My reasons from the first and second blog post, in relation to the "written track record" and the "liar" apply also here, and for the reasons set out under the first blog post I conclude that the opening sentence to this blog is protected by fair comment.

Fifth post complained of

[147] The fifth blog post is entitled "Awan the liar, part 5" and the underlined words are complained of:

> **<u>Awan the liar, part 5</u>**
>
> Now Julian Porter is asking Khurrum Awan about his press conference at the InterContinental Hotel in Toronto, featuring Faisal Joseph. Porter pointed out that Awan and Joseph didn't make the "mutually acceptable" offer there, either.

> Awan gave his incoherent explanation, with an extra dollop of Fargo: he was worried that Maclean's would distort an offer of a mutually acceptable article, so they didn't make it.
>
> Porter: "if you distort it's okay; if he does, it's bad"
>
> Porter then read out Awan's article in the Globe and Mail, where Awan not only said the proposed article would be from a mutually acceptable writer, but that writer could be from inside or outside the Muslim community -- but, in fact, Awan had demanded that the author of that cover-story rebuttal be from the Muslim community, and of the CIC's own choosing.
>
> Another lie.
>
> Awan is drowning in his own quicksand.
>
> Keep talking, little grasshopper. Keep talking.

[148] My reasons regarding the first blog post also apply here.

Sixth post complained of

[149] The sixth blog post is entitled "Awan the liar, part 6" and the underlined words are complained of:

> **Awan the liar, part 6**
>
> Now Awan is listing authors he'd find acceptable for the rebuttal article they were demanding -- including Haroon Siddiqui, of the Toronto Star. Why the hell not? Just because they're competitors, no reason why you shouldn't try to force Siddiqui onto Maclean's.
>
> But Porter points out that Awan did not mention Siddiqui's name, or any other.
>
> Porter: why didn't you put those ideas to Whyte?
>
> Awan: "Well we couldn't." Uh, okay. So you had time to demand cash, and a cover story, but you "couldn't" have spoken the truth back then?

> I don't even understand the excuse. But it's not meant to be understandable; it's not meant to clarify; it's meant to muddy, to confuse.
>
> Let me sum up for you, dear reader, who are not here to watch a junion [sic] would-be lawyer try to explain to a court why he is a serial, malicious, money-grubbing liar.
>
> Khurrum Awan went in demanding cash and editorial control. Then he realized that doesn't look good in a liberal democracy like Canada. So he edited the truth. He amended what he said. He lied.
>
> And lied and lied and lied.
>
> And kept lying.
>
> He smeared Ken Whyte. He smeared Maclean's. He smeared Rogers. And that damn fool thought he'd get away with it. He was so brazen that he thought he'd even call himself as a witness.
>
> Julian Porter has earned his fee today.

[150] It is alleged that these words meant and were understood to mean that the plaintiff is a liar, is dishonest and deceptive, and is a person who seeks to deceive the court. Again, the words do bear these meanings, which are defamatory.

[151] Considering this post in context, I conclude that my reasons regarding "liar" and lying for the first blog post apply here, subject to the following. This post not only states that the plaintiff repeatedly lied, but that he did so because the students' proposal did not "look good in a liberal democracy". This purported reason for lying was not proved at trial. There is also the statement that the plaintiff called himself as a witness, which was proved at trial to be untrue.

Seventh post complained of

[152] The seventh blog post is entitled "Awan the liar, part 7" and the whole post is complained of:

> **Awan the liar, part 7**
>
> Julian Porter is asking Awan if he remembers whether or not he demanded money from Maclean's.
>
> Porter is now reading out a written demand by the sock puppets for "substantial" monies.
>
> Awan is denying the documentary record.
>
> Awan says that $10,000 was the number they had in mind -- though he acknowledges he hadn't particularize [sic] that sum before.

[153] My reasons regarding the first and second blog post with respect to lying and a written record also apply here.

Eighth post complained of

[154] The next blog post at issue was posted on June 4, 2009, about a year after the hearing, called "Khurrum Awan the liar, part 8." The defendant testified that the plaintiff brought this post on himself because he and Ms. Mithoowani wrote a letter to the editor of the Toronto Star in response to a piece written by the defendant. The defendant's testimony was, in effect, that if the plaintiff did not want these blog posts to continue he should not have spoken up.

[155] The underlined words from the post are complained of:

> **<u>Khurrum Awan the liar, part 8</u>**
>
> 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.

That, of course, is a procedure unknown to any court -- to have a stunt double doing your testimony for you. Awan wasn't the complainant; he wasn't a British Columbian, the jurisdiction that held the trial; he wasn't an expert in anything. He was just some guy who was testifying so that his boss, Elmasry, could avoid answering tough questions. The idea of sending in a proxy -- a PR flack; a stunt double; an actor; whatever -- to give testimony on behalf of the real complainant is novel in law. But then these kangaroo courts aren't run by real judges with real rules of procedure -- they just make it up as they go along.

My point is that it was an absolute pleasure watching Maclean's trio of top-gun lawyers tear Awan's buffoonery apart sentence by sentence. If I hadn't had the outlet of my blog, I might well have laughed or cheered aloud.

My favourite part was when Julian Porter, Q.C., got Awan to admit that he had been lying to the Canadian media for months when he had publicly claimed that he had said to Maclean's that their demanded "rebuttal" to Mark Steyn's article could be authored by someone that the Canadian Islamic Congress and Maclean's mutually agreed upon. Under oath, Awan admitted that was a lie -- he had demanded that Maclean's submit to an author of the CIC's own choosing. And, under oath again, Porter got Awan to admit that he also tried to shake Maclean's down for thousands of dollars, too.

It was like watching a snowman melt in a spring rain.

Here are my series of blog entries from that day called "Khurrum Awan the liar": 1, 2, 3, 4, 5, 6 and 7.

Well, I'd like to add an eighth instalment to my series. I missed it when I first read it in the Star's letter to the editors section (scroll down), but Mark Steyn points it out: Awan implies that he was the complainant against me and the Western Standard magazine for publishing the Danish cartoons of Mohammed. Awan writes:

Ezra Levant accuses Canada's human rights commissions of censorship for investigating our hate-speech complaints about his publishing of cartoons depicting Muslims…

Uh, nope. The complaints against me were filed by a Pakistani Jew-hater named Syed Soharwardy, and Soharwardy's fellow censors at the Edmonton Council of Muslim Communities. Awan and the Canadian Islamic Congress had nothing to do with it.

Who cares, really.

But it's so curious: what is it about Awan that just makes him say or write anything -- anything at all -- no matter if it's true or not?

I can understand if he has an urge to lie. It's called taqiyya. But surely any intelligent liar would choose a lie that is not so easily check-able. Why lie about something that can be so easily disproven?

It's a small point. But it brings me back to the fabulous vivisection performed on Awan by Porter. And I guess it just gave me a fond trip down memory lane.

P.S. At Steyn's trial last year, Awan was revealed to be a non-party, non-expert, no-standing witness. And it was more bizarre than that. Awan was not only a stand-in witness for Elmasry -- he was co-counsel for Elmasry, along with Faisal Joseph.

Could you imagine: someone's lawyer (or articling student, to be more accurate), being a "witness" for his client, too? It's the definition of conflict of interest.

And then take that conflict of interest to the power of two: when Awan was testifying, he was being led by Faisal Joseph, Elmasry's other lawyer (and co-counsel with Awan). And – here's the gorgeous part -- Awan testified that he was going to go to work for Joseph at his firm, as a lawyer.

To recap:

1. Awan wasn't a party or an expert in any way. Yet he testified.

2. But he was also co-counsel for the complainant and party in the case, Elmasry.

3. The lawyer who examined Awan was Awan's co-counsel, Joseph.

4. And Joseph had offered Awan a job at his firm.

Crazy.

~~Just for fun, I went to Faisal Joseph's law firm, Lerners LLP. And Awan is not in fact working there -- see for yourself.~~

~~Did he not do a good enough job at the show trial?~~

~~Did the Lerners partners read about his antics, and scotch his job offer?~~

~~Did Awan's serial lies cause them to disown him?~~

~~Are Joseph and Awan still buddies?~~

~~What's going on? Other than being an unimpressive emcee at CIC events, what's Awan up to these days? Is he even lawyering?~~

~~The Law Society of Upper Canada directory suggests he's not.~~

A commenter points out, I'm wrong: Awan is indeed an articling student at Lerner's.

[156] The last part of the blog appears showing the words struck out because a third party contacted the defendant to say that the statements were incorrect. In this regard, the defendant relies on an "Internet practice" he described, involving overstriking the incorrect text rather than removing it.

[157] This blog raises some issues I have already dealt with above, and some new defamatory meanings.

[158] The defendant again calls the plaintiff a liar, and my reasons for decision regarding this defamatory meaning under the first blog post apply equally here. This blog post again uses the word "taqiyya". Although taqiyya is now hyperlinked to a different article, it again carries the meaning deception and my reasons for decision regarding the first blog post apply to this post as well.

[159] This blog post introduces additional defamatory meanings, specifically the imputation that the plaintiff is an anti-Semite and that he was in a conflict of interest at the BCHRT hearing. These meanings do arise from the words complained of and are defamatory.

[160] The defendant's statements that the plaintiff was in a conflict of interest arise from a number of factual errors made by the defendant. First, the defendant wrongly describes the plaintiff as a "stand-in" for Dr. Elmasry. On the trial evidence, it is clear that the plaintiff was not called as a witness instead of Dr. Elmasry. He was called to testify about what transpired at the Maclean's meeting – a subject upon which Dr. Elmasry could not testify. Second, it is clear on the trial evidence that it was Mr. Joseph's decision to call the plaintiff as a witness and the plaintiff was not collaborating with Mr. Joseph about that decision. Third, the blog post says the plaintiff was going to work for Mr. Joseph at his firm, which is incorrect. The plaintiff was hired to work in the Toronto office, a process in which Mr. Joseph was not involved, and not going to work for him. Fourth, the statement in the blog that "Joseph had offered Awan a job at his firm" is incorrect.

[161] Next, the defendant describes the plaintiff as "co-counsel", which is incorrect. The defendant was not counsel or co-counsel for the complainants. This was made clear at the outset of the hearing when counsel were expressly required to identify themselves on the record. Only Mr. Joseph was counsel. Nor was the defendant assisting Mr. Joseph in any meaningful way. Again this was made clear at the outset of the hearing when only the other two students were identified as assisting Mr. Joseph. The plaintiff was identified as a witness.

[162] Considerable evidence was called at trial regarding whether or not the plaintiff ever sat at the counsel table. As is apparent from the hearing transcript, most of the time that the plaintiff spent at the hearing was spent in the witness box. And after his testimony, the plaintiff left. I have found that the plaintiff was briefly at the counsel table helping with photocopies. This did not elevate the plaintiff to "co-counsel".

[163] In his trial testimony, the defendant said that "co-counsel" was both a term of art in the legal context and a descriptive term. Coming from the defendant, a lawyer, I conclude that readers would understand his references to "co-counsel" to have the legal meaning. However, even as a descriptive term it must mean more than briefly helping with photocopies when not in the witness box.

[164] In essence, the defendant asserts that the plaintiff was in a conflict of interest because he was acting as counsel by deciding to call himself as a witness, and then testifying as a witness. The decision of who to call as a witness is the role of counsel. It is a significant role. It was not the plaintiff's role.

[165] To make out the defence of fair comment, the factual underpinnings for the alleged conflict of interest must be true. Here, they are not true.

[166] Based upon the trial evidence, the defendant has also not proved that the plaintiff is or was an anti-Semite. The defendant, in cross-examination, did not say that he was. The defendant relied on the plaintiff's connections to Dr. Elmasry and in turn the CIC. However, the words complained of were specific to the plaintiff and were not stated as matters of opinion.

[167] There remains the issue of the part of the blog that has been crossed out. The plaintiff submits these words meant or were understood to mean that he was incompetent and justifiably fired by Lerners. The defendant does not attempt to defend the substance of this part of his blog. He knows he got his facts wrong. He testified that he followed an Internet practice of striking out the words, which showed that he was wrong. In addition, he added the last sentence, which said that he was wrong.

[168] There was no evidence before me significantly challenging the practice that the defendant relied upon of striking out words. While I would not endorse this approach as a routine matter, in the specific context of this blog post I am satisfied that the readers of the blog post would not have regarded the crossed out words as defamatory. The claim based upon those words therefore fails.

Ninth post complained of

[169] The amended amended statement of claim also complains of a January 21, 2010 post by the defendant, entitled "Mark Steyn's would-be censor sues me -- and I'm going to fight back". In this lengthy post, which is not reproduced in full, the defendant described the plaintiff as a "shakedown artist", someone who abuses the courts to bully his opponents, and a friend of "the notorious anti-Semite Greg Felton." The post included the following additional words complained of:

. . .

> Let me quote a Jew now, just because it will irritate Awan. As Justice Louis Brandeis wrote nearly 100 years ago, "publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." I'm going to bring some klieg lights to trial on this one.
>
> I believe that nothing will disinfect our public square better than scrutiny and publicity of how illiberal Islamic fascists are waging war against our values. I hope that the lasting impact of this trial will be the complete and final detonation of the CIC's credibility.

. . .

> …And I certainly don't want this suit to change what I say or do in my life, especially my ability to criticize radical Islam and its politically correct allies.
>
> . . .

[170] With respect to the reference to "shakedown", I adopt my reasons above, concluding that it is fair comment. I reach the same conclusion about the reference to bullying – that sentence reads "That's Awan's strategy: abuse our courts to bully his opponents." I agree that these words are defamatory, however, I find that a person could honestly hold that view based on the proved facts insofar as the plaintiff did commence an action against the defendant seeking relief against him. Whether or not this action is an abuse is, in context, a matter of opinion and the opinion may be, for example, prejudiced, extreme, severe or even fantastic. I conclude that the defendant honestly holds that opinion. The requirements for fair comment are therefore satisfied.

[171] There is then the statement that the plaintiff is a friend of "the notorious anti-Semite Greg Felton." Mr. Felton was called as a trial witness by the defendant, mainly to testify about a story he wrote that quoted the plaintiff. Mr. Felton's testimony and publications cast substantial doubt on his own credibility. In any event, the evidence did not demonstrate facts to support the alleged friendship.

[172] With respect to the defamatory meaning that the plaintiff is an anti-Semite, I adopt my reasons from the prior blog post.

[173] Next, the plaintiff submits that the last paragraph quoted above amounted to calling the plaintiff a terrorist and anti-Canadian, including the phrase "illiberal Islamic fascists are waging war against our values". The defendant submits that this phrase is not defamatory. Alternatively, he defends it on the basis of fair comment.

[174] On discovery, the defendant admitted that he would not call the plaintiff a fascist. At trial, he first appeared to call the plaintiff a fascist and then said it was the activity, not the plaintiff, that he described that way. Having heard his various descriptions of these words, I conclude that the defendant does not have an honest belief that the plaintiff is a fascist.

[175] In argument, the defendant`s counsel submitted that calling someone a fascist is not defamatory because it is nothing more than "vulgar abuse or an insult". I agree that mere insults are not defamatory. The question is whether the words complained of were used in a defamatory sense, or merely intemperate expressions used in the heat of the moment: Brown, at p. 4-436.

[176] Taken in the context of the entire blog post, I conclude the words "illiberal Islamic fascists" were used in the defamatory sense. They meant or were understood to mean that the plaintiff had extreme, intolerant views. The necessary factual basis for this comment was not proved at trial, nor is the honest belief requirement met. It cannot therefore be defended as fair comment. However, the later phrase, "waging war against our values" does have an adequate

factual foundation. There is no question that freedom of the press forms part of our values and it was challenged in the human rights commission proceedings.

[177] At trial, other parts of this publication were also complained of, including a reference to "the soft jihad of 'lawfare'" and a sentence that reads: "It's Awan's little jihad". However, these passages were not identified as words complained of in the amended amended statement of claim. Given the requirement to specifically plead the words complained of, I conclude that these statements are not properly part of the plaintiff's claim.

Malice

[178] Malice is commonly understood as spite or ill-will, and also includes any indirect motive or ulterior purpose; it may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth: *Hill*, at para. 145.

[179] The defences of fair comment and qualified privilege are defeated if the plaintiff proves express malice. Express malice may be proved through extrinsic or intrinsic evidence. Intrinsic evidence is evidence that the words themselves provide. Extrinsic evidence is evidence apart from the words themselves that tends to show that in publishing the statement the defendant was actuated by a motive of personal ill-will or some other improper motive, in contrast to a motive inspired by a sense of duty or the mutual interest that the occasion created: *Taylor et al. v. Despard et al.*, [1956] O.R. 963, 6 D.L.R. (2d) 161 (C.A.), at para. 20.

[180] Proof of honest belief within the context of the fair comment defence does not negate the possibility of a finding of malice. That defence can still be defeated by proof that malice was the dominant motive of the particular comment: *WIC Radio*, at para. 53.

[181] The plaintiff alleges that, like the *Vigna v. Levant* case, malice is proved because the defendant was motivated by his ongoing campaign to delegitimize human rights commissions and those participating in them. The defendant frankly acknowledged this campaign and gave his reasons for his campaign against the work of human rights commissions. However, I am not satisfied that this campaign was what motivated the defendant to attack the plaintiff. If it had been, I would have expected the defendant to more broadly attack the student group as a whole. The public statements that the defendant asserts are lies are statements of all four students, not just the plaintiff. Yet the defendant attacked only the plaintiff.

[182] There is, however, ample evidence before me demonstrating express malice on the part of the defendant. That malice arises not from his campaign against human rights commissions but from his strongly held animus toward Dr. Elmasry. It was apparent through the course of the defendant's trial evidence that he regarded the plaintiff and Dr. Elmasry, for all intents and purposes, as one and the same. As a result, all of the defendant's ill-will against Dr. Elmasry, which was amply demonstrated, was visited on the plaintiff in these blogs.

[183] This is also shown by intrinsic evidence in the blogs themselves, especially the eighth blog post, written about a year after the BCHRT hearing. In that post, the defendant said the following:

> 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.
>
> . . .
>
> He [the plaintiff] was just some guy who was testifying so that his boss, Elmasry, could avoid answering tough questions. The idea of sending in a proxy -- a PR flack; a stunt double; an actor; whatever -- to give testimony on behalf of the real complainant is novel in law.

[184] The defendant testified that there were some connections between the plaintiff and Dr. Elmasry. I agree that there were connections. But this is not a fair comment analysis. This is a question of whether there was malice.

[185] The numerous errors made by the defendant also speak to the question of malice. Although he agreed in cross-examination that it was important to publish accurate facts, he did little or no fact-checking regarding the posts complained of, either before or after their publication. Nor did he accurately report what was taking place at the hearing. And, with one exception, when he learned that he got his facts wrong, he made no corrections.

[186] When Dr. Elmasry did not testify at the BCHRT hearing, but the plaintiff did, the defendant wrongly jumped to the conclusion that the plaintiff was testifying for him. This is an example of a mistake made by the defendant, which he made no effort to check.

[187] At trial, the defendant took little or no responsibility for the accuracy of the words complained of, routinely attempting to minimize or mischaracterize his own errors. The defendant did not, at any time, seek any input or comment from the plaintiff. When asked why not, he said that the plaintiff could have and did not contact him.

[188] I find that the defendant's dominant motive in these blog posts was ill-will, and that his repeated failure to take even basic steps to check his facts showed a reckless disregard for the truth.

[189] As a result, to the extent that I concluded above that certain of the words complained of were properly the subject of a fair comment defence, that defence is defeated by malice.

Damages

[190] This claim was brought under the Simplified Rules. As a result, the plaintiff has forgone any damages in excess of $100,000. Subject to that limitation, the plaintiff seeks general, aggravated and punitive damages.

[191] In an action for defamation, damages are presumed. Harm to reputation is presumed from the mere publication of the defamatory words: *MacRae v. Santa*, [2006] O.J. No. 3852 (S.C.), at para. 34, quoting from *Brown*.

[192] The factors to consider in determining the quantum of damages for defamation include the following: the plaintiff's position and standing, the nature and seriousness of the defamatory statements, the mode and extent of publication, the absence or refusal of any retraction or apology, the whole conduct and motive of the defendant from publication through judgment, and any evidence of aggravating or mitigating circumstances: *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416, 187 O.A.C. 238, at para. 30, citing *Hill*.

[193] In the Internet context, these factors must be examined in the light of the ubiquity, universality and utility of that medium: *Barrick*, at para. 31.

[194] Plaintiff's counsel submitted that an award well in excess of $100,000 would be warranted but for the cap imposed by the Simplified Rules. Large awards from other cases were relied upon. However, each libel case is unique and little can be gained from a detailed comparison of awards made in other cases: *Hill*, at para. 187.

[195] In this case, the plaintiff was at a vulnerable stage of his career during the publication of the nine blog posts. Although he had already secured an articling position at Lerners, which he completed over the period 2008/2009, he then had to look for a job. Lerners had no openings in his area. Contrary to his prior experience, he was having difficulty finding a job. Although he cannot be sure, he believes that the blog posts were a negative factor in his job search. A Google search, which would ordinarily be done by a prospective employer, brought up the many defamatory headlines at issue here and links to other defamatory statements by the defendant.

[196] The plaintiff's and his wife's family were in Toronto, but he decided to expand his search and ultimately did secure a job in Saskatchewan. Although he testified about his continuing worries that colleagues and others would see the blogs and believe their defamatory imputations, he has achieved some success in his position. However, he has deferred a return to Ontario out of concern that he will, once again, have problems finding a position.

[197] As for the nature and seriousness of the defamatory statements, they are extremely serious. They go to the heart of both the plaintiff's reputation as a lawyer and as a member of our society.

[198] The extent of publication is not known. The website is easily accessible by any member of the public, and there was some evidence at trial that in a three-day period in 2008, the defendant's blog received approximately 45,000 visitors, in approximately 100,000 visits. However, those figures are cumulative totals of all the blog posts that readers viewed during that time. The defendant published close to one hundred blog posts in that time period, only seven of which are the subject matter of this action. This illustrates the difficulty with these general statistics. The readership could have been quite modest, in Internet terms.

[199] However, the simple fact that these posts were all on the Internet, and there were many of them, increases the likely readership of at least the headlines if not also the posts.

[200] With respect to mitigation, there is no doubt that the defendant did not offer to or publish any apology or retraction for the words complained of.

[201] The defendant argues that if there was any harm to the plaintiff's career or reputation, it is just as likely that the harm was caused by the plaintiff's own actions in being publicly identified as a complainant against Maclean's and in taking an active role in that controversy. There certainly were many negative commentators over the course of the human rights commission proceedings against Maclean's, but they were mainly focused on the question of freedom of the press, not dishonesty and the other imputations here. While I take that other negative commentary into account, it does not have the major impact suggested by the defendant.

[202] In favour of a lower damages award, the defendant further argues that the readership was likely familiar with the defendant's reputation as a provocateur and his right-wing political views. That would certainly be the case for some readers, and I take it into account.

[203] In my view, subject to considering the relevant factors, awards of general damages for libel should be relatively modest. The most important remedy is the vindication of reputation arising from the judgment itself. Having considered all the relevant factors, I conclude that the appropriate award of general damages in this case is $50,000.

Aggravated damages

[204] Aggravated damages may be awarded in circumstances where the defendant's conduct has been particularly high-handed or oppressive, increasing the plaintiff's humiliation and anxiety arising from the libel: *Hill*, at para. 188.

[205] Like general or special damages, these damages are compensatory in nature. Their assessment requires consideration 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: *Hill*, at para. 189.

[206] Having found that the defendant was motivated by malice, I further find that it increased the injury to the plaintiff. There is ample testimony from the plaintiff in that regard.

[207] Aggravating factors include the repetition of the word "liar" in the headlines, the many references to lying in some of the later blogs and the inclusion of hyperlinks to all of the prior "liar" blogs in the eighth blog, posted a year later.

[208] The headlines are particularly aggravating given their impact in the context of Internet searches, especially by employers considering job applications.

[209] The defendant's failure to address any of the errors in the blogs, but one, is a further aggravating factor. There are numerous examples of the defendant's failure to take reasonable steps. For example, even after deciding that his first link regarding the meaning of taqiyya was not a good choice, he did not change it. Even after learning of certain errors he admits he made in the blogs, he addressed only one. Further, rather than taking a hard look at his publications when he was served with notice of libel, he just kept on going.

[210] It is also significant that the defendant is himself a lawyer. For most of the blogs at issue, he was purporting to report on a legal proceeding. This is underscored by his reliance on the qualified privilege for reports on quasi-judicial proceedings in the defence of this action. Further, he ought to have been aware of the serious ramifications of his words on the reputation of this law student. Yet, at trial, he repeatedly tried to minimize his mistakes and his lack of diligence.

[211] Overall, I conclude that an award of $30,000 is appropriate for aggravated damages.

Punitive damages

[212] 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. As set out in *Hill*, at para. 196:

> 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 others from acting in this manner.

[213] It is important to emphasize that punitive damages should only be awarded where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence: *Hill*, at para. 196. In this case, where the defendant is an individual and not a member of the major media, I find that the combined award above is sufficient to achieve these goals. I am therefore not awarding punitive damages.

Injunction

[214] No significant time or attention was spent during argument challenging this relief. To the extent that I have found the words complained of to be defamatory, they should be taken down from the defendant's website. Either each entire post should be taken down or steps should be taken to fairly remove the defamatory material. I have set out below a process to be followed in this regard.

Judgment

[215] I therefore order as follows:

(i) that the defendant pay the sum of $80,000 to the plaintiff; and

(ii) that the defendant remove the defamatory words from his website within 15 days.

[216] If the defendant proposes to remove only part of any of the nine posts, the defendant shall follow the following procedure:

(i) the defendant shall promptly provide plaintiff's counsel with the proposed edited text of the blog posts; and,

(ii) if the parties are unable to agree on the removal plan, the blog posts shall be taken down in their entirety pending submissions about the defendant's proposed approach, which shall be included in the written submissions referred to below.

[217] If the parties are unable to agree on interest and costs, the plaintiff shall make its submissions by brief written submissions together with a costs outline to be delivered by December 19, 2014. The defendant may respond by delivering brief written submissions by January 19, 2015.

Justice W. Matheson

Released: November 27, 2014

CITATION: Awan v. Levant, 2014 ONSC 6890
COURT FILE NO.: CV-09-00386377
DATE: 20141127

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KHURRUM AWAN

Plaintiff

– and –

EZRA LEVANT

Defendant

REASONS FOR DECISION

Justice Matheson

Released: November 27, 2014