QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2015 SKQB 7**

Date: **2015 12 08**
Docket: Q.B. 67/2012
Judicial Centre: Weyburn

BETWEEN:

WILLIAM GARY WHATCOTT

PLAINTIFF (APPLICANT)

- and -

CANADIAN BROADCASTING CORPORATION

DEFENDANT (RESPONDENT)

Counsel:

Thomas A. Schuck — for the plaintiff
Matthew A. Woodley — for the defendant

JUDGMENT — ELSON J.
January 8, 2015

Introduction

[1] The plaintiff, William Whatcott, alleges that he was defamed by a video clip which the defendant, Canadian Broadcasting Corporation, aired in a television and internet newscast on October 12, 2011. He has commenced an action in defamation against the defendant and now brings this application for summary judgment. Mediation, under Part VII of *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01, has been conducted, and both parties have filed their

required briefs. Accordingly, it is appropriate for the court to hear the application. Even so, the defendant contends that this case is not a proper one for a summary disposition.

[2] The case before the court is somewhat novel, for two reasons. First, the application is brought by the party who alleges the defamation. While applications for summary judgment are not unknown to defamation actions, particularly in other jurisdictions, they are more commonly brought by the party defending the claim. Such applications by the complaining party are rather less common.

[3] The second reason the case is novel pertains to the authorship of the impugned words. Unlike the customary defamation action, where the complainant alleges a defamatory meaning in words authored by a defendant or a third party, the plaintiff here complains about the defendant's depiction of words that he authored in a flyer which he also printed and distributed. The essence of his argument is that the manner and context in which his words were presented seriously distorted and misrepresented his views, thereby giving the words a defamatory meaning.

[4] For the reasons which follow, I am satisfied, firstly, that this case is appropriate for disposition by way of a summary judgment. As to the merits of the case, I am also satisfied that the plaintiff has made out a case for defamation, but that the damages to which he is entitled are considerably less than his counsel suggests.

Background

[5] The evidence in relation to this application is principally drawn from the plaintiff's affidavit, on which he was cross-examined by the defendant's counsel. The defendant filed no affidavit material. As will be noted in due course, I have also made some factual observations, drawn from two judicial proceedings, both of which are matters of public record.

[6] The plaintiff resides in Weyburn, Saskatchewan. He describes himself as "a pro-life and pro-family advocate," who is opposed to homosexuality. He first became active in this cause in 1989. Since 1994, the plaintiff's activities have become, more or less, a full-time endeavour.

[7] For the most part, the plaintiff's activism is characterized by picketing, demonstrations and distribution of material, primarily flyers. The flyers, which the plaintiff creates himself, are often handed out in the course of picketing and demonstration activities, or are distributed door-to-door. There are a series of flyers, going back a number of years.

[8] As one might expect, the plaintiff's activism has attracted attention, some of which he welcomes, and some not. In one notable instance, the plaintiff's work became the subject of a human rights complaint that made its way to the Supreme Court of Canada. The defendant covered the case and aired various news stories about it. One of those news stories is the subject of the plaintiff's claim.

[9] Although not specifically placed in evidence, the circumstances of the case are a matter of public record. As such, I consider it both necessary

and appropriate for me to describe and consider those circumstances in this application.

[10] In 2001 and 2002, the plaintiff distributed flyers in Regina and Saskatoon entitled, respectively, "Keep Homosexuality out of Saskatoon's Public Schools!" and "Sodomites in our Public Schools". The flyers prompted four separate complaints to the Saskatchewan Human Rights Commission [Commission]. In turn, the Commission appointed a human rights tribunal to hear the complaints.

[11] The tribunal rendered its judgment in May 2005. It concluded that s. 14 of *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1 [*Code*] was a reasonable restriction on the plaintiff's right of freedom of religion and expression, as guaranteed by a ss. 2(b) and (e) of the *Canadian Charter of Rights and Freedoms*. The tribunal went on to conclude that the materials distributed by the plaintiff constituted a breach of this provision of the *Code*. The plaintiff was ordered to pay compensation to each complainant.

[12] The plaintiff appealed the tribunal's decision to this Court. The appeal eventually made its way to the Supreme Court of Canada, where it was heard on October 12, 2011. The judgment of the court was rendered on February 27, 2013, and is now reported at *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, [2013] 1 SCR 467.

[13] Meanwhile, as the Saskatchewan case was winding its way to the Supreme Court of Canada, the plaintiff continued to print and distribute more flyers. One flyer, printed and distributed in 2008 – 2009, was written in response to a human rights case in Alberta. Despite the fact that this flyer was

not part of the human rights case in Saskatchewan, it is at the heart of this action. In order to distinguish it from the other flyers, I will refer to it simply as the "Alberta flyer."

[14] While the Alberta flyer was exhibited to the plaintiff's affidavit, the evidence as to its background and significance was not very well presented. Some evidence in this respect was drawn out in cross-examination, although defence counsel was understandably cautious when he pursued this line of questioning. The Alberta flyer, itself, provides evidence of the plaintiff's unhappiness with a decision made by an Alberta human rights panel, but it provided little detail about the decision or its significance to the plaintiff's views about it.

[15] Despite the lack of detail in the affidavit, I concluded it would be appropriate to conduct my own review, provided that it was confined to matters of public record. Armed with allegations in the statement of claim and information from the Alberta flyer, I was able to locate a 2003 decision of a hearing panel of the Alberta Human Rights and Citizenship Commission, in *Johnson v Music World Limited*, 2003 AHRC 3 [*Music World*]. In my view, it is necessary to consider the Alberta flyer against the background of the *Music World* decision.

[16] In *Music World*, an individual filed a complaint about a music store retailing a CD album by the group known as "Deicide". The album entitled "Upon the Cross" included a song with the title "Kill the Christian". The complainant in the case asserted that the respondents, by marketing the album, discriminated against him on the grounds of his religious beliefs. He

specifically contended that the distribution of the albums exposed Christians to hatred and contempt. The panel disagreed. It dismissed the complaint, finding that there had not been a violation of the applicable legislation, the *Human Rights, Citizenship and Multiculturalism Act*, RSA 2000, c H-14 (now the *Alberta Human Rights Act*, RSA 2000, c A-25-5). Specifically, the panel held that the medium of the message lacked credibility and, as such, it was not likely to expose a person or a class of persons to hatred or contempt.

[17] As part of its consideration of the evidence, the panel recited in its decision the complete lyrics of the song that prompted the complaint. In order that they can be compared to the words later used by the plaintiff in the Alberta flyer, they are similarly recited here:

> *Kill The Christian*
> *You are the one we despise*
> *Day in day out your words compromise lies*
> *I will love watching you die*
> *Soon it will be and by your own demise*
> *Buried in hypocrisy*
> *Lacerate your faith in God*
> *Morally diseased*
> *On the cross of Calvary your body bashed defeated stabbed*
> *Blessing as you hate*
> *Loyal to your enemies*
> *Monetary faith*
> *As him you will pay for the lies of your prophecy*
> *Satan wants you dead*
> *Kill the Christian, kill the Christian*
> *Kill the Christian, kill the Christian*
> *Kill the Christian, kill the Christian, kill the Christian*
> *Armies of darkness unite*
> *Destroy their temples and churches with fire*
> *Where in this world will you hide*
> *Sentenced to death, the anointment of Christ*
> *In due time your path leads to me*
> *Put you out of your misery*
> *The death of prediction*

Kill the Christian
Kill the Christian, dead!

[18] While the evidence does not disclose when the plaintiff first became aware of the *Music World* decision, he was obviously aware of it by 2008-2009 when he prepared and distributed the Alberta flyer. The content of the flyer reads like a form of mocking criticism of the decision, the panel and, in particular, the panel chairperson.

[19] A more complete description of the Alberta flyer is in order here. It is a two sided letter sized document. At the top of the first page, there is a caption, in bold font, reading "Kill the homosexuals!". Following this caption there is a photograph of two men engaged in a sexual act on a public street with a thumbnail photograph of the panel chairperson superimposed over the lower midsection of one of the men. Below the photograph there is a paragraph, also in bold font, in which the plaintiff is critical of the panel chairperson. Specifically, the plaintiff complained about the chairperson's view that "calling for the death of Christians is okay but this behaviour is a human right beyond reproach!!!".

[20] Below the paragraph containing the criticism, the plaintiff set out a poem/song which the plaintiff, on the subsequent page, describes as a redacted version of the lyrics to "Kill the Christian". The poem/song, printed in italicized regular script that fills out the remainder of the first page and carries over to the next page, reads as follows:

Kill The homosexual
You are the one we despise
Day in day out your words compromise lies

I will love watching you die
Soon it will be and by your own demise
Buried in hypocrisy
Lacerate your faith in sodomy
Morally diseased
On the Cross of Calvary your body bashed defeated stabbed
Blessing as you hate
Loyal to your enemies
Monetary faith
As him you will pay for the lies of your prophecy
God wants you dead
Kill the homosexual, kill the homosexual
Kill the homosexual, kill the homosexual
Kill the homosexual, kill the homosexual, kill the homosexual
Armies of darkness unite
Destroy their bath houses and porn shops with fire
Where in this world will you hide
Sentenced to death, the anointment of Sodom
In due time your path leads to me
Put you out of your misery
The death of prediction
Kill the homosexual
Kill the homosexual, dead!
Author and redactor Bill Whatcott

[21] Following the poem/song, the plaintiff wrote out four more paragraphs. All four paragraphs appear on the second page of the Alberta flyer. In the second of these paragraphs, the plaintiff included four sentences which he regards as an "exculpatory statement" or a disclaimer. These four sentences read as follows:

> None the less, Bill Whatcott does not want homosexuals to be killed. While Bill Whatcott posted the above song on this flyer (with some minor redactions to the original text) advocating murder and violence, he wants to be very clear this flyer **SHOULD NOT BE INTERPRETED** as an incitement to violence. In fact, Bill Whatcott would much prefer homosexuals repent of their sins and turn to Jesus Christ so they can inherit the Kingdom of Heaven. Bill Whatcott looks forward to spending the rest of eternity fellowshipping with millions of repentant and

> forgiven homosexuals in the loving presence of our risen Saviour and Lord Jesus Christ! …

[22] In cross-examination, the plaintiff testified that, when preparing his flyers, he commonly uses photographs and specific words or phrases that are designed to attract attention and to provoke both thought and debate. With respect to the Alberta flyer, the plaintiff candidly admitted that, by using the combination of the title, the words on the page and the photograph, he "definitely wanted a shock value and... wanted to cause people to think".

[23] When the Saskatchewan human rights case was heard by the Supreme Court of Canada, the Alberta flyer had been out for almost three years. On the same day the appeal was heard, but after the hearing, the defendant broadcast a news story about the case. Associated with the story, there was an audio-video clip. The clip is two minutes and twelve seconds long, and is narrated by the defendant's reporter, Cameron MacIntosh.

[24] Although the plaintiff's complaint relates primarily to only a fragment of the video portion of the clip, I agree with the defendant's submission that the broadcast clip must be considered as a whole, with both the video and audio components. Accordingly, I will describe the video depictions along with the related audio.

[25] The video aspect of the clip begins with an archived depiction of the plaintiff delivering a flyer to a private residence. This is immediately followed, at the 8 second mark, by a camera shot of the first page of the Alberta flyer (as opposed to one of the flyers at issue in the appeal). The camera shot, which is essentially a still image, lasts for approximately 4

seconds. It depicts the first 12 lines of the poem/song as well as the paragraph which precedes it. At the 12 second mark, the video features a close-up image of the poem/song. The close-up image is unmistakably centred on the 15th, 16th and 17th lines of the poem/song. These are the lines in which the phrase "kill the homosexual" appears seven times. This close-up image lasts for 1 second before it fades to an image of the exterior of the Supreme Court of Canada building. Meanwhile, the audio aspect for this portion of the clip is a narration by Mr. MacIntosh, as follows:

> MacIntosh (narrating): "Ten years ago, Bill Whatcott set out to make a point with these flyers, speaking out against what he calls the sin of homosexuality. Now those very flyers are at the heart of a Supreme Court case that could very well topple Canada's hate laws."

[26] The remaining 1 minute and 59 seconds of the broadcast clip contain brief interviews of four people: the plaintiff, one of the complainants, the Chief Commissioner and an unidentified free speech advocate. Between the interview segments, there were video depictions of one of the actual flyers in dispute, video of the plaintiff attending earlier hearings and a segment of the argument made by the plaintiff's counsel in the Supreme Court. In one of the video depictions of the plaintiff, he is wearing a white T-shirt prominently displaying the phrase "Homosexuality is a Sin" on the front.

[27] The audio of this portion of the broadcast clip, after the opening narration already described, is as follows:

> William Whatcott: "Christians have a right to speak on moral issues such as homosexuality, and I see it as specious to characterize all our speech as hate speech."

> MacIntosh: "At issue is the text of a flyer distributed in Saskatoon and Regina. Whatcott, a former gay prostitute, called gay people filthy, sodomites and pedophiles. James Komar is a Christian gay advocate. He was one of four Saskatchewan men to complain."
>
> James Komar: "I felt that it was hate literature because I'm gay but I am not a sodomite. I'm not a child molester. I'm not obsessed with sex."
>
> MacIntosh: "The Saskatchewan Human Rights Commission found the material hateful and fined Whatcott $17,500. Whatcott refused to pay and fought it all the way to the Saskatchewan Court of Appeal, where he won. Now the Saskatchewan Human Rights Commission is asking the Supreme Court to define the limits of free speech."
>
> David Arnot (Commissioner, Saskatchewan Human Rights Commission): "Every right has a limit. And with respect to the limit on freedom of expression, there is a responsibility not to devolve into the use of words of hate as a weapon to make hateful comments and harm individuals."
>
> Thomas Schuck (shown addressing the Supreme Court of Canada): "He should be able to preach forcefully, and drive home his points to his target audience."
>
> MacIntosh: "Whatcott's lawyer argues that the statements are not hateful because they are against an action, not a person. It all poses an uncomfortable question. Can hate be justified and protected as legitimate opinion? Twenty-five human rights, liberties, religious groups and media organizations have signed on as intervenors, some in reluctant support of Whatcott."
>
> Unidentified person: "And in its content, you know, we reject it, but in a free and democratic society, you've got to let speech like this happen."
>
> MacIntosh: "Now the question of free speech and the protection from it is now before seven Supreme Court justices. A decision could take months. As for Whatcott, he says he's going to keep saying what he's saying. Cameron MacIntosh, CBC news, Regina."

[28] The portion of the broadcast clip that depicts a page from one of the flyers, which was the subject of the human rights case, lasts for

approximately 4 seconds, and coincides with the part of Mr. MacIntosh's narration where he describes the contents of the flyer. Although there was a close-up image of the text, where certain passages were highlighted in yellow, I found that the text was not shown with the same prominence as certain lines were shown from the Alberta flyer.

[29] After the broadcast, on November 8, 2011, the plaintiff, through his counsel, wrote to the defendant, complaining about both this broadcast and a radio broadcast occurring that same day (the radio broadcast is not part of this action). The plaintiff sought a retraction, but did not specifically demand an apology. The defendant provided neither.

The Pleadings

[30] The plaintiff's complaint focuses on that portion of the broadcast, near the beginning, where the defendant's camera depicted the first page of the Alberta flyer. In his statement of claim, the plaintiff contends that by depicting the Alberta flyer in the manner it did, without referencing the disclaimer on the second page, the defendant conveyed the impression that the plaintiff advocated the killing of homosexual people, which was the opposite of the meaning he actually conveyed in the flyer, when read as a whole. The plaintiff further contends, in both the statement of claim and his affidavit, that the defendant acted maliciously in creating the false impression and with careless regard as to whether the context of the words in the Alberta flyer made that impression true or not. Finally, the plaintiff pleads that, as a consequence of the allegations, he has sustained injury to his reputation which, in turn, has negatively impacted his ability to raise funds for his cause.

[31] In its statement of defence, the defendant admits to a number of facts. First, it admits it published the broadcast complained of on October 12, 2011, and that the broadcast also appeared on the internet. Second, the defendant admits that, in the broadcast, it panned the front page of the Alberta flyer, depicting the text which I have described in paragraph 23 of this judgment. Third, the defendant admits that the relevant camera panned the Alberta flyer so as to show the text of the poem/song, from line 10 to line 22, inclusive. Fourth, the defendant admits that the plaintiff's statement, which he describes as an exculpatory statement, appeared on the second page of the flyer.

[32] In the addition to these admissions, the defendant pleads certain facts it regards as material. Specifically, the defendant asserts that the entire first page of the Alberta flyer was shown over a period of four seconds in the broadcast clip. It also asserts that it provided no comment in regard to the Alberta flyer, providing it simply as background for the broadcast and "to illustrate the provocative nature of the Plaintiff's flyers."

[33] As to the plaintiff's claim of defamation in respect of the broadcast, the defendant denies it, entirely. In the alternative, the defendant suggests that the broadcast, taken as a whole, would not cause viewers to reach the conclusion that the plaintiff advocated the killing of homosexual people. Rather, the defendant contends that the broadcast, viewed as a whole, would cause viewers to conclude that the plaintiff:

(1) hates homosexuals;

(2) believes sex acts between persons of the same gender are aberrant and abhorrent;

(3) believes God shares his views of homosexuals;

(4) advocates discrimination against homosexuals and the restriction of their civil rights.

The defendant also pleads the defence of justification and qualified privilege.

Issues

[34] As already mentioned, I have concluded that this case is an appropriate one for the court to determine by way of summary judgment. I will explain my reasons for this conclusion later in this judgment.

[35] Having decided that summary judgment is appropriate, the remaining issues raised in this action are as follows:

(1) Was the defendant's broadcast defamatory of the plaintiff?

(2) If the broadcast was defamatory, has the defendant established any of the defences it has pleaded?

(3) What are the plaintiff's damages?

Application of the Summary Judgment Rules

[36] The new summary judgment process is set out in Division 2 of Part 7 of *The Queen's Bench Rules*. Rule 7-5 sets out the criteria a court must consider in deciding whether to grant summary judgment for all or part of an action. Rule 7-5 reads as follows:

> **7-5**(1) The Court may grant summary judgment if:
>
> (a) the Court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by summary judgment and the Court is satisfied that it is appropriate to grant summary judgment.
>
> (2) In determining pursuant to clause (1)(a) whether there is a genuine issue requiring a trial, the Court:
>
> (a) shall consider the evidence submitted by the parties; and
>
> (b) may exercise any of the following powers for the purpose, unless it is in the interest of justice for those powers to be exercised only at a trial:
>
> (i) weighing the evidence;
>
> (ii) evaluating the credibility of a deponent;
>
> (iii) drawing any reasonable inference from the evidence.
>
> (3) For the purposes of exercising any of the powers set out in subrule (2), a judge may order that oral evidence be presented by one or more parties, with or without time limits on its presentation.
>
> (4) If the Court is satisfied that the only genuine issue is a question of law, the Court may determine the question and grant judgment accordingly.

> (5) If the Court is satisfied that the only genuine issue is the amount to which the applicant is entitled, the Court may order a trial of that issue or grant judgment with a reference or an accounting to determine the amount.
>
> (6) If the Court is satisfied that there is a genuine issue requiring a trial with respect to a claim or defence, the Court may nevertheless grant judgment in favour of any party, either on an issue or generally, unless:
>
> > (a) the judge is unable on the whole of the evidence before the Court on the application to find the facts necessary to decide the questions of fact or law; or
> >
> > (b) the Court is satisfied that it would be unjust to decide the issues on the application.
>
> (7) If an application for summary judgment is dismissed, either in whole or in part, a judge may order the action, or the issues in the action not disposed of by summary judgment, to proceed to trial in the ordinary way.
>
> (8) If an application for summary judgment is dismissed, the applicant may not make a further application pursuant to rule 7-2 without leave of the Court.

[37] Since the current Rules came into force on July 1, 2013, the summary judgment process has attracted considerable attention. Under the circumstances, this is understandable. As was observed by Popescul C.J.Q.B. in *Pervez v Caskey*, 2013 SKQB 377, at para 29, 431 Sask R 201 [*Pervez*], the new summary judgment rules represent "a complete overhaul" of the Rules that preceded it.

[38] Initially, this Court's approach to the criteria in Rule 7-5 was to apply the so-called "full appreciation" test. This test had earlier been applied in Ontario, the province from which our summary judgment rules were emulated. Under the full appreciation test, the question whether there was a

genuine issue requiring a trial depended on the court's ability to gain a full appreciation of the issues of the case without a trial. See *Combined Air Mechanical Services Inc. v Flesch*, 2011 ONCA 764, 108 OR (3d) 1. This Court followed the full appreciation test in *Pervez*; *Park Derochie Coatings (Saskatchewan) Inc. v 607911 Saskatchewan Ltd*., 2013 SKQB 422, 434 Sask R 104; and *Royal Bank of Canada v Hrenyk*, 2014 SKQB 15, 436 Sask R 129.

[39] Subsequently, the Supreme Court of Canada, in *Combined Air Mechanical Services Inc. v Flesch*, 2014 SCC 7, [2014] 1 SCR 87 (sub nom. *Hryniak v Mauldin*) [*Hryniak*], rejected the full appreciation test in favour of a test that placed greater emphasis on access to justice and proportionality. Of course, the decision in *Hryniak* has caused this Court to modify its approach. This modification is reflected in the decisions of this Court in *Tchozewski v Lamontagne*, 2014 SKQB 71, 440 Sask R 34 [*Tchozewski*]; *Saskatoon & Region Home Builders' Association Inc. v Children's Wish Foundation of Canada*, 2014 SKQB 89, 440 Sask R 300; *Elchuk v Gulansky*, 2014 SKQB 252; and *Jo-Mar Fashions Inc. v Giang*, 2014 SKQB 251, [2014] 11 WWR 801.

[40] In *Tchozewski*, which was the first case after *Hryniak* to consider the new test, Barrington-Foote J. conducted a helpful analysis of the new test. In doing so, he took the "roadmap" from *Hryniak* and applied it to the landscape of the Saskatchewan *Queen's Bench Rules*. This roadmap is described in para. 30 of the judgment and appears as follows:

> 30 The central question posed on a Rule 7-2 application, accordingly, is whether summary judgment will achieve what Karakatsanis J. calls (at para. 28) the "principal goal", and Popescul C.J.Q.B calls "the overarching consideration" (at

para. 49, *Pervez*): that is, a fair process that results in a just adjudication of the dispute before the court. The answer to this question calls for an analysis of the affidavit and other evidence presented and the issues raised by the application, in the context of the litigation as a whole. In *Hyrniak*, Karakatsanis J. breaks that analysis down into discrete steps and key principles -- a "roadmap" -- based on the various elements of the summary judgment rules. In brief, the key elements of that roadmap, in the context of a Rule 7-2 application, are as follows:

> 1. The court must first decide if there appears to be a genuine issue requiring a trial within the meaning of Rule 7-5(1)(a)), based solely on the evidence before the court, and without using the powers provided by Rule 7-5(2)(b) to weigh the evidence, evaluate credibility and draw inferences. (*Hryniak*, para. 66)
>
> 2. There will be no genuine issue requiring a trial if the judge is able to reach a fair and just determination on the merits based on the affidavit and other evidence. That will be so if the summary judgment process:
>
> > (a) allows the judge to make the necessary findings of fact;
> >
> > (b) allows the judge to apply the law to the facts; and
> >
> > (c) is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial. (*Hryniak*, para. 49)
>
> 3. The issue is not whether the summary judgment process is as thorough or the evidence is as complete as at trial. It is whether the judge is confident he or she can find the facts and apply the relevant legal principles so as to fairly resolve the dispute. If the judge has that confidence, proceeding to trial is generally not proportionate, timely or cost effective. A process that does not give the judge confidence in his or her conclusions, on the other hand, is never proportionate. (*Hryniak*, paras. 50 and 57)
>
> 4. If there appears to be a genuine issue requiring a trial, the court should next determine if a trial can be

avoided by using Rule 7-5(2)(b) powers to weigh evidence, evaluate credibility and draw inferences, and whether it is in the interests of justice that those powers be exercised only at trial. (*Hryniak*, para. 56)

5. In deciding whether there is a genuine issue requiring trial, and whether it is in the interests of justice to use the powers provided by Rule 7-5(2)(b) to avoid a trial, the court must consider the nature of the evidence and issues. It must also consider proportionality in the context of the litigation as a whole. The relevant factors may include, but are not limited to:

(a) the complexity of the claim;

(b) the amount at issue;

(c) the importance of the issues;

(d) the relative cost and speed of a summary judgment application, as compared to trial;

(e) whether better evidence will be available at trial than on the application, and the nature and extent of the conflict in the evidence, including:

(i) whether there is competing evidence from multiple witnesses, the evaluation of which would benefit from cross-examination;

(ii) whether credibility determinations are at the heart of the issues to be determined; and

(iii) whether credibility determinations are made more difficult by the shortage of reliable documentary yardsticks.

(f) whether the court is able to fairly evaluate the evidence, including the extent to which it would assist the court to have evidence presented by way of a trial narrative, to hear and observe witnesses and to have the

> assistance of counsel in reviewing the facts and the law within the conventional trial process;
>
> (g) whether summary judgment would resolve all claims against all parties, or whether a trial will be necessary in any event, raising, among other things, the possibility of duplicative proceedings or inconsistent findings of fact; and
>
> (h) whether the application could dispose of an important claim against a key party, thereby reducing cost and delay. (Rule 1-3, *Hryniak*, *supra*, paras. 58, 60 and 66, and *Pervez*, para. 48)
>
> 6. The court also has the discretion to permit a party to present oral evidence pursuant to Rule 7-5(3) if it would allow the court to reach a fair and just adjudication on the merits and is the proportionate course of action. (*Hryniak*, para. 63)

[41] As I discern the steps to be followed, it is first necessary for the court to determine if there is a genuine issue which would require a trial without a specific exercise of any of the powers set out in Rule 7-5 (2)(b). In other words, the question is whether or not I am satisfied that there was a genuine issue requiring a trial without having to weigh the evidence, evaluating credibility or drawing inferences from the evidence presented. There will be no genuine issue requiring a trial if the process allows the court to make the necessary findings of fact, allows the court to apply the law to those facts and if the process provides a proportionate more expeditious and less expensive means to achieve a just result than with a trial.

[42] In order to complete the first step, assessing whether there is a genuine issue requiring a trial, without using the powers set out in Rule 7-5

(2)(b), the court must do the analysis described in sub-paras. 2 and 3 of the roadmap. In other words, the court must ask the question whether it is confident it can make the necessary findings of fact, apply the law to those facts and do so in a way that reflects a proportionate, expeditious and economic means of attaining a just result.

[43] In the case before the court, having regard to the pleadings and evidence produced, I am satisfied that there is no genuine issue that would require a trial. As far as I can determine, there are no meaningful facts in dispute. The content of both the broadcast and the Alberta flyer have not been challenged by the defendant. Moreover, the defendant admits to having broadcast the video clip by television and by the internet. While it would have been preferable for the court to receive more evidence, particularly about the reasons for the defendant to have depicted the Alberta flyer in the manner it did, as well as more evidence going to the plaintiff's damages, I do not regard this lack of evidence as an impediment to a summary determination. While either party could have pursued and subsequently produced such evidence, I must defer to their respective decisions not to do so.

[44] In arriving at this decision, I draw some comfort from an earlier judgment of this Court in *Vellacott v Laliberte*, 2012 SKQB 23, 390 Sask R 120 [*Vellacott*]. In that case, the plaintiff in a defamation action brought an application for summary judgment under former Rule 492, which was applicable to cases under the then simplified procedure. Under the former Rule, a court was obliged to determine the case summarily unless it could not be decided in the absence of cross-examination or it would be otherwise unjust to do so. Popescul C.J.Q.B. found the facts were not in dispute and that the

only real issues before the court related to whether the undisputed facts made out the tort of defamation and, if so, the quantum of damages. On this basis, he concluded that the issues could be decided in the absence of cross-examination and that it would not be otherwise unjust to do so. In the present case, cross-examination on the plaintiff's affidavit has already been done. While the present rules differ somewhat from the former Rule 492, I believe the court here is in as good or better a position to determine this case than was the situation in *Vellacott*.

Defamatory Meaning and a Lesser Defamatory Meaning

[45] In 2009, Canadian courts received a helpful refresher on the law of defamation from the Supreme Court of Canada in *Grant v Torstar Corp*. 2009 SCC 61, [2009] 3 SCR 640 [*Grant*]. This judgment, along with the companion decision in *Quan v Cusson*, 2009 SCC 62, [2009] 3 SCR 712 [*Cusson*], are principally known for first recognizing the "responsible communication on matters of public interest" defence. Before articulating the analysis of the new defence, Chief Justice McLachlan, in paras. 27 – 37, set out a concise description of the law as it pertains to liability for defamation and its various defences. In para. 28, the Chief Justice identified the three elements necessary to support a defamation judgment as follows:

> (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;
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> (2) that the words in fact referred to the plaintiff; and
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> (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.

[46] In the present case, there is no issue as to the second or the third elements in this list. Accordingly, the principal issue relates to whether the defendant's broadcast conveyed a defamatory meaning of the plaintiff. If the words are defamatory, the defendant raises a secondary issue, namely, whether the words have a lesser defamatory meaning which the defendant was justified in conveying as true.

[47] The definition of a defamatory meaning has been expressed in a variety of ways, each with a wide range of verbs and/or adjectives to describe the impact of certain published words. Despite the variety of expressions, they all come down to the same essential question the Chief Justice posed in *Grant*, namely, whether the relevant words have a tendency to diminish the reputation of the plaintiff in the view of reasonable people. In two relatively recent Saskatchewan cases, *Vellacott* and *Taylor v Cox*, 2013 SKQB 146, 419 Sask R 98, this Court expressly accepted a definition drawn from the Ontario Superior Court of Justice in *Leenen v Canadian Broadcasting Corporation* (2000), 48 OR (3d) 656 (Ont Sup Ct), where the following definition was observed, at para 40:

> [40] A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers, a statement which tends to lower that person in the estimation of right-thinking members of society generally and, in particular, to cause the person to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem. The very essence of a defamatory statement is its tendency to injure reputation, which is to say all aspects of a person's standing in the community.

[48] It is clear that, in applying the definition, the court is obliged to consider the relevant publication, as a whole, and not the fragment where the

alleged defamatory words appear. In this respect, I agree with counsel for the defendant that the plaintiff's counsel was wrong when he focussed virtually all of his arguments on the five second portion of the broadcast, where the image of the Alberta flyer appeared.

[49] Having said this, I also discern the defendant's argument as suggesting that the court must simply identify a principal meaning which would characterize the entire broadcast and leave it at that. On this point, I disagree. In my view, the purpose behind the approach of considering the entire publication is simply to determine whether other parts of it alter, in a meaningful way, the defamatory meaning of the excerpt complained of. This approach, and the purpose behind it, hearkens back to the axiom of Alderson, B. in *Chalmers v Payne* (1835), 2 C.M. & R. 156 at 159 when he said that "the bane and the antidote must be taken together." In other words, the court is obliged to determine whether the sting of the defamatory words in a publication has been diminished, or even cured, by the remainder of the publication.

[50] The defendant's principal contention is that there is no defamatory meaning in the broadcast when considered as a whole. The defendant argues that ordinary and reasonable viewers, viewing the entire broadcast only once, would understand that the words displayed from the Alberta flyer were part of an entire document that, from a practical perspective could not be broadcast in its entirety. Further, since the entire broadcast did not contain any suggestion that the plaintiff had ever encouraged violence against homosexual people, it would not have been reasonable for ordinary and reasonable viewers to believe any such suggestion. Rather, the meaning

they would be left with is simply that the plaintiff regards homosexuality as a sin and distributes his flyers as part of his outspoken advocacy against it, and that one of the flyers is at the heart of a hate speech issue before the Supreme Court of Canada. The defendant goes on to assert that such a meaning is true and, therefore, not defamatory.

[51] The defendant's secondary argument is that, if the broadcast conveyed a defamatory meaning, it was a lesser defamatory meaning, which is true. As I understand this submission, the lesser defamatory meaning is little different from the meaning the defendant advances as part of its principal argument.

[52] With respect, I cannot agree with the defendant's submissions, in regard to either the principal or the lesser defamatory meanings. In my view, by focusing the camera's attention on the phrase "kill the homosexual", as it appeared in the Alberta flyer, and doing so early on in the broadcast, the defendant conveyed the impression that the plaintiff's activism was considerably more extreme than it actually was. Indeed, it conveyed the impression that the plaintiff's views extended to inciting violence against homosexual people. Despite the fact that the focus on these words was no more than five seconds long, I am satisfied that it was long enough to have injured the plaintiff's reputation in the estimation of reasonable viewers. While the rest of the broadcast did nothing to support or reinforce this impression, it also did nothing to reduce it or to diminish the injury.

[53] Further, the fact that it was not practicable to broadcast the entire flyer is irrelevant. In my view, this would only pose a dilemma for the

defendant if there was some compelling reason to have broadcast the content of the Alberta flyer, at all. From the evidence, I see no reason, compelling or otherwise, to have done so. No part of the news story pertained to the content of the Alberta flyer. It was not one of the flyers at issue before the court, and it played no obvious role in the true focus of the story, which centered on the debate between freedom of speech and protection against hate literature.

[54] As for the fact that the plaintiff authored and otherwise published the words, albeit by redaction, I am satisfied that, while it might play a role in the assessment of damages, it is not a defence to the assertion of a defamatory meaning. The law recognizes, as I believe it must, that a person's words can be restated in a context that distorts the author's intended meaning. Where the distortion creates a defamatory meaning, liability will follow, subject to any defences that otherwise arise.

[55] The Ontario decision in *Myers v Canadian Broadcasting Corp.* (1999), 103 OTC 81 [*Myers*] (Ont Sup Ct), affirmed (2001), 54 OR (3d) 626 (Ont CA) (application for leave to appeal to SCC dismissed February 7, 2002) illustrates this point well. In *Myers*, the plaintiff was a cardiologist who had been asked to participate on a committee convened to assess the safety and efficacy of a certain heart medication. The plaintiff had disclosed the fact that he had worked with the pharmaceutical company in relation to this drug. The plaintiff, along with certain other committee members, was critical of some of the studies that had concluded all forms of the medication were dangerous, irrespective of whether they were used in short acting or long acting forms. The defendant's television news show, "**the fifth estate"**, ran a program on the drug which interspersed comments made by the plaintiff in an interview

and at a committee meeting. The plaintiff asserted that there had been very selective editing of his comments such that, when the final version was broadcast, it cumulatively created several defamatory innuendos.

[56] At trial, Bellamy J. found liability against the defendant, a finding later affirmed by the Ontario Court of Appeal. In arriving at his decision, the trial judge found the defendant had gone out of its way to be selective and inappropriate in its use of the plaintiff's words. The cumulative effect of the broadcast, and the selective use of the plaintiff's comments, created a defamatory impression. Among other things, it created the defamatory meaning that the plaintiff did not care about the harm caused by the drug he was recommending, and that he was assisting the manufacturer in promoting a drug he knew to be dangerous.

[57] Turning back to the present case, I am satisfied that, when viewing the broadcast as a whole, the selective presentation of the plaintiff's words from the Alberta flyer, conveyed the impression that plaintiff's views extended to inciting violence against homosexuals. I also have no difficulty concluding that this presentation would tend to lower the plaintiff's reputation in the eyes of a reasonable person, and, as such, is defamatory. I also reject the defendant's submission that the words are capable of a lesser defamatory meaning.

Defences: Justification and Qualified Privilege

[58] Once a defamatory meaning has been identified, the burden rests on the defendant to present a defence. As already mentioned, the defendant raises two defences in its pleading, justification and qualified privilege.

[59] In the defence of justification, the burden falls on the defendant to show that the "sting" of the defamatory words in question is justified. As observed in *Grant*, the defence of justification obliges the defendant to adduce evidence showing that the defamatory statement was "substantially true". In the case before the court, the defendant has not presented any evidence to support the impression that the plaintiff encourages or condones acts of violence against homosexual persons. In fairness, I perceived the defendant's submission, about the impugned words having a lesser defamatory meaning, as an argument that extended to justification of the lesser meaning, only. As I have already found that the words are not capable of a lesser defamatory meaning, it necessarily follows that the defence of justification in this regard cannot succeed.

[60] With respect to the defence of qualified privilege, the defendant's counsel did not raise this issue in his brief, even though it was pleaded in the statement of defence. At the time oral submissions were received, counsel essentially conceded that the defence would have very limited application. In my view, this concession was wise.

[61] The defence of qualified privilege is a very specific concept which focuses on the publisher's duty to communicate information and a corresponding interest in the reader or viewer to receive it. Where the defence has been successful, it has often depended on the publisher and the receiver of the information having a special relationship that characterizes both the respective duty to publish, and the corresponding interest to receive, the relevant information. In the context of media organizations, it is difficult to establish such a relationship. As a result, the defence has rarely succeeded.

[62] Since the decisions in *Grant* and *Cusson*, the defence of qualified privilege, as it pertains to publication of news stories, has essentially been displaced by the "responsible communication on matters of public interest" defence. The validity of this defence depends on a twofold test: 1) the publication must be on a matter of public interest, and 2) the publisher must show that there was diligence exercised in verifying the allegations, having regard to all the relevant circumstances. The defendant did not raise this defence in its submissions to the court. Having said that, it did plead a defence it described as "neutral reportage". To the extent this pleading engages the responsible communications defence, I have had no difficulty in finding that neither element of the twofold test had been made out. In particular, for the reasons set out in paragraph 53 of this judgment, I find nothing to suggest that the publication of the impugned excerpt from the Alberta flyer was a matter of public interest, or was even relevant to the focus of the broadcast as a whole.

Damages

[63] The assessment of damages in a defamation action can be one of the most vexing and difficult tasks for a court. The assessment eschews precise calculation and is a matter to be determined exclusively by the finder of fact. As observed by Cory J. in *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130 [*Hill*], at para 190:

> 190 If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff. See, for example, *Walker v. CFTO Ltd.*, *supra*, at p. 111; *Vogel, supra*, at p. 178; *Kerr v. Conlogue*

> (1992), 65 B.C.L.R. (2d) 70 (S.C.), at p. 93; and *Cassell & Co. v. Broome, supra*, at pp. 825-26. The malice may be established by intrinsic evidence derived from the libellous statement itself and the circumstances of its publication, or by extrinsic evidence pertaining to the surrounding circumstances which demonstrate that the defendant was motivated by an unjustifiable intention to injure the plaintiff. See *Taylor v. Despard, supra*, at p. 975.

[64] The assessment of damages in a libel case flows from a particular confluence of the following elements: the nature and circumstances of the publication of the libel, the nature and position of the victim of the libel, the possible effects of the libel statement upon the life of the plaintiff, and the actions and motivations of the defendants. It follows that there is little to be gained from a detailed comparison of libel awards.

[65] The factors identified by Cory J. were drawn from the following passage by Philip Lewis, *Gatley on Libel and Slander*, 8th ed (London: Sweet & Maxwell, 1981) at pps 592-593 [*Gatley*] (restated in para. 182 of *Hill*):

> Section 1. Assessment of Damages
>
> 1451. Province of the jury. In an action of libel "the assessment of damages does not depend on any legal rule." The amount of damages is "peculiarly the province of the jury," who in assessing them will naturally be governed by all the circumstances of the particular case. They are entitled to take into their consideration the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology, and "the whole conduct of the defendant from the time the libel was published down to the very moment of their verdict. They may take into consideration the conduct of the defendant before the action, after action, and in court at the trial of the action," and also, it is submitted, the conduct of his counsel, who cannot shelter his client by taking responsibility for the conduct of the case. They should allow "for the sad truth that no apology, retraction or withdrawal

> can ever be guaranteed completely to undo the harm it has done or the hurt has caused." They should also take into account the evidence led in aggravation or mitigation of damages. …

[66] The plaintiff in this case also seeks aggravated and punitive damages. In considering these issues, it is wise to return to the majority judgment in *Hill*, where Cory J. again adopted relevant comments from the *Gatley* text at pps 593-594 (restated in para. 183 in *Hill*):

> 1452. Aggravated damages. The conduct of the defendant, his conduct of the case, and his state of mind are thus all matters which the plaintiff may rely on as aggravating the damages. "Moreover, it is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation." In awarding 'aggravated damages' the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous, rather than a more moderate award to provide an adequate solatium … that is because the injury to the plaintiff is actually greater, and, as the result of the conduct exciting the indignation, demands a more generous solatium."

[67] The general interpretation drawn from this comment is that, while a certain degree of malice is necessarily presumed from the indefensible publication of a defamatory statement, the presence of actual malice on the part of the defendant must be taken to have aggravated the injury such that an award of aggravated damages is justified.

[68] As for punitive damages, Cory J. found they were confined to circumstances where the conduct of the defendant justified considerations of punishment and deterrence. In this respect, he said the following at para. 196:

> 196 Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

[69] While there was a comment in *Hill* to the effect that detailed comparison with other libel cases may not be particularly helpful, I have noted, with interest, two decisions where the analysis in *Hill* was applied. In *Vellacott*, Popescul C.J.Q.B. referenced the same passages included here. In that case, the plaintiff was a sitting Member of Parliament campaigning for re-election. During a television call-in program, the defendant caller implied that the plaintiff had previously committed a sexual assault. Although it was found that the defendant's conduct was reprehensible, there was no evidence as to the extent to which the defamatory statement had been published. Further, there was no evidence of actual malice. Accordingly, the court awarded $5,000 in general damages, but, in doing so, commented that the damages would have been much higher with more evidence as to the size of the statement's audience.

[70] In *Myers*, the evidence showed that the news program in question had been seen by one million people in its initial broadcast and another 200,000 people in re-broadcast. There was also a great deal of evidence as to the personal impact the program had on the plaintiff. In assessing the defendant's conduct, the trial judge concluded that there was actual malice on the part of the defendant, which was specifically associated with the manner in which it had distorted the plaintiff's words. In assessing general damages, the trial judge awarded $200,000, but with no additional award for aggravated damages. On appeal, the plaintiff was awarded an additional $150,000 in aggravated damages. In adding this amount, the Court of Appeal specifically referenced the trial judge's finding of actual malice.

[71] In the case at bar, there is no verifiable evidence of the plaintiff sustaining any actual financial loss. In his evidence, the plaintiff could point to any comparison between his fundraising abilities before and after the broadcast. His evidence in this respect was speculative and anecdotal. Under the circumstances, I find the plaintiff has not established any pecuniary loss.

[72] There was also very little specific evidence of the plaintiff's position and standing. While his activism has certainly attracted publicity and attention, the human rights case illustrates that it has not always been positive. Indeed, in cross-examination, the plaintiff acknowledged that the cause he promotes is "controversial" in North America. There is some vague and non-specific evidence that he is held in favourable regard among those who share his views. However, there is nothing to suggest he holds a position of high standing in the community, at large. As such, this is not a factor that would justify significant damages.

[73] As for the personal impact on the plaintiff, his affidavit was conspicuously thin on the point. At the most, the plaintiff says he has suffered personal embarrassment and humiliation, but he describes no facts or particulars to support his statement. There is no evidence that he has been ostracized or shunned by people with whom he had previously associated, and no evidence of any physical or emotional health issues resulting from the defamation. In short, there is no evidence on this factor that would support a significant award of damages.

[74] As to the audience for the defamation, there is no specific evidence as to the extent to which the defamatory broadcast was published. Having said this, given that it was aired as part of a national news story and shown on the internet, one can fairly conclude that the extent of publication would have been considerable. It would have at least been as much as the 1.2 million viewers referenced in *Myers* – probably more. It follows that this is a factor that weighs in favour of greater award than would otherwise be the case.

[75] Although a recognized factor, I do not regard the absence of a retraction or apology as particularly significant, one way or the other. At the most, a retraction and apology would have mitigated damages only in a modest way. The nature of the defamation was such that a retraction would have only served to draw more attention to the unusual circumstances of the case.

[76] The question as to whether the defendant's conduct will increase the award of general damages, and justify an award of aggravated damages, depends on evidence of actual malice, which will be considered in addition to

the malice that the law presumes from the publication of an indefensible defamatory statement. The burden in this regard rests with the plaintiff.

[77] Interestingly, the plaintiff's counsel suggested that the court should find actual malice and do so on the premise that the defendant is known to be biased and unsympathetic with the plaintiff's cause. In this respect, counsel seemed to suggest that this knowledge was sufficiently notorious and well known that it was open for this Court to take judicial notice of it.

[78] I am not persuaded by the plaintiff's submission in this respect. Whatever one's views might be of the news media, and the defendant in particular, I am satisfied that this is not a matter upon which the court can take judicial notice or presume actual malice. The existence of actual malice depends on evidence from which proof can be identified or inferences drawn. As always, indignation, even supported by the conventional wisdom of one partisan view or another, is a feeble substitute for evidence.

[79] Having said the foregoing, I am satisfied that there is some credible evidence from which the court can properly draw an inference of actual malice. In this respect, it is clear that the defendant had the Alberta flyer in its possession for a sufficient period of time that it was able to film and broadcast the front page. Hence, the defendant's staff was aware, or should have been aware, of the entire contents of the Alberta flyer, including the disclaimer. They would also have known that the document was not one of the flyers at issue before the Supreme Court of Canada, and had virtually nothing to do with legitimate news story it was presenting. Despite this knowledge, the defendant chose to present the Alberta flyer in the manner it

did. Under such circumstances, I find the defendant demonstrated actual malice. As such, not only is this a consideration in the assessment of general damages, it also justifies an award of aggravating damages.

[80] As for any mitigating factors in the assessment of damages, I am satisfied the court must consider the extent to which the plaintiff's conduct, in creating and distributing the Alberta flyer, contributed to the publication of the defamation he now complains of. In his cross-examination, the plaintiff admitted to having written the parodied song in order to provoke interest and attract attention. While I have not found this fact to have played any role in assessing the presence of a lesser defamatory meaning, it deserves consideration as a factor in the assessment of damages.

[81] In my view, the plaintiff's conduct is not an insignificant factor. Unlike the circumstances of the distorted words in *Myers*, the plaintiff here was actively trying to provoke and attract attention by creating, printing and distributing the Alberta flyer with the parodied song. In doing so, he must be taken to have accepted the risk, three years before the defendant's broadcast, that readers might note the impugned words but not the disclaimer on the second stage of the flyer. When cross-examined, the plaintiff said he expected the song would have prompted people to read the entire document, in which case they would have satisfied themselves that the plaintiff had disassociated himself from the lyrics.

[82] On this point, I am much less sanguine than the plaintiff. While I accept that some readers would have acted as the plaintiff expected, I am also satisfied that many would not. Indeed, I suspect that many readers may have

been so offended by the parodied song that they would have discarded the flyer before reading it further. The end result would have been that those readers would have had the same impression of the plaintiff as the one he claims was created by the defendant.

[83] Having regard to all the identified factors, including mitigating and aggravating factors, I am satisfied that a general damage award of $20,000 properly reflects a fair compensatory assessment. As I have found the defendant's conduct reflected actual malice, an aggravated damage award of $10,000 is in order. I do not, however, find the defendant's conduct to be so oppressive and high-handed as to offend the court's sense of decency. Accordingly, there will be no award of punitive damages.

[84] In the result, the plaintiff's application for summary disposition is allowed, and judgment is entered for the plaintiff in the amount of $20,000 in general damages and $10,000 in aggravated damages, for a total award of $30,000. The plaintiff shall have his taxable costs for the action against the defendant on a party-and-party basis, under Column 3.

J.
R.W. ELSON