COURT OF APPEAL
Cour d'appel
FILED / DÉPOSÉ
MAR 27 2020
of Yukon
du Yukon

COURT OF APPEAL OF YUKON

Citation: *Senft v. Vigneau*,
2020 YKCA 8

Date: 20200327
Docket: 18-YU840

Between:

Angela R. Senft and Michael E. Senft

Respondents
(Plaintiffs)

And

Audrey Vigneau and Susan Herrmann

Appellants
(Defendants)

Before: The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Harris
The Honourable Madam Justice K. Shaner

On appeal from: An order of the Supreme Court of Yukon, dated February 13, 2019, (*Senft v. Vigneau*, Whitehorse Docket 17-A0120).

Counsel for the Appellants: D. Sutherland
M. Hannam

Counsel for the Respondents: G. Whittle
M. Whittle

Place and Date of Hearing: Whitehorse, Yukon
November 13, 2019

Place and Date of Judgment: Vancouver, British Columbia
March 27, 2020

Written Reasons by:
The Honourable Madam Justice D. Smith

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Madam Justice K. Shaner

Summary:

The respondents brought an action against the appellants for allegedly defamatory comments. The appellants pleaded the defence of fair comment and the respondents replied by pleading the appellants had acted with express malice in publishing the comments. The judge put the question of malice to the jury without first determining if the evidence established a probability of malice. The jury was directed to first make a finding on the question of malice before considering if the defence of fair comment was established. The jury found the comments were defamatory and that the appellants had acted with malice. They awarded the respondents general, special, aggravated and punitive damages. No finding was made with respect to the defence of fair comment. Held: Appeal allowed, awards set aside and a new trial ordered. The judge erred in failing to determine whether the evidence adduced at trial raised a probability of malice before putting the question of malice to the jury. The judge also erred in failing to instruct the jury that (i) express malice could not be considered unless they first determined the appellants had established the defence of fair comment on a balance of probabilities and (ii) if established, in order to defeat the defence, that malice was the appellants' dominant motive in publishing the defamatory comments.

Reasons for Judgment of the Honourable Madam Justice D. Smith:

Introduction

[1] This appeal raises issues about the jury instructions in a damages action commenced by the respondent plaintiffs, Angela and Michael Senft, for allegedly defamatory comments made about them by the defendant appellants, Audrey Vigneau and Susan Herrmann. The appellants pleaded the defence of fair comment. The respondents replied by pleading that the appellants had acted with malice in publishing the alleged defamatory comments. A successful claim of malice would defeat a successful defence of fair comment.

[2] The civil jury hearing the action found that: (i) the appellants had made the alleged defamatory comments; and (ii) the appellants were actuated by malice when they published the defamatory comments. The jury was not asked to make a finding on whether the defamatory comments were on a matter of public interest but the judge instructed the jury on that issue. As the appellants do not raise it as a ground of appeal, I have inferred that they accept that the jury found the defamatory comments were made on a matter of public interest. The jury made no finding with

respect to the appellants' defence of fair comment. In the result, the jury awarded the respondents damages of $377,367.62 against the appellant Audrey Vigneau, and $432,367.79 against the appellant Susan Herrmann.

[3] After the jury had rendered its verdict, but before the formal judgment had been filed, the appellants applied to the judge for a determination on whether the evidence at trial established a probability of malice. The judge dismissed the application for reasons set out in *Senft v. Vigneau,* 2019 YKSC 23.

[4] The appellants raise three grounds of appeal, each of which alleges an error of law.

[5] First, relying on *Davies & Davies Ltd. v. Kott,* [1979] 2 S.C.R. 686 [*Davies*], the appellants submit the judge erred by failing to determine whether the evidence adduced at trial raised a probability of malice, before instructing the jury on the question of malice. They submit that, as a matter of law, the judge was required to make that determination before the issue could be put to the jury.

[6] Second, they submit the judge erred in his instructions to the jury on the question of express malice by: (i) directing them to consider that issue before determining if the appellants had established the defence of fair comment; (ii) by failing to instruct the jury that, in order to defeat the defence of fair comment, the respondents had to prove not only that that the appellants had acted with express malice, but that malice was their dominant or overriding motive in publishing the defamatory comments; and (iii) by failing to instruct the jury that, in order to rely on a lack of honest belief to draw an inference that malice was the dominant motive, the lack of honest belief needed to relate to the meaning of the defamatory comments and not merely to any knowing misstatement of collateral facts.

[7] Last, the appellants contend the judge erred in his instructions with respect to the heads of damages raised in the pleadings by failing to articulate the specific principles governing compensatory, special, aggravated and punitive damages and in failing to explain the countervailing social and democratic interests that mandate a

restrained assessment of damages. They claim this resulted in an unreasonable and perverse award of damages by the jury, constituting a reviewable error of law.

[8] For the following reasons, I am of the view the appeal must be allowed, the award of damages set aside and a new trial ordered. A determination of whether the evidence adduced at trial raised a probability of malice should have been made before the jury was instructed on the question of malice. In the circumstances of this case, that error could not have been rectified after the verdict had been rendered. I am also of the view that aspects of the jury charge were in error. In light of my proposed disposition, I shall refer to the evidence only to the extent that is necessary to address the legal issues raised in those grounds of appeal.

Background

[9] Mr. and Ms. McRae were long-time friends of the Senfts. Mr. McRae died unexpectedly on November 26, 2007. At the time of his death, Ms. McRae was an elderly widow.

[10] Thereafter, Ms. McRae became a client of the Regional Services division of the Department of Health and Social Services at Dawson City, Yukon Territory ("Yukon Health and Social Services"). Ms. Senft, in her then capacity as a social services worker, briefly assisted Ms. McRae with some financial matters related to Mr. McRae's death. Later, Ms. Senft was promoted to the position of social worker.

[11] The friendship between Ms. McRae and Ms. Senft continued after Mr. McRae's death and they became very close. Ms. Senft assisted Ms. McRae with many of her daily chores and Ms. McRae looked upon Ms. Senft as a daughter.

[12] Ms. McRae's only significant asset was her residence in Dawson City. She had shared that residence with her husband for 29 years until his death.

[13] After Mr. McRae's death, Ms. McRae executed a will appointing Ms. Senft as her executrix and beneficiary of her entire estate. She named Mr. Senft as alternate executor. Ms. McRae also transferred title to her residence to Ms. Senft, Mr. Senft

and herself in joint tenancy on the understanding that the Senfts would obtain ownership and possession of the property only upon her death. The only family Ms. McRae had was an adult son, but they were estranged.

[14] Several years later, Ms. McRae and the Senfts had a falling out. Ms. McRae had come to believe, incorrectly, that the Senfts wanted to remove her from her home and place her in a seniors' residence so that they could move themselves into her home. The respondents in fact never intended to move into Ms. McRae's residence until after Ms. McRae's death.

[15] Based on her misunderstanding, Ms. McRae sent a letter to the Senfts demanding that they sign a quitclaim deed of their respective interests in the residence, return all her papers, keys, disabled parking sign, and Ducks Unlimited shotgun. The Senfts returned her personal belongings but declined to comply with Ms. McRae's demand that they sign a quitclaim deed. This prompted Ms. McRae to threaten to sue them. In response, the Senfts proposed that they would buy out Ms. McRae's interest in the property or alternatively that Ms. McRae could buy out their interests. This led Ms. McRae to execute a new will naming Ms. Vigneau, who had been her support worker for many years, as her executrix and beneficiary.

[16] Ms. McRae made it known that she was upset and angry over the dispute with the Senfts. Her allegation that the Senfts were trying to move her out in order to take possession of her home quickly came to the attention of the inhabitants of the community. As members of the community became aware of the matter, they voiced their concerns over what they understood had transpired between the parties, based on Ms. McRae's account.

[17] Eventually, a public complaint was filed with Yukon Health and Social Services, through both the Deputy Minister and the Manager of Regional Services. The Manager of Regional Services issued a letter of reprimand to Ms. Senft for placing herself in a real or perceived conflict of interest in relation to Ms. McRae and in failing to disclose this situation to her employer. The letter stated in part:

> It is your ethical responsibility (as per your professional guidelines for ethical practice CASW) to inform a client when a real or potential conflict of interest may arise, and to clarify with the client your role and responsibilities.
>
> It is also your responsibility as a Yukon Government employee to avoid situations that could place you in an actual or perceived conflict of interest and to seek advice from your supervisor about any situation that could affect or call into question your impartiality. Where this is [sic] possibility of conflict of interest, it is also your duty as a public service to disclose to your deputy minister any situation in which you are involved that may pose a conflict of interest and to provide information as required.
>
> This letter serves as a written reprimand, and a copy will be placed on your personnel file, for your failure to advise your client about your role as a social worker and the professional boundaries that needed to be maintained, your failure to seek advice from your supervisor about the situation, and your failure to disclose to the deputy minister the nature of the potential conflict. Please be advised that further incidents of this nature may result in further discipline, up to and including dismissal.

[18] Ms. Senft responded by grieving the letter of reprimand.

[19] The Deputy Minister responded to Ms. Senft's grievance letter. After summarizing her account of how the matter arose, he wrote:

> Based on the facts that you have provided and considering the duties of the position that you hold, I have great concerns regarding the nature of involvement that you have with this individual. It is important that you understand your obligations as a public servant and a social worker in delivering the full range of social work services to members of the community. Your role as social worker requires you to provide child protection, income support, adult protection, youth justice and community development serves to members of the community and do so in a manner that strictly maintains separation of personal and professional interests. Your role as public servant requires that you abide by the direction of GAM policy 3.39 to the conduct standard summarized therein: (Per: 2.3.2) "*No conflict should exist or appear to exist between the private or personal interests of public servants and their official duties.*"
>
> I consider there to be at minimum a perceived conflict of interest with regard to your personal and private interests related to TC [referring to "the client"] and your role as a Social Worker. I am not prepared to clear you from conflict of interest given the information that you have provided.
>
> It is my expectation that you will remove yourself from the real or perceived conflict of interest that exists between your fiduciary interests with TC and your role as Social Worker immediately. This involve removing yourself from all personal matters involving TC. Professionally, it is expected that you will work with ...], Manager of Regional Services and your supervisor to formulate and implement a plan that ensures ongoing access to services for

> TC while maintaining your separation from handling any services to TC until such time as you are formally advised otherwise.
>
> Thank you for ensuring the separation of your private, fiduciary and professional interests.

[20] Thereafter, the Senfts commenced an action against Ms. McRae in which they requested a declaration that: (i) Ms. McRae and the Senfts were the registered owners in joint tenancy of the Dawson City residence; and (ii) Ms. McRae had gifted to each of the Senfts the right of survivorship in the legal and beneficial interest of the property (the “Senft action”).

[21] At the time of the Senft action, Ms. McRae was 80 years old. Many of her friends and supporters had financially contributed to her legal costs of defending the lawsuit. However, as time passed, the contributions decreased, and she ran out of money and energy to continue her opposition to the action. Ultimately, she agreed to the dismissal of the action with a declaration confirming the Senfts’ interest in her residence as they had claimed.

[22] Thereafter, the Senfts moved to Whitehorse where Ms. Senft obtained employment with the Champagne and Aishihik First Nations as a family liaison worker. That employment was terminated within the probationary period for the stated reasons that she was found “not well suited for the position.” Ms. Senft then retired.

The Defamatory Publications

[23] On November 19, 2017, Ms. Vigneau published to third parties the following GoFundMe words:

> *Help Daniele McRae – Save her home!*
>
> *I am compelled to go to this social funding page to ask for support for my dear friend Daniele McRae Daniele is a retired senior who has been a long time resident in Dawson City and still maintains her own home on* [street name]. *After losing her husband about 10 years ago she reached out to find support to manage her affairs and to support her in a difficult time. <u>Daniele trusted the wrong people who it turns out befriended her with ulterior motives than just friendship</u>. These people have managed to get Daniele to put them in her will as she has no heirs to her estate. They were good to her, helped her out with mobility and companionship so she agreed it was a good idea.*

> *Daniele is now in a situation of being verbally abused and threated by these people who claim to be her friends. They want her out of her home and living in MacDonald Lodge so they can take possession immediately. They are suing Daniele for the rights to use "their" property now! This was not the agreement Daniele signed on for, she is fighting for her home so she can live out her days peacefully. This couple has now forced her into court and she has a legal battle in front of her. As a pensioner she cannot afford a legal battle but has no other option at this time.*
>
> *I am asking for financial assistance, even the smallest contribution, to support Daniele's legal costs as she may lose her home. Daniele is a proud woman and self reliant, she is not one to ask for hand outs, but at this time she is overwhelmed and feeling vulnerable. It is hard to imagine you putting trust into someone and having that person turn on you as soon as they get what they want. I can only say it is blatant senior abuse and fraudulent.*
>
> *Daniele will be so thankful for...any support she receives even in a kind word. Thank you for all reading my story and I am happy to answer any questions this may have raised.*
>
> *Sincerely,*
>
> *Audrey Vigneau*
>
> [Emphasis added.]

[24] On November 20, 2017, Ms. Herrmann published the following "Daniele's Story" to third parties on Facebook and had it delivered by Canada Post to the households of Dawson City:

> *[Danielle]'s Story*
>
> *For those of you who don't know her,* [Danielle] *McCrae is a long time resident of Dawson City who lives on* [street name]. *She lost her husband over 10 years ago and during this sad time, Danielle was befriended by another local couple who helped her through her grief and assisted her with maintaining the property. Seeing as she had no heirs, she graciously put this couple into her will and added their names to hers on the title of her property. All Danielle wishes to do is remain in her own home until her demise. That's where this happy story ends. Now this couple does not want to wait until she passes away, they wan[t] Danielle to move into MacDonald lodge so that they can have possession of her home now! They are trying to evict her from her own home! We cannot let this happen!*
>
> *All avenues of assistance have been exhausted: Adult Protection, Ministry of Justice, Health Minister, Premier, RCMP. The only option is to retain a lawyer to fight this.*
>
> *I am willing to front the retainer fee but am seeking contributions to help Danielle with her legal fight. This could potentially amount to between $50 - $100,000 if this couple and their lawyer continue with this action.*
>
> *Please join me in assisting Danielle to sty in her home. Any amount, every little bit helps!*

Ways to donate:

- *GoFundMe page titled "Help Daniele McRae – Save her home!*
- *Mail your donation to* [Box number], *Dawson City*
- *Drop off with* [name] *at Dawson Hardware.*

Come on Dawson, protect our seniors!

Thank you.

Susan Herrmann

[Emphasis added.]

[25] The publications reflected the appellants' understanding of the allegations, as recounted to them by Ms. McRae, but were subsequently found in part to be erroneous. The publications were made for the purpose of raising money to help Ms. McRae in her legal battle to recover title to her home.

The Defamation Action

[26] Shortly after the publications, on November 28, 2017, the Senfts commenced the underlying action against Ms. Vigneau and Ms. Herrmann. The underlying action related to Ms. Vigneau's comments in her GoFundMe page, and Ms. Herrmann's comments in her "Danielle's Story".

[27] In their Statement of Claim, the Senfts pleaded that the appellants had published comments about them that were false and malicious. The appellants in their respective Statements of Defence pleaded that, if their comments were defamatory, they had been made in good faith and without malice.

[28] On January 10, 2018, Ms. Herrmann apologized to the citizens of Dawson City by Facebook and by flyer to Canada Post in which she wrote:

> *To the community citizens of Dawson City I sincerely apologize to you all if I have offended you in anyway in regards to the McRae case. All I was trying to do was help out a senior in our community. Once again sincere apologies to each and everyone.*
>
> *Susan Herrmann*

[29] On January 14, 2018, Ms. Vigneau published an apology and retraction to the Senfts, writing:

In November last year, I started a GoFundMe page campaign to raise money for Daniele McRae, who was being sued over the ownership of her home in Dawson City. On the GoFundMe page, I gave some background and expressed my opinion on the lawsuit involving Daniele. Because I am a close friend of Daniele's and sympathize with her, my write-up was strongly worded, but as a person with 70 yrs life experience, I should know that there are 2 sides to every story. Regrettably, I was very critical in my write-up and said things that I have realized I ought not to have said, and have since taken down the GoFundMe page. My opinion that the issue with the ownership of the house involved fraud was particularly in [*sic*] *inappropriate and I am profoundly sorry for these and other harsh words and therefore offer this apology and retraction to Angela and Michael Senft.*

Sincerely

Audrey Vigneau

[30] Ms. Herrmann's post remained on Facebook until January 2019.

[31] The trial of the defamation action commenced on January 28, 2019, and continued until the jury rendered their verdict on February 13, 2019. During the trial, Ms. McRae testified on behalf of the appellants. By then she was 81 years old.

[32] Ms. McRae died on July 20, 2019.

The Jury Charge

[33] In his opening comments to the jury, the judge explained how the general rule that a plaintiff carries the burden of proof to establish their claim was modified in defamation claims by a shifting of the burden between the plaintiff and the defendant on certain issues. He advised that: (i) the plaintiffs had the burden of proving on a balance of probabilities the facts needed to establish that the defendants' words were defamatory; (ii) the burden then shifted to the defendants to prove on a balance of probabilities that their words were a fair comment on a matter of public interest and that any person could honestly express that opinion on the facts they find have been proven; and, (iii) then the burden shifted back to the plaintiffs to prove that the defendants had acted with express malice, which if established would defeat the defence of fair comment.

[34] The judge began his specific instructions on the law of defamation by quoting paras. 1 – 3 from *Grant v. Torstar Corp.,* 2009 SCC 61, in which the Court discusses

the conflicting *Charter* values encompassed by the constitutional protection for freedom of speech and the protection of reputation. He then outlined the three requirements to establish defamation: (i) the words used by the defendants were about the plaintiffs; (ii) the words used by the defendants would tend to lower the plaintiffs' reputation in the eyes of a reasonable person; and (iii) the words used by the defendants about the plaintiffs were communicated (published) to at least one other person. The jury found the impugned comments by the appellants were defamatory and no issue has been taken with that finding on appeal.

[35] The judge then turned to whether the appellants had established the defence of fair comment. He instructed the jury that the defence "protects the right to comment or express an opinion fairly on known facts." He outlined the four elements of the defence, each of which he said had to be established by the appellants on a balance of probabilities in order for the defence to be established:

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

b) the comment must be based in fact;

c) the comment, though it can include inferences of fact, must be recognisable as comment;

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

[36] No issue is taken with the judge's identification of the elements of the defence of fair comment.

[37] On appeal, the appellants submit the judge erred in his instructions on the defence of fair comment by failing to instruct the jury that they had to decide if it had been established before they could consider the question of malice. I shall address this issue further below. The respondents contend there was insufficient evidence to establish each of the four elements of the defence of fair comment and therefore defence was not established.

[38] With respect to the first element of the defence, the judge advised the jury that "a matter of public interest" is one where the public welfare is in issue or the public has some substantial concern. He said that the matter must be in the interest of the public and not one that simply interests the public. He opined that, as a matter of law, in his view the transfer of property by a vulnerable senior citizen to a social worker was a matter of public interest but reiterated that it was up to the jury to determine whether "it is in the public interest as a matter of fact."

[39] The appellants submit that the judge correctly characterized the comments as "a matter of public interest", but suggest that the latter instruction as to whether the matter was "in the public interest" rather than "a matter of public interest" was incorrect and may have caused confusion for the jury. In my view, the latter instruction, while not technically correct, appears to have been a slip of the tongue. When considered in the context of the whole of the instruction on this element of the defence, in my view, the judge's instructions on this factual issue were clear. The respondents submit that the appellants' statements were not made on a matter of public interest because the Senft action was a private matter and therefore there was insufficient evidence to support a finding on the second element of the defence.

[40] With respect to the second element of the defence, the judge instructed the jury that, for the purpose of the defence, "a comment 'based on fact' is one whose facts are well-known enough that the listeners can make up their own minds on the merits of the defence." He directed the jury to the comments of Ms. Herrmann in the Daniele's Story publication and Ms. Vigneau's words in her GoFundMe publication. He reviewed the impugned comments of each appellant. He stated that Ms. Herrmann's words were factual but "not always perfectly correct", referring to the following comments:

- She is factual in saying that Daniele McRae graciously put the Senfts in her Will and added their names to the title of her property.
- She was incorrect to say that Daniele McRae had no heirs but it was common knowledge that Daniele did not want her son to be an heir.

- Susan Herrmann's statement that the Senfts wanted to move Daniele into McDonald Lodge and have her property is based upon what she was told by Daniele.

- The statement that the Senfts were trying to evict Daniele from her own home is based upon what Susan Hermann was told by Daniele.

He identified the following words used by Ms. Vigneau that he said were not factual:

- The Senfts have managed to get Daniele to put them in her Will as she has no heirs to her estate.

- Daniele McRae is in a situation of being verbally abused and threatened.

He also identified words she used words that in his opinion might be considered comments based on the factual circumstances:

- She stated that it was blatant senior abuse and fraudulent. It is up to you to determine if that is fair comment based on the facts you find were known to Audrey Vigneau. This requires you to examine Daniele McRae's allegation that she was scammed.

- This couple has now forced her into court and she has a legal battle in front of her.

[41] He reiterated to the jury that this was his opinion of the evidence but that it was for them to decide if each of the appellants had established this element of the defence of fair comment on a balance of probabilities.

[42] The appellants submit that the comments each made were based on pleaded facts in their respective Statements of Defence, many of which were not controversial and which were proven. In the alternative, they say the matters that formed the basis of the Senft action were known generally by those who read their comments. The respondents submit that that the appellants' words were made as statements of fact, which had not been proven and in any event were not recognizable as comments.

[43] There was no express instruction to the jury on the third and fourth elements of the defence.

[44] The appellants contend that both were clearly met. The respondents submit that if the appellants' words were comments, they were not based on proven facts and no person could honestly believe they were based on proven facts.

[45] The judge then turned to the issue of malice. He instructed:

> No comment can be called "fair" if it is primarily motivated by malice. Ask yourself, why did the defendants say what they said? If the defendants made the statement out of spite or ill will or with an intent to injure the plaintiffs, or without any honest belief in truth of the statement, then you may consider that malice has been established and the defence of fair comment should be dismissed. In this case both defendants say that their purpose was to raise money for legal fees for Daniele McRae. Both Audrey Vigneau and Susan Herrmann contributed their own money to assist Daniele McRae. If you find that there is no malice and the statement amount to fair comment, you must find in favour of the defendants and dismiss the plaintiffs' case.

[46] This aspect of the jury charge followed the *CIVJI* pattern instruction on malice (found at 11A.01.VII) and is the central issue in this appeal.

[47] Last, the judge instructed the jury on damages. He stated that it was not necessary for the defendants to prove they had suffered harm or financial loss by the defamatory comments, as injury to their reputation is presumed in law. He added that if they found that a specific loss had a monetary value, they could award additional damages for that specific loss. As an example, he referred to the respondents' submissions that they had suffered a specific loss by Ms. Senft having to retire from her job and move to Whitehorse, while the appellants submitted that Ms. Senft lost her job because of her own conduct.

[48] He then identified the following heads of damages that could be awarded: (i) compensatory; (ii) aggravated; and (iii) punitive. He did not address special damages, which were included in the questions for the jury to answer.

[49] Compensatory damages, he explained, related to the nature of the harm caused to the respondents' position, reputation and standing in the community, the mode and extent of the publication, the absence or refusal of any retraction or apology, and the conduct of the appellants from the time the statement was published to when the verdict was rendered. He instructed the jury that if they found

the defamatory comments caused little harm given its nature and the respondents' own conduct, or if they disapproved of the respondents' conduct, they could award a very low sum or zero damages.

[50] Aggravated damages, he said, could be awarded if they found that the respondents had acted out of malice and their conduct was high-handed and oppressive in a manner that increased the harm to the Senfts by increased humiliation, distress, or damage to their reputation in the way that they were defamed. He noted that there was no evidence of the defence of justification, which had been pleaded by the appellants, and had been widely reported by the media. However, he also noted that Ms. Herrmann had not deleted the comments from her Facebook account.

[51] With respect to punitive damages, he stated that they could be awarded if the jury found that the appellants had acted in an outrageously malicious, high-handed, or contemptuous manner and if the amount they had already awarded the Senfts did not fully punish the appellants. The judge distinguished punitive damages, which he advised are awarded to punish disgraceful conduct, from compensatory damages that are awarded for actual harm.

[52] The judge's instructions on damages generally follow the principles to be considered in an assessment of damages as set out in *Hill v. Church of Scientology,* [1995] 2 S.C.R. 1130 at paras. 182–83, 188–191, and 196–199.

[53] At the conclusion of the charge, the judge listed a number of questions for the jury to decide. Those questions are attached as Appendix A to these reasons. The hand-written notations on the question sheet indicate the jury's answers to the questions as they were directed.

[54] The order of the questions directed the jury to consider the issue of malice before the defence of fair comment; only if jury did not find the appellants had acted with malice, was the jury then directed to consider whether the appellants had established the defence of fair comment. The jury found the appellants had acted

with malice and did not answer the question of whether the appellants had established the defence of fair comment. The questions then directed the jury to quantify the claims of general, special, aggravated and punitive damages for each appellant.

[55] In rendering their verdict, the judge advised the jury they could dismiss the respondents' claims, or if they granted the claims they could give a general or special verdict. He explained that if they granted a general verdict they had only to answer questions 1–3, and 9–10. If they granted a special verdict, he said, they should answer questions 1–3, and 4–10. He gave no instruction on the difference in or reason for granting a general or special verdict.

[56] The jury answered questions 1 – 2, 5 – 6, and 9 – 10.

Issues on Appeal

[57] The appellants allege the judge erred as follows:

1. in law by failing to determine whether there was sufficient evidence adduced to raise a probability of malice before instructing the jury on whether the defendants had acted with malice in publishing the defamatory statements;

2. in law in his instructions to the jury on liability by: (i) failing to instruct the jury that the question of malice could not be considered unless they first found that the appellants had established the defence of fair comment; (ii) by instructing the jury that the defence of fair comment could be defeated if the purpose of the defamatory comment was "primarily' malicious, rather than dominant or overriding; and (iii) failing to instruct the jury that if they found the defamatory words were published with malice because of a lack of honest belief in their truth, that lack of honest belief must relate directly to the defamatory meaning of the words that is being sued upon; and

3. in law by failing to adequately instruct the jury on the necessary criteria for the proof of the various heads of damages, which led to an unreasonable and perverse quantum of damages.

[58] If the appeals are granted on any of the liability issues, the appellants request that this Court reweigh evidence adduced at trial and decide whether the issue of malice should have been put to the jury, or alternatively order the matter be remitted for a new trial. In the further alternative, if their appeals on the liability issues are dismissed, they ask this Court to allow the appeal on the awards of damages and substitute its own assessment of damages or, alternatively, to remit the reassessment of damages to the trial judge.

Malice at law

[59] As a matter of law, before the question of malice can be put to the jury for determination, there must be a determination by the judge that the evidence adduced raises a probability of malice: *Davies* at 695.

[60] The issue in *Davies* concerned the manner in which a claim of express malice by the plaintiff could be put to the jury in order to defeat the defendants' defence of qualified privilege. The Court explained how the usual rule with respect to the burden of proof had to be modified in these circumstances:

> The relationship between a judge and jury in dealing with issues of fact is generally clear and well established. Ordinarily a judge sitting with a jury is not concerned with the weight of evidence. If he concludes that there has been adduced admissible evidence going to the proof of the fact in issue, he must leave it to the jury. It is then the function of the jury upon weighing the evidence to accord it such effect as it may consider appropriate. This rule while one of general utility must be modified in a case of this kind. Where words are spoken on occasion of qualified privilege, the question of malice should not be put to the jury unless the trial judge is of the opinion that the evidence adduced raises a probability of malice.
>
> This view is well rooted in authority in England, Canada and other Commonwealth jurisdictions. It rests upon the proposition that the privilege of which the defendant has the benefit creates a presumption against malice. In this context, the word "malice" is used to connote malice in fact, actual malice, or express malice which goes beyond the malice ordinarily presumed upon the mere publication of libellous words. More than a mere possibility of malice must therefore be shown to override the privilege upon which it has

> been said rests the protection of many honest transactions in the daily conduct of human affairs.

[61] *Davies* (at 695) summarized the jurisprudential basis for the "probability of malice" test by reference to the comments of Spence J. in *Sun Life Assurance Co. of Canada v. Dalrymple,* [1965] S.C.R. 302 at 309-310:

> Firstly, it must be determined what evidence of malice is sufficient to go to the jury. Whether the defendant was actuated by malice is, of course, a question of fact for the jury but whether there is any evidence of malice fit to be left to the jury is a question of law for the judge to determine: Gatley, *op. cit. p.* 272; *Adam v. Ward, supra, per* Lord Finlay L.C. at p. 318.
>
> Roach J. A. in *Taylor et al. v. Despard et al.,* [1956] O.R. 963 at p. 978 said:
>
>> The law is well settled that in order to enable a plaintiff to have the question of malice submitted to the jury – and I am of course dealing only with the occasions of qualified privilege – it is necessary that the evidence should raise a probability of malice and be more consistent with its existence that with it non-existence and that there must be more than a scintilla of evidence.
>
> This would seem to be support by other authorities.
>
> In *Turner v. M-G-M Pictures, Ltd.* [1950] 1 All E.R. 449, Lord Oaksey said at p. 470:
>
>> Did the appellant prove that it was more probable than not that the respondents were actuated by malice.
>
> And Lord Porter said at p. 455:
>
> No doubt, the evidence must be more consistent with malice than with an honest mind, but this does not mean that all evidence adduced of malice towards the plaintiff on the part of the defendant must be set against such evidence of a favourable attitude towards him as has been given and the question left to, or withdrawn from, the jury by ascertaining which way the scale is tipped when weighed in the balance one against the other. On the contrary, each piece of evidence must be regarded separately, and, even if there are a number of instances where a favourable attitude is shown, one case tending to establish malice would be sufficient evidence on which a jury could find for the plaintiff.

[62] The Court further clarified the above mentioned words of Lord Porter and Spence J. (at 696):

> ...While I accept as correct Lord Porter's words referred to above and those of Spence J. last quoted, they do not mean that one piece of evidence of whatever weight may be sufficient to overcome the presumption against malice raised by privilege. One piece of evidence may be sufficient provided

> that it is by itself of sufficient weight to raise a probability of the existence of malice.

[63] Although *Davies* concerned the question of malice to defeat a defence of qualified privilege, the British Columbia Court of Appeal in *Creative Salmon v. Staniford*, 2009 BCCA 61 (at para. 32) opined in *obiter dicta* that the same reasoning applies to a defence of fair comment.

[64] In this case, the judge received no assistance from trial counsel on this issue. Appellants' trial counsel made no objection to the verdict or to respondents' counsel's application for judgment on the terms of the verdict. It was not until a few months later that appellants' appeal counsel, who was not trial counsel, applied to the judge for a ruling on whether the evidence adduced at trial had raised a probability of malice.

[65] The judge found, relying on *R. v. Hummel*, 2003 YKCA 4 and *P.S. Sidhu Trucking Ltd. v. Yukon Zinc Corp.*, 2016 YKSC 40, that as the order for judgment had not yet been filed, he had jurisdiction to hear the application. He then reviewed the decisions in *Stuart v. Hugh,* 2011 BCSC 426 and *Warman v. Fournier,* 2015 ONCA 873 to which he was referred.

[66] In *Stuart,* the defendants had applied for a ruling on whether the evidence established a probability of malice before the jury was instructed on malice. The judge reserved his decision and instructed the jury on the issue. The jury found that the plaintiff had failed to prove the alleged defamatory words had been spoken and thus the ruling became moot. However, had the jury found that the alleged defamatory words had been spoken, the judge said he would have found a probability of malice as the defendant Hugh acknowledged that the words as pleaded were false. In my view, the procedure followed by the judge in *Stuart* runs contrary to *Davies* and should not be followed.

[67] In *Warman,* the trial judge failed to make a ruling on whether the evidence raised a probability of malice before instructing the jury on that issue. The court found that as the question of malice was properly pleaded, there was some

admissible evidence of malice and a correct instruction on malice, the question was properly before the jury. With respect, in my view this decision does not apply the legal test from *Davies* and I would decline to follow it.

[68] In the matter before us, the judge found that, given the delay in the bringing of the application, the additional delay that would be caused by having to order a transcript of the evidence adduced at trial, and further time that he would require to review the evidence and undertake the detailed analysis of that evidence in order to make the ruling, he could not accede to the application. He also relied in part on the following comments of Tysoe J.A. in *Creative Salmon*:

> [44] Malice is a state of mind. Only the trier of fact can determine Mr. Staniford's state of mine when he published the two press releases. This Court cannot look to the evidence and make its own finding in this regard.

[69] As a Notice of Appeal had been filed, the judge left it to this Court to determine the issue.

[70] The appellants submit that, as required by *Davies,* the lack of a ruling before the jury was instructed on the issue of express malice was an error of law. They request that this Court review and weigh the evidence in order to make the ruling, or alternatively, to remit the matter back for a new trial, which would be prohibitively costly to all concerned.

[71] The respondents submit that as counsel for the appellants did not raise or object to the lack of a ruling by the judge on whether the evidence established a probability of malice to go to the jury during the trial, or to the jury instructions as a whole, they should not be permitted to raise this issue on appeal. They further submit that based on the functional approach to be taken to jury charges, this one was adequate. Last, they say that, in any event, there was sufficient evidence of malice for that issue to have been put to the jury for determination.

[72] In my opinion, as a matter of law, the judge was required to make a determination on whether the evidence adduced raised a probability of malice before instructing the jury on the issue. His failure to do so constituted an error of law

reviewable on a standard of correctness. In the circumstances of this case, this error could not be rectified after-the-fact on appeal. The judge properly recognized that, months after the trial had been completed, he could not undertake a detailed review and weighing of the evidence in order to remedy the oversight of failing to make the required ruling (at para. 33).

[73] This Court is faced with the same problem. Where the issue of express malice raises a question of fact, an appellate court is generally not well-suited to step in and undertake a detailed evidentiary analysis as a matter of first instance in order to determine if the evidence raised a probability of malice. In this case, the trial of the matter occurred over 13 days with multiple witnesses called by each party. The credibility of certain witnesses was at issue. This Court is in no position to undertake a detailed review and analysis of the evidence for the purpose of determining if it raised a probability of malice, where the trial judge himself found the delay had made it impossible for him to undertake the task. In my view, the only way the error in this case can be rectified is to order a new trial. In these circumstances, I would adopt the comments of Tysoe J.A. in *Creative Salmon* at para. 44.

[74] Accordingly, on this ground of appeal, the appeal must be allowed, the awards of damages set aside, and a new trial order.

[75] The appellants have raised other grounds of appeal with respect to the substance of the jury charge. As I would order a new trial, I shall address the remaining grounds of appeal in the alternative, in order to provide some guidance on the crafting of a jury charge in this complex area of the law.

Malice in Fact

[76] Malice is presumed at law when published comments are found to be defamatory. Malice in fact, or express malice, can be claimed by a plaintiff if the defendant establishes a defence. In this case, the appellants pleaded the defence of fair comment; the respondents responded by claiming that the appellants were actuated by malice in publishing the defamatory comments.

[77] A claim of express malice can only be advanced if the defence pleaded is established. If the defence is established and express malice is proved, it will defeat the defence. As explained above, however, before the question of express malice may be put to the jury, the trial judge must determine if the evidence adduced at trial establishes a probability of malice. Thus, the success of a claim of express malice is closely connected to the success of a defence.

[78] The legal test for the defence of fair comment received thorough articulation in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40. In that decision, the Court adopted the test set out by Dickson J., dissenting in *Cherneskey v. Armadale Publishers,* [1979] 1 S.C.R. 1067 at 1099–1100, which identified the elements of the defence as follows:

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

b) the comment must be based in fact;

c) the comment, though it can include inferences of fact, must be recognisable as comment;

d) the comment must satisfy the following objective test: could any [person] honestly express that opinion on proved facts? and

e) even though the comment satisfies the objective test, the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice.

[79] The Court in *WIC Radio* held that a defendant must prove each of the first four elements of the defence of fair comment on a balance of probabilities before the onus switches back to the plaintiff to prove on a balance of probabilities the fifth element, namely that the defendant was actuated by express malice: *WIC Radio Ltd.* at para. 52. The Court added:

> [53] … If a defendant relies on *objective* honest belief the defence can still be defeated by proof that *subjective* malice was the dominant motive of the particular comment.

[80] The majority in *Cherneskey* had required the publisher to have a "subjective honest belief" in the defamatory comments in order to establish the defence of fair

comment. In *WIC Radio,* the Court changed the test by adopting Dickson J.'s "objective honest belief" approach in order to better represent "a balance between free expression on matters of public interest and the appropriate protection of reputation against damage that exceeds what is required to fulfill free expression requirements" (at para. 49).

[81] The defence of fair comment is broad in scope and does not create a high threshold. It only requires a defendant to establish that the comment be one that *any person,* however opinionated or prejudiced, could honestly express on the proven facts: *WIC Radio* at paras. 39 and 40. While the comment must have a basis in the proven facts, it need not be supported by the facts: *WIC Radio* at para. 39.

[82] The legal effect of a successful defence is to rebut the presumption in law of malice upon the publication of defamatory words: *Hill* at para. 144. Thereafter, proof that the defendant's dominant motive in publishing the defamatory comments was a malicious one will establish malice in fact and defeat the defence: *WIC Radio* at para. 1.

[83] LeBel J., in concurring reasons in *WIC Radio*, helpfully explained the rationale for requiring that malice be the publisher's dominant motive in order to defeat the defence of fair comment:

> [106] The requirement that malice be the *dominant* motive for expressing an opinion in order to defeat fair comment helps maintain a proper balance between protecting freedom of expression and reputation. Arguments between ideologically-opposed participants in a public debate often breed bitterness, but such debate remains valuable and worthy of protection in a democratic society. However, while it is not appropriate to judge the objective fairness of an opinion, the protection of reputation may justify judging the motive for expressing it. After all, the purpose of the fair comment defence is to protect and encourage free debate on issues of public importance. Opinions published with the primary intention of injuring another person (for example), rather than furthering public debate, are sufficiently far removed from the type of speech the defence was intended to protect that they may justifiably be excluded from the scope of its protection.

[84] What then constitutes malice for the purpose of defeating the defence of fair comment?

[85] Actual or express malice is typically inferred from evidence that the publisher acted out of an improper motive: *WIC Radio* at para. 63. An improper motive may include actuation by spite, ill-will, a desire to harm, an intent to injure, or knowingly or recklessly publishing a false defamatory comment.

[86] In *Cherneskey,* Dickson J. described malice (at p. 1099) as follows:

> Malice is not limited to spite or ill will, although these are its most obvious instances. Malice includes any indirect motive or ulterior purpose, and will be established if the plaintiff can prove that the defendant was not acting honestly when he published the comment. This will depend on all the circumstances of the case. Where the defendant is the writer or commentator himself, proof that the comment is not the honest expression of his real opinion would be evidence of malice. ... [Emphasis added.]

[87] In *WIC Radio*, LeBel J. adopted this description of malice but was careful to emphasize that although "proof that the comment is not the honest expression of the publisher's real opinion may be evidence of malice, it is not determinative ... [as] there may be non-malicious and valid reasons for publishing views one does not personally hold" (para. 102).

[88] In the context of the defence of qualified privilege, the Supreme Court in *Botiuk v. Toronto Free Press Publications Ltd.,* [1995] 3 S.C.R. 3 stated:

> [79] Where an occasion is shown to be privileged, the *bona fides* of the defendant is presumed and the defendant is free to publish remarks which may be defamatory and untrue about the plaintiff. However the privilege is not absolute. It may be defeated in two ways. The first arises if the dominant motive for publishing is actual or express malice. Malice is commonly understood as ill will toward someone, but it also relates to any indirect motive which conflicts with the sense of duty created by the occasion. Malice may be established by showing that the defendant knew he was not telling the truth, or was reckless. [Emphasis added.]

See also *Ward v. Clark*, 2001 BCCA 724, which described the requirement that the indirect motive be "dominant or overriding" (at para. 53).

[89] Thus, in order to defeat a defence, express malice must be the dominant or overriding motive for the publication of the defamatory comments. This is a

significant requirement as publishers often make comments for multiple purposes. Only where the malicious purpose is the dominant purpose can it defeat a defence.

[90] In *Creative Salmon,* the court adopted Lebel J.'s description of malice in *WIC Radio.* Writing for the court, Tysoe J.A. found that *Botiuk* (at para. 79) did not equate a lack of honest belief to malice, but only "that a trier of fact may draw an inference of malice if the defendant knew he or she was not telling the truth or was reckless as to the truth of the statement." (at para. 33) (emphasis added). He stated:

> [34] … I agree with this qualification. It is open to the trier of fact to draw an inference of malice from a lack of honest belief, but there may be circumstances where malice is not the dominant motive of the defendant even though he or she does not have an honest belief in the comment they expressed. In *Gatley on Libel and Slander,* 10th ed. London: Seet & Maxwell, 2004) at para. 16.4, the authors express the view that "malice arises only where the defendant acts from an improper motive: knowledge of or recklessness as to falsity is not a separate head of malice, it is simply a way if establishing that the defendant was acting from an improper motive. [Emphasis added.]

[91] Tysoe J.A. held that the trial judge had erred in finding that Mr. Staniford was motivated by malice, as the defendant had not established that Mr. Staniford had made his comments for an improper or ulterior purpose, but rather was simply legitimately expressing his opinion on a matter of public interest being the business of fish farming in Clayoquot Sound on the west coast of Vancouver Island. He underscored that the objective of the defence of fair comment is free speech, which is a cornerstone of Canadian societal values, stating:

> [41] The protection of a person's ability to exercise his or her right to freedom of expression in order to attempt to influence public opinion on legitimate public issues is the objective of the defence of fair comment. The defence cannot be defeated if Mr. Staniford was doing the very thing that the defence was designed to protect. What the trial judge found to be malice was not malice at law because her finding of Mr. Staniford's motivation did not represent an indirect motive of ulterior purpose.

[92] In the result, the court ordered a new trial, declining to reweigh the evidence in order to make its own findings on the factual issue of whether Mr. Staniford had acted with malice when he made the impugned publications.

[93] Finally, it must be noted that carelessness as to the truth of a statement is not recklessness for the purpose of inferring malice. The two concepts are different. In *Botiuk,* the Court explained the distinction as follows:

> [96] A distinction in law exists between "carelessness" with regard to the truth, which does not amount to actual malice, and "recklessness", which does. In *The Law of Defamation in Canada, supra,* R.E. Brown refers to the distinction in this way (at pp. 16-29 to 16-30):
>
> > ... a defendant is not malicious merely because he relies solely on gossip and suspicion, or because he is irrational, impulsive, stupid, hasty, rash, improvident or credulous, foolish, unfair, pigheaded or obstinate, or because he was labouring under some misapprehension or imperfect recollection, although the presence of these factors may be some evidence of malice.
>
> [Emphasis added.]

[94] In sum, in order to defeat a successful defence of fair comment, a plaintiff must prove that express malice was the defendant's dominant purpose in publishing the defamatory remarks. Proof that the defendant did not honestly believe in the truth of the defamatory comment may support a finding of express malice, but such a finding may also not be determinative if the lack of honest belief in the truth of the defamatory comments was not the dominant or overriding motive in publishing the comments.

Application to the case

[95] The jury was not instructed to answer the question of whether the appellants had established the defence of fair comment before deciding the issue of express malice. Based on the questions posed to the jury, if they found the words used by the respondents were defamatory, they were next directed to determine if the words used were malicious. Only if their answer was "no" to the respondents' claim of malice was the jury then directed to consider the defence of fair comment. In short, the jury was directed to decide the issue of express malice without ever determining if the appellants had established the defence of fair comment. In my view this constituted an error of law in the instructions.

[96] For ease of reference, I repeat the impugned instruction on malice below:

> No comment can be called "fair" if it is primarily motivated by malice. Ask yourself, why did the defendants say what they said? If the defendants made the statement out of spite or ill will or with an intent to injure the plaintiffs, or without any honest belief in truth of the statement, then you may consider that malice has been established and the defence of fair comment should be dismissed. In this case both defendants say that their purpose was to raise money for legal fees for Daniele McRae. Both Audrey Vigneau and Susan Herrmann contributed their own money to assist Daniele McRae. If you find that there is no malice and the statement amount to fair comment, you must find in favour of the defendants and dismiss the plaintiffs' case.

[97] In my view, for the following reasons, this instruction does not accurately capture the full scope of the legal test for proving express malice in order to defeat the defence of fair comment.

[98] First, it fails to advise the jury that the question of whether the defendants were actuated by malice, only arises if the jury is first satisfied that the defendants have established each of the elements of the defence of fair comment on a balance of probabilities.

[99] Second, the passage fails to instruct the jury that, if they find the defence of fair comment has been established, the plaintiffs must prove their claim of express malice for the purpose of defeating the defence on a balance of probabilities.

[100] Third, the passage fails to advise the jury that, if they find that the defendants made the statements knowing they were false or with a reckless disregard as to their truth, they may, not must, infer the defendants were actuated by malice. There may be circumstances where the defendants do not have an honest belief in the truth of the statements or have a reckless disregard for their truth, but nevertheless malice is not the dominant motivation underlying the comment. A defendant is not actuated by malice merely because he relies solely on gossip and suspicion, or because he may be irrational, impulsive, improvident or labouring under some misapprehension or imperfect recollection, although the presence of these factors may be some evidence of malice. It is the totality of the circumstances in which the statement was published that must be considered.

[101] Fourth, and relatedly, the jury should be instructed that, in order for a lack of honest belief in the truth of the statements to support an inference that malice was the defendant's dominant purpose, the lack of honest belief must relate to the statements in the defamatory publication and not merely to statements that may knowingly be misstated but otherwise immaterial. For example, the fact that Ms. Vigneau may have known that Ms. McRae had a son even though her GoFundMe page stated that Ms. McRae had no heir, which statement may have demonstrated a lack of honest belief, it was not material to the issue of whether she had a lack of honest belief relating to the defamatory comments. The judge's instruction to the jury in this case did not make this clear.

Damages

[102] The appellants submit the damages awarded are the seventh highest awards, after appeal, in Canadian jurisprudential history. They say the awards do not reflect the principles that underlie each of the heads of damages awarded by the jury, and reflect awards that are unreasonable, perverse, excessive, and wholly disproportionate in the circumstances of this case.

[103] The judge correctly charged the jury on the general principles for assessing damages as set out in *Hill* at paras. 182–83, 188–191, and 196–199 with respect to awards for compensatory, aggravated and punitive damages. The charge was silent on the principles to be applied for an assessment of special damages. Some instruction in my view was required to guide the jury in the assessment of those damages. In view of my proposed disposition on the liability issues, I would decline to address the issue of whether the jury's award of damages was unreasonable or perverse.

Disposition

[104] For the foregoing reasons, I would allow the appeal, set aside the awards of damages, and order a new trial.

The Honourable Madam Justice D. Smith

I AGREE:

The Honourable Mr. Justice Harris

I AGREE:

The Honourable Madam Justice K. Shaner

APPENDIX A

Questions for the Jury

1. Are the words of Audrey Vigneau defamatory of either Angela Senft or Michael Senft?

   Answer yes or no. If your answer is no, you may dismiss the case against Audrey Vigneau.

2. Are the words of Susan Herrmann defamatory of either Angela Senft or Michael Senft?

   Answer yes or no. If your answer is no, you may dismiss the case against Susan Herrmann.

3. If you find the words used were defamatory of the plaintiffs, you may give a general verdict of judgment against the defendants or one of them and proceed to Questions 9 and 10 on damages. If you have rendered a general verdict, you do not need to answer questions 4 – 8.

4. If you find the words used were defamatory of the plaintiffs, you may proceed to the next question if you wish to render a special verdict.

5. Were the words used by Audrey Vigneau malicious?

   Answer yes or no. If your answer is no, proceed to Question 7. If your answer is yes, proceed to Question 9.

6. Were the words used by Susan Herrmann malicious?

   Answer yes or no. If your answer is no, proceed to Question 8. If your answer is yes, proceed to Question 10.

7. Is the defence of fair comment made out by Audrey Vigneau?

   Answer yes or no. If your answer is yes, you should render a verdict dismissing the case against Audrey Vigneau. If your answer is no, proceed to the damage Question 9.

8. Is the defence of fair comment made out by Susan Herrmann?

   Answer yes or no. If your answer is yes, you should render a verdict dismissing the case against Susan Herrmann. If your answer is no, proceed to the damage Question 10.

9. a) If you find Audrey Vigneau liable for defamation, what damages do you award Angela Senft?

   General: $ $100,000
   Special: $ 109,707.42
   Aggravated: $ 40,000
   Punitive: $ 2,500

   b) If you find Audrey Vigneau liable for defamation, what damages do you award Michael Senft?

   General: $ 100,000
   Special: $ 2669.30
   Aggravated: $ 20,000.00
   Punitive: $ 2,500.00

10. a) If you find Susan Herrmann liable for defamation, what damages do you award Angela Senft:

   General: $ 100,000
   Special: $ 109,707.42
   Aggravated: $ 50,000
   Punitive: $ 10,000
   269,707.47

b) If you find Susan Herrmann liable for defamation, what damages do you award Michael Senft:

General:	$ 100,000
Special:	$ 2,660.37
Aggravated:	$ 50,000
Punitive:	$ 10,000
	162,660.37