SUPREME COURT OF NOVA SCOTIA
Citation: *Racki v. Racki*, 2021 NSSC 46

Date: 20210224
Docket: Hfx 485326
Registry: Halifax

Between:

Paula Racki

Applicant

v.

Kyle Racki

Respondent

D E C I S I O N

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	November 23, 2020, in Halifax, Nova Scotia
Written Release:	February 24, 2021
Counsel:	Richard W. Norman and Sarah Stevens, for the Applicant David G. Coles Q.C., and Deirdre Festeryga, Articled Clerk, for the Respondent

By the Court:

[1] It has been said the Common Law broadens down from precedent to precedent. In this case the issue is does Nova Scotia law recognize a right to bring a proceeding for damages for public disclosure of private facts.

[2] Paula Racki and Kyle Racki divorced in 2017. The separation and ongoing custody dispute between them have been acrimonious. Mr. Racki self published a book in which he disclosed Ms. Racki had been addicted to sleeping pills and attempted suicide twice. Ms. Racki commenced an application in court claiming damages and other relief on the basis of the public disclosure of private facts about her.

Facts

[3] Paula Racki and Kyle Racki were married in 2004 and divorced in 2017. They had one child together and Ms. Racki has two teenage children from a previous marriage. The marriage was unhappy for both of them. The separation and ongoing custody dispute have been acrimonious.

[4] In approximately 2009 Ms. Racki was addicted to prescription medication. Around the same time she attempted suicide twice. Her memory of that period is very poor. Mr. and Ms. Racki's relationship was in a downward spiral. Ms. Racki's struggle to overcome her addiction was a long hard personal journey. She did not want the world to know of her difficulties with prescription medication. It is not something she would share with strangers. It is a private matter. Her attempts at suicide is also something she did not wish to be publicly disclosed.

[5] Mr. Racki came up with the idea for a book in the last couple of years. He was told people may be interested in a book about departing the Jehovah's Witness faith and starting a business. The book is intended to encourage entrepreneurship and inspire others to overcome hardships and pursue owning and operating their own business.

[6] Mr. Racki self published a book entitled "Free Trials (and Tribulations): How to Build a Business While Getting Punched in the Mouth" (Book) at a cost of $20,000.00 U.S. It is a print on demand book copyrighted in 2018. It is possible to request a change to the manuscript by email. The Book is sold on Amazon and royalties are paid monthly.

[7] The Book contains the following references to Ms. Racki:

At page 24:

> In 2009, my relationship with my first wife, Paula, fell apart in a big way. She became addicted to sleeping pills, and attempted suicide twice.

and in a footnote on the same page:

> I personally believe Paula has undiagnosed borderline personality disorder, which makes normal, peaceful relationships almost impossible. Even though we're now divorced, she is still in an almost constant state of chaos, and co-parenting with her is extremely difficult.

and at page 110:

> Paula was in a downward spiral. Addicted to prescription sleeping pills, she was either lying in bed all day or out forging cheques in my name. Her behaviour became more erratic and unpredictable, and she eventually tried to take a whole bottle of pills.

[8] Mr. Racki sent copies of the Book, which included the references to Ms. Racki, to eight "influencers" and 52 friends and family to review. Part of the purpose of the Book was to increase his business profile. He sent a copy of the Book to Ms. Racki's older daughter but not Ms. Racki, who learned of the publication from her eleven-year-old son. Ms. Racki did not consent to the publication of the personal facts about her.

[9] With regard to the references to Ms. Racki in the Book, Mr. Racki's current wife asked him if he wanted to make the comments as it might affect Paula, adding she might sue him. Mr. Racki did not change the manuscript.

[10] Active on social media, Mr. Racki has approximately 3000 followers on LinkedIn, 2800 on Twitter and 1700 on Instagram. He has about 500 friends on Facebook as well as a Facebook page which is more about marketing with approximately 100 followers. All of his social media platforms have headers to promote his Book. Mr. Racki has sold several hundred copies of the Book. People, including strangers, have told him they have read the Book. An internet search of Ms. Racki's name brings up the Book.

[11] During cross-examination Ms. Racki agreed she has used the name Paula Reed on social media for the last six years. She has not been under doctor's care, seen medical professionals or had medical follow-up at a hospital since her second suicide attempt.

[12] After the Book was published, Ms. Racki decided to stop volunteering, although no one where she volunteered spoke to her about the Book. Nobody came up to Ms. Racki on the street and spoke to her about her suicide attempts.

[13] Ms. Racki responded to people who commented about the Book online disputing the Book's accuracy and stating she had been abused.

[14] There were two articles about Mr. and Ms. Racki's relationship and the Book in Frank Magazine. Ms. Racki spoke to five people she knew about the articles and testified her relationship with those individuals has not changed. She confirmed nobody told her they were not going to hire her or date her because of the Book or Frank articles.

[15] As stated earlier, the relationship between Mr. and Ms. Racki was acrimonious. In an email dated June 19, 2019 from Ms. Racki to Mr. Racki she stated she was definitely suing for defamation, that this case was a practice case, she was not looking for money, she wanted the Book destroyed. During cross-examination Ms. Racki said she was desperate and did not know what she meant by "practice case". In an email dated March 27, 2019 from Ms. Racki to Mr. Racki she stated she was dropping the privacy lawsuit and had a "really good interview" going through which would be embarrassing to Mr. Racki's wife and he would probably sue her as a result. Ms. Racki testified she did not remember writing the email and was emotionally distraught at the time. On March 28, 2019, Ms. Racki emailed Mr. Racki's counsel, who represented him in their family litigation, again stating she was dropping the "privacy lawsuit" and threatening to do an interview about Mr. Racki bringing forward material damaging to him. She denied this action was taken as leverage in the family proceeding.

[16] Ms. Racki conceded on cross-examination she may have said she was going to publish her own book telling Mr. Racki it was "tit for tat". I find she did threaten to publish her own book. Ms. Racki made threats to go to the media but said she was desperate and did not intend to carry out the threat.

[17] During her cross-examination Ms. Racki initially gave evidence which was different from her evidence given on discovery. She explained the discrepancies were because of her poor memory of the period she was addicted and the emotional stress she experienced. However, the discrepancies do not impact the facts concerning the publication of the Book and the statements about Ms. Racki.

Analysis

Does Nova Scotia Recognize A Tort for Invasion of Privacy

[18] The genesis of the modern torts for invasion of privacy was described by Sharpe J.A., in giving the Court's judgment in *Jones v. Tsige,* 2012 ONCA 32, where he stated at paras. 16 to 18:

> 16 Canadian, English and American courts and commentators almost invariably take the seminal articles of S.D. Warren & L.D. Brandeis, "The Right to Privacy" (1890) 4 Harv. L.R. 193 and William L. Prosser, "Privacy" (1960), 48 Cal. L.R. 383 as their starting point.
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> 17 Warren and Brandeis argued for the recognition of a right of privacy to meet the problems posed by technological and social change that saw "instantaneous photographs" and "newspaper enterprise" invade "the sacred precincts of private life" (at p. 195). They identified the "general right of the individual to be let alone", the right to "inviolate personality" (at p. 205), "the more general right to the immunity of the person" and "the right to one's personality" (at p. 207) as fundamental values underlying such well-known causes of action as breach of confidence, defamation and breach of copyright. They urged that open recognition of a right of privacy was well-supported by these underlying legal values and required to meet the changing demands of the society in which they lived.
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> 18 Professor Prosser's article picked up the threads of the American jurisprudence that had developed in the seventy years following the influential Warren and Brandeis article. Prosser argued that what had emerged from the hundreds of cases he canvassed was not one tort, but four, tied together by a common theme and name, but comprising different elements and protecting different interests. Prosser delineated a four-tort catalogue, summarized as follows, at p. 389:
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> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
> 2. Public disclosure of embarrassing private facts about the plaintiff.
> 3. Publicity which places the plaintiff in a false light in the public eye.
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

[19] According to the American Restatement (Second) of Torts, the tort of publicity given to private life is described as follows:

> § 625D Publicity Given to Private Life
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> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.

[20] In dealing with the "publicity" required for the tort the Restatement provides:

> "Publicity," on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.
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> Thus it is not an invasion of the right of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons. On the other hand, any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity within the meaning of the term as it is used in this Section. The distinction, in other words, is one between private and public communication.

[21] The New Zealand Court of Appeal recognized a cause or causes of action protecting privacy that is distinct from the tort of breach of confidence in *Hosking v. Runting* [2004] NZCA 34, where Gault P. and Blanchard J. outlined the elements of the tort at para. 117:

> The scope of a cause, or causes, of action protecting privacy should be left to incremental development by future courts. The elements of the tort as it relates to publicising private information set down by Nicholson J. in *P. v. D.* provide a starting point, and are a logical development of the attributes identified in the United States jurisprudence and adverted to in judgments in the British cases. In this jurisdiction it can be said that there are two fundamental requirements for a successful claim for interference with privacy:
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> > 1. The existence of facts in respect of which there is a reasonable expectation of privacy; and
> >
> > 2. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

[22] In Ontario the Court of Appeal in *Jones v. Tsige*, *supra*, confirmed the existence of a right of action for intrusion upon seclusion, one of the privacy causes of action recognized in the United States, which include public disclosure of private facts.

[23] The Federal Court of Appeal in *R. v. John Doe*, 2016 FCA 191, held with respect to a claim based on publicity given to the private life of another, the motions judge should not have dismissed the claim due to the novelty of the cause of action but rather on the basis the claim was not supported by material facts.

[24] The Supreme Court of Canada has held that the right to privacy has been accorded constitutional protection and should be considered as a *Charter* value.

While the *Charter* does not apply to common law disputes between private individuals, the Supreme Court has developed the common law in a manner consistent with *Charter* values: *Jones v. Tsige, supra*, at paras. 39 to 46.

[25] Today a person's privacy is a precious commodity which is becoming harder to protect. Modern life infringes on all aspects of personal privacy. Technology, which changes rapidly, has made it possible to track all aspects of a person's life. We live in a world much different from just a decade or two ago. As society changes the law must evolve to meet changing circumstances. Existing causes of action, such as defamation with the defences available to such a claim, do not address the circumstances arising from the public disclosure of private facts. Considering all of the foregoing, it is appropriate to find the existence in Nova Scotia of the right of action for public disclosure of private facts of another.

[26] The elements of the tort are: (a) There must be publicity of the facts communicated to the public at large to become a matter of public knowledge; (b) The facts are those to which there is a reasonable expectation of privacy; and (c) The publicity given to those private facts must be considered, viewed objectively, as highly offensive to a reasonable person causing distress, humiliation or anguish.

[27] The claim may give rise to competing claims, such as freedom of expression or matters of public interest: *Jones v. Tsige*, *supra*, para. 73.

[28] Given the intangible nature of the interest protected by the privacy tort, general damages, as in claims in defamation, are presumed by the publicity of the private facts and are awarded at large. *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130, at para. 167; *Jones v. Tsige*, *supra*, at para. 71.

[29] Was there publicity of the facts?

[30] Mr. Racki self published the Book. It is for sale on Amazon. All of his social media platforms on LinkedIn, Twitter, Instagram and Facebook have headers to promote the Book. Mr. Racki sent copies of the Book to "influencers" to promote the Book as well as to friends and family. Mr. Racki sold several hundred copies of the Book. I find Mr. Racki intentionally communicated to the public at large, through the publication of his Book and its promotion, as set out above, information about Ms. Racki so that the information became a matter of public knowledge.

[31] Does the information so given publicly contain facts to which Ms. Racki has an expectation of privacy?

[32] There were a number of references to Ms. Racki in the Book. At page 110 Mr. Racki stated Ms. Racki forged cheques in his name. In her affidavit Ms. Racki denied she forged the cheques, stating she may pursue a claim in defamation concerning the allegation. The forgery allegation is not a private fact concerning Ms. Racki. Any action concerning the allegation would have to be by way of a claim of defamation with all the defences available to such a claim. During argument Ms. Racki's counsel agreed the allegation was not included in the claim Ms. Racki put forward. In footnote 2 on page 24 Mr. Racki gives his opinion of an undiagnosed disorder he thinks Ms. Racki has. That opinion is not a fact which would bring the statement within the terms of the tort.

[33] At page 24 of the Book Mr. Racki stated:

> In 2009 my relationship with my first wife, Paula, fell apart in a big way. She became addicted to sleeping pills, and attempted suicide twice.

and at page 110:

> Paula was in a downward spiral. Addicted to prescription sleeping pills, she was either lying in bed all day or out forging cheques in my name. Her behaviour became more erratic and unpredictable, and she eventually tried to take a whole bottle of pills.

[34] Ms. Racki was addicted to prescription sleeping pills and did attempt suicide twice in or around 2009. Mr. and Ms. Racki were married. The addiction and attempts at suicide are facts of which Ms. Racki would have a reasonable expectation of privacy. Ms. Racki did not consent to the publication of the facts.

[35] Was the publicity given to the private facts of the addiction and attempted suicide, viewed objectively, highly offensive to a reasonable person causing distress, humiliation or anguish?

[36] Considering all the evidence, I find the publicity given to the private facts of addiction to sleeping pills and attempts at suicide viewed objectively are highly offensive to a reasonable person which would cause distress, humiliation or anguish. Ms. Racki deposed, which I accept, that when she learned of the comments about her in the Book she was horrified, humiliated and full of anguish.

[37] Mr. Racki submits the publishing of the Book, including the information about Ms. Racki, is protected by his right to freedom of expression. The Book's purpose is to encourage entrepreneurship and inspire others to overcome hardships and pursue owning and operating their own businesses. The Book is of legitimate concern to the public.

[38] The right to privacy is not absolute. It has to be weighed against competing rights including freedom of expression. In this case Mr. Racki has the right to publish a book to encourage entrepreneurship and overcome hardship. But the issue in considering the Book as a whole, is whether the publication of the private facts of Ms. Racki's addiction and suicide attempts is in the public interest.

[39] What is in the public interest was described by McLachlin C.J.C. in giving the majority judgment in *Grant v. Torstar Corp.,* 2009 SCC 61 at paras. 105 and 108:

> 105 To be of public interest, the subject matter "must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached": Brown, vol. 2, at pp. 15-137 and 15-138. The case law on fair comment is "replete with successful fair comment defences on matters ranging from politics to restaurant and book reviews": *Simpson v. Mair*, 2004 BCSC 754, 31 B.C.L.R. (4th) 285 (B.C.S.C.), at para. 63, *per* Koenigsberg J. Public interest may be a function of the prominence of the person referred to in the communication, but mere curiosity or prurient interest is not enough. Some segment of the public must have a genuine stake in knowing about the matter published.
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> …
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> 108 The question then arises whether the judge or the jury should decide whether the inclusion of a particular defamatory statement in a publication was necessary to communicating on the matter of public interest. Is this question merely a subset of determining generally whether the publication is in the public interest? Or is it better treated as a factor in the jury's assessment of responsibility? Lord Hoffmann in *Jameel* took the view that determining whether a defamatory statement was necessary to communicating on a matter of public interest is a question of law for the judge, conceding, however, that this may require the judge to second-guess editorial judgment, and must be approached in a deferential way (para. 51).

[40] Considering the purpose of the Book, the publication of the facts of Ms. Racki's addiction and suicide attempts was not in the public interest, in that the facts were not required to advance the purpose of the Book about overcoming hardships and starting a business. Mr. Racki could have stated his relationship with his wife was falling apart without disclosing the facts his wife was addicted to sleeping pills and attempted suicide. Given the facts of this case Mr. Racki's right to freedom of expression does not prevail over Ms. Racki's privacy claim.

[41] Mr. Racki submits Ms. Racki waived her action for privacy against him by bringing this application in open court knowing the filing the notice of application would likely, as it did, result in publication of the private facts. I reject that argument. The Book was published before Ms. Racki commenced the application. A party is entitled to such a remedy in court. Other claims which deal with private matters such as claims in defamation proceed in open court.

[42] Mr. Racki also submits Ms. Racki did not seek a confidentiality order pursuant to *Civil Procedure Rule* 85. While true, that fact has no bearing on Ms. Racki's right to the remedies she is seeking in this application.

[43] I find Ms. Racki has established all elements of the tort.

Injunction

[44] In the Notice of Application in Court, Ms. Racki seeks an injunction restraining the sale of the Book. In her pre-hearing submissions and at the hearing Ms. Racki sought an injunction requiring Mr. Racki remove the offending passages from his book. In *Northumberland Fisherman's Association v. Patriquin* 2015 NSSC 30, LeBlanc J. adopted the test for a permanent injunction originally set out in *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396, which comprised two prongs: first, has the applicant established its legal rights; and second, if so, is an injunction the appropriate remedy?

[45] I found the tort was made out.

[46] Is an injunction the appropriate remedy? Those parts of the Book which refer to the private facts of Ms. Racki's addiction and attempts at suicide are to be removed. If those parts of the Book are deleted, there is no need to restrain the sale of the Book. An injunction to restrain the sale of the Book would only be necessary if Mr. Racki does not delete the offending passages. Mr. Racki is to delete the passages of the Book which refer to Ms. Racki's addiction to sleeping pills and attempted suicide. If the parties are unable to agree on the necessary deletions, I will hear them on that issue, or if required, on the form of injunction required.

Damages

[47] In determining the amount of damages in a claim for intrusion upon seclusion in *Jones v. Tsige, supra*, Sharpe J.A., stated at paras. 87 and 88:

> 87 In my view, damages for intrusion upon seclusion in cases where the plaintiff has suffered no pecuniary loss should be modest but sufficient to mark the wrong that has been done. I would fix the range at up to $20,000. The factors identified in

> the Manitoba *Privacy Act*, which, for convenience, I summarize again here, have also emerged from the decided cases and provide a useful guide to assist in determining where in the range the case falls:
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> > 1. the nature, incidence and occasion of the defendant's wrongful act;
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> > 2. the effect of the wrong on the plaintiff's health, welfare, social, business or financial position;
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> > 3. any relationship, whether domestic or otherwise, between the parties;
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> > 4. any distress, annoyance or embarrassment suffered by the plaintiff arising from the wrong; and
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> > 5. the conduct of the parties, both before and after the wrong, including any apology or offer of amends made by the defendant.
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> 88 I would neither exclude nor encourage awards of aggravated and punitive damages. I would not exclude such awards as there are bound to be exceptional cases calling for exceptional remedies. However, I would not encourage such awards as, in my view, predictability and consistency are paramount values in an area where symbolic or moral damages are awarded and absent truly exceptional circumstances, plaintiffs should be held to the range I have identified.

[48] In this case Mr. and Ms. Racki were former spouses of each other and the facts which are the subject of this claim arose during their marriage. Prior to and subsequent to the publication of the Book, the parties have been involved in an acrimonious separation and ongoing custody dispute. The disclosure of the drug addiction and suicide attempts was not necessary to advance the message of Mr. Racki's Book. It was a cheap shot. Mr. Racki took what was private and made it public. He sent a copy of the Book to Ms. Racki's daughter.

[49] Mr. Racki's current wife asked him if he wanted to put the comments about Ms. Racki in his Book as it affected Ms. Racki and she might sue him. Despite that and his ability to change the text of the print on demand Book by simply sending a request to change the text to the publisher, Mr. Racki did not remove the references to Ms. Racki's addiction and suicide attempts from the Book.

[50] Ms. Racki learned of the publication of the Book from her then eleven- year-old son. Upon learning of the comments made about her, Ms. Racki was horrified, humiliated and suffered anguish.

[51] There is no evidence of the publicity of the private facts having affected Ms. Racki's relationship with her family, friends or other people. It is the nature of publicity to the public at large, that it will never be known if the publicity has impacted another person's unexpressed opinion, including a potential employer, of Ms. Racki. Once out, the genie cannot be put back in the bottle.

[52] In *Jones v. Tsige*, *supra*, the Court awarded general damages of $10,000 in a case in which a respondent, who was in a common-law relationship with the appellant's former husband, surreptitiously looked at the appellant's banking records at least 174 times. The exposure from the breach of Ms. Racki's privacy was much more widespread than in *Jones v. Tsige*. Considering all of the facts Mr. Racki will pay general damages of $18,000.00 to Ms. Racki.

[53] Ms. Racki is also seeking aggravated damages. The circumstances in which aggravated damages may be awarded was described in *Hill v. Church of Scientology of Toronto*, *supra*, by Cory J. in giving the majority judgment at para. 191:

> Aggravated damages may be awarded in circumstances where the defendant's conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous statement. The nature of these damages was aptly described by Robins J.A. in *Walker v. CFTO Ltd.*, supra, in these words, at p. 111:
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> > Where the defendant is guilty of insulting, high-handed, spiteful, malicious or oppressive conduct which increases the mental distress – the humiliation, indignation, anxiety, grief, fear and the like – suffered by the plaintiff as a result of being defamed, the plaintiff may be entitled to what has come to be known as "aggravated damages."

[54] In order to find an award of aggravated damages is justified there must be a finding Mr. Racki was motivated by actual malice which increased the injury to Ms. Racki: *Hill v. Church of Scientology of Toronto*, *supra*, para. 193. I find Mr. Racki was motivated by malice in giving publicity to Ms. Racki's addiction and suicide attempts. They were engaged in an acrimonious divorce and ongoing custody dispute. Although told his comments about Ms. Racki affected her and despite the ease with which he could delete the offending facts from the Book, he did not delete them and has not done so to date. He sent a copy of the Book to Ms. Racki's daughter from a previous marriage. To publicize a former spouse's addiction and suicide attempts while engaged in acrimonious custody litigation is malicious and spiteful. This is a proper case for aggravated damages. Mr. Racki will pay aggravated damages of $10,000 to Ms. Racki.

[55] Ms. Racki is also seeking an award of punitive damages. In *Hill v. Church of Scientology of Toronto*, *supra*, Cory J. described the nature of punitive damages at para. 199:

> 199 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.

[56] I do not find this is an appropriate case for an award of punitive damages.

[57] If the parties are unable to agree I will hear them on the issues of pre-judgment interest and costs.

Coughlan, J.