Citation: Muzik v Canadian Broadcasting Corporation et al, 2023 MBCA 95
Date: 20231121
Docket: AI22-30-09766

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Madam Justice Jennifer A. Pfuetzner
Madam Justice Janice L. leMaistre

BETWEEN:

KENNETH WAYNE MUZIK	)	
	)	***R. C. Roy,***
(Plaintiff) Respondent	)	***A. Gonsalves*** *and*
	)	***J. A. Safayeni***
- and -	)	*for the Appellants*
	)	
CANADIAN BROADCASTING CORPORATION and GOSIA SAWICKA	)	***W. S. Gange,***
	)	***T. K. Reimer*** *and*
	)	***T. D. Reimer***
(Defendants) Appellants	)	*for the Respondent*
	)	
- and -	)	*Appeal heard:*
	)	***December 7-8, 2022***
WILLIAM WORTHINGTON, CECIL ROSNER and JOHN BERTRAND	)	
	)	*Judgment delivered:*
	)	***November 21, 2023***
(Defendants)	)	

On appeal from *Muzik v Worthington et al*, 2021 MBQB 263

MONNIN JA

Introduction

[1] After a lengthy trial, the plaintiff was successful in his claim against the defendants, the Canadian Broadcasting Corporation (CBC) and Gosia Sawicka (Sawicka), that he had been defamed by publications on CBC's nightly television news broadcast, and in a short online article (the

publications), and was awarded substantial damages. CBC and Sawicka appeal on numerous grounds seeking to set aside the judgment. For the reasons that follow, I would grant this appeal.

Background

The Plaintiff

[2] Starting in or about 1979, the plaintiff sold life insurance products and other financial services for various companies in Winnipeg. As a result of a merger, and later a takeover, he began working for Assante Financial Management Ltd. (Assante) in 2001. By that time, he was also a chartered life underwriter, financial consultant and financial planner.

[3] In 2004, the plaintiff's relationship with Assante ended somewhat acrimoniously when, as a result of several client complaints, his employer imposed disciplinary measures that included, amongst other things, a fine of $20,000 and a requirement to work under supervision. The plaintiff refused to accept the disciplinary measures. As a result, he was suspended. On May 7, 2004, Assante gave the plaintiff notice that, effective that date, his employment would be terminated because, amongst other reasons, he refused to accept the disciplinary measures.

[4] The plaintiff then obtained employment with Wellington West Financial Services Inc. (Wellington West). The transfer of his registration as a mutual fund dealer with the Manitoba Securities Commission (the MSC) was subject to his agreement to be supervised, which he accepted.

[5] In July 2011, Wellington West was purchased by National Bank Financial (NBF). In April 2012, the plaintiff resigned from Wellington West and applied to transfer his registration to NBF. The MSC required that the strict supervision conditions to which the plaintiff was subject at Wellington West be continued at NBF and the plaintiff's registration was approved on July 27, 2012.

[6] The plaintiff had developed a niche market with railroad employees who were approaching their pensionable age. At both Canadian railways, the Canadian Pacific Railway (CP) and the Canadian National Railway, employees had a defined benefit pension plan with an option to commute the funds available in an employee's pension plan before they reached the age of 55. The commuted amount would be transferred—partly in cash and partly in a registered plan at the employee's discretion—to a third party for administration. The ostensible benefit was the ability of the employee to deal with the funds as they saw fit, including providing for their spouse and family upon their death, contrary to the pension that would see their spouse receive a substantially reduced amount if the employee predeceased them. As well, at the time, there were broad concerns of underfunding of a number of corporate pension plans (e.g., Nortel).

[7] Prior to his retirement from CP in 2006, the defendant, William Worthington (Worthington), met with the plaintiff three times to discuss the possibility of commuting his pension and placing the funds with him. Worthington contended at trial that he relied upon the advice he received from the plaintiff in order to reach his decision. However, the trial judge concluded that, while Worthington sought advice from the plaintiff to confirm that he understood in broad strokes what his options would be, the trial judge satisfied

himself that Worthington understood his choices and came to the decision on his own.

The Professional Relationship Between the Plaintiff and Worthington

[8] At the time of his retirement, Worthington received funds of approximately $675,000, which he placed with the plaintiff. During the next four years, the plaintiff administered the funds in Worthington's account. He held regular meetings with Worthington to discuss his investments and provide advice on how to deal with the portfolio. Factors that significantly affected the value of the portfolio over that period of time included two bear markets: one in 2008 and one in 2011. As noted by the trial judge, in the 2011 bear market, stock indices lost about 20% of their value. As well, Worthington took larger than expected monthly withdrawals from the plan than those that had been discussed originally in setting up the portfolio. He also withdrew $5,000 for a winter vacation and approximately $20,000 from his investment portfolio for a loan to his brother-in-law. In 2010, he withdrew from his investment portfolio to finance some house repairs in order to get his house ready for sale. The trial judge found that most of these withdrawals and loans occurred with the plaintiff's knowledge, but not necessarily with his encouragement.

[9] The plaintiff referred Worthington to Earl Phillips (Phillips), another advisor in the Wellington West Group, for the purposes of purchasing flow-through shares in order to neutralize Worthington's tax liabilities when he received his payout from CP. Unbeknownst to the plaintiff, Worthington took out a line of credit in the sum of $50,000 using his house as collateral for an investment in the flow-through shares at the suggestion of Phillips. This

decision, while resulting in tax-savings, may not have been a prudent long-term investment.

[10] By 2011, Worthington was very unhappy with the drop in the value of his investment portfolio and contacted the MSC. The MSC encouraged Worthington to obtain copies of his Know-Your-Client (KYC) forms. Worthington discovered from the KYC forms that his annual income and his risk tolerance had been overstated.

[11] Believing that the plaintiff had not been truthful, Worthington and his wife surreptiously recorded their two-hour meeting with the plaintiff in late November 2011.

[12] Mrs. Worthington contacted Sawicka, a CBC reporter with whom she had developed an existing relationship. The trial judge was highly critical of the manner in which CBC and, in particular, Sawicka, conducted herself from that point on. In his view, she "gave short shrift to the paramountcy of objectivity" and, while she tried to portray the issues as "cautionary tales for the public about the risks of commuting a defined benefit pension", he concluded that it was, in truth, an "attack on the integrity and trustworthiness of [the plaintiff]" (at para 46). He also concluded that the investigation fell below the journalistic standard of an objective and thorough investigation because it relied almost entirely on documentation provided by the Worthingtons and dismissed the conclusions of the MSC and NBF (see para 47). In his view, those organizations considered the plaintiff's transgressions as relatively minor.

[13] In particular, the trial judge viewed Sawicka's refusal to comment on the Worthingtons' failure to disclose the full recording of their

conversation with the plaintiff as a "glaring lack of objectivity" (at para 49). This was compounded by Sawicka's failure to make any effort to inform the public about the fact that the recording was apparently lost which, in the trial judge's view, would throw the Worthingtons' credibility in doubt. He also took exception to the CBC's failure to report on significant facts, such as the true reason why the Worthingtons needed to sell their house and on the Worthingtons' failed efforts to receive compensation from NBF, amongst others (see para 51).

[14] Included in the trial judge's criticism of CBC's conduct and that of its reporter was their failure to deal with the essentially positive, in his view, conclusions of the MFDA in respect of the complaints made by the Worthingtons against the plaintiff.

Regulatory Issues

[15] The plaintiff, as a registered mutual fund dealer, was subject to regulatory oversight by the MSC and the MFDA (and at a later time, when he sought registration, with the Investment Industry Regulatory Organization of Canada (IIROC)).

[16] Prior to the publications, the plaintiff was the subject of many investigations by the MSC and the MFDA, some of which resulted in formal disciplinary action and findings against him.

[17] As previously mentioned, as a result of a number of client complaints and concerns as to his conduct, the plaintiff's employer at the time, Assante, disciplined him in 2003, which discipline included placing him on a tight supervisory schedule. His refusal to accept the discipline meted out by

Assante led to the termination of his employment in 2004. The plaintiff styled this as a voluntary resignation in order to join Wellington West.

[18] In order for the plaintiff to join Wellington West in May 2004, it was necessary for the MSC to agree to the transfer of the plaintiff's registration. It only did so on the condition that the increased supervision, which was in place at Assante, follow the plaintiff to Wellington West. The plaintiff agreed to that condition and was under that strict supervision during the first number of years that he was with Wellington West, including the time when he met and commenced his relationship with the Worthingtons. Neither Wellington West nor the plaintiff advised the Worthingtons, or any other clients, that the plaintiff was under these supervisory restrictions. The Worthingtons were surprised and angry when they obtained that information in 2011.

Settlement Agreement

[19] In December 2011, the plaintiff entered into a settlement agreement with the MSC arising from an investigation that had commenced in 2004. Under the settlement agreement, the plaintiff acknowledged that he acted contrary to the public interest when he recommended leveraging and investments in mutual funds that were outside the risk tolerance of clients, and made recommendations to clients when completed KYC forms were not on the clients' files. The terms of the settlement agreement included a reprimand on the plaintiff's registration, a voluntary payment of $15,000 and a requirement that he pay costs of $5,000. The settlement was also a factor in the Worthingtons' displeasure with the plaintiff as they were unaware that he was under investigation.

The Complaints

[20] The Worthingtons complained about the plaintiff's conduct and the performance of their portfolio to Wellington West (which forwarded their complaint to NBF), to the MFDA and to the MSC. Eventually, they also filed a complaint with IIROC.

[21] NBF, in a letter dated May 9, 2012 (the NBF letter), advised the Worthingtons that it was dismissing their complaint. The Worthingtons sent further information to NBF, which caused it to reconsider the complaint. As a result of the further information provided, NBF eventually settled with them without admitting liability.

[22] As to the Worthington's complaint to the MFDA dated December 21, 2011, the MFDA responded by its letter dated July 20, 2012 to the Worthingtons. It concluded that the plaintiff's recommendations for the Worthingtons' accounts were "suitable and in keeping with [their] investment objectives and . . . with [their KYC] objectives." The MFDA advised that, while it had decided not to commence formal disciplinary proceedings, it had "taken other disciplinary measures against [the plaintiff]." It did not stipulate whether they were imposed as a result of violations alleged by the Worthingtons or other violations identified during the course of their review of the complaint and the plaintiff's activities.

[23] The actual MFDA decision was sent to the plaintiff on July 20, 2012. In its decision, the MFDA concluded that the allegation that the plaintiff "did not provide William Worthington with leverage risk disclosure when [he] made a recommendation for purchasing securities by borrowing"

was made out. This was referred to as a minor breach that only warranted a cautionary letter.

[24] The Worthingtons were not the only clients of the plaintiff who were dissatisfied. As a result of a number of complaints received, the MFDA conducted a further investigation. By a warning letter dated July 6, 2015 (the warning letter), it advised the plaintiff that a review of his files while he was employed by Wellington West raised concerns with respect to 17 of his clients. It advised the plaintiff that MFDA staff identified the following:

> . . .
> i. From 2005 to 2007, [the plaintiff] misrepresented, failed to fully and adequately explain, or omitted to explain, the risks, material assumptions, and features of commuting the value of a pension that [the plaintiff] recommended and implemented in the accounts of 17 clients, thereby failing to ensure that the strategy was suitable and appropriate for the clients and in keeping with their investment objectives; and
>
> ii. From 2005 to 2008, [the plaintiff] failed to individually assess the 17 clients' risk tolerance and investment knowledge and misrepresented their know-your-client information on the account opening documents of the 17 clients such that the investments in their accounts would appear suitable for them, thereby failing to know the clients, engaging in conduct unbecoming an Approved Person, and failing to observe high standards of ethics and practice in the conduct of business.
> . . .

The staff was of the view that there would be sufficient evidence to support a finding of a breach of the integrity rule of the MFDA.

[25] The same warning letter confirmed that, while the conduct was considered a serious matter, the MFDA had decided not to initiate a formal

disciplinary proceeding, but to issue a warning to ensure there would be no similar breaches.

[26] The Worthingtons were advised that investigations had been commenced against the plaintiff but, since there were no formal disciplinary proceedings, they were not a matter of public record. It is noteworthy that the conduct for which the plaintiff was considered to be in breach of the integrity rule is part of the conduct about which the Worthingtons complained.

[27] In September 2012, NBF suspended the plaintiff after discovering a signed, incomplete KYC form. This was contrary to the conditions upon which he was to operate at NBF given his agreement with the MSC. He was fired for cause on November 6, 2012. He sued NBF for wrongful dismissal on June 6, 2014, a claim that was not resolved at the time of trial.

[28] After the plaintiff's employment with NBF was terminated, he sought employment with Sterling Mutuals Inc., a mutual fund company with its head office in Windsor, Ontario. He sought reactivation of his registration with the MSC.

[29] A memorandum prepared for the MSC's director of registration (the director) raised the following concerns:

> . . .
> Based on [the plaintiff's]:
>
> - failure to meet terms and conditions on his registration by the use of pre-signed forms,
> - being terminated for cause,
> - having a permanent reprimand on his file,

- [i]ssued two Cautionary letters by the MFDA,
- [i]ssued one Warning letter by the MFDA,
- [i]ssued one Cautionary letter by IIROC,
- open investigation files; and
- numerous closed investigation files against [the plaintiff]

Staff [questioned the plaintiff's] integrity.

. . .

[30] After giving the plaintiff an opportunity to be heard, the director issued his decision.

[31] In his reasons for decision dated November 4, 2013, the director found that the plaintiff was not suitable for registration and that his proposed registration was objectionable. The application for registration was refused. Included in the director's reasons was the plaintiff's conduct at Wellington West and at NBF, as well as activities he engaged in after his departure from the latter when he was not a registered dealer.

The Recording of the November 2011 Meeting

[32] The Worthingtons met with the plaintiff together on two occasions only, both in November of 2011. At the second meeting on November 30, 2011, Mrs. Worthington recorded the meeting without telling the plaintiff. The meeting was approximately two hours in length.

[33] Mrs. Worthington could not give details about the device she used to record the meeting nor the format in which it was recorded. She only provided a portion of the recording to Sawicka and refused to disclose the rest

of the recording. In an email exchange with Sawicka, Mrs. Worthington indicated that she would only provide the full recording to her lawyer if they decided to sue.

[34] The trial judge disbelieved Mrs. Worthington's evidence about why she failed to provide the full recording to CBC. In his view, it suggested a sinister motive. Even more sinister in his view was the "loss" of the recording that the Worthingtons claimed occurred during their move from their house to Mrs. Worthington's mother's house. Again, the trial judge found the fortuitous "loss" a reason to disbelieve the Worthingtons' evidence on that point.

[35] According to the trial judge, Sawicka's failure to question the Worthingtons' credibility due to their refusal to provide the full recording and the alleged loss of the recording went to CBC's objectivity and was a basis to support a finding of malice. More on that issue later.

The Publications

[36] On June 19, 2012, CBC released the publications in this case. They comprised:

> . . .
> . . . (a) a 2-minute, 45-second video ("**Video**") with an introduction and brief comments by a news anchor, which ran once on the local Winnipeg news ("**Broadcast**"), and (b) a short online article ("**Article**") with the Video embedded in it (together, "**Publications**"). The Publications reported on the "allegations" in [Worthington's] complaint, the fact [the plaintiff] was "under investigation" by the MFDA and NBF, and the MSC Settlement.
> . . .
>
> [footnotes omitted]

[37] On July 17, 2012, the plaintiff served CBC with a notice of action. The defamatory statements complained of were the following:

> . . .
> 1. *"I trusted him completely. That was my biggest mistake.";*
> 2. *"Last year* [*Worthington*] *noticed his $600,000 pension was more than half gone";*
> 3. Worthington's *"investments dropped by more than $300,000.00, forcing him to sell his house and look for work again";*
> 4. *"[Worthington] and his wife started investigating and noticed [the plaintiff] was keeping incorrect documentation about him";* and
> 5. *"the files [the plaintiff] kept about him (Worthington) contained false information".*
> . . .
>
> [emphasis in original]

[38] Prior to the release of the publications, Sawicka sought comments from the plaintiff on two occasions (via voicemail messages), as well as from NBF. The plaintiff was advised by legal counsel at NBF that he should not respond and he did not do so, nor did NBF.

[39] The plaintiff's evidence was that, after the publications, he was advised not to attend at the office.

Proceedings

[40] A statement of claim was filed in this action in 2012. By the time of the trial, the claims against Worthington and the defendants, Cecil Rosner (Rosner) and John Bertrand, had been withdrawn and the two defendants

remaining were CBC and Sawicka. The matter did not proceed to trial until April 2019, when, within a few days, there was an adjournment application.

[41] During the course of discoveries, CBC attempted to obtain information as to the type and extent of fees charged by the plaintiff to the Worthington account. They were unsuccessful in obtaining that information before trial, even after a motion for further discovery.

[42] When, during his examination-in-chief, the plaintiff proceeded to tender information concerning his fees and the manner in which they were generated, the defendants obtained an adjournment. As a result of delays caused by COVID-19-related matters, the trial did not resume until March 2021.

[43] In March 2019, the defendants provided an expert report prepared by an investment expert, Professor Betermier (Prof. Betermier) (the Betermier report). In that report, Prof. Betermier suggested that the plaintiff's investment strategy appeared to favour himself through the payment of fees, as opposed to matching the retirement objectives of Worthington—an indirect reference to the practice of "churning"—objectionable in financial planning circles. However, after hearing the plaintiff's direct evidence in April 2019, and gathering further information during the course of discovery thereafter, CBC advised the plaintiff and the Court that it would not be relying upon the Betermier report. It sought permission to file another report, that of Lawrence Boyce (Boyce), which was granted.

[44] In response, the plaintiff sought to rely upon the Betermier report itself as evidence of the allegations of churning that were no longer part of CBC's case. As well, the plaintiff sought to tender a letter from CBC's

original counsel, wherein counsel had attempted to use the threat of being tainted with churning in order to convince the plaintiff to settle. The trial judge allowed the plaintiff to do both.

[45] CBC sought an amendment to the pleadings to allow it to plead a failure to mitigate on the part of the plaintiff. While the trial judge suggested in his reasons that he did allow that motion, in fact, it was denied.

[46] The trial judge issued lengthy reasons finding in favour of the plaintiff in all respects. He preferred the evidence of the plaintiff, both as to narrative and theory, and viewed the conduct of defendants CBC and Sawicka as not in keeping with the objective standards required.

[47] To the extent the evidence of Worthington and the plaintiff differed, the trial judge found the latter more reliable and credible and that Worthington was not a truthful witness. Nor did the trial judge believe Mrs. Worthington's evidence as to the couple's motivation for bringing the matter to CBC's attention. In the trial judge's view, rather than being altruistic, it was a "joint plan . . . to inflict as much negative publicity as possible on [the plaintiff], in order to achieve a favourable financial settlement from NBF" (at para 14).

[48] As to the defendants, the trial judge was of the view that, despite their evidence to the contrary, they relied almost entirely on the documentation provided by the Worthingtons without considering the conclusions of both the MSC and NBF, which viewed the plaintiff's conduct as relatively minor. He found that the comments contained in the publications had definite defamatory meanings and that those meanings were to the effect that the plaintiff was (at para 105):

> . . . a dishonest person who was guilty of misconduct in how he handled the financial interests of Mr. Worthington . . . [suggesting] that a financial advisor like [the plaintiff was] dishonest and [lacked] integrity in how the financial interests of a client [were] managed, [constituting] a devastating blow to [his] professional reputation. . . .

[49] The trial judge concluded that CBC had acted with malice and that the defence of justification was not available given the inaccuracies in the publications.

[50] As to the responsible communication defence, the trial judge reached the conclusion that it was not available to the defendants as the publications were not on a matter of public interest. In his view, this was merely "a private dispute between an investor looking for compensation and a financial advisor who denied wrongdoing, dressed up by the CBC to look like a matter of public interest" (at para 147).

[51] As well, the trial judge found that the defence was not available given that he found malice on the part of the defendants. Finally, it was his view that CBC had not acted with due diligence and, therefore, failed on that aspect of the defence as well.

[52] The trial judge awarded damages totalling $1,659,403.

Issues

[53] On this appeal, the issues raised by the defendants and in the material can be set out as follows:

1. Did the trial judge err with respect to his analysis of the defamatory meanings of the publications?

2. Did the trial judge err in dismissing the justification defence?

3. Did the trial judge err in rejecting the responsible communication defence and, in particular, did he err in finding that the matter was not one of public interest, that the defendants had not exercised due diligence and that the plaintiff had proven malice on the part of the defendants?

4. Did the trial judge err in his assessment of the damages flowing from the defamation?

Standard of Review

Issue #1: Defamatory Meanings

[54] The jurisprudence is clear that whether or not words complained of by the plaintiff are capable of holding a defamatory meaning is a question of law that is subject to appellate review on a standard of correctness. However, whether the words had defamatory meaning on the particular facts of the case and the evidence available to the trier of fact is a question of fact that is subject to review on a palpable and overriding error standard.

Issue #2: The Justification Defence

[55] The defendants raise a number of alleged errors made by the trial judge in his analysis of the justification defence. However, they primarily relate to issues of evidence, including the weighing and alleged misapprehension of pieces of evidence. In short, they are not allegations of errors of law but instead, about what conclusions had been drawn from the

evidence before the trial judge. Accordingly, the review must proceed on a palpable and overriding error standard.

Issue #3: Responsible Communication Defence

[56] This issue raises three questions: (a) whether the publications were a matter of public interest, (b) whether CBC and Sawicka exercised due diligence in trying to verify the allegations, and (c) whether their conduct was malicious.

[57] The defendants argue that it is a question of law as to whether the publications dealt with a matter of public interest. They rely upon McLachlin CJ's comments in *Grant v Torstar Corp*, 2009 SCC 61 [*Grant*], where she stated (at para 100):

> This is a matter for the judge to decide. To be sure, whether a statement's publication is in the public interest involves factual issues. But it is primarily a question of law; the judge is asked to determine whether the nature of the statement is such that protection may be warranted in the public interest. The judge acts as a gatekeeper analogous to the traditional function of the judge in determining whether an "occasion" is subject to privilege. Unlike privilege, however, the determination of whether a statement relates to a matter of public interest focusses on the substance of the publication itself and not the "occasion". Where the question is whether a particular communication fits within a recognized subject matter of public interest, it is a mixed question of fact and law, and will therefore attract more deference on appeal than will a pure determination of public interest. But it properly remains a question for the trial judge as opposed to the jury.

[58] While *Grant* was a jury case, the Chief Justice's comments indicate that the determination of what is a matter of public interest, while involving

factual issues, is a question of law. As well, she notes that that determination is usually subject to review for correctness.

[59] As to the issue of whether due diligence was exercised by the defendants in the circumstances, I would agree with the plaintiff's position—that this is determined on whether there was evidence available to the trial judge to reach that conclusion and whether he did so by following the proper test without misapprehension of the evidence.

[60] Finally, as to the issue of whether the defendants' conduct was malicious, that again is an issue that should be reviewed on a palpable and overriding error standard.

Issue #1: Defamatory Meanings

[61] The defendants argue that the trial judge made several errors in arriving at the meaning of the publications. First, they argue that the trial judge found that the publications ascribed a defamatory meaning "more injurious than the plaintiff's pleaded meanings." This, according to the defendants, is an error of law that tainted the rest of the trial judge's analysis and, on this basis alone, they argue that the decision cannot stand.

[62] They also submit that the trial judge failed to assess the meanings of the words from the perspective of a reasonable person and cannot "select the harshest and most extreme meaning of [the] words" (see *WIC Radio Ltd v Simpson*, 2008 SCC 10 at para 56). This, again, would constitute a legal error. They argue that the trial judge's discounting of the use of the words "under investigation", "complaint" and "alleged" as legal jargon demonstrated that he failed to appreciate that a reasonable person would have understood the

words to mean that the matters had "yet to be proven." As well, they assert that the trial judge made several errors in his approach to determining the meaning of the words in the context of the audiovisual elements of the television broadcast. For instance, they argue that he erred by relying on the broadcast's "imagery" and "dramatic music" and the anchor's "tone" in finding the meaning without considering the principle governing such factors—namely, that it is the content of the words used in the broadcast, so long as not distorted by the audiovisual aspects of the broadcast, that must be the focus. They also say that the trial judge erred "by concluding that a television viewer 'is more likely to indulge in a certain amount of loose thinking'", which is also an error of law.

[63] Finally, the defendants also submit that the trial judge erred by basing the defamatory meaning on irrelevant factors, such as the consideration of other news stories published by CBC, as opposed to the publications, the fact that only excerpts of the recorded meeting were used and the placement of the interview clip in relation to other elements of the broadcast.

[64] I am of the view that this aspect of the appeal must fail as, while the trial judge's reasons are singularly favourable to the plaintiff, his findings are not necessarily unreasonable.

[65] The plaintiff's allegations regarding the defamatory meaning of the words used in the publications can be found in his amended statement of claim:

> . . .
> 18.3 . . . The [words used in the publications] meant and [were] understood to mean as follows:

(i) that the plaintiff cannot be trusted to handle retirement savings of the public in a safe and ethical manner;

(ii) that the plaintiff inappropriately or unethically withheld information from his clients;

(iii) that the plaintiff lacks character and integrity towards clients and potential clients; and

(iv) that the plaintiff has a propensity to engage in unethical business practices.

[underlining omitted]

[66] Counsel for CBC acknowledged in their opening and closing statements that the words used in the publications were capable of a defamatory meaning.

[67] The trial judge concluded that (at para 100):

> . . . [I]t [was] objectively reasonable to think that a reasonable viewer would understand that [this] was not a story about a lack of regulatory oversight in the financial industry or the risks of commuting a private pension, but rather the danger posed to investors by a dishonest and unethical financial advisor like [the plaintiff].

[68] The publications also included an interview with the director of the MSC. While that interview could lead to a view that both a lack of regulatory oversight and the unethical business practices of a financial advisor were involved, the trial judge's conclusion is not an unreasonable one in the circumstances. While I agree with counsel for CBC that the reference to the use of only a portion of the recording, namely, what was not included as

opposed to what was in the broadcast, is somewhat puzzling, it does not take away from the availability of the trial judge's conclusion.

[69] The trial judge makes reference to the fact that he could not consider "the harshest and most extreme meaning of words" (at para 102) and that the use of the words "under investigation" or similar words could not be used as a "shield from a finding of defamatory meaning" (at para 103). These are not misstatements of the law.

[70] The trial judge concludes that, amongst other things, the words left the clear impression that the plaintiff was "untrustworthy or at best incompetent", that he "[d]id not act with integrity towards his clients and potential clients" and that he "[h]ad a propensity to engage in unethical business practices" (at para 104). Those findings are consistent with the wording of the allegations set out in the plaintiff's amended statement of claim.

[71] I am satisfied that the trial judge's conclusions that the words used were defamatory in their natural, ordinary and eventual meanings is not unreasonable on the evidence before him.

[72] I will now turn to the defences.

Issue #2: Justification Defence

[73] At trial, the defendants raised a defence of justification, also known as a defence of substantial truth. In order to be successful on such a defence, they must prove that the "'sting' of the defamatory expression [was] substantially true" (at para 114). This includes any defamatory meaning that

would arise from the use of those words in their context (see *Makow v Winnipeg Sun et al*, 2004 MBCA 41 at 8).

[74] The trial judge concluded that this defence of justification was not available to the defendants for three reasons.

[75] In the first aspect of his review, the trial judge concluded that the evidence adduced by the defendants through Boyce as to the unsuitability of the investment portfolio devised by the plaintiff was offset by the fact that the MFDA had reviewed the plaintiff's conduct with respect to the Worthingtons' complaints on two occasions and had decided that the matters were either of a minor nature or did not merit formal disciplinary proceedings. It had only issued a cautionary letter. He believed that the MFDA decisions were owed deference and that the defence of justification could not succeed based on the Boyce evidence after the MFDA failed to reach that determination.

[76] The second aspect of his review of the defence of justification was a finding that the defendants omitted material facts from their news stories; specifically, 15 facts, which are outlined in his reasons (see para 125). They include the fact that all investors suffered similar decreases in the value of their investment portfolios due to bear markets and that Worthington had repeatedly failed to adhere to the advice that the plaintiff provided as to his withdrawal activities. Further, they include the fact that the Worthingtons' decision to sell their home was motivated by their desire to move into Mrs. Worthington's mother's home so they could act as full-time caregivers; that the MSC reprimand of the plaintiff was part of a negotiated settlement agreement that concluded a seven-year investigation and included a $15,000 voluntary payment by the plaintiff rather than a fine, amongst others. As well,

only a portion of the audio recording was provided to CBC and it had been lost. In the trial judge's view, the failure of CBC to include those facts and others defeated the defence of justification as they would have conveyed an entirely different impression about the plaintiff to reasonable viewers and readers.

[77] The third aspect of the reason for the failure of the justification defence was the trial judge's findings that key factual statements in the publications were not true. Those included that the value of Worthington's investments had dropped by more than $300,000, forcing him to sell his house and to look for work again; that Worthington hoped to retire again someday; that the plaintiff had been ordered to pay a $15,000 fine; and that Worthington never used the word "leverage" (at para 139). The trial judge concluded that CBC could not prove that the factual statements in the news stories were true, let alone the defamatory meanings that arose therefrom.

[78] On appeal, the defendants argue that the trial judge erred on all three of these aspects.

[79] On the first part of the trial judge's analysis, namely, his disregard for Boyce's evidence, the defendants argue that the MFDA letters, by themselves, could not be treated as expert evidence. The only expert evidence before the trial judge on the suitability of the investments was Boyce's evidence. The defendants assert that the MFDA findings were not owed deference in a civil trial as they related to regulatory proceedings where the specific issue of suitability was not necessarily before them. As well, they argue that the trial judge "fundamentally misapprehended the findings in the July 2015 Warning Letter" as that letter reinforced the conclusions reached by

Boyce. The defendants argue that the plaintiff admitted that the crux of Worthington's complaint was substantiated by the MFDA's warning letter. As well, the warning letter confirmed that the findings against the plaintiff were a "serious matter", which was admitted by the plaintiff in his evidence.

[80] As to the trial judge's findings on justification, the defendants argue that the omission of material facts is only relevant if including the information would create an "entirely different impression" than the defamatory meaning (see Raymond E Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, 2nd ed (Toronto: Thomson Reuters, 1999) (loose-leaf updated 2023, release 4), ch 10, pt III at section 10.9). The defendants argue that the trial judge, in his reasons, failed to relate the crucial omitted facts to the defamatory meanings and erred by relying on the purported omissions in and of themselves to find that justification was not available. They assert that none of the omitted facts conveyed an entirely different impression of the plaintiff than the meanings of the publications.

[81] Finally, as to the trial judge's finding that key factual statements were not true, the defendants submit that the trial judge erroneously parsed, line by line, what he considered to be key factual statements and conducted an analysis that was "rooted in strained and unsupportable meanings."

[82] The plaintiff's position on the justification defence on appeal is that the trial judge was correct. In his submission, the trial judge could decline to accept Boyce's evidence and place greater weight on the findings of the MFDA. In his submission, the MFDA's findings that the plaintiff "failed to explain the risks" of commuting did not equate to a finding that the underlying

advice and strategy were unsuitable. The issue is one of weight ascribed by the trial judge to portions of the MFDA's letter.

[83] As to the omission of material facts, the plaintiff argues that there was a sound evidentiary and legal basis supporting the trial judge's conclusion—namely, that the omitted facts, had they been included, would have left the public with the impression that it was a combination of a poor market and Worthington's own choices that resulted in the disappointing performance of his investments and not the plaintiff's conduct.

[84] As to the factual statements, the plaintiff argues that the onus was upon the defendants to prove that the publications were true. The trial judge did not err in his interpretation of the factual statements, nor whether evidence was provided to support their accuracy.

Analysis

[85] While I am of the view that some of the arguments raised on appeal by the defendants have merit, I am also of the view that, on the evidence before him, the trial judge could reach the conclusion that the defendants had not proven the truth of the defamatory statements nor the "sting" that attached to them.

[86] I am concerned with the trial judge's dismissal of Boyce's evidence as a result of "deference" to the findings (or lack of them) of the MFDA (at para 121). Boyce's cogent evidence regarding the plaintiff's investment strategy prepared for Worthington and its suitability for his long-term goals went to some of the issues that were before the trial judge. In particular, it went to the first meaning that the plaintiff was giving to the statements—

namely, that the plaintiff could not be trusted to handle retirement savings of the public in a safe and ethical manner. That said, in my opinion, the trial judge's reasons and his discussion of the findings of the MFDA demonstrate that he was unable to conclude, on the basis of Boyce's evidence alone, when considered in the context of the MFDA investigations and letters, that the investment plans were inadequate. The onus was on the defendants to convince him and to provide evidence to that effect. While Boyce's evidence was more direct and to the point, the fact that the letters made no direct finding as to the unsuitability of the investments was something that the trial judge could consider in reaching his conclusion whether to accept Boyce's evidence.

[87] As to the omitted facts, I agree with the submission of the defendants that some of the facts had little likelihood of affecting the view of a reasonable person such that they would have conveyed an entirely different impression about the plaintiff. For example, the omission of the reference to the NBF letter rejecting Worthington's complaints in and of itself has little bearing on the outcome since, at the end of the day, NBF accepted that there was some exposure on its part when it settled the case with the Worthingtons. Similarly, the trial judge's view that the failure to disclose the entire recording and that only a portion of it was available to CBC may not be a material fact given that the plaintiff agreed that the portion that was provided was accurate. However, it was within the trial judge's purview to consider all of these facts and to determine whether, in his opinion, they may have had the potential of materially affecting the impression left by the publications. I am unable to conclude that the trial judge erred in a material way in concluding that the justification defence was not available due to the omission of some or all of these facts.

[88] Finally, as to the trial judge's finding that "key factual statements" (at para 127) were not true, I must reach the conclusion argued by the plaintiff—that the defendants' disagreement with the trial judge's findings does not give rise to a palpable and overriding error warranting appellate intervention in a finding that justification has not been made out.

Issue #3: The Responsible Communication Defence

[89] In *Grant*, the Supreme Court of Canada recognized that the law of defamation should be modified to provide greater protection for communications on matters of public interest. It created the defence of "responsible communication" (at para 97), available for publications on matters of public interest where the defendant could show that the publication was responsible and that diligence was exercised in trying to verify the allegations having regard to all the circumstances. The defence is not available where malice is shown as that would be inconsistent with a finding of responsible publication or due diligence.

[90] In this case, the defendants raised the defence of responsible communication, but the trial judge found that it did not apply for three reasons.

[91] In the first instance, he was of the view that the matter in issue was not one of public interest but, rather, "a private dispute between an investor looking for compensation and a financial advisor who denied wrongdoing, dressed up by the CBC to look like a matter of public interest" (at para 147).

[92] Secondly, the trial judge found that the defendants failed to meet the due diligence factors that form the second prong of the test for responsible communication (see para 148).

[93] Finally, the trial judge concluded that CBC and Sawicka had acted with malice in their conduct towards the plaintiff both at the time of the publications and up to and including the trial.

Public Interest

[94] The trial judge was fairly curt in his conclusion that there was no public interest issue raised by the publications. Apart from a few comments as to his conclusion that the matter did not raise issues of regulatory review or risks to investors, he summarily found that it was a private dispute.

[95] In this defence, the public interest to be considered must be given a "generous and expansive" interpretation, as Côté J stated in *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 at para 30. Although speaking to the meaning of a similar phrase found in anti-SLAPP legislation, she drew from the principles in *Grant* and stated (at paras 26-27):

> . . . [F]inally, what does "relates to a matter of public interest" mean? These words should be given a broad and liberal interpretation, consistent with the legislative purpose of s. 137.1(3) [of the *Courts of Justice Act*, RSO 1990, c C43]. . . .
>
> In [*Grant*], this Court considered the question of how public interest in a matter is to be established. While that case concerned the defence of responsible communication to a defamation action, it also involved determining what constitutes a "matter of public interest". The same principles apply in the present context. The expression should be assessed "as a whole", and it must be asked whether "some segment of the community would have a genuine interest in receiving information on the subject" (paras. 101-2). While there is "no single 'test'", "(t)he public has a genuine stake in knowing about many matters" ranging across a variety of topics (paras. 103 and 106). This Court rejected the "narrow" interpretation of public interest adopted by courts in Australia, New Zealand, and the United States; instead, in Canada, "(t)he

> democratic interest in such wide-ranging public debate must be reflected in the jurisprudence" (para. 106).
>
> [emphasis added]

[96] As well, in *Fortress Real Developments Inc v Rabidoux*, 2018 ONCA 686, Doherty JA wrote (at para 36):

> The meaning of the phrase "relates to a matter of public interest" in s. 137.1(3) was considered in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685, at paras. 50-66 (released concurrently with these reasons). Like the motion judge, this court has opted for a broad reading of the phrase, consistent with the analysis in [*Grant*]. . . .
> . . .
>
> [emphasis added]

[97] In order to properly assess whether the matter is one of public interest, one must look at the context in which the expression was made and the entirety of the relevant communication. Where a motion judge focused on "the merits [of the allegation of defamation] or [the] manner of the expression, [and] the motive of the author", he committed an extricable error of law (see *Levant v Day*, 2019 ONCA 244 at para 11).

[98] The publications may also relate to more than one matter; that is, they can be a matter of public interest even if there is also a focus on a private issue. If there is a public interest element involved, motivations of the allegedly defamatory speaker are not a factor in the conclusion (see *Ontario College of Teachers v Bouragba*, 2019 ONCA 1028 at para 32, leave to appeal to SCC refused, 39229 (29 October 2020)).

[99] While the publications referred to the ongoing "battle" between the Worthingtons and the plaintiff, they also referred to the plaintiff's practice relating to his investment strategy of commuting deferred pension benefits into an investment portfolio. They also reviewed the ongoing proceedings involving the plaintiff before the MSC and MFDA and included an interview with the MSC director. The regulatory scheme governing financial planners was a significant factor in the publications.

[100] In my view, the trial judge erred in taking a narrow focus of the dispute and failing to appreciate that there was a public interest element to the publications. As such, he committed an error of law. I will now proceed to the other two grounds upon which the trial judge dismissed the responsible communication defence.

Due Diligence

[101] In *Grant*, the Court set out some relevant factors that can be considered in determining whether a defamatory communication on a matter of public interest was responsibly made. They include (i) the seriousness of the allegation, (ii) the public importance of the matter, (iii) the urgency of the matter, (iv) the status and reliability of the source, (v) whether the plaintiff's side of the story was sought and accurately reported, and (vi) whether the inclusion of the defamatory statement was justifiable (see para 126).

[102] As well, the Court in *Grant* indicated that all matters relevant to whether the defendant communicated responsibly can be considered. The Court noted that the tone of the article may not always be relevant and stated that "[a]n otherwise responsible article should not be denied the protection of the defence simply because of its critical tone" (at para 123). As well, "[i]f

the defamatory statement is capable of conveying more than one meaning, the [trier of fact] should take into account the defendant's intended meaning, if reasonable, in determining whether the defence of responsible communication has been established" (at para 124).

[103] Referring to paragraph 126 of *Grant*, the trial judge relied on his assessment of the seriousness of the allegations and the reliability of the source to find that CBC had not met its onus to satisfy him that the second prong of the test for the responsible communication defence had been met. In his view, the allegations, and in particular, the suggestion that the plaintiff's wrongdoings resulted in Worthington losing more than $300,000, forcing him to sell his home and to look for employment again, were highly serious allegations that required a high degree of diligence. In his view, no research was conducted by CBC into the strategy underlying the plaintiff's investment plan and the plaintiff was not informed in the two voicemail messages that were left for him that CBC would broadcast snippets of the surreptitious audio recordings or that a second news broadcast was planned. As well, CBC failed to obtain the full audio recording or to inquire as to why it was being suppressed. No effort was made to report about the contents of the NBF letter, which denied the Worthingtons' claim. CBC also did not report on the results of the MFDA investigation which included a letter from the MFDA to Worthington dated July 24, 2015 (the MFDA letter), in which it indicated that the MFDA would not be taking disciplinary measures against the plaintiff.

[104] As to the reliability of the sources relied upon by CBC, the trial judge noted that CBC knew that the Worthingtons had failed to disclose the full audio recording of their meeting with the plaintiff without explanation and that it knew that the Worthingtons were making their complaints with a

view to obtaining financial compensation and not to serve the greater public good. In his view, CBC was therefore obligated to take additional steps to verify the accuracy of the allegations and the integrity of the Worthingtons. The failure to obtain the full audio recording or to question and disclose why the Worthingtons refused to provide it represented a critical failure on the part of CBC to verify the status and reliability of its primary source. This was compounded by the decision not to report on the "loss" of the audio recording after the fact became known during the course of the litigation. He stated that CBC failed "to report the facts in a fair, balanced and responsible manner" (at para 154).

[105] As well, CBC omitted numerous material facts that, had they been reported, would have substantially affected the impression a fair-minded viewer would have had about the plaintiff. All of these considerations led the trial judge to conclude that CBC could not avail itself of the public interest and responsible communication defence as they had not met the test of due diligence.

[106] The trial judge addressed the due diligence factors from the vantage point of the story being about the dispute between the plaintiff and the Worthingtons. He paid little attention to those aspects of the story relating to the role the regulators had played and were continuing to exercise.

[107] One of the salient facts that drove the Worthingtons' complaint was the failure to disclose that the plaintiff was subject to stringent supervision and controls by his employers. The Worthingtons were also not told that the plaintiff had entered into a settlement agreement with the MSC which led to those conditions being imposed. Whether it was incumbent upon a dealer to

advise a potential or existing client of such investigations was part and parcel of the enquiries Sawicka had with the director of the MSC. Sawicka had a lengthy interview with the director that led to a videotaped portion of it being part of the publications.

[108] As she described in her evidence in chief, which is not commented upon by the trial judge, Sawicka and her superiors were considering a larger story than merely the dispute between the Worthingtons and the plaintiff. Rather, they were considering a story about a consumer making a significant decision to commute a pension into an investment fund and the advice given by financial planners to their clients. CBC was also considering the relationship between the regulatory agencies that were involved. Sawicka did seek comments from the plaintiff and NBF. Voicemail messages were left for the plaintiff on two occasions. He did not respond to either.

[109] The trial judge took issue with the fact that the plaintiff "was not informed in the two voicemails that . . . CBC would broadcast snippets of the surreptitious audio recordings or that a second news broadcast was planned that would include the complaint of another disgruntled client" (at para 150). I fail to see how providing that level of detail in the requests for comments was necessary in order to establish a fair playing field. No doubt, had the plaintiff responded to the request for comment, there may have been further information provided to him as to what was to be said and, perhaps, comments sought on those aspects themselves. However, in my view, it was not necessary at that stage for the CBC to provide the detailed information that the trial judge found necessary to amount to due diligence.

[110] Similarly, the trial judge believed that a lack of diligence was shown by the fact that CBC failed to obtain the full audio recording or enquire as to why it was being suppressed. The evidence concerning the recording is that it was a digital recording that Mrs. Worthington downloaded to her computer. From the approximately two hours of recorded audio, she provided four excerpts to Sawicka, the same excerpts she provided to the MSC and NBF with her complaints. Sawicka asked Mrs. Worthington to provide the entire recording, but Mrs. Worthington refused, indicating that she would play the entire recording for her lawyer if and when she found it necessary to sue the plaintiff or NBF. Sawicka, in her evidence, explained that she did give consideration to the fact that CBC had not been provided with the entire recording; that she discussed it with her superior, Rosner; and that a decision was made that, notwithstanding the unavailability of the entire recording, they would proceed with the portions they had as they appeared to be self-contained and complete. It should be noted that the plaintiff confirmed at trial that the excerpts of the recording, which were provided by Mrs. Worthington to CBC, were accurate.

[111] While another judge may have made a different call on whether Sawicka made sufficient attempts to obtain the full audio recording, the trial judge was entitled to decide as he did on the evidence he accepted. He did not believe Mrs. Worthington's evidence regarding the recording and its subsequent loss, saying her evidence "defies belief" (at para 41).

[112] The trial judge found that CBC's failure to report on the contents of the NBF letter whereby NBF dismissed the Worthingtons' complaint, amounted to a lack of due diligence. However, at the time of the publications, Sawicka had been made aware by Mrs. Worthington that NBF was reopening

its investigation and considering a number of different issues, including the issues which form part of the Worthingtons' complaints against the plaintiff, and those of others. From CBC's point of view, all of these matters formed part of its public interest investigation. As a result, the NBF letter was not a necessary part of the story at the time of publication.

[113] The trial judge also found that CBC's failure to report on the MFDA letter amounted to a lack of due diligence. That could only be with respect to CBC's conduct after publication. The time to look at whether or not due diligence had been exercised is prior to or contemporaneous with the publications. Something occurring three years afterwards cannot be relevant to a determination of due diligence at the time of the events themselves. It was a palpable error for the trial judge to have considered this as a factor.

[114] As to the reliability of the source, there is no doubt that the Worthingtons had an animus towards the plaintiff and the trial judge effectively found that they were the only source that CBC and Sawicka relied on for their story. He stated, "CBC was obligated . . . to take additional steps to verify the accuracy of the allegations and the integrity of the Worthingtons, but it chose not to" (at para 151) (emphasis added).

[115] However, although a primary one, they were not the only source relied upon by Sawicka. CBC relied upon information obtained from the director, the documents concerning the plaintiff's settlement agreement and the commentary and information obtained from other individuals who had issues with the plaintiff.

[116] CBC and Sawicka did seek information on the strategy underlying the investment plan devised for Worthington from the University of Manitoba,

but were unable to find a source to comment upon that prior to the interview airing.

[117] All of these investigative steps, and more, were described by Sawicka in her evidence at trial. The trial judge's finding that CBC "chose not to" take steps (at para 151) to verify the allegations is in direct contrast to this part of Sawicka's evidence. The trial judge did not refer to or specifically reject this uncontradicted evidence. As a result, he made a palpable and overriding error in finding that CBC took no steps to investigate the allegations and the integrity of the Worthingtons.

[118] As to the suggestion that CBC had omitted numerous material facts, which would have substantially affected the impression of a fair-minded viewer and reader, I have commented upon that previously. In my view, the material facts at issue are not of such probative value or importance in the context of a matter of public interest that they merited being included as a necessity for a fair and accurate picture, nor would they have had the substantive effect suggested.

[119] As a result of the trial judge's errors in his findings relating to several of the due diligence factors, it is necessary to reassess and reweigh those factors as discussed in *Grant*.

[120] I am of the view that, given the public interest aspect of the story, the CBC performed a satisfactory investigation into the status and reliability of its main source, the Worthingtons. As I have explained, the trial judge made a palpable and overriding error in finding that it did not.

[121] I would defer to the trial judge's assessment on the seriousness of the allegations, but note that in *Grant*, the Court recognized that, in its assessment of the responsible communication defence, the trier of fact should take into account the defendants' intended meaning, if reasonable. While the trial judge dismissed the use of terms such as "under investigation" (at para 103) as having no effect on the perception of the reader, it is clear that it would be a factor available to consider the intended meaning of the defendants in a responsible communication defence. As well, the tone used by a reporter is of less importance when considering the context of the defence (see *Grant* at paras 123-24).

[122] In this assessment, I note that, contrary to the trial judge's findings, there is evidence of attempts made by CBC to research the strategy underlying the Worthington's investment plan in order to comment upon it. In my view, CBC and Sawicka did not fall short of their obligation to inform the plaintiff when, in the voicemail messages left for him, they did not inform him that they intended to use the recording in its broadcast and to have another of the plaintiff's clients speak on-air.

[123] While I must defer to the trial judge's findings that Sawicka could have done more to obtain the full audio recording or to enquire as to why Mrs. Worthington refused to release it, I would not ascribe to that failure the importance that the trial judge did, given the plaintiff's admission that what was used was accurate. As discussed, the trial judge erred in faulting CBC for making no effort to report on the contents of the NBF letter as he failed to consider the evidence that CBC knew NBF was reopening its investigation. I am also of the view that the trial judge made a palpable and overriding error

in finding that CBC should have reported on the MFDA letter as it could not have done so at the time of the publications.

[124] The trial judge's finding that CBC omitted material facts from the publications is entitled to deference although again, given the nature of the facts, I would not place significant weight on this failure.

[125] In totality, when considering CBC's conduct and investigation prior to and contemporaneously with the publications, I am satisfied that, in the context of a responsible communication defence and the issues of public interest, which were being investigated, CBC has met the due diligence requirements. I will now consider whether the plaintiff can show malice.

Malice

[126] The trial judge rejected CBC's responsible communication defence on the basis that CBC had acted with malice.

[127] In *Grant*, when formulating the modern responsible communication defence, the Supreme Court commented that it is not available to a defendant who acted with malice since "[a] defendant who has acted with malice in publishing defamatory allegations has by definition not acted responsibly" (at para 125).

[128] The trial judge noted that it was not difficult for him to conclude that there should be a finding of malice by relying on a read-in by the defendant from the examination for discovery of the plaintiff, which states as follows (at para 141):

> . . .
> [COUNSEL FOR THE DEFENDANTS]: So you're suggesting in the article, the story of November 14th, 2013, which appears just at the bottom of page 7 –
>
> [PLAINTIFF]: Yeah
>
> [COUNSEL FOR THE DEFENDANTS]: It begins – where CBC reported that you had been denied a licence by the Manitoba Securities Commission, even though that report is true, that that's an act of malice?
>
> [PLAINTIFF]: Absolutely.
> . . .

[129] In the trial judge's view, by reading in those questions and answers, the defendants were deemed to have adopted, as part of their case, the truthfulness of the statements contained in the answers. Therefore, in accordance with our provincial jurisprudence, CBC was bound by that statement unless further evidence was provided to negate it.

[130] The trial judge also listed six other pieces of evidence that he relied upon to conclude that the plaintiff had met his burden to prove that CBC either acted with malice in a desire to injure him or that it acted recklessly in a way that demonstrated indifference to the truth.

[131] First, he found that the willingness of CBC to use the allegation of churning during the course of the litigation, including during settlement discussions and right up to the start of the trial was highly disturbing. In his view, that "served no legitimate purpose and [was] fueled by schadenfreude" (at para 144(f)).

[132] Two other factors related to CBC's use of the recording: specifically, the trial judge focused on the use of portions of the recorded meeting without informing the public that CBC had never challenged the Worthingtons as to why the full recording was being withheld or if the withheld parts might support the plaintiff's position. As well, the fact that the loss of the full audio recording was not reported on amounted to a contribution to the allegation of malice.

[133] Two further factors considered by the trial judge were the omissions by CBC to report the fact that NBF had dismissed the Worthingtons' complaints and that the MFDA had only issued a letter of reprimand to the plaintiff. In his view, those facts, if referred to, would have painted the plaintiff in a more positive light. The fact that they were not reported in the original publication or in subsequent publications amounted to evidence of malice. Similarly, the trial judge found that the failure to fully report the conclusions of the MFDA amounted to a failure by CBC to meet its own journalistic standards and practices. Finally, he considered that CBC treated Worthington's withdrawals from his investment portfolio as being the actual "cause of a 'drop' of some $300,000 in the value of the investment portfolio, when in fact the CBC admitted it was a figure closer to $60,000 . . . [and] that there were two bear markets during the relevant time frame that impacted all investors [which] was also omitted" (at para 144(e)).

[134] The trial judge's findings on malice and the evidence that he relied upon suffer from the fact that they, for the most part, relate to events that occurred after the publications. As noted in Brown at section 16:4, an important consideration of a finding of malice "is the state of mind of the

defendant at the time the words were published" (*Simmonds v Murphy*, 1996 CanLII 3694 at 12 (PE SCTD)).

[135] There is jurisprudence to the effect that a court can examine the conduct of a defendant throughout the course of events, including before and after the publication of the remarks (including the course of judicial proceedings) to establish the conduct and motivation of that defendant. That is to determine whether the conduct may constitute evidence of a previous intention as to a previous fact. In other words, the conduct is assessed to determine whether it can be used to draw an inference that, at the time of the publication, the defendant displayed an animus towards the plaintiff which motivated the defendant in publishing (see Brown at section 16:14).

[136] The trial judge's explanation as to the jurisprudence surrounding read-ins of examinations for discovery is accurate. However, one must always consider the actual read-in for what it is—a piece of evidence. A careful reading of the questions and answers suggests they do not have the meaning ascribed to them by the trial judge. It was not, as found by the trial judge, an admission; rather, it was a statement of the plaintiff's position in the litigation, which was that the November 14, 2013 article (which the plaintiff agreed was true) amounted to an act of malice in his eyes. That article indicated that the plaintiff had been denied a licence by the MSC. That the plaintiff took that article as evidence of malice by CBC is not proof of the fact that CBC had acted, on that occasion, with an intent to injure or that it was reckless as to whether it did. It is merely a statement of the plaintiff's view of the motive behind that article. Of course, the timing is also relevant. As noted by CBC, the article is not evidence and does not purport to address malice with respect to the publications that are at issue in this litigation.

[137] In my view, the trial judge erred in placing the significant reliance he did on the read-ins as one of the bases for his finding of malice against CBC.

[138] As to the churning allegation, it also arose at a later point in the litigation when CBC tendered the Betermier report as an expert report for trial. It contained a suggestion that the plaintiff's investment strategy benefitted him more than the client.

[139] The fact that the allegation was made is relevant in the determination of the defendants' conduct in the proceedings, but it cannot be related back to the publications in any way. This was the opinion of an independent expert on the plaintiff's investment strategy. It had no probative value in determining whether there was, at the time of the publications, an intent to injure. Its relevance, if any, would be with respect to the issue of damages, not liability.

[140] As explained by Sawicka, in her view, the portions of the recording that she relied on were self-contained and focused on narrow and specific points. This was confirmed by substantial evidence at trial, including the plaintiff's own admission. Not only did she have concerns, but she discussed them with her superior, Rosner, and a decision was made to use the excerpts for the reasons previously described. It was hardly a cavalier or reckless approach.

[141] With respect to the failure to report on NBF's dismissal of the Worthingtons' complaint, both Sawicka and Rosner understood from NBF's email dated June 6, 2012 (before the publications) that the investigation had been reopened. As well, NBF declined an interview to give its view of the

events. It was not evidence of malice for the CBC and Sawicka not to report that a complaint had been dismissed when it was still under investigation.

[142] As to the MFDA letter that occurred some time after the publications, it referred to disciplinary measures against the plaintiff without providing information as to what those measures were. As to the July 2012 MFDA letter, the CBC and Sawicka were aware that the MFDA was continuing its investigation into the plaintiff's clients.

[143] Finally, I will turn to CBC's treatment of the withdrawals made by Worthington as causing the substantial drop in his portfolio when, in fact, the drop was a smaller amount and likely caused by the bear markets. The difficulty with using that as evidence of malice is that, at the time of the publications, CBC was relying upon the information provided by the Worthingtons as to the likely cause of their financial problems. This was supplemented by the information received from the regulatory agencies of complaints based on an unsuitable investment strategy. CBC was not aware, at the time of the publications, of the actual drop in Worthington's portfolio as this information only became available during the course of the litigation. Again, it could not form a basis for a finding of malice at the time of the publications, nor could it substantiate an inference that malice existed at the time of the publications because no reference was made to the smaller amount, nor the impact of the bear markets.

[144] In short, the evidence relied on by the trial judge to conclude that malice existed at the time of the publications is either not probative of that finding, of limited probative value or not related to CBC and Sawicka's state of mind at the time of publication. As this Court has noted, there is a strong

presumption in favour of the *bona fides* and honest belief of a defendant (see *Laufer v Bucklaschuk*, 1999 CanLII 5073 at para 100 (MB CA); and Brown at section 16:6). A court must be slow to draw the inference of malice (see *Kent v Martin*, 2016 ABQB 314 at para 232).

[145] Finally, the trial judge paid little attention to the evidence of Sawicka and Rosner as to the reasons that motivated them in proceeding with the publications. Both Sawicka and Rosner set out in detail in their direct examinations the steps they took to investigate and weigh the information they obtained from the regulatory agencies and their belief that the then current regulatory scheme was worthy of public commentary.

[146] In my view, the trial judge considered evidence that was not worthy of the weight that he ascribed to it and placed too much importance on matters that were not relevant to the issue of whether malice existed at the time of the publications. In doing so, misdirected himself as to whether or not the plaintiff had satisfied the onus of proving malice on the part of the defendants, leading to a palpable and overriding error that warrants appellate intervention.

[147] The evidence of the CBC and Sawicka is sufficient to satisfy me that the plaintiff has not met the onus to prove that there was malice at the time of the publications. Further, the events occurring thereafter do not allow a court to conclude that malice likely existed at the time of the publications. In my view, the responsible communication defence was available to the defendants and they should succeed on this aspect of the appeal.

Damages

[148] If I am wrong in my assessment of whether the responsible communication defence applies, then damages for the defamatory comments must be considered. The trial judge awarded the following damages:

- general damages of $400,000;
- aggravated damages of $400,000;
- punitive damages of $250,000; and
- special damages of $609,403.

General Damages

[149] The leading case with respect to the assessment of damages for defamation is *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 [*Hill*], where the Supreme Court identified six factors to be taken into account in assessing general damages for defamation (*Chartier v Bibeau*, 2022 MBCA 5 at para 41):

> . . . (1) the plaintiff's conduct, (2) their position and standing, (3) the nature of the defamatory statement, (4) the mode and extent of publication, (5) the absence or refusal of any retraction or apology, and (6) the conduct of the defendant "from the time when the libel was published down to the very moment of (the jury's) verdict" (at para 182). The jury is also required to "take into account the evidence led in aggravation or mitigation of the damages" (*ibid*).

Evidence led in aggravation or mitigation of damages is also relevant.

[150] While *Hill* was a civil jury trial, the principles apply as well to the directions trial judges must give themselves.

[151] The trial judge began his analysis by assessing whether the defendants had proven that the plaintiff's reputation at the time of the libel was so low that it could not be damaged any further, and ultimately concluded that the defendants had failed to do so. Relying primarily on the plaintiff's testimony, the trial judge concluded that the publications were devastating to his private life and professional career. He referred to strains on family life, on the plaintiff's medical and emotional well-being, and on personal relationships. The trial judge accepted the plaintiff's evidence that, prior to the publications, the relationship with his then-employer, NBF, was excellent and he was successful in his business activities. However, following the publications, the plaintiff was temporarily prohibited by his employer from attending to the office and was subsequently suspended in September 2012, without written notice. In November 2012, NBF gave him a termination letter.

[152] The trial judge did not accept the defendants' argument that there was no causal relationship between the publications and the deterioration of the plaintiff's professional and personal life. The trial judge conceded that the plaintiff's "reputation as a financial advisor was not impeccable, but it was not underwater" (at para 169) as suggested by the defendants. While the plaintiff had a long-running dispute with the MSC, it had been resolved prior to the publications by way of a voluntary payment with costs based on his admission that he acted contrary to the public interest. In the trial judge's opinion, this matter did not involve accusation or charges of fraud and misappropriation of client funds. The decision of the MSC was a matter of

public record and, according to the trial judge, "the evidence [showed] there was no negative impact on his earnings as a result of the voluntary payment" (at para 170).

[153] While the plaintiff had been named as a defendant in numerous actions, that should not amount to a finding of misconduct and there was no evidence that the lawsuits impacted his income-earning ability in a negative way. The trial judge also described the MFDA letter as "minor slap-on-the-wrist discipline meted out by the MFDA after the litigation started" (at para 172). He noted that the fact that the plaintiff was placed on strict supervision was a matter of public record and did not thwart his income-earning potential. He concluded "on all the evidence that the calamitous drop in [the plaintiff's] income . . . was directly related to the [publications] and it took him years to recover his financial equilibrium" (at para 174).

[154] The trial judge noted that because of the online accessibility to CBC's website, the "ongoing storm of negative publicity" (*ibid*) continued to impact the plaintiff. The trial judge was of the view that by its read-ins, CBC adopted the truth of the plaintiff's position that his termination by NBF was not for cause. The trial judge viewed the fact that the plaintiff's associate's buyout offer shortly after the first broadcast was on a reduced basis, as evidence of how severe the professional and financial impacts of the publications were on him.

[155] Relying on the factors established in *Leenen v Canadian Broadcasting Corp*, 2000 CanLII 22380 (ONSC), for consideration of general damages, the trial judge found that they weighed heavily in favour of a significant award of general damages. He took particular note of the repetition

of the defamatory expression as a result of the continued publications of news articles on CBC's website. He found that "[t]he persistent publication by the CBC of a narrative about [the plaintiff] that was biased against him and that painted the Worthingtons as his victims . . . must attract considerable damages" (at para 176). He therefore awarded $400,000.

[156] With respect to the trial judge's assessment of the plaintiff's regulatory troubles, I am of the view that he minimized what was a series of ongoing and repetitive complaints that concerned the regulatory authorities. The plaintiff's failure to diligently complete or have his clients complete the KYC form, which formed the basis of an assessment of a client's ability to withstand certain risks, stemmed back to his days with Assante, continued with Wellington West and then with NBF. It was the basis for NBF issuing its notice of termination.

[157] This failure was also part of the consideration for the MFDA and the MSC imposing strict supervisory conditions on the plaintiff's transfer of registration to Wellington West. It was a source of concern. On November 4, 2013, the director of the MSC dealt with the plaintiff's request for registration as a mutual fund dealer with an Ontario corporation. As a result of investigations into the plaintiff's background, the registration was refused. This refusal was based, in part, on the plaintiff's termination from NBF due to his failure to diligently complete a KYC form. In his response to the termination notice, the plaintiff took the position that a single piece of information had been inadvertently missed and that the remainder of the KYC form at issue had been completed.

[158] In his reasons, the director said:

> . . .
> What is clear is the omissions on this form represent more than a minor mistake or error. For a registrant with the experience and background of [the plaintiff] to allow a form to be signed which failed to disclose the most basic elements of investment objectives and risk tolerance is clearly unacceptable. . . .
> . . .
> The repetitive conduct of [the plaintiff] is clear. He was aware of the necessity to complete forms prior to conducting trading activity on behalf of clients. . . . When questioned of these repeated instances of what he acknowledged to be unacceptable conduct [the plaintiff] could provide no insight into his conduct except that it was a mistake and in some instances done for some perceived benefit to the client.
> . . .

[159] In addition, the director noted in his reasons that the plaintiff, while not registered at that time, involved himself in trading or advising clients with the director stating that "[t]his continued conduct by [the plaintiff] following the loss of his registration [called] into question his suitability for registration for a number of reasons."

[160] The director's comments with respect to the plaintiff's termination are an indication of two things. The plaintiff's reputation was not as stellar as he portrayed it to be and his continued conduct in breach of the regulatory authorities that had commenced prior to the publications was on its way to affect his professional reputation. In brief, there was evidence before the trial judge with respect to the plaintiff's regulatory problems, both before, at and after the date of the publications.

[161] For the trial judge to dismiss the plaintiff's conduct and his regulatory problems in his assessment of the reputation the plaintiff held at

the time of the publications is a failure to give proper effect to relevant evidence.

[162] For the trial judge to indicate that the strict supervision was known to the public and had little effect on the plaintiff's ability to earn income does not consider Mrs. Worthington's evidence that one of the major concerns she had was that those strict supervisory requirements were in place, but the Worthingtons had never been advised of that fact. While the publications may have had the impact of broadening the dissemination of those requirements to the general public, it is not an aspect of the publications that is being pursued as being defamatory. This was a legitimate part of the public interest enquiry made by the broadcaster.

[163] Part of the assessment of general damages was the trial judge's finding that CBC adopted the plaintiff's contention that the termination by NBF was unjustified. Given the comments I have just reviewed from the MSC, the plaintiff's explanation appears to be of doubtful value. This reliance upon the read-ins is also an error. The read-ins state as follows:

> . . .
> 49 [COUNSEL FOR CBC]. Ultimately, on November 6, 2012, [NBF] advised you that it was terminating your employment effective November 5th, 2012?
>
> [PLAINTIFF]. Correct.
>
> 50 [COUNSEL FOR CBC]. They were again purporting to do it for cause was their basis?
>
> [PLAINTIFF]. Correct.
>
> 51 [COUNSEL FOR CBC]. I take it you dispute that, and I understand you have a claim against them in relation to that?

> [PLAINTIFF]. That's correct.
>
> 52 [COUNSEL FOR CBC]. As of November 6, 2012 your registration to trade in securities was also ended as a result of that [NBF] termination?
>
> [PLAINTIFF]. That's correct.
>
> 53 [COUNSEL FOR CBC]. Since then you haven't been able to trade in securities or deal in mutual funds?
>
> [PLAINTIFF]. No, I haven't.
>
> . . .

[164] This was not an admission that the termination was without cause. It is simply an admission that the plaintiff disputed that his termination was for cause. It should be noted that, in the statement of claim he filed against NBF, challenging the termination, the plaintiff alleged that the cause of his loss of income was as a result of the termination with no mention of the publications.

[165] The trial judge erroneously relied upon the plaintiff's assertions that his loss of income was caused by a general loss of reputation or related to the publications. In fact, the trial judge failed to consider the clear evidence that NBF was in a position to terminate the plaintiff's employment for cause given his repetitive and ongoing breaches of ethical obligations, which they did. To find that NBF's termination had no effect on his reputation and ability to earn further income is a palpable and overriding error.

[166] If general damages are to be awarded, I would reduce the amount to $100,000.

Aggravated Damages

[167] In *Hill*, the general principles with respect to aggravated damages were laid out. Aggravated damages may be awarded in a situation where the defendant's conduct has been "particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from libelous statements" (at para 188).

[168] The trial judge stated (at para 159):

> . . .
> If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff. . . .
> . . .

[169] As the trial judge explained, what animated his "finding that aggravated damages [were] appropriate . . . [was CBC's] position throughout the litigation process and right up to the first day of trial that [the plaintiff] was engaged in churning" (at para 178). He referred to this conduct as being "both egregious and outrageous" (at para 179). He criticized CBC's conduct for emphasizing in its opening statement that the trades seemed to favour the plaintiff, implying it had the evidence to support that allegation and then making every effort to avoid any further mention of the strategy in the litigation process. In his view, that was unquestionable evidence that CBC was motivated by actual malice and aggravated the injury caused to the plaintiff. He expressed "the '*natural indignation of the court*' to the conduct" (*ibid*) (emphasis in original).

[170] It is important to place the churning issue and allegation in its proper context. Throughout the examination for discovery process, CBC sought information from the plaintiff and his counsel as to what particular fees that were charged to Worthington's portfolio. Despite repeated requests by CBC, that evidence was not disclosed.

[171] Using the information they had at hand, CBC obtained an expert report from Prof. Betermier, an expert in the area of financial planning. That report contained a statement that questioned whether the plaintiff's investment strategy devised for Worthington may have advantaged the plaintiff by the payment of greater fees or commissions than would be necessary.

[172] In his opening statement, counsel for CBC made reference to that comment for the purposes of challenging the investment strategy derived by the plaintiff for Worthington.

[173] However, in his direct examination, the plaintiff gave testimony as to the fees and commissions on mutual funds transactions that indicated that the value-added services were provided at no charge. This information was offered by the plaintiff for the first time during his testimony.

[174] CBC then moved for an adjournment to allow it time to consider its position and seek further examination for discovery of the plaintiff on this issue.

[175] The trial judge, recognizing the importance of the matter, granted the adjournment. Further examination for discovery took place and, upon receiving the additional information, CBC, through new counsel, advised that it was no longer relying upon Prof. Betermier or his report. In other words,

there was no further suggestion that churning was an issue prior to the trial resuming. In fact, it was the plaintiff who sought to have the Betermier report introduced as evidence for the purposes of showing that CBC, at one time, alleged churning.

[176] Until the plaintiff gave evidence that changed the information that CBC and Prof. Betermier had concerning the fees and commissions being charged to Worthington's account, there was nothing to suggest that Prof. Betermier's conclusion that the investment strategy was flawed was unreasonable. The fact that information was withheld is what led to Prof. Betermier's opinion, which was a legitimate litigation position based upon the information that had been provided to him at that time. The fault lies with the plaintiff and his refusal to provide information through the discovery process on a timely basis. It cannot form the basis of a suggestion that the conduct by CBC by relying upon Prof. Betermier was "malicious" and "high-handed" (at para 160). As soon as the information was provided, which disabused CBC of the correctness of the opinion, CBC withdrew it and obtained a different opinion from Boyce. Again, this does not suggest malice or high-handed conduct. This does not meet the high standard required for a finding of aggravated damages.

[177] I am of the view that the trial judge erred in awarding aggravated damages for that reason, which was the only explanation given.

Punitive Damages

[178] The trial judge was of the view that punitive damages were necessary in this case as a party with wealth and power persisted in a defamatory expression towards a vulnerable victim.

[179] In *Hill*, Cory J set out the general principles with respect to awarding punitive damages in defamation actions as follows (at paras 196-97):

> 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.
>
> Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?

[180] Noting that CBC has considerable resources and is a national broadcaster that also widely distributes through its website, the trial judge acknowledged that the publications occurred where the plaintiff lived and worked. He also noted that "[i]t [would] be something that [lived] on forever" (at para 181) and he was of the view that an award of punitive damages would serve as a deterrent and make CBC reconsider how it performs its investigation about professionals, and how it conducts itself in any further claims for defamation that might emerge.

[181] There is truly a lack of analysis as to why punitive damages were warranted and met the legal test in the circumstances of this case. As I have discussed with respect to the awarding of aggravated damages, in my view, there is no indication that CBC acted in a high-handed or a particularly oppressive manner in this case. This was an attempt to discuss a matter of public interest albeit with some inaccurate reporting on some personal aspects of the relationship between the Worthingtons and the plaintiff. Punitive damages are not warranted and should not have been awarded.

Special Damages

[182] The plaintiff sought special damages with respect to lost income as a result of the defamatory expression. In order to succeed on that point, it was necessary for him to prove the losses arose as a result of the defamation. The trial judge recognized that he bore that onus when discussing the plaintiff's income calculation of $2.5 million. That amount was based primarily on the plaintiff's belief that his assets under management (AUM) as of July 1, 2012 were $75 million. However, as the trial judge noted, the plaintiff was unable to produce any financial documents or records listing his clients and their respective investment balances as of that date to support his AUM figure. He did not call an actuary to testify in support of his claim.

[183] On the other hand, CBC produced a report by Nancy Rogers (Rogers) who is a chartered professional accountant and chartered business evaluator. Her qualifications were not challenged. She prepared a model that postulated the pre-tax income losses totalling $609,403. The trial judge used that amount as the plaintiff's income loss and awarded him special damages.

What the trial judge did not discuss in his reasons were the assumptions used by Rogers to support her calculations.

[184] Those assumptions were that:

- the plaintiff's clients would never have been made aware of his issues with the regulators or his clients' complaints;
- the plaintiff's clients would have made no further complaints after the publications;
- NBF would not have terminated the plaintiff's employment; and
- the plaintiff would have remained in good standing with the regulators.

[185] The plaintiff's position on appeal is that the premise behind these assumptions is that they would somehow have impacted the plaintiff's ability to earn an income. According to the plaintiff, the evidence demonstrated the opposite. The assumptions were irrelevant to the issue of the quantum of income loss in the event that the defendants were found liable to the plaintiff for defamation. As there was ample evidence to support the trial judge's finding that the plaintiff suffered a loss due to the publications, he could accept some, all or none of Rogers' evidence. He preferred Rogers' calculation and that does not amount to a reversible error.

[186] The difficulty I have with the plaintiff's position is that Rogers' calculations were premised on certain factors which, in her opinion, formed part of the basis upon which the income was generated. For example, the fact

that the plaintiff would have continued in his employment with NBF was a factor that formed part of the reasoning for her calculations. To say that the plaintiff's employment was not a factor in him continuing to earn the income he did prior to the publications is, with respect, unsupportable. It forms part of the factual background upon which Rogers made her calculations and is necessary for it to be maintained.

[187] Accordingly, I agree with the defendants that at least some of the assumptions that Rogers relied upon were not borne out by the evidence. NBF did terminate the plaintiff's employment and, while there is some suggestion advanced by the plaintiff that his employment was terminated as a result of the publications, the preponderance of the evidence demonstrates that the plaintiff's employment was terminated as a result of misconduct unrelated to the publications. As well, the publications had nothing to do with his inability to obtain registration with the MSC—a denial which was based, in part, upon conduct preceding the publications.

[188] It was an error for the trial judge to rely upon Rogers' calculations without considering whether her underlying assumptions had been proven. In my view, the award of special damages cannot stand.

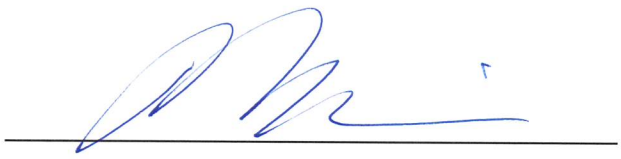
Conclusion

[189] In summary, the finding that the publications complained of were defamatory is upheld. However, the defendants are entitled to rely upon a defence of responsible communication.

[190] If I am incorrect in that initial determination and the defendants are liable in defamation, the damages awarded are reduced to $100,000 for general damages and the balance of the damages awarded are set aside.

Costs

[191] Given the defendants' success on the appeal, I would award them one set of costs against the plaintiff in this Court and in the Court below.



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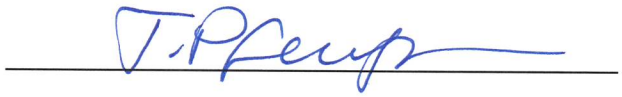

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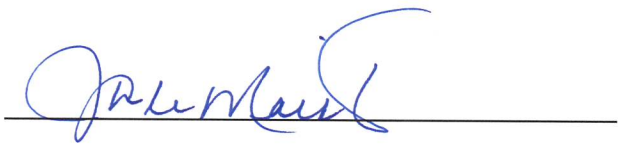

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