IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

Citation: *Tremblay v. Campbell,2008NLTD203*
Date: 20081215
Docket: 200401T4249

BETWEEN:

HENRY TREMBLAY

PLAINTIFF

AND:

STEVEN CAMPBELL

DEFENDANT

Before: The Honourable Madam Justice Maureen Dunn

Place of hearing: St. John's, Newfoundland and Labrador

Appearances:

Mr. Paul Burgess	Counsel for the Plaintiff
Mr. Steven Campbell	Representing himself

Authorities Cited:

CASES CONSIDERED: Hill v. Church of Scientology of Toronto (1995), 126 D.L.R. (4th) 129 (S.C.C.); In **Spence v. Hamlyn and Kelly**, 2008NLTD 109; **Leenan v. Canadian Broadcasting Corp.** (2000), 48 O.R. (3d) 656; **Peckham v. Mount Pearl (City) and Connolly** (1994), 122 Nfld. & P.E.I.R. 142 (NLTD); **A.T.U. v. I.C.T.U.** (1997) CarswellAlta 154 [1997] 5 W.W.R. 662; **Wells v. Sears** (2007) 264 Nfld. & P.E.I.R. 171 (C.A.); **Judith Day v. James Karagianis et al**, 2008 N.L.C.A. 32; **Bay Bulls Sea Products Ltd. v. Insurance Corp. of Newfoundland Ltd.**, (2006) N.L.C.A.

56, 260 Nfld. & P.E.I.R. 173; **Hamilton v. Open Window Bakery Ltd.** (2003), [2004] 1 S.C.R. 303 (S.C.C.)

STATUTES CONSIDERED: *Defamation Act*, R.S.N.L. 1990, c. D-3

TEXT CONSIDERED: *Brown, RE, The Law of Defamation in Canada*, 2nd ed. (Toronto: Carswell, 1994)

REASONS FOR JUDGMENT

DUNN, J.:

INTRODUCTION

[1] At the time of the issuance of the Statement of Claim, filed in this court on November 29, 2004, the Plaintiff was a resident at 12 B 39 Queen=s Road, St. John=s. The unit in which he resided (unit 12) was located in the Chapel Hill Condominium Complex. Since commencing this action the Plaintiff and his spouse have relocated to another home in the downtown area due to, in their submission, matters arising in respect of this action. The Defendant is a non-resident of Chapel Hill Condominium but befriended an owner of one of the units, Linda Dunn.

[2] The plaintiff=s claim arises out of receipt of correspondence dated and received by him on November 18, 2004 from the Defendant. It is Tremblay=s position that the correspondence contained defamatory statements including statements such as Ayou are either dumb or a deceitful, belittling, lying criminal@ Y Ayou misquote from the bylaws of the corporation to tell half-truths, which in context are false and misleading@. Other statements of concern in the letter include a reference to the plaintiff as Apossibly had criminal intent@ and the plaintiff=s actions as Afraudulent@. At the close of the correspondence in question Campbell indicates he will be forwarding a copy of it to the legal department of Tremblay=s employer, Kongsberg Maritime Simulation, demanding the plaintiff=s dismissal

and threatening legal action against him and the plaintiff=s employer jointly and severally.

[3] Tremblay further states the correspondence was published in an intentional and reckless manner by Campbell when he knew or ought to have known its contents were false. He claims general damages, special damages, punitive damages, aggravated damages and solicitor/client costs, as well as, judgment interest pursuant to the relevant legislation. As well, he asks the Court to issue a specific warning to Campbell to cease any and all further action against the plaintiff.

[4] Campbell in his defence acknowledges preparing and sending the correspondence of November 18, 2004. He says it was sent to Tremblay in Tremblay=s capacity as president of Chapel Hill Condominium Corporation. The defendant pleads both the defence of justification and fair comment on matters of public interest which public he contends are individual condominium unit holders of Chapel Hill Condominium Corporation. He further denies the statements were either false or defamatory.

ISSUES

[5] There are three issues for determination:

1) Are the statements contained in the correspondence of November 18, 2004 defamatory of Tremblay?
2) Were the statements made protected on the basis of justification, fair comment or qualified privilege?
3) If defamation is established, what is the appropriate quantum of damages, in the present circumstances?

THE LAW

Defamation

[6] The root of the common law action for defamation is found in **Hill v. Church of Scientology of Toronto** (1995), 126 D.L.R. (4th) 129 (S.C.C.), at paragraphs 110-120, inclusive. The significance of injury to the reputation of an individual in our society is set out by Cory, J. commencing at paragraph 110:

> 110 The other value to be balanced in a defamation action is the protection of the reputation of the individual. Although much has very properly been said and written about the importance of freedom of expression, little has been written of the importance of reputation. Yet, to most people, their good reputation is to be cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws. In order to undertake the balancing required by this case, something must be said about the value of reputation.
>
> 111 Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual=s sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.
>
> 112 From the earliest times, society has recognized the potential for tragic damage that can be occasioned by a false statement made about a person. This is evident in the Bible, the Mosaic Code, and the Talmud. As the author Carter-Ruck, in *Carter-Ruck on Libel and Slander*, 4th ed. By Peter F. Carter-Ruck, Richard Walker, and Harvey N.A. Starte (London Butterworths, 1992), explains, at p. 17:

The earliest evidence in recorded history of any sanction for defamatory statements is in the Mosaic code. In *Exodus* XXII 28 we find AThou shalt not revile the gods nor curse the ruler of thy people@ and in *Exodus* XXIII 1 AThou shalt not raise a false report: put not thine hand with the wicked to be an unrighteous witness@. There is also a condemnation of rumourmongers in *Leviticus* XIX 16 AThou shalt not go up and down as a talebearer among thy people@.

113 To make false statements which are likely to injure the reputation of another has always been regarded as a serious offence. During the Roman era, the punishment for libel varied from the loss of the right to make a will, to imprisonment, exile for life, or forfeiture of property. In the case of slander, a person could be made liable for payment of damages.

114 It was decreed by the Teutons in the Lex Salica that if a man called another a “wolf” or a “hare”, he must pay the sum of three shillings; for a false imputation of unchastity in a woman the penalty was 45 shillings. In the Normal Costumal, if people falsely called another “thief” or “manslayer”, they had to pay damages and, holding their nose with their fingers, publicly confess themselves a liar.

115 With the separation of ecclesiastical and secular courts by the decree of William I following the Norman conquest, the Church assumed spiritual jurisdiction over defamatory language, which was regarded as a sin. The Church “stayed the tongue of the defamer at once pro custodia morum of the community, and pro salute anima e of the delinquent”. See V. V. Veeder, “The History and Theory of the Law of Defamation” (1903), 3 Colum. L. Rev. 546, at p. 551.

116 By the 16th century, the common law action for defamation became commonplace. This was in no small measure due to the efforts of the Star Chamber to eradicate duelling, the favoured method of vindication. The Star Chamber even went so far as to punish the sending of challenges. However, when it proscribed this avenue of recourse to injured parties, the Star Chamber was compelled to widen its original jurisdiction over seditious libel to include ordinary defamation.

117 The modern law of libel is said to have arisen out of the case De Libellis Famosis (1605), 5 Co. Rep. 125a, 77 E.R. 250. There, the late Archbishop of Canterbury and the then Bishop of London were alleged to have been “traduced and scandalized” by an anonymous person. As reported by Coke, it was ruled that all libels, even those against private individuals,

ought to be sanctioned severely by indictment at common law or in the Star Chamber. The reasoning behind this was that the libel could incite "all those of the same family, kindred, or society to revenge, and so tends per consequens to quarrels and breach of the peace" (p.252). It was not necessary to show publication to a third person and it made no difference whether the libel was true or whether the plaintiff had a good or bad reputation. Eventually, truth was recognized as a defence in cases involving ordinary defamation.

118 It was not until the late 17th century that the distinction between libel and slander was drawn by Chief Baron Hale in King v. Lake (1679), Hardres 470, 145 E.R. 552, where it was held that words spoken, without more, would not be actionable, with a few exceptions. Once they were reduced to writing, however, malice would be presumed and an action would lie.

119 The character of the law relating to libel and slander in the 20th century is essentially the product of its historical development up to the 17th century, subject to a few refinements such as the introduction and recognition of the defences of privilege and fair comment. From the foregoing we can see that a central theme through the ages has been that the reputation of the individual is of fundamental importance. As Professor R.E. Brown writes in The Law of Defamation in Canada (2nd ed. 1994), at p. 1-4:

> - "(N)o system of civil law can fail to take some account of the right to have one's reputation remain untarnished by defamation." Some form of legal or social constraints on defamatory publications" are to be found in all stages of civilization, however imperfect, remote, and proximate to barbarism." [Footnotes omitted.]

120 Though the law of defamation no longer serves as a bulwark against the duel and blood feud, the protection of reputation remains of vital importance. As David Lepofsky suggests in "Making Sense of the Libel Chill Debate: Do Libel Laws 'Chill' the Exercise of Freedom of Expression?' (1994), 4 N.J.C.L. 169, at p. 197, reputation is the "fundamental foundation on which people are able to interact with each other in social environments". At the same time, it serves the equally or perhaps more fundamentally important purpose of fostering our self-image and sense of self-worth. This sentiment was eloquently expressed by Stewart J. in Rosenblatt v. Baer, 383 U.S. 75 (1996), who stated at p. 92:

> - The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty.

[7] In **Spence v. Hamlyn and Kelly**, 2008NLTD 109, a recently filed decision of this Court, Seaborn, J. sets out the law in respect of the meaning of a defamatory statement and the test to be applied in determining what is, in fact, defamatory, at paragraphs 5 and 6 of the decision:

> 5 In **Simms v. Hickey** (1988), 71 Nfld. & P.E.I.R. 298 (NLTD), Adams J. discussed the meaning of a defamatory statement and the test for determining what is defamatory, at paras. 66-67, as follows:
>
> > [66] The meaning of a defamatory statement is stated in Halsbury's Law of England (4th Ed.), vol. 28, at pp. 21-22, as follows:
> >
> > > "The essence of a defamatory statement is its tendency to injure the reputation of another person. There is no complete or comprehensive definition of what constitutes a defamatory statement, since the word defamatory' is nowhere precisely defined. Generally speaking, a statement is defamatory of the person of whom it is published if it tends to lower him in the estimation of right thinking members of society generally or if it exposes him to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.
> > >
> > > "A person's reputation is not confined to his general character and standing but extends to his trade, business or profession, and words will be defamatory if they impute lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of his trade, business or professional activity."
> > > (Footnotes omitted).
> >
> > Gately on Libel and Slander and Brown, The Law of Defamation in Canada, contain similar definitions at pp. 31-32 and 40-44, respectively.
> >
> > [67] The test for determining what is defamatory is stated in Halsbury, above, at p. 22 as follows:

> "In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand it in a defamatory sense. ...
>
> "The fact that the person to whom the words were published did not believe them to be true is irrelevant and does not affect the right of action, although it may affect the question of damages." (Footnotes omitted).

6 In Wells v. Sears (2006), 256 Nfld. & P.E.I.R. 38 (NLTD), reversed on appeal on the issue of qualified privilege, another Adams J. made the following comments concerning defamation:

> 10 To similar effect is the statement of the general rule of construction contained in The Law of Defamation in Canada, Brown, Carswell, 2nd Edition (loose leaf service), Volume 1, at pp. 5-7 to 5-12:
>
> > Courts will not resort to a technical construction of the language used, nor will it (sic) engage in legal research to determine its meaning. The rules to be applied in determining whether certain language is defamatory are not rules of construction in a legal sense, or ones that lawyers would apply, since these are considered unreliable guides to the way in which words are spoken or written by the ordinary person.
> >
> > Courts will apply a standard of common sense construction. The tests are objective. Words will be given a fair reading, and construed as they are generally understood. They are to be given that meaning "which they bear in common parlance", and understood in the sense in which they have been used. "The question is, how would ordinary men naturally understand the language used?" They are to be construed in their appropriate, common, natural, normal, ordinary, plain, popular and usual sense, and given their common, fair, natural, obvious, ordinary and commonly accepted meaning. Courts "are to understand words in the same sense as the hearers understood them". This is true even though a reasonable person might otherwise be mistaken in his or her belief and someone better informed might reach a different conclusion.

> The natural and ordinary meaning is not necessarily the literal meaning of the words, but that meaning which they would naturally convey to those reading or hearing them, giving the words their ordinary signification. "The law does not strip words to their minimum meaning and ignore their implications." Therefore, the ordinary meaning includes not only what is explicitly stated but any inferences and implications which the words reasonably may bear. It excludes any special knowledge which the recipient may have. [Authorities omitted.] [Emphasis added.]
>
> ...
>
> 15 An individual's reputation for honesty and integrity is a valuable asset to be cherished and protected. Against this must be balanced the freedom of expression in a democratic society, another cherished right enjoyed by Canadians. ...

[8] The Ontario Superior Court of Justice in **Leenan v. Canadian Broadcasting Corp.** (2000), 48 O.R. (3d) 656 outlines the necessary elements for an action in defamation at paragraph 41:

> [41] To show defamation, the onus is on the plaintiff to prove three elements:
>
> (a) that the words complained of were published;
> (b) that the words complained of refer to the plaintiff; and
> (c) that the words complained of, in their natural and ordinary meaning, or in some pleaded extended meaning, are defamatory of the plaintiff.

Defences

[9] If the plaintiff establishes the remarks are defamatory the burden then shifts to the Defendant to justify the making and publishing of same. In the present case, Campbell argues the defences of fair comment, justification and qualified privilege. Seaborn, J. in the **Spence** case cites a decision of Orsborn, J. in **Peckham v.**

Mount Pearl (City) and Connolly at paragraph 7 of the decision setting out what is required in order to establish the applicability of a defence of fair comment:

> Orsborn J. in **Peckham v. Mount Pearl (City) and Connolly** (1994), 122 Nfld. & P.E.I.R. 142 (NLTD), described the elements of the defence of fair comment in relation to a defamatory statement, in para. 34, as follows:
>
> > An untrue defamatory statement may nonetheless not be actionable if the defence of fair comment is applicable. A useful summary of the elements of this defence is set out in R.E. Brown, The Law of Defamation in Canada, vol. 1 (Toronto: Carswell, 1987) at pp. 669-670:
> >
> > > "Everyone is entitled to comment fairly on matters of public interest. Such comments are protected by a qualified privilege if they are found to be comments and not statement of fact, and are made honestly, and in good faith, about facts which are true on a matter of public interest. A comment is the subjective expression of opinion in the form of a deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof. In order to be fair, it must be shown that the facts upon which the comment is based are truly stated, and that the comment is an honest expression of opinion relating to those facts. Where a comment imputes evil, base or corrupt motives to a person, it must be shown that such imputations are warranted by, and could reasonably be drawn from these facts. The comment must be made on a matter of public interest. The matter may be of interest because of the importance of the person about whom the comment is made, or because of the event, occasion or circumstances that give rise to the opinion. The protection may be lost if it is shown that the comment was made maliciously, in the sense that it originated from some improper or indirect motive, or if there was no reasonable relationship between the comment that was made and the public interest that it was designed to serve."

[10] A useful discussion of the defence of justification is set out in **A.T.U. v. I.C.T.U.** (1997) CarswellAlta 154 [1997] 5 W.W.R. 662 from paragraph 45 to 47 inclusive:

> 45 Once the Plaintiff has established his case, the onus moves to the Defendant to make out his defences. The Defendant has the onus of establishing:
>
> > **$** that the statements were substantially true (defence of justification)

> **$** that the statements were fair comment, based on true facts and made in good faith, or
>
> **$** that the statements were made in circumstances of qualified privilege.
>
> The Defendant's onus includes presenting the required evidence to prove the defences:
>
> There is no burden on a plaintiff to disprove defences raised by a defendant. The plaintiff merely has to prove its cause of action. That does not include disproving any possible defences the Defendant might raise. A Defendant cannot raise defences of fact in his pleading, present no evidence to support those Defences, sit back and say that the plaintiff must put forward witnesses who can disprove those defences of fact (Alberta v. Wenley Enterprises & Sales Ltd. et al. (1985), 66 A.R. 232 (M.C.)) at p. 241.
>
> 46 Once the Defendant has established a defence of justification, he has an absolute defence. If he establishes only a defence of fair comment or qualified privilege, the onus shifts back to the Plaintiff to prove the presence of malice, which defeats both defences.
>
> 47 General damages are presumed in a defamation case, but the onus of proving substantial or punitive damages will be on the Plaintiff.

[11] Finally, the general principles pertaining to a defense of qualified privilege can be found in **Wells v. Sears** (2007) 264 Nfld. & P.E.I.R. 171 (C.A.) Rowe, J. in paragraph 10:

> 10 If defamation is proven, liability will be negated if the defendant establishes a defence. In this appeal, Mr. Sears relies on the defence of qualified privilege. This defence, including its limits and how it may be defeated, is discussed in **Hill**:
>
> > [143] Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. As Lord Atkinson explained in *Adam v. Ward*, [1917] A.C. 309 (H.L.), at p. 334:
> >
> > > ... a privileged occasion is ... an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person

> to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.
>
> …
>
> [144] The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with malice. Where the occasion is shown to be privileged, the *bona fides* of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff. However, the privilege is not absolute and can be defeated if the dominant motive for publishing the statement is actual or express malice. ...
> [145] Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes, as Dickson J. (as he then was) pointed out in dissent in *Cherneskey [v. Armadale Publishers Ltd*., [1979] 1 S.C.R. 1067], at p. 1099, "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created. ... Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth. ...
>
> [146] Qualified privilege may also be defeated when the limits of the duty or interest have been exceeded. ...
>
> ... Anything that is not relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected.
>
> [147] In other words, the information communicated must be reasonably appropriate in the context of the circumstances existing on the occasion when that information was given.
>
> (emphasis added)

Damages

[12] Section 3(2) of the *Defamation Act*, R.S.N.L. 1990, c. D-3, states:

> 3. (1) An action lies for defamation.
>
> (2) In an action for defamation where defamation is proved, damage shall be

presumed.

[13] Other relevant provisions of the *Act* include:

> 2. In this Act Y
>
> (b) Adefamation@ means libel or slander; Y
>
> (e) Apublication@ includes a newspaper or a broadcast. Y
>
> 5. In an action for defamation in which
>
> (a) the defendant has pleaded a denial of the alleged defamation only;
>
> (b) the defendant has suffered judgment by default; or
>
> (c) judgment has been given against the defendant on motion for judgment on the pleadings,
>
> the defendant may give in evidence in mitigation of damages that he or she made or offered a written or printed apology to the plaintiff for the defamation
>
> (d) before the commencement of the action; or
>
> (e) if the action was commenced before there was an opportunity of making or offering the apology, as soon afterwards as there was an opportunity.

[14] Seaborn, J. in the **Spence** case, citing Adams, J. in **Simms v. Hickey** reviews the principles respecting assessment of damages arising from a defamatory statement at paragraphs 9-11, inclusive:

> 9 In **Simms v. Hickey**, supra, Adams J. noted the following principles in regard the assessment of damages arising from a defamatory statement:
>
> > [102] ... The basis of the award of damages is stated in **Halsbury's Laws of England** (4th Ed.), vol. 28, at pp. 117-118, as follows:

"235. Basis of the award of damages. In actions for libel and slander, damages are awarded to compensate the plaintiff for (1) the injury to his reputation; and (2) the hurt to his feelings. Such damages are compensatory and are at large. They operate to vindicate the plaintiff to the public and to console him for the wrong done; they are better viewed as a solatium than as monetary recompense for harm measurable in money terms. Special damages, over and above such general damages, may be awarded in respect of particular temporal injuries proved to have been sustained as a natural result of the words complained of. Damages have never been awarded for injury to health consequent upon defamation, but the possibility cannot be excluded. The general compensatory damages may be increased to take into account the defendant's motives in uttering the words complained, or his conduct before or during the action; such aggravated damages' (which must be distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury, going beyond that which would have flowed from the words alone, caused by the presence of the aggravating factors. Exemplary damages, that is, damages going beyond mere compensation, can only be awarded in special circumstances."

See also: **Gately on Libel and Slander**, p. 592ff., Brown**, Law of Defamation in Canada**, vol. 2, 1003ff.

...

[107] It is not possible to determine the quantum of an award in defamation on the basis of a mathematical formula. Any such award has to be an arbitrary decision taking into account all the circumstances of the particular case. In Snyder v. Montreal Gazette Limited, above, Mr. Justice Lamer of the Supreme Court of Canada said:

> “In fixing a sum of money to compensate a defamation victim for his pain and suffering, the court is undeniably making a purely arbitrary decision. Can the judge objectively place a price on pain, humiliation and anguish? As such a determination is not based on any mathematical calculation, he can easily get carried away and award compensation, the court must still ensure that he is not overcompensated. Compensation should not be a means of enriching him at the expense of the offending party.” (See p. 12 of his reasons for judgment).

10 As well, in Wells v. Sears, supra, the trial judge sets out the factors which courts should consider in awarding damages for defamation:

> [53] The Supreme Court of Canada in Hill, supra, quotes from Gatley on Libel and Slander (8th ed.) in paragraph 182 to set out the factors courts should consider in awarding damages for defamation:
>
> > They are entitled to take into their consideration the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology, and "the whole conduct of the defendant from the time when the libel was published down to the very moment of their verdict. They may take into consideration the conduct of the defendant before action, after action, and in court at the trial of the action," and also, it is submitted, the conduct of his counsel, who cannot shelter his client by taking responsibility for the conduct of the case. They should allow "for the sad truth that no apology, retraction or withdrawal can ever be guaranteed completely to undo the harm it has done or the hurt is has caused." They should also take into account the evidence led in aggravation or mitigation of the damages.
> >
> > [Authorities omitted.]

11 Counsel for the parties referred to the following cases in commenting on the possible quantum of damages to be awarded on the claim and/or counterclaim in this matter:

1. **Farrell v. Cdn. Broadcasting Corp.** (1987), 66 Nfld. & P.E.I.R. 145 (NLCA):

The defendant, on its radio and television outlets, reported that the plaintiff, a medical doctor and provincial cabinet minister, had deliberately set a fire in his apartment. The charges against the plaintiff were eventually dismissed at the preliminary inquiry stage. The Court of Appeal reduced the award of damages for defamation from $80,000 to $45,000.

2. **Simms v. Hickey**, supra:

A former provincial cabinet minister called a press conference in which he accused the plaintiff of being incompetent and negligent in his responsibilities as the Director of Child Welfare following the death of a boy who had escaped from a juvenile detention centre. The court found the comments to be defamatory and awarded the plaintiff $30,000 in damages.

3. **Peckham v. Mount Pearl (City) and Connolly**, supra:

> A city councillor accused a senior public servant, in a council debate where he knew the media would be present, of having deliberately lied to a minister of the Crown and the premier and stated that he had participated in "an exercise in sabotage" respecting a proposed bill regarding the provision of regional services. The Court awarded $12,000 in general damages for defamation.
>
> 4**. Puddister v. Wells** (2004), 242 Nfld. & P.E.I.R. 254 (NLTD):
>
> The mayor of St. John's accused a councillor of calling a corporate taxpayer who was planning a development in the city a bunch of crooks, which the councillor had not said. He also described that councillor and others who opposed the development as being "nothing but a bunch of shysters". The remarks of the mayor were broadcast over the local cable television channel. The court held the remarks to be defamatory and awarded the plaintiff $7,500 in damages.

[15] In addition to his request for general damages, special damages and a form a compensatory damages the plaintiff also requests punitive and/or aggravated damages. Brown in his text, *The Law of Defamation in Canada* (supra) distinguishes punitive damages and aggravated damages commencing at page 25-253:

> Punitive damages are to be distinguished from Aaggravated@ damages. They are not compensatory. They Aserve fundamentally different functions and fall under separate classifications in a damage assessment.@ Aggravated damages compensate a plaintiff for an affront to his or her feelings; punitive damages punish a defendant for his or her reprehensible conduct. A punitive award is based upon the nature and character of the defendant=s malice and misconduct; it focuses on motive and intent. Aggravated damages are based upon the exceptional character of the agony, hurt or embarrassment that is suffered by the plaintiff; it focuses on feelings. In this sense, aggravated damages are merely a part and parcel of the compensatory award. Nevertheless, the award is deemed to include a penal element. For this and other reasons Athe distinction is easier to state than to apply@; the very circumstances which give rise to the plaintiff=s hurt and embarrassment may also make it desirable for the court to punish the defendant.

[16] In the present case the defendant argues he did, through an apology, retract his statements and in so doing is no longer liable for any damages arising out of the

defamatory statements. Generally an apology is not a defence to the action but, rather, may minimize any damages awarded. The apology must be full, complete and fair as set out in, *Brown, RE, The Law of Defamation in Canada*, 2nd ed. (Toronto: Carswell, 1994) at page 25-100 where it states:

> The requirements of an effective and adequate apology were summarized in *Hoste v. Victoria Times Publishing Co.* The defendants were willing to apologize, but only in such terms as the plaintiff could reasonably require. Begbe C.J. said:
>
> That is surely not sufficient. It is not the offer nor even the publication of an apology at all, but an offer to offer an apology. And even in terms, it seems to reserve to the defendant a right of judging whether the plaintiff is reasonable in demanding any particular form e.g., it offers to make sure an apology as the defendant thinks fit. Such an apology as merely Abeg your pardon,@ or Asorry for it,@ is not sufficient in a case of libel. The defendant should admit that the charge was unfounded, that it was made without proper information, under an entire misapprehension of the real facts, etc., and that he regrets that it was [published in his paperY. You should not offer to make, but actually make and publish at once, and unconditionally, such an apology, expressing sorrow, withdrawing the imputation, rehabilitating the plaintiff=s character as well as you can; not stipulating that the plaintiff is to accept it; not making any terms but publishing it in the interests of truth, and because you are anxious to undo whatever harm which may have accrued from a wrong which you find you have been the unconscious instrument of inflicting. [cites omitted]

[17] Other areas for consideration in arriving at an appropriate award of damages take into account the particular circumstances of the case such as the conduct of the plaintiff, his position in the community, the nature of the defamatory accusation, the mode and extent of the publication, the adequacy of the apology, if any, the mode of, intent and conduct of the defendant from the time of publication throughout the course of the proceedings. (Brown, The Law of Deformation in Canada, pages 25-278 to 25-288)

[18] Finally, the court may take into consideration a republication of the defamatory statements by the defendants which intensifies the impact of the original publication. (Brown, The Law of Deformation in Canada, page 25-290)

COSTS

[19] In addition to the foregoing areas of damage awards the plaintiff, herein, seeks solicitor/client costs. The defendant asks that in the event the plaintiff is successful no costs be awarded on the basis he is a self-represented litigant and cannot afford to pay legal fees or costs, of any amount. The Newfoundland and Labrador Court of Appeal recently reviewed the issue of costs in the case of **Judith Day v. James Karagianis et al**, 2008 N.L.C.A. 32:

> [31] Mark Orkin, in **The Law of Costs**, 2d ed., looseleaf (Aurora, Ont.: Canada Law Book, 2007) vol. 1 at pp. 2-78 to 2-80, lists several exceptions to the rule that a successful party is entitled to their costs, including misconduct of the parties, miscarriage in the procedure, and oppressive and vexatious conduct of proceedings. Orkin then states:
>
> > The fact that the imposition of costs would cause financial hardship is not sufficient to displace the ordinary rule that costs should follow the event. As has been said, to make a determination of costs based on the respective financial positions of the parties would undermine the logic and purpose of the rules. Neither the needy circumstances of an unsuccessful plaintiff nor the defendant's financial ability to absorb the costs are relevant considerations. …
>
> …
>
> [33] **Murphy v. Myers** (1995), 127 Nfld. & P.E.I.R. 86 (NLTD) [affirmed on appeal at (1997), 157 Nfld. & P.E.I.R. 323 (NLCA), the costs issue not being at issue in the appeal] dealt with a claim for damages for personal injuries allegedly arising out of a motor vehicle collision. Justice Green (as he was then) dismissed the claim. With respect to costs, the plaintiff argued that the imposition of costs would cause him severe financial hardship. At para. 10, Green J. stated:
>
> > Even accepting that the plaintiff acted in good faith in bringing his proceeding and that the claim is not a frivolous one I am not satisfied that it is appropriate in this case to deprive the defendant of the costs to which, as the successful party, he would normally be entitled solely because the defendant is better able to bear them.
>
> The defendant was awarded costs on a party and party basis.

> [34] **Brown v. Black Top Cabs Ltd. (**1997), 97 B.C.A.C. 59 (BCCA) involved an action for negligence arising from a motor vehicle accident. The apportionment of liability and its variation on appeal gave rise to a complex result. However, the Court set out a simple rule in the context of hard circumstances. The plaintiff was a single mother, supported by social assistance, unemployed and probably unemployable as a result of the accident. She argued that costs should be not awarded against her in light of her circumstances. At paras. 16-17, the Court stated:
>
> > We are of the view that a discretionary award of costs of the sort sought here seeks to elevate needy circumstances to a principle of law. …
> >
> > … The considerations to be borne in mind should be those that arise from the nature and conduct of the litigation. …
>
> In my view, the Court acted in accordance with established authority in the foregoing passage. See also **Wilson v. INA Insurance Co. of Canada** (1998), 112 B.C.A.C. 208 at para. 25.

[20] Appropriateness of awarding solicitor/client costs is reviewed in **Bay Bulls Sea Products Ltd. v. Insurance Corp. of Newfoundland Ltd.**, (2006) N.L.C.A. 56, 260 Nfld. & P.E.I.R. 173 at paragraphs 166 to 170, inclusive. Cameron, J.A. at paragraph 167 includes an extract from a decision of Arbour, J. in **Hamilton v. Open Window Bakery Ltd.** (2003), [2004] 1 S.C.R. 303 (S.C.C.). The extract reads:

> In ***Young v. Young***, [1993] 4 S.C.R. 3, at p. 134, McLachlin J. (as she then was) for a majority of this Court held that solicitor-and-client costs "are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties". An unsuccessful attempt to prove fraud or dishonesty on a balance of probabilities does not lead inexorably to the conclusion that the unsuccessful party should be held liable for solicitor-and-client costs, since not all such attempts will be correctly considered to amount to "reprehensible, scandalous or outrageous conduct". However, allegations of fraud and dishonesty are serious and potentially very damaging to those accused of deception. When, as here, a party makes such allegations unsuccessfully at trial and with access to information sufficient to conclude that the other party was merely negligent and neither dishonest nor fraudulent (as Wilkins J. found), costs on a solicitor-and-client scale are appropriate: Y

ANALYSIS

Defamation

[21] In order to meet the onus upon him Tremblay must prove three elements, that is, the words complained of (set out in the correspondence of November 18th, 2004): refer to him; in their natural and ordinary meaning are defamatory of him; and were published. There is no question the words complained of relate to behaviours of the Plaintiff, Henry Tremblett.

[22] The Plaintiff alleges the defamatory comments as set out in the correspondence would include:

> You are either dumb or are a deceitful belittling lying criminal.
>
> …
>
> … This made me realize that you possibly had the criminal intent to have the Condo Corp pay for new windows in unit 12. I most recently have been made aware through a past president, that you were told the same thing several years before that. I therefore conclude that your actions have been fraudulent and not in the best interest of the Owners. You have therefore failed the first responsibility of a director of a corporation. You are a disgrace. You tried again and again to rob the people around you.
>
> As a professional engineer, I am obligated to the well being of the community and its people. I will therefore be making a complaint to the RNC.
> Since you continue to use Kongsberg status in your callous correspondence to the Owners, including Ms. Dunn, I am sending a copy of this letter to the legal department of Kongsberg, demanding your immediate dismissal. Otherwise, any legal actions taken against you may be made jointly and severally with Kongsberg.

[23] There is little doubt the ordinary meaning of what is stated in the above extract from the correspondence to the Plaintiff represents allegations of a criminal nature. The word “fraudulent” and “to rob the people around you” would be viewed, in the context in which they are used as allegations of criminal conduct. This interpretation is reinforced by reference to both “criminal intent” and “I will therefore be making a complaint to the RNC.”

[24] In meeting the burden upon him the Plaintiff must also show the words complained of were published. The evidence establishes, as confirmed by the Defendant, the letter was distributed to all of the occupants of the units of the Chapel Hill Condominium Complex either through delivery at the door or in the mail boxes. Some of the individuals who would have received a copy would not necessarily be owners of the unit but would include those individuals who were renting units from the owners. A copy of the letter was also provided to Ms. Sears Whalen, employee of CIBC Wood Gundy, bankers for the condo corporation, by Ms. Linda Dunn, friend of the Defendant. I am satisfied, on a balance of probability, Campbell would have been aware of the actions of Dunn despite his suggestions to the contrary. The third manner of publication proven is the letter was provided to the employer of the Plaintiff along with what the Defendant purports was an apology to Henry Tremblay. These modes of distribution of the correspondence are sufficient to establish publication giving rise to damage to the reputation of the Plaintiff in the eyes of his fellow condominium unit holders or owners, a banking institution and his employer.

[25] On the basis of the forgoing I am satisfied Tremblay has met the onus upon him to establish the three elements necessary in an action for defamation.

Defences

[26] It is now incumbent upon the Defendant to justify the making and publishing of the comments. Campbell has raised three defences, fair comment, justification and qualified privilege. I will deal firstly with the defence of fair comment and

qualified privilege. As set out in paragraph 9 of this decision Orsborn, J. in **Peckham v. Mount Pearl (City) and Connelly** recognized an untrue defamatory statement may not be actionable if the defence of fair comment is applicable. In an abstract quoted by him, from The Law of Defamation in Canada, it is apparent the defence arises if the comment is made fairly and honestly on matters of public interest the result of which they may be protected by qualified privilege. The Defendant insinuated his way into the affairs of this private organization without invitation and, apparently, in a personal quest to assist and/or defend the interests of Linda Dunn. That he did so with an element of malicious intent becomes evident in a review of correspondence forwarded by him to the spouse of the Plaintiff on November 25th, 2004. In this correspondence Campbell states:

> …
>
> if you do not make peace, and right away, I will shift my focus to defending Linda's rights. I will use my law firm Paterson Palmer to sue everyone. This has seriously affected my life negatively, and I'm mad.
>
> I am known to be tenacious. …
>
> If Henry makes any claim against me, I will be forced to focus on destroying him financially, morally, and socially. My preservation will be at stake. Do you and Henry really want to take me on?
>
> After witnessing the crime of fraud, I am now forced to go to the police and make a statement. As a professional engineer, I have an obligation to the community. An investigation will follow.
>
> To mitigate damage and get our lives back on track, I respectfully advise that you and Henry go to the police, and with remorse, ask for leniency up front. I don't think there will be jail time if you admit to what happened before charges are laid. I would not be opposed to such a sentence.
> …
>
> If you wish to stop me from sending out an apology, I suggest that you contact me right away."

[27] The character of the forgoing statements satisfy me that the Defendant had embarked on a personal vendetta, for reasons yet to be adequately explained, and with the intent of not only destroying the Plaintiff's reputation but destroying him "financially, morally, and socially." Even had the facts given rise to either fair comment or the protection of qualified privilege it is clear the Defendant was acting in a malicious, personal and unacceptable manner.

[28] Before concluding this portion of the analysis I would add despite comments of the Defendant as to his position of professional engineer giving rise to some special obligation to the community such obligation, if it does exist, does not extend to the operation of a private corporation. I further note, complaints were made to the Royal Newfoundland Constabulary by Campbell but no charges were forthcoming against Tremblay.

[29] In conclusion, on the defences of fair comment and qualified privilege, the Defendant has failed to discharge the burden upon him to establish either that the comments where made fairly and honestly or that they related to matters of a public interest. In the result, both defences fail.

[30] The primary thrust of the defence presentation pertained to the defence of justification. The Defendant set out to establish the statements made by him were substantially true. It became apparent, early on in the Defendant's trial presentation, he was utilizing the court processes in an attempt to conduct a general discovery with the objective of proving his statements that the Plaintiff was acting with criminal intent and had attempted to defraud and rob his fellow unit holders. The Defendant was not able to provide evidence to establish, at the time of the making of the letter in November of 2004, he had any documentation or information available to him which would, on balance, lead one to believe the Plaintiff had acted in a criminal manner.

[31] The foregoing circumstances were further aggravated by the fact that although the Defendant did plead the defense of justification he did not plead the

factual particulars upon which he relied. Despite this glaring error I will, nonetheless, conduct a review of the four points raised by the Defendant at trial in support of the defense of justification.

[32] The Defendant says he believed the Plaintiff was involved in a robbery which occurred in the condominium building despite knowing the Plaintiff was out of the country at the time. Campbell suggested the existence of a conspiracy involving the plaintiff and the maintenance person retained by the condominium corporation. To this end, the Defendant called Gerald Browne, the said maintenance person, to testify at the trial. When one considers Campbell presented no foundation for this belief it is not surprising Browne denied any such conspiracy. Campbell pressed Browne by asking who Browne believed committed the robbery. Browne replied he thought it was Campbell, the Defendant. I note this, not to imply the Defendant was involved in any robbery, but to highlight the dangers inherent in speculation without foundation. As well, this evidence exemplifies the efforts by the Defendant to conduct discovery proceedings during the course of the trial.

[33] One of the primary areas of contention raised by the Defendant pertained to his submission the Plaintiff was attempting to have his windows replaced at the expense of the condominium unit owners despite By-Laws to the contrary. I find this argument to be completely without merit, particularly in light of the fact all of Tremblay's statements, on this point, were contained in minutes of the meetings of the Board of Directors of the corporation which minutes were provided to Linda Dunn. In other words, no attempt was made by Tremblay to hide what was being proposed regarding windows. Where conflicts exist in the testimony of the parties I accept the statements of Henry Tremblay over Stephen Campbell on this and other points having found him to be the more credible witness. Finally, I would add no windows were installed to the benefit of the Plaintiff at the expense of the corporation.

[34] The Defendant alleged the Plaintiff had been involved in misappropriation of monies from the condominium corporation. He based this contention on one

statement of the financial affairs of the company. At trial, he requested and was denied complete disclosure of all financial records. As with his other submissions, it was clear he did not have in his possession either proof of misappropriation of funds or, if any funds had been misappropriated, it occurred at the hands of the Plaintiff.

[35] The fourth area of illegal activity suggested by the Defendant as having been conducted by the Plaintiff is insurance fraud. The Defendant called Stephen Hawco as a witness to establish such a fraud had occurred. Hawco's testimony confirmed there was no connection between his company and the Plaintiff. Again, the Defendant's effort to use the trial process to establish insurance fraud was defeated and proved, as were the above theories, to be speculative and erroneous in nature.

[36] In addition to all of the foregoing Steven Campbell contended he was referring to breaches of the by laws and not to illegal activities. I reject his submission, on this point, for reasons already stated. The Defendant has failed, on a balance of probability, to establish the defence of justification.

Damages

[37] The *Defamation Act* provides once defamation is proved damage shall be presumed. The Defendant can establish mitigation of damages, if before the commencement of the action, he offers a written or printed apology to the Plaintiff. I will deal with the apology hereafter. An award of damages is intended to compensate the Plaintiff for injury to his reputation and hurt to his feelings. Special damages may be allowed over and above any general damages awarded. Such damages must be proved to have been sustained as a result of the words complained of. The law also allows for the payment of aggravated damages where the defendant's motives in uttering the words complained of or his conduct before

or during the action go beyond that which would have flowed from the words alone.

[38] In the present case I view as relevant to arriving at a fair quantum of damages, the following:

1. The limited distribution of the publication, that is, to the unit holders and/or owners, the employer and the representative of the Bank. I would contrast this with publication in a newspaper or broadcast to the listening public such as seen in cases involving individuals in the political arena.

2. All of the witnesses called at trial, the majority of whom were called by the Defendant except for Linda Dunn, indicated, either directly or indirectly, they did not believe the allegations. They confirmed they thought no less of the Plaintiff despite having received the defamatory correspondence. As to the representative of Wood Gundy her response to this situation was to note the corporation was run by lay people not familiar with the By Laws of the company. She appeared not to attribute any wrongdoing to Tremblay.

3. Although a copy of the correspondence was sent to the employer of the plaintiff there is no evidence of any repercussions which impacted his status with the company. Unwittingly, the plaintiff may have contributed to the defendants' contacting his employer by sending e-mails which reflected the employer company's address and which may have given rise to the Defendants' belief the condominium unit of the Plaintiff (and his wife) was owned by the employer.

4. Although the Defendant argued at trial his references in the correspondence related to breach of By-Laws of the company and issues of a civil nature, the statements made both in the November 18th correspondence to the plaintiff and further correspondence to his spouse lead to the inevitable conclusion the defendant acted with malicious intent and with a reckless disregard to the damage he may have been doing to the plaintiff's reputation.

[39] At paragraph 14 of this decision is an outline of awards made by our courts in defamation cases. The amounts range from seventy-five hundred dollars (**Puddester v. Wells**) to forty-five thousand dollars **(Farrell v. Canadian Broadcasting Corporation**). In all of the foregoing cases the comments were made in the media and would be distributed to a very broad audience of listeners. In two of the cases allegations of criminal conduct were made (**Farrell v. Canadian Broadcasting Corporation** and **Puddester v. Wells**). The nature of the comments herein are more akin to the comments made in **Farrell v. Canadian Broadcasting Corporation** in that they are not general in nature but specifically say the Plaintiff acted fraudulently and robbed his fellow unit owners and/or holders. However, the extent of the publication herein is far more limited than in the Farrell case. Considering the foregoing factors I believe a fair award for injury to reputation and hurt feelings would be the sum of seven thousand dollars.

[40] I believe this is one of those circumstances where aggravated damages are in order. I have already set out that the defendant acted with malicious intent. The two areas of particular concern are the writing of the letter to Helen Peters with the threat to Henry Tremblay contained therein and the sending of the defamatory correspondence, along with an inadequate apology, to the plaintiff's employer. The defendant's attitude at trial did not reflect remorse or regret and he appeared to maintain a belief the plaintiff acted in a criminal fashion. Accordingly, I order aggravated damages in the amount of five thousand dollars. Having awarded damages under this head, I decline to award punitive damages.

[41] In addition to the foregoing the plaintiff also claims special damages arising out of his having to sell his condominium unit due to the actions of the defendant both in writing the November correspondence and disseminating it as well as his ongoing persistence in his belief the Plaintiff committed criminal acts. The only evidence before me which supports the plaintiff's claim is his statement and that of his wife as to why they sold their condominium unit. The Defendant contends this argument is not sustainable in light of the fact the plaintiff and his wife purchased alternate housing in the same area. He points out Linda Dunn was not residing in her condominium unit throughout the time frame of the actions comprising the within action, she resided in a part of the Defendant's home. I accept the defendant's persistence caused Tremblay and his spouse to feel they had to relocate to get away from the situation. Buying a new dwelling had not previously been in their contemplation. They liked and enjoyed living in the Chapel Hill Condominium Building and had made many friends there. This they had to give up and, in so doing, incurred unwarranted costs. The evidence of the plaintiff, his wife, as well as the conduct of the defendant as described by each of them and in the course of the trial of this matter satisfies me the plaintiff has made out his case for special damages. The costs of having to sell the unit are proven at eleven thousand six hundred fifty-four dollars (exhibit HT No. 2). The plaintiff's claim for special damages is allowed in this sum.

Mitigation

[42] The Defendant argues mitigation of damages because of an apology and/or retraction provided by him to the plaintiff and the plaintiff's employer. The apology was circulated to the units at the condominium corporation. It is brief and states:

> November 25, 2004
>
> WITHOUT PREJUDICE
>
> To whom it may concern:

> As demanded by the solicitor Paul Burgess, representing Mr. Henry Tremblay, I Stephen Campbell, retract the comments made in my November 18, 2004 letter entitled, "Re: *Chapel Hill Condominium Corporation and the Bully*", letter attached.
>
> I hereby unequivocally apologize to Mr. Tremblay for any harm to his reputation that I may have inadvertently caused him.
>
> Sincerely,
>
> Steven Campbell, P.Eng.

[43] At paragraph 16 of this decision can be found an extract from Brown, The Law of Defamation in Canada (2nd edition), wherein he describes the form an apology ought to take in order for an individual to raise it as a defence or for the purpose of minimizing any damages to be awarded in an action for defamation. The apology should admit the charge was unfounded and made without proper information. It should be unconditional, expressing sorrow, withdrawing the imputation and rehabilitating the Plaintiff's character to the best that the person tendering it can.

[44] The introductory sentence of Campbell's apology sets out it is being written at the demand of the solicitor for Tremblay. This phrase suggests duress has been placed on Campbell by plaintiff's counsel, thus making the apology equivocal. Other identifiable flaws in the apology include: it does not contain an acknowledgment the charges set out in the offending correspondence were unfounded; it does not express sorrow; it does not withdraw the imputation; and it suggests all of the harm caused was inadvertent. I see nothing inadvertent in the manner in which the defendant wrote and circulated the November 18, 2004 letter.

[45] The apology is dated the same date as the letter forwarded to Helen Peters, wife of the plaintiff. Coincidental with its writing Campbell is telling Peters should

the plaintiff act against him he will set out to destroy him socially, morally and financially. Further, the apology was forwarded along with a copy of the November 18, 2004 letter to the plaintiff's employer. Unbeknown to the plaintiff, this letter had not been sent to his employer prior to the time of the making of the apology. His belief it had been sent was based on a statement made in the said correspondence. Forwarding the letter and apology to the employer, at this point in time, negates the submission the apology was sincere. I conclude the apology does not warrant mitigating the amount of damages ordered.

COSTS

[46] In the present circumstances I am prepared to award solicitor-client costs in a manner similar to that taken by McLachlin, J. of the Supreme Court of Canada in the **Young v. Young** case (para. 20 herein). The reasons I do so are, firstly, the defendant made serious allegations against the Plaintiff of a criminal nature without any foundation in fact for same. Secondly, the Defendant attempted to utilize the trial process in a manner more akin to a Discovery proceeding in order to establish facts which he did not have available to him at the time of the writing of the foregoing correspondence, this served to both frustrate and delay the process extending what was expected to be a three day trial into a nine day trial. Thirdly, throughout the trial the Defendant acted in an outrageous manner by not only attacking the character of the Plaintiff but also the character of any witness who, seemingly, did not agree with him. Further, the defendant attempted to malign a law firm and its members by suggesting the advice they gave to the Condominium Corporation was negligent. All of the foregoing, he did, without any foundation being established for the allegations.

[47] The defendant has argued because he is self represented no order should be made for solicitor-client costs. This issue was addressed by the Newfoundland and Labrador Court of Appeal in **Day v. Karagianis et al** (para. 19 herein).

[48] I find, in this case, it is appropriate to award costs on a solicitor-client basis.

DISPOSITION

[49] Judgment is entered for the Plaintiff as follows:

1. General damages of seven thousand dollars ($7,000.00);

2. Aggravated damages of five thousand dollars ($5,000.00);

3. Special damages of eleven thousand six hundred fifty-four dollars ($11,654.00);

4. Solicitor and client costs;

5. Judgment interest.

[50] I decline to make an order regarding a specific warning to the Defendant to cease all further action against the Plaintiff as I am not aware of any authority vested in me to do so. It is hoped this judgment will act as a deterrent to the defendant against future inappropriate actions.

_____

MAUREEN DUNN
Justice