
CANADA / JUDGMENT

Kazakoff v. Taft

2018 BCCA 241

COURT

British Columbia Court of Appeal

DECIDED

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2018 BCCA 241 Kazakoff v. Taft

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Kazakoff v. Taft,

2018 BCCA 241

Date: 20180618

Docket: CA44467

Between:

Devin Kazakoff

Respondent

(Plaintiff)

And

Gerry Taft

Appellant

(Defendant)

Before:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated

May 4, 2017 (Kazakoff v. Taft, 2017 BCSC 737, Cranbrook Registry S26506).

Counsel for the Appellant:

R. McConchie

A. McConchie

Counsel for the Respondent:

M. Skorah, Q.C.

N. Robertson

Place and Date of Hearing:

Vancouver, British Columbia

February 26, 2018

Place and Date of Judgment:

Vancouver, British Columbia

June 18, 2018

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Hunter

Summary:

Mr. Taft posted a comment in response to an online article in which he suggested Mr. Kazakoff was a convicted felon unworthy of belief. Mr. Kazakoff successfully sued for defamation. The judge found Mr. Taft had acted with malice and ordered aggravated damages and special costs in addition to general damages. Mr. Taft appealed, alleging the judge erred in finding malice, rejecting his defences, finding the words were capable of a certain meaning, and determining the remedy. Held: appeal allowed in part. While the judge did not err in his assessment of the defamation, he erred on the issue of damages by mischaracterizing certain facts and granting double compensation. The compensatory damages are reduced to \$35,000 and the special costs are set aside.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

- [1] After a seven-day trial, a judge sitting without a jury found that Mr. Taft, the Mayor of the District of Invermere, had defamed Mr. Kazakoff, a local animal rights activist, in a website posting he made in response to a press release issued by an organization with which Mr. Kazakoff was associated. The sting of the defamation was that Mr. Taft asserted that Mr. Kazakoff is a "convicted felon" and unworthy of belief, both generally and with respect to a deer cull issue which had divided the community in which both men lived. The judge awarded general damages of \$50,000, aggravated damages of \$25,000, and special costs. In making the award, the judge rejected Mr. Taft's contention that the posting was true in substance, was fair comment, was published on an occasion of qualified privilege, or was protected as responsible communication. He found further that Mr. Taft was motivated by actual malice, which in any event displaced certain of his defences.
- [2] On this appeal, Mr. Taft contends that the judge erred in law in concluding that parts of the posting were defamatory and that other parts were not true in substance. He says that those errors contaminated the judge's other conclusions, most particularly his finding of actual malice. He contends the judgment should be set aside entirely or that this Court should substitute a nominal or much reduced award of damages.

Background

- [3] The issues in this action arose out of a controversial public policy aimed at addressing an influx of deer into urban areas in a number of communities in the East Kootenays, including Invermere. The particular point of contention was whether the communities should make use of a deer cull, in addition to other policies, to control the urban deer population. It is fair to say that the deer cull issue polarized opinion in the communities. Both Mr. Taft and Mr. Kazakoff were actively involved in the issue. Mr. Taft, in his capacity as Mayor of Invermere, supported the use of a cull as one policy in the arsenal. Mr. Kazakoff opposed a deer cull.
- [4] In 2011, Invermere struck a citizens' committee to study the issue and recommend management options. In the summer of 2011, the committee recommended culling deer as one means of managing the issue. At this time, Mr. Kazakoff was an active and vocal member of the anti-cull movement. From 2011 to 2014, Mr. Kazakoff held senior positions in several societies advocating against culling deer. One of those groups sought and received an ex parte interim injunction against Invermere prohibiting a cull, although the petition was later dismissed. Throughout this time, there were heated social media exchanges between pro- and anti-cull factions.
- [5] In February 2014, Mr. Kazakoff and an accomplice destroyed two deer traps in Kimberley, B.C. Mr. Taft learned of the incident through local media, which reported extensively that Mr. Kazakoff had been arrested for vandalizing the traps. The Crown eventually proceeded summarily against Mr. Kazakoff. He pleaded guilty to a single count of mischief under \$5,000. Judge R. Webb sentenced him to a 30-day conditional discharge. The condition was

that he pay restitution of \$735 to the City of Kimberley, a fine to the provincial government, and a victim fine surcharge of \$1,040. Mr. Kazakoff paid the amounts the following day. Accordingly, his discharge became absolute on May 1, 2015 and, as a result, he does not have a criminal record. Local print and online media prominently published the proceedings, with headlines like "Kazakoff fined, conditionally discharged"; and "No criminal record for [Mr. Kazakoff] in trap tampering".

- [6] In January 2016, the B.C. Deer Protection Society ("BCDPS") (of which Mr. Kazakoff was a director) issued a press release concerning a deer cull in neighbouring Cranbrook, which linked to a video showing fawns being captured and euthanized in traps during the cull. BCDPS contended that Cranbrook was in violation of its cull permit. The press release listed Mr. Kazakoff as a BCDPS contact from which to obtain further information. In fact, Mr. Kazakoff played no part in preparing the press release. Mr. Kazakoff saw a draft of the press release before it was issued, and, although it was not discussed with him, he was not surprised to see his name included as a contact person and did not object to its inclusion. The press release read:

Undercover footage shows the
cruelty of Cranbrook's secret deer cull

In mid-December 2015, Cranbrook began to cull deer without notification to area residents. The only public notification came from the BC Deer Protection Society and Animal Alliance of Canada in an ad that ran in the Cranbrook Townsman prior to the start of the cull.

On Friday, January 8, 2016, the BC Deer Protection Society lodged a formal complaint to the Minister of Forests, Lands and Natural Resource Operations about incidents involving fawns in Clover traps. The incidents which show the cruelty of the cull, were captured through photographs and video footage.

Two incidents in particular reveal violations of the terms of the cull permit issued by the Minister.

Footage for one incident shows a fawn captured in a trap (unedited video documents the fawn pacing for over two hours). The cull contractors [sic] arrive, collapsing the trap on the animal and applying the bolt gun. The cull contractors stand and the fawn moves. They apply the bolt gun a second time. The fawn moves again as the contractors try to erect the trap. They drop it and observe the fawn. One contractor starts to reach for the bolt gun but stops. They proceed again to erect the trap and drag the fawn away by the hind leg. In both cases the fawn is seen moving. The cull contractor returns immediately leaving the fawn still alive and unattended. A total of six minutes passed between the arrival of the contractors and the removal of the deer. (bcdeer.org)

Photographs from a second incident show two fawns entangled in a trap that has collapsed on them. They remain entangled and compressed for at least two hours prior to the arrival of the cull contractors. It is not known at this time whether the fawns' struggle was so violent as to dislodge the mechanism holding the trap upright or whether the mechanism was faulty. Regardless, no-one checked the trap during that two hour period to end the suffering of these two animals. (bcdeer.org).

In the letter to the Minister, we urge him in the strongest possible terms to end the cull, conduct a full investigation of the violations of the permit and lay charges where appropriate. In addition, we ask that the permit for the current contractor be revoked until the investigation is complete.

SOURCE Animal Alliance of Canada

For further information:

Daven [sic] Kazakoff: [contact information omitted]; Liz White: [contact information omitted]; Barry MacKay: [contact information omitted]; Sherry Adams: [contact information omitted].

[7] On January 13, 2016, a Cranbrook-based local interest website called e-know.ca ("e-know") published an article about the press release and erroneously stated that it had been signed by Mr. Kazakoff. The same day, Mr. Taft published the words that form the basis of the present action in the comments section of the e-know website immediately below the article:

Signed by the same Devon Kazzakof [sic] who was convicted of tampering with and destroying traps in Kimberly. I wouldn't be so quick to believe convicted felons who have extreme positions on animal rights issues and who do not respect the decisions of democratically elected local governments doing what the majority of their constituents want.

[8] In the next few days, third parties responded to Mr. Taft's e-know comment by posting below it on the website. One commenter told Mr. Taft that Mr. Kazakoff had received a conditional discharge, which is "a pretty big difference from being a 'convicted felon'". Mr. Taft admitted that he read the responses but did not take any steps to correct his position because he considered them merely to be adding to the ongoing dialogue.

[9] Mr. Kazakoff testified that, the day after Mr. Taft posted his comment, he sent Mr. Taft a private Facebook message demanding he take down the defamatory comment. Mr. Taft denied having read the demand at the time, and did not read it until he was alerted to it by receiving a letter from Mr. Kazakoff's lawyer on January 25, 2016.

[10] After some correspondence between the parties, Mr. Taft rejected two requests to publish a full retraction and apology on e-know. Mr. Taft said he viewed the request as an attempt to muzzle him on the deer cull issue. On February 4, 2016, Mr. Taft posted a more limited apology:

On January 13th, 2016 at 6:29 pm, I posted a comment stated Mr. Devin Kazakoff was a convicted felon in relation to destroying deer traps in Kimberley (the post has since been removed). After receiving a letter from a lawyer representing Mr. Kazakoff, a legal distinction has come to my attention, and I would like to state that this comment was not true and I wish to retract it. Mr. Kazakoff plead [sic] guilty to destroying deer traps in Kimberley and received a conditional discharge, he was not convicted of a crime and does not have a criminal record, and is not a felon. I hereby tender my unconditional apology to Mr. Kazakoff, to e-know (and it's [sic] readers).

[11] The apology did not include a retraction of the suggestion that Mr. Kazakoff was not worthy of belief, as Mr. Kazakoff's lawyer had requested in the second letter.

Reasons for Judgment

[12] The trial judge set out the general principles governing proof of claims in defamation. No exception is taken to his statement of those principles. The critical portion of his judgment concerning the alleged defamation is the following:

[124] The sting asserted by the plaintiff is derived from the whole of the words used by the defendant, including his adoption of the words "signed by", which contextually link the Press Release and the Video to the plaintiff.

[125] The plaintiff claims that the alleged defamatory words conveyed the following natural and ordinary inferential meanings:

- a) the plaintiff is unworthy of belief because he was feloniously convicted of tampering with and destroying deer traps in Kimberley and is an animal rights activist;
- b) the plaintiff fabricated or staged the incidents;
- c) the complaint is a sham because the plaintiff fabricated or staged the incidents;
- d) the incidents did not occur as described or at all, as the plaintiff knew or should reasonably have known; and
- e) the complaint is a fabrication by the plaintiff because the incidents did not occur as described or at all.

[126] Reduced to its essentials, the plaintiff alleges that the defendant's post was defamatory of him because it asserted he is a "convicted felon" and as such, is unworthy of belief, both generally and with respect to the deer cull issue.

(a) "who was convicted" and "convicted felon"

[129] The defendant submits that reasonable people of ordinary intelligence without special knowledge do not understand the difference between a conviction and a conditional discharge which is why "people hire lawyers to represent them in criminal proceedings".

- [132] The word "felon" is used in the United States to mean someone who has committed a felony. A felony is a crime regarded as more serious than a misdemeanour: Oxford English Dictionary (12th ed.).
- [133] In my view, the words "convicted" and "convicted felons" were defamatory of the plaintiff based on their literal meaning alone.
- [134] Describing a person as having been convicted of a criminal offence or as a "convicted felon" clearly meets the test of defamation. It lowers the person's reputation in the estimation of any reasonably thoughtful, right-thinking and informed member of society generally.
- (b) "I wouldn't be so quick to believe"
- [135] The plaintiff submits that, in the context of the January 13, 2016 post as a whole, an ordinary person would infer from the natural meaning of the words used that, because he is a criminal who takes extreme positions on animal rights issues, the plaintiff is so unworthy of belief that he might have fabricated or staged the Video.
- [136] The defendant submits that the words infer nothing of the sort, but rather simply caution the reader not to jump to any conclusions regarding the Press Release and Video and to carefully reflect and consult other sources first. He submits further that a reasonable person of ordinary intelligence without special knowledge would have no difficulty reading the post in such a "common-sense manner".
- [137] The question is whether an ordinary person would infer from the words "I wouldn't be so quick to believe" in the context in of the defendant's post as a whole that the plaintiff had staged the Video and then fabricated the Press Release based upon it. I am satisfied on the balance of probabilities that an ordinary, reasonably thoughtful, right-thinking person reading the defendant's words would infer nothing less.
- [13] The judge analyzed a variety of defences to the defamation, including justification. In respect of justification he reasoned:
- [145] The defendant argues that the words he used were nothing more than a "slight inaccuracy" and that the "gist" of the language is true and it did not add to the sting that would have been conveyed had he stated that the plaintiff "pleaded guilty" and received a "conditional discharge".
- [148] A person who has received a conditional discharge for a summary offence for which a guilty plea was entered is not by any measure the equivalent of a "convicted felon", and is a far cry from a slight inaccuracy or an innocuous legal mis-description as to the "manner" in which the offence was committed. The sting created by the words "convicted" and "convicted felons" was substantially greater in quality and in kind than would have been the case had he used the words "pleaded guilty" and "conditional discharge" for which no conviction was entered.

- [149] In further support of his defence of justification, the defendant pleads an alternative (nested) defamatory meaning of the words used, namely that the plaintiff is not a trustworthy source of information with respect to the content of the Press Release and Video generally due to his prior criminal conduct and his disrespect for the decisions of democratically elected local governments.
- [152] The defendant's purported nested defamatory meaning is an attempt to selectively re-write what was published and ignores the actual words used. I agree with counsel for the plaintiff that the defendant's attempt to attribute truth to selected and segmented portions of his post without consideration for the context of the post as a whole is fallacious.
- [14] The judge also found the defences of fair comment, qualified privilege, and responsible communication to be inapplicable. It is not necessary to dwell on those defences in light of the judge's conclusion that they were defeated in any event because Mr. Taft had been motivated by actual malice in making the defamatory posting. In finding actual malice, the judge relied on adverse credibility findings against Mr. Taft observing:
- [173] The defendant maintains that his mistake in using the wrong legal terminology ("convicted felon") was simply a careless mistake and that he apologized for it once it was brought to his attention. He further submits that it was not malicious to seek to adduce evidence that by wearing a balaclava the plaintiff was guilty of an indictable offence, because it was relevant to his pleaded defence of justification.
- [174] The law is clear that the mere fact the defendant published his words precipitously and recklessly after merely skimming the e-know article and immediately reacting to it based upon his vague recollection of past events and without regard for accuracy is not enough to establish malice. However, in this case, the defendant's animosity towards anti-deer cull activists generally and the plaintiff, in particular, permeated his conduct on the issue almost from the outset of the plaintiff's involvement. It was particularly palpable during his cross-examination .
- [175] The evidence demonstrates that, from and after the commencement of the plaintiff's vocal opposition to the deer cull decision, the defendant set upon a campaign to discredit the plaintiff at any opportunity, as evidenced by his social media exchanges, his usurping the billboard space, and his incorrect attribution of any media posts by animal rights organizations to the plaintiff alone. Why else would the Mayor of Invermere, for example, stoop to linking the town's new flooring business to the plaintiff and the destruction of deer traps if he was not motivated by bitterness towards the plaintiff?
- [176] Moreover, the defendant was determined during the course of this litigation, including during the trial, to paint the plaintiff as someone akin to a "convicted felon" because, in his view, and he submitted, in the eyes of any reasonable and ordinary person without special knowledge, wearing a balaclava was equivalent to being guilty of felonious conduct.

- [177] On the whole of the evidence before me, the inescapable conclusion is that the defendant's January 13, 2016 post was published with the intent to selectively attack the plaintiff's credibility and reputation because of his previous opposition to and activism in respect of the deer cull decision.
- [178] I find that the defendant was motivated solely by distain towards the plaintiff because of his activism activities, the unrecovered costs incurred by Invermere in connection with its successful defence of the Petition proceeding, and because the plaintiff received a conditional discharge in respect of the Kimberley Incident.
- [15] The judge awarded \$50,000 in general damages for the loss of or harm done to Mr. Kazakoff's reputation and integrity in his community. In doing so, he took into account the extent to which Mr. Kazakoff had been redeeming his reputation after the conditional sentence, the impact of defamation in a small closely-knit community, the fact that the defamatory words were published by the Mayor and carried the weight and residence of his office, and the fact that they were published on the Internet and were therefore widely available. Finally, the judge was critical of Mr. Taft for failing to take meaningful steps to apologize and pressing the claim that the description of Mr. Kazakoff was substantially true. He summed up his conclusion thus:
- [193] Although I find that the defendant's defamatory post diminished the plaintiff's reputation in the eyes of the community, it did not do so to the extent complained of by him. His identity in the community prior to the post was a notorious one, characterised by his very public activism activities which included a guilty plea for mischief in respect of the destruction of two traps being used in Kimberley for its deer cull.
- [194] I find that, although the plaintiff had made significant strides in reducing his public persona since his guilty plea, his activist reputation within the community remained extant at the time of the post.
- [16] The judge awarded \$25,000 in aggravated damages justified as follows:
- [198] The factors the court may take into account in assessing aggravated damages include:
- a) whether there was a withdrawal of the defamatory statement;
 - b) whether an apology was tendered;
 - c) whether there was conduct calculated to deter the plaintiff from proceeding with the action; and
 - d) whether there was a plea of justification which the defendant knew was bound to fail[.]

See Hill at para. 191.

- [199] Although the defendant published an apology, he was reluctant to do so despite the almost immediate responses to his post from readers. It took two demand letters from plaintiff's counsel before the defendant begrudgingly published an apology that was limited to his use of incorrect legal terminology.
- [200] Throughout the litigation, although perhaps misguided, the defendant steadfastly maintained his plea of justification and sought to prove that the plaintiff was indeed a "convicted felon", a defence he knew or ought to have known was bound to fail.
- [201] Almost every aspect of this case demonstrates the persistent malice of the defendant towards the plaintiff.
- [17] After declining to award punitive damages, the judge awarded special costs because Mr. Taft's attempt to prove that Mr. Kazakoff was guilty of criminal conduct in order to justify using the words "convicted" and "convicted felons" was inexcusable and deserving of censure and rebuke.

On Appeal

- [18] Mr. Taft's appeal focuses on two principal alleged errors concerning the defamatory posting. First, he contends that the judge made a legal error in his determination that the posting was legally capable of carrying the meaning that Mr. Kazakoff had staged the video and then fabricated the press release based on it. As I apprehend the issues on appeal, Mr. Taft does not dispute that the posting was reasonably capable of conveying the meaning found by the judge to be the sting of the defamation. Nor does he contend that the sting of the defamation rests on palpable and overriding error. The sting is that as a convicted felon and someone convicted of tampering with traps, Mr. Kazakoff is unworthy of belief generally and in relation to this issue.
- [19] Second, Mr. Taft does, however, renew his argument that, although he had made errors in using the words "convicted" and "convicted felons", those errors were really technical and, given the facts, were either substantially accurate or their defamatory sting was much attenuated. This ground of appeal does not dispute that the words complained of are defamatory, subject to the justification argument.
- [20] Mr. Taft goes on to allege that the judge made palpable and overriding errors of fact in both his conclusion that Mr. Taft was motivated by actual malice, as well as in his awards of damages and special costs. He contends that the judge "double counted" in these awards by considering the same factors under different heads, and, I took it, that the "justification" argument, advanced at trial and repeated before us, does not justify an award of special costs.

Analysis

- A. Were the words capable of the defamatory meaning alleged?

Standard of Review

- [21] At the hearing of the appeal, there was some uncertainty about the appropriate standard of review in a judge-alone defamation trial. This arises because two distinct questions must be answered in a defamation trial by judge and jury. The first is a question of law regarding whether the words used are reasonably capable of having the alleged defamatory meaning and should go to the jury. This is reviewable on a correctness standard. The second question involves a finding by the jury as to whether the words did, in fact, have that meaning and is subject to deference: *Weaver v. Corcoran*, 2017 BCCA 160 at para. 66.
- [22] The question of how to apply this framework to a judge-alone trial was considered in *Mitchell v. Nanaimo District Teachers' Assn.* (1994), 94 B.C.L.R. (2d) 81 (C.A.). Although the Court split on the result, all members of the division agreed that the question whether words are capable of bearing the alleged defamatory meaning was an issue of law reviewable on a standard of correctness. Mr. Justice Donald put the matter thus:

38 The trial judge must first determine whether the publication is capable of bearing a defamatory meaning. That is a question of law and must be answered in the affirmative in order for the case to go to the jury. The jury (or the judge as trier of fact, if sitting alone) then decides whether the publication is in fact defamatory.

39 Ordinarily this court reviews questions of law on the standard of correctness and questions of fact on the standard of reasonableness, or, to put it in conventional terms: was there a palpable or overriding error. However, counsel for the plaintiff submitted to us that the threshold question in defamation actions is so bound up in the facts that it should be subjected to the lower level of scrutiny. I cannot give effect to this submission.

40 Many issues are considered questions of law because judges should decide them, not because they are purely conceptual matters uncluttered by any considerations of evidence. In the division of responsibility between judge and jury the law has assigned certain questions to the province of the judge; the admissibility of evidence is an example that immediately comes to mind. The judge answers the question in order to provide direction to the trier of fact and to ensure that the case stays on the right track. It follows that if the judge makes a mistake and misdirects the jury (or him or herself) the Court of Appeal must be able to put the matter right. An appeal court must be free to correct errors of law but it cannot interfere with errors of fact unless the mistake is egregious. No persuasive reason has been given for departing from the usual standard of review for a questions of law in examining the threshold decision in this case.

[Emphasis added.]

- [23] Madam Justice Southin, with whom Madam Justice Ryan agreed in the result, accepted this proposition. She wrote:

1 I have had the privilege of reading in draft the reasons for judgment of Mr. Justice Donald.

2 In the end, the case comes, as my learned colleague says, to the question of whether the publication is capable of bearing a meaning defamatory of the plaintiff. Upon a trial by judge and jury, that is a question for the judge. I need not decide whether that is so because it is a question of law or whether it is so simply because of the historic forces that shaped the modern law of defamation. One might even say that the term "question of law" means any question which, by precedent is, upon a trial by judge and jury, for the judge. As it is a question for the judge, it is also a question properly within the purview of this Court, whether the trial is by judge and jury or by judge alone.

3 In other words, it is one upon which we may substitute our opinion for his, untrammelled by such a formulation as "palpably and manifestly wrong".

[Emphasis added.]

[24] The approach taken in Mitchell was adopted in Lawson v. Baines, 2012 BCCA 117 at para. 11. In that case, Mr. Justice Hinkson (as he then was) separated the two parts of the threshold question and analyzed them independently, concluding that the trial judge was correct to find the words at issue were capable of being defamatory: at paras. 26-31.

[25] Some confusion may have occurred as a result of two recent cases of this Court. In Weaver, Madam Justice Dickson stated:

[67] The threshold question requires assessment of the range of possible meanings that words could reasonably bear and sets the outer limits of potential liability. In an action tried by a judge alone, it need not be asked and answered separately. As the trier of fact, the judge's function is to determine definitively whether the impugned words did, in fact, have a defamatory meaning. The threshold question is subsumed by this inquiry: Mainstream Canada at para. 15.

[26] Similarly, in Taseko Mines Limited v. Western Canada Wilderness Committee, 2017 BCCA 431 [Taseko], Madam Justice Bennett included the following:

[48] When there is a trial by judge and jury, the judge has a gatekeeping function, in that he or she must first determine if the impugned words are "capable of being defamatory", which is a question of law. If so, then the case is submitted to the jury to determine if the words are defamatory, which is a question of fact. This two-step analysis is not necessary if there is a judge alone trial: Mainstream Canada v. Staniford, 2013 BCCA 341 at para. 15.

[49] In this case, the trial judge did not need to determine if the words were capable of being defamatory, and he did not. He concluded that two of the five articles were, in fact, defamatory. The finding that the impugned words were defamatory is a question of fact: Brown on Defamation, ch. 5 at 445. This issue is assessed on the standard of palpable and overriding error: Mitchell v. Nanaimo District Teachers' Assn., [1994] 94 B.C.L.R. (2d) 81 (C.A.) at para. 41; Housen v. Nikolaisen, 2002 SCC 33 at para. 10.

- [27] In my view, these cases are not indicative of any change in the law. In *Weaver*, the Court made clear that a trial judge is not required to explicitly state his or her conclusion on the first question. Where the words are in fact defamatory, they must be capable of having that meaning. Thus, the first question is "subsumed" in the second.
- [28] In *Taseko*, the court below had dismissed the defamation claim and the plaintiff appealed. In order to overturn the trial judge's decision that certain writings did not have the defamatory meaning alleged, *Taseko* had to show the statements were in fact defamatory and so were subject to the higher deferential standard. Simply proving they were capable of that meaning would have been insufficient.
- [29] In summary, the question of the standard of review depends on the nature of the alleged error. If the issue is whether the words are reasonably capable of bearing the alleged meaning, then that is a question of law reviewable on a correctness standard. If the issue is whether the words are in fact defamatory then the palpable and overriding error standard applies. Thus, even where a trial judge has merged the two steps into one and concluded that the words are in fact defamatory, this Court must review whether the words are capable of being defamatory on a correctness standard, if that is the alleged error.
- [30] In this case, the judge subsumed the threshold question (are the words reasonably capable of being defamatory) into the factual determination of whether they were in fact defamatory. He concluded that in fact they conveyed the meaning pleaded, including that Mr. Kazakoff had staged the video and fabricated the press release. Mr. Taft argues that the posting was not reasonably capable of bearing the meaning that Mr. Kazakoff had staged the video and fabricated the press release. In my view, applying *Mitchell*, in principle, that issue is to be addressed on a correctness standard of review.

Application

- [31] I need not canvass in any detail the test to determine whether impugned words are reasonably capable of bearing a defamatory meaning or the defamatory meaning alleged. Much judicial ink has been spilt in articulating the test, which may be summarized as follows in Raymond E. Brown's *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, loose-leaf (consulted on 22 April 2018), 2d ed (Toronto: Thompson Reuters Canada, 2017), ch 5.3(1)(a):

"The question ... is whether the words in their ordinary signification are capable of being defamatory." It is whether the particular imputation is reasonably capable of being conveyed. Would a reasonable person to whom they were published understand them in a defamatory sense? Particular attention will be given to the time when the words are read or heard, to the mode or manner of the publication, and to the community in which they are published. The nature of the publication itself may be a material consideration; the reader of a sensational article may be permitted a certain amount of loose thinking, while the reader of a non-sensational article may be expected to apply a greater degree of analytical focus. If the

defamatory meaning is latent and depends upon the existence of extrinsic facts to be understood in a defamatory sense, the plaintiff must prove that the persons to whom the words were published were aware of those facts.

A court must be guided by the test of reasonableness. It will not strain to give a particular meaning to published words, or stretch them beyond their fair meaning. It will avoid any unusual meaning, or a tortured, forced or unreasonable interpretation of the language, and the inferences drawn must not be far-fetched. Words will not be distorted to give them an unusual meaning. They should be judged by their general tenor. The language will not be tortured to make certain that which is not certain. It is not the ingeniously possible interpretation, but the plainly normal construction that is preferred.

[Footnotes omitted.]

[32] I am of the opinion that the alleged defamatory post is reasonably capable of meaning that Mr. Kazakoff staged the video and fabricated the press release. While this meaning may not be the most reasonable or obvious interpretation of the post, I cannot conclude in substance that it would have been an error to leave the issue to a jury, if this had been a jury trial. Nor am I prepared to go so far as to say that the judge's finding of fact on this meaning rests on a palpable or overriding error. I would not accede to this argument.

[33] I accept then for the purpose of the appeal that the judge found the post defamed Mr. Kazakoff by alleging he had staged the video and fabricated the press release. Having said that, it is important to recognize that the judge places little, if any, weight on this meaning in his analysis of the sting of the defamation and his assessment of the damage caused by it. The sting of the defamation is taken to be that, as a "convicted felon" and someone "convicted" of tampering with traps, Mr. Kazakoff is unworthy of belief generally and in relation to this issue. This is essentially the first meaning pleaded in the claim. It is the meaning the judge relies on in his analysis. In my opinion, the judge's findings of fact about the sting of the defamation were open to him on the evidence. The findings about the sting of the defamation could only be interfered with if they rested on palpable and overriding error. No such error is alleged, nor is there a plausible argument they rested on such errors.

B. Were the words substantially true?

[34] The second issue on the appeal is whether the judge erred in his approach to the meaning of "who was convicted" and "convicted felon".

[35] Mr. Taft admits that his words were inaccurate. Although Mr. Kazakoff had initially been charged both with a summary offence and an indictable offence, the Crown proceeded only on the summary offence (mischief), staying the other charge. Because he received a conditional discharge on pleading guilty, which then became an absolute discharge on the fulfilment of the conditions, Mr. Kazakoff does not have a conviction. He is also not a "convicted felon". The term felon is not a term of art in Canadian criminal law, but to the extent it would be reasonably understood in Canada it would refer to someone convicted of a

more serious, typically an indictable, offence. All of this Mr. Taft concedes.

- [36] Rather, Mr. Taft argues that his inaccuracies were technical in nature. He says Mr. Kazakoff had committed an offence, been charged and pleaded guilty. Moreover, on any reasonable interpretation of the post, the reference to being a convicted felon was tied to the offence to which Mr. Kazakoff had pleaded guilty. In these circumstances, the defamatory meaning, to the extent it exists, is much attenuated.
- [37] The judge understood and rejected this argument. His analysis is rooted in a correct appreciation of the legal principles governing conditional and absolute discharges as well as his analysis of the defamatory significance of calling someone a convicted felon. Ultimately, the judge's conclusions are findings of fact and reviewable on the resulting deferential standard. I cannot say that the judge made a palpable and overriding error in his findings. The trial judge properly considered Mr. Kazakoff's offence, in the context of the degree to which his reputation would be affected by the words, to go to the question of damages.

C. Did the judge err in finding malice?

- [38] Mr. Taft next challenges the judge's finding of malice. In oral argument, he suggested the finding that his post implied Mr. Kazakoff had staged or fabricated elements of the press release contributed to the finding of malice. Similarly, he argues his initial refusal to apologize was taken as evidence of malice. However, neither are mentioned in the judge's reasons on this issue and, even if they were wrongly considered, there was substantial other evidence upon which the trial judge could have made this finding.
- [39] Mr. Taft submits the judge erred by failing to consider other posts made before and after his own, which provide context for his statements. The judge found that Mr. Taft's comment was motivated by disdain for Mr. Kazakoff based on previous interactions. The other posts do not show that finding to have been made in error.
- [40] The judge explained his credibility findings. He referred to examples of the evidence from which he concluded that Mr. Taft was actuated by malice. He articulated the correct test for finding malice. Mr. Taft has not articulated any basis for appellate intervention in the judge's conclusion.

D. Did the judge err in his assessment of damages?

- [41] I turn now to the issue of damages and the costs award. Here, there are three issues. The first is whether the damages are inordinately high. The second is whether the judge erred in making multiple awards based on the same factors; a double counting issue. Thirdly, is whether an award for special costs was warranted in the circumstances?

General Damages Award

- [42] A damage award is subject to deference and will not be disturbed unless it was based on a mistaken or wrong principle of law, or the award is so inordinately high or low that it is a wholly erroneous estimate of the damage: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 9, leave to appeal ref'd [2009] S.C.C.A. 197. In the case of intangible harm, such as the loss of reputation, the Supreme Court of Canada has said (*de Montigny v. Brossard*, 2010 SCC 51):
- [27] In civil liability cases, judges sometimes have the difficult task of quantifying the value of concepts as intangible as a person's life, physical inviolability or suffering. In this area, where, by definition, the exercise of reasoned discretion remains the rule, the judge must also give as much priority as possible to following established judicial practice while adapting it to the specific circumstances of each case. Because of the essential factual assessment required by this task, an appellate court must take a highly deferential approach to varying the quantum of compensatory damages awarded by the trial judge. The "palpable and overriding error" standard applies to findings and inferences of fact concerning the assessment of such damages (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 10 and 25; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at para. 53).
- [43] The judge awarded \$50,000 in general damages. The factors the judge took into account were set out at paras. 183-89 of the reasons. Beyond the inherent seriousness of alleging that someone is a convicted felon, they are:
- The small closely-knit community.
 - The comment was published by the mayor.
 - The comment was posted on the Internet and widely accessible.
 - The lack of a meaningful apology.
 - Mr. Taft's attempted justification of "convicted felon".
 - Mr. Kazakoff's testimony regarding how his reputation has suffered.
- [44] In addition, the judge significantly discounted what the damages would otherwise have been in light of Mr. Kazakoff's notorious reputation as an activist, including his guilty plea for mischief in destroying the traps.
- [45] I am, with respect, of the view that in the circumstances of this case, the award was inordinately high. I think the judge mistakenly characterized or did not consider relevant facts when determining damages. As a result, he committed palpable and overriding error in his assessment of damages.

[46] First, the post was available, in the ordinary course, for only nine days before it was deleted. Second, the post was directly and effectively challenged within hours by subsequent posts that set the record straight about the status of the discharge, thereby ameliorating any damage to Mr. Kazakoff's reputation. Third, Mr. Taft apologized within about three weeks for his error in alleging that Mr. Kazakoff had been convicted and was a convicted felon. It is convenient to reproduce that apology here:

On January 13th, 2016 at 6:29 pm, I posted a comment stated Mr. Devin Kazakoff was a convicted felon in relation to destroying deer traps in Kimberley (the post has since been removed). After receiving a letter from a lawyer representing Mr. Kazakoff, a legal distinction has come to my attention, and I would like to state that this comment was not true and I wish to retract it. Mr. Kazakoff plead [sic] guilty to destroying deer traps in Kimberley and received a conditional discharge, he was not convicted of a crime and does not have a criminal record, and is not a felon. I hereby tender my unconditional apology to Mr. Kazakoff, to e-know (and it's [sic] readers).

[47] The judge did not consider this to be a meaningful apology and criticized Mr. Taft for not making a full apology on the terms requested by counsel. In doing so, he appears to have treated the apology as an aggravating factor. With respect, I think this conclusion amounts to a palpable and overriding error leading to an inordinately high award. The apology closely echoes the one originally requested by Mr. Kazakoff's counsel. Mr. Taft retracted and unconditionally apologized for exactly what was false in his original post. The facts are accurately stated. The effective sting of the defamation is now that having destroyed traps, pleaded guilty, received a conditional discharge, Mr. Kazakoff is an unreliable and untrustworthy commentator on the deer cull issue. Although it may be defamatory to say that readers should not be too quick to believe such a person, it cannot be considered remotely as damaging to a person's reputation as continuing to maintain that they are a convicted felon.

[48] The errors of the judge in taking into account irrelevant factors, failing to accord sufficient weight to relevant factors and mischaracterizing the significance of the evidence resulted in an award that was inordinately high. On a proper appreciation of the relevant facts and considerations, I consider an award of \$25,000 sufficient to vindicate Mr. Kazakoff's reputation.

Aggravated Damages Award

[49] I turn now to the award of aggravated damages and the issue of double counting. Here, the judge took into account the following factors at paras. 199-201:

- The lack of a meaningful apology.
- Mr. Taft's attempted justification of "convicted felon".
- Persistent malice.

[50] I observe that the first two of the three reasons given for the award of aggravated damages duplicate reasons given to support the award of general damages. In my view, it would be preferable to consider these factors only once in making an award of compensatory damages to avoid the risk of double compensation. I have already commented on the issue of the apology. I accept that, in principle, the two other factors are capable of supporting an award of aggravated damages.

[51] The issue of double compensation can arise when the same factors are relied upon to justify awards under different heads of damages and has attracted critical commentary. Brown on Defamation includes the following commentary at chapter 25.3(1.1):

The Ontario Law Reform Commission, while not specifically referring to the law of defamation, has recommended the abolition of a separate award of aggravated damages. This recommendation should also be followed in actions for defamation, particularly in those jurisdictions which place no limitations on the award of punitive damages. A separate award of aggravated damages is a pernicious development in the law; it is absurd in theory and mischievous in practice. [An] overlapping of factors necessarily will occur where aggravated damages are recognized as just another aspect of compensatory damages. In addition, by emphasizing the necessity of malicious conduct on the part of the defendant as an essential basis for an award of aggravated damages, there is a considerable overlap with punitive damages which also require evidence of malicious conduct. There is not only a risk of double counting, but there is in fact double counting where separate awards of compensatory, aggravated and punitive damages are made.

[Footnotes removed.]

[52] The leading case in British Columbia regarding the overlap of general and aggravated damage awards is *Brown v. Cole* (1998), 114 B.C.A.C. 73, leave to appeal ref'd, [1998] S.C.C.A. No. 614, in which Justice Southin concluded:

[100] Although I am not prepared to say that it is an error in law to break compensatory damages into [general and aggravated damages], I have no doubt it is an error in law to double count, and this Court, in reviewing the damage award in defamation, must address the issue of whether there was double counting.

[Emphasis added.]

[53] The issue of double compensation within general and aggravated damages was raised again in *Nazerali v. Mitchell*, 2018 BCCA 104 at paras. 75-76 and 87, but no decision was necessary on this point because the award was inordinately high in any event. This Court noted in *Nazerali* that the Supreme Court of Canada, in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, contemplated that certain factors may be relevant to more than one head of damages, but did not cast doubt on the general proposition found in *Brown*.

- [54] In this case, it is only necessary to determine whether the combined award involves double counting. In my view, it appears that double counting did occur and Mr. Kazakoff was compensated for the same conduct under both heads of damages. Hence, although I accept that Mr. Kazakoff was entitled to an award of aggravated damages grounded in the finding of malice, to avoid double compensation, I would reduce the award of aggravated damages to \$10,000.
- [55] In the result, I would substitute a combined general and aggravated damages award of \$35,000.

Special Costs

- [56] I turn finally to the award of special costs. This award is generally made as a result of reprehensible conduct during litigation that is worthy of rebuke. As the award is discretionary, it is reviewable only when the trial judge has erred in principle or the award is plainly wrong: see *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177.
- [57] The judge relied, at paras. 208 and 210, on two factors to justify an award of special costs: the fact that Mr. Kazakoff was forced to seek vindication in court because Mr. Taft would not apologize and Mr. Taft's attempted justification of "convicted felon".
- [58] First, I observe that again there is a possible element of double counting in the factors underlying the award of aggravated damages and special costs, although the former is compensatory in character and the latter punitive. As noted in *Nazerali* at para. 115:

It is true that conduct during the course of the proceeding can be taken into account when assessing aggravated damages: see *Hill* at paras. 191 and 192. There may be a danger of double counting in some cases where special costs are also awarded.

- [59] However, it is not necessary to decide this issue, as I have determined that the special costs awards should be reversed for other reasons.
- [60] With respect, I think the judge erred in basing the award on Mr. Taft's refusal to apologize. Mr. Taft had in fact apologized for calling Mr. Kazakoff a convicted felon and had done so accurately, so far as that aspect of the case is concerned. In light of that apology, and presumably confident of his defences, it is not reprehensible conduct to stand one's ground and seek to defend oneself in court, even if the consequence is that a plaintiff has to take a matter to trial to vindicate his or her reputation.
- [61] The more serious question is whether Mr. Taft's tactics at trial in seeking to defend the partial or substantial truth of the convicted felon allegation could found the judge's conclusion that Mr. Taft had engaged in reprehensible conduct. To assess that question, it is necessary to examine what was in issue.

- [62] In brief, Mr. Taft sought to demonstrate that in breaking the traps, Mr. Kazakoff had not only committed mischief, but also an indictable offence because he wore a balaclava at the time, even though that charge was stayed. As a result, Mr. Taft aimed to show his posting, while legally inaccurate, was factually substantially accurate. This argument was pressed in support of a substantial justification defence, as well as being relevant to damages.
- [63] Mr. Taft's attempt to persuade the judge that he was entitled to advance this argument occurred on two occasions. The first involved submissions on the general principles in support of this approach. The argument involved numerous exchanges between counsel and the judge in which the judge attempted to gain a clear articulation of the position being advanced. It is fair to say that the judge did not find the argument meritorious, for good reason, and it ended with the judge asking whether counsel had any authority to support his position. Counsel then handed up authorities, which the judge retired to read. On his return, the judge ruled against the relevance of the intended line of defence.
- [64] Shortly after the ruling, counsel objected on the record to the ruling and sought to reopen the argument, asserting he had not been given the opportunity to make submissions on the significance of the authorities. The judge then permitted further argument on the cases before again dismissing as irrelevant any pursuit of the issues involving the manner in which the offence was committed, including cross-examination on the wearing of a balaclava. The judge also reviewed the transcript of the sentencing proceedings and concluded that Mr. Kazakoff had not admitted whether he had worn a balaclava when destroying the traps. As I understand it, the Crown, in describing the circumstances of the offence, referred to persons seen leaving the scene wearing balaclavas and that balaclavas were found in the vehicle together with Mr. Kazakoff when it was stopped. Of course, Mr. Kazakoff did not have to admit the facts alleged by the Crown, but once alleged he would have to specifically deny them to put them in issue. As I see the matter, there was some basis in the record for Mr. Taft to advance his argument.
- [65] During the course of submissions, the judge on several occasions expressed his concern about the proposed line of defence and warned counsel to be careful about the positions he was advancing.
- [66] There is no doubt, in my view, that the line of defence was misconceived insofar as it purported to support a defence of substantial justification. The Crown proceeded only with the mischief charge and stayed the other charge. Mr. Kazakoff pleaded guilty only to that charge and as a result of the conditional discharge, made absolute, is deemed not to have been convicted and does not have a criminal record. The judge's ruling on relevance for that purpose was undoubtedly correct and Mr. Taft's position was properly rejected. Having said that, Mr. Taft was able to point to authority that he could in good faith argue supported his position. There are cases that suggest that incorrectly describing the legal consequences of certain acts may not be inconsistent with substantial justification depending on the underlying facts.

- [67] Having reviewed the transcript, I think the judge fell into error in concluding that advancing the argument that he was entitled to inquire into the manner in which the offence to which Mr. Kazakoff pleaded was committed in support of a plea of substantial justification was sufficiently reprehensible to justify an award of special costs. Advancing the argument may have been misguided, the argument was weak, the cases relied on were capable of being readily distinguished, but all of this strikes me as bearing on bad judgment or ineffective counsel work, rather than reprehensible conduct by the party.
- [68] Accordingly, I would set aside the award of special costs and substitute an award of party and party costs.

Conclusion

- [69] In summary, I would reduce the damages award to \$35,000 and order party and party costs to replace the special costs order.
- [70] As success on this appeal has been divided, I would order each party to bear his own costs.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Bennett"

I agree:

"The Honourable Mr. Justice Hunter"

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