

CANADA / JUDGMENT

Manno v. Henry

2008 BCSC 738

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 738 Manno v. Henry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Manno v. Henry,

2008 BCSC 738

Date: 20080610

Docket: S052021

Registry: Vancouver

Between:

Dina Manno, Roman Manno, Germana L'Heureux, Salvatore

Manno, Marina Manno, and Maria Rosa Manno

Plaintiffs

And

Ken Henry, Rick Collins, John Doe, Jane Doe, Lower Mainland

Publishing Ltd., and Canwest Interactive Inc.

Defendants

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

Counsel for the Plaintiffs:

R.D. McConchie and A. McConchie

Counsel for Defendants:

B.T. Gibson, Q.C.

Date and Place of Trial:

April 28, 29, 30; and

May 1, 2, 5, 6, 8 and 9, 2008

Vancouver, B.C.

I INTRODUCTION

- [1] The plaintiffs are all members of the same family. The plaintiff Maria Rosa Manno ("Mrs. Manno") is the matriarch of the family. The remaining plaintiffs comprise five of her 10 adult children. The older children were born in Italy, while the remainder were born in Canada after the family emigrated to British Columbia in 1978. Mrs. Manno and her husband were subsequently divorced. For ease of reference, and meaning no disrespect, I propose generally to refer to the five Manno children who are plaintiffs by their first names.
- [2] Each of the plaintiffs claims against the defendants for damages for defamation and breach of privacy. Although the claims all arise out of the same publications concerning the same series of events, the claim of each plaintiff must be considered separately.
- [3] The claims arise out of a newspaper report (the "article") prepared by the defendant Ken Henry and published, together with a photograph taken by Mr. Henry, in the Abbotsford/Mission Times newspaper. The article, without the photograph, was republished on the newspaper's website on the Internet.
- [4] The Abbotsford/Mission Times was at the material time published twice weekly by the defendant Lower Mainland Publishing Ltd./Lower Mainland Publishing Group Inc. ("LMP"), which defendant also published the content of the Abbotsford/Mission Times website. The remaining defendants did not participate in this litigation.
- [5] The impugned article related to a robbery (the "incident") that occurred on Tuesday, October 19, 2004, at a farm of nearly eight acres located at 29655 Fraser Highway in Abbotsford, B.C. (the "farm").
- [6] At the time of this incident, the farm was owned by Mrs. Manno and Salvatore Manno, the eldest of her children. It had been in the Manno family since 1988. The farm served as the family home for most of the Manno children at different stages in their lives, and was the centre of family activities for the children and grandchildren. When the incident occurred, the family home on the farm was undergoing renovations and was temporarily unoccupied. Salvatore was carrying out the renovations.

II THE ARTICLE

[7] The article was published on page 13 of 48 in the Abbotsford/Mission Times edition for Friday, October 29, 2004. It appeared both above and below the fold, and was the only article on the page. The rest of the page was filled with ads. Its headline was prominent. It read as follows:

News_____

Violence increasing

with added grow ops

Ken Henry

As the number of marijuana growing operations has increased throughout Abbotsford and the rest of B.C. so has the number of pot rip-offs.

That's been the suspected case twice in the past two weeks in Abbotsford. On Wednesday afternoon in Abbotsford police arrested three men in their 20s after they were caught breaking into a home in the 32000 block of Atwater Crescent. Officers at the scene discovered a marijuana growing operation and believe that's the reason the suspects targeted the house. Last week police responded to a possible shots fired call at home at 29655 Fraser Highway and heard reports of two suspects running away with full garbage bags. The victims of the incident did not co-operate with police.

"Obviously marijuana grow ops are a fairly lucrative business," said Abbotsford police Staff Sgt. Carl Vreeman. "It's also equally lucrative to go and take the proceeds of those efforts and there are people out there that are willing to do that."

Marijuana sells for about \$2,000 pound on average. Police say there's usually four crops a year, and each plant can yield as much as three to four ounces of marijuana for each harvest. So a growing operation with 400 plants could net as much as \$800,000 in one year.

One of Abbotsford's most severe grow rip cases was Nov. 7 when three suspects entered a home at 34416 Clayburn Rd. and killed [X], 40, and shot her boyfriend [Y] seven times - five times in the face - before taking their marijuana stash. [Y] survived but is physically no longer capable of functioning properly. He's been through 12 operations, is blind in one eye, is deaf in one ear, has a large chunk of his jaw missing and has bullet fragments and lead throughout his face and head.

Const. Shinder Kirk said anyone with a growing operation is at risk.

"Certainly if you are going to engage in growing marijuana the chances of being ripped off or meeting some kind of violence increases greatly," he said. "Anything to do with drugs or the drug trade can lead to violence."

[The names of civilians mentioned in the article, who are not involved in this lawsuit, have been deleted for privacy]

- [8] The article was accompanied by a photograph measuring 9.5 mm x 12.5 mm (3¾" x 5"). The photograph depicted four police officers standing around three of the plaintiffs, being Dina Manno, Roman Manno and Germana L'Heureux. Included among the officers were Const. Kelly, Sgt. Kingra, and Const. Savinkoff of the Abbotsford Police Force. Dina is standing between officers Kelly and Kingra, while Roman and Germana are seated at the edge of a flower bed next to the driveway at the feet of Const. Savinkoff. Sgt. Kingra is speaking into a cell phone. All are easily recognizable, except for the fourth police officer whose face is partially obscured by Const. Kelly. The photograph is attributed to Ken Henry. The caption, in bold, reads as follows:

Police talk to residents of a house at 29655 Fraser Highway last week. Reports over the police scanner were that the residents of the home were victims of a grow rip.

- [9] It will be observed that the article mentions no names. 29655 Fraser Highway is, as stated above, the address of the Manno family farm.
- [10] With respect to the republication on the newspaper's website, it would appear that news articles generally remain accessible under the "news" tab for one or two weeks before being archived. Thereafter, they are accessible via the site search engine, powered by Google. This particular article remained posted and accessible on the website until May of 2005.

III ALLEGATIONS AND ISSUES

- [11] Each of the plaintiffs claims to have been libelled by the articles on the basis that the words complained of bore and would reasonably have been understood to bear, the following inferential meanings:
1. The plaintiffs and each of them were involved in the criminal enterprise of operating a marijuana growing operation at 29655 Fraser Highway, Abbotsford, and consequently were guilty of possessing marijuana and/or producing and possessing marijuana for the purpose of trafficking, contrary to the Controlled Drugs and Substances Act, S.C. 1996, c. 19; and/or
 2. The plaintiffs and each of them were the victims of a "grow rip," namely a theft of their illegal marijuana and/or their illegal proceeds of sale of marijuana; and/or
 3. The plaintiffs and each of them refused to co-operate with a lawful police investigation in order to obstruct or prevent police from establishing that the plaintiffs and each of them were involved in the criminal enterprise of operating a marijuana growing operation at the house located at 29655 Fraser Highway, and consequently were guilty of possessing marijuana and/or producing and possessing marijuana for the purpose of trafficking, contrary to the Controlled Drugs and Substances Act, S.C. 1996, c. 19.
- [12] The plaintiffs allege that the impact of the articles on their lives was significant, and claim general damages, interest and costs.

- [13] The three plaintiffs depicted in the photograph further allege that the defendant Ken Henry breached their rights of privacy pursuant to the Privacy Act, R.S.B.C. 1996, c. 373. Counsel for the plaintiffs advised, however, that if these plaintiffs are awarded damages for libel, then any damages available under the Privacy Act would be subsumed in that award and would not be separately pursued.
- [14] The defendants admit publication. They deny the defamatory meaning alleged by the plaintiffs, except that, to the extent the article meant and was understood to mean that the plaintiffs or any of them had refused to cooperate with police who were attempting to investigate a possible incident at the plaintiffs' home, then the words were true in substance and fact. This is the defence of justification.
- [15] The defendants further raise the issue of identity. They submit that the article does not identify the plaintiffs by name, and that it is unlikely that more than a small group of people would associate them with the article. Among that small group, it is unlikely that any of them would associate the grow rip allegation with anyone other than Roman. The defendants further submit that there is no evidence that anyone in that small group believed that any of the plaintiffs was operating a grow op.
- [16] The defendants then maintain that the plaintiffs were offered a full and fair apology for the grow rip allegation and did not accept it. In any event, they submit that the article does not show the plaintiffs in any worse light than an accurate story of the actual events of October 19, 2004, would have done.

IV DISCUSSION: THE FACTS

- [17] The plaintiffs were all adamant, and I find, that there was no marijuana growing operation anywhere on the property on October 19, 2004, or at any other time. No evidence was led to the contrary, and indeed the defence evidence from the attending police officers was consistent with the absence of any such operation.
- [18] I now turn to consider the evidence as to what in fact occurred at the Manno farm on October 19, 2004.

A. The Incident as related by the Mannos

- [19] On that day, Salvatore and Roman were at the farm clearing out junk from the basement of the house. Salvatore was then 40 years old, and Roman was 24. Their sister Marina, 26, was in the house doing laundry, and Salvatore's daughter, Brianna, then 11 years old, was also in the house.
- [20] The basement is on the ground floor of the house. Salvatore and Roman were carrying refuse from the basement to a utility trailer across the driveway, right outside the basement door on the east side of the house. The driveway carried on to the south, through an avenue of trees, down to Fraser Highway.

- [21] Roman was engaged in one such trip that afternoon when he saw two men approaching up the driveway. They were both carrying handguns. He yelled for his brother, calling out "Sal!"
- [22] Inside the basement, Salvatore was chatting with his sister Marina. They both heard the yell, and thought that Roman was calling for help with his load of refuse. Marina headed out the basement door with Salvatore right behind her. Salvatore saw the men. He testified that he saw that one of them had a gun in his hand, and that they were carrying garbage bags. He immediately grabbed his sister, wheeled her back inside the house, and pushed her upstairs to the main floor. They then fled out an exterior doorway and down a short flight of steps on the west side of the house, and headed south to Fraser Highway to find help. When they got there, Salvatore realized that he had forgotten about his daughter Brianna and returned to the house to find her. Happily, he was able to pick her up at the same west doorway, and escorted her safely to the highway.
- [23] Marina had stopped traffic on Fraser Highway and had persuaded two drivers to call 911. She was joined shortly by Brianna. An employee at Scamp Industries, located across the street next to the Aloha Trailer Court, then escorted the women to his office where Marina telephoned her sisters Dina and Germana.
- [24] Although Marina did not recall what she said, her sisters testified, and I accept, that she reported that Roman had been shot. They were told to come quickly. Marina wanted to get Brianna out of the area, and arranged with the Scamp Industries employee for a ride home.
- [25] Meanwhile, on the east side of the house, Roman fared less well.
- [26] Roman testified that as he was walking back towards the basement after dumping a load of old VHS movies into the trailer, he looked down the driveway and saw two armed men approaching. One was in his late 20s, dressed in jeans and a grey sweatshirt, with glasses, acne, and spiky hair. He was pointing his handgun at Roman. The other was stockier; both were about 6 feet tall. The second gunman was dressed in black and was in the process of pulling a balaclava over his face. Roman screamed for his brother. His brother and sister came out of the basement and looked down the driveway. Salvatore yelled, and ran with his sister back into the house. The gunmen then came running up quickly and the one with the balaclava headed into the house. The other gunman, with the spiky hair, put his gun in Roman's face, and said he was there to rob him.
- [27] According to Roman, as he was pleading with this gunman, he heard a gun go off. Needless to say, it was not the gun that was pointed in his face. Salvatore and Marina also testified to hearing a loud "bang" like a backfire or gunshot. No one, however, saw a gun being fired, nor was there any evidence of a casing, bullet or bullet hole being found.
- [28] Roman testified that the second gunman came running out of the house asking "Who was that?", and acting quite upset. He pointed his gun at Roman and told him to get into the house. That, at least, was the gist of what he said. The witness deleted expletives from his testimony.

- [29] Roman was then grabbed by the back of his shirt and pushed into the basement with both gunmen pointing their weapons at his head. In the basement, the man with the mask began searching, asking "Where is it, where is it?". Roman told him to take anything he wanted, at which point the masked man pointed his gun at Roman's knees and told him to call his brother down. Roman called for his brother, but there was no response.
- [30] Roman was then told that this was taking too long, they had to go upstairs. Roman did not want to open the door at the top of the stairs, but was told he would be shot if he did not. As he opened it, he reached around and tried to grab for the gun at his back. He was then pushed down, picked up roughly, slammed against the wall and the gun was put in his mouth. He was told that he had acted very stupidly, with the gunman swearing that this was taking too long, and asking "Where is it?". Once again, Roman pleaded with him to take anything he wanted and leave.
- [31] In the meantime, the gunman without the mask was going through the house, rummaging around. While this was going on, Roman heard a "clink" which he recognized as the sound of the lid of a glass candy dish being moved. The glass dish was kept on the mantelpiece and contained a personal supply of marijuana, a bag containing about an eighth of an ounce, that Roman kept there. He said that he used it to help cope with the pain from a serious leg fracture he had suffered.
- [32] The masked man continued to threaten to shoot Roman if he did not hurry things up, and ordered him up to the attic. There, he ordered Roman to get on his knees and close his eyes. Because of his leg injury, this order was difficult for Roman to carry out, and he was pushed roughly to the ground. He was then ordered to close his eyes and to start counting. Roman put his hands over his head and started praying. He then passed out.
- [33] When Roman came to, he felt disoriented. He picked himself up, and went down to the main floor. He picked up a large knife in the kitchen, and then looked through the house to see if anyone was there. The house was empty. His marijuana was gone from the glass dish on the mantelpiece; some DVDs, video games and an Xbox console were also missing.
- [34] Roman then exited through the door on the west side, and went around the house. He looked down the driveway and saw his brother Salvatore, coming up from Fraser Highway. Roman said that Salvatore told him he had seen the robbers jump over the fence towards the west, in the direction of Ross Road. Curiously, Salvatore did not recall seeing the robbers, or speaking to his brother at this point. I accept Roman's evidence in this regard. It is consistent with what was reported to the police, and Salvatore, by his own admission, had considerable difficulties with memory.
- [35] In any event, Roman dropped the knife on the ground, and ran to his car. He drove down the driveway and turned right (west) on Fraser Highway to the first intersection, Ross Road. From there, he drove north to the intersection of Ross and Maclure, where he turned left. He did a U-turn, and then saw a police car coming west on Maclure as he returned to the intersection of Ross and McClure. Roman then turned right down Ross to Fraser Highway,

with the police car following him, and he parked in gravel at the corner of Ross and Fraser Highway. He testified that he was happy to see the police, who he assumed were there to help him.

B. Attendance of the Abbotsford Police

- [36] In the police car were Constables Savinkoff and Morgan of the Abbotsford Police Department. Const. Savinkoff stated that he attended because he had received a report of shots being fired in the area of Ross Road and Fraser Highway. He was to set up a containment of the area, and had been assigned to look for a suspect vehicle that had been seen leaving the residence. That proved to be the vehicle driven by Roman, which stopped as related above. When Roman got out of the car, the police officers "took him down" at gunpoint, and then detained him for investigation. He was handcuffed and put into the back seat of the police car, where Const. Savinkoff interviewed him.
- [37] According to Const. Savinkoff, Roman explained who he was, that he was the victim, not the robber, explained what had occurred, and said that he was out looking for the suspects. He related that he and his sister had been at the farm, when he saw two males approaching up the driveway. They asked him if he was Roman, to which he replied that he was. The males then pulled out handguns. Somebody fired a shot. They asked Roman where the dope was, and he told them that there was no dope. He was then dragged into the residence. Inside, the robbers took two garbage bags of marijuana and then fled the residence.
- [38] Const. Savinkoff asked Roman why he had marijuana at the residence. Roman explained that he had it for medicinal purposes because of an injury to his leg. Roman remained handcuffed in the back of the car while Const. Savinkoff drove him to the farm, where he was released.
- [39] Const. Savinkoff noted that Roman was entirely cooperative throughout this detention. Const. Savinkoff asked him only the general question about what happened, and did not ask for any details other than specifics concerning the description of the robbers, which Roman provided to him. Const. Savinkoff did not ask Roman where he had been taken into the house, for how long he had been there, or what quantity of marijuana had been in the two garbage bags. He did not know whether Roman was referring to large garden refuse bags, or kitchen catchers. He took no written statement from Roman.
- [40] In describing this same encounter, Roman reported that he got out of his vehicle at gunpoint, put his keys on the trunk and then put his hands behind his head. A police officer ordered him to the ground. He explained that it was not he whom they were looking for, as he had just been shot at. He was told to get on his knees. He replied that he could not bend his knees. He was then slammed to the ground, his arms were put behind his back and he was handcuffed. He was then pulled up and thrown into the back of a police car. While he was there, the officer searched Roman's car, then came back and asked him his name, address, and what he had been doing. Roman responded. The police officer then walked off,

leaving the car door open, and then returned to ask for a description of the robbers. Roman gave it to him.

- [41] Roman denied telling the Const. that the robbers had asked him, "Where's the dope?". What they did ask him was, "Where is it?". He also denied reporting that two garbage bags of marijuana had been stolen, although he had seen that the robbers had garbage bags. He said that the police officer asked him if there was a grow op on the property, and he replied that there was not. He was then asked if any marijuana had been stolen, and he said yes, some personal marijuana that he had for medicinal use. The police officer asked skeptically whether he had had two full garbage bags of marijuana for medicinal use. Roman said that he did not. He was again asked if there was a grow op and if his crop had been stolen. He again denied it. The police officer then closed the door and left again for a number of minutes before returning to drive Roman to the farm. Throughout this time he remained handcuffed in the back. He estimates that he spent a total of about 20-25 minutes in that state.
- [42] I accept that Const. Savinkoff got the impression that two garbage bags of marijuana had been stolen. I do not accept, however, that Roman told him that. I conclude that Const. Savinkoff was mistaken and misunderstood what he was told. It appears that the police had in mind that a grow rip had occurred from the start. Sgt. Kingra said that the original call had in part led him to that conclusion, and Mr. Henry testified that the report he heard on the police scanner included a reference to a suspected grow rip with shots fired. Not only did I find Roman's account to be generally credible, but there was also nothing in the evidence that would support the conclusion that Roman kept two garbage bags full of marijuana at the farm. It would be surprising if he would report that to the police. It would be still more surprising that he would describe such a large amount as being maintained for medicinal purposes. Moreover, other family members including his young nieces had free access to the premises, and Brianna (11) was there that day. In these circumstances, I consider it unlikely that he had such a quantity at the house. It is, in my view, far more probable that Roman reported, as he testified, that a bag of marijuana kept for medicinal purposes had been taken, and that in all of the circumstances, this was misunderstood by Const. Savinkoff, who confused it with the report of the burglars fleeing with two garbage bags.
- [43] Const. Savinkoff testified that he then reported to his superior, Sgt. Kingra, who was at the farm, what Roman had told him. At Sgt. Kingra's request, Const. Savinkoff then detailed the junior officer on scene, Const. Kelly, to speak to Salvatore. Subsequently, Sgt. Kingra told Const. Savinkoff that what Salvatore was saying was completely contrary to the statement of Roman, and that Salvatore was trying to obstruct the investigation. He therefore asked Const. Savinkoff to arrest Salvatore for obstructing a police officer. Const. Savinkoff did so and read Salvatore his Charter rights, including his right to speak to a lawyer. He then directed Const. Steeves to detain Salvatore and to drive him to the station where he was to be incarcerated. Const. Steeves handcuffed Salvatore and put him in the back of a police

cruiser. It is possible that Const. Steeves also read him his Charter rights. Const. Savinkoff could not recall whether Salvatore in fact asked for a lawyer.

- [44] Const. Kelly was the junior officer on the scene, and it was he who interviewed Salvatore prior to his arrest. Const. Kelly testified that he was dispatched to attend the area of Fraser Highway and Ross Road because shots had been fired. As he arrived, he noted people on the street in front of the Aloha Trailer Court on Fraser Highway. He related that he was subsequently directed by Const. Savinkoff to interview Salvatore, who he understood was one of the victims. When asked if in fact he had been flagged down by Salvatore when he arrived in the area, Const. Kelly agreed that that was possible. He did not recall whether Salvatore began to describe the events to him right away, but did not deny it.
- [45] In any event, when he interviewed Salvatore, he was told that Salvatore had been standing in the yard with his brother Roman, when they were approached by two males with black garbage bags and at least one handgun. They came quickly down the driveway. One of them told Salvatore to "Get the f--- out of the way!". Salvatore ran to the Fraser Highway. The robbers ran up the yard and through the northwest end of the yard to Ross Road. Salvatore told Const. Kelly that one of them was a Caucasian male dressed in black, with short black curly hair. He did not have a description of the other. He thought he might be able to recognize the gunman he described if he saw him again.
- [46] Salvatore was very excited and jumpy, and Const. Kelly found it difficult to get a coherent statement from him. Const. Kelly asked for a written statement, but realized that Salvatore was in no shape to give him one. Salvatore was very emotional and said that he was having trouble remembering.
- [47] Const. Kelly did not ask Salvatore if he entered the house, or whether he'd been separated from Roman at any time, or whether he'd had any contact with his sister or daughter. The Constable was concentrating on identifying the perpetrators. Salvatore did tell him that he'd heard at least one shot, but did not know if it'd been aimed at him. Although he was very agitated, he did not at any time act in a hostile manner towards the police officer. Salvatore was not asked to re-enact what had happened. He was not taken to demonstrate where he'd seen the robbers leave, because that would potentially contaminate the area for dog tracking.
- [48] After interviewing Salvatore, Const. Kelly reported to Sgt. Kingra, who then ordered Salvatore's arrest.
- [49] Const. Kelly confirmed that he looked through all the windows on the lower level of the house. None was covered, and all curtains were open. He could see inside. There was nothing to suggest a grow op. Indeed there was no evidence anywhere of a current grow op, at least as far as he could tell from the outside.

- [50] A tracker dog was brought to the property by Const. Mike Zinck of the Chilliwack RCMP, part of the integrated dog section. An effort was made to pick up the scent of the robbers, but was unsuccessful.
- [51] Sgt. Kingra testified that he had responded to a shots fired call and was told to look for suspect vehicle that apparently had left the scene. As he drove through the area, he saw nothing until, at the intersection of Fraser Highway and Ross Road, he observed Constables Savinkoff and Morgan dealing with the suspect vehicle. He then went to the driveway of the Manno farmhouse, driving his car right up to the house. His role was supervisory. Basically, he was trying to find out what had actually happened.
- [52] Sgt. Kingra described the scene as charged and chaotic. It is not surprising, given the circumstances, that he and others testifying about these events had some difficulty in being clear about the timing and sequence of things. He learned from Const. Savinkoff, either right then or perhaps later, that he had a subject in custody who was saying that he'd been robbed of dope, that there were two suspects, that shots had been fired, and that the suspects had fled northwest through the yard.
- [53] Sgt. Kingra stated that he had no recollection of being told by Const. Savinkoff that Roman had been dragged into the residence by the two robbers. This information would have been very important to him, and he does not recall knowing it. There was nothing about it in his notes. He only recalls being aware that there had been a robbery, and that shots had been fired. Nevertheless, he said at one point in his testimony that he wanted to get into the house to see inside. When questioned, however, about whether he had ever asked Roman for permission to go in, he stated first that he had not, then said that he did not recall doing so, and lastly decided that he could not say that he had not done so. There was nothing in his notes to indicate that he was refused permission to enter by either Salvatore or Roman. Salvatore and Roman both testified that they were not asked for permission to enter, and therefore had neither granted nor refused it. I accept their evidence in this regard.
- [54] Sgt. Kingra said that he looked for bullet casings on the ground around the driveway outside of the basement entrance of the house, and also looked for any evidence of drugs. He found nothing. He looked around the driveway area and the exterior of the house, searching for evidence of a grow op. He did so because of the way the call had come in, and because of information from Const. Savinkoff about marijuana having been stolen. He found no such evidence. He stated that often there are bits of plant material around when plants have been stolen, and there was none here. There was no evidence of the usual signs of a grow op. There were no fans, there was no smell, no condensation on the windows, and no windows were covered. This was not like a typical grow op house. If he had found signs that suggested the existence of a grow op, he would have contained the house and obtained a warrant.
- [55] Sgt. Kingra also testified that in endeavouring to find out what happened, whether anyone had been hurt, whether there had in fact been a robbery, and whether marijuana had been stolen, he felt that he was not getting much cooperation. Sgt. Kingra spoke to Roman himself

after Roman was driven back to the property and was released, and then learned from Const. Kelly what Salvatore had to say. He considered the stories to be very different, and felt that Roman's story was likely true: that shots had been fired, that there had been a robbery, and some dope had been stolen. He felt that Salvatore was obstructing them, and therefore ordered him to be detained.

- [56] Sgt. Kingra acknowledged that this very much upset Roman and the two sisters, Dina and Germana, who were present. Shortly after Salvatore was taken away, Germana handed Sgt. Kingra a cell phone and asked him to speak to the lawyer whom she had reached. The lawyer asked him some questions, and he explained to the lawyer what he was trying to accomplish. The lawyer was very pleasant and was not trying to be difficult. He explained that the family was very excitable, and that the police officer was unlikely to get much cooperation at this point. The lawyer said nothing about warrants being required or about the police leaving the property. Sgt. Kingra explained that he had no grounds to do anything further. After speaking to the lawyer, Sgt. Kingra decided that he could not continue the investigation, on the basis that he was not going to get any cooperation. He ordered Salvatore to be returned to the property and released, and then proceeded to clear all units from the scene. By this time, the dog tracking, which Sgt. Kingra could not remember, had come up empty. The police were on the scene for a total of approximately 1½ hours.
- [57] Sgt. Kingra testified that he felt very frustrated in trying to investigate the robbery. It was his perception that the two brothers' stories did not match, and that he was being obstructed. He had to deal with the two sisters, Dina and Germana. One (evidently Germana) was more volatile than the other. They were confrontational. They were also upset by the presence of the press at the bottom of the driveway, where at least three reporters had gathered and were snapping pictures. One of the sisters told him that he should leave unless he had a warrant. He advised her that he did not need a warrant because he was investigating a crime scene.
- [58] Const. Kelly also testified that the sisters were extremely confrontational and that they asked the police to get off the property if they did not have a warrant. They both told their brothers not to speak to the police.
- [59] Const. Savinkoff testified that Germana was quite outspoken, and was upset and angry when Salvatore was arrested and taken away to be incarcerated. At one point, he said, she told them that she had a lawyer on the phone who wanted the police to leave unless they had a warrant. As noted above, the lawyer did not say any such thing to Sgt. Kingra when they spoke.

C. Attendance of Ken Henry

- [60] After graduating from grade school in Langley, Mr. Henry studied journalism for two years at Langara College, graduating in 2002. He then worked at the Langley Times as an intern and as a reporter until June of 2003 when he got a full-time job at the Abbotsford/Mission Times.
- [61] Mr. Henry was in the newspaper office in downtown Abbotsford listening to the police scanner. He heard a report of suspected grow rip with shots fired, and two men running away with garbage bags. He grabbed the office camera and headed out to the scene. He parked his car at Fraser Highway and Ross Road. He saw a photographer for the Abbotsford News, and a freelance cameraman who was being hit on the shoulder with a purse or a handbag by a woman, later identified as Germana. He does not recall any other members of the media being present. He was about 200 m away from the driveway at that time.
- [62] Mr. Henry then approached the farm driveway. The other members of the media were on the city side of the ditch that separates the farm property from Fraser Highway. Mr. Henry stated, and I accept, that he never crossed the ditch to go on to the farm property.
- [63] Mr. Henry reported a general sense of hostility against the media. One woman fingered them, and he took a photograph (it was Germana). The other swore at them. Police officers were on the scene. He saw Roman Manno in handcuffs, but he was later released. He began taking photographs with a Nikon D1H digital camera to which was attached a 300 mm telephoto lens. Among the many photographs he took was the one published with the article, which he took at approximately 3:42 p.m. He could not hear any of the conversation taking place among the persons in the photograph because he was using his telephoto lens at its maximum magnification, and was some distance away.
- [64] Mr. Henry took a large number of photographs before leaving the property at about the time the police left, around 4:00 p.m. He is not sure whether the police were there when he first arrived, but testified that police officers were on site throughout most of the time that he was there.
- [65] Before writing the article, or in the course of doing so, Mr. Henry spoke to Deputy Chief Rick Lucy of the Abbotsford Police Force, and to Const. Shinder Kirk, the Abbotsford Police Force media/community liaison. On the theme of increasing violence, Mr. Henry quoted Deputy Chief Lucy as having told him that, "It's one of the very large concerns we have about the grow industry. The problems are of a paramount concern, and there is a high danger to the general public when those are going on." The information Mr. Henry obtained from Const. Kirk was noted as follows:

I can't tell. Certainly if you are going to engage in growing marijuana chances of being ripped off or meeting some kind of violence increases greatly.

Absolutely anything to do with drugs or the drug trade can lead to violence much more so to someone who is not engaged.

Alleged grow rip somebody reported shots fired. Reportedly males running around with full garbage bags. Two males. Then basically get to the house and property owners won't let us investigate further. They would be the alleged victims. The house is known to us, let's put it that way. Yeah, so we didn't get very much cooperation from anybody at the house and we left.

Suspects not found yet. Nobody shot - whether it was actual shots or something else I don't think has been conclusively confirmed, it's hard when you get to a victim's house and they're entirely uncooperative with you. [Spelling corrected]

[66] Neither Deputy Chief Lucy nor Const. Kirk happened to mention to Mr. Henry that the police had concluded that the farm was not being used as a grow op, and Mr. Henry made no attempt to interview any of the Mannos.

D. Attendance of Dina and Germana

[67] Dina had arrived at the farm in a somewhat panicked state, having been told by her sister Marina on the phone that Roman had been shot. She drove into the driveway. Her sister Mandy was already there, and she saw her brother Salvatore across the street. He was talking to a police officer. Roman was nowhere to be seen.

[68] Dina then saw her sister Germana, who was berating a cameraman whom she was hitting with her purse. Shortly thereafter, another police car drove up and decanted Roman, who was then released from his handcuffs. She was very relieved to see that he was okay. Subsequently, Salvatore was handcuffed and detained, which was very upsetting to both sisters. It was Germana who contacted the family's lawyer by cell phone, she believes at Salvatore's request, and subsequently handed the phone to Sgt. Kingra.

[69] Both sisters confirmed Sgt. Kingra's impression of chaos. They arrived in a state of near panic, fearing for the safety of their brother. They were then confronted by the presence of the media, gathered at the foot of the driveway. This interfered with Dina's ability to move her car, and with Germana's ability to get into the driveway. Both were exposed to being photographed repeatedly at close range. Germana reported that she found it necessary to hit one photographer on the shoulder with her purse so that she could get him out of her way in order to find out whether her brother had been hurt. Dina saw Roman being released from arrest, while both witnessed Salvatore being arrested.

[70] Neither sister, of course, had anything to contribute to the police investigation as neither had been present during the incident.

[71] Germana and Dina both denied asking the police to leave. They testified that they did ask the police to get rid of the media, or at least move them along. Germana thought it was very strange that the police were hanging around the property instead of chasing after the gunmen, and had arrested Salvatore instead of going after the culprits. According to

Salvatore, he did speak to the police about leaving after he had been brought back to the property and released, saying words to the effect of, "If there is nothing further you need here, please leave the property."

V DISCUSSION: LIABILITY

A. Defamatory Meaning

[72] The test for defamatory meaning is an objective one. Neither the intention of the author or publisher, nor the subjective impression of the plaintiff is relevant. The following passage from the speech of Lord Reid in the leading English decision of *Lewis v. Daily Telegraph*, [1964] A.C. 243; [1963] 2 All E.R.151 at 154-155, is instructive:

What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them and that is also regarded as part of their natural and ordinary meaning.

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In this case it is, I think, sufficient to put the test this way. Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naïve. One must try to envisage people between these two extremes and see what is the most damaging meaning that they would put on the words in question .

What the ordinary man not avid for scandal, would read into the words complained of must be a matter of impression.

[73] In the speech of Lord Devlin at 172-173, we find the following:

The real point, I think, that [plaintiff's counsel] makes is that whether the libel is looked at as a statement or as a rumour, there is no difference between saying that a man is suspected of fraud and saying that he is guilty of it. It is undoubtedly defamatory, he submits, to say of a man that he is suspected of fraud, but it is defamatory only because it suggests that he is guilty of fraud: so there is no distinction between the two. This is to me an attractive way of putting the point. On analysis I think that the reason for its attraction is that as a maxim for practical application, though not as a proposition of law, it is about three-quarters true. When imputation is made in a general way, the ordinary man is not likely to distinguish between hints and allegations, suspicion and guilt. It is the broad effect that counts and it is no use submitting to a judge that he ought to dissect the statement before he submits it to the jury. But if on the other hand the distinction clearly emerges from the words used it cannot be ignored. If it is said of a man - "I do not believe that he is guilty of fraud but I cannot deny that he has given grounds for suspicion," it seems to me to be wrong to say that in no circumstances can they be justified except by the speaker proving the truth of that which is expressly said he did not believe. It must depend on

whether the impression conveyed by the speaker is one of frankness or one of insinuation.

It is not, therefore, correct to say as a matter of law that a statement of suspicion imputes guilt. It can be said as a matter of practice that it very often does so, because although suspicion of guilt is something different from proof of guilt, it is the broad impression conveyed by the libel that has to be considered and not the meaning of each word under analysis. A man who wants to talk at large about smoke may have to take his words very carefully if he wants to exclude the suggestion that there is also a fire; but it can be done. One always gets back to the fundamental question: what is the meaning that the words convey to the ordinary man; a rule cannot be made about that. They can convey a meaning of suspicion short of guilt; but loose talk about suspicion can very easily convey the impression that it is a suspicion that is well-founded.

See also: *Grassi v. WCI Radio Ltd.* (2000), 49 C.C.L.T. (2d) 65, [2000] 5 W.W.R. 119 at paras. 25-28, rev'd on other grounds 2001 BCCA 376, 89 B.C.L.R. (3d) 198.

[74] Counsel for the defendants submitted that the actual reference to the Manno family in the article was in fact entirely accurate, reading as follows:

Last week police responded to a possible shots fired call at home at 29655 Fraser Highway and heard reports of two suspects running away with full garbage bags. The victims of the incident did not cooperate with police.

[75] Accordingly, he submits, one must look at carefully at the false innuendo meanings, or inferences, alleged by the plaintiff as quoted above in para. 11. He suggests that the evidence does not establish that these innuendo meanings are of and concerning the particular plaintiffs. I prefer to consider first the question of defamatory meaning, and then consider the extent to which that meaning, if established, can be said to have been made of and concerning any particular plaintiff.

[76] In this regard, I note that the ordinary reader would not dissect the article paragraph by paragraph, but would form his or her impression from the article as a whole.

[77] Bearing in mind the principles quoted above, I have no hesitation in concluding that the article, taken as a whole including the headline, the photograph and its caption, would convey to the ordinary reader the impression that the residents of the house located at 29655 Fraser Highway, some of whom were depicted in the photograph, had been carrying on a marijuana growing operation, were suspected of having been the victims of a violent grow rip, and had failed to cooperate with the police as a means of covering up their illegal activities.

[78] The story is about a proliferation in grow ops attracting increasing violence, as the headline and opening paragraph suggest. After describing an increase in the number of "pot rip-offs", the article then states that "that's been the suspected case twice in the past two weeks in Abbotsford." The article then describes the two incidents. The first was a break-in where officers at the scene discovered a marijuana growing operation and "believe that's the reason the suspects targeted the house". The second was the robbery in question, where the victims

"did not co-operate with police", inferentially explaining why the police were not reported as having found a marijuana growing operation there as well. Nevertheless, as the caption under the photograph made clear: there, too, the police believed that a grow op was the reason the suspects had targeted the house.

- [79] The reference to what occurred on the farm, in the context of being one of two recent cases, put together with the caption under the photograph quoting police reports that "the residents of [29655 Fraser Highway] were victims of a grow rip", gives rise in my view to the clear inference that those residents had been operating a marijuana grow op, and were suspected by the police to have been the victims of a violent grow rip that involved shots being fired, but their failure to cooperate with police prevented the nature of the rip-off from being fully confirmed. In short, they were getting away with running a grow op. These are the stings of the article. That they are defamatory cannot be in doubt. Allegations of criminal activity are extremely serious, and damaging to anyone's reputation. As A.F. Wilson J. of this Court stated in *Clark v. East Sooke Rural Assn.*, 2004 BCSC 1120, 133 A.C.W.S. (3d) 646 at para. 132, an imputation of criminal conduct "ranks high on the continuum of 'seriousness' of the defamation."

B. Justification

- [80] The defendants have not pleaded justification of the alleged imputation to the residents of the farm of running a marijuana grow operation. The defendants seem to suggest that such imputation was not of or concerning any of the plaintiffs with the possible exception of Roman, who in fact did have marijuana on the property.
- [81] The defendants have, however, pleaded justification in relation to the statement in the article that "the victims of the incident did not co-operate with police".
- [82] Having considered all of the evidence, I accept the evidence of the police officers that the sisters Dina and Germana were confrontational, and that at least one of them did ask the police to leave, likely at some point after Sgt. Kingra had been given the telephone to talk to their lawyer. I also accept that Salvatore asked them to leave in the manner he described. At no time was he described as exhibiting hostility.
- [83] In the witness box, both sisters seemed to me to be trying to relate their evidence honestly, but both were excitable and somewhat confrontational under cross-examination. Given their concern over the safety of their brother Roman, their distress over the presence of the media, their shock at the arrest of their brother Salvatore, and their puzzlement at what they perceived as inaction on the part of the police in pursuing the robbers, confrontational behaviour on their part, while not to be condoned, would come as no surprise.

- [84] Notwithstanding this finding, there was no evidence before me of any actual failure on the part of any plaintiff, and in particular the two victims of the robbery, Roman and Salvatore, to provide the police with any information requested of them. The officers who interviewed Roman and Salvatore were quite clear that both were cooperative in their interviews.
- [85] Sgt. Kingra stated repeatedly that he was getting no co-operation and was frustrated in carrying out his investigation, but he was unable to give any specific instance of a question he asked that someone refused to answer, or of permission sought that was denied, or of an area of investigation that he was prevented from pursuing. His frustration seemed to be based largely on his perception that the stories related by the two victims, Roman and Salvatore, as reported to him by Constables Savinkoff and Kelly respectively, were inconsistent. To some degree, of course, inconsistency would be expected since Salvatore fled the scene in the driveway after seeing the robbers, and had no idea what happened to Roman thereafter.
- [86] Nevertheless, in my view, Sgt. Kingra's problem was not one of inconsistency, but rather of incompleteness in his understanding of what these witnesses had to say. For instance, although it was very important to him to inspect the crime scene, he never realized that the crime had in fact largely taken place not outside, but inside the house as related by Roman to Const. Savinkoff. Sgt. Kingra therefore never requested entry. In the meantime, he freely inspected the outside area, as did Const. Kelly, and the tracker dog had been taken around the property.
- [87] As far as the information obtained from Salvatore by Const. Kelly was concerned, it seemed to me to be simply a garbled version of the evidence Salvatore gave in court as outlined above, which is consistent with Const. Kelly's report of Salvatore being highly agitated and scarcely coherent. I note moreover that Salvatore, who was nearly 15 when his family moved from Italy to Canada, speaks with an Italian accent, and that English is clearly not his first language. Having observed him in the witness box, I can appreciate how he might easily have been misunderstood, particularly in an agitated state.
- [88] In these circumstances, given the clarity of Const. Kelly's evidence concerning Salvatore's excited emotional state at the time he was interviewed, Sgt. Kingra's decision to arrest him on a charge of obstructing a police officer, without first making any attempt to clarify his evidence, seems somewhat surprising.
- [89] Taking all of this into account, I am very doubtful that it could fairly be said, in any sense of the phrase, that the victims, both of whom had been arrested, did not cooperate with the police. But even if I am wrong in that, it is clear to me that the sting of the phrase, when taken in context, was that the victims/residents did not cooperate with the police in order to cover up their criminal activity. That suggestion was in no way supported by the evidence. There was no criminal activity to cover up. Although I have found that Roman had in fact been in possession of marijuana, that was disclosed to the police forthrightly, and was not covered up in any way.

[90] The defence of justification accordingly fails.

C. Identification

[91] It is all very well to conclude that the article defamed the unnamed "residents" of 29655 Fraser Highway. In order for any plaintiff to succeed, that plaintiff must establish on a balance of probabilities that, in the circumstances, the words would be reasonably understood to be defamatory of that plaintiff. As is stated by Professor Brown in *The Law of Defamation in Canada* (2nd Ed., 1999) at pp. 6-7 to 6-10:

It is essential to the cause of action that the words be defamatory of the plaintiff. It is not necessary that the plaintiff be named specifically, or identified by his or her proper name, or even mentioned at all, if it is otherwise shown that the words would be reasonably understood to refer to the plaintiff. Nor is it necessary for the person to whom the publication is made to know the plaintiff by name.

Direct evidence that the plaintiff is pointed to is not essential. He or she may be indicated "by designation or description", or pointed to by the circumstances. It may be clear from other evidence that he was the one alluded to, but he must satisfy the court in that regard. This may be done by introducing evidence, apart from the publication, connecting the plaintiff with the defamatory publication. The extrinsic facts do not have to coincide exactly with the facts detailed in the publication so long as they enable a reasonable person to identify the plaintiff.

The court approaches the issue objectively. The question in such case is whether or not the words used are such as to lead an ordinary sensible person, or reasonable persons, who pay reasonable attention to the contents of the communication, to understand that it was the plaintiff to whom the defendant referred. The test is objective.

The test of whether words that do not specifically name the plaintiff refer to him or not is this: are they such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to? That does not assume that those persons who read the words know all the circumstances or all the relevant facts. But although the plaintiff is not named in words, he may, nevertheless, be described so as to be recognized; and whether that description takes the form of a word-picture of an individual or the form of a reference to a class of persons of which he is or is believed to be a member, or any other form, if in the circumstances the description is such that a person hearing or reading the alleged libel would reasonably believe that the plaintiff was referred to, that is a sufficient reference to him. [Per Isaacs J. in *David Syme & Co. v. Canavan* (1918), 25 C.L.R. 234 at 238 (Aust. H.C.). Quoted favourably by Lieberman, J. in *Fraser v. Sykes*, [1971] 1 W.W.R. 246 at 258, affirmed (1971), 19 D.L.R. (3d) 75 (Alta. C.A.), which was affirmed, sub nom. *Sykes v. Fraser*, [1974] S.C.R. 527.]

[92] In the seminal case of *Knuppfer v. London Express Newspaper, Ltd.*, [1944] A.C. 116 at 119-121, Viscount Simon L.C. addressed the issue in this way:

Where the plaintiff is not named, the test which decides whether the words used referred to him is the question whether the words are such as would reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to. There are cases in which the language used in reference to a limited class may be reasonably understood to refer to every member of the class, in which case every member may have a cause of action. A good example is *Browne v. D.C. Thomson & Co.*, 1912 S.C. 359, where a newspaper article stated in Queenstown "instructions were issued by the Roman Catholic religious authorities that all Protestant shop assistants were to be discharged," and where seven pursuers who have averred that they were the sole persons who exercised religious authority in the name and on behalf of the Roman Catholic Church in Queenstown were held entitled to sue for libel as being individually defamed.

There are two questions involved in the attempt to identify the appellant as the person defamed. The first question is a question of law - can the article, having regard to its language, be regarded as capable of referring to the appellant? The second question is a question of fact - Does the article in fact lead reasonable people, who know the appellant, to the conclusion that it does refer to him? Unless the first question can be answered in favour of the appellant, the second question does not arise, and where the trial judge went wrong was in treating evidence to support the identification in fact as governing the matter, when the first question is necessarily, as a matter of law, to be answered in the negative.

See also *Booth v. British Columbia Television Broadcasting System Ltd.* (1980), 139 D.L.R. (3d) 88, 16 A.C.W.S. (2d) 183; and *A.U.P.E v. Edmonton Sun* (1986), 75 A.R. 253, 49 Alta. L.R. (2d) 141.

[93] It would be helpful here to review some of the evidence concerning the Manno family's connection with the farm at 29655 Fraser Highway.

[94] As noted, the family acquired the farm in 1988. Salvatore, who was employed, took an ownership position in order to help obtain the financing for the purchase. Mrs. Manno lived there from 1988 through the summer of 2004 when renovations required her to move, accompanied by her youngest daughter, Imma. Salvatore has two children and spent various years living on a farm between jobs and relationships. His daughter Brianna spent much of the time living on the farm with her grandmother.

[95] Germana, born 1971, who has two children, lived on the farm for only one year. Dina, born 1975, who has three children (one of whom was born after these events), lived there from the age of 13 to the age of 17. Roman, born in 1980, lived there from the age of 8 until age 20 or 21. Marina, born 1982, lived at the farm until she graduated from high school in 2001 when she moved Kelowna. She returned to the farm from mid-2002 until early 2004 when she moved to Montréal to study. She returned to Abbotsford in October of 2004, staying with her mother at her mother's temporary residence on Château Place in Abbotsford. When Mrs. Manno moved back to the farm, Marina remained at Château Place where she was joined by her boyfriend whom she met in Montréal, until 2006 when they returned to Montréal.

- [96] Both Roman and Salvatore kept livestock at the farm, and attended there regularly when they were not in residence. Roman made sure that there were pet farm animals for each of the grandchildren, and looked after them daily. The birthdays of the grandchildren were regularly celebrated at the farm, and the family gathered there for holiday occasions, and frequently for family dinners. Celebratory parties were held at the farm such as grad parties and summer bonfires. In addition, the farm bordered on Ross Road Community Church, which the family regularly attended, frequently as a group, over many years. The church had a congregation of approximately 400.
- [97] There is no doubt on the evidence that the family was a tight-knit one, and was reasonably well-known in the Abbotsford/Mission community. There were not many Italian families with 10 children in the area.
- [98] With this background, I turn to consider the issue of identification.
- [99] The question of identification seems to me to be beyond doubt with respect to the three plaintiffs, Roman, Dina and Germana, who were depicted in the photographs as "residents" of the house where "the residents" were stated to have been victims of a grow rip. The clear inference of the caption in the context of the article as a whole is that the residents of the house were victims of a grow rip (and therefore had been involved in a marijuana growing operation), some of which residents were pictured talking to (but not cooperating with) the police. The photograph is sufficient identification within the principles discussed above. Any reader, whether or not acquainted with those three plaintiffs, could come to no other reasonable conclusion than that they were among the persons referred to in the article as being the "residents" of the house.
- [100] Counsel for the defendant argued that at the time of the incident, and at the time of the publication of the article, there were in fact no residents of the house due to ongoing renovations, and that no one had in fact lived there since the summer of 2004. He suggested that anyone acquainted with those plaintiffs would be aware of that, and would also know that neither Dina nor Germana had lived there for many years. I do not consider that to be an answer. Whatever the accuracy of the word used to describe them, in this case "residents", that description and photograph had the effect of clearly identifying them as among the persons who were involved in a marijuana grow operation, and who had been the victims of a grow rip. One need not be actually in residence to be so involved.
- [101] The key, in my view, is not whether these or any of the plaintiffs were known to be residing on the property at the time in question, but whether the use of the term "residents", in the context of the article as a whole, was sufficient to identify them with the libel. I conclude that it was.
- [102] I turn now to consider the position of the three plaintiffs who were not depicted in the photograph. It will be recalled that the caption to the photograph read as follows:

Police talk to residents of a house at 29655 Fraser Highway last week. Reports over the police scanner were that the residents of the home were victims of a grow rip. [Emphasis added.]

- [103] In my view, it is clear from this caption that the three plaintiffs there depicted were not the only members of the group of "the residents of the home" who were said to have been victims of a grow rip. The question becomes whether reasonable readers would have identified any of the other three plaintiffs as belonging to that group.
- [104] In support of his contention that they, too, were sufficiently identified, counsel for the plaintiffs noted the relationship of the plaintiffs to each other, to the property, and to the community, and also the nature of the sting of the libel: involvement in a marijuana grow operation. This kind of misconduct, he submitted, is of a type that of necessity would be visible and known to anyone connected to the property, including the owners, those ordinarily resident there, and those known regularly to visit it. I agree.
- [105] On the evidence, I am satisfied that persons acquainted with Salvatore and the matriarch, Mrs. Manno, could reasonably be expected to be aware that they were owners of the property in question, that they were closely connected to it, that it was the centre of Mrs. Manno's family life, and that Salvatore had been engaged in working on renovations on the farm for some time. Municipal permits had been issued in his name, inspectors met with him on the property, and materials were delivered to the address on Fraser Highway to his attention. In my view, such persons would identify these two plaintiffs as being included among the "residents" of the house where a marijuana grow operation was located, and who were the victims of a grow rip.
- [106] Counsel for the defendants submitted that publication of the farm's address was not sufficient identification. He noted that several of the witnesses were unable to give the addresses of neighbouring properties, and submitted that very few people know addresses other than their own. That may well be so. But it is one thing to be unaware of a neighbour's address. It is another thing to be told of an address in the neighbourhood where illegal activities are said to have occurred. Locating it is not then so difficult. When one puts together the address and the photographic connection of Roman, Dina and Germana to that address as being among the residents there who were involved in a marijuana grow operation, it is no stretch at all to extend that group to the two registered owners of the property, Mrs. Manno and Salvatore, whose close connection to it was well known.
- [107] After much reflection, however, I conclude that it is too great a stretch to extend that identifying connection to the plaintiff Marina Manno. Although Marina was on the property at the time of the incident, she played no part in the police investigation, and had in fact been resident in Montréal where she was a student until a few days before this incident. Although she testified that people who knew her were aware that she had lived on the farm, they also were aware that she had more recently been living in Montréal.

- [108] As counsel for the defendants pointed out, it is not sufficient simply to be known as being a member of the same family as the victims of defamatory comments, however embarrassing that may be. There must be something to link that family member directly to the defamation. In this case, I have concluded that connection to the property through the use in the article of the address and the term "residents", together with the depiction of three Mannos as being among the residents, is crucial to the issue of identification. In my view, the facts do not support the contention that persons acquainted with Marina would believe that the phrase "the residents" of 26955 Fraser Highway would refer to her, as opposed to members of her family.
- [109] In all of the circumstances, having regard to all of the evidence, and to the whole of the article including the photograph and its caption, I conclude that the article defamed the plaintiffs Dina Manno, Roman Manno, Germana L'Heureux, Salvatore Manno and Mrs. Manno. I do not find the article to have been defamatory of the plaintiff Marina Manno.

D. The Internet Article

- [110] As noted, the article was republished on the newspaper's Internet site where it remained available until early May of 2005. It was identical in form, except that it lacked the photograph and its caption.
- [111] Plaintiffs' counsel submits that neighbours and others who knew the Mannos could refer back to the printed article after seeing the article on the Internet, while others who had seen the original printed article would be further reminded of its defamatory content by this republication, which remained on the defendant newspaper's site even after this lawsuit was commenced on April 13, 2005.
- [112] No evidence was available concerning the number of hits on this Internet publication.
- [113] To underline the seriousness of Internet libel, plaintiffs' counsel referred me to the case of *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416; 239 D.L.R. (4th) 577 (C.A.), where the court awarded general damages of \$75,000 and punitive damages of \$50,000. That, however, was a case where the defendant had embarked upon "a systematic, extensive and vicious campaign of libel over an extraordinarily lengthy period". The campaign was conducted over the Internet and involved the postings of hundreds of false and defamatory statements concerning Barrick on various websites. That is a far cry from the case before me.
- [114] The absence in the Internet article of the photograph and caption that was published in the print version of the newspaper materially changes the issue of identification. We are left, for the purposes of identification, with the reference to the address of the home where the grow op was said to be located, and the reference to the "victims of the incident" who did not co-operate with police. There was no caption referring to the "residents".

- [115] The defamatory meaning remains much the same: that persons at the house located at 29655 Fraser Hwy had been carrying on a marijuana growing operation, were suspected of having been the victims of a "pot rip-off", and had failed to cooperate with the police as a means of covering up this illegal activity. But no Manno was either named or pictured.
- [116] Considering the Internet article standing alone, and applying the same test I enunciated above in relation to the article in the newspaper, I conclude that only the plaintiffs Salvatore, Roman and Mrs. Manno had the necessary connection to the property so as to lead to persons acquainted with them reasonably to conclude from the Internet article that they were the "victims" referred to. In the absence of the photographic link, the plaintiffs Dina and Germana lacked that connection.
- [117] It is likely, however, that some of the persons who viewed the Internet article had also read the newspaper article. They would already have in mind the identification of Dina and Germana as well as the other three.
- [118] Accordingly, while I find that while the Internet republication taken by itself was defamatory only of the defendants Salvatore, Roman and Mrs. Manno, it is probable that it also exacerbated, to a minor degree, the defamation by the newspaper article of all five.

E. Conclusion on Liability

- [119] The article and photograph published in the Abbotsford/Mission Times on October 29, 2004, authored by the defendant Ken Henry, defamed the plaintiffs Dina, Roman, Germana, Salvatore and Mrs. Manno. The sting of the libel was twofold: first, that those plaintiffs were involved to some degree or other in a marijuana grow operation located at 29655 Fraser Highway, and were suspected to have been the victims of a violent grow rip there. Second, that as a means of covering up their illegal activity, they refused to cooperate with the police who attended in response to the grow rip.
- [120] With respect to the second sting, the defence of justification fails.
- [121] The republication of the article on the newspaper's website on the Internet defamed the plaintiffs Roman, Salvatore and Mrs. Manno, and, to a minor degree, exacerbated the defamation created by the newspaper article with respect to Roman, Salvatore, Mrs. Manno, Dina and Germana. The sting of libel was again twofold, and essentially the same. The defence of justification again fails with respect to the second libel.
- [122] Neither the original print article nor its republication on the Internet defamed the plaintiff Marina Manno.

VI. DISCUSSION: DAMAGES

A. General Principles

[123] It is appropriate here to set out some of the general principles applicable to the assessment of damages in a libel case.

[124] First, it is to be remembered that only general damages are claimed. No actual economic losses are alleged. It is not disputed that in a case of libel, unlike negligence, damages need not be proven in order to perfect the cause of action. General damage is presumed: see, for instance, *Ratcliffe v. Evans*, [1892] 2 Q.B. 524 (C.A.). As the Supreme Court of Canada stated in the leading case of *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129 at para. 164, "It has long been held that general damages in defamation cases are presumed from the very publication of a false statement and are awarded at large."

[125] The concept of damages being awarded "at large" was explained by Lord Hailsham, LC in *Cassell & Co Ltd v. Broome*, [1972] 1 All E.R. 801 at 824 (HL):

In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of *restitutio in integrum* has necessarily an even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge. As Windeyer J well said in *Uren v. John Fairfax & Sons Pty Ltd* (1967), 117 CLR 118 at 150:

It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is, simply because he was publicly defamed. For this reason, compensation by damages operates in two ways - as a vindication of the plaintiff to the public, and as a consolation to him for a wrong done. Compensation is here a *solatium* rather than a monetary recompense for harm measurable in money.

That is why it is not necessarily fair to compare awards of damages in this field with damages for personal injuries. Quite obviously, the award must include factors for injury to the feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology, or the reaffirmation of the truth of the matter complained of, or the malice of the defendant. The bad conduct of the plaintiff himself may also enter into the matter, where he has provoked the libel, or where perhaps he has libelled the defendant in reply. What is awarded is thus a figure which cannot be arrived at by any purely objective computation. This is what is meant when the damages in defamation are described as being 'at large'.

[126] In the *Hill* case, *supra* at para. 182, the Supreme Court of Canada adopted the factors set out in *Gatley on Libel and Slander* (8th ed.) at pages 592-93 as those which should be taken into account in assessing general damages, as follows:

In an action of libel "the assessment of damages does not depend on any legal rule." The amount of damages is "peculiarly the province of the jury" [or in this case, the trier of fact], who in assessing them will naturally be governed by all the circumstances of the particular case.

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 it has caused." They should also take into account the evidence led in aggravation or mitigation of the damages.

[127] The court noted that there may be some overlap in these factors, as some aspects of the conduct of the defendant to be considered in assessing general damages may also be relevant to the issues of aggravation or mitigation of the damages.

[128] I have already discussed the nature of the libel. I now turn to review other factors relevant to my assessment of damages.

B. The Plaintiffs' General Reputation and Conduct

[129] An issue has arisen concerning the relevance of evidence touching on the plaintiffs' reputations. Relying on the oral reasons for judgment of Bouck J. of this court (as he then was) in *Neeld v. Western Broadcasting Co.* (1976), 65 D.L.R. (3d) 574 (B.C.S.C.), counsel for the defendants submitted that the court must consider the reputation of the plaintiff both before and after the defamation. He noted that the plaintiffs did not call any independent evidence to show their good reputation in the community, and relied on the following passage from the *Neeld* judgment, *supra* at para. 15:

As I understand the law the measure of damages must bear some relationship to the actual standing and reputation of the plaintiffs in the community prior to the libel. The higher the reputation the greater the damages. Of course the precise nature of the libel is also relevant. A person with a poor reputation is not defamed if the truth is told of him. The more a libel gets away from the truth the greater is the effect on the award of damages. The closer the libel is to the truth the less the damages must be.

Bouck J. cited no authorities in his brief reasons.

[130] Counsel for the plaintiffs took exception to this submission. He submitted that the law presumes that the plaintiff has a good reputation, and that evidence of general good character is neither relevant nor necessary, even if the defendant has entered a plea of justification. Accordingly, the plaintiff cannot introduce evidence on his or her good

reputation in the community prior to the defendant's evidence. This is supported by Brown, *The Law of Defamation in Canada*, supra at p. 22-10, and cases such as *Wiley v. Toronto Star Newspapers Ltd.*, (1988), 65 O.R. (2d) 31, 51 D.L.R. (4th) 439 (H.Ct.) where it is noted at para. 35 that "the law assumes Mr. Wiley has an unblemished reputation and character".

- [131] I do not think that the authorities are necessarily inconsistent. I accept that the plaintiffs are presumed to be of general good character and that evidence of such need not (and should not) be led in chief. It nevertheless remains open to the defendants to introduce evidence of the reputation of the plaintiff(s) at the time of publication, as was evidently done in the Neeld case, supra, without rebuttal. According to Brown, loc. cit. supra, such evidence is to be limited to the plaintiff's general reputation in the community. It may not include evidence of particular acts of misconduct or of rumours and suspicions of like effect.
- [132] Before me, counsel for the defendants reviewed the conduct of the plaintiffs in relation to the assessment of damages for two purposes: to suggest that Roman's reputation was less than stellar before the libel, and to support his contention that the difference between the impact of the libellous allegations and the impact of a report of the true circumstances of the incident would have been negligible.
- [133] In so doing, counsel for the defendants contrasted police evidence as to what Roman had reported, to Roman's evidence. The police were told that two gunmen had come up to Roman in broad daylight asking, "Are you Roman?", indicating that he was the target of the robbery. It was suggested by counsel that Roman denied this at trial, but in fact when it was put to him in cross-examination, his answer was that he believed that to be correct. It was noted that the police were told that the gunmen asked "Where is your dope" (or as Roman testified, "Where is it?" - I see no material difference between the two), indicating that the robbers had come to steal marijuana. Defence counsel's submission on this evidence was that "Roman's reputation or something he had said or done had led the gunmen to conclude that Roman had a worthwhile quantity of marijuana on the premises."
- [134] I am unable to accept the suggestion that I should make conclusions about Roman's general reputation on the basis of speculation about what the robbers might have believed or how they might have come to that belief. I note in this regard that Roman was not even living on the premises at the time in question.
- [135] Defence counsel also suggested that Roman found himself in a tight spot because if the robbers were apprehended, their bags of marijuana would be evidence against him, and submitted that it was obvious that Roman did not want the gunmen to be apprehended. He went on to suggest that the reason the sisters did not cooperate with the police and told Roman to be quiet, was that they thought they had something to hide. It was also suggested that the lawyer, briefed by Germana, told the officers to leave, but the evidence was to the contrary.

- [136] I reject those submissions. There is no evidence that Roman did not want the gunmen to be apprehended, and that proposition was never put to him in cross-examination. On the contrary, the evidence was that Roman cooperated with Const. Savinkoff in describing what had happened, and in describing the gunmen. He was never asked to do anything more such as look at mugshots. Both he and Salvatore told the police where the robbers had been seen leaving the property. The correctness of their information, according to the police, was subsequently confirmed by a neighbour. Roman testified that while he was under arrest, he pleaded with Const. Savinkoff to go after the robbers, maintaining that he was innocent. That was not denied.
- [137] As to the reason for the sisters asking the police to leave and telling their brothers not to say anything, the fact that their brothers had both been arrested, notwithstanding that they were victims rather than perpetrators, commends itself.
- [138] Accordingly, I reject the contention of counsel for the defendants that the impact of a report of the "true circumstances" would not have differed materially from the impact of the libel as reported.
- [139] Moreover, no meaningful evidence was led before me that would support the contention that the general reputation at the time of publication of any of the plaintiffs was anything less than the good reputation that the law presumes.
- [140] Mr. Gibson also submitted that the measure of damages must bear some relationship to the actual standing and reputation of the plaintiffs in the community. Thus their standing in the community or station in life may be taken into consideration, particularly where a plaintiff holds some public office or professional position. As these plaintiffs were not public figures or persons whose integrity was crucial to their livelihood (such as the plaintiff in the Hill case), then their loss must be less. He relied upon Brown, *supra* at 25-132 to 25-134, and cases such as *Blunden v. Stirling*, [1979] B.C.J. No. 1326 (S.C.).
- [141] In response, Mr. McConchie referred to this as the "little people theory of damages", and relied upon the changes that have occurred in damage awards since the Supreme Court of Canada's decision in *Hill*, *supra*. He submitted that libel is not the private club of elite individuals.
- [142] In my view, the cases confirm that the actual standing of a person in the community is a relevant consideration, and the fact that a person's livelihood may depend upon the public trust is likely to increase his or her damages where he or she is a victim of a defamatory comment that would affect that trust. But that is not to say that persons who are not public figures or professionals are not to be properly compensated when they are falsely reported to be criminals.

C. Extent of Publication

- [143] The evidence established that the newspaper had at the time a readership of approximately 65,000 persons over the age of 18 in the Abbotsford/Mission area. 44,126 copies were distributed free of charge, consisting of: 29,024 delivered to single-family homes in Abbotsford; 4,248 as bulk deliveries to apartment building lobbies in Abbotsford; 9,918 delivered to single-family homes in Mission; 395 as bulk deliveries to apartment building lobbies in Mission; 512 delivered to local businesses on a delivery list maintained by the newspaper; and 29 copies to paid residential subscribers outside Abbotsford and Mission.
- [144] There was, of course, the further publication on the Internet, the extent of the viewership of which is unknown.
- [145] Counsel for the plaintiffs submitted that this was equivalent to a "smart bomb" aimed straight at the community where the plaintiffs lived, worked and raised their children.
- [146] Counsel for the defendants submitted that among this readership would be relatively few who would know the plaintiffs, or know of them, and who would have associated them in any way with the article. While I consider there to be some merit to this submission, I must also take into account the notoriety of the subject matter of the article (the proliferation of marijuana grow ops and the increasing violence associated with them), and the public interest it would generate.

D. Evidence of Impact

- [147] None of the plaintiffs saw the article until it was brought to their attention by someone else. All testified to feeling sick about it.
- [148] Dina learned of the article from her father-in-law who was very upset by it. When she saw the article, she was particularly upset to have her picture in the paper. She stopped attending functions at her child's school after a man there had approached her and raised the fact that she had been in the paper. She also overheard two women in the gymnasium at the school whispering that she was the lady who had been in the paper. She stopped taking her daughter out on field trips, driving kids to the choir and doing hot lunches at the school.
- [149] She stated that the pastor from her church had phoned her after the publication of the article to ask if she would like some prayer, and to say that he was praying for her family. He had never done so before. Others asked her about what the article was all about. When she and her sister Germana went to Earl's for lunch, two male acquaintances asked them if they had a "hoot", meaning some pot to smoke. Her father-in-law's partner asked whether an Irish stew she was cooking was "home-grown". She testified that she suffered from anxiety, loss of sleep and irritability, and stopped wanting to go out.

- [150] Roman testified that he was angry and upset when he saw that there was an article with a picture of him, alleging that he was some sort of dope grower making a six-figure income. When he saw the address, he felt quite depressed.
- [151] Before the article, when he walked into the community church beside his farm, he was always greeted with handshakes. That stopped after the article was published. When he went to parties, people would laugh about how he had been in the paper, and he stopped wanting to go.
- [152] Roman testified that he was well known in Abbotsford and Mission, had a lot of friends through school and through church, and was well liked.
- [153] At the time of publication, Roman was then involved with a girlfriend, Angela Fehr, whom he has since married. After the article appeared, her father telephoned from Kelowna, asking if it was true that there had been a shooting on the property and that he had been growing marijuana. Roman told him he should not believe what he read in the paper, whereupon Mr. Fehr asked him why he should not believe it. Roman felt that he lost a lot of credit with his future father-in-law. They were, however, able to reconcile.
- [154] Roman testified that his relationship with his nephew Nicholas, elder child of Salvatore, was impacted because Nicholas's mother, Sonia, did not want him to go over to the farm after reading the article. He testified that she had phoned him after the article had been published to ask whether he was involved in a grow op.
- [155] His relationship with Angela became strained for a period of time because he became depressed and angry, and did not want to do normal things like go out or see friends.
- [156] Roman did not want to go back to the farm after the article was published. Angela was told by her parents not to go there. He sold the livestock because he was not going there regularly anymore. He was concerned that the article was like a map to the farm, inviting more violence by telling criminals where to go if they wanted to find pot or money.
- [157] Germana had worked for two years at a café on Mission's main street, where she knew all of the customers, who are regulars, by name. According to Germana, the publication of the article interfered with her attempt to reconcile with her husband, from whom she was separated, and it moved him to refuse permission for her children to visit the farm because he thought that there was a grow op on it. She acknowledged that he was angry in part because she had not told him about the incident before the article was published. Germana stopped going to church at the Ross Road Community Church because she was embarrassed.
- [158] Germana confirmed the incident reported by Dina at Earl's, noting that one person asked whether they had any weed for sale, while another asked if they had a "hoot", which she understood to mean pot.

- [159] Germana testified that she became quite depressed, suffered from insomnia for a year and a half, lost weight, and felt that people did not trust her. She spoke of a man named Darcy whom she had known in grade 8, and whom she met at a mall where her sister was a hairdresser. He mentioned to her that there were rumours that there was a grow op at the farm. She found this very embarrassing.
- [160] Salvatore was dismayed when his attention was directed to the article. He felt that he could not go outside because people were going to think bad things about him. He said that he felt destroyed by the article. He felt that people at his daughter's school treated him differently, and a co-worker asked him about whether the article was true. When he took his daughter Brianna to a riding lesson, the father of another child mentioned to him that he had heard about some 'stuff' going on in their area. When Sal said that it was in fact his house, the man acknowledged that he was aware of that, and asked what had happened. Salvatore's view was that the article reflected on all of the family - on their house and everyone there.
- [161] Mrs. Manno was told about the article. She does not read English, and indeed speaks it very poorly. She says that she panicked. She felt ashamed. She did not go to church at Christmas time. She was too embarrassed. She spoke of going to catch a bus one day. She overheard another woman at the bus stop refer to her as 'the lady with the children who were in the paper'. She did not want to take the bus after that.
- [162] Angela Fehr also testified. At the time of publication, she had been going out with Roman for about two years. She was with him when he learned of the article from his sister Dina. He became distraught, angry and embarrassed. They went to get a copy at a gas station. Angela went in to get it as Roman was too embarrassed.
- [163] When Angela's mother came to town, she asked Angela if it was true that there was a grow op. Her father was also angry about it and wanted to know the truth, and why this article was printed. Later, in April of 2005, she overheard her father speaking angrily to Roman about the matter, while Roman was bright red, squirming, and very upset. At a wedding she and Roman attended with her family, her grandmother asked her if they were taking notes (for what her grandmother hoped would be their own wedding). Her father responded empathically, "No!". Angela was very upset by this. She described how before, Roman was a very happy-go-lucky, popular guy, but afterwards he was quite withdrawn and did not want to go out. He became more so after the article that he had been between the time of the incident and the article. This caused tension because she was in her early 20s and wanted to go out. Roman just wanted to stay home. He was embarrassed and they argued all the time.
- [164] Ms. Fehr conceded under cross-examination that after she spoke to her father, he believed that there had been no grow op. He was concerned for her safety, not just because of the newspaper article, but also because shots had been fired at the farm.

- [165] Counsel for the defendants argued that much of what the plaintiffs complained of in terms of what they suffered after these events must properly be attributed to the trauma of being robbed at gunpoint, rather than the allegations contained in the article. For that, he submitted, his clients cannot be held responsible. He noted that it would make sense for someone to be concerned about their children going to the farm when there had recently been an armed hold-up there. He submitted that there is no real evidence that anyone truly believed that there had been a grow op there.
- [166] I accept that some of the trauma described by the plaintiffs was due to the incident itself, and that it cannot all be attributed to the publication of the article. But at the same time, I accept the evidence of the plaintiffs that they were deeply concerned about their reputations in the community as a result of the publication of the article, and that it had a serious impact on them.
- [167] The plaintiffs do not need to prove that any particular person believed the libel. I note the following passage from the judgment of the Supreme Court of Canada in the Hill case, *supra* at para. 177-178, addressing the fact that following (and notwithstanding) the publication of the libel, the plaintiff lawyer had received promotions, was elected a bencher of the Law Society of Upper Canada, and was eventually appointed a superior court judge:

As a lawyer, Hill would have no way of knowing what members of the public, colleagues, other lawyers and judges may have been affected by the dramatic presentation of the allegation that he had been instrumental in breaching an order of the court and that he was guilty of criminal contempt.

This nagging doubt and sense of hurt must have affected him in every telephone call he made and received in the course of his daily work, in every letter that he sent and received and in every appearance that he made before the courts of the province of Ontario. He would never know who, as a result of the libellous statement, had some lingering suspicion that he was guilty of misconduct which was criminal in nature. He would never know who might have believed that he was a person without integrity who would act criminally in the performance of his duties as Crown counsel. He could never be certain who would accept the allegation that he was guilty of a criminal breach of trust which was the essential thrust of the libel.

- [168] Similarly, the Mannos, particularly Roman, could never be sure who might have believed that they were persons whose illegal activities made them deserving targets. What is clear to me from all of the evidence is that once the article was published, instead of being objects of appropriate sympathy, the plaintiffs became objects of unwarranted suspicion. In a community such as Abbotsford-Mission, that can be very serious indeed.

E Conduct of the Defendants

- [169] Conduct on the part of the defendants that in my mind bears on the issue of damages includes: their failure to publish an apology (which I consider in my analysis of mitigation); their failure to remove the article from the newspaper's website when its continued posting

there was brought to their attention; the risk of further violence that arose from their linking the farm to a highly profitable criminal enterprise that was a known target for theft and violence ("anyone with a grow op is at risk."); and the fact that although justification was not pleaded in relation to the grow op imputation, the defendants nevertheless continued to raise at trial implications of unsavoury activity on the part of Roman, and cover up by his sisters, which were not warranted by the evidence.

F. Assessment

- [170] In addition to the factors outlined above, I consider that the harm flowing from the article was greatest for those plaintiffs who were depicted in the photograph, and was aggravated only modestly by the Internet publication.
- [171] Both counsel referred to a number of cases on the issue of the quantum of damages, although both acknowledged that, as the authorities suggest, awards in other cases are of limited value given the 'at-large' nature of damages for defamation.
- [172] Counsel for the plaintiff relied upon cases such as *Hill*, supra (1995), where the Supreme Court of Canada upheld a jury award of \$300,000 for general damages (as well as aggravated damages of \$500,000 and punitive damages of \$800,000), and *Clark*, supra (2004), where the plaintiff, who had been an elected official at the time of the libel, was awarded general damages of \$100,000.
- [173] Counsel for the defendant relied upon cases such as *Leonhard v. Sun Publishing Co.* (1956), 4 D.L.R. (2d) 514; 19 W.W.R. 415 (B.C.S.C.), where the award was a nominal one of \$1.00, *Neeld*, supra (1976), and *Blunden*, supra (1979), where the awards to the plaintiffs were in the amount of \$250 each, *Makow v. Winnipeg Sun*, 2004 MBCA 41; [2004] 6 W.W.R. 45, where the Manitoba Court of Appeal upheld an award of \$5,000 on the basis that the plaintiff's reputation had already been diminished to some degree by his own conduct, and *Stieb v. Vernon News*, [1947] 4 D.L.R. 397 (B.C.S.C.), where an award of \$350 was considered sufficient.
- [174] In my view, while these cases are valuable for their application of the relevant principles, the amounts awarded are, as predicted, of limited assistance, particularly in those cases that predate *Hill*, supra.
- [175] Bearing in mind all of the factors and principles to which I have referred, I assess general damages as follows:

Roman Manno: \$55,000

Dina Manno: \$45,000

Germana Manno \$45,000

Salvatore Manno: \$35,000

Maria Rosa Manno: \$30,000

G. Mitigation

[176] The defendants submit that after being notified on behalf of the plaintiffs of their objections to the article, they offered to publish a full and fair apology to the plaintiffs, to which publication the plaintiffs unreasonably failed to consent. The defendants take the position that this should be taken into account in mitigation of the plaintiffs' damages. The background is as follows.

[177] On December 2, 2004, Mr. McConchie, counsel for the plaintiffs, wrote to the Abbotsford/Mission Times to request an urgent meeting for the purpose of agreeing on the content, form and publication of an unequivocal retraction and apology for the article's

utterly false and defamatory imputations that my clients were involved in a much-detested criminal activity, namely the operation of a marijuana "grow op" at the property at 29655 Fraser Highway; that they were the victims of a "grow rip", and that they refused to cooperate with police in order to conceal their criminal activity.

[178] There had been no previous contact between the plaintiffs and the defendant newspaper.

[179] Mr. Gibson's office responded by letter dated December 3, 2004, advising that they were the solicitors for the Abbotsford/Mission Times, and that after his return to Vancouver on December 6, Mr. Gibson would consult with his client and respond.

[180] On December 9, 2004, Mr. Gibson wrote to Mr. McConchie asking him to set out the exact relief at being sought by his clients, including the wording of any clarification or apology they desired.

[181] Mr. McConchie responded by letter dated December 14, 2004, requesting an unequivocal retraction and apology with sufficient prominence so that it would be likely to attract the attention of people who read the October 29 article. Mr. McConchie took the position that the apology and retraction should appear on the front page, and attached his suggested wording as follows:

WE WERE WRONG - APOLOGY TO MANNO FAMILY

This newspaper is deeply concerned about a story we published on October 29 which contained serious errors.

Our story falsely suggested a robbery at the Manno residence at 29655 Fraser Highway was a "grow rip" and led many readers to conclude incorrectly that members of the Manno family were involved in a marijuana grow operation.

We are completely satisfied that 29655 Fraser Highway was not the site of a grow op and that it never has been. For nearly 20 years, it has been the Manno family home.

The Manno family members depicted in the photograph which accompanied our article are decent, honest, law-abiding people. So are the other members of the Manno family who lived in the house at 29655 Fraser Highway when the robbery occurred. Any suggestion to the contrary is absolutely false.

[Insert a reduced version of the photograph from original article here, small so that individual faces can no longer be recognized but with enough detail to remind readers of the earlier article].

Contrary to our article, all Manno family members co-operated with the police. Any suggestion they did not fully cooperate or that any of them had something to hide from police was completely wrong.

Because of the seriousness of our mistake, the Abbotsford Mission Times took the decision to make this apology on the front page. We were very wrong and, in this case, it is right that we should say so prominently.

We apologize unreservedly to the Manno family for our erroneous story and acknowledge that it caused them acute distress and embarrassment. We are very sorry that this happened.

Signed: Rod Thomson, Publisher

[182] Mr. McConchie expressed two concerns in requesting this apology: first, that the apology mitigate further injury to his clients' reputations; and secondly that the apology address the existing threat to his clients' health and safety from the perception among criminal elements that there was marijuana and/or the proceeds of trafficking to be found at their residence.

[183] On January 4, 2005, Mr. Gibson responded as follows:

I have reviewed with my client your letter of December 14 and the apology you have requested.

While the robbery was reported to police as a "grow rip," The Abbotsford-Mission Times would be prepared to say that it was a robbery, although the item would read better if your clients could say what was stolen.

The newspaper has no first-hand knowledge of the reputations of the Manno family members and is therefore concerned about making a statement that they are decent, honest, law-abiding people.

The newspaper would be prepared to republish the picture as you suggest.

The newspaper is not prepared to say that the Manno family members co-operated with the police. In fact, we understand that a couple of the family members were arrested that evening because the police felt that they were obstructing the investigation. We also understand that family members refused to give the police access to the home where the robbery took place.

We can discuss placement and exact wording of the apology if the above are acceptable to your clients.

[184] Mr. McConchie wrote back to Mr. Gibson on January 20, 2005, stating the following:

I refer to your letter dated January 4, 2005.

My clients are baffled by our accusation that a family member refused to give police access to the residence at 29655 Fraser Highway where the incident took place. To the contrary, if such a request had been made, it would have been immediately granted.

The truth is that none of my clients were asked at any time by any police officer for permission to enter any portion of the residence.

My clients are perplexed that the newspaper and its reporter would refuse to consider publishing that they are decent, honest, law-abiding people on the grounds that the newspaper lacks "first-hand knowledge" and yet publish - as they did - the very damaging allegations in the October 29 article (utterly false) without once interviewing any of them about what happened.

I note that your letter is silent concerning the basis for your accusation that "family members refused to give the police access to the home where the robbery took place." Knowing that your letter to me would inevitably be read by my clients, did the newspaper or its reporter give any thought to the fresh distress and insult that such an allegation would cause my clients?

Contrary to the allegations in your letter, each Manno family member co-operated fully with the police. No charges of obstruction were ever laid against any of them. No family member was taken away to the Abbotsford police station. There was never any basis - "first hand" or otherwise - for a charge that any family member obstructed the investigation.

Based on the tone and content of your letter of January 4, my clients have understandably formed the view that the Abbotsford-Mission Times and Ken Henry feel no regret about publishing the October 29 article and have no intention of publishing a sincere or meaningful apology.

Please ask your clients to reconsider their position.

Take notice that Dina Manno, Germana L'Heureux, Roman Manno, Marina Manno, Salvatore Mann, and Maria Rosa Manno, each reserve all rights including the right to bring this letter to the attention of a court of competent jurisdiction in the event of litigation.

[185] On January 26, 2005, Mr. Gibson replied to Mr. McConchie. His letter included the following paragraphs:

Under the circumstances, the Abbotsford-Mission Times considers that it would be inappropriate for them to make a positive statement that the Manno family co-operated, or that the family enjoys any particular reputation in the community.

We have redrafted the apology accordingly, and enclose a copy of what the newspaper proposes to publish. Please let us know whether your clients wish us to proceed on this basis. We can discuss placement and the exact wording of the apology if the above are acceptable to your clients.

[186] The enclosed redrafted apology read as follows:

APOLOGY TO MANNO FAMILY

A story in our October 29, 2004 edition wrongly suggested that a robbery at the Manno residence at 29655 Fraser Highway was a "grow rip" and led many readers to conclude incorrectly that members of the Manno family were involved in a marijuana grow operation.

We are satisfied that 29655 Fraser Highway was not the site of a grow op and that it never has been. For nearly 20 years, it has been the Manno family home.

[insert a reduced version of the photograph from original article here, small so that individual faces can no longer be recognized but with enough detail to remind readers of the earlier article]

We apologize to the Manno family for our erroneous story. We are very sorry that this happened.

Rod Thomson, Publisher

[187] It will be observed that the first two paragraphs of Mr. Gibson's redrafted apology closely echoed the second and third paragraphs of Mr. McConchie's proposed apology, and incorporated Mr. McConchie's proposal concerning the photograph.

[188] I was not told of any response. Mr. Gibson was not advised that the Manno family wished to proceed on that basis, and neither that form of apology nor any other was ever published.

[189] On both February 16 and March 7, 2005, Mr. McConchie wrote Mr. Gibson to point out that the article continued to be accessible on the Abbotsford/Mission Times website, and requested its immediate removal. It was finally removed on or about May 4, 2005.

[190] Before me, Mr. Gibson relied on s. 10 of the Libel and Slander Act, R.S.B.C. 1996, c. 263. The section reads as follows:

10. In an action for defamation if the defendant has pleaded not guilty, if judgment has been given against the defendant with damages to be assessed, or the defendant admits the defamation, the defendant may give in evidence in mitigation of damages, that the defendant made or offered a written or printed apology to the plaintiff for the defamation before the commencement of the action, or if the action was commenced before there was an opportunity of making or offering the apology, that the defendant did so as soon afterwards as the defendant had opportunity.

- [191] In the alternative, Mr. Gibson submitted that even if s. 10 is inapplicable in the circumstances of this case, I can take into account the plaintiffs' refusal to accept the proffered apology at common law in mitigation of damages, or in the further alternative, I can take from the plaintiffs' refusal that by the time of the letter, January 26, 2005, they considered that the consequences of the defamation were no longer serious enough to warrant pursuing the matter further.
- [192] Mr. Gibson further submitted that the newspaper could not go ahead and publish its redrafted apology without the Mannos' consent because the apology, unlike the original article, used their names (as had been requested by Mr. McConchie in his original draft). A risk therefore arose of repeating or exacerbating the libel.
- [193] There would, of course, have been no impediment to the newspaper publishing a more generic apology, apologizing for and retracting the suggestion that the residents and/or owners of property located at 29655 Fraser Highway were in any way involved in marijuana grow operations, et cetera.
- [194] There is no doubt that the proffered apology retracts the suggestion that the robbery was a "grow rip" and that members of the Manno family were involved in a marijuana grow operation. It does not directly address the imputation arising from the statement that the victims did not cooperate with the police. Nevertheless, to the extent the sting of that imputation was, as I have found, that the family was attempting to cover up their criminal activity, it seems to me that the acknowledgment that there had been no such criminal activity would go some distance in removing that sting.
- [195] None of the members of the Manno family who testified were able to articulate just why the apology was not accepted. I was not, of course, privy to what legal advice they received in that regard. Salvatore did state that he wanted a reference to his family as honest, law-abiding people. I sense, however, that the principal sticking point was the failure of the apology to include a retraction of the suggestion that the family had not cooperated with the police.
- [196] In my view, the apology, if published with sufficient prominence, would have gone a considerable way in addressing the harm caused to the plaintiffs' reputations by the article. But it was not published. The question is to what extent I can take the offer of the apology into account in mitigation of damages.
- [197] Section 10 of the Libel and Slander Act was amended in 2004. It permits the defendant in an action for defamation to lead evidence of its proffered apology in mitigation of damages in three circumstances: (a) if the defendant has pleaded not guilty; (b) if judgment has been given against the defendant with damages to be assessed; or (c) if the defendant admits the defamation.

- [198] Counsel for the plaintiffs submitted that none of those three circumstances arises here, so that in law, I may not take the proffered apology into account. Alternatively, he submitted that the section requires the apology to be for the defamation for which the action was brought. As the proffered apology here did not cover both defamatory comments, it cannot on that ground be taken into account.
- [199] Counsel for the defendants argued that the proffering of the apology was in itself an admission at least in so far as the imputation of a grow op was concerned, bringing the defendants within the third ground, and argued further that the section refers not to a publication, but to the defamation. If there were two defamatory meanings, one of which was covered by the apology and the other not, I can take into account the apology with respect to the one that was covered.
- [200] I was not referred to any cases construing this section. The section as it was before the 2004 amendment was considered by our Court of Appeal in the case of *Carter v. Gair*, 1999 BCCA 132, 170 D.L.R. (4th) 204. At that time, s. 10 read, in part, as follows:
10. In an action for defamation where the defendant has pleaded not guilty only, or has suffered judgment by default, or judgment has been given against him on proceedings in lieu of demurrer, or by admission, he may give in evidence, in mitigation of damages, that he made or offered a written or printed apology to the plaintiff for the defamation .
- [201] The arguments raised in this case were not considered there. The Court of Appeal noted that the trial judge had found that the plaintiff had acted unreasonably in failing to accept the apology offered by the defendant newspaper. Newbury JA then stated the following:

But whether or not [the plaintiff's] insistence on a particular form of apology was unreasonable, the onus lay on the defendants to mitigate his damages. It will be recalled that s. 10 of the Libel and Slander Act permits a defendant to give in evidence in mitigation of damages that he "made or offered a written or printed apology to the plaintiff" . Any apology so offered or made must amount to a full and frank withdrawal of the charges conveyed and should be worded so that "an impartial person would consider it reasonably satisfactory in all the circumstances". [Citations omitted.] The old British Columbia case of *Hoste v. Victoria Times Publishing Co.* (1889) 1 B.C.R. 365 (B.C.S.C.) contains a ringing passage from the judgment of Begbie C.J. that is apposite:

The most proper apology cannot undo the irretrievable publication and dissemination of the slander, nor be regarded as a complete restitution, though it may properly be considered in damages. And that is what Lord Campbell's Act permits. 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 interest of truth, and because you are anxious to undo whatever harm which may have accrued from a wrong that you find you have been the unconscious instrument of inflicting.

[202] I pause to observe that the relevant section of Lord Campbell's Act (1843, 6 & 7 Vict., c. 96) referred to by Chief Justice Begbie read as follows:

I. In any action for defamation it shall be lawful for the defendant (after notice in writing of his intention so to do, duly given to the plaintiff at the time of filing or delivering the plea in such action) to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology.

[203] In *Carter, Newbury* JA went on to note that the defendants had made the offer conditional upon the plaintiff accepting it, and concluded that while the offer could be considered in mitigation of the plaintiff's damages, the effect was minor in light of the defendants' failure to carry through with a published apology.

[204] Bearing in mind the statutory history of the section, going back to Lord Campbell's Act, it is my view that s. 10 should not be construed as narrowly as submitted by plaintiffs' counsel. It is true that this is not a case where the defendant has admitted the defamation (which surely must be taken to mean admitted for the purposes of the litigation), or where judgment has been given against the defendant with damages to be assessed. It is, however, one where the defendant has pleaded not guilty, in the sense of denying the defamation and denying liability. The reference to the defendant pleading not guilty should be construed in juxtaposition to the reference to the defendant admitting the defamation, as opposed to pleading guilty. It cannot be intended to refer to a criminal libel, as this Act could have no application to a criminal charge.

[205] On this basis, I conclude that the section is therefore *prima facie* applicable. This is consistent with its treatment by the Court of Appeal in the *Carter* case.

[206] The next question is whether the apology proffered by the defendants in this case is taken outside of the section by reason of the failure of the defendants to include an apology for the allegation that the residents had failed to cooperate with the police, which I found to have its own defamatory sting. I conclude that the position of plaintiffs' counsel on this issue again goes too far. As we have seen, the law requires a full and frank withdrawal of the charges conveyed. Whether the defendants' offered apology so qualifies in this case is a question of fact, which is to be decided objectively. The test is whether a reasonable person to whom the apology was published would understand it to be a sufficiently complete and unqualified apology so as to be reasonably satisfactory in all of the circumstances. In my opinion, the extent of the apology when objectively viewed therefore becomes a factor to be taken into account in considering whether the proffered apology satisfies the defendants' duty to mitigate the plaintiffs' damages, rather than a ground for excluding consideration altogether.

- [207] While *Tait v. New Westminster Radio Ltd.* (1984), 58 B.C.L.R. 194 (C.A.), is authority for the proposition that a published apology can be taken into account in mitigation of damages even where it does not meet the requirements of the Libel and Slander Act, I do not need to decide whether that proposition applies equally to proffered but unpublished apologies in view of my interpretation of s. 10.
- [208] Both counsel raised the issue of delay in relation to the apology: on the part of the plaintiffs in contacting the newspaper to complain and to request an apology, and on the part of the defendants in offering one. Both the plaintiffs and the defendants were represented by senior and experienced counsel, whose advice, recommendations and other commitments I am not entitled to know. In the circumstances, I do not consider delay on either side to be a factor in this regard, whether in terms of the degree of harm suffered by the plaintiffs, or the degree of sincerity exhibited by the defendants.
- [209] In my view, the factors that are the most important are two that I have noted above. First, although the offered apology did not expressly retract the 'no co-operation' statement, its form was such as would have removed the essence of the sting of that libel, by unambiguously retracting any suggestion of criminal activity. Second, neither the offered apology nor any other was in fact published notwithstanding that the defendant newspaper was clearly prepared to acknowledge that it was wrong to have conveyed the impression that the Mannos had been involved in a grow op. That was a very serious allegation. Once the defendant newspaper accepted that it was untrue, as it evidently did (and no justification being pleaded), mitigation demanded publication. It was simply the right thing to do.
- [210] Given the first factor, had the apology been published in the form offered, or in such generic form as would have protected the newspaper from any consequences arising from the publication of the plaintiffs' names, I would have given it effect in reducing the plaintiffs' damages notwithstanding its failure to address directly the issue of no co-operation. Given the second factor, I decline to do so.

VII CONCLUSION

- [211] The claim of the plaintiff Marina Manno is dismissed.
- [212] The claims of the remaining plaintiffs for general damages are allowed as against the defendants Ken Henry and Lower Mainland Publishing Ltd./Lower Mainland Publishing Group Inc., in the following amounts:

Roman Manno: \$55,000

Dina Manno: \$45,000

Germana Manno \$45,000

Salvatore Manno: \$35,000

Maria Rosa Manno: \$30,000

[213] Although these damages are non-pecuniary in nature, their award nevertheless constitutes a pecuniary judgment within the meaning of s. 1(1) of the Court Order Interest Act, R.S.B.C. 1996, c. 79, and they do not arise from personal injury or death within the meaning of s. 2(e) of that Act. Accordingly, the plaintiffs are entitled to interest from the date on which their cause of action arose to the date of this judgment.

[214] The parties are at liberty to speak to costs if they cannot agree.

"GRAUER J."

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