
CANADA / JUDGMENT

Nazerali v. Mitchell

2018 BCCA 104

COURT

British Columbia Court of Appeal

DECIDED

19 March 2018

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2018 BCCA 104 Nazerali v. Mitchell

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Nazerali v. Mitchell,

2018 BCCA 104

Date: 20180319

Docket: CA43682

Between:

Altaf Nazerali

Respondent

(Plaintiff)

And

Mark Mitchell, Patrick Byrne and Deep Capture LLC

Appellants

(Defendants)

And

High Plains Investments LLC, GoDaddy.com, Inc.,

Nozone, Inc. dba Steadfast Networks,

Google Inc. and Google Canada Corporation

(Defendants)

Before:

The Honourable Mr. Justice Tysoe

The Honourable Madam Justice Garson

The Honourable Madam Justice Fenlon

On appeal from: Orders of the Supreme Court of British Columbia dated May 6,

2016 and December 28, 2016 (Nazerali v. Mitchell, 2016 BCSC 810

and 2016 BCSC 2085, and Nazerali v. Mitchell, 2016 BCSC 2424,

Vancouver Docket S116979)

Counsel for the Appellants:

R.D. McConchie and A. McConchie

Counsel for the Respondent:

D.W. Burnett, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

January 15 and 16, 2018

Place and Date of Judgment:

Vancouver, British Columbia

March 19, 2018

Written Reasons by:

The Honourable Mr. Justice Tysoe

Concurred in by:

The Honourable Madam Justice Garson

The Honourable Madam Justice Fenlon

Summary:

The appellants appeal an order finding they had defamed the plaintiff. The judge awarded damages totalling \$1,205,000 and special costs, and granted a permanent injunction against the appellants, restraining publication of any defamatory words concerning Mr. Nazerali. The appellants submit the judge erred in determining Mr. Nazerali was defamed, applying the presumption of falsity, rejecting their pleaded defences, finding they acted with malice, rejecting their mitigation argument, assessing damages, awarding the permanent world-wide injunction

and awarding special costs against them. Held: appeal allowed in part. The award of \$500,000 for aggravated damages is inordinately high and is reduced to \$200,000. The permanent injunction is varied to include only the words found to be defamatory by the judge, and to permit the appellants leave to apply to vary the injunction as required. All other grounds of appeal are dismissed.

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

- [1] In 2011, the appellants published a document on the Internet entitled "The Miscreants' Global Bust-Out". It consisted of 21 chapters, 16 of which contained references to the respondent, Altaf Nazerali.
- [2] Mr. Nazerali sued the appellants for defamation, and a trial of approximately four weeks took place in 2015. In reasons for judgment indexed as 2016 BCSC 810, the trial judge found the appellants had defamed the respondent and awarded him aggregate damages in the amount of \$1,205,000. In further reasons for judgment indexed as 2016 BCSC 2424, the judge awarded special costs of the action against the appellants.
- [3] The appellants appeal the trial decision on numerous grounds and also appeal the costs decision.

Background

- [4] The website, www.deepcapture.com, is operated by the appellant, Deep Capture LLC. In April 2011, Deep Capture LLC began posting chapters of "The Miscreants' Global Bust-Out" (which, to be consistent with the trial decision, I refer to as the "Articles"). The chapters of the Articles mentioning the respondent, Altaf Nazerali, copies of which were introduced as exhibits at the trial, were posted between May 5, 2011 and August 18, 2011. The Articles were written by the appellant, Mark Mitchell; the editor and publisher was the appellant, Patrick Byrne.
- [5] The alleged defamatory statements were set out at length in Mr. Nazerali's amended notice of civil claim and were reproduced at para. 3 of the trial decision. In view of the holdings of the trial judge, the following excerpts are sufficient examples for the purposes of this appeal (the majority of which duplicate the examples listed in Mr. Nazerali's factum; the page numbers given are with respect to the copies as printed November 30, 2011, or September 13, 2011, being Exhibit 1, provided in the appeal books):
 - a) Chapter 3 (p. 2):

The year was 1979

... Nazerali offered [to Irving Kott] to patch things up with the Mafia - and he did a good job of it. a couple of years later, Kott, Nazerali and the Mafia were all in [doing] business together

Nazerali dabbled in arms dealing, delivering weapons to war zones in Africa and to the mujahedeen

b) Chapter 9 (p. 3):

At least some of these market manipulators also got lucky on September 11, 2001. Among the lucky were Ali Nazerali

the head of Saudi intelligence was running scams with [the] Nazerali [brothers]"

c) Chapter 12:

(p. 3) Mark Salter previously worked for Westcap Securities, then controlled by the above-mentioned Ali Nazerali (who has, as I documented earlier, has run a stock scam with the chief of Saudi intelligence)

(p. 7) Mafia capo Phillip Abramo (who was involved with Ali Nazerali's BCCI brokerage)

(p. 9) [Arik Kislin] was previously among the small pack of closely affiliated market manipulators who traded through Global Securities.

That's the pack that included Anthony Elgindy (tied to the Russian Mafia and multiple leaders of jihadi terrorist groups); Ali Nazerali (former top employee of Abbas Gokal, a Pakistani ISI asset who works for the Iranian regime);

(p. 11) In addition, Mr. Dvoskin-Lozin-Kozin-Etc. is a notorious market manipulator who has orchestrated multiple death spiral scams, sometimes in league with prominent members of the Milken network, including Ali Nazerali

Thompson Kernaghan who got his job thanks to his connections to Ali Nazerali and Nazerali's friend Soleiman Rashid, who is, like Nazerali, on especially close terms with jihadis.

Among the many Yasin al Qadi deals handled by the brokerage were Imagis (the anti-terrorism company that began pumping out massive volumes of unregistered stock just before the 9-11 attacks)

d) Chapter 13:

(p.10) Milken and some of his close associates, including Ali Nazerali and Gene Phillips, discussed ways to destroy some big companies.

(p. 12) Ali Nazerali is best known for small-time "pump and dump" scams, though he is involved in much bigger schemes -- the sorts of destructive schemes that I have already described, such as bust-outs, death spiral finance, and naked short selling.

Nazerali, recall, has working relationships with the Gokal family (of BCCI fame), members of Al Qaeda's Golden Chain, the regime in Iran, Pakistan's ISI, La Cosa Nostra, the Russian Mafia, and others in the Milken network.

At this time in 2006, Nazerali has some business with the Belzberg brothers - Sam and Hymie (who, say Canadian and U.S. authorities, have done business with Genovese Mafia capos).

e) Chapter 19:

(p. 15) Ali Nazerali got his start as an arms dealer to the mujahedeen.

In the 1970s and 1980s, Nazerali and Gokal were important figures in the Bank of Credit and Commerce international (BCCI), the massive criminal enterprise that did business with everyone from La Cosa Nostra and the Russian Mafia to Col[o]mbian drug cartels

(p. 16) Nazerali formed a Dubai fund [Star Soft], in partnership with members of the Mogilevich organization and Mufti al Abbar, the man in charge of manipulating the markets for Libyan dictator Muammar Qaddafi.

(p. 20) Nazerali's business partners have included: 1) the Mogilevich organization (instrument of Russian intelligence; tried to sell highly enriched uranium to Al Qaeda); 2) Osama bin Laden's favorite financier (Yasin al Qadi); 3) Mufti al Abbar, chief market manipulator for Muammar Qaddafi 4) Abbas Gokal (Pakistani intelligence asset and key financial advisor to the Iranian regime); 5) Habib Bank (bankers to Daniel Pearl's kidnappers and D-Company, among others).

There are more: 6) Sergei Chemezov (Russian intelligence operative and Russia's chief arms dealer); 7) DeCalvacante Mafia capo Phil Abramo ; [8] Boris Berezovsky (former "Godfather of the Kremlin"); 9) Roman Abramovich (current "Godfather of the Kremlin"); 10) the Abu Dhabi royal family; 11) the ruler of Dubai.

And the list goes on: 12) the head of Saudi intelligence (Nazerali partner in the stock scam Even Resources); 13) Adnan Khashoggi (Capcom); 14) the Ndrangheta Mafia organization in Italy; 15) an impressive number of securities traders who are also narco-traffickers (such as Paul Combs, until Combs was whacked by Nazerali's mobster friend Egor Chernov); 16) the Mafia brokerages that cleared their trades through Adler Coleman and JB Oxford and, of course, 17) BCCI, the greatest criminal bank of all time, controlled by future financiers of Al Qaeda.

f) Chapter 20 (p. 11):

In 2001, Nazerali perpetrated a stock fraud (Even Resources) Nazerali was also involved (in the 1980s) with Capcom, the BCCI subsidiary that was controlled by Saudi intelligence and implicated (by a U.S. Congressional committee) in the manipulation of the U.S. markets

g) Chapter 21 (p. 3):

· Many other key financial advisors to the Iranian regime-e.g. Ali Nazerali (hedge fund partner of "Specially Designated Global Terrorist" Yasin al Qadi);

[The references italicized in square brackets are the words used in screen captures of the chapters at different times.]

- [6] Mr. Nazerali pleaded in his notice of civil claim that the natural and ordinary meaning of the words in the Articles was that he was "a criminal, arms dealer, drug dealer, terrorist, fraud artist, gangster, mobster, member of the mafia, dishonest, dangerous and not to be trusted".
- [7] On September 6, 2011, Mr. Nazerali sent an email to Mr. Mitchell complaining about the Articles and asking to speak with him. Mr. Mitchell replied the following day with an email stating that he was eager to speak with Mr. Nazerali and that he would correct any facts in the Articles that were wrong.
- [8] Mr. Nazerali and Mr. Mitchell spoke on the telephone for over 45 minutes on September 9, 2011. Mr. Nazerali recorded the conversation, and the recording was transcribed by his lawyer's office (with some minor corrections by Mr. Nazerali). The transcript is set out in full at para. 74 of the trial decision. In the conversation, Mr. Nazerali pointed out a number of statements in the Articles that he maintained were not accurate, and he ended the conversation by saying he was going to give Mr. Mitchell an opportunity to review his sources and it would be great if Mr. Mitchell could see his way towards correcting what he had written.
- [9] The two men exchanged emails following their conversation. Mr. Nazerali encouraged Mr. Mitchell to re-verify his sources as he believed the sources had misled Mr. Mitchell. He asked Mr. Mitchell to send him the media reports mentioned by Mr. Mitchell in the conversation regarding an investigation into a short-selling scheme in which Mr. Nazerali was allegedly involved with the Belzberg family.
- [10] In his email to him, Mr. Mitchell invited Mr. Nazerali to give him meaningful information. Mr. Mitchell said he did not reveal the names of his sources and, if Mr. Nazerali became a source, he would remove Mr. Nazerali's name from the Deep Capture website. He also said he would remove the information about the Belzbergs. Mr. Mitchell followed up with another email later in the day attaching the media report about the Belzbergs and stating that it referred to Mr. Nazerali's brother and he had taken his brother's name out of the story. No other substantive change was ever made to the Articles.
- [11] Mr. Mitchell also emailed Mr. Byrne following his telephone conversation with Mr. Nazerali. He said, "this is going to be fun". He indicated he was going to suggest to Mr. Nazerali that he was open to changing the Articles if Mr. Nazerali could provide verifiable information of value and he might even suggest he would remove Mr. Nazerali's name from the Articles altogether if he provided trading records of a particular individual. He concluded by saying: "If Nazerali agrees, nothing lost. After he gives me the information I'll just put him back in the story. Sleazy, but well, it is what it is".
- [12] The Articles were republished on various other websites in addition to the Deep Capture website. These included "Before It's News", "Regator", "Boardreader" and "Yahoo Finance".

- [13] On October 19, 2011, Mr. Nazerali commenced the underlying action and obtained an ex parte interim injunction restraining the appellants from publishing statements about him on the website or elsewhere. The interim injunction was to expire on December 2, 2011. It was extended once to December 13, 2011 but a further extension was refused on the basis that there were some potential defences to the claim.
- [14] On December 28, 2011, the appellants filed their response to civil claim. It was amended three times prior to trial. The appellants pleaded various defences to the claim. The first defence was that the notice of civil claim did not disclose a reasonable claim, and was frivolous, vexatious or otherwise an abuse of process. They pleaded that the words in the Articles were not defamatory of Mr. Nazerali. They asserted the defence of justification, maintaining the words to be true, and the amended response to civil claim set out over 20 pages of particulars in support of their contention that Mr. Nazerali was "a fraud artist", "dishonest" and/or "not to be trusted". They also pleaded that Mr. Nazerali consented to the publication of the words and that the words constituted fair comment and responsible communication on matters of public interest. It was the position of the appellants that Mr. Nazerali was disentitled to damages because he had a bad reputation prior to the publication of the Articles. Finally, the appellants raised a constitutional argument to the effect that in order to conform to Charter values, especially after the changes to the discovery procedures brought about by the enactment of the Supreme Court Civil Rules, B.C. Reg. 168/2009, effective July 1, 2010, the defence of justification should require the plaintiff to prove the falsity of the words complained of, rather than the defendant having to prove their truth.
- [15] Despite providing a witness list in their trial brief, the appellants did not call any evidence in support of their defences. They relied primarily on their cross-examination of Mr. Nazerali.

Summary of the Trial Judge's Decisions

- [16] After reviewing the facts, the relevant law and the submissions of the parties, the trial judge held that Mr. Nazerali had pleaded his case with the required precision and that the words complained of, in their ordinary meaning, were defamatory of him.
- [17] The judge did not accept the appellants' constitutional argument. He held the court had the discretion to enlarge document discovery, to permit further time for examinations for discovery and to order cross-examination on affidavits in support of a summary trial application. He pointed to the overriding objective of the Supreme Court Civil Rules to determine proceedings on their merits.
- [18] In dealing with the defence of justification, the judge noted that as the appellants did not call any evidence of their own, they were required to prove the truth of the words using Mr. Nazerali's evidence. He found that Mr. Nazerali's credibility was not damaged during his lengthy and aggressive cross-examination and that the questions posed on the cross-examination did not, without being accepted by Mr. Nazerali, prove the truth of the questions. He noted that Mr. Nazerali was not questioned on many of the defamatory

statements. The judge concluded the defence of justification was not made out.

- [19] The judge rejected the defence of fair comment for two reasons. First, he held the words in question were statements of fact, not comment. Second, he found the defence to be defeated by his finding that the appellants had conducted themselves with express malice when publishing the words.
- [20] The judge found the defence of responsible communication was devoid of merit because no attempt was made to contact Mr. Nazerali before publication of the Articles. He also found Mr. Nazerali did not consent to the publication of the Articles. He did not accept that Mr. Nazerali's reputation disentitled him to an award of damages because the appellants had not proven that Mr. Nazerali had a generally bad reputation prior to the publication of the Articles.
- [21] In dealing with the assessment of damages, the judge referred to numerous case authorities. He awarded \$400,000 in general damages, \$500,000 in aggravated damages, \$250,000 in punitive damages and \$55,000 in special damages. The final remedy granted by the judge was a permanent injunction restraining publication on the Internet or otherwise of any defamatory words concerning Mr. Nazerali.
- [22] In his trial decision, the judge gave directions for the parties to make submissions on costs of the proceeding, and the parties made written submissions. In the costs decision, the judge awarded Mr. Nazerali special costs of the action.

Issues on Appeal

- [23] The appellants assert the trial judge erred in the following respects in the trial decision:
- (a) by determining that Mr. Nazerali was defamed, without finding whether any of the inferential meanings alleged in the notice of civil claim were conveyed by the words complained of;
 - (b) in applying the presumption of falsity of defamatory expression when dealing with the defence of justification;
 - (c) in rejecting the defence of justification;
 - (d) in finding the appellants were actuated by express malice;
 - (e) in rejecting the defence plea that damages were mitigated by evidence of Mr. Nazerali's general reputation or by facts that were relevant to the defence of justification;
 - (f) in assessing the general, aggravated, punitive and special damages; and
 - (g) in granting the permanent world-wide injunction.
- [24] The appellants also say the judge erred in awarding special costs against them.

Discussion

a) Inferential Meanings

[25] There are three alternate means by which defamation can be proven, as set out in *Lawson v. Baines*, 2012 BCCA 117 at para. 13:

- a) If the literal meaning of the words complained of are defamatory;
- b) If the words complained of are not defamatory in their natural and ordinary meaning, but their meaning based upon extrinsic circumstances unique to certain readers (the "legal" or "true" innuendo meaning) is defamatory; or
- c) If the inferential meaning or impression left by the words complained of is defamatory (the "false" or "popular" innuendo meaning).

[26] In the trial decision, the judge found that the literal meaning of the words was defamatory. He said this:

[147] The assertion that the words complained of by the plaintiff are not, in their literal meaning, defamatory of the plaintiff is spurious. To write of a man that he:

- i. does business with the Mafia;
- ii. has sold arms to the mujahedin [sic];
- iii. is a market manipulator;
- iv. has run stock scams;
- v. has ties to the Russian mafia and jihadi terrorist groups;
- vi. has been "in league" with a market manipulator who has engaged in multiple "death spiral scams";
- vii. has a working relationship with La Cosa Nostra;
- viii. has had business dealings with Osama bin Laden's favorite financier; Russia's chief arms dealer; a Mafia Capo; the Ndrangheta Mafia; "narco traffickers", and that he is a "specially designated global terrorist".

would tend to lower his reputation "in the eyes of a reasonable person" (See: *Grant* [Grant v. Torstar Corp., 2009 SCC 61]).

[27] The appellants say that only item iv in this passage ("has run stock scams") is a literal quotation from the words complained of in the notice of civil claim and that the other items are not literal quotes. They maintain the failure of the judge to determine the issue of inferential meanings is a core error and, without the inferential meanings being determined, liability and damages cannot be properly determined.

[28] With one exception, I am unable to accept the appellants' contention that the judge erred in his conclusion the words complained of did not have the literal meanings listed in para. 147 of the trial decision. I will list the words from the Articles quoted in para. 5 above that correspond to the first seven items in para. 147 of the judge's reasons:

- i. Chapter 3 (p. 2) - "a couple of years later, Kott, Nazerali and the Mafia were all doing business together";
- ii. Chapter 3 (p. 2) - "Nazerali dabbled in arms dealing, delivering weapons to war zones in Africa and to the mujahedeen";

Chapter 19 (p. 15) - "Ali Nazerali got his start as an arms dealer to the mujahedeen";

iii. Chapter 9 (p. 3) - "At least some of these market manipulators also got lucky on September 11, 2001. Among the lucky were Ali Nazerali";

iv. Chapter 9 (p. 3) - "the head of Saudi intelligence was running scams with [the] Nazerali [brothers]";

Chapter 12 (p. 3) - "Ali Nazerali (who has, as I documented earlier, has run a stock scam with the chief of Saudi intelligence ...)";

- v. Chapter 12 (p. 9) - "That's the pack that included Anthony Elgindy (tied to the Russian Mafia and multiple leaders of jihadi terrorist groups); Ali Nazerali";

Chapter 13 (p. 12) - "Nazerali, recall, has working relationships with the Russian Mafia";

vi. Chapter 12 (p. 11) - "In addition, Mr. Dvoskin-Lozin-Kozin-Etc. is a notorious market manipulator who has orchestrated multiple death spiral scams, sometimes in league with prominent members of the Milken network, including Ali Nazerali";

Chapter 13 (p. 12) - "Ali Nazerali is best known for small-time "pump and dump" scams, though he is involved in much bigger schemes -- the sorts of destructive schemes that I have already described, such as bust-outs, death spiral finance, and naked short selling";

vii. Chapter 13 (p. 12) - "Nazerali, recall, has working relationships with La Cosa Nostra".

[29] The one exception to which I referred relates to item viii in para. 147. The literal meanings of the first five particulars contained in item viii are supported by the following excerpts from the Articles as set out in para. 5 above:

Chapter 19 (p. 20) - "Nazerali's business partners have included: 2) Osama bin Laden's favorite financier ; 6) Sergei Chemezov (Russian intelligence operative and Russia's chief arms dealer) ; 7) DeCalvacante Mafia capo Phil Abramo ; 14) the Ndrangheta Mafia organization in Italy; 15) an impressive number of securities traders who are also narco-traffickers".

- [30] The trial judge did make a slip in the last particular of item viii when he stated that Mr. Nazerali was "a specially designated global terrorist". The statement in chapter 21 of the Articles (p. 3) was that Mr. Nazerali was a "hedge fund partner of 'Specially Designated Global Terrorist' Yasin al Qadi".
- [31] In my opinion, the literal meanings of the words used in the Articles correspond to the meanings given to them in items i to vii and all but the last particular in item viii listed in para. 147 of the trial decision. While the judge did not repeat the exact words contained in the Articles, he was simply summarizing their literal meanings in stating his conclusion that the literal meanings were defamatory. He did not draw any inferences in summarizing the meanings. The judge did make the slip at the end of item viii but, in my view, it was not significant to his conclusion that the other literal meanings were defamatory of Mr. Nazerali or to his assessment of damages.
- [32] I would not accede to this ground of appeal.
- b) Presumption of Falsity
- [33] The common law of defamation in Canada prescribes that once words have been found to be defamatory, there is a rebuttable presumption that the words are false. In a case such as the present one, where the appellants relied on the defence of justification, the onus was on them to rebut the presumption and prove that the words were true.
- [34] At the trial, the appellants raised what was referred to as a constitutional argument to the effect that, especially with the changes to civil procedure introduced in 2010 by the British Columbia Supreme Court Civil Rules, the common law presumption of falsity is not consistent with the values underlying the Canadian Charter of Rights and Freedoms. They argued the presumption should be removed from the law of defamation, as occurred in the United States by the decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
- [35] The trial judge noted that, in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, the Supreme Court of Canada declined to follow *Sullivan* and found there was no need to change the common law of defamation, including the presumption of falsity. He also noted that the appellants' argument had been specifically rejected in *Pressler v. Lethbridge* (1997), 153 D.L.R. (4th) 537, 41 B.C.L.R. (3d) 350 (S.C.). He went on to hold that the 2010 changes to the Rules narrowing the scope of document discovery and putting time limitations on examinations for discovery, together with the fact that summary trials are frequently conducted without cross-examination on the affidavits, did not warrant a change in the common law presumption.
- [36] As I understand the appellants' argument, they are not raising the point as a constitutional argument on appeal and saying the presumption of falsity should be removed from the law of defamation in this jurisdiction. Rather, they submit the judge should not have applied the presumption "in the specific circumstances of this case". The circumstances relied upon by the appellants are the asserted lack of document disclosure by Mr. Nazerali and evasive

answers during his cross-examination. They also point to the narrowing of the scope of document discovery and the seven-hour limit on examinations for discovery contained in the Supreme Court Civil Rules, and argue that it was an unreasonable infringement of freedom of expression to impose the onus on them to prove the defence of justification.

- [37] As pointed out by the trial judge, it was open to the appellants to have applied to the court to enlarge the scope of document discovery (Rule 7-1(14)(b)) and to extend the time of the examination for discovery (Rules 7-2(2) and (3)). They could also have applied to the court if they had reason to believe that Mr. Nazerali was not listing on his list of documents all documents that were or had been in his possession or control. They could have submitted (and possibly did submit) to the trial judge that any evasiveness by Mr. Nazerali during his cross-examination should be used against him when assessing his credibility.
- [38] In my opinion, there is nothing unusual about the circumstances of this case that would justify a departure from the normal presumption that the defamatory words were false. I would not give effect to this ground of appeal.

c) Defence of Justification

- [39] The appellants say the trial judge erred by failing to conclude that the cross-examination of Mr. Nazerali established that he is a "fraud artist", "dishonest", "not to be trusted", and that he ran stock scams. They point to the decision in *R. v. Théroux*, [1993] 2 S.C.R. 5, for the proposition that a fraudulent state of mind requires only an awareness that the act in question carries a risk of deprivation, and the person's belief of the morality or honesty of the act is not relevant. They say the judge should have inferred dishonesty from the circumstantial evidence.
- [40] The appellants focus on the activities of two companies, First Commerce Securities and Imagis Technologies Inc., which they say were clearly implicated in stock scams. First Commerce Securities was based in Amsterdam, and it was involved in the marketing of unregulated securities. Mr. Nazerali became involved in First Commerce Securities in the mid-1980s when he and another man agreed to manage it after meeting with representatives of the Netherlands government. Mr. Nazerali testified that he realized after approximately a year that the financial records of the company were in a disastrous state and he rescinded the agreement to manage the company. First Commerce Securities eventually failed, and Mr. Nazerali was questioned by the Dutch police. No charges were laid against him.
- [41] In the 1990s, Mr. Nazerali acquired an interest in Imagis Technologies, a Canadian listed company which was endeavouring to develop facial recognition technology. Interest in the company increased after the terrorist attacks in September 2001, and Mr. Nazerali was approached by a man representing a Boston venture fund called Pembridge. In January 2002, Pembridge began giving strategic financial advice to Imagis. In March 2002, Pembridge wrote a letter to Imagis suggesting there was a compelling case for taking Imagis private at a price higher than its then listed price. Pembridge issued a news release about the letter, and the price of the Imagis shares "took a big jump". After the Pembridge representative ceased

to be a director of Imagis in October 2002, investigations were conducted by the British Columbia Securities Commission and the United States Securities and Exchange Commission. Imagis eventually merged with another company, and Mr. Nazerali ceased to be involved with the merged company.

- [42] Mr. Nazerali was cross-examined at length about his involvement in these two companies. The judge reviewed the cross-examination at paras. 91 through 105 of the trial decision. He analyzed the cross-examination in the context of the defence of justification at paras. 148 through 153 of the trial decision. The judge concluded that, although the questions may have painted an unflattering picture, Mr. Nazerali never accepted the premise underlying the questions that he was dishonest, and that there was no other evidence from which the judge could draw such a conclusion.
- [43] The appellants have not pointed to any error of law made by the judge or any palpable and overriding error in his findings of fact. They simply invite this Court to draw its own inferences. In the absence of the judge misapprehending the evidence or overlooking relevant evidence, he is entitled to deference, and this Court should not reweigh the evidence. I have reviewed the transcript references relied upon by the appellants in their factum, and they do not demonstrate the judge erred in his finding of fact that Mr. Nazerali did not admit the truth of any of the defamatory statements.
- [44] In addition, as was pointed out by the judge at para. 107 of the trial decision, Mr. Nazerali was not cross-examined on many of the statements contained in the Articles that were found to be defamatory. These included his dealings with the mafia, arms dealing, ties to terrorist groups, working with market manipulators and having a number of disreputable business partners. The defence of justification could not have succeeded in whole without any admissible evidence in relation to the truth of these defamatory statements.
- d) Malice
- [45] The trial judge found the appellants acted with malice in publishing the Articles. He made this finding in the context of holding that the defence of fair comment was not made out by the appellants (it was also a perquisite to the judge's award of aggravated damages). As with the defence of justification, the appellants contend the judge erred in law and made palpable and overriding errors in his findings of fact in respect of his determination they were actuated by express malice.
- [46] The appellants cite the following passage from *Smith v. Cross*, 2009 BCCA 529, with respect to a finding of malice:
- [34] In *Canadian Libel and Slander Actions* (Toronto: Irwin Law, 2004) at 299, R.D. McConchie and D.A. Potts reduce this statement [from Hill at para. 145] to a helpful framework for the categories under which a finding of malice can be made. A defendant is actuated by malice if he or she publishes the comment:

- i) Knowing it was false; or
- ii) With reckless indifference whether it is true or false; or
- iii) For the dominant purpose of injuring the plaintiff because of spite or animosity; or
- iv) For some other dominant purpose which is improper or indirect, or also, if the occasion is privileged, for a dominant purpose not related to the occasion.

More than one finding can be present in a given case (McConchie and Potts at 299).

[47] The trial judge (at paras. 130-131) quoted this passage, as well as a lengthy section from *Amalgamated Transit Union v. Independent Canadian Transit Union*, [1997] 5 W.W.R. 662, 49 Alta. L.R. (3d) 1 (Q.B.) at paras. 73 to 75. The appellants have not pointed to any error of law made by the judge in relying on these authorities, or otherwise.

[48] The appellants say the judge made palpable and overriding errors because he did not accept evidence given by Messrs. Mitchell and Byrne at their examinations for discovery which were read in at trial as part of Mr. Nazerali's case. Mr. Mitchell said on discovery that he had spoken to six or seven confidential sources about Mr. Nazerali and he was confident he had correct information. Mr. Byrne said on discovery that he was satisfied from his communications with Mr. Mitchell that a passage about Mr. Nazerali was true and Mr. Mitchell vouched for the material in the Articles about Mr. Nazerali.

[49] In finding express malice, the judge relied on the following:

[156] Malice is revealed by:

- i. the inflammatory language of the defamatory words;
- ii. these defendants' reckless indifference for the truth;
- iii. the threat to keep the plaintiff in "the story" if he did not agree to become a "quality source".
- iv. the motive of these defendants to inflict damage on the plaintiff;
- v. Mitchell's intention (not carried out) to promise to remove the plaintiff's name from the website if he became an informant but later, once the information was received, to renege on the promise;
- vi. the overt animosity, even hatred of the plaintiff, expressed by Mr. Byrne following his examination for discovery;
- vii. a reckless disregard for the reputation of non-parties.

[50] The judge was not bound to accept the explanations given by Messrs. Mitchell and Byrne at their examinations for discovery. The above list supports the finding of malice. The appellants have not demonstrated any palpable and overriding errors in the judge's finding of malice.

e) Mitigation of Damages

[51] There were two potential bodies of evidence that could be used to mitigate or lessen the amount of damages to which Mr. Nazerali was entitled as a result of the publication of the defamatory words. The first body consisted of the cross-examination of Mr. Nazerali. The second body consisted of books called *Contrepreneurs*, *False Profits and Révélation*, and four articles published in *Business in Vancouver*, *Stockwatch* and the *New York Post*.

[52] The reasons of the trial judge are not entirely clear as to the judge's determinations about these potential bodies of evidence. At para. 159 of the trial decision, he referred to the appellants' pleading that Mr. Nazerali had a generally bad reputation before the publication of the Articles. He noted that the author of *Contrepreneurs* had been on the appellant's witness list but was not called as a witness at trial. At para. 160, he quoted para. 131 of *Manno v. Henry*, 2008 BCSC 738, containing the propositions that plaintiffs in defamation cases are presumed to be of good general character and that defendants may introduce evidence of reputation at the time of publication (but not evidence of particular acts of misconduct). At para. 161, the judge stated the appellants had offered no evidence that Mr. Nazerali had a generally bad reputation.

[53] At paras. 162 to 164, the judge referred to the appellants' pleading that they relied in mitigation of damages on the facts set out in the paragraphs asserting their defence of justification "which are directly relevant background context which is relevant to the plaintiff's reputation". He then concluded this section of the trial decision with the following paragraph:

[165] In *Burstein v. Times Newspapers Ltd.*, [2000] E.W.C.A. Civ 338 at para. 28, the Court referred to the decision in *Scott v. Sampson* (1882), 8 QBD 491 as follows:

"As to the third head or evidence of facts and circumstances tending to show the disposition of the plaintiff, both principle and authority seem equally against its admission. At the most it tends to prove not that the plaintiff has not, but that he ought not, to have a good reputation, and to admit evidence of this kind is in effect as was said in *Jones v. Stevens* (11 Price, 235) to throw upon the plaintiff the difficulty of showing an uniform propriety of conduct during his whole life. It would give rise to interminable issues which would have but a very remote bearing on the question in dispute, which is to what extent the reputation which he actually possesses has been damaged by the defamatory matter complained of."

It is not clear what conclusion the judge drew from this passage for the purposes of this case.

[54] The appellants say the judge misunderstood *Burstein*, the first case mentioned in the above passage, and the judge erred in failing to consider evidence of directly relevant background contextual matter bearing on Mr. Nazerali's reputation. A considerable amount of time at the hearing of this appeal was spent on *Burstein*.

- [55] In *Burstein*, the publication concerning the claimant was that he was "an aggressively self righteous, rather slushy composer who used to organise bands of hecklers to go about wrecking performances of modern atonal music, particularly anything by Sir Harrison Birtwhistle". The defendant had pleaded the defence of fair comment, but the plea was struck by the judge at the beginning of the trial. The judge then ruled that none of the facts relied upon for the defence of fair comment were admissible in reduction of the claimant's damages.
- [56] The trial judge's ruling in *Burstein* appeared to be consistent with the other decision mentioned in the passage quoted above, *Scott v. Sampson*. In the appeal of the ruling of the trial judge, Lord Justice May discussed *Scott v. Sampson* at some length. He also discussed the decision in *Plato Films Limited v. Speidel*, [1961] A.C. 1090 (H.L.), in which the House of Lords held that *Scott v. Sampson* was correctly decided.
- [57] In *Burstein*, before he began his discussion of *Scott v. Sampson*, May L.J. referred at para. 21 to the following passage from *Pamplin v. Express Newspapers Limited*, [1988] 1 W.L.R. 116 at 120A for one of the types of evidence that is admissible in mitigation of damages:

But a defendant is also entitled to rely in mitigation of damages on any other evidence which is properly before the court and jury. This other evidence can include evidence which has been primarily directed to, for example, a plea of justification or fair comment.

At para. 22, May L.J. referred to the fact that this can lead to unsatisfactory tactical manoeuvring in the sense that defendants may want to rely on a weak case of justification so that they can nevertheless use the facts pleaded in support of that defence to reduce damages.

- [58] In discussing *Scott v. Sampson*, May L.J. explained at para. 28 that there were three categories of evidence in issue in that case, the third being "particular facts tending to show the character and disposition of the plaintiff that did not specifically relate to the defamatory publication". Later in para. 28, May L.J. quoted the paragraph which the trial judge in this case reproduced at para. 165 of the trial decision dealing with this third category of evidence.
- [59] Lord Justice May then discussed the various opinions in *Plato Films* and concluded this discussion as follows:
- [35] I have quoted at length from the speeches in *Plato Films v. Speidel* to show that a main concern was to prevent libel trials from becoming roving inquiries into the plaintiff's reputation, character or disposition; that what was held to be inadmissible was particular facts said to be relevant to the plaintiff's general reputation or disposition; and that the case does not decide that particular facts directly relevant to the context in which a defamatory publication came to be made are inadmissible.

- [60] After setting out evidence which he considered to be evidence of the background context to the defamatory publication in the case before the Court, May L.J. expressed his conclusion this way:
- [42] In my view, permitting the defendants to rely on the directly relevant background context in the way in which I have described would not offend anything said in *Scott v. Sampson* or *Plato Films v. Speidel*. the evidence which *Scott v. Sampson* excludes is particular evidence of general reputation, character or disposition which is not directly connected with the subject matter of the defamatory publication. It does not exclude evidence of directly relevant background context. To the extent that evidence of this kind may also be characterized as evidence of the claimant's reputation, it is admissible because it is directly relevant to the damage which he claims has been caused by the defamatory publication.
- [61] Thus, May L.J. held that the exclusion of the particulars on which the defendants want to rely in reduction of damages was, in part, wrong. The appeal was dismissed, however, because the Court was not satisfied that the improperly excluded evidence would have resulted in a reduction of the award of damages.
- [62] I have summarized *Burstein* in some detail because the appellants have relied heavily upon it, calling it one of the pillars of the appeal. However, I agree with Mr. Nazerali that the ratio of *Burstein* has no application to the case at bar. The facts the appellants relied upon in mitigation of damages were not "evidence of directly relevant background context", which *Burstein* held was admissible. The facts which the appellants pleaded in respect of mitigation of damages were facts demonstrating that the defamatory statements were true, not evidence of background context.
- [63] The irony of this discussion concerning *Burstein* is that evidence of the facts upon which the appellants pleaded in respect of mitigation of damages was admissible without the need to rely on *Burstein*. That is because, as set out in the passage from *Pamplin* quoted in *Burstein* (reproduced above), evidence that is before the court on a defence of justification is admissible in mitigation of damages even if the defence fails.
- [64] I am comforted in my interpretation of *Burstein* by the following discussion in *Gatley on Libel and Slander*, 11th ed. (London: Sweet & Maxwell, 2008) at para. 29.26 with respect to the permissible pleadings and evidence in support of mitigation of damages:

A defendant may also plead in mitigation of damages the claimant's general bad reputation. The defendant may at trial rely in mitigation of damages on any evidence properly before the court, including evidence which has been primarily directed to an unsuccessful plea of justification or fair comment. A defendant may also plead in mitigation of damages "directly relevant background context" material.

[Footnotes omitted.]

Pamplin is cited as authority for the second sentence and Burstein is cited as authority for the third sentence. Also see a more detailed discussion of evidence in mitigation of damages in *Gatley on Libel and Slander*, 12th ed. (London: Sweet & Maxwell, 2013) at pp. 1288 to 1300.

- [65] Hence, the appellants were entitled to rely on evidence called to support their defence of justification to mitigate damages even though the defence did not succeed. The obstacle facing the appellants, however, was the fact that they did not call any evidence to prove the truth of the defamatory statements. Instead, they relied on their cross-examination of Mr. Nazerali, and the trial judge found Mr. Nazerali did not concede the truth of any of the defamatory statements or accept the premise of the questioning that he was a dishonest businessman. The result is that while evidence of the facts going to the issue of the truth of the defamatory statements was admissible to mitigate the damages, the appellants did not prove any of those facts.
- [66] The appellants submit that the directly relevant contextual background facts include the facts contained in the books and articles referred to above. While those books and articles may potentially be evidence of Mr. Nazerali's general reputation, the statements of the facts asserted in them constitute hearsay, and the books and articles are not admissible evidence of the truth of those facts.
- [67] What I believe has given rise to confusion on this issue is the fact that the appellants have conflated "evidence of directly relevant background context" (Burstein) and "evidence which is properly before the court [including] evidence which has been primarily directed to a plea of justification" (Pamplin) in an attempt to have the facts asserted in the books and articles about Mr. Nazerali admitted as evidence going to the issue of mitigation of damages. Just as those facts are inadmissible hearsay on the issue of justification, they are inadmissible hearsay on the issue of mitigation.
- [68] The other evidence potentially admissible in mitigation of damages was evidence of Mr. Nazerali's generally bad reputation (11th ed. of *Gatley on Libel and Slander* quoted above). However, as noted in the excerpt from *Manno v. Henry* quoted by the trial judge, evidence of particular acts of misconduct are not admissible in this respect (also see para. 29.26 of the 11th ed. of *Gatley*, citing Pamplin, and para. 33.32 of the 12th ed. of *Gatley*, citing *Plato Films*).
- [69] I mentioned above that the books and articles upon which the appellants seek to rely may be admissible as evidence of Mr. Nazerali's general reputation. I need not decide the point because they do not speak of his general reputation. Rather, they contain assertions of particular acts of misconduct, which generally are not admissible. That is why the trial judge stated at para. 161 that there was no evidence to prove that Mr. Nazerali had a generally bad reputation prior to the publication of the Articles. In my view, he did not err in this regard.
- [70] It is not known what was in the mind of the trial judge when he quoted the passage from *Scott v. Sampson* because he did not make any comments after quoting the passage. He may not have fully appreciated that Burstein qualified or clarified the statements in the passage

by holding that "evidence of directly relevant background context" was admissible on the issue of mitigation of damages. In any event, for the reasons I have explained, there was no admissible and proven evidence that mitigated the damages occasioned by the publication of the defamatory words about Mr. Nazerali contained in the Articles.

f) Assessment of Damages

i) General Principles

- [71] The leading authority on the assessment of damages in defamation cases is *Hill*, in which the Supreme Court of Canada upheld a jury's awards of \$300,000 for general damages, \$500,000 for aggravated damages and \$800,000 for punitive damages. The defamatory comments were made about a Crown attorney, asserting that he had misled a judge and breached sealing orders. Justice Cory, for the majority, agreed with the Ontario Court of Appeal's characterization of that case being in a "class by itself" (para. 187), stating that "the circumstances presented in this exceptional case demonstrate insidious, pernicious and persistent malice" (para. 203).
- [72] In discussing general damages at para. 182, Cory J. quoted with approval an extract from *Gatley on Libel and Slander*, 8th ed. (London: Sweet & Maxwell, 1981), in which it was stated that the assessment of damages will be governed by all the circumstances of the particular case and that the factors to be considered include "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.'"
- [73] Justice Cory stated that "[a]ggravated damages may be awarded in circumstances where the defendants' conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous statement" (para. 188). They "take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct" and "they are compensatory in nature" (para. 189). There must be "a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff" (para. 190). Some of the factors to be considered in assessing aggravated damages are "whether there was a repetition of the libel", "a prolonged and hostile cross-examination of the plaintiff or a plea of justification which the defendant knew was bound to fail" and conduct of the defendant in publishing the libel that was "aimed at obtaining the widest possible publicity in circumstances that were the most adverse possible to the plaintiff" (para. 191).
- [74] Justice Cory explained at para. 196 that punitive damages may be awarded "where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency". Their aim is "to punish the defendant" and they are "in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner". They should only be awarded "where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence".

[75] Although Hill is, of course, binding authority, it is not free from criticism. In Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States, 2d ed., vol. 6 (Toronto: Carswell, 1999) (loose-leaf updated 2016, release 3), the author expressed his disagreement with having separate awards for general and aggravated damages. He explained (c. 25.3(1.1)):

Almost every criteria identified by the court in justification of the separate award of aggravated damages are precisely the same criteria identified by courts generally as the basis upon which a jury may make an award of general compensatory damages. In fact, in reviewing these criteria and upholding the \$300,000 award of general damages, the court listed in Hill almost precisely the same factors that led it to approve the award of aggravated damages. This overlapping of factors necessarily will occur where aggravated damages are recognized as just another aspect of compensatory damages. In addition, by emphasizing the necessity of malicious conduct on the part of the defendant as an essential basis for an award of aggravated damages, there is a considerable overlap with punitive damages which also require evidence of malicious conduct. There is not only a risk of double counting, but there is in fact double counting where separate awards of compensatory, aggravated and punitive damages are made.

[Footnotes omitted.]

[76] Similar concerns about double counting have been expressed by this Court in a decision pre-dating Hill, Brown v. Cole (1998), [1999] 7 W.W.R. 703, 61 B.C.L.R. (3d) 1 (C.A.). At para. 93, Justice Southin quoted from Gatley on Libel and Slander, 9th ed. (London: Sweet & Maxwell, 1998), which pointed out that aggravated damages have an inbuilt punitive element while punitive (exemplary) damages are overtly punitive. She then observed at para. 98 that there was confusion between general and aggravated damages. Justice Southin concluded at para. 100 that, while it was not an error of law to break compensatory damages into general and aggravated damages, it would be an error of law to make awards of general and aggravated damages that included double counting.

ii) Standard of Review

[77] General and aggravated damages in defamation cases are compensatory damages determined at large, and the standard of review of awards by appellate courts is the same standard used in respect of non-pecuniary damages in personal injury cases. An appellate court will interfere with a damage award made by a judge only if it is "inordinately high", or a "wholly erroneous estimate of the damage suffered" (a damage award made by a jury is subject to a higher standard requiring it to be "wholly out of proportion", "wholly disproportionate" or "grossly out of proportion"): see Southam Inc. v. Chelekis, 2000 BCCA 112 at para. 27; Moskaleva v. Laurie, 2009 BCCA 260 at para. 127; and Hill at para. 159.

[78] Appellate courts have greater discretion in respect of punitive damages in defamation cases. The court must ask itself whether the misconduct of the defendant was so outrageous that punitive damages were rationally required to act as punishment or a deterrent: see Hill at para. 196.

iii) General Damages

[79] In determining the quantum of general damages, the trial judge referred to awards made in a number of cases: Chelekis (\$250,000); Ager v. Canjex Publishing d.b.a. Canada Stockwatch, 2005 BCCA 467 (\$200,000); WeGo Kayaking Ltd. v. Sewid, 2007 BCSC 49 (\$250,000); and Griffin v. Sullivan, 2008 BCSC 827 (\$100,000). He believed that the sustained attack by the appellants on Mr. Nazerali's reputation and the changing value of money since the awards in those cases led to an award of \$400,000.

[80] I have also reviewed a number of other awards of general damages in defamation cases over the past twenty years: Hodgson v. Canadian Newspapers Co. (2000), 189 D.L.R. (4th) 241 (Ont. C.A.) (\$400,000 general and aggravated damages); Leenen v. Canadian Broadcasting Corp. (2001), 54 O.R. (3d) 612 (C.A.) (\$400,000 general damages); Myers v. Canadian Broadcasting Corporation (2001), 54 O.R. (3d) 626 (C.A.) (\$200,000 general damages); Reichmann v. Berlin (2002), 115 A.C.W.S. (3d) 343 (Ont. Sup. Ct. J.) (\$200,000 general damages); Fiola v. LeBrun, 2002 MBQB 312 (\$250,000 general damages); 122164 Canada Ltd. v. C.M. Takacs Holdings Corp., 2012 ONSC 6338 (\$425,000 general and aggravated damages); and Rutman v. Rabinowitz, 2016 ONSC 5864 (\$200,000 general damages).

[81] The appellants say that the judge applied wrong principles of law in assessing general damages by failing to take into account the mode and extent of publication, republication, the conduct and standing of the plaintiff and the identity of the accuser. In the alternative, the appellants say the award was inordinately high.

[82] Although the judge did not discuss these factors when assessing general damages, I am satisfied that he was aware of them and took them into account when determining the appropriate amount of damages. In the absence of an extricable error, I am unable to conclude that the judge took the incorrect approach.

[83] The appellants cite a number of authorities with lower awards of general damages and say that an appropriate award in this case was \$75,000. While it is true that lower awards have been made, the authorities mentioned by the judge and the additional authorities to which I have referred demonstrate that, while the award of \$400,000 was on the high side, it cannot be said to be inordinately high. I would not interfere with the award.

iv) Aggravated Damages

[84] In assessing aggravated damages, the trial judge referred to the sentence from para. 188 of Hill which I have quoted above ("[a]ggravated damages may be awarded in circumstances where the defendants' conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous statement"). He

then reproduced a portion of Mr. Nazerali's evidence in which he referred to the defamation as the "cruellest form of torture" and said that he had been "in considerable pain" since the publication of the Articles because he has been constantly asked about the allegations at social functions. He also said his health had been disturbed and he frequently had to take sleep medications. The judge then stated that an award of \$500,000 for aggravated damages was upheld in Hill, and he awarded the same sum to Mr. Nazerali.

[85] In my opinion, this award is inordinately high. Hill was the only authority referred to by the judge, but it was a jury award subject to the more stringent standard of review requiring the amount to be "wholly out of proportion", "wholly disproportionate" or "grossly out of proportion" before an appellate court will interfere. In addition, Hill is distinguishable in the sense that the award of aggravated damages was upheld solely on the basis of the defendant's misconduct, including events which took place after the trial (see paras. 192 to 195).

[86] It seems to me that an award of aggravated damages in an amount higher than the award of general damages should be reserved for cases explicitly found to be extraordinary, like Hill. In general, one would expect the amount of aggravated damages to be less than the amount of general damages. This is borne out by the awards of aggravated damages in the authorities referred to by the trial judge and the additional authorities to which I have referred. Following is a list of the cases where separate awards for general damages and aggravated damages were made against the defendant/multiple defendants:

Case

General Damages

Aggravated Damages

Chelekis

\$250,000

\$100,000

Ager

\$200,000

\$100,000

Griffin

\$100,000

\$50,000

Leenen

\$400,000

\$150,000/\$100,000/\$50,000/\$50,000

Myers

\$200,000

\$150,000

Reichmann

\$200,000

\$50,000/\$50,000

Fiola

\$250,000

\$100,000

Rutman

\$200,000

\$200,000

[87] The only explanation given by the judge for awarding \$500,000 for aggravated damages was that it was the amount awarded in Hill. It may be that there was double counting by the judge of the nature discussed in Brown on Defamation and Brown v. Cole. For example, it may be that the judge gave such a high award in order to punish the appellants for their high-handed conduct, but this objective was accomplished by the award of punitive damages. However, I need not decide whether there was double counting, and it is sufficient for me to conclude that the award is inordinately high.

[88] There can be no doubt that Mr. Nazerali is entitled to an award of aggravated damages. The judge was of the view that the appellants' conduct was high-handed and that it increased Mr. Nazerali's humiliation and anxiety. However, the aggravation was not of an extreme nature where, for example, it led to the hospitalization of the plaintiff. It must also be borne in mind that Mr. Nazerali would have suffered some humiliation and anxiety from the publication of the defamatory words even if the appellants' conduct was not high-handed. I am of the view that an appropriate award for Mr. Nazerali's increased humiliation and anxiety resulting from the high-handed conduct was \$200,000.

v) Punitive Damages

- [89] Punitive damages may be awarded when the defendant's misconduct is so malicious and high-handed that it offends the court's sense of decency. They are not compensatory, but in the nature of a fine which is meant to deter the defendant and others from engaging in similar conduct: Hill at para. 196.
- [90] In the present case, the trial judge addressed punitive damages in one paragraph, saying:
- [192] Punitive damages are justified in this case. They are meant to punish, not to compensate, and should be awarded only in those circumstances where a combined award of general and aggravated damages will not be sufficient to achieve the goal of punishment and deterrence. The tortious misconduct of Mitchell, Byrne and Deep Capture LLC demonstrates an indecent and pitiless desire to wound. There will be the award of \$250,000 in punitive damages.
- [91] The judge correctly identified punishment and deterrence as the justification for an award of punitive damages. He also recognized that punitive damages should be awarded only when the sum of general and aggravated damages is not sufficient to achieve those objectives. The judge addressed the punitive basis for the award, referring to the defendants' "indecent and pitiless desire to wound". But he did not discuss why the combined general and aggravated damages were not sufficient to achieve those objectives.
- [92] An award of punitive damages in addition to a large award of compensatory and aggravated damages may be justified when a defendant is a person of significant means. In Hill, Cory J. observed:
- [199] Punitive damages can and do serve a useful purpose. But for them, it would be all too easy for the large, wealthy and powerful to persist in libelling vulnerable victims. Awards of general and aggravated damages alone might simply be regarded as a licence fee for continuing a character assassination. The protection of a person's reputation arising from the publication of false and injurious statements must be effective. The most effective means of protection will be supplied by the knowledge that fines in the form of punitive damages may be awarded in cases where the defendant's conduct is truly outrageous.
- [Emphasis added.]
- [93] It follows in my view that in determining the appropriate quantum of punitive damages, it will be appropriate for the judge to take into account the resources of the defendant, and the anticipated impact of the awards already made for compensatory damages. That approach has been adopted in a number of cases: Elgert v. Home Hardware Stores Limited, 2011 ABCA 112, leave to appeal ref'd [2011] S.C.C.A. No. 294; Rookes v. Barnard, [1964] 1 All E.R. 367 (H.L.); 735619 Ontario Ltd. v. Stone (1989), 36 C.P.C. (2d) 313 (Ont. Master); Matusiak v. British Columbia and Yukon Territory Building and Construction Trades Council (1999), 22 B.C.T.C. 193 (S.C.); and Fung v. Lu (1997), 9 C.P.C. (4th) 81 (B.C.S.C.).

- [94] The Alberta Court of Appeal in *Elgert* emphasized the importance of proportionality in determining the quantum of punitive damages. It reviewed the six dimensions of proportionality articulated at paras. 111-126 of *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, one of which requires the quantum of punitive damages be proportionate to the need for deterrence. In that respect, the court in *Elgert* noted at para. 82 that a defendant's financial power may become relevant if the defendant raises the issue of financial hardship or "where it may rationally be concluded that a lesser award against a moneyed defendant would fail to achieve deterrence".
- [95] In the present case, it appears that no evidence was led relating to the means of the appellants. I note, however, that the appellants did not suggest, either at trial or in the hearing before us, that the award of punitive damages was disproportionate to their financial resources. Rather, they simply submitted that punitive damages served no rational purpose given the magnitude of the other damage awards.
- [96] The judge reviewed at some length the egregious nature of the defendants' conduct both before and during the legal proceedings. As noted in *Hill*, the conduct of the defendants during and even after trial may support the need for a significant total award if deterrence is to be effective. The Court upheld a jury award of \$800,000 in punitive damages in addition to general and aggravated damages of \$800,000 because the defendants demonstrated a persistent and flagrant willingness to continue defaming the plaintiff even after they knew their allegations were not true:
- [201] There might have been some concern that, in light of the award of general and aggravated damages totalling \$800,000, there might not be a rational basis for punitive damages. However any lingering doubt on that score is resolved when Scientology's persistent misconduct subsequent to the trial is considered. On the very next day following the verdict, Scientology republished the libel in a press release delivered to the media. It then brought a motion to adduce fresh evidence which it stated would have a bearing "on the credibility and reputation of the plaintiff S. Casey Hill" which, if presented at trial, "would probably have changed the result". Its actions were such that Hill was forced to bring an application for an injunction enjoining Scientology from republishing the libel. In his reasons for granting the injunction, Carruthers J. stated that he was forced to take that action because "no amount awarded on account of punitive damages would have prevented or will prevent the Church of Scientology from publishing defamatory statements about the plaintiff". Even the injunction did not deter Scientology which moved to set it aside. Further, in its notice of appeal of the libel judgment, Scientology alleged that the trial judge had erred in ruling the decision of Cromarty J. in the contempt proceedings was res judicata of the issues raised in the libel trial.

[202] During the appeal, it was conceded and the evidence and events confirmed that in all likelihood, no amount of general or aggravated damages would have deterred Scientology. Clearly then, this was an appropriate case for an award of punitive damages. Scientology did not withdraw its plea of justification until the first day of the oral argument in the Court of Appeal. Nor was any apology tendered by Scientology until the fifth day of oral argument before the Court of Appeal.

[Emphasis added.]

[97] The defendants in the present case were invited to withdraw their plea of justification at the trial, after they had called no evidence to support the plea, but declined to do so. In addition, in their factum, the appellants repeated their claim of "the substantial truth" of some of the defamatory statements. Although the defendants complied with an ex parte interlocutory injunction in effect between October 19 and December 13, 2011, they subsequently published a number of taunting and inflammatory statements as the proceedings progressed.

[98] In light of the conduct of the defendants taken as a whole, it cannot be said that the judge erred in making a significant compensatory award. There is, however, some force to the argument that the original awards of general and aggravated damages totalling \$900,000 would have sufficed to deter and punish the defendants without the need for a further award of punitive damages. In *Hodgson*, where special damages of \$380,000 and general and aggravated damages of \$400,000 were awarded, the Ontario Court of Appeal set aside a \$100,000 award for punitive damages on the basis that they were not required to achieve the goal of punishment and deterrence in view of the aggregate award of \$780,000 in other damages. The same could be said in respect of an aggregate award for general and aggravated damages in the amount of \$900,000.

[99] However, as I have explained above, the \$500,000 award of aggravated damages made by the judge was inordinately high, and it is my view that an appropriate award would have been \$200,000. That will make the aggregate amount of general and aggravated damages the sum of \$600,000. Although I may have been prepared to interfere with the award of punitive damages on top of a \$900,000 award, I am not inclined to disagree with the judge that an award of punitive damages was necessary to achieve the goals of punishment and deterrence when the total of other damages is \$600,000.

vi) Special Damages

[100] The judge's award of \$55,000 for special damages related to the cost incurred by Mr. Nazerali to retain a search engine optimization firm for the purpose of mitigating his losses. The judge found it was appropriate for Mr. Nazerali to have done this and was satisfied the cost was reasonable.

[101] The appellants say that although Mr. Nazerali pleaded that he suffered financial damages, the pleading stated that the particulars of them would be provided prior to trial, and no particulars were provided before the trial. They also say no documentary proof of these damages was introduced at the trial.

[102] In my view, there is no merit in these submissions. There was a proper pleading for special damages, and it was open to the judge to receive evidence of the damages even though particulars were not provided until trial. While the judge could have required documentary proof of the damages, he was entitled to accept the testimony of Mr. Nazerali as satisfactory evidence of the damages.

g) The Injunction

[103] The judge granted a permanent injunction with respect to the appellants in the same terms as the interim injunction dated October 19, 2011; namely, that the appellants be "permanently enjoined from publishing on the Internet or elsewhere any defamatory words concerning the Plaintiff".

[104] The appellants say there was no evidence justifying a world-wide injunction and, if an injunction is granted, it should not interfere with their freedom of expression in the United States.

[105] In my view, the factors relied upon by the judge justified the granting of a permanent injunction, but I do have concerns about the breadth of the injunction, both in terms of the conduct it enjoins and its application outside Canada. These aspects were not fully argued before us, with the result that the precedential weight of these reasons should be treated with some caution.

[106] The decision in the present case was issued prior to *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, which upheld an interlocutory injunction requiring Google to de-index all of the defendant's websites. The majority of the Supreme Court of Canada agreed that the Supreme Court of British Columbia had in personam jurisdiction over Google and could make an order with extraterritorial effect.

[107] Google had argued that a global injunction violated international comity because the injunction could require it to violate the laws of another jurisdiction, including interfering with freedom of expression. The majority dealt with this argument by pointing out that Google was at liberty to apply to vary the interlocutory order.

[108] In the present case, the trial judge had in personam jurisdiction over the appellants because they attorned to the jurisdiction of the Supreme Court of British Columbia. However, in order to respect international comity, the injunction should have given the appellants liberty to apply to vary it as circumstances may require. As the injunction is permanent in nature, it may not be possible for the court to vary it unless liberty to apply is expressly given.

[109] It is also my view that the scope of the injunction was overly broad because it was prospective in nature. It enjoined not only the publication of the defamatory statements contained in the Articles, but any defamatory words concerning Mr. Nazerali, and this could include words that have not yet been published. The injunction should have been limited to the words that were found by the judge to be defamatory because it should not expose the appellants to potential contempt proceedings in respect of words that have not yet been published.

h) Special Costs

[110] The appellants submitted to the trial judge, as they also submit to this Court, that special costs should not be awarded to Mr. Nazerali because they would constitute double compensation in view of the awards of aggravated and punitive damages in his favour. They relied in this regard on the following passage from *Panghali v. Panghali*, 2014 BCSC 647:

[100] The plaintiff is correct to say that special costs are awarded where there has been reprehensible conduct on the part of one of the parties. Reprehensible conduct includes "scandalous or outrageous conduct [and] milder forms of misconduct deserving of reproof or rebuke" (*Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 at para. 17 (B.C.C.A.)).

[101] The purpose of special costs is to chastise or punish a litigant, and to allow the court to disassociate itself from the litigant's misconduct: *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at paras. 8, 10.

[102] Generally speaking, special costs are only available for misconduct in the course of the litigation itself. However, in exceptional circumstances, special costs can be awarded where pre-litigation conduct warrants rebuke: *Dockside Brewing Co. Ltd. v. Strata Plan LMS 3837*, 2007 BCCA 183 at para. 90. To attract an award of special costs, the pre-litigation conduct must give rise to a compensable legal wrong: *Evergreen Building Ltd. v. IBI Leaseholds Ltd.*, 2009 BCCA 275 at para. 33.

* * *

[106] In most cases, reprehensible conduct giving rise to the cause of action can be addressed by an award of punitive damages, rather than special costs: *D.H. v. L.J.H.*, [1997] B.C.J. No. 2724 at para. 26 (S.C.). Where the plaintiff receives punitive damages, the fruits of the litigation clearly provide compensation for the reprehensible conduct, and special costs should not be awarded. Awarding both for the same conduct would comprise double compensation: *McPhillips v. British Columbia Ferry Corp.* (1993), 16 C.P.C. (3d) 284 at para. 18 (B.C.S.C.). In a number of decisions the court has refused to award special costs on the basis that punitive damages have already fulfilled that function: see *P.B. v. R.V.E.*, 2008 BCSC 613 at para. 27; and *Manavi v. McDonald*, [1993] B.C.J. No. 463 (S.C.) at para. 23.

The appellants also relied on similar comments in *Home Equity Developments Inc. v. Crow*, 2005 BCSC 743 at paras. 38 to 41.

[111] In the costs decision, the trial judge found these decisions to be inapplicable because the proceeding had been unusual in the following respects which were intended to cause damage to Mr. Nazerali and to increase the cost to him of seeking the vindication of his reputation:

- (a) the appellants pleaded extensive and highly detailed allegations of serious misconduct by Mr. Nazerali, including conduct of a criminal nature, but they called no evidence at trial;
- (b) the appellants employed intimidation tactics such as pleading the untenable position that the notice of civil claim did not disclose a cause of action and was frivolous, vexatious or otherwise an abuse of process;
- (c) it was the judge's opinion that the appellants had no belief that they could prove the truth of the defamatory statements unless Mr. Nazerali admitted them in his lengthy cross-examination; and
- (d) the judge drew the inference that the appellants' reliance on the law of the United States was to lay the ground for resisting enforcement of a damage award against them in the United States.

[112] The judge accepted the above passage from *Panghali* would apply in the usual case, but was of the view that this case was far from usual because the conduct of the appellants compelled Mr. Nazerali to incur very substantial expense to seek vindication of his reputation, and the appellants were indifferent to the effect on Mr. Nazerali of their single-minded determination to cause him damage.

[113] The judge issued the costs decision prior to the decision of this Court in *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177, clarifying the law in this jurisdiction with respect to the granting of special costs. The Court held that a bright line should be drawn between pre-litigation conduct and conduct in the course of the proceedings. Special costs may be awarded only in respect of reprehensible conduct during the course of the proceedings.

[114] As a result, the concerns expressed in *Panghali* no longer apply. Reprehensible conduct giving rise to the cause of action can only be a basis for an award of punitive damages and cannot also be the basis for an award of special costs. An award of special costs does not represent double compensation.

[115] It is true that conduct during the course of the proceeding can be taken into account when assessing aggravated damages: see *Hill* at paras. 191 and 192. There may be a danger of double counting in some cases where special costs are also awarded. However, in the present case, the trial judge considered only Mr. Nazerali's increased humiliation and anxiety from the publication of the defamatory statements when he assessed the aggravated damages, and he did not rely on the appellants' conduct during the proceeding. Nor did I

rely on that conduct when re-assessing the appropriate amount of aggravated damages.

[116] The conduct of the appellants relied upon by the judge in awarding special costs was all conduct that occurred during the course of the proceeding. I cannot say he was wrong in considering it to be reprehensible conduct worthy of rebuke in the form of an award of special costs.

Conclusion

[117] I would allow the appeal to the following limited extent:

- (a) by reducing the award for aggravated damages from \$500,000 to \$200,000; and
- (b) by varying the permanent injunction to enjoin the appellants from "publishing on the Internet or elsewhere the defamatory words described in paragraph 3 of the Reasons for Judgment herein, issued May 6, 2016" and by giving the appellants leave to apply to vary the injunction as circumstances may require.

[118] I would not accede to any of the other grounds of appeal. While the appellants have had some success on this appeal, they were unsuccessful on the issues that took up almost all of the time at the hearing of the appeal. In these circumstances, I would order that the parties bear their own costs of the appeal.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Madam Justice Fenlon"

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Prepared on 25 October 2026 · Esheria