CITATION: *Chopak v. Patrick*, 2020 ONSC 5431
COURT FILE NO.: 141/19
DATE: 2020-09-10

SUPERIOR COURT OF JUSTICE (DIVISIONAL COURT) – ONTARIO

RE: STACEY CHOPAK, Plaintiff (Respondent)

AND:

EDWARD PATRICK, Defendant (Appellant)

BEFORE: Schabas J.

COUNSEL: *Mark Donald*, counsel for the Plaintiff (Appellant)

Thomas D. Galligan, counsel for the Defendant (Appellant)

HEARD: July 30, 2020

REASONS ON APPEAL

Introduction

[1] This is an appeal, pursuant to s. 31 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, from the decision of a Deputy Judge of the Small Claims Court who awarded judgment to the plaintiff, Stacey Chopak ("Chopak"), in a defamation action she brought against Edward Patrick ("Patrick"). Chopak was awarded $25,000 in damages and costs of $3,750.

[2] For the reasons that follow, the appeal is allowed in part, and damages are reduced to $5,000. Costs of the trial must also be reduced to $1,000. As I discuss below, the trial judge made errors of law in his consideration of the law of defamation, particularly relating to the defence of fair comment and the existence of malice. He also made palpable and overriding factual errors and errors of mixed fact and law in his application of the law to the evidence.

Background

[3] On March 24, 2011, an article appeared in the Toronto Star titled "Toronto Press Club's future uncertain." It discussed the decline of the Toronto Press Club, a venerable Canadian institution which possessed "irreplaceable memorabilia and artwork… old books, valuable prints and original sketches by famous political cartoonists," as well as its "most treasured legacy," the Canadian News Hall of Fame. As the article stated: "Questions are swirling…How many people still belong? Who is collecting dues? Where is the historical memorabilia that once adorned the clubhouse walls? And what is

happening with the Canadian News Hall of Fame, which the press club founded but has been moribund since 2001?"

[4] The article quoted several people, including the plaintiff, Stacey Chopak, who raised questions about the status of the club, its leadership by the defendant, Edward Patrick, and its assets. These comments included the following:

> "It's been totally in disarray," says Stacey Chopak, a former member.
>
> "We've been in a complete state of limbo," says Michael Sunter, who isn't sure if he is a board member.
>
> "I don't know what the heck is going on," concludes past president and current board member Bill Somerville.
>
> Somerville says members have received scant information about the press club since 2007, when Ed Patrick, a retired copy editor, was elected president.

[5] Patrick was also quoted, saying the Club "has its affairs in order and there are simply 'people who want to stir things up.' He says Somerville is on a personal vendetta and has allied himself with the committee trying to wrest the [Canadian News Hall of Fame] away".

[6] Chopak was also quoted raising concerns about the status of valuable artwork:

> But others are far more concerned with the irreplaceable memorabilia and artwork that once adorned the press club, back when it had a home. ...
>
> Chopak remembers a William Kurelek painting that once hung on the press club's wall when it was at Commerce Court South. She claims the painting may be worth tens of thousands of dollars.
>
> "I asked (Patrick about it); he said, 'Oh, it's in public storage,'" Chopak says. "I said, 'Well, show us the invoices that you're paying storage costs for it.' We've never seen anything."

[7] Upset by Chopak's comment about the Kurelek painting, which he felt suggested he had stolen a valuable work of art, Patrick sued Chopak for libel in June 2011.

[8] Patrick had a long career in the newspaper industry, as a writer and editor. He retired in 1996. Patrick joined the Toronto Press Club in the 1960s and was first elected president in 1989. He was elected again in the early 2000s and continued to hold that position in 2011.

[9] Chopak had a career as a stockbroker dating back to the 1960s. In her claim she describes herself as "an unemployed woman… entering her eighth decade of life." She joined the

club in the 1980s and became the "social secretary" and "collected the fees for the luncheons."

[10] Patrick's libel suit settled at a Pre-trial conference conducted by Stinson J. on September 8, 2014. Chopak agreed to sign a Mutual Release (the "Release") and an apology, and agreed to "not make further defamatory remarks about Mr. Patrick." In the "Apology to Edward Patrick" signed on September 18, 2014, Chopak stated:

> I wish to apologize for the defamatory comments made by me to a reporter for the Toronto Star, published in an article in the Toronto Star, published online and in print (March 24/25, 2011). I mistakenly stated that a painting by William Kurelek belonged to the Toronto Press Club. Such was not the case. After further investigation I am satisfied that such a painting was never at any time in the possession of Mr. Patrick or the Toronto Press Club but in fact this painting was the property of the Ontario Club.
>
> I further wish to apologize unreservedly for the personal pain suffered by Mr. Patrick and his family and any damage caused to his good reputation, directly or indirectly, as a result of my statements.

[11] The Release provided, among other things, that the parties

> **HEREBY RELEASE AND FOREVER DISCHARGE EACH OTHER** from any and all actions, causes of actions, claims and demands for damages, loss or injury including but not limited to claims for libel, slander and maintenance, in any way arising out of this action, which heretofore may have been or may hereafter be sustained by them including all damage, loss and injury not now known or anticipated but which may arise in the future and all effects and consequences thereof.

[12] The Minutes of Settlement did not contain a confidentiality clause, as it was important to Patrick that he be able to inform people that Chopak had retracted her comment about the Kurelek painting. The Toronto Star article remained online.

[13] Patrick initially made a post on Twitter that read: "Celebrating winning an apology from Stacey Chopak in a libel action. Moral: Don't believe everything you read in the newspapers!"

[14] On April 15, 2015, some seven months after the settlement, Patrick posted an article, written by him, on the business social media platform Linked-In (the "Linked-In article"), which stated, in full:

> Ed Patrick wins retraction and apology in libel case
>
> Published on April 15, 2015

> TORONTO: Ed Patrick, long-time press club president and governor of the National Newspaper Awards, has won a full retraction and apology in a libel action that lasted almost four years. The case stemmed from comments made by former press club member Stacey Chopak, of Leaside, and reported in a Toronto Star article in March 2011.
>
> In a three-hour pretrial conference before Justice David Stinson, Chopak admitted she lied to Star reporter Jennifer Yang. Chopak signed a full apology to Mr. Patrick and agreed not to make defamatory statements about him in future.
>
> Patrick, a former copy editor with the Star, said: "This is just another example of why people shouldn't believe everything they read in the newspapers. It also shows how easy it is for people with an axe to grind to get the ear of a reporter and have harmful lies published in a reputable paper." He added: "Often an experienced senior editor smells a rat and kills the story. Sadly, that didn't happen in this case."
>
> Chopak said her phone interview with the Star reporter was arranged by press club past-president Bill Somerville. Called before the press club's board of directors, Somerville denied planting the story in the Star, but added "I know who did." He also stated that the story was "full of mistakes." His membership in the press club was immediately suspended.
>
> Patrick has been a member of the press club since 1968 and president for 10 of the past 25 years, the most often elected president in the history of the club. He is a founding member of the National Newspaper Awards board of governors and a key member of the Canadian News Hall of Fame committee.
>
> The Star article appeared shortly after the press club turned down an effort by a group of former and current newspaper journalists to take over the Canadian News Hall of Fame, founded by the press club in 1965. Three members of the group are current or former employees of the Toronto Star.

[15] Sometime in early 2016, Patrick published what is called a Press Release on the website of The International Order of the Companions of the Quaich (the "Quaich article"), titled "Ed Patrick Wins Libel Action," which has text identical to the Linked-In article.

[16] At trial, Patrick testified that he published these statements to let people know the article was wrong.

[17] It is not known how many people read either statement. The Linked-In article was read by at least eight people as a screenshot indicated that eight people either "liked" or commented on it. There is no information about how many people, if any, read the Quaich article. Patrick described the Quaich as a "social society" that he founded "for the purpose of socializing, having dinners, drinks, good social times with members."

[18] Chopak does not own a computer and was unaware of the Linked-In and Quaich articles until December 15, 2016, when her friend Richard MacFarlane brought them to her attention. This time it was Chopak's turn to complain. She retained a lawyer and demanded a retraction and apology. When this was not forthcoming, she sued Patrick for libel, issuing this action in Small Claims Court on March 3, 2017.

[19] Following the commencement of the action Patrick made two small changes to the Linked-In article, removing the reference to a retraction in the headline and, in the second paragraph, changing "admitted she lied" to "admitted she was mistaken". Patrick subsequently removed the articles from the internet since, he testified, "they served no further useful purposes. They had been online for the better part of two years. The people who were interested in it would have seen it by this time."

[20] At the trial held on December 5, 2018, Chopak and Patrick were the only witnesses. Chopak testified that at no time did she admit that she lied, and Patrick agreed that he never heard Chopak make such an admission, relying only on the apology in which Chopak admitted she was "mistaken."

[21] The trial judge gave oral reasons for judgment on February 19, 2019. He found that Chopak did not admit to lying and therefore Patrick's statement that she had done so was untrue. He also found that Patrick was not entitled to rely on the defence of fair comment as, among other things, the judge concluded that Patrick's actions were "founded in malice and ill will and spite." The trial judge awarded Chopak the maximum amount allowable in Small Claims Court, $25,000. He also awarded the maximum permitted for costs under s. 29 of the *Courts of Justice Act* which, absent a finding that it is necessary to penalize a party for their conduct in the proceeding, is limited to 15% of the amount claimed, $3,750.

Issues

[22] The appeal raises the following issues:

(a) Is the action barred by the Release?

(b) Did the trial judge err in finding that the defence of justification did not apply?

(c) Did the trial judge err in finding that the defence of fair comment did not apply?

(d) Were the damages excessive?

The standard of review

[23] As this is an appeal from a trial, I must apply the appropriate standard of review when considering the trial judge's decision. It is well-established that where the issue raises a pure question of law, the standard of review is correctness. Where the issue raises a question of fact, or of mixed fact and law, I must show deference to the trial judge unless

he or she has committed a "palpable and overriding error." Such an error must be "clear to the mind or plain to see…so obvious that it can be easily seen or known…readily or plainly seen." The error must also be "overriding," meaning that it is sufficiently significant to vitiate the challenged finding: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 5; *Allcock v. Larsen*, 2013 ONSC 2591 (Ont. Div. Ct.) at para. 20.

[24] As I will address below, both standards of review arise in this case.

The Release does not bar the action

[25] The appellant submits that the trial never should have taken place as the action was barred by the Mutual Release signed by the parties in 2014. It is argued that Chopak is simply relitigating something she agreed she could not do when she signed the Release. The trial judge rejected this argument, holding that "the mutual full and final release signed at the settlement conference or shortly thereafter, does not prohibit or prevent the Plaintiff's action. The case brought here by Ms. Chopak, deals with a fresh cause of action."

[26] The parties disagree over whether the interpretation of a release using standard language raises a question of law that is reviewed on a standard of correctness, or is a question that requires me to show deference and apply the standard of "palpable and overriding error." It is not necessary for me to resolve this issue, as I agree with the trial judge's reasons on the effect of the Release.

[27] The appellant's submission that the Release "wipes the slate clean" even for future causes of action is not supported by the language of the Release. The language of this Release, which is very common, releases the parties from claims "in any way arising out of this action," which refers to the action Patrick brought against Chopak for words she uttered to a Toronto Star reporter (emphasis added). Further, the reference to claims "which heretofore may have been or may hereafter be sustained by them including all damage, loss and injury not now known or anticipated but which may arise in the future and all effects and consequences thereof," addresses claims for damage, loss or injury arising from what Patrick sued over in 2011; it does not include new and separate causes of action that may arise in the future.

[28] While it may be possible for parties to release one another for wrongful acts that they may commit in the future, very clear language must be used to evidence such an intention. As the House of Lords observed in *Bank of Credit and Commerce International SA v. Munawar Ali*, [2001] UKHL 8; [2001] 1 All E.R. 961, at para. 8, cited with approval by the Ontario Court of Appeal in *Biancaniello v. DMCT LLP*, 2017 ONCA 386, 138 O.R. (3d) 210, in interpreting a release "the object of the court is to give effect to what the contracting parties intended." To do so, as Feldman J.A. stated at para. 28 of *Biancaniello*, "[t]he court does not inquire into the parties' subjective states of mind, but makes an objective assessment based on the contract as a whole, the impugned words in

their ordinary meaning and in the context of the agreement, the parties' relationship, and all relevant facts surrounding the transaction so far as known to the parties."

[29] In my view, the Release is intended to be limited to any claims either party could make, whether then known or not, arising from the issues raised in the lawsuit Patrick brought against Chopak. It contains no language addressing separate, new and unanticipated future wrongful acts.

[30] Further, while Patrick asserts that he was entitled to comment on the outcome of the case, including publishing Chopak's apology, in order to rehabilitate his reputation, and that this was clearly contemplated by the parties when the settlement was reached and the Release was signed, the settlement and Release did not give Patrick a license to defame Chopak. In short, this lawsuit by Chopak arises from Patrick's statements made in 2015 and 2016, not the statements made by Chopak in 2011 that were the subject of the action settled in 2014. The Release has no application.

The trial judge's findings on defamatory meanings and the defences of justification and fair comment

[31] The trial judge focused on three statements which he found were defamatory of Chopak, contained in the second and third paragraphs of the Linked-In article. He stated:

> I find that the contents of the articles as published mention the plaintiff, Ms. Chopak, by name and by implication. Amongst other things, the plaintiff Chopak is referred to as:
>
> 1) A liar. Meaning dishonest and untruthful.
>
> 2) That Ms. Chopak had an axe to grind. Meaning that she bore a personal grievance against the defendant, Patrick, and was seeking retribution in speaking to The Star.
>
> 3) That Ms. Chopak was a rat, or someone who would engage in trickery or deceit.

[32] As I will address below, the trial judge appears to have put the worst possible meaning on some of the words, and treated them all as statements of fact. He then turned to the defences.

[33] The trial judge's analysis and application of the defence of justification was as follows:

> As to the defence of truth. As I have found and accept the plaintiff's evidence that she did not admit to lying to The Star at the settlement conference. I find that the defendant fails this test of truth. I also state and find that the defendant's published statements refer to the plaintiff by implication, namely, that she had an axe to grind and that she was the rat. I reject the defendant's evidence that these

> words are about the newspaper industry and poor journalism standards and that Mr. Patrick maintains they are not about Ms. Chopak. I find Mr. Patrick's position totally untenable.
>
> Accordingly, I find these statements as well as the statements that the plaintiff is a liar are all defamatory. The defence of truth fails. I also state that where the evidence differs in this case, I accept the evidence of the plaintiff as being reliable and trustworthy and prefer her evidence to that of the defendant's.

[34] The trial judge addressed the defence of fair comment as follows:

> As to the defence of fair comment, the defendant must satisfy the following test:
>
> A) The comment must be on a matter of public interest. I find that these articles and the subject matter were of a private nature and they were not of public interest.
>
> B) The comment must be based on fact. I find that these articles by the defendant are not based on fact as set out above.
>
> C) The comment must be recognizable as comment. I find that the defendant was not making comment but rather the articles purpose was founded in malice and ill will and spite towards the plaintiff.
>
> D) The comment must satisfy the following objective tests. That is, could any person honestly express that opinion on the proved facts. The answer I find is no.
>
> E) Even if the comment satisfies the objective test, the defence is defeated because I find that the defendant acted and published the articles with malice. This defence of fair comment, accordingly falls.

Analysis

[35] There are a number of problems with the trial judge's approach and conclusions, which include errors of law on which a correctness standard applies, and findings that are unreasonable and amount to palpable and overriding errors.

The meaning of the words

[36] The meaning of words in a defamation case is to be determined by the trier of fact, who is to decide on the "natural and ordinary meaning" of the words, which is a "matter of impression." As Lord Reid stated long ago in *Lewis v. Daily Telegraph Ltd.*, [1964] A.C. 234, at 258-260, the judge or jury, as the case may be, asks simply "what the words would convey to the ordinary man," who "does not live in an ivory tower and … is not inhibited by a knowledge of the rules of construction." The "ordinary man" is "not avid for scandal," is neither "unusually suspicious" or "unusually naïve," and "one must try to

envisage people between these two extremes and see what is the most damaging meaning they would put on the words in question." (emphasis added) As Binnie J. put it in *WIC Radio v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 56, "[t]he Court is to avoid putting the worst possible meaning on the words."

[37] Applying this test, I agree with the trial judge that the words mean that Chopak is a liar, or dishonest and untruthful, and that she would be one of the people who Patrick suggests has an "axe to grind," which motivated her comments to the Star. However, I do not agree that the reference to smelling a "rat" means that Chopak "would engage in trickery or deceit." The word "rat" is used in the context of criticizing the newspaper for not checking its facts more carefully in the face of a serious allegation made by disgruntled members of the Press Club. It is simply going too far to find that saying an editor should have smelled a rat means that there was "trickery or deceit" by those quoted. In my view the words are not capable of that meaning, which is a question of law: *Lewis v. Daily Telegraph* at p. 286 per Lord Devlin. Alternatively, this finding of the worst possible meaning arising from the reference to "rat" constitutes a palpable and overriding error of mixed fact and law. Nevertheless, despite my conclusions on this issue, as I will discuss below, even applying the meaning given by the trial judge, the defence of fair comment applies to it.

[38] The trial judge also appears to have been influenced by evidence in considering the meaning of the defamatory words. He at no time referred to the test that I have discussed above, that the meaning is a matter of impression for him to decide; rather, he referred to and rejected as "totally untenable" the evidence of the meaning asserted by the defendant, "that these words are about the newspaper industry and poor journalism standards" and "not about Ms Chopak." This suggests an implicit acceptance of the plaintiff's evidence of what the words meant (e.g. Chopak's evidence that she did not consider herself to be a "rat" for speaking to the Star), which constitutes an error of law. Consistent with *Lewis v Daily Telegraph*, the meaning of words is not to be based on evidence of what the speaker intended or on what some interested people think the words mean, and no evidence is admissible to establish the meaning of the words: *Hodgson v. Canadian Newspapers Co.* (1998), 39 O.R. (3d) 235, 1998 CarswellOnt 2757 at p. 253 para. 46 (Ont. Gen. Div.), appeal allowed in part, on other grounds, (2000), 49 O.R. (3d) 161 (C.A.).

[39] Perhaps the trial judge fell into these errors by what appears to have been a basic misunderstanding of the tort of defamation. At two places in his reasons the trial judge refers to libel, incorrectly, as an "intentional tort." It is quite the opposite, as the tort is established simply by proof of publication: *Breeden v. Black*, 2012 SCC 19, [2012] 1 S.C.R. 666, at para. 20. While the intent of the speaker, as I will come to, may be relevant to the existence of an honest opinion and to malice, it is not to inform a finding of the meaning of the words.

Fact or comment?

[40] In rejecting both defences – justification and fair comment – the trial judge failed to turn his mind to whether the three defamatory passages are statements of fact to which the defence of justification would apply, or expressions of opinion that would give rise to the defence of fair comment. Rather, in considering justification, having concluded that Chopak did not admit to lying, the trial judge simply found all of the words to be untrue, without considering whether each of the defamatory statements are statements of fact. When addressing fair comment, where he acknowledged that he was obligated to consider whether the statements are "recognizable as comment," he failed to do so, simply stating that they are not comment as "the articles [sic] purpose was founded in malice."

[41] The trial judge's failure to determine whether the defamatory words are statements of fact or expressions of opinion is a prerequisite to applying the defences, and is an error of law. If the defamatory statement is a statement of fact capable of objective proof, then the defence of justification must be considered. On the other hand, if the defamatory sting conveys an expression of opinion then the defence of fair comment may apply: see Downard, *Law of Libel in Canada*, 4th ed. (LexisNexis Canada, 2018), at paras. 11.27-11.28. As Binnie J. stated in *WIC Radio Ltd.* at para. 26:

> In *Ross v. New Brunswick Teachers' Assn.* (2001), 201 D.L.R. (4th) 75, 2001 NBCA 62, at para. 56, the New Brunswick Court of Appeal correctly took the view that "comment" includes a "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof." Brown's *The Law of Defamation in Canada* (2nd ed. (loose-leaf)) cites ample authority for the proposition that words that may appear to be statements of fact may, in pith and substance, be properly construed as comment. This is particularly so in an editorial context where loose, figurative or hyperbolic language is used (Brown, vol. 4, at p. 27-317) in the context of political debate, commentary, media campaigns and public discourse. See also, R. D. McConchie and D. A. Potts, *Canadian Libel and Slander Actions* (2004), at p. 340.

[42] As with determining the meaning of the words, "[w]hat is comment and what is fact must be determined from the perspective of a 'reasonable viewer or reader'": *Ross v. N.B.T.A.*, at para. 62, quoted with approval in *WIC Radio* at para. 27. On these issues, I am as well-positioned as the trial judge to determine the meaning of the words and whether they are statements of fact or comment. Further, I have been urged by the parties to render a decision which does not involve referring the matter back for a new trial, having regard to the age of the plaintiff and the expense involved. However, this does not mean I may ignore the trial judge's findings where they do not constitute an error of law or a palpable and overriding error, and I approach the balance of my Reasons with that caution.

[43] The first defamatory statement, that "Chopak admitted she lied" is a straightforward statement of fact and would be understood as such by a reasonable reader. The trial judge

found that it was not true that she had lied, and therefore the defence of justification for that defamatory statement failed. The defendant argues that saying Chopak "admitted she lied" does not mean she was dishonest or untruthful. Patrick's argument, essentially, is that Chopak's admission that she was mistaken establishes that it was substantially true to say she lied. I disagree. In my view the reasonable person would find a significant difference between calling someone a liar and saying they were mistaken. Calling someone a liar suggests deliberate dishonesty and untrustworthiness, whereas being "mistaken" is much more innocent. Accordingly, not only is the trial judge's decision on this issue supported by the evidence and entitled to deference, I reach the same conclusion.

[44] However, the two other defamatory statements, that Chopak had "an axe to grind" and, as the trial judge found, that she was referred to as a "rat," are different. In my view they would be understood by the ordinary, reasonable reader as expressions of opinion. Unlike the statement that she "admitted she lied," which is reported as fact, theses statements are contained in quotations from Patrick who is expressing his opinions on how people with a grievance can mislead a newspaper, and that the newspaper fell short in failing to see that the sources provided incorrect information. Even if a reader concluded, as the trial judge did, that Patrick was referring to Chopak as a person with an "axe to grind" and was a "rat" who engaged in "trickery or deception," Patrick was nevertheless using terms that are criticisms or conclusions that reflected his view of the event, which is comment, or opinion.

[45] I turn then to the trial judge's consideration of the remaining elements of the test of fair comment as it applies to the statements relating to an "axe to grind" and being a "rat."

Public interest

[46] The trial judge's finding that the defamatory words were not on a matter of public interest is incorrect and constitutes an error in law. As McLachlin C.J.C. stated in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 100:

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

[47] While I do not believe this case falls into the limited situation where the public interest involves a mixed question of fact and law referred to by McLachlin C.J.C., even if a determination of the public interest "involves factual issues" I would find the trial judge's decision on this point to be unreasonable, and a palpable and overriding error.

[48] As Binnie J. stated in *WIC Radio*, at para. 30, "[t]he public interest is a broad concept." In *Grant v. Torstar Corp*., McLachlin C.J.C. noted at para. 101 that one "must consider the subject matter of the publication as a whole." She continued, at para. 105, that to be of public interest, "the subject matter 'must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached'," citing Brown, *The Law of Defamation in Canada*, 2nd ed. Scarborough, Ont.: Carswell, 1999 (loose-leaf updated 2008, release 3) at vol. 2, at pp. 15-137 and 15-138. She also cautioned at para. 107 that an "[o]verly narrow characterization may inappropriately defeat the defence at the outset."

[49] Unfortunately, that is exactly what happened here. The trial judge did not mention, or consider, the breadth of the concept of public interest. He did not address the fact that Patrick was commenting on an article in the Toronto Star, a major Canadian daily newspaper, about a significant Canadian institution, the Toronto Press Club, that has faded away, which raised concerns by members as to what had become of it and its assets. While some members of the public might "be less than riveted" by the story, others, including many non-members, will have "a genuine interest in receiving information on the subject": *Grant v. Torstar Corp*. at para. 102. The trial judge's conclusion that the subject matter was "of a private nature" is contrary to the evidence, inconsistent with the test for public interest and is plainly unreasonable.

The comment must be based on fact

[50] The trial judge stated that "these articles by the defendant are not based on fact as set out above." Leaving aside the vagueness of such reasons, the only factual finding that seems to have been made by the trial judge which relates to the defamatory comments is that the plaintiff did not admit to lying, which was not disputed by Patrick.

[51] In *WIC Radio* Binnie J. stated, at para. 31, that "[w]hat is important is that the facts be sufficiently stated or otherwise be known to the listeners that listeners are able to make up their own minds on the merits of [the defendant's] editorial comment. If the factual foundation is unstated or unknown, or turns out to be false, the fair comment defence is not available (*Chicoutimi Pulp*, at p. 194)." On the other hand, it is important to limit the requirement for the comment to have a "basis" in the facts, rather than being "supported by the facts" which, as Binnie J. observed "might be thought to set the bar so high as to create the potential for judicial censorship of public opinion." (at para. 39)

[52] In this case the trial judge failed to consider the wider factual context. There are many facts stated in Patrick's articles and the Toronto Star article which provide a basis for the

opinions expressed. These include that the Press Club had become inactive, some members were suggesting that Patrick was acting improperly or incompetently and had mistakenly suggested that Patrick may have removed a valuable painting belonging to the Press Club, that Patrick disputed those allegations at the time, and that subsequently he obtained an apology from Chopak for statements she made in the Toronto Star article. These facts clearly provided, to use Justice Binnie's words at para. 34 of *WIC Radio*, "a sufficient launching pad for the defence of fair comment."

Is the comment an honest expression of opinion?

[53] The trial judge gave no reasons for his finding against Patrick on this issue. He simply said that Patrick was motivated by "ill will and spite," which is relevant to malice, but not to honest opinion. He did not turn his mind, therefore, to the heart of the fair comment defence, which is that the opinion need not be "fair" at all. Rather, as the Supreme Court confirmed in *WIC Radio*, the test is whether *anyone* could honestly have expressed the defamatory comment on the proven facts. This is, quite deliberately, not a high test, and "protects obstinate, or foolish, or offensive statements of opinion, or inference, or judgment, provided certain conditions are satisfied. The word "fair" refers to limits to what any honest person, however opinionated or prejudiced, would express upon the basis of the relevant facts": *WIC Radio*, at para. 49, quoting from *Channel Seven Adelaide Pty. Ltd. v. Manock* (2007), 241 A.L.R. 468, [2007] HCA 60, at para. 3 (emphasis added by Binnie J.).

[54] In recent years this point has been emphasized in suggesting the name of the defence itself is misleading. In *Reynolds v. Times Newspapers Ltd*., [1999] 4 All E.R. 609, [2001] 2 A.C. 127 at 615, Lord Nicholls discussed the wide scope of the defence and said that "the time has come to recognize that in this context the epithet 'fair' is now meaningless and misleading." And the British Parliament adopted this suggestion in the *Defamation Act 2013*, c. 26, s. 3, when it codified the defence under the heading "honest opinion."

[55] In this case, there was a sufficient basis for a person to honestly believe that Chopak and others quoted in The Star article had an "axe to grind" and that the editor should have smelled a "rat" before the story went to print. As I have stated, Chopak and others were disgruntled former members of the Toronto Press Club who were making allegations against Patrick, including a serious allegation about valuable artwork that was unfounded. Even applying the trial judge's meaning of "rat," that Chopak engaged in "trickery and deceit," this was an opinion that a person, albeit perhaps a "prejudiced" or "opinionated" person, could honestly hold about Chopak, no matter how "unfair" it might seem to her or to others.

Malice, credibility and sufficiency of reasons

[56] This brings me to the trial judge's findings on malice and credibility, and my concerns about the sufficiency of the trial judge's reasons, all of which are related.

[57] The trial judge noted that malice defeats the defence of fair comment, and concluded that "the defendant acted and published the articles with malice." However, once again the trial judge did not explain the basis for this finding. He simply made conclusory statements that Patrick's publications were "motivated by malice and by ill-will" and by "spite towards the plaintiff."

[58] While ill-will and spite, or an improper purpose, may be evidence of malice, malice can only defeat the fair comment – or honest opinion – defence if subjective malice is the "dominant motive of the particular comment": *WIC Radio*, at para 53. A person must be entitled to express one's opinions about an individual that the speaker may dislike, perhaps intensely, and even wish that people will think less of that person as a result of what they say, but so long as the ill will is not the dominant motive the honest opinion defence protects the speaker. To be deprived of the defence simply due to the existence of ill-will or dislike of a person, would undermine the breadth of the "honest opinion" element, and inappropriately infringe the right of free speech: see, *e.g.*, *Whitehead v. Sarachman*, 2012 ONSC 6641 (Div. Ct.) at paras. 54-57.

[59] I note that in England the courts have gone even further in narrowing the scope of malice. In *Spiller v. Joseph*, 2010 UKSC 53, at para. 108, the United Kingdom Supreme Court stated: "The fact that the Defendant may have been motivated by spite or ill-will is no longer material. The only issue is whether he believed his comment was justified." Section 3 of the United Kingdom's *Defamation Act 2013* does not address malice at all, noting only that "[t]he defence is defeated if …the defendant did not hold that opinion." See generally, Downard, *Law of Libel in Canada*, at paras. 11.56-11.59.

[60] In this case, the trial judge did not address the test for malice, that it must be the "dominant motive," or the evidentiary basis for his finding that malice existed at all. Although the trial judge stated conclusions which could be interpreted as criticisms of Patrick, such as that Patrick "never published the plaintiffs [sic] apology," instead publishing his articles which, he said, read "as a press release or as a news story," he did not discuss this conduct in the context of the test for malice. Similarly, while he described Patrick's revision of his article to say that Chopak "admitted she was mistaken" as "a feeble attempt to extricate himself" from the statement that she admitted that she lied, and observes that Patrick did not apologize to Chopak, he does not link this to malice either.

[61] In addressing credibility the trial judge said that he accepted "the plaintiff's evidence as being credible and reliable when she states under oath that she never admitted that she lied to the Toronto Star at the settlement conference" – but this is something Patrick does not dispute; indeed, he acknowledged this in his evidence-in-chief at trial. Without any explanation, the trial judge stated that "where the evidence differs in this case, I accept the evidence of the plaintiff as being reliable and trustworthy and prefer her evidence to that of the defendant." However, at no time did the trial judge say where their evidence differed, let alone why he preferred the plaintiff's evidence. Having reviewed the transcript, I am not sure where the evidence differs and it is not apparent to me on what basis the trial judge could have found that Patrick was not testifying honestly about his

intention in publishing the articles, which was, as he said, "to get the word out that the article was wrong, that Stacey [Chopak] had apologized for the mistaken comment she made" so that his "reputation would be somewhat restored."

[62] The trial judge, in making findings on malice and credibility, was required to explain himself and not just provide boiler-plate conclusions: *Dovbush v. Mouzitchka*, 2016 ONCA 381, 131 O.R. (3d) 474, at para. 29. In saying this, I am mindful of the fact that this trial was held in Small Claims Court and that "[o]ne cannot expect, or demand, that the reasons of a small claims court judge are going to approach the comprehensiveness of the reasons expected of a Superior Court judge": *Abade v. Nardone*, 2017 ONSC 7120 at para. 38. The Court of Appeal made a similar observation in *Maple Ridge Community Management Ltd. v. Peel Condominium Corporation No. 231*, 2015 ONCA 520, at para. 35, that "appellate consideration of Small Claims Court reasons must recognize the informal nature of that court, as well as the volume of cases it handles and its statutory mandate to deal with these cases efficiently." Nevertheless, the Court stated, "[r]easons from the Small Claims Court must be sufficiently clear to permit judicial review on appeal. They must explain to the litigants what has been decided and why."

[63] In short, reasons must, "at a minimum, provide some insight into how the legal conclusion was reached and what facts were relied upon in reaching that conclusion": *Barbieri v. Mastronardi*, 2014 ONCA 416 at para. 22; see also *Gray v. Ontario (Disability Support Program, Director)*, (2002) 59 O.R. (3d) 364 (C.A.), at para. 22. Reasons must be more than a series of conclusory statements. The trial judge here failed to draw a connection between what he had decided and why he had reached his conclusions on critical issues.

[64] In particular, returning to malice, the trial judge erred in law by failing to address the test for malice, which is that it must be the "dominant motive" of the defendant. He also failed to identify a sufficient evidentiary basis for, or explain, his finding of malice. This was an issue of mixed fact and law which in my view was a palpable and overriding error as there was no evidence to support a finding that Patrick's dominant motive in publishing the articles was for the improper purpose of harming Ms. Chopak. Indeed, a reasonable reading of the articles, supported by the evidence, is that Patrick was attempting to set the record straight about the Star article which was defamatory of him. His inclusion of comments about newspapers and information from Bill Somerville that the article was "full of mistakes" is consistent with what Patrick said was his objective at trial, but which was said by the trial judge to be "untenable" without explaining why. Patrick's mistake was that he overstated Chopak's misconduct by calling her a liar, something he corrected when sued. And although he did not apologize for his mistake, this does not support a finding of malice.

Conclusion on liability

[65] My analysis above leads to the conclusion that the trial judge correctly found that Patrick was liable for the defamatory statement of fact that Chopak had "admitted she lied."

However, his conclusion that there was no defence to the other two defamatory statements was based on errors of law, and palpable and overriding errors of fact and law, and must be set aside. The statements about Chopak having an "axe to grind" and being a "rat" were expressions of opinion to which the defence of fair comment, better described as the honest opinion defence, applies. As urged by the parties, and since on critical issues I am as well-positioned as the trial judge to make these findings, I substitute my judgment for that of the trial judge rather than direct a new trial.

Damages

[66] As a result of my findings the amount of damages must also be reviewed. The trial judge awarded the maximum allowable in Small Claims Court. He did so in the context of having found three statements to be defamatory, not just one. Further, and more significantly, he relied on his unsupported finding of malice. In that context the trial judge also noted that Patrick had been a journalist and suggests that he acted unprofessionally, which seems to have been held against him as well.

[67] The trial judge put weight on the fact that the articles were posted on the internet, citing *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.). However, posting statements on the internet should not, on its own, be an aggravating factor. As Stewart J. observed in *Pichler v. Meadows,* 2016 ONSC 5344 at para. 37: "The factors of the mode and extent of publication can be particularly significant considerations in assessing damages in internet defamation actions. In certain cases, however, the nature of the communication is such that it should not be automatically assumed that it has reached a wide audience."

[68] The internet has become the mode of communicating just about everything today. Some statements on the internet are read by millions of people, other statements are read by very few people, and no doubt many things are not read by anyone at all. What must be considered, as with all defamatory statements, is the extent of the publication, as well as the other usual factors, such as the plaintiff's position and standing, the nature and seriousness of the defamatory statements, the absence or refusal to apologize or retract the libel, the conduct and motive of the defendant, the presence of any other aggravating of mitigating circumstances, and the impact of the defamatory words on the plaintiff: see Downard, *Law of Libel in Canada*, at para. 14.01 and following. The trial judge said nothing about these factors in his discussion of damages.

[69] The evidence is that the articles were read by a very small number of people. Contrary to the trial judge's statement that "[t]he plaintiff has suffered harm," there was no evidence that the articles had any impact on Chopak or her reputation whatsoever. Chopak was unaware of the articles for many months until a friend drew them to her attention – a friend who supported her in both Patrick's lawsuit and in this action. The Linked-In article was then revised to remove the incorrect defamatory statement that Chopak "lied," and both articles were subsequently removed from the internet. The trial judge erred in failing to consider any of this in determining an appropriate sum for damages.

[70] In my view the trial judge made errors of law and reached conclusions that were unreasonable and unsupported by the evidence. Like the trial judge in *Barrick Gold*, he failed to have regard to relevant evidence, which affected his assessment of damages. However, unlike *Barrick Gold*, this case did not involve hundreds of defamatory statements posted on many websites over a lengthy period of time in what was described as "a systematic, extensive and vicious campaign of libel." (*Barrick Gold* at para. 3)

[71] While damages are presumed and the plaintiff need not show any actual loss or harm, the purpose of general damages is to compensate for harm to reputation and injury to the plaintiff's feelings. At the end of the day, the damages should reflect compensation for describing the plaintiff as having admitted she lied, rather than admitting she was mistaken in what she told the Toronto Star. The damages should also reflect the fact that the articles were read by a very small number of people – so small a group that the libel did not even come to the attention of the plaintiff until many months later through a friend who was involved in the prior action brought by Patrick. And the damages should reflect the fact that there is no evidence of any actual damage to Chopak's reputation.

[72] In my view, having regard to these factors, this case warrants, at most, a modest award of damages. As in *Pichler*, the circulation was very narrow, the statements have been removed and there is no evidence of any actual harm to reputation. In *Pichler*, Stewart J. awarded $5,000 in general damages. A similar amount is appropriate in this case, and I reduce the damages to $5,000.

The anti-SLAPP Issue

[73] On this appeal the appellant raised the application of s. 137.1 of the *Courts of Justice Act*, which permits a court to dismiss an action that is brought for the improper purpose of muzzling speech in the public interest. As motions to invoke s. 137.1, known as anti-SLAPP motions (Strategic Litigation Against Public Participation), may not be brought before Deputy Judges in the Small Claims Court, this issue was not raised at trial. However, as stated in s. 137.2(1) of the *Courts of Justice Act*, such motions may be made "at any time after the proceeding has commenced." The appellant argues that this includes on an appeal and that I should invoke s. 137.1 now and dismiss the action in its entirety.

[74] I decline to do so. Leaving aside whether an appeal is a "proceeding", as s. 137.1(3) states that the motion applies only to a "proceeding" which is defined in the *Rules of Civil Procedure* as "an action or application," one of the objectives of anti-SLAPP motions is to avoid an expensive proceeding and trial. Although such a motion could not have been brought before the trial judge in this case, it was open to the defendant to have taken steps to bring the motion before a Superior Court Justice and he did not do so: see, *e.g.*, *Peel Condominium Corporation No. 346 v. Florentine Financial Corporation*, 2018 ONSC 2636, in which the Court transferred a matter from Small Claims Court when only the Superior Court had jurisdiction to grant additional relief sought by the plaintiff. Instead, Patrick went to trial and received a judgment. It would be improper and unfair to now

permit the defendant to invoke a process that should have been brought before trial. Furthermore, as the Court of Appeal stated in the case which concluded that Deputy Judges cannot hear anti-SLAPP motions: "It is not appropriate, as a matter of general application, for this court to engage in determining matters of first instance. Among other reasons, doing so has a direct and significant effect on appeal rights": *Bruyea v. Canada (Veteran Affairs)* (2019) 147 O.R. (3d) 84 (C.A.), at para. 30.

Conclusion

[75] Accordingly, the appeal is allowed in part, and damages are reduced to $5,000. The trial judge's award of $3,750 in costs was the maximum permitted and is no longer appropriate based on the reduced damage award and my findings regarding the defences and absence of malice. I reduce the costs award at trial to $1,000 inclusive of HST and disbursements.

[76] As to costs of the appeal, counsel advised that they had agreed on $5,500, but this does not include disbursements which it was estimated were about $1,000, incurred by the appellant. As the appeal was successful in part, the appellant should be awarded some costs, but not the full amount agreed upon. Having regard to the overall objective of fixing costs in an amount that is fair and reasonable for the unsuccessful party to pay, the factors set out in Rule 57.01 of the *Rules of Civil Procedure*, and the sums proposed by counsel, I award the appellant costs for the appeal in the amount of $3,000, inclusive of HST and disbursements.

Schabas J.

Date: 2020-09-10