**CHOPAK v. PATRICK**

META DATA

CASE NUMBER

**2020 ONSC 5431**

CORRESPONDING LAW REFERENCE

***Chopak v. Patrick,* 2020 ONSC 5431**

DATE OF DECISION

**9/10/2020**

REGION

**North America**

COUNTRY

**Canada**

TYPE OF EXPRESSION

**Electronic/ Internet-based Communication; Press/ Newspapers**

JUDICIAL BODY

**Appellate Court**

TYPE OF LAW

**Civil Law**

MAIN THEMES

**Defamation/ Reputation**

OUTCOME

**Decision - Affirmed in Part, Reversed in Part**

STATUS

**Closed**

TAGS

**?**

**CASE ANALYSIS**

**Case Summary and Outcome**

The Superior Court of Justice (Divisional Court) of Ontario, Canada allowed the appeal in part of a defamation action brought by Stacey Chopak against Edward Patrick, the President of the Toronto Press Club. The appeal was brought by Mr. Patrick following a ruling by the Small Claims Court that an article he had published online describing a previous defamation settlement with Ms. Chopak was “founded in malice and ill will and spite.” The Superior Court concurred with the lower court that Mr. Patrick was liable for the defamatory statement of fact that Ms. Chopak had “admitted she lied.” In Ms. Chopak’s “Apology to Edward Patrick”, she only admitted to “mistakenly” stating a falsehood. However, the two statements that Ms. Chopak had an “axe to grind'' and was a “rat” were found to be expressions of opinion to which the defence of fair comment applied. Accordingly, damages against Mr. Patrick were reduced from $25,000 to $5,000.

**Facts**

On March 24, 2011, the Toronto Star published an article titled: “Toronto Press Club’s future uncertain.” The article addressed alleged uncertainty and disarray within the Toronto Press Club, a historic social organization that owns “irreplaceable memorabilia and artwork.” The plaintiff, Stacey Chopak, was quoted in the article as the social secretary of the Toronto Press Club. Ms. Chopak expressed concern about the standing of the club under the leadership of the defendant, Edward Patrick, a retired journalist. Ms. Chopak was also quoted raising concern about the status of valuable assets, including a William Kurelek painting worth tens of thousands of dollars that once hung in the press club. According to Ms. Chopak, Mr. Patrick had claimed that the Kurelek painting was in storage yet failed to produce invoices of storage costs. Believing that Ms. Chopak had suggested he had stolen the valuable artwork, Mr. Patrick sued Ms. Chopak for libel in June 2011.

On September 8, 2014, Mr. Patrick’s libel suit settled at a Pre-trial conference. Ms. Chopak signed an apology, claiming she “mistakenly stated that a painting by William Kurelek belonged to the Toronto Press Club”, and agreed to “not make further defamatory remarks about Mr. Mr. Patrick.” [para. 10] Both parties also signed a Mutual Release from “any and all actions… arising out of this action.” [para. 11]

On April 15, 2015, Mr. Patrick wrote and published an article on the business platform Linked-In titled “Ed Patrick wins retraction and apology in libel case.” In the article, Mr. Patrick claimed that “Ms. Chopak admitted she lied to Star reporter Jennifer Yang.” [para. 14] The same article was subsequently published by Mr. Patrick in early 2016 as a Press Release on the website of The International Order of the Companions of the Quaich. Ms. Chopak was not aware of these articles until December 15, 2016.

On March 3, 2017, Ms. Chopak sued Mr. Patrick for libel, demanding a retraction and apology. Mr. Patrick removed the reference to a retraction in the headline of both articles and edited “admitted she lied” to “admitted she was mistaken.” [para. 19] Both articles were then removed by Mr. Patrick. At the trial held on December 5, 2018, Mr. Patrick agreed that Ms. Chopak had never admitted to lying and had solely relied on her apology in which she claimed she was “mistaken.”

On February 19, 2019, the trial judge found that Mr. Patrick’s statements were untrue, as Ms. Chopak had not admitted to lying. The judge also rejected Mr. Patrick’s defence of fair comment, finding that his actions were “founded in malice and ill will and spite.” [para. 21] Ms. Chopak was awarded the maximum amount within Small Claims Court, $25,000 as well as the maximum costs under s. 29 of the *Courts of Justice Act*: 15% of the amount claimed, $3,750.

**Decision Overview**

Judge Paul B. Schabas delivered the opinion of the Ontario Superior Court of Justice.

The appeal raised four key questions:

1. “Is the action barred by the Release?
2. Did the trial judge err in finding that the defence of justification did not apply?
3. Did the trial judge err in find that the defence of fair comment did not apply?
4. Were the damages excessive?” [para. 22]

*Is the action barred by the Release?*

The first question before the Court was whether or not the Mutual Release signed by both parties on September 8, 2014 bars the action brought by Ms. Chopak. The appellant, Mr. Patrick, argued that the Release “wipes the state clean” even for future causes of action. The trial judge rejected this argument, finding that the “case brought here by Ms. Chopak, deals with a fresh cause of action.” [para. 25] On appeal, Judge Schabas agreed with the trial judge’s reasoning, concluding that the Release does not bar the action. The language of the Release relates to cases arising out of “this action”, in reference to the article published by The Toronto Star on March 24, 2011, and does not address “separate, new and unanticipated future wrongful acts.” [para. 29]

*Did the trial judge err in finding that the defences of justification and fair comment did not apply?*

At first instance, three statements were found to be defamatory. The plaintiff Ms. Chopak was referred to as:

1. “A liar. Meaningful, dishonest and untruthful.
2. That Ms. Ms. Chopak had an axe to grind. Meaning that she bore a personal grievance against the defendant, Mr. Patrick, and was seeking retribution in speaking to The Star.
3. That Ms. Ms. Chopak was a rat, or someone who would engage in trickery or deceit.” [para. 31]

Concerning the defence of justification, the trial judge found that the defendant failed the “test of truth.” At first instance, the Court found Mr. Patrick’s position “totally untenable,” preferring the evidence of Ms. Chopak to that of the defendant’s. [para. 33]

The trial judge also rejected the defence of fair comment. Firstly, the articles and their subject matter were not a matter of public interest. Secondly, the comments published by the defendant were not based on fact. Thirdly, the defendant’s comments were not “recognizable as comment”; rather, the trial judge held that they were “founded in malice and ill will and spite towards the plaintiff.” [para. 34] Fourthly, applying the “objective test”, the trial judge held that no person would “honestly express that opinion on the proved facts.” [para. 34] Finally, applying the objective test, the defence is defeated because the trial judge concluded that the articles had been published with malice.

On appeal, Judge Schabas found that the trial judge had erred in their approaches and conclusions, which amounted to “palpable and overriding errors.” [para. 35]

Judge Schabas first considered the meaning of the words. In a defamation case, this is to be determined by their “natural and ordinary meaning” as a “matter of impression.” Citing Lord Reid in *Lewis v. Daily Telegraph Ltd.*, [1964] A.C. 234, at 258-260, Judge Schabas noted that this asks “what the words would convey to the ordinary man.” [para. 36] Furthermore, applying Binnie J. in *[WIC Radio v. Simpson](https://globalfreedomofexpression.columbia.edu/cases/wic-radio-ltd-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.” [para. 36] Applying this test, Judge Schabas concurred with the trial judge that the impugned statements allege that Ms. Chopak is a liar with an “axe to grind”, which motivated her remarks to the Star. However, Judge Schabas rejected the trial judge’s conclusion that “rat” means that Ms. Chopak would engage in “trickery or deceit.” Judge Schabas found that this conclusion goes too far, as a question of law. Alternatively, the application of the worst possible meaning of “rat” would constitute a “palpable and overriding error of mixed fact and law.” [para. 37] Furthermore, the trial judge based his determination on the “totally untenable” evidence provided by the defendant, rather than the test applied above. The Court noted that the meaning of the defamatory statements should not be determined by evidence of the speaker’s intention or the opinion of some interested people. (*Lewis v. Daily Telegraph Ltd.*, [1964] A.C. 234)

Judge Schabas further notes the error of law made by the trial judge in failing to consider whether the three defamatory statements were statements of fact, to which the defence of justification applies, or expressions of opinion, which gives rise to the defence of fair comment. Judge Schabas found that the first statement, that “Ms. Chopak admitted she lied”, is a statement of fact. The trial judge held that this statement was false, and the defence of justification failed. The defendant claimed that Ms. Chopak’s admission to having been mistaken means that it was “substantially true to say she lied.” [para. 43] Judge Schabas rejected the defendant’s argument; to be “mistaken” is more “innocent” than the dishonest and untrustworthy nature of a liar. As such, Judge Schabas reached the same conclusion as the trial judge concerning the first statement and the defence of justification did not apply.

However, Judge Schabas overturned the trial judge’s opinion concerning the other two defamatory statements. The Court determined that the ordinary, reasonable reader would consider references to Ms. Chopak as a “rat” with an “axe to grind” to be expressions of opinion. Judge Schabas subsequently considered the defence of fair comment. Firstly, Judge Scahbas held that the trial judge made an error in law in finding that the defamatory statements were not a matter of public interest. Citing Binnie J. in *WIC Radio v. Simpson*, at para. 30: “[t]he public interest is a broad concept,” Judge Schabas found that the public interest was narrowly characterized at first instance. The trial judge’s determination that the subject matter was “of a private nature” failed to address the fact that Mr. Patrick’s article was a comment on the Toronto Star, a major Canadian daily newspaper, concerning a significant Canadian institution, the Toronto Press Club. As such, Judge Schabas held that the trial judge’s conclusion was contrary to the evidence and plainly unreasonable.

Judge Schabas then considered whether the comment was based on fact. The trial judge held that “these articles by the defendant are not based on fact as set out above.” [para. 50] Judge Schabas held that the trial judge failed to consider the wider factual context, only referring to the fact that the plaintiff did not admit to lying. Other facts include the inactivity of the Press Club, allegations by members of Mr. Patrick’s incompetence, as well as Mr. Patrick’s dispute with these allegations. Citing Justice Binnie at para. 34 of *WIC Radio*, Judge Schabas determined that these facts were “a sufficient launching pad for the defence of fair comment.” [para. 54]

The Court subsequently assessed whether the comment was an honest expression of opinion. The test is whether anyone could honestly have expressed the defamatory comment on the basis of the proven facts. This is a low bar and protects “obstinate, or foolish, or offensive statements of opinion, or inference, or judgment.” (*WIC Radio*, para. 49] At first instance, the only reasoning provided by the trial judge was that Mr. Patrick was motivated by “ill will and spite,” which is relevant to malice, not to honest opinion. Judge Schabas, however, found that there was a sufficient basis for a person to honestly believe that Ms. Chopak had an “axe to grind” and that the editor of The Star should have smelled a “rat” before publishing the story. This was an opinion a person, prejudiced or otherwise, could honestly hold about Ms. Chopak.

Finally, the Court considered the trial judge’s determination on malice and credibility, which defeats the defence of fair comment. At first instance, the trial judge held, without evidence, that “the defendant acted and published the articles with malice.” [para. 57] This conclusion was justified by the trial judge’s observation that Mr. Patrick’s publications were “motivated by malice and by ill-will” and by “spite towards the plaintiff.” [para. 57] However, Judge Schabas notes that malice only defeats fair comment if it is the “dominant motive of the particular comment.” (*WIC Radio*, at para. 53) This test was not applied by the trial judge. Judge Schabas noted that the trial judge 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) [para. 62] Judge Schabas conceded that the decision was from a Small Claims Court, yet asserts that 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) [para. 63] Judge Schabas determined that Mr. Patrick’s dominant motive was to “set the record straight” about a defamatory article published about him in the Star. Mr. Patrick’s mistake in overstaying Ms. Chopak’s misconduct in calling her a “liar” was ultimately corrected and was found to be insufficient to support a finding of malice.

*Conclusion*

Accordingly, Judge Schabas concluded that the trial judge was correct in finding that Mr. Patrick was liable for the defamatory statement of fact that Ms. Chopak had “admitted she lied.” [para. 65] However, the Judge Schabas overturned the trial judge’s determination that there were no defences to the two other defamatory statements. Mr. Patrick’s references to Ms. Chopak having an “axe to grind” and being a “rat” were expressions of opinion to which the defence of fair comment applies.

*Were the damages excessive?*

Finally, Judge Schabas considered the damages awarded in the first instance. The trial judge awarded the maximum mount within Small Claims Court, $25,000. This was due to his finding that all three statements were defamatory, not just the one statement identified on appeal. Furthermore, the trial judge relied on his “unsupported finding of malice” and emphasised the unprofessional conduct of Mr. Patrick as a journalist. [para. 66] Weight was also placed 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.). Judge Schabas rejected this argument, finding that posting statements on the internet is not in itself an aggravating factor, citing Stewart J. in *Pichler v. Meadows*, 2016 ONS 5344: “the nature of the communication is such that it should not be automatically assumed that it has reached a wide audience.” [para. 67] Rather, the audiences reached by statements on the internet vary greatly and, in this case, the articles were read by a very small number of people. Furthermore, other relevant factors were not considered by the trial judge, including the plaintiff’s position and standing, the seriousness of the defamatory statements and whether the plaintiff apologised.

Judge Schabas found that the trial judge made errors of law and reached conclusions that were not supported by the evidence. While the plaintiff need not show any actual loss or harm, general damages are awarded to compensate for harm to reputation and injury to the plaintiff’s feelings. In this case, there was no evidence that the articles had any impact on Ms. Chopak or her reputation and the articles were removed from the internet. As such, Judge Schabas awarded a reduced sum of $5,000 in general damages.

*The anti-SLAPP Issue*

On appeal, the appellant raised an anti-SLAPP motion (Strategic Litigation Against Public Participation) under s. 137.1 of the *Courts of Justice Act*. S.137.1 permits a court to dismiss an action that is brought for the improper purpose of restricting speech that is in the public interest. Judge Schabas rejected this motion, finding that the motion should have been brought before trial at first instance.

**DECISION DIRECTION**

**Mixed Outcome - Edit**

**PERSPECTIVE**

**Table of Authorities**

**Related International and/or regional laws**

**National Standards, Laws or Jurisprudence**

*Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.)

**CASE SIGNIFICANCE**

[The decision establishes influential or persuasive precedent outside its jurisdiction…]

**OFFICIAL CASE DOCUMENTS**