

any retraction or apology, and “the whole conduct of the defendant from the time when the libel was published down to the very moment of their verdict. They may take into consideration the conduct of the defendant before action, after action, and in court at the trial of the action”, and also, it is submitted, the conduct of his counsel, who cannot shelter his client by taking responsibility for the conduct of the case. They should allow “for the sad truth that no apology, retraction or withdrawal can ever be guaranteed completely to undo the harm it has done or the hurt it has caused”. They should also take into account the evidence led in aggravation or mitigation of the damages.

[18] The plaintiff has also sought “exemplary damages” which I presume, in the context of this case, to be a claim for aggravated damages. Aggravated damages, as distinct from general damages and punitive damages, may be awarded where the plaintiff has proved that the defendant was motivated by actual malice. This concept was explained by Cory J. in *Hill v. Church of Scientology of Toronto*, *supra*, at paras. 188-91:

188 Aggravated 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. The nature of these damages was aptly described by Robins J.A. in *Walker v. CFTO Ltd.*, *supra*, in these words at p. 111:

Where the defendant is guilty of insulting, high-handed, spiteful, malicious or oppressive conduct which increases the mental distress – the humiliation, indignation, anxiety, grief, fear and the like – suffered by the plaintiff as a result of being defamed, the plaintiff may be entitled to what has come to be known as “aggravated damages”.

189 These damages take into account the additional harm caused to the plaintiff’s feelings by the defendant’s outrageous and malicious conduct. Like general or special damages, they are compensatory in nature. Their assessment requires consideration by the jury of the entire conduct of the defendant prior to the publication of the libel and continuing through to the conclusion of the trial. They represent the expression of natural indignation of right-thinking people arising from the malicious conduct of the defendant.

190 If aggravated damages are to be awarded, there must be a finding

that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff. See, for example, *Walker v. CFTO Ltd.*, *supra*, at p. 111; *Vogel* [[1982] 3 W.W.R. 97], at p. 178; *Kerr v. Conlogue* (1992), 65 B.C.L.R. (2d) 70 (S.C.), at p. 93; and *Cassell & Co. v. Broome*, *supra*, at pp. 825-26. The malice may be established by intrinsic evidence derived from the libellous statement itself and the circumstances of its publication, or by extrinsic evidence pertaining to the surrounding circumstances which demonstrate that the defendant was motivated by an unjustifiable intention to injure the plaintiff. See *Taylor v. Despard* [[1956] O.R. 963], at p. 975.

191 There are a number of factors that a jury may properly take into account in assessing aggravated damages. For example, was there a withdrawal of the libellous statement made by the defendants and an apology tendered? If there was, this may go far to establishing that there was no malicious conduct on the part of the defendant warranting an award of aggravated damages. The jury may also consider whether there was a repetition of the libel, conduct that was calculated to deter the plaintiff from proceeding with the libel action, a prolonged and hostile cross-examination of the plaintiff or a plea of justification which the defendant knew was bound to fail. The general manner in which the defendant presented its case is also relevant. Further, it is appropriate for a jury to consider the conduct of the defendant at the time of the publication of the libel. For example, was it clearly aimed at obtaining the widest possible publicity in circumstances that were the most adverse possible to the plaintiff?

[19] Further, the Court may award punitive damages in exceptional cases for “malicious, oppressive and high-handed” misconduct that “offends the court’s sense of decency”. See *Hill v. Church of Scientology of Toronto*, *supra*, at paras. 196, 197 and 199:

196 Punitive damages may be awarded in situations where the defendant’s misconduct is so malicious, oppressive and high-handed that it offends the court’s sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. 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. It is important to emphasize that punitive damages should only be awarded in those circumstances where

the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

197 Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?

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.

The concept of awarding separate "aggravated damages" instead of awarding increased compensatory damages to compensate for aggravated damages has been the subject of some criticism. In *Tremblay v. Campbell*, 2010 NLCA 62, 305 Nfld. & P.E.I.R. 1, for example, Green C.J. stated at para. 47 that although it may still be open to make separate general and aggravated damages awards, "... it would be preferable for trial judges in this jurisdiction to adopt the practice of making one overall compensatory award".

## V. ANALYSIS

### A) Liability

[20] The only evidence before this Court is that the defendant uttered the impugned words in the circumstances outlined in the plaintiff's affidavit. Consequently, there is no doubt that the defendant's words refer to the plaintiff and were "published" in that they were spoken on a live television broadcast. The defendant does not seriously dispute this. Accordingly, I find that the first two elements of the tort of defamation have

been established.

[21] However, to complete the elements necessary to establish liability the plaintiff must also prove that the words uttered were defamatory. An appropriate definition of defamation is found in *Leenen v. Canadian Broadcasting Corporation* (2000), 48 O.R. (3d) 656 (Ont. Sup. Ct.), [2000] O.J. No. 1359 (QL), at para. 40:

[40] A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers, a statement which tends to lower that person in the estimation of right-thinking members of society generally and, in particular, to cause the person to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem. The very essence of a defamatory statement is its tendency to injure reputation, which is to say all aspects of a person's standing in the community.

[22] The defendant argues that the impugned words do not fit within the definition of defamation because the words did not express a conclusion, but merely asked a question. However, this argument must fail because whether words have a defamatory meaning is determined from the "ordinary meaning of the published words themselves". See *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, [1995] S.C.J. No. 69 (QL), at para. 62, per Cory J. Further, the "ordinary" meaning includes any implied, inferential or indirect meaning that a reasonable person would draw from the words. See *Dhami v. Canadian Broadcasting Corp.*, 2001 BCSC 1811, [2001] B.C.J. No. 2773 (QL).

[23] To ask the plaintiff whether he was removed from his church because he was charged with sexually assaulting his secretary implies that he was charged with sexually assaulting his secretary and that he was possibly removed from his church for that reason. The premise upon which the question is based is that (a) the plaintiff committed a sexual assault, (b) upon his secretary, and (c) resultantly was possibly

removed from his church. The plaintiff denies that anything of this nature happened and describes the allegations/insinuations as “absolutely fictitious”. The defendant has offered no proof to the contrary.

[24] I have no difficulty in concluding that the “question” posed by the defendant constitutes a defamatory statement. Insinuating that the plaintiff had been charged with sexual assault most definitely is defamatory because, notwithstanding the legal presumption of innocence, the mere accusation produces a negative effect on the plaintiff’s reputation. See *St. Pierre v. Pacific Newspaper Group Inc.*, 2006 BCSC 241, [2006] B.C.J. No. 259 (QL), at paras. 11-12. To suggest that the plaintiff, a married person with children, perpetrated a sexual assault on his secretary and that this event may have been the catalyst that caused him to be removed from his church would certainly tend to lower the plaintiff’s reputation in the community.

[25] Accordingly, I find that the statement made by the defendant was defamatory.

## B) Damages

### *i) General damages*

[26] The evidence before the Court is very thin. Essentially, the salient facts are as follows.

[27] On Tuesday, January 17, 2006, during the course of a federal election campaign, the defendant telephoned a televised call-in program being broadcast live on local cable television and posed a question to the plaintiff, a federal member of