

ONTARIO
SUPERIOR COURT OF JUSTICE
(NEWMARKET SMALL CLAIMS COURT)

B E T W E E N:

ROBERT LEPP)	
)	
)	Plaintiff) <i>Self-represented</i>
- and -)	
)	
TORONTO STAR NEWSPAPERS LIMITED)	
and BOB AARON)	
)	Defendants) <i>Emma Carver for Toronto Star</i>
)	<i>Newspapers Limited</i>
)	
)	<i>Bob Aaron, self-represented</i>
)	
)	HEARD Orally via Zoom : April 5, 2022
)	

2022 CanLII 39874 (ON SCSM)

REASONS FOR DECISION ON MOTION

Deputy Judge David M. José

I. BACKGROUND AND THE RESULT

OVERVIEW

[1] Mr. Lepp, a self-proclaimed municipal activist, assisted a resident in his community (Ms. “**Buckles**”) in a fence dispute with a neighbour (Ms. “**Duncan**”). Unfortunately for Mr. Lepp, things did not turn out well: he was ultimately sued by Duncan in defamation, and in a default summary hearing he was ordered, amongst other things, to pay Duncan \$70,000.00 in damages, as reflected in the decision of Favreau J. dated May 25, 2020 in [Duncan v. Buckles](#), 2020 ONSC 3219, (herein the “**Decision**”).

[2] Mr. Robert Aaron, a senior Ontario real estate lawyer, with a regular column in the Toronto Star newspaper, wrote a column on the Decision entitled: “*Dispute over a property line fence stirs up a costly battle at the Superior Court of Justice*”, which was published by the Toronto Star on October 14, 2020, both in print and on-line (the “**Column**”).

[3] Mr. Lepp sues Mr. Aaron and the publisher of the newspaper, the Toronto Star Newspaper Limited (the “**Toronto Star**”) for \$5,000.00, alleging that the Column was defamatory of his character.

THE MOTION

- [4] The Defendants brought a formal joint motion in writing to obtain the following relief:
- (a) An order striking the Claim pursuant to Rule 12.02(1) of the Rules of the Small Claims Court, O.Reg. 258/98 (herein the “**SCC Rule**”) on the grounds that it discloses no reasonable cause of action, is inflammatory, a waste of time, a nuisance, and an abuse of the court's process, because, amongst other reasons, the Column is not defamatory of Mr. Lepp, it was written on the occasion of an absolute or qualified privilege to report on a court proceeding, and the claim seeks to challenge prior court findings and rulings; and
 - (b) In the alternative, an order for security for costs to be paid pursuant to section 12(1) of the *Libel and Slander Act*, R.S.O. 1990, c. L. 12 (the “**LSA**”), in the amount of \$2,000.00 per Defendant (\$4,000.00 in total).

THE RESULT

[5] For the reasons that follow, the Claim is dismissed, with costs payable by the Plaintiff in the sum of \$750.00 for fees, and \$266.00 in disbursements. The motion for security for costs is rendered moot, but if it were not, I would have ordered Mr. Lepp to tender \$1,000.00 for security for costs.

II. THE EVIDENCE

[6] The Defendants tendered an Affidavit from Mr. Aaron sworn October 13, 2021, consisting of fourteen short paragraphs covering approximately one page, and an Affidavit from Gwendolyn Adrian consisting of six paragraphs covering approximately one page. Mr. Lepp delivered an Affidavit dated March 30, 2022, consisting of twelve pages of unknown number of paragraphs because the paragraphs were not numbered. Each party provided direct testimony to confirm their affidavit evidence and each

party was cross-examined. Mr. Lepp tendered several emails containing letters or emails about his efforts to pay various prior cost awards made against him, which the Defendants did not oppose.

III. ISSUES

[7] The Defendants' motion raises the following issues, which will be addressed in this order:

- (a) Is there jurisdiction to summarily dismiss this defamation claim?
- (b) Was the Column an accurate and fair report, and was it defamatory?
- (c) Should the claim be dismissed on the grounds that it discloses no reasonable cause of action, or because it is inflammatory, a waste of time, or an abuse of the court's process?
- (d) Does this Court have jurisdiction to award security for costs?
- (e) Should Mr. Lepp be ordered to tender security for costs and how much?

A. JURISDICTION TO SUMMARILY DISMISS DEFAMATION CLAIMS

[8] Under SCC Subrules 12.02(1) and (2), a claim can be dismissed if the court is satisfied that it discloses no reasonable cause of action, is inflammatory, a waste of time, a nuisance or an abuse of the court's process. A "waste of time" equates to "no meaningful chance of success at trial" (*Van de Vrande v. Butkowsky*, 2010 ONCA 230 and *O'Brien v. The Ottawa Hospital* (Civic Campus), 2011 ONSC 231 (Div. Ct.)). There is no general rule against rendering summary judgment in defamation cases: *Skafco Limited v. Abdalla*, 2020 ONSC 136, at paras 45-46. Defamation cases have been summarily dismissed by this court: see for example *Cummings v Burlington Radio Control Modelers*, 2018 CanLII 123232 (ON SCSM), which concluded the defamation claim in that instance had no meaningful chance of success.

B. THE COLUMN'S ACCURATENESS AND DEFAMATORY CONTENT

The Column

[9] The impugned Column reads in its entirety as follows, with the bold underlined text being the portions that Mr. Lepp identifies as defamatory of his character, as extracted from his libel notice and his Claim:

By Bob Aaron, Contributing Columnist Wed., Oct. 14, 2020

A decision from Superior Court in **Newmarket** in May provides a compelling lesson about why disputing neighbours should keep their differences off the internet. The case ended with a \$70,000 judgment against **an online activist who interfered in the dispute**.

The plaintiff, Tina Duncan, owns a house on Wells St., in Aurora. Her neighbour to the south, Marnee Buckles, owns a house eight inches from the lot line between the two properties.

After Duncan purchased her house in 2017, she constructed a wooden fence **on the property line**. Buckles objected to the height of the fence, saying it blocked the view from some of her windows.

When Buckles complained to the town of Aurora, by-law inspectors inspected and advised Duncan that the fence was too high but they found no by-law infractions. Duncan reduced the height of the fence.

Since Aurora would not require the removal of the fence, Buckles then went public with her complaints to the local media, and on Facebook and other social media platforms.

In January 2018, Buckles engaged Robert Lepp to assist in her dispute. In his online blog, Lepp described himself as a “trusted street view photographer and municipal activist.”

Lepp made **numerous negative and disparaging comments about Duncan in blog posts, emails and YouTube videos**. He also launched an online petition signed by at least **300 people**.

Buckles then took Duncan to Small Claims Court for **nuisance and trespass damages**. **The judge found the fence was legal and did not constitute a nuisance or trespass**.

After Duncan served Buckles and Lepp with a notice under the Libel and Slander Act, Buckles removed her online posts but Lepp continued with his.

Duncan then sued Buckles and Lepp for defamation. **Lepp did not defend the action**, and was noted in default in the litigation. He continued his online campaign against Duncan.

After a delay, Lepp applied to Superior Court to allow him to file a defence to the lawsuit, but he was turned down and ordered to pay \$18,000 in costs.

In January 2020, Duncan applied to Superior Court Justice Lise Favreau for a default judgment against Lepp for defamation. **Since Lepp had not filed a defence**, the judge ruled that there was no need for a trial and all Duncan had to do was to prove her claim for defamation.

The judge ruled that Duncan’s claim met the three tests and that Lepp’s words had indeed defamed her. She found that Lepp accused Duncan of deliberately acting illegally, that his statements suggested she received preferential treatment from the town because of political connections, and that she was a liar.

Lepp was ordered to pay Duncan \$50,000 in general damages, \$10,000 in aggravated damages for conduct which was high-handed and oppressive, and \$10,000 in punitive damages for actions that were malicious and unfounded.

Lepp has appealed the decision.

[10] For completeness, the online version was edited on October 26th, 2020, such that the first nine words, “A decision from Superior Court in Newmarket in May” were replaced with “A recent decision from the Ontario Superior Court of Justice in Toronto.”

The Words Complained Of (in the order that they appear)

[11] To succeed in defamation, Mr. Lepp must establish, amongst other things, that the words complained of refer to him, and that those words would tend to lower his reputation in the eyes of a reasonable person ([Skafco](#), supra, at paragraph 15). For the Defendants to succeed with their absolute or qualified privilege defence to publish a report on a court proceeding, the Column must, amongst other things, be a fair and accurate representation of the contents of the Decision. For each portion of the Column complained of, I will address these factors at the same time. What follows in the italicized bulleted headings are Mr. Lepp’s assertions:

- *The Column inaccurately stated that the trial was held in Newmarket.*

[12] Mr. Lepp correctly points out that the trial referenced in the Decision was held in Toronto: not Newmarket. Citing the wrong court location does not defame Mr. Lepp. This misnomer, however, is of no consequence since the law in Ontario is the same, regardless of the courthouse location where the decision was rendered.

- *The Column inaccurately stated that Mr. Lepp “interfered” in the dispute.”*

[13] Mr. Lepp asserts that the Decision never described him in this way, and it is defamatory of his character because he did not “interfere,” but rather he was hired, or at least invited to advocate, on behalf of Buckles. The parties debated this issue at length: each providing a different dictionary definition of the term “interfere.” The Defendants relied on the following definition: “to enter into or take a part in the concerns of others,” which they say is an accurate description of Mr. Lepp’s involvement. Mr. Lepp, relied on the following definition: “to involve yourself in a situation when your involvement is not wanted or is not helpful,” which Mr. Lepp argues, portrays him very unfavourably, like a meddler or interloper when this was furthest from the truth.

[14] Black’s Law Dictionary®, Ninth Edition does not have a definition for the word “interfere,” but it does define “interference” as: “1. The act of meddling in another’s affairs. 2. An obstruction or hindrance.”

[15] Allegedly defamatory comments must be read in context, and not in isolation (*Frank v. Legate*, 2015 ONCA 631 at para 48). In isolation, the term “interfered” would in my opinion inappropriately suggest that Mr. Lepp was interloping; however, the Column read as a whole makes it abundantly clear that this was not the case, explaining that “in January 2018, Buckles engaged Robert Lepp to assist in her dispute when he considered her in need of that assistance.” This leaves the reader with the right impression of Mr. Lepp – a person retained to help someone in need. As such, I do not find the reference to “interfered” to be defamatory of Mr. Lepp when the Column is read as a whole.

- *The Column inaccurately stated that the wooden fence was built “on the property line.”*

[16] Mr. Lepp asserts that the fence encroached onto Buckles’ property, making the prior court findings wrong, and hence the Column wrong. The only germane point is that the Column was an accurate report on the court’s acceptance that there was no fence encroachment onto Buckles’ property. Regardless, this statement is not about Mr. Lepp and cannot be defamatory of his character.

- *The Column inaccurately stated that Mr. “Lepp made numerous negative and disparaging comments about Duncan in blog posts, emails and YouTube videos.”*

[17] This sentence on its face is defamatory of Mr. Lepp’s character. It specifically refers to Mr. Lepp, and portrays him as someone who recklessly and unlawfully smeared a person on social media. There is no alternative takeaway from this portion of the Column, in my view. Reading the entire Column doesn’t alter this sentiment.

[18] However, I also consider this statement to be a fair and accurate report on the Decision. Mr. Lepp disagrees, citing that everything he posted about Duncan was true; however, up to the point of the Decision, and to the date of the Column, no court found Mr. Lepp’s comments about Ms. Duncan to be accurate or 100% factual.

[19] Indeed, the Decision contains many more flavourful words and expressions about Mr. Lepp’s social media activity (see paragraphs 14, 15, 23, 40, 50, and 58 and 62), which include: “Mr. Lepp’s unrelenting spate of negative comments about Ms. Duncan, the nature of the personal attacks on Ms. Duncan and his persistence in those attacks even after the Small Claims Court found that the fence was lawful demonstrate malice,” and “after he was contacted by Ms. Buckles, Mr. Lepp immediately undertook a relentless campaign against Ms. Duncan and her fence.” In light of this, Mr. Aaron’s description that “Lepp made numerous negative and disparaging comments about Duncan in blog posts, emails and YouTube videos” was a very fair, accurate, and I would add “Lepp-friendly” report on the

Decision. The reality is that court decisions can, and often do, contain things that are unflattering and defamatory of the participating litigants.

- *The Column inaccurately stated that Mr. Lepp launched an online petition signed by at least 300 people.*

[20] Mr. Lepp asserts that this is wrong because the petition was signed by over 1,100 people. The reference to 300 people comes straight from the Decision, at paragraph 14; hence the Column is accurate. Regardless, the reference is not defamatory of Mr. Lepp, in my view.

- *The Column inaccurately stated that Buckles took Duncan to Small Claims Court for nuisance and trespass damages.*

[21] Mr. Lepp says this phrase is wrong because the claim was for “loss of future market value.” This is not defamatory of Mr. Lepp: it refers to a court proceeding between parties other than Mr. Lepp. Additionally, it appears to be accurate, as reflected in *Duncan v. Buckles*, 2019 ONSC 5044 (a decision that would have also been available to Mr. Aaron), where at paragraph 6 it states that “Buckles commenced an action in Small Claims Court on February 21, 2018 against Duncan alleging the fence trespassed on her property and caused a loss of value, use and enjoyment of her home, and for nuisance, trespass and negligence.”

- *The Column inaccurately stated that the judge found the fence was legal and did not constitute a nuisance or trespass.*

[22] Mr. Lepp asserts that the Small Claims Court judge was not asked to rule on the issue. However, the Decision, rightly or wrongly, contains the following pronouncement at paragraph 27:

“The Small Claims Court made the following findings:

- a. The fence was lawful;
- b. The fence was on Ms. Duncan’s side of the property and there was insufficient evidence of subterranean encroachment;
- c. Ms. Duncan was not liable in nuisance; and
- d. Ms. Buckles’ property did not lose any value due to the fence.”

[23] Again, I believe the Column’s summation was an accurate and fair report on the Decision, and this is not defamatory of Mr. Lepp: it refers to a court ruling between parties other than Mr. Lepp.

- *The Column inaccurately reported that Mr. Lepp did not defend the action, and was noted in default in the litigation*

[24] Mr. Lepp asserts that after he was noted in default, he attempted to file a defence (some 23 days after service), followed by a motion to dismiss Duncan’s defamation case under section 137.1 of the [Courts of Justice Act](#), R.S.O. 1990, c. C.43 (his “**anti-SLAPP Motion**”). A plausible negative connotation of saying someone did not defend a lawsuit is that they walked away from the claim because it was indefensible, which Mr. Lepp asserts is false because he could prove that all of his postings about Duncan were 100% truthful and factual.

[25] The Column, however, read as a whole makes it clear that Mr. Lepp was not an absentee defendant: it specifically states that “after a delay, Lepp applied to Superior Court to allow him to file a defence to the lawsuit, but he was turned down...” The Column accurately conveyed that Mr. Lepp did not file a defence on time, and fought to try and get a seat at the table to defend his actions. It was a fair, accurate, and collectively non-defamatory report on Mr. Lepp’s non-participation in the trial.

- *The Column inaccurately reported that “after a delay, Lepp applied to Superior Court to allow him to file a defence to the lawsuit, but he was turned down and ordered to pay \$18,000 in costs.”*

[26] Mr. Lepp asserts that this is inaccurate because the relief he was seeking was to have the Duncan’s claim struck pursuant to an anti-SLAPP motion, and not through a Defence pleading. I find this to be a distinction without a difference. Mr. Lepp brought a motion to set-aside the noting in default. Whether he wanted the default set aside so he could file an anti-SLAPP motion, or to file a defence, is not overtly material. I find the Column to have accurately reported on paragraph 29 of the Decision, reflecting that “Mr. Lepp finally brought a motion to set aside the noting in default ... [and]... Schabas J. dismissed the motion ... [and]... ordered Mr. Lepp to pay \$18,000 in costs.” Being turned down by a court is not defamatory of Mr. Lepp’s character.

- *Other Allegations in the Claim*

[27] Outside of the libel notice, but in his Claim, Mr. Lepp also takes issue with Mr. Aaron’s use of the term “ended,” to describe the outcome, because the lawsuit was still ongoing against Buckles. But the fact remains that the trial ended vis-à-vis Mr. Lepp, and the use of that term is accurate. Regardless, it is not defamatory of Mr. Lepp to say a case ended. Mr. Lepp also raised issues in his motion material about the way the fence height was addressed in the Column, but references to a fence is not defamatory of Mr.

Lepp's character, and additionally, the Column in my view accurately reported on the fence related text found at paragraph 9 of the Decision.

Conclusion

[28] There were many references in the Decision that were far more damaging to Mr. Lepp's reputation than was conveyed in the Column, which to me is a further indication that the Column wasn't written to defame or attack Mr. Lepp, but rather it was written to transmit a valuable story to the public about being careful in the way social media is used when trying to resolve disputes.

[29] However, the threshold for defamation is not grounded on how much defamatory material was left out, and the Column would likely still lower Mr. Lepp's reputation in the community, even though it could have been much more tarnished had the Defendants reported differently. However, the defamatory representation of Mr. Lepp being a person who wrongfully smeared someone on social media was an accurate and fair summation of the Decision. As is often the case, a court ruling can be very unflattering to a party. The question remains whether the Defendants are protected from publishing this defamatory Column on the grounds that it was written on an occasion of a recognized privilege to report on a court proceeding.

C. SHOULD THE CLAIM BE DISMISSED ON THE GROUNDS THAT IT REVEALS NO REASONABLE CAUSE OF ACTION, OR BECAUSE IT IS INFLAMMATORY, A WASTE OF TIME, A NUISANCE OR AN ABUSE OF THE COURT'S PROCESS?

Discloses No Reasonable Cause of Action?

[30] The Defendants assert that this Claim ought to be dismissed on the basis that it discloses no reasonable cause of action. I disagree. The Claim, in my opinion, sufficiently sets out a recognizable claim in defamation.

Inflammatory?

[31] I don't consider Mr. Lepp's Claim to be inflammatory, which is a Claim that is rife with irrelevant assertions designed to provoke an outcome that is not in accord with sound legal principles. Albeit there may be a few assertions in Mr. Lepp's Claim that might cross the line, the motion before me is not about striking out certain portions of the Claim: it is about striking the Claim *in toto*, and I am not persuaded to do so on the inflammatory condition set out in SCC Rule 12.02.

Waste of Time?

[32] Returning to the cases such as *Van de Vrande v. Butkowsky*, 2010 ONCA 230 and *O’Brien v. The Ottawa Hospital* (Civic Campus), 2011 ONSC 231 (Div. Ct.), referenced earlier, the waste of time element equates to “no meaningful chance of success at trial.” Having carefully considered all the factors in this case, I am of the opinion that there is no meaningful chance of success at trial because the absolute or qualified privilege to report on a court proceeding defeats this claim.

Newspaper Privilege to Report on Court Proceedings

[33] The privilege that attaches to the occasion of reporting on a judicial proceeding is grounded in both the common law and statute: this includes reporting on a court decision (*Chidley-Hill v. Daw*, 2010 ONSC 1576, upheld on appeal: *Chidley-Hill v. Daw*, 2010 ONCA 835).

Analysis on the Statutory Privilege to Report on Court Proceedings

[34] The statutory privilege is codified in section 4 of the LSA, which reads as follows:

Report of proceedings in court

4 (1) A fair and accurate report without comment in a newspaper or in a broadcast of proceedings publicly heard before a court of justice, if published in the newspaper or broadcast contemporaneously with such proceedings, is absolutely privileged unless the defendant has refused or neglected to insert in the newspaper in which the report complained of appeared or to broadcast, as the case may be, a reasonable statement of explanation or contradiction by or on behalf of the plaintiff.

Improper matter

(2) Nothing in this section authorizes any blasphemous, seditious or indecent matter in a newspaper or in a broadcast.

[35] Section 4 of the LSA provides the Defendants with the highest level of protection against defamation claims: an absolute privilege as long as the report is a fair and accurate report of a judicial proceeding, and none of the exclusions are triggered. Thereafter, malice is an irrelevant consideration.

[36] I have already found, based on my earlier analysis, that the Column was a fair and accurate report on the Decision. This leaves me to consider whether the statutory privilege is lost because: a) the Column contains commentary, b) the Column was not contemporaneous, c) the Defendants failed to publish a reasonable statement of explanation or contradiction by or on behalf of the plaintiff, and/or d) the Column

was a publication on a blasphemous, seditious or indecent matter. For the reasons that follow, I don't consider any of these exclusions to be triggered.

A) Commentary?

[37] The Column, in my view, does not contain any extraneous commentary. Mr. Aaron may have imparted a comment about the Decision providing a “compelling lesson” on how airing disputes on the internet can be dangerous, but this in my view is accurate, and sums up the import of the Decision. Mr. Aaron, for example, does not comment on the correctness of the Decision, nor does he express any personal views about the parties outside what was expressed in the Decision: “comment” includes a “deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof” (*Ross v. New Brunswick Teachers' Assn.* (2001), 201 D.L.R. (4th) 75, 2001 NBCA 62 (CanLII), at para. 56.

[38] Mr. Lepp insists that Mr. Aaron was tendering an opinion that neighbours should avoid free speech on the internet. I don't view that to be the case: the take-away from the Column is to be honest in what you say about others online, which has been Mr. Lepp's position throughout. The only difference is Mr. Lepp says he was telling the truth, and perhaps he was, but Favreau J. did not come to that conclusion in her Decision.

B) Contemporaneous?

[39] The LSA does not define the term contemporaneous, and to my knowledge, neither do any of the counterparts in other provinces, although some do incorporate an outside temporal limit, such as the *Defamation Act* in Alberta and New Brunswick ([R.S.A. 2000, c.D-7](#) and [R.S.N.B. 2011, c 139](#), respectively), which requires that the report be “published contemporaneously with the proceedings that are the subject-matter of the report, or within 30 days thereafter.”

[40] Absent a temporal limit, the discretion lies with the court to assess what is contemporaneous. In assessing their equivalent of section 4 of the LSA, the Supreme Court of South Australia, in [Sands v Channel Seven Adelaide Pty Ltd](#) [2010] SASC 202 at para 132, agreed with the observations of Cox J. in *Bunker v James* (1980) 26 SASR 286, at para 303, that the court should not apply a literal interpretation of the term contemporaneous (i.e.: immediately, right away, or as soon as possible), but rather the court should adopt a more purposeful interpretation that fosters the legislative intent “to deny the statutory protection to reports that are stale, and in that sense no longer news.”

[41] In my view, the Column, appearing only four months after the Decision was released, was not stale, and it was still newsworthy at the time of its publication, sufficient to satisfy the contemporaneity

requirement in the context of a report on a static court decision that was not subject to any appellate review. In other more dynamic instances, such as reporting on an active trial, the acceptable timeline would likely be significantly shorter.

C) Publication of a Reasonable Statement of Explanation or Contradiction?

[42] This exclusion does not apply because the Defendants never refused or neglected to publish a reasonable statement of explanation or contradiction by or on behalf of the Plaintiff. Indeed, Mr. Lepp never provided one. Instead, Mr. Lepp demanded to be interviewed, as revealed in his libel notice, wherein he framed the demand as follows:

“My Request

Someone other than Bob Aaron wrote this article. He could NOT have researched Newmarket court records to write anything about this because it was a Toronto matter.

I ask you assign a cub reporter to interview me for a followup article. If a fair article is published by October 31, 2020 then I shall not sue.”

[43] Demanding an interview is not akin to providing a reasonable statement of explanation or contradiction by the plaintiff. In order to potentially remove the Defendants’ ability to rely on section 4 of the LSA, it was incumbent on Mr. Lepp to do the heavy lifting, and to prepare a concise statement of explanation or contradiction (using no more words than the original report) so that the Defendants could assess its reasonableness.

[44] In *Dale v. Guardian, Division of Southam Inc.*, 1999 CanLII 4603 (PE SCTD), for example, the defendant newspaper refused to publish a letter of explanation that was provided to them by the plaintiff, and the PEI equivalent of section 4 of the LSA still protected the newspaper because the judge was “unable to conclude” that what was submitted by the plaintiff in that case fell “within the context as a ‘reasonable’ letter or statement of explanation or contradiction,” because what was submitted did “not explain anything and it ...[did]... not set out any grounds or factual basis of contradiction” (at paragraph 23).

[45] Put another way, if the judge in *Dale* could not assess the reasonableness of an actual letter or statement provided by or on behalf of the plaintiff in that case, this same handicap certainly exists when no letter or statement is given at all, as the case here. No trial can assist on this issue.

[46] Mr. Lepp’s libel notice does contain a “summary,” which perhaps was his attempt at a letter or statement of explanation or contradiction, and it read as follows:

“SUMMARY

Your words are defamatory in that they lie about me, my motives, my actions and what the court ordered.

They were published as a favour to one or more of Tina Duncan, Jaclyn Solomon, Gwendolyn Adrian, Mandie Crawford or Helen Clarke.

It was timed for October 13, as a result of the August 28 TORONTO “Examination In Aid Of Execution”, wherein Gwendolyn lost her bid to have me declared in contempt for NOT providing an “Affidavit of Documents”. She was admonished for attempting it.”

[47] This, to me, falls significantly short of a reasonable statement of contradiction or explanation. Put another way, if the Defendants published this, or even something close to it, the readership would be left scratching their heads.

D) Blasphemous/Seditious/Indecent?

[48] I don’t consider the Column to be a publication on a blasphemous, seditious or indecent matter: nothing in the Column would fall into these categories, on the plain meaning of these words.

Summary on the Absolute Privilege to Report on Court Proceedings

[49] In summary, section 4 of the LSA is a complete defence to this claim: a trial would be a waste of time. Issues of malice are irrelevant.

Analysis on the Qualified Privilege for Newspapers to Report on Court Proceedings

[50] Distinct from the statutory absolute privilege is the common law qualified privilege to report fairly and accurately on a court proceeding (*Hill v Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 SCR 1130, at para 150), where contemporaneity is not a requirement, although the length of time that elapses between the time of the proceeding and the report may be relevant to the question of whether the publication was intended as a report of a judicial proceeding (*Chidley-Hill*, supra, at para 36). I have already concluded, as noted above, that the Column was a timely report.

[51] The qualified privilege also has no requirement to publish a reasonable letter or statement of explanation or clarification. Indeed, as expressed in *Chidley-Hill*, supra, at paragraph 38, “if a judge releases a decision in a court proceeding, the press need not talk to all the parties mentioned in the decision or review the entire court file before publishing a report of the judicial decision. The Canadian press does not labour under such a burden; the law only requires that the report be fair and accurate.”

[52] Unlike the statutory absolute privilege, malice can defeat a qualified privilege, although the occasion for the qualified privilege presumes that malice doesn't exist ((*R.T.C. Engineering Consultants Ltd. v. Ontario*, 2002 CanLII 14179 (ON CA), 58 O.R. (3d) 726 (C.A.), at para. 14, *Hill*, supra, at para. 144), and the onus shifts to the Plaintiff to establish the dominant motive for publishing the statement must be actual or express malice (*Foulidis v. Baker*, 2014 ONCA 529, at para 55).

[53] Mr. Lepp's pleading is not succinct, however, distilled to its core he is asserting that the Defendants acted with malice by accepting and publishing a story proffered to Mr. Aaron by one or more of Mr. Lepp's longstanding enemies.

[54] Mr. Lepp conveyed to me several times during his submissions that he should never have asserted in his Claim that the Column was written by his enemies, and that he was prepared to strike those allegations from the Claim. I was prepared to accept that request, but Mr. Lepp wasn't consistent because at other times he stressed how important it was for me to understand that it was his enemies who fed the story to Mr. Aaron. Mr. Aaron says that he learned of the Decision from one of his legal subscription feeds such as Quicklaw, LexisNexis, Carswell, etc.: he categorically denies any outside influence.

[55] If I accept Mr. Lepp's request to strike those portions of his Claim that reference the involvement of his enemies in the creation of the Column, then malice is no longer in issue, and the qualified privilege to deliver a fair and accurate report on a court proceeding is a complete defence to Mr. Lepp's claim. However, even if these allegations remain, the result does not change because despite any "involvement" of Mr. Lepp's enemies, Mr. Aaron nonetheless took it upon himself to write a timely, accurate and fair report of a court ruling, which I have unequivocally found the Column to be: a trial to determine how Mr. Aaron was drawn to put pen-to-paper (Mr. Lepp's enemies or a legal subscription service) is a waste of the court's time. Put another way, even if Mr. Lepp's enemies intended to manipulate Mr. Aaron, he didn't take the bait.

ABUSE OF PROCESS?

[56] The last issue is whether Mr. Lepp's claim is to be dismissed as an abuse of process under SCC Rule 12.02 because it constitutes an attempt to re-litigate a matter that was decided previously: *Vuong v. Toronto East General & Orthopaedic Hospital*, 2010 ONSC 6827 (CanLII) (Div. Ct.); see also *Frank*, supra, at para 88 and 89.

[57] Mr. Lepp unequivocally considers the trial of seminal importance to him: to get the record straight. He asserts that the other judges got so many things wrong. He views this defamation case, for instance,

as an opportunity to show the world that he was right and everyone else was wrong. Mr. Lepp wants to establish that everything he said on social media was “100% true.”

[58] Respectfully, it is not open to Mr. Lepp, in this action, to argue that Favreau J., or any other judge, got it all wrong. Even if Favreau J. “got it all wrong,” and her Decision was successfully appealed, the assessment of fairness and accurateness is still made against her reversed decision as of the date of the impugned publication. (*Chidley-Hill*, supra, at paragraph 39).

[59] Mr. Lepp asserts that Papageorgio J. in *Tina Jayne Duncan v. Marnee Buckles*, 2021 ONSC 291, “completely reversed” the findings and conclusions reached by Favreau J. in the Decision. Even if this were the case, it is not relevant.

[60] But not to put too much emphasis on Mr. Lepp’s argument, Papageorgio J. did not “reverse” anything. The matter before Papageorgio J. was the continuing saga of Duncan’s defamation claim against Buckles (with the portion against Mr. Lepp having ended as reflected in the Decision). However, Papageorgio J. never did hear the defamation case against Buckles because at the eleventh-hour Duncan withdrew her defamation claim against Buckles, and only proceeded to seek reimbursement against Buckles on a very trivial \$1,412.50 expended to temporarily remove and replace the fence to accommodate some natural gas maintenance work on Buckles’ property. The reimbursement claim was ultimately denied, and when addressing costs, Papageorgio J. was certainly very critical of Duncan for pursuing this singular modest claim, while abandoning her more substantive defamation claim against Buckles, which her Honour thought lead to the “reasonable inference that Duncan realized her (defamation) claim had no merit after she received Buckles’ response to the summary judgment motion,” and that pursuing the singular modest claim was perhaps some “strategic step taken to achieve some success to avoid paying costs of the summary judgment motion” (all at para 41).

[61] By no yardstick is this a “reversal” of the Decision, as interpreted by Mr. Lepp. No findings of fact were made, and the judge simply made some very unfavourable inferences against Duncan. But regardless of the import of Papageorgio J.’s decision, it is not relevant, just as a successful appeal of the Decision would be an irrelevant consideration (*Chidley-Hill*, supra).

[62] All matters considered, I conclude that it is an abuse of the court process for Mr. Lepp to use this forum as a means to challenge the findings made against him as reflected in the Decision, and even more so when the outcome of any such challenge is an irrelevant consideration for the determination of this case.

D. JURISDICTION TO AWARD SECURITY FOR COSTS

[63] The Defendants’ motion for security for costs, in conjunction with an order staying the proceeding until the security is posted, is moot in light of my ruling that the Claim is dismissed.

[64] I am not aware of any decision from this Court dealing with a motion for security for costs: this may largely be because there is no such rule in the SCC Rules. However, where, as here, there is a legislative right to bring a motion for security for costs before the court, the authority lies with this court to entertain the motion, and where necessary, this court could apply the Rules of Civil Procedure governing security for costs motions. This is in contrast to a motion before a judge which would remove my authority to hear this motion (as would be the case, for example, in an anti-SLAPP motion under subsection 137.1(3) of the *Courts of Justice Act*).

E. CRITERIA TO AWARD SECURITY FOR COSTS, AND QUANTUM

[65] Having read section 12 and 13 of the LSA, I consider the Defendants to have satisfied all the elements: namely that this is an action for libel in a newspaper, the motion was brought on notice, the Defendants raised a good defence on the merits, they led evidence that the statements complained of were made in good faith, and they have demonstrated that Mr. Lepp “is not possessed of property sufficient to answer costs” given Mr. Lepp’s admission that he doesn’t have sufficient assets to meet his debt obligations.

[66] The Defendants seek security for costs in the sum of \$2,000.00 for each Defendant, or \$4,000.00 in total. If I had to rule on this, I would have fixed the quantum at \$1,000.00 in total.

[67] Fixing security for costs can be tricky because impecuniosity is often the trigger, and in such instances ordering costs can prevent access to justice. Mr. Lepp advised the court that he could post \$750.00 in security for costs, and would gladly pay it. Mr. Lepp doesn’t believe it should be \$750 for each Defendant. I believe Mr. Lepp’s position is reasonable and fair.

[68] Considered overall, I would have fixed security for costs at \$1,000.00, being consistent with the 15% cap enumerated in section 29 of the *Courts of Justice Act*, which would be \$750.00 (15% of \$5,000), plus an additional \$250.00 for disbursements.

IV. CONCLUSION

[69] Notwithstanding any defamatory elements within the Column, I am persuaded that a trial is not necessary because of the Column was published on an occasion of a recognized privilege, both absolute

and qualified, for the Defendants to publish a fair and accurate report on a court proceeding; in this case the Decision, which unfortunately was not very flattering towards Mr. Lepp.

[70] In the circumstances of this case there is no need for a trial on the issue of malice given the parity between the Column and the Decision and its timeliness, which effectively renders the involvement of any of Mr. Lepp's enemies irrelevant: the absolute privilege makes this even more so.

[71] Even though not material to the result, I also accept that Mr. Aaron wrote the Column on his own, without interference: this again comes from the parity between the Decision and the Column, but in addition, I would reject Mr. Lepp's assertion that it was ghost written by his enemies because I believe if it was constructed by Mr. Lepp's enemies, it would have highlighted the more unfavourable portions of the Decision pertaining to Mr. Lepp, and it would have undoubtedly included a lot of content not found in the Decision itself given that Mr. Lepp's enemies would be privy to all that unsavory "history" between them as asserted by Mr. Lepp.

[72] The Column, in my view, doesn't contain any divergent inaccuracies from the content of the Decision, and even if I am wrong such that there are some differences, they are clearly very subtle (ie: Toronto instead of Newmarket), and the privilege associated with reports on court proceedings, whether absolute or qualified, does not require a verbatim transcription of the court proceeding: slight inaccuracies or omissions is immaterial (*Dale v. Guardian, Division of Southam Inc.*, 1999 CanLII 4603 (PE SCTD), *Benoit v Telegraph Journal*, 2016 NBQB 53 at paras 13-14).

[73] I also wish to address Mr. Lepp's chastisement of my previous directive made during an earlier Settlement Conference, requiring the parties to prepare a Words List, which was essentially a chart that identified all the words or phrases in the Column that had no counter-part in the Decision. Mr. Lepp asserted that I was misguided in making the parties undertake this exercise because a word-by-word comparison had no place in the law of defamation.

[74] Mr. Lepp misunderstood the purpose behind my directive. It wasn't to identify defamation, but rather it was to be a helpful tool for the parties, and for the judge if it went to trial, to conceptualize the degree of divergence between the Column and the Decision which is a valid consideration for the courts when a defendant asserts an absolute or qualified privilege to report on court proceedings (see for example *Dale*, supra).

[75] But more importantly, the Word List was intended to squarely address Mr. Lepp's plea at paragraph 8 and 39 of his Claim that "Mr. Aaron could not have found these words" in the court records, and that Mr. Aaron "had to get them from ...[Mr. Lepp's enemies]." As matters turned out, the Words List revealed that there was no foundational detail in the Column that was extraneous to the Decision: Mr.

Aaron could have written the Column entirely from the Decision, and he didn't have to look elsewhere as was emphatically pleaded by Mr. Lepp.

[76] I do agree with Mr. Lepp that the assessment of whether an article or report is defamatory requires the trier of fact to use a contextual approach, assessing all the words in their entirety, which is what I have done (see for example my *dicta* on the use of the term “interfered” earlier in this decision).

V. COSTS

[77] The Defendants submitted that in the event of success, they were seeking a representation fee (of the motion and action) in the sum of \$750.00 for each Defendant, which although I find to be reasonable, it may run afoul of the 15% cap in section 29 of the [Courts of Justice Act](#).

[78] There is obviously an interesting debate on whether the cap applies to each defendant, or to the claim as a whole which would effectively require multiple defendants to share their combined legal representation fee to 15% of the amount claimed. No case law was provided to me on this issue, and I am not aware of any touching on this issue.

[79] I am aware of many cases involving multiple defendants, but in each instance they were represented by the same legal representative. The challenge here is that Mr. Aaron was self-represented, and the Toronto Star had legal representation. I was not provided with any explanation for why the Defendants could not be represented by the same legal representative. I can speculate as to why, but that is not proper. Mr. Lepp argues that the two Defendants are one in the same, and that the Toronto Star did most of the heavy lifting.

[80] Costs are governed, in part, by the reasonable expectations of the parties ([Anderson v St Jude Medical, Inc.](#), 2006 CanLII 85158 (Ont. Div. Ct.)). In the present case, it would be reasonable for Mr. Lepp to have expected the Defendants to be represented by one legal representative, and being exposed to only one legal fee.

[81] As such, I fix costs at \$750.00, payable to the Toronto Star Newspapers Limited. These funds will be infused with a trust in favour of Mr. Aaron, subject to termination once an agreement is reached between the Defendants on how the \$750.00 is to be distributed amongst the Defendants. Barring any agreement being reached within the next fourteen days, each Defendant shall deliver to my attention a one-to-two-page submission on their position for the distribution, after which I will rule on the division of the \$750.00 legal fee.

[82] I appreciate that there was no trial, and costs on a motion are typically capped at \$100, however, the Defendants filed separate Defences and would be awarded \$100 each in fees for that exercise, which brings me to \$300 in total, leaving a balance of \$450 for two defendants in fees for the action, which I believe is fair.

[83] In addition to the \$750.00 in legal representation fees to be paid to the Toronto Star, the Defendants will be awarded the amounts they sought for disbursements, which I find to be reasonable, as follows:

- (a) Mr. Lepp is to pay an additional \$193.00 to the Toronto Star (as a reimbursement toward the fee to file their Defence in the sum of \$73.00, and the fee to file this motion in the sum of \$120.00); and
- (b) Mr. Lepp is to pay an additional \$73.00 to Mr. Aaron, representing the fee to file his Defence.

VI. DISPOSITION

[84] On the basis of the reasons set out herein, I order and adjudge as follows:

- (a) The Plaintiff's Claim is dismissed.
- (b) Costs to the Defendants of \$750.00 in fees, and \$266.00 in disbursements, as itemized in the paragraph above.

"D. M. José"

Deputy Judge DAVID M. JOSÉ

Released: May 3, 2022