COURT OF APPEAL FOR ONTARIO

CITATION: Rutman v. Rabinowitz, 2018 ONCA 80
DATE: 20180131
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Cronk, Huscroft and Nordheimer JJ.A.

BETWEEN

Ronald Rutman

Plaintiff (Respondent)

and

Saul Rabinowitz, Moishe Bergman, Artcraft Company Inc.,
John Doe 4 and John Doe 5

Defendants (Appellants)

Helen A. Daley and Michael Finley, for the appellants Moishe Bergman and Artcraft Company Inc.,

John J. Adair, for the appellant Saul Rabinowitz

Matthew P. Sammon and S. Jessica Roher, for the respondent

Heard: November 16, 2017

On appeal from the judgment of Justice Michael A. Penny of the Superior Court of Justice (Commercial List), dated November 30, 2016, with reasons reported at 2016 ONSC 5864.

By the Court:

INTRODUCTION

[1] This is a case of serious, sustained, and baseless Internet defamation.

[2] The respondent, Ronald Rutman, a Toronto chartered accountant and businessman, was subjected to an orchestrated Internet defamation campaign specifically designed to harm his personal and professional reputations. The campaign involved postings on the Internet of numerous defamatory allegations, including that he had engaged in tax fraud and was a thief and a cheat. The allegations were entirely without substance.

[3] The defamatory statements were made by the appellant, Saul Rabinowitz, who admitted liability at trial. The trial judge found the appellants, Moishe Bergman and Artcraft Company Inc., jointly and severally liable for the defamation. He awarded: $200,000 general damages as against all three defendants; $200,000 aggravated damages and $250,000 punitive damages as against Rabinowitz; and $50,000 punitive damages as against Bergman.

[4] Rabinowitz appeals the trial judge's damages awards. He argues that a total award of $400,000 compensatory damages ($200,000 general damages, plus $200,000 aggravated damages), is inordinately high. According to Rabinowitz, awards of $50,000 for general damages and $50,000 for aggravated damages are at the upper end of the range for compensatory damages in cases like this one,

where the plaintiff's reputation allegedly was unharmed by the defamatory conduct in question.

[5] Rabinowitz offers only a qualified acknowledgement that punitive damages are appropriate in this case. He submits that an award of punitive damages is justified if, and only if, the overall compensatory damages awarded by the trial judge are substantially reduced. In this event, Rabinowitz says, a rational award of punitive damages would be in the range of $25,000 to $50,000.

[6] Bergman and Artcraft appeal from the joint and several liability holding against them. In the alternative, they seek to reduce the quantum of the general damages award to $25,000. Bergman also seeks to vacate the punitive damages awarded against him.

[7] For the reasons that follow, the appeal is dismissed.

BACKGROUND IN BRIEF

[8] Rutman is a partner at the accounting firm Zeifmans LLP, where he has worked for over 40 years. He is also a board member and Chair of the Independent Trustees of H&R Real Estate Investment Trust ("H&R REIT"), a publicly traded real estate trust that manages over $13 billion in assets and investments, and he serves on the boards of directors of several charitable organizations. It is undisputed that he enjoys an excellent reputation in Toronto, has been successful

in business, and plays an active leadership role in his cultural and religious communities.

[9] Rabinowitz and Bergman were Rutman's long-time business associates. Rabinowitz managed Artcraft Limited,[1] a company owned by Rutman. Bergman was responsible for sales. The three men were also all members of Toronto's Orthodox Jewish community and shared many common friends and acquaintances.

[10] In June 2007, Rabinowitz and Bergman commenced proceedings against Rutman and Artcraft's predecessor companies over control of the business. A settlement was reached in August 2007, under which Bergman and Rabinowitz agreed to purchase most of the Artcraft assets from Rutman, and all parties provided mutual full and final releases of all claims as against each other, save only in respect of the settlement and the transactions contemplated under it.

[11] Rabinowitz and Bergman were not satisfied with some terms of the settlement. In August 2008, notwithstanding the prior delivery of the releases, they sought to enjoin Rutman from exercising certain rights under the settlement agreement. They also sought to issue a fresh statement of claim containing serious allegations of professional impropriety against Rutman in respect of the

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[1] The appellant, Artcraft, was later incorporated to carry on the business previously conducted by Artcraft Limited.

Artcraft business, including tax fraud. The court refused Rabinowitz's and Bergman's injunction request. Further discussions ensued and the settlement agreement was amended. The proposed fresh statement of claim was never issued.

[12] The Internet defamation campaign against Rutman began on August 18, 2008 with the creation of an email account by Rabinowitz (handrmember@ gmail.com), using an Artcraft computer. Rabinowitz used this account to send anonymous emails to Rutman's business partners at Zeifmans concerning "suspicious activities/transactions done by your firm". He also used it to send an email to the managing director and trustees of H&R REIT, suggesting that Rutman be investigated for "money laundering and tax evasion fraud".

[13] Rabinowitz also used an Internet bulletin board website known as "GigPark" to post numerous negative reviews about Rutman, each purporting to be authored by a different person. These postings described Rutman as "a thief and a bastard" and someone who "deserves to be behind bars", among other defamatory things.

[14] In late September 2008, Rabinowitz learned that Rutman was refusing to pay an outstanding invoice from an Artcraft supplier, Laptide Industries Ltd. This prompted Rabinowitz and Bergman to consider, and ultimately to commence, litigation to force Rutman to pay. It was also the trigger for further defamatory postings on the GigPark site.

[15] Rabinowitz attempted to spread the defamatory comments widely. At trial, he acknowledged the postings were made with malice and that he used the names of Rutman's business partners and his son in the postings in an attempt to maximize Rutman's pain and suffering.

[16] In December 2008, the appellants retained counsel to prosecute the Laptide litigation. Over time, Rabinowitz escalated the Internet defamation campaign by impersonating Rutman using fake email addresses and by sending defamatory emails about Rutman from anonymous addresses to his friends, family, business associates, and members of Toronto's Orthodox Jewish community. Further defamatory emails about Rutman were sent to H&R REIT and to the media using anonymous email addresses and additional postings were made about Rutman on the GigPark site. Rabinowitz continued to allege serious wrongdoing, including criminal behaviour by Rutman. The GigPark postings, for instance, described Rutman as a "tax cheater", "corrupt", a "cheater who should be reported", a "crook", a "swindler", a "thief" and a "master of tax fraud", among other derogatory things.

[17] In April 2009, Rabinowitz swore an affidavit in the Laptide litigation denying his involvement in these matters, but eventually admitted that he committed perjury in doing so. He attempted to frustrate Rutman's investigation into the anonymous emails by installing software on his computer in an attempt to hide his IP address, with the intent of making additional defamatory statements about Rutman on the Internet. He later enlisted the assistance of an Artcraft employee in charge of

technology for this purpose, and installed further software designed to delete and destroy electronic data.

[18] Rabinowitz's defamatory activities persisted over a lengthy period. They were unrelenting, insidious and reprehensible.

TRIAL JUDGE'S DECISION

[19] In April 2009, Rutman sued Rabinowitz, Bergman and Artcraft for damages in defamation, among other matters. Rabinowitz admitted liability for the defamatory statements. Bergman denied that he participated with Rabinowitz in the publishing of those statements and Artcraft denied any responsibility for Rabinowitz's actions.

[20] At trial, Bergman's evidence was that he never agreed to the campaign; was not aware of it until April 19, 2009, when he sent an email message believing it was going to Rutman when in fact it was in response to another fraudulent email sent by Rabinowitz, stating "Wishing you much luck!"; and that he never condoned, encouraged, or sought to benefit from the campaign.

[21] All the defendants pleaded justification as a defence to Rutman's claim. They did not abandon this defence until mid-trial, when it became apparent that it could not succeed.

[22] The trial judge found that the words complained of were defamatory, were about Rutman, and were published to a third party. He rejected Bergman's

evidence on all key points, holding, in effect, that Bergman had knowingly encouraged and assisted Rabinowitz in his defamatory attacks against Rutman.

[23] Specifically, Bergman admitted at trial that he was not on speaking terms with Rutman, had no reason to be wishing him luck, and that he had changed his story about the incriminating "much luck" email mid-trial after discussions with Rabinowitz in preparation for trial. The trial judge found that Bergman had "utterly failed" in his disclosure obligations and routinely deleted emails notwithstanding his knowledge of the terms of an *Anton Piller* order requiring him to preserve evidence. In addition, contrary to a court order, he failed to produce his Blackberry device until two years following the date of the *Anton Piller* order, and admitted that he gave false evidence in answer to discovery undertakings about the email address he was using.

[24] The trial judge also held, contrary to Bergman's contention, that there was no evidence that Bergman disapproved of Rabinowitz's Internet defamation campaign and had told him to stop. Indeed, there was evidence that Bergman had corresponded with Rabinowitz using the fake Rutman email address Rabinowitz had created – evidence that was revealed only as a result of a forensic inspection of Rabinowitz's computer. The tone and context of these communications were inconsistent with Bergman's claim that he was opposed to Rabinowitz's conduct and wanted him to stop.

[25] The trial judge further found that, at least by mid-April 2009, Bergman knew Rabinowitz had been using fraudulent Internet postings to defame Rutman, had been sending fraudulent defamatory emails to H&R REIT, and that Rabinowitz was engaged in a campaign to cause pain and injury to Rutman. For example, Bergman's and Rabinowitz's lawyer at the time (not counsel on appeal) had threatened to contact the Canada Revenue Agency (the "CRA") with allegations of tax fraud against Rutman if Rutman refused to settle the Laptide litigation on their terms. The lawyer further suggested the email campaign against Rutman would stop if he accepted the settlement proposal. In doing so, the lawyer had acted at all times on instructions from Rabinowitz and Bergman, and had kept both men apprised of all developments.

[26] The trial judge also made clear findings in support of his holding that Artcraft was vicariously liable for the Internet defamation campaign mounted against Rutman. He found that Rabinowitz and Bergman, as the controlling shareholders, directors, and directing minds of Artcraft, had authorized the use of company equipment and employees to effect the defamatory campaign against Rutman.

[27] Specifically, the trial judge found that Artcraft computers and email servers were used in the Internet defamation campaign and that an Artcraft employee, at Rabinowitz's request, provided assistance in perpetrating the campaign and in attempting to avoid detection. In addition, as mentioned above, Rabinowitz and Bergman authorized their lawyer to use the defamation campaign as a bargaining

chip in settlement negotiations concerning the Laptide dispute, litigation in which Artcraft Limited was a named party.

[28] Finally, as described above, the trial judge awarded $200,000 general damages against Rabinowitz, Bergman and Artcraft, jointly and severally; $200,000 aggravated damages and $250,000 punitive damages against Rabinowitz; and $50,000 punitive damages against Bergman.

ISSUES

[29] The appellants raise four issues on appeal:

A. Liability: Bergman and Artcraft

1) Did the trial judge err by misconstruing the test for concerted action liability?

2) Did the trial judge err by inferring Bergman's knowledge of the Internet defamation campaign?

3) Did the trial judge err by misconstruing the test for the vicarious liability of Artcraft?

B. Damages: All Appellants

4) Did the trial judge err in assessing damages?

DISCUSSION

A. Liability: Bergman and Artcraft

1) Did the trial judge err by misconstruing the test for concerted action liability?

[30] Bergman argues that joint liability in defamation requires either approval or publication of the defamatory statements at issue, neither of which occurred in this case: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 179; *Lawson v. Burs, Succamore and Jim Pattison Broadcasting Ltd.*, [1976] 6 W.W.R. 362, at para. 17; *Kent v. Postmedia Network Inc.*, 2015 ABQB 461, 77 C.P.C. (7th) 419, at para. 77.

[31] More particularly, Bergman submits there was no evidence at trial that he wrote or repeated the defamatory statements at issue and, consequently, he could not be held jointly and severally liable on the basis of the concerted action doctrine. At its highest, Bergman contends, he knew of Rabinowitz's plan and did nothing to stop it. However, he says, he was under no duty to do so; passivity does not render him a joint tortfeaser. Rather, active assistance in the commission of a tort is required: *Sea Shepherd UK v. Fish & Fish Limited*, [2015] UKSC 10, at paras. 55 and 57-60, per Lord Neuberger.

[32] We reject this ground of appeal.

[33] Concerted action may occur in a variety of ways. Generally, it involves a common design or conspiracy. In *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, the Supreme Court of Canada adopted the following formulation of the law regarding concerted action liability as set out by John G. Fleming in *The Law of Torts*, 8th ed. (Sydney: Law Book Co., 1992), at p. 255:

> The critical element of [concerted action liability] is that those participating in the commission of the tort must have acted in furtherance of a common design. … Broadly speaking, this means a conspiracy with all participants acting in furtherance of the wrong, though it is probably not necessary that they should realize they are committing a tort.

[34] The difficulty, of course, is determining the degree of involvement or connection necessary to meet the requirements of concerted action liability. Canadian authorities suggest that concerted action liability arises when a tort is committed in furtherance of a common design or plan, by one party on behalf of or in concert with another party: see Lewis N. Klar & Cameron S.G. Jefferies, *Tort Law*, 6th ed. (Toronto: Thomson Reuters, 2017), at p. 657; G.H.L. Fridman, *The Law of Torts in Canada*, 3rd ed. (Toronto: Carswell, 2010), at p. 856. In *The Law of Torts*, 10th ed. (Sydney: Thomson Reuters, 2011), at p. 302, Fleming puts it this way: “[k]nowingly assisting, encouraging or merely being present as a conspirator at the commission of the wrong would suffice, so too would any form of ‘inducement, incitement or persuasion’ which procures the commission of the

wrong." And, W. Page Keeton, in *Prosser and Keeton on the Law of Torts,* 5th ed. (Minnesota: West Publishing Co., 1984), at p. 323, states:

> All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit, are equally liable.

[35] The key point is that concerted action liability is a fact-sensitive concept. Lord Neuberger emphasized as much in *Sea Shepherd*, at para. 56, reiterating Bankes LJ's admonition from *The Koursk*, [1924] P 140, at p. 151 that "[i]t would be unwise to attempt to define the necessary amount of connection", and that each case "must depend on its own circumstances". We agree.

[36] In our view, on the facts here, the trial judge was correct to hold that the test for concerted action liability was made out in respect of Bergman. That Bergman did not publically approve or repeat the defamatory statements at issue does not absolve him from liability for Rabinowitz's tortious conduct. Bergman was not merely a passive or silent observer of the Internet defamation campaign. There was ample evidence at trial to support the trial judge's conclusion that there was a common design between Bergman and Rabinowitz to cause harm to Rutman, not only by the campaign of defamatory statements but also by threats of litigation and reports to the CRA levied against Rutman in order to exhort him to settle the parties' Laptide dispute on terms favourable to Bergman and Rabinowitz.

[37] It was not necessary for the trial judge to find that Bergman was an active participant in the Internet defamation campaign from the outset in order to attract joint and several liability. The trial judge found that Bergman was aware of the campaign at least by the end of April 2009 and was willing to use it to his potential advantage. Bergman did not simply agree with or acquiesce in Rabinowitz's campaign. To the contrary, on the trial judge's factual findings, he was involved in authorizing the use of Artcraft equipment and personnel to facilitate the defamation campaign; he jointly authorized his lawyer to use the defamation campaign and threats of an adverse report concerning Rutman to the CRA in an effort to extort an advantageous settlement of the Laptide litigation; and, contrary to court order, he deleted and destroyed emails and other data relevant to his involvement in the Internet defamation campaign.

[38] It was therefore open to the trial judge to hold that the foundation for a finding of concerted action liability had been established, thus rendering Bergman jointly and severally liable for defamation. We see no reversible error in this holding.

2) Did the trial judge err by in inferring Bergman's knowledge of the Internet defamation campaign?

[39] In his factum, Bergman argues that, even assuming he knew of Rabinowitz's defamatory activities, it could not be inferred that he knew of them prior to April 19, 2009. He submits that the trial judge impermissibly used his rejection of Bergman's

evidence as proof of the affirmative proposition that Bergman knew of Rabinowitz's wrongdoing from the outset.

[40] Bergman did not press this ground of appeal at the appeal hearing. This was a prudent decision. In our view, on this record, this ground has no merit.

[41] The trial judge's appreciation of the evidence and his fact finding are entitled to deference from this court. His factual findings can be disturbed by a reviewing court only if they are tainted by palpable and overriding error. No such error has been established here. In particular, it was open to the trial judge on the evidentiary record to conclude there were sound reasons for disbelieving Bergman's claim that he never agreed to Rabinowitz's Internet defamation campaign, and was unaware of it until April 19, 2009. This finding was supported, for instance, by the evidence of their lawyer's knowledge of the campaign, as well as the email exchanges between Bergman and Rabinowitz using the fraudulent account that Rabinowitz had established in Rutman's name – the disclosure of which Bergman had sought to keep from the court.

[42] This ground of appeal fails.

3) Did the trial judge err by misconstruing the test for the vicarious liability of Artcraft?

[43] Bergman and Artcraft submit that, while the trial judge stated the correct test for vicarious liability, he erred in applying it. Specifically, he failed to consider if, at the material times, Rabinowitz was acting as Artcraft, as opposed to acting on his

own behalf. Bergman and Artcraft argue that Rabinowitz's campaign directed at amending the settlement agreement among the parties was harmful to Artcraft, rather than helpful, in that Rabinowitz sought to have funds returned to him and Bergman, the recovery of which would have imposed liabilities on Artcraft. There was, therefore, no rationale for attributing Rabinowitz's personal misconduct to Artcraft. Moreover, they contend, there was no evidence that Rabinowitz's defamatory activities were part of his employment.

[44] We do not accept these submissions.

[45] The trial judge considered and rejected the same arguments Bergman and Artcraft now raise on appeal regarding Artcraft's vicarious liability. Recall that the trial judge found that Rabinowitz and Bergman were the controlling shareholders, directors, and directing minds of Artcraft, and that they authorized the use of company equipment and employees to perpetrate the Internet defamation campaign and to try to conceal their involvement in it.

[46] On this evidentiary record, these critical findings are unassailable. They establish that Artcraft became associated with the defamatory statements at issue, that it was an authorized vehicle for the misdeeds of Rabinowitz and Bergman and, consequently, that it was vicariously liable on this basis: *Botiuk*, at paras. 89-90. There is no requirement that actions inure to the benefit of a corporation in order for the corporation to be held vicariously liable.

[47] Accordingly, this ground of appeal also fails.

B. Damages: All Appellants

4) Did the trial judge err in assessing damages?

[48] Rabinowitz argues that the trial judge's total damages award of $650,000 as against him is irrational and incoherent. It is irrational, he submits, because it ignores or discounts the evidence at trial, including Rutman's alleged admission that he suffered no reputational harm from Rabinowitz's wrongful conduct. And it is incoherent, he says, because it is inconsistent with awards in similar cases.

[49] These factors, Rabinowitz argues, support only a modest award of $100,000 in compensatory damages in this case ($50,000 general damages, plus $50,000 aggravated damages). Further, Rabinowitz says, if, and only if, the compensatory damages awarded at trial are substantially reduced, is an award of punitive damages justified, in the amount of $25,000 to $50,000.

[50] Bergman, for his part, attacks the trial judge's damages awards as against him on three grounds.

[51] First, general damages. Bergman argues the trial judge was obliged to focus his damages analysis on the wrong Rutman complained of and the injuries he sustained. He submits that, as framed in his pleading, the "defamatory sting" or wrong of which Rutman complained was limited to the illusion created by the Internet defamation campaign that multiple people held negative views about him,

which harmed his reputation. Consequently, to the extent the trial judge awarded general damages for injuries arising from the contents of the GigPark postings, he erred.

[52] Next, like Rabinowitz, Bergman stresses that Rutman sustained no pecuniary losses or reputational injury as a result of the Internet defamation campaign. Rutman, Bergman says, was "the epitome of a thick-skulled plaintiff" and his reputation survived "unscathed".

[53] As a result of these factors, Bergman maintains, only modest general damages are warranted, in the amount of $25,000.

[54] Finally, Bergman submits that, as his involvement in the defamation campaign was "minimal", no award of punitive damages against him is sustainable.

(i) Standard of review

[55] In the leading case of *Hill*, the Supreme Court of Canada addressed the standard of appellate review applicable to a jury's award of general damages in a defamation case. Citing the decision of this court in *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104, at p. 110, the Supreme Court cautioned, at para. 161, "the assessment of damages is 'peculiarly the province of the jury'" and "an appellate court is not entitled to substitute its own judgment as to the proper award for that of the jury merely because it would have arrived at a different figure." Instead, at

para. 162, *Hill* instructs that, as outlined in *Walke*r, the reviewing court should consider whether:

> [T]he [jury] verdict is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate or, put another way, whether the verdict is so exorbitant or so grossly out of proportion to the libel as to shock the court's conscience and sense of justice.

See also *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 108.

[56] A different and less deferential standard applies to appellate review of a jury award of punitive damages. Appellate review in these circumstances is based upon the court's estimation as to whether the impugned award serves a rational purpose. As the Supreme Court explained in *Hill*, at para. 200:

> 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?

[57] This "rationality" test applies both to the issue whether a punitive damages award should be made and to the question of its quantum: *Whiten*, at para. 101. Further, "[i]n the case of punitive damages, the emphasis is on the appellate court's obligation to ensure that the award is the product of reason and rationality. The

focus is on whether the Court's sense of reason is offended rather than on whether its conscience is shocked": *Whiten*, at para. 108.

[58] Accordingly, if an award of punitive damages, together with the compensatory damages awarded, "produces a total sum that is so 'inordinately large' that it exceeds what is 'rationally' required to punish the defendant, it will be reduced or set aside on appeal": *Whiten*, at para. 109.

[59] This case, however, was a judge-alone trial. In *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416, at para. 25, this court accepted the following statement by the Newfoundland Court of Appeal in *Farrell v. St. John's Publishing Co.*, [1986] N.J. No. 19, at p. 13, as an accurate description of the standard of review applicable to an award of compensatory damages in a judge-alone defamation case:

> In assessing damages in a libel action, a judge, sitting without a jury, has a great deal of latitude and the Court of Appeal will not readily interfere with his award unless it is satisfied that he arrived at his figure either by applying a wrong principle of law or through a misapprehension of the facts or that the amount awarded was so extremely high or so low as to make it an entirely erroneous estimate of the damages. [Citations omitted.]

[60] We will address the appellants' attacks on the damages awarded by the trial judge in turn, with these standard of review principles at the forefront.

(ii) Compensatory damages

(a) Absence of evidence of actual harm

[61] The appellants maintain that the trial judge erred in quantifying compensatory damages by failing to accord sufficient or any weight to Rutman's alleged concession at trial that he suffered no pecuniary losses or reputational injury as a result of the Internet defamation campaign. As a result, they assert, only modest compensatory damages were appropriate.

[62] This submission is problematic for several reasons. First, it is trite law that general damages in libel cases are presumed from the very publication of the false statement. The injured plaintiff bears no obligation to prove actual loss or injury: *Hill*, at para. 167; Raymond E. Brown, *Brown on Defamation*, loose-leaf, 2d ed. (Toronto: Thomson Reuters, 2017), at 25.1. The appellants' focus on the alleged lack of pecuniary or reputational damage to Rutman discounts this foundational principle.

[63] Second, as the Supreme Court pointed out in *Hill,* at para. 172, special damages for pecuniary loss are rarely claimed in libel actions and are "often exceedingly difficult to prove". Thus, "the whole basis for recovery for loss of reputation usually lies in the general damages award": *Hill*, at para. 172. This case is no exception in this regard.

[64] Third, we do not accept the suggestion that Rutman conceded at trial that he sustained no reputational damage as a result of the defamatory statements at issue. The record, in our view, confirms merely that he acknowledged that he was unaware of any specific injury to his reputation.

[65] The inability to point to specific reputational harm is not an admission that such harm did not occur. To the contrary, the courts have accepted that, "[t]he consequences which flow from the publication of an injurious false statement are invidious" and that, "[a] defamatory statement can seep into the crevasses of the subconscious and lurk there ever ready to spring forth and spread its cancerous evil. The unfortunate impression left by a libel may last a lifetime": *Hill*, at paras. 168-169.

[66] The injurious effects of defamatory statements regarding a professional are particularly acute. *Hill*, which involved libelous statements about a young lawyer who went on to achieve great professional success, is a case in point. As the Supreme Court stressed, at paras. 180-181, a lawyer's reputation is of paramount importance. Clients, colleagues and the courts depend on the lawyer's integrity, and "[a]nything that leads to the tarnishing of a professional reputation can be disastrous for a lawyer." The defamed lawyer has no way of knowing what members of the public, colleagues and others may have been affected by the defendant's defamatory allegations or of being certain who may have accepted the false allegations of wrongdoing levied against him.

[67] These comments are apposite here. The importance of a reputation for integrity and trustworthiness is not confined to lawyers. It applies equally to other professions and callings, including chartered accountants and tax advisors like Rutman: *Botiuk*, at paras. 91-92.

[68] This leads to an additional, key consideration. This is an Internet defamation case. As this court held in *Barrick*, at para. 28, the pernicious effect of defamation on the Internet, or "cyber libel", distinguishes it, for the purposes of damages, from defamation in another medium. Consequently, while the traditional factors to be considered in determining general damages for defamation remain relevant (for instance, the plaintiff's conduct, position and standing, the nature and seriousness of the defamatory statements, the mode and extent of publication, the absence or refusal of any apology or retraction, the whole conduct and motive of the defendant from publication through judgment, and any evidence of aggravating or mitigating circumstances: *Hill*, at para. 185), they must be examined in light of the Internet context of the offending conduct. Justice Blair explained in *Barrick*, at para. 31:

> [O]f the criteria mentioned above, the mode and extent of publication is particularly relevant in the Internet context, and must be considered carefully. Communication via the Internet is instantaneous, seamless, inter-active, blunt, borderless and far-reaching. It is also impersonal and the anonymous nature of such communications may itself create a greater risk that the defamatory remarks are believed. [Citation omitted.]

[69] He continued, at para. 34:

> It is true that in the modern era defamatory material may be communicated broadly and rapidly via other media as well. The international distribution of newspapers, syndicated wire services, facsimile transmissions, radio and satellite television broadcasting are but some examples. Nevertheless, Internet defamation is distinguished from its less pervasive cousins, in terms of its potential to damage the reputation of individuals and corporations, by the features described above, especially its interactive nature, its potential for being taken at face value, and its absolute and immediate worldwide ubiquity and accessibility. The mode and extent of publication is therefore a particularly significant consideration in assessing damages in Internet defamation cases.

[70] In this case, the trial judge's reasons, at para. 221, indicate he recognized, correctly, the purposes of compensatory damages in libel cases, as well as the traditional considerations relevant to assessing the quantum of such damages, listed above. They also confirm, at paras. 236-238, he appreciated the requirement that the analysis of the damages occasioned by the extensive Internet defamation campaign be evaluated in the context of the "unique and somewhat insidious nature of [I]nternet defamation" and in light of the fact that the defamatory statements at issue were "instantly available to an unknown number of recipients".

[71] Further, in approaching his compensatory damages analysis, the trial judge observed, at para. 216:

> Sometimes, for example, there may be relatively little demonstrable damage to reputation, but serious emotional distress; on other occasions, the need for public vindication will predominate; in yet other cases the financial consequences of damage to the reputation of

> the individual may represent the most serious feature. [Citation omitted.]

This, too, was correct.

[72] In applying these principles in this case, the trial judge made the following critical findings, at paras. 231-241:

> (1) notwithstanding Rutman's excellent reputation in the Toronto community and his professional success, he suffered real distress, hurt, humiliation and deep embarrassment as a result of the GigPark defamatory postings. He was unable to sleep and work regularly, changed his religious observational habits to avoid encounters with people in his Toronto Orthodox Jewish community, and suffered fear of the unknown and the possibility that people would take the posted allegations seriously;
>
> (2) the existence of the GigPark postings was broadly known in Rutman's community, they were a topic of conversation at his synagogue, and a number of his clients accessed the GigPark site;
>
> (3) Rutman's fears and anxiety occasioned by the GigPark postings were exacerbated by the fact that he did not know how many people actually saw the postings;
>
> (4) Rabinowitz's admitted purpose in carrying out the Internet defamation campaign was to cause the precise pain and suffering experienced by Rutman;
>
> (5) the full extent of the dissemination of the defamatory statements was unknown because the GigPark postings also affected Rutman's online Google profile. Any search of that profile in 2009 would have likely revealed one of the defamatory posts on GigPark;

> (6) the fraudulent emails directing people to the GigPark postings were sent to at least 240 people. The relevant page on the GigPark site itself showed more than 5,000 viewings; and
>
> (7) the vindication of Rutman's good name was the most important factor in this case "precisely because it is not known, given the means used to carry out the defamation campaign, what the true effect of that campaign was or could have been."

[73] These facts, in the trial judge's view, militated towards a significant general damages award. We agree.

[74] In addition, the nature and reach of the defamatory conduct supported such an award. As the trial judge put it, at para. 243:

> The defamation of Rutman was serious, ongoing, malicious and targeted directly at the communities where his reputation is most important. The allegations in the GigPark posts went to the core of Rutman's reputation for honesty and integrity.

[75] The trial judge concluded, at para. 247:

> Having regard to the objectives of compensating Rutman for the damage to his reputation, vindicating his good name, and taking account of the distress, hurt and humiliation which the defamatory publication[s] caused, I grant an award of general compensatory damages in the amount of $200,000.

[76] We see no error in the trial judge's approach to or quantification of general damages. He considered the controlling principles for the awarding of general compensatory damages in an Internet defamation case, and applied them to the facts as he found them. His factual findings in this regard are not challenged on

appeal. The quantum of general damages that he awarded to achieve the purposes of such an award was well within his discretion and was amply supported by the evidentiary record.

[77] Similarly, we see no basis to fault the trial judge for his award or quantification of aggravated damages. We note that Rabinowitz has been unable to point to any specific error in the trial judge's assessment of aggravated damages, contending merely that the total compensatory award of $400,000 was excessive. We disagree.

[78] The trial judge, for clear and detailed reasons, at paras. 252-260, found that the insidious nature of Rabinowitz's conduct compounded Rutman's suffering and angst; that Rabinowitz acted maliciously, motivated by anger and personal business self-interest; that his motives and conduct, including his "malevolence and spite" and the "manner of committing the wrong", aggravated the injury done to Rutman, including to his dignity and pride; and that Rabinowitz admittedly acted to cause additional harm to Rutman. On these findings, which also are not challenged on appeal, a significant aggravated damages award was clearly justified.

[79] And, there is more. Rabinowitz admitted that he was motivated by actual malice in conceiving and carrying out the Internet defamation campaign against Rutman. He sought to obtain wide dissemination of his defamatory statements in

circumstances and in a manner that were calculated by him to maximize Rutman's pain and embarrassment and he persisted in his defamatory activities for a lengthy period of time. There is no suggestion that he withdrew his defamatory statements, or tendered any apology. Moreover, for more than seven years, he advanced a plea of justification, which he only abandoned belatedly, mid-trial, in recognition that it was bound to fail.

[80] In combination, in our view, all these considerations amply grounded the aggravated damages award made against Rabinowitz.

(b) Compensatory awards in other libel cases

[81] Rabinowitz next argues that the total compensatory damages award in this case is "incoherent" because it is inconsistent with the quantum of compensatory damages awarded in allegedly similar cases. We reject this argument for two reasons.

[82] First, as the courts have repeatedly emphasized, libel cases are particularly fact-sensitive and, in that sense, each is unique. In fashioning his damages awards, the trial judge appreciated that, for this reason, a comparison with awards in other libel cases was of little assistance.

[83] This conclusion accords with the jurisprudence in libel cases. In *Hill*, at para. 190, the Supreme Court held:

> The assessment of damages in a libel case flows from a particular confluence of the following elements: the nature and circumstances of the publication of the libel, the nature and position of the victim of the libel, the possible effects of the libel statement upon the life of the plaintiff, and the actions and motivations of the defendants. It follows that there is little to be gained from a detailed comparison of libel awards. [Emphasis added.]

See, to the same effect, *Botiuk*, at para. 105.

[84] Second, and in any event, although Rabinowitz relies on several libel cases in which the amount of the compensatory damages awarded was lower than that awarded here, other libel cases reveal compensatory damages awards in amounts higher than those awarded by this trial judge. The variability in the amount of compensatory damages awarded in Canadian libel cases does not mean that the award in this case is "incoherent", as Rabinowitz argues. Rather, it underscores the highly fact-sensitive and unique nature of each libel case. Given all the factors at play here, including Rabinowitz's admitted misconduct, the nature of the defamatory statements, and their impact on Rutman, no other libel case is especially instructive, let alone controlling, on the issue of the quantification of damages.

(c) Scope of the wrong asserted

[85] Bergman advances a final ground of appeal regarding the trial judge's general damages award. In brief, he submits that, as pleaded, Rutman's claims against the appellants did not extend to a claim for damages arising from the

contents of the GigPark postings but, rather, were restricted to only those damages arising from the false appearance that multiple people were posting negative comments about Rutman on the Internet.

[86] Again, we disagree.

[87] We do not read Rutman's pleading as excluding a claim for damages for defamation arising from the contents of the GigPark postings, although it does contain such an exclusion in respect of specified defamatory communications Rabinowitz sent from an anonymous gmail email account to Zeifmans and to H&R REIT. Rutman did, however, plead the contents of the GigPark postings, as well as the manner of the postings, in support of his damages claims.

[88] Based on his pleading and the issues actually contested at trial, the defamatory sting complained of by Rutman may fairly be seen as arising both from the contents of the GigPark postings and from the apparent authorship of the defamatory statements by numerous members of the public.

[89] It must be emphasized, in this regard, that the appellants' collective conduct of the case ensured that the defamatory contents of the GigPark postings figured prominently at trial. Recall again that the appellants sought to prove the truth of the underlying allegations in the GigPark postings and they pursued a defence of justification until Rutman's cross-examination at trial. In these circumstances, we do not accept that it is open to the appellants to now seek to circumscribe the

nature of the misconduct said by Rutman to anchor a substantial general damages award.

(iii) Punitive damages

[90] This brings us, then, to the issue of the appropriateness of the trial judge's punitive damages awards.

[91] Rabinowitz acknowledged at trial that an award of punitive damages as against him was warranted. Before this court, he argues that punitive damages are appropriate only if the quantum of the compensatory damages awarded by the trial judge is substantially reduced. In support of this argument, he submits that the trial judge erred by failing to consider or refer to two critical principles, affirmed in *Whiten*, that: i) punitive damages are appropriate only where compensatory damages are insufficient to accomplish the goal of deterrence; and ii) a punitive damages award should be no greater than necessary to accomplish the objectives of punitive damages. As a result, Rabinowitz contends, the trial judge's award of punitive damages fails the rationality test.

[92] In our view, this argument fails.

[93] The trial judge's reasons confirm that he appreciated the purposes of punitive damages, their exceptional nature, the need to be fair to both sides, and the basis for Rabinowitz's contention at trial that any award of punitive damages as against him should be limited to $25,000 to $50,000.

[94] It is true that the trial judge did not refer expressly to *Whiten* in his reasons. However, he did refer frequently to *Hill*, in which the Supreme Court stated, at para. 199:

> 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.

[95] The Supreme Court in *Hill* also affirmed the rationality test for the awarding of punitive damages. For convenience, we again set out the Court's relevant comments, at para. 200:

> [A]ppellate review should be based upon the court's estimation as to whether 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?

[96] We see no basis on which to conclude that, because the trial judge failed to cite *Whiten* in support of the above-noted principles, he was unaware of or ignored them. To the contrary, that he was alive to these principles is confirmed by his recognition, at para. 267(1), of the proportionality principle that governs the assessment of punitive damages, as emphasized in *Whiten*, and by his explicit statement, at para. 267(2):

> [W]here compensatory damages are insufficient to accomplish the objects of retribution, deterrence of the defendant and others from similar misconduct in the future and the community's collective condemnation or denunciation of what has occurred, <u>punitive damages will</u>

> be given in an amount that is no greater than necessary to accomplish these objectives rationally. [Emphasis added.]

These comments encapsulate the very principles identified in *Hill* and *Whiten* upon which Rabinowitz relies.

[97] We note, as well, that the trial judge also referred to this court's decision in *Pate Estate v. Galway-Cavendish and Harvey (Township)*, 2013 ONCA 669, 117 O.R. (3d) 481, in which the *Whiten* and *Hill* principles regarding punitive damages are discussed extensively.

[98] Thus, the trial judge's reasons belie the contention that he ignored or failed to apply the governing principles concerning punitive damages, including those articulated in *Hill* and *Whiten*. To the contrary, in our opinion, his reasons make it abundantly clear that he was cognizant of these principles and properly applied them to the facts of this case. He specifically held, at para. 270, that an award of punitive damages was required "to accomplish the objects of retribution, deterrence of the defendants and others from similar misconduct in the future and the community's denunciation of this behavior". This holding reflects the trial judge's conclusion that the compensatory damages awarded were insufficient to achieve the accepted objectives of a punitive damages award.

[99] Finally, we appreciate that Rabinowitz complains especially that the punitive damages awarded as against him considerably exceed those awarded by this court to the injured plaintiff in *Barrick* ($250,000 here versus $50,000 in *Barrick*).

On this basis, Rabinowitz says, the trial judge's punitive damages award was "entirely irrational" and "unsustainable".

[100] These arguments do not avail Rabinowitz. As we have explained, no two libel cases are the same. The assessment of damages in each case must account for a myriad of idiosyncratic factors particular to the parties, the misconduct in question and the conduct of the litigation. In *Barrick*, as in this case, punitive damages served a rational purpose and were required to address the defendant's malicious, high handed and tenacious conduct. It does not follow, however, that the quantum of the punitive damages held to be appropriate in *Barrick* was also appropriate on the facts of this case, for these parties and in light of this misconduct. Nor is the award in *Barrick* among the highest punitive damages awards set or upheld by appellate courts (see, for example, $450,000 in *Pate*; $800,000 in *Hill*; and $1,000,000 in *Whiten*).

[101] In our opinion, on the particular facts of this case, it cannot be said that the quantum of the punitive damages awarded as against Rabinowitz was irrational, given the underlying objectives of such damages. As we see it, the overall damages awards were rationally related to those objectives, as mentioned above, namely, retribution, deterrence and denunciation. It follows that the punitive damages award was proportionate and appellate intervention with it is precluded.

[102] We also reject Bergman's contention that his misconduct was so minimal that no award of punitive damages as against him was warranted.

[103] On the trial judge's findings, Bergman's misconduct was neither trivial nor insignificant. As we have already said, he was not a passive or silent bystander, nor did he simply acquiesce in Rabinowitz's wrongdoing. The trial judge specifically rejected Bergman's attempt to downplay his involvement and found that his conduct attracted joint and several liability for the damage caused by the Internet defamation campaign.

[104] Recall also that, like Rabinowitz, Bergman authorized their former lawyer to attempt to extort Rutman to settle the Laptide litigation on favourable terms under threat of defamatory reports of tax evasion by Rutman to the CRA. And, together with Rabinowitz, he persisted for many years, including at trial, in advancing a defence of justification that was only belatedly abandoned. Finally, neither individual showed any remorse for their conduct, and they both destroyed relevant evidence in the face of known court orders for the preservation of evidence, thereby necessitating lengthy and costly forensic computer examinations.

[105] On these facts, in our opinion, the trial judge did not err in awarding punitive damages against Bergman. The quantum of that award ($50,000) is proportionate to the nature and extent of his misconduct and reflects his degree of culpability.

DISPOSITION

[106] Accordingly, for the reasons given, the appeal is dismissed. The respondent is entitled to his costs of the appeal. If the parties are unable to agree on the quantum of costs, the respondent shall deliver his brief costs submissions to the Registrar of this court within 15 days from the date of release of these reasons. The appellants' responding brief costs submissions shall be delivered to the Registrar within 15 days thereafter.

Released:

"JAN 31 2018"
"GH"

"E.A. Cronk J.A."
"Grant Huscroft J.A."
"I.V.B. Nordheimer J.A."