

Court of Queen’s Bench of Alberta

Citation: Chak v Levant, 2021 ABQB 946

Date: 20211126
Docket: 1403 06165
Registry: Edmonton

Between:

Dr. Farhan Chak

Plaintiff

- and -

**Ezra Levant, Sun News General Partnership,
Quebecor Media Inc and Sun Media Corporation**

Defendants

**Memorandum of Decision
of the
Honourable Madam Justice S. Leonard**

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Introduction

[1] This is an action in defamation brought by the Plaintiff, Dr. Farhan Chak, against the Defendants, Ezra Levant, Sun News General Partnership, Quebecor Media Inc., and Sun Media Corporation.

[2] Mr. Levant was a television host on the program, “The Source with Ezra Levant.” During a live cable broadcast on February 25, 2014 (the Broadcast), Mr. Levant made the following statements:

Farhan Chak ran for a Federal Liberal nomination in Edmonton and won. He was briefly Stephane Dion’s candidate up there, but then things started coming to light about him, like that night he shot up a nightclub. Yeah, that old thing. Hey, boys will be boys. Right? I mean, gunfire at a nightclub. Could happen to anyone. (the Statements)

[3] The Plaintiff denies that he was involved in a nightclub shooting and claims damages in the amount of \$200,000 as well as special damages, in an amount to be proven at trial, plus applicable interest and costs.

[4] The Defendants do not dispute that the Statements were defamatory, were about the Plaintiff, and were published to some third parties; however, they advance the defence of justification and claim that the Statements are substantially true. The Defendants also disagree with the Plaintiff’s argument as to the extent of the publication.

[5] The Statements relate to an altercation during the early morning hours of March 27, 1993, at the Barry T’s nightclub in Edmonton between a group of Barry-T employees and a group of non-employee individuals. At some point, an individual retrieved a shotgun from a vehicle, pointed it in the direction of some of the Barry T’s employees, and pulled the trigger. The shot hit an exterior wall of Barry T’s but did not hit any of the employees. No one was injured from the blast. The Defendants seek to establish that Dr. Chak was the shooter.

[6] The Plaintiff asserts that he was not the shooter and that this is a case of mistaken identity. He stood trial in the Court of Queen’s Bench on charges arising from this incident and was found not guilty of those charges. He contends that the Statements are defamatory and he is entitled to damages.

[7] For the reasons that follow, I find that the Defendants have failed to make out the defence of justification in this case. The Plaintiff has succeeded in his claim in defamation. He is entitled to general damages in the amount of \$40,000 and aggravated damages in the amount of \$20,000.

Standard of proof

[8] The Defendants rely on the defence of justification. As such, they bear the burden of proving, on a balance of probabilities, that the Statements are substantially true. The key issue in this case is whether, on a balance of probabilities, Dr. Chak shot up a nightclub.

[9] Even though the circumstances underlying the events at issue in this case gave rise to criminal charges, this is a civil case. The standard of proof applied in civil cases is proof on a balance of probabilities. I may consider context as well as the “inherent probabilities or improbabilities or the seriousness of the allegations or consequences” however, these factors do not change the standard of proof: *FH v McDougall*, 2008 SCC 53 at para 40.

[10] I must scrutinize all the evidence presented in this case with care: *McDougall* at para 45. This includes considering the quality of the evidence. The “quality of evidence necessary to meet [the] threshold so as to satisfy a trier of fact of a proposition on a balance of probabilities will depend upon the nature of the claim and of the evidence capable of being adduced”: *Nelson (City) v Mowatt*, 2017 SCC 8 at para 40. Similarly, the “evidence must... be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test”: *McDougall* at para 46.

The criminal proceedings

[11] Dr. Chak was charged with offences stemming from the 1993 shooting at the Barry T’s nightclub. A preliminary inquiry was conducted on September 21 and 22, 1993, and Dr. Chak was committed to stand trial. The transcript of the preliminary inquiry was made an exhibit in this civil trial. Dr. Chak did not testify at the preliminary inquiry.

[12] The Queen’s Bench trial occurred over six days from October 3-7, 1994. Dr. Chak was found not guilty on all counts. There is no transcript or audio recording of the Queen’s Bench trial. The trial endorsements show that 17 witnesses were called: 12 for the Crown and five for the defence.

[13] Three of the Crown witnesses were called to testify in this civil trial: Patrick Graham, Derrick Racette, and Glenn Morezewich. Mr. Graham and Mr. Morezewich testified at both the preliminary inquiry and the Queen’s Bench trial. Mr. Racette only testified at the Queen’s Bench trial; he did not testify at the preliminary inquiry.

[14] Dr. Chak’s defence at the criminal trial was that he was not the shooter. The evidence of the defence included alibi witnesses who testified in favour of Dr. Chak. At the conclusion of the Queen’s Bench trial, Dr. Chak was found not guilty. Dr. Chak claims that the presiding judge apologized to him and said he never wanted to see Dr. Chak in a courtroom again.

[15] Although the Plaintiff acknowledges that the acquittal is not evidence that the actions underlying the criminal allegations did not take place, he nonetheless argues that the Court can draw certain inferences from the acquittal.

[16] The Plaintiff argues that the testimony of the witnesses in the civil trial and the preliminary inquiry are at odds with the conclusions of the criminal trial judge, i.e. despite the witnesses having presumably identified Dr. Chak as the shooter, the trial judge nonetheless found Dr. Chak not guilty.

[17] The Plaintiff posits that the trial judge must have made an adverse credibility or reliability finding against the witnesses or that the evidence from Dr. Chak’s witnesses was found to be more credible. The Plaintiff argues that it is unlikely the trial judge in the criminal trial would have found reasonable doubt unless there was an adverse credibility finding against the witnesses that testified for the Crown.

[18] To bolster this argument, the Plaintiff points to the fact that the Crown did not appeal the acquittal as well as the fact that the none of the witnesses at the criminal trial commenced a civil action against Dr. Chak.

[19] I reject the Plaintiffs arguments on the acquittal. The acquittal in the “criminal trial is inadmissible in a subsequent civil trial as proof that the party did not commit the offence”: *Rizzo v Hanover Insurance Co*, 1993 CanLII 8561, 14 OR (3d) 98 (ONCA) at para 7.

[20] Further, contrary to the assertions of the Plaintiff, it is not necessary for the criminal trial judge to have made adverse credibility findings against the Crown witnesses in order to have acquitted Dr. Chak. As the Court of Appeal has made clear, there must be an acquittal where the trier of fact does not know which competing version of events to believe: *R v SMC*, 2020 ABCA 19 at para 23.

[21] As such, no conclusions can be drawn from the criminal trial as to whether the underlying actions occurred or whether the trial judge might have found that the Crown witnesses lacked credibility.

[22] In addition, the absence of an appeal is of no assistance in this case. The Crown may only appeal an acquittal from conviction where there has been an error of law: *Criminal Code*, RSC 1985, c C-46, s 676(1)(a). Further, Crown decisions to appeal are made internally within prosecution services and may involve considerations that are not publicly known.

[23] Finally, I decline to draw any conclusions from the fact that Dr. Chak did not face civil proceedings as a result of the shooting at Barry T's. I do not know why this did not occur and this issue was not put to the witnesses that testified in this matter.

[24] This civil trial must be resolved based on the evidence that was presented in court.

Evidence of Dr. Chak

[25] Dr. Chak testified that the 1993 incident was a case of mistaken identity. He testified that he was not at Barry T's on the night of March 27, 1993, and that he had only been there once or twice. He only learned of the incident at Barry T's after a police officer visited his parents' home. The event was reported in the news. He contacted a lawyer and went voluntarily to the police station to provide a statement. He testified that he was nonetheless charged.

[26] Dr. Chak testified that he recalls that night and recalls being at his home. It was a normal evening, spent with his friends. He explained that his home was a center point for youth in the area and that people would come over to play cards and watch movies. Dr. Chak explained that at the trial, two people provided alibi evidence on his behalf.

[27] Dr. Chak testified that during the preliminary inquiry, he sat next to his lawyer the whole time. On cross-examination, he initially denied that the witnesses at the preliminary inquiry identified him. He then corrected his response to say that "some witnesses did not identify me and some falsely identified me."

[28] Dr. Chak also denied having been identified as the shooter at the criminal trial. He denied that Mr. Graham, Mr. Morezewich, and Mr. Racette identified him at the criminal trial. Dr. Chak said, "to my recollection, not a single Crown witness identified me, or was certain that I was the person they were referring to..."

Evidence of the defence witnesses

[29] The Defendants called three witnesses in support of their assertion that Dr. Chak was the shooter. Mr. Graham, Mr. Morezewich, and Mr. Racette were all working at Barry T's on the night of the shooting. Each testified regarding the events leading up to the shooting and each identified Dr. Chak as the shooter.

[30] Mr. Graham testified that the week prior to March 27, 1993, two friends at the bar were playing pool with some “brown guys.” The brown guys lost the pool game but would not pay the debt. The group went outside, and a fight ensued.

[31] The following week, in the early morning hours of March 27, 1993, after the bar was closed and the staff was cleaning up, the group of “brown guys” returned to the bar. Mr. Graham recognized one of the men as being Negman Chak because he frequented the bar on a regular basis.

[32] The men came to fight Mr. Graham. Both Mr. Graham and Mr. Racette testified that one of the men had a gun. Mr. Racette explained that the manager of the bar intervened and said that if there was going to be a fight, the gun had to go back in the car. The man with the gun went to put the gun in the car and then returned to the bar.

[33] A fight ensued between Mr. Graham and a man that Mr. Graham identified as Mustafa. As Mr. Graham was getting the upper hand, another man named Fry came up to Mr. Graham and stabbed him in the leg.

[34] The stabber and the other non-employees ran out of the bar. They were followed by some of the employees, including Mr. Graham, Mr. Morezewich, and Mr. Racette.

a) Mr. Graham’s observations outside the bar

[35] Outside, Mr. Graham saw a guy standing by an industrial garbage can with a shotgun. It was the same person that he identified as having had the gun inside the club. Mr. Graham did not think the gun was real. The individual shot the gun and Mr. Graham thought, “holy shit, it’s real.”

[36] Mr. Graham testified that the distance between him and the garbage can was approximately 75 feet. He could see the individual with the gun because there were lights over the parking lot. He described the individual as having red hair, a big nose, devilish eyebrows, and dark clothing. He was tall and slim. He testified that he was able to recall what the individual looked like because the individual shot at him. He learned the name of the gunman when he was later at the hospital and his friends told him.

b) Mr. Morezewich’s observations outside the bar

[37] Outside the club, Mr. Morezewich was looking around with another doorman, Mr. Racette, to see if they could find anyone. They went to the parking lot and no one was there. They went to the front and no one was there. They returned to the back by the bottle shed. Some of the people from the fight inside passed them and words were exchanged between the two groups.

[38] Mr. Morezewich then saw someone open the trunk of one of the cars and pull out a gun. It was the taller fellow with the loose-fitting jacket and purple hair that had been inside the club earlier. As soon as Mr. Morezewich saw the gun, he looked at Mr. Racette and said words to the effect of “let’s get out of here.”

[39] Mr. Graham then came out of the nightclub. He was struggling and appeared agitated. Mr. Morezewich turned to see behind him. All he could hear behind him was people running and leaving the area. Mr. Morezewich kept his eyes on the gunman. He was trying to communicate with Mr. Graham to get him back in the club. The area was really well lit and Mr. Morezewich saw the gunman walk around. He was fiddling with the gun as if trying to open it. It was a pump

shot gun. Mr. Morezewich was telling Mr. Graham to get in but kept his eyes on the gunman. The gunman opened the shotgun and placed something in it, then pointed the gun at Mr. Morezewich.

[40] The gunman then lowered the gun and words were exchanged. Mr. Graham was trying to get into the club. The gunman raised the gun again. Something else was said. The gunman's right hand moved and Mr. Morezewich heard the gun go off. He was at the club door and was able to pull it shut. He did not see where the round landed.

[41] Mr. Morezewich testified that the individual was distinctive looking. He was taller and lanky. He stood out because of his hair. He also had a distinctive profile. At this time, Morezewich did not know the shooter's name.

c) Mr. Racette's observations outside the bar

[42] Mr. Racette testified that he followed the group out to the vehicle. Mr. Morezewich was with him. Although Mr. Racette referred to Dr. Chak as being the shooter throughout his testimony, I will simply refer to "the shooter" when describing his testimony.

[43] Mr. Racette testified that the shooter pulled out a shotgun from the vehicle. Mr. Racette told everyone to get back inside the club.

[44] Mr. Racette testified that the shooter was standing behind a dumpster. The shooter aimed the shotgun at Mr. Racette. He heard a click. The shooter started playing around with the handle. Mr. Racette assumed it was the safety. Again, the shooter aimed the gun at Mr. Racette. Mr. Racette recalled that there was yelling but he did not know what was being said. Mr. Racette thought about running but he thought it might cause the shooter to panic so he just stood there and held his hands up. The shooter then pulled the trigger. Mr. Racette held his hands over his face but he did not feel anything. He saw that the pellets landed in the wall next to him. Then he ran back into the nightclub.

[45] Mr. Racette testified that he was looking at the shooter's face the whole time and that the interaction outside took between four to five minutes. Mr. Racette was 15-20 feet from the shooter and the area was well lit – there were massive bright lights on the building facing the parking lot. He testified that the shooter's hair was purplish in colour. It was not short but it was not long. When he stood next to him in the bar, he could see that his skin had light freckles and that his eyes were hazel. He said he was wearing baggy clothes and recalled that it was a baggy sweat suit.

[46] When asked why he remembered the event, Mr. Racette said, "you don't forget anyone that shoots at you. I've told this story many times..."

Identification evidence

a) Preliminary inquiry identification evidence of Mr. Morezewich and Mr. Graham

[47] The preliminary inquiry transcript was entered as an exhibit in these proceedings. The parties do not agree on the extent to which or whether the Court can rely on the transcript. Only two of the witnesses that testified at the preliminary inquiry also testified in the civil trial. These are: Patrick Graham and Glenn Morezewich.

[48] The Defendants argue that the preliminary inquiry testimony of Mr. Graham and Mr. Morezewich is admissible in its entirety to enhance the probative value of their in-court identifications. Because the preliminary inquiry occurred closer in time to the events in question, the Defendants argue that the prior identifications enhance the probative value of the in-court identifications. Further, the Plaintiff cross-examined these witnesses on the preliminary inquiry transcript, enabling the Court to assess the probative value of the in-court identifications.

[49] The Plaintiff argues that use of the preliminary inquiry transcript be limited to assessing the credibility of the testimony given of Mr. Graham and Mr. Morezewich in the civil action.

[50] The Plaintiff had an opportunity to cross-examine Mr. Graham and Mr. Morezewich on the evidence they gave at the preliminary inquiry. As such, I am satisfied that I can consider the evidence given by these two witnesses at the preliminary inquiry to assess the credibility and reliability of these witnesses, as well as the strength of their memories. The recollection of these witnesses would undoubtedly have been better at the time of the preliminary inquiry. Thus, given that they were cross-examined in these proceedings and the Plaintiff had the opportunity to challenge the evidence given at the preliminary inquiry, the evidence given by the witnesses in this proceeding can be considered along with the evidence that was given at the preliminary inquiry.

[51] Mr. Graham was not able to identify Dr. Chak at the preliminary inquiry because Mr. Graham believed he was not in the courtroom. At trial before this court, Mr. Graham explained that he was unable to identify Dr. Chak because he had dyed his hair and was sitting in the gallery of the courtroom. Mr. Graham did not remember much about the Queen's Bench trial and was unable to recall whether or not he identified Dr. Chak as the shooter.

[52] At the preliminary inquiry Mr. Morezewich initially identified Dr. Chak as the shooter. Mr. Morezewich identified the shooter as being a person that was sitting in the first row of the courtroom, wearing a denim shirt. The hair of the person he identified was shorter and, he was wearing glasses and he looked a little heavier. Despite these changes, Mr. Morezewich was initially confident that Dr. Chak was the shooter. In these proceedings, Mr. Morezewich testified that he also identified Dr. Chak at the trial.

[53] The preliminary inquiry transcript reveals that Mr. Morezewich was extensively cross-examined on his identification of Dr. Chak as the shooter. Although Mr. Morezewich was confident that the man he described inside the night club was the shooter, when asked whether he was sure that the man he described was the man he identified in court, he responded:

I can't say for sure it's the same man; eight months later, his hair is shorter. It's not the same incident. At the time I can witness to it, it looks like the same gentleman there now without the long hair... No, I can't guarantee that that's him.
(Transcript, p. 195-6)

b) In-court identification evidence

[54] Due to Covid-19 travel restrictions that were in place at the time, Dr. Chak brought an application to give his evidence remotely by WebEx. This application was opposed by the Defendants but was granted by the Court. As such, Dr. Chak testified and was cross-examined by WebEx but was not present, either remotely or physically, for any other portions of the trial.

[55] Each of the three Defence witnesses were provided a photograph of Dr. Chak from 1993 as well as a current photograph of Dr. Chak. The witnesses were asked whether the person in the photographs was the shooter. Each of the witnesses answered in the affirmative.

[56] When Mr. Graham was shown the picture of Dr. Chak from the early 1990s, he identified Dr. Chak. He recognized Dr. Chak's hair, eyebrows, and nose. Mr. Graham was also shown the more recent photo of Dr. Chak and testified that it was the person with the gun in 1993.

[57] Mr. Morezewich was shown the photo of Dr. Chak from the 1990s. He testified that the photo was almost exactly how he looked at the time of the incident. Mr. Morezewich was also shown the current picture of Dr. Chak. He testified that the photo looked like Dr. Chak. His hair was different, he was heavier set, and he looked a bit older.

[58] When shown the picture of Dr. Chak from the 1990s, Mr. Racette said, "this is definitely him. Farhan Chak." Mr. Racette was also shown the current picture of Dr. Chak. He agreed that the photo was of Dr. Chak and that he could tell because of his eyes, his hair, and his forehead.

[59] The in-court identifications of Dr. Chak through the use of photographs are problematic. First, the in-court identifications were done almost 30 years after the event. It is common knowledge that Courts must exercise extreme caution "when a witness initially is unable to provide a useful description or make a positive identification, but whose memory appears to improve with the passage of time with the ultimate effect that he or she comes to believe... that they can positively make an identification": *Belleperche v Budget Rent-A-Car of Edmonton Ltd*, 2009 ABQB 620 at para 34.

[60] Mr. Graham was unable to identify Dr. Chak at the preliminary inquiry but confidently identified him in Court some 30 years later. Mr. Graham's description of events at Barry T's is consistent with his evidence at the preliminary inquiry. However, his inability to identify Dr. Chak at the preliminary inquiry seriously undermines his identification of Dr. Chak before this Court.

[61] Similarly, although at the preliminary inquiry Mr. Morezewich was not confident that Dr. Chak was the shooter, he was very confident that the photos provided to him in court depicted the shooter.

[62] Finally, Mr. Racette also identified the two photos as being photos of Dr. Chak. He testified that he testified once in this matter. He was certain that it was at the preliminary inquiry and that he did not testify at the trial. The Court record is clear that Mr. Racette testified at the trial, not at the preliminary inquiry. As such, there is no transcript of Mr. Racette's evidence from 1993/1994. Mr. Racette testified from memory, without reviewing any documents or materials to prepare.

[63] Because there is no transcript of Mr. Racette's evidence, I cannot assess the quality of this identification. Was he certain or did his identification waver under cross-examination?

[64] Compounding the problems with the in-court identification is the fact that each of the three witnesses proffered by the Defendants acknowledged that they had looked Dr. Chak up on the internet.

[65] Mr. Graham acknowledged having looked up Mr. Chak on the internet and admitted to seeing pictures of him on YouTube in 2019.

[66] Mr. Morezewich testified that he kept a copy of his preliminary inquiry transcript and that he looked at it from time to time. He also testified that he looked Dr. Chak up online and was aware that he had a Facebook page. Additionally, Mr. Morezewich crossed paths with Dr. Chak at the University of Alberta while they were both students there.

[67] Mr. Racette admitted to “Googling” Mr. Chak and seeing a photo of him online.

[68] At the preliminary inquiry, Mr. Graham was unable to identify Dr. Chak and Mr. Morezewich was not sure he correctly identified Dr. Chak. I know nothing of Mr. Racette’s identification evidence at the criminal trial. Given the frailties of identification evidence, the fact that the identifications made closer to the events in question are weak, as well as the fact that the witnesses have seen photos of Dr. Chak over the years, I conclude that the in-court identification evidence given by the three witnesses is unreliable and can be given very little weight.

c) Preliminary inquiry evidence of other witnesses

[69] The Defendants urge the court to accept the entirety of the preliminary inquiry transcript with respect to witnesses that did not testify at the civil trial but did testify at the preliminary inquiry.

[70] Three Barry T’s employees testified at the preliminary inquiry but were not called at the civil trial, namely: Joseph Horvat, Travis Nick, and Filip Turk. The transcripts of the preliminary inquiry demonstrate that each of these witnesses identified Dr. Chak as the shooter.

[71] The Defendants argue that the Court can nonetheless rely on the evidence given by these witnesses at the preliminary inquiry for the truth of its contents. The Defendants argue that these witnesses were unavailable for the civil trial and that as such, their evidence can be considered pursuant to the principled exception to the hearsay rule.

[72] The Plaintiff argues that the preliminary inquiry transcript cannot be relied on for the truth of its contents. The Plaintiff contends that the preliminary inquiry transcript is hearsay and that hearsay may only be admitted where it is both necessary and reliable. The Plaintiff argues that neither of these requirements are met in this case.

[73] The Defendants’ counsel explained the efforts she made to locate the individuals and the reasons for their non-attendance. Her efforts were described as “heroic.” The Plaintiff objected to the Court making use of counsel’s representations on the grounds that it is unsworn evidence.

[74] From the Plaintiff’s perspective however, it appears that the Defendants *chose* not to call the additional witnesses. They say the Defendants have significant resources at their disposal and they could have paid for the witnesses to come. The Plaintiff argues there is no evidence to explain why these three witnesses did not come to court. As such, the Plaintiffs argue that an adverse inference should be drawn.

[75] This is not a situation where the Defendants are asserting that the witnesses are deceased or that they were unable to locate them. In fact, from the submissions of counsel, it appears that all three of the missing witnesses were located, at least initially. Mr. Horvat was located in Boston, Massachusetts. He was initially responsive but then ceased communicating with counsel. Similarly, Mr. Turk was initially responsive but then refused to testify and ceased communicating with counsel. Counsel explained that Mr. Turk could not be located for the purpose of serving him with a Notice to Attend trial. Mr. Nicks was initially located by a private

investigator but never responded to counsel. The Defendants were subsequently unable to locate him.

[76] The Supreme Court of Canada has established, in the criminal context, that hearsay evidence can be admitted for the truth of its contents where the evidence is both necessary and reliable: *R v Khan*, [1990] 2 SCR 531; *R v Smith*, [1992] 2 SCR 915; *R v B(KG)*, [1993] 1 SCR 740; and *R v U(FJ)*, [1995] 3 SCR 764.

[77] The requirements that hearsay evidence be both necessary and reliable:

...serve to minimize the evidentiary dangers normally associated with the evidence of an out-of-court declarant, namely the absence of an oath or affirmation, the inability of the trier of fact to assess the demeanour of the declarant, and the lack of contemporaneous cross-examination: *R v Hawkins*, [1996] 3 SCR 1043 at para 67.

[78] The Supreme Court endorses a flexible approach to the assessment of the necessity and reliability criteria:

Khan and *Smith* establish that hearsay evidence will be substantively admissible when it is necessary and sufficiently reliable. Those cases state that both necessity and reliability must be interpreted flexibly, taking account of the circumstances of the case and ensuring that our new approach to hearsay does not itself become a rigid pigeon-holing analysis...: *U(FJ)* at para 35.

[79] The principles that govern the admissibility of hearsay evidence in the criminal context are equally applicable in the civil context: see *Fawley v Moslenko*, 2017 MBCA 47 at para 94; *Dobrowolski v Dobrowolski*, 2020 MBCA 105 at para 45; *Pfizer Canada Inc v Teva Canada Ltd*, 2016 FCA 161 at para 87.

i. Is the evidence reliable?

[80] The Defendants argue that the preliminary inquiry evidence is reliable. They assert that the issue before the Court in the civil trial is the same as the issue at the preliminary inquiry, i.e. whether Dr. Chak was the shooter. The evidence was given under oath and the witnesses were cross-examined by counsel for Dr. Chak on the issue of identity.

[81] The Plaintiff contends that the purpose of the preliminary inquiry is to determine whether there is a prospect of conviction. As such, defence counsel does not usually rigorously cross-examine the witnesses, nor do they test and employ the full range of defence theories. Further, the evidence led before a preliminary inquiry is not complete, particularly because not all the witnesses testified, in particular, no defence witnesses were called and Dr. Chak did not testify. Finally, the Plaintiff argues the biggest source of prejudice associated with the preliminary inquiry transcript arises from the fact that there is no transcript of the Queen's Bench criminal trial.

[82] The preliminary inquiry transcript is presumptively inadmissible because it is hearsay. At this stage of the analysis, the Court must assess the threshold reliability of the evidence. I find that the preliminary inquiry transcript is reliable. It was made in circumstances that provide sufficient guarantees of trustworthiness: it was taken under oath before a judge and the witnesses were subject to cross-examination.

[83] In *Hawkins* the Supreme Court of Canada addressed the admissibility of a preliminary inquiry transcript where the witness subsequently married the accused, Mr. Hawkins, and was no longer a compellable witness at Mr. Hawkins' trial. The Court agreed that the evidence given by the witness at the preliminary inquiry met the requirement of threshold reliability:

We are persuaded that a witness's testimony before a preliminary inquiry will generally satisfy this threshold test of reliability since there are sufficient guarantees of trustworthiness. A preliminary inquiry will involve precisely the same issues and the same parties as the trial. The hearsay dangers associated with testimony in such an adjudicative proceeding are minimal. Preliminary inquiry testimony is given under oath, and is also subject to the adverse party's right to contemporaneous cross-examination. It is only tainted by the lack of the declarant's presence before the trier of fact...: at para 76.

[84] The case at bar is distinguishable from *Clayson-Martin v Martin*, 2015 ONCA 596. *Clayson-Martin* was a family matter involving parenting. The mother claimed that the father had tried to kill her. The father disputed this version of events, saying that the mother tried to kill him. The transcript of a blood expert, from the father's criminal trial, was admitted in the family trial without calling the expert as a witness. This evidence was central to the trial judge's assessment of the wife's credibility. The wife appealed the decision, arguing in part, that the trial judge erred by admitting the transcript into evidence.

[85] The Ontario Court of Appeal held that the trial judge should have considered that the wife was not a party to the criminal proceedings and had no opportunity to cross-examine the expert. The cross-examination conducted by the husband was not sufficient as his interests were at odds with his wife's interests.

[86] Although the preliminary inquiry evidence in this case does not arise in the same proceeding as the civil trial, Dr. Chak is a party to both proceedings. The identity of the shooter is the central issue in both proceedings and Dr. Chak's counsel contemporaneously cross-examined the witnesses that testified at the preliminary inquiry. I am satisfied that the preliminary inquiry transcript is reliable.

ii. Is the evidence necessary?

[87] In criminal trials, the admissibility of hearsay evidence is determined on evidence within a *voir dire*. In this case, the preliminary inquiry transcript was entered into an exhibit by the Defendants with the consent of the Plaintiff. However, the Plaintiff caveated this consent by indicating that there would be argument regarding what use the Court might make of the transcript, particularly for witnesses that were not called to testify at the civil trial.

[88] In their closing argument, the Defendants argued that the requirement of necessity was met and explained the steps they took to secure the missing witnesses. The Plaintiff urges the Court not to accept the submissions made by counsel for the Defendants in this regard because the submissions of counsel are not evidence.

[89] In this case, the necessity criterion is focussed on witnesses that are, perhaps, outside the jurisdiction, or otherwise unavailable for the purpose of giving evidence: *B(KG)* at paras 107-108. The Defendants bear the burden of establishing that the necessity requirement is met. The Defendants have not led evidence regarding the efforts that were made to locate the witnesses. As stated in *R v Parrott*, [2001] 1 SCR 178 at para 74: "while the concept of necessity 'must be

given a flexible definition capable of encompassing diverse situations’ ... it must nevertheless be established on the facts of each particular case.”

[90] While I have no doubt that efforts were made to locate the witnesses, in the absence of evidence, the Court is unable to assess the quality of those efforts or the reasons for the witnesses’ absences. This is particularly problematic in the face of the Plaintiff’s objections to the unsworn information being considered by the Court. These objections could have easily been overcome had the Defendants entered evidence relevant to the necessity requirement. The Plaintiff would then have had an opportunity to challenge the evidence and make arguments regarding whether the efforts of the Defendants were sufficient. As such, on the evidence before me, the Defendants have not met the burden of establishing that necessity requirement for the admission of hearsay evidence. The preliminary inquiry testimony of the absent witnesses is not admissible for the truth of its contents.

Other evidence

a) Utterance to Mr. Graham in the hospital

[91] The Defendants argue that Mr. Graham’s evidence of identification includes an extra-judicial identification that is admissible to corroborate the identification he made at the trial. Mr. Graham testified that he was told at the hospital by another Barry T’s employee that the shooter’s name was Farhan Chak and that he was Nagman’s brother.

[92] The Defendants rely on *R v Lavallee*, 2020 ABCA 464 in which the Court of Appeal applied the decision of the Supreme Court of Canada in *R v Evans*, [1993] 3 SCR 653 at para 16 where Justice Sopinka pointed out:

An out-of-court statement which is admitted for the truth of the contents is hearsay. An out-of-court statement offered simply as proof that the statement was made is not hearsay and is admissible as long as it has some probative value.

[93] Here, the Defendants acknowledge that the statement made to Mr. Graham is hearsay but they argue that it has a “relevance link” (*Lavallee* at paras 51-52) to the issues because it corroborates the Defendants’ other evidence that Dr. Chak was the shooter.

[94] In order for me to accept that the identification made by a third party to Mr. Graham corroborates the Defendants’ evidence that Dr. Chak was the shooter, I must accept that the statement was true. That is, I must accept it for the truth of its contents. I fail to see how it can be used in any other way.

[95] I acknowledge that another person identified Dr. Chak as the shooter. Just as in *Lavallee*, the existence of this statement might have given the Defendants another path to pursue to establish that Dr. Chak was the shooter, such as by calling the person who made the statement as a witness, for example. They chose not to do this. While the existence of this statement is relevant, in order for the Court to rely on it as circumstantial proof that Dr. Chak was the shooter, a further basis for its admissibility must be made out. Here, the Plaintiff is unable to test the veracity, perception, or memory of the person that made the statement. I decline to put any weight on this statement or to use it as corroboration that Dr. Chak was the shooter.

b) Dr. Chak's change in appearance

[96] Mr. Graham, Mr. Morezewich and Mr. Racette all testified that Dr. Chak changed his appearance from the time of the shooting to the time of the preliminary inquiry and trial. The Defendants argue that the Court can rely on this factor as evidence of Dr. Chak's involvement in the shooting.

[97] In principle, I agree with the arguments of the Defendants. Changing one's appearance can be used as circumstantial evidence of guilt. The difficulty is that the identification evidence of the three witnesses is weak and does not give me confidence that he *probably* was the shooter. Without the underlying evidence that he is the shooter, the fact that he may have changed his appearance does not provide circumstantial evidence of his involvement in the shooting. Based on the evidence that I accept, I do not know whether Dr. Chak changed his appearance or whether the witnesses noted the change in appearance because he was in fact not the shooter.

c) Can the preliminary inquiry transcript be used to undermine Dr. Chak's credibility?

[98] The Defendants argue that there are some aspects of the preliminary inquiry transcript that can be accepted without cross-examination of the witnesses, for the purpose of impeaching the credibility of Dr. Chak. For example, Dr. Chak testified that he sat with his lawyer throughout the preliminary inquiry; however, the transcript makes it clear that he was not sitting next to his lawyer at all times. Similarly, Dr. Chak testified at the civil trial that he was not identified by any of the witnesses as being the shooter. Four of the five Barry T's employees identified him at the preliminary inquiry.

[99] I agree these contradictions can be accepted by this Court to assess Dr. Chak's credibility as a witness. While the statements constitute hearsay, they are not being proffered for the truth of their contents, i.e. they are not being used to establish that Dr. Chak was the shooter. Rather, they are being proffered to establish that witnesses at the preliminary inquiry made statements to the effect that he was the shooter and that Dr. Chak did not always sit next to his lawyer. Put another way, where on the face of the transcript it is clear that a witness identified Dr. Chak as the shooter, this contradicts the evidence of Dr. Chak and undermines his credibility as a witness. These contradictions have probative value and are relevant to Dr. Chak's credibility as a witness in this trial.

[100] I do not believe the evidence of Dr. Chak with respect to whether or not he was identified at the preliminary inquiry and where he was sitting at the preliminary inquiry. I find that he was not consistently sitting next to his trial counsel during the preliminary inquiry and he was identified by a number of witnesses at the preliminary inquiry. These findings are grounded in a facial reading of the preliminary inquiry transcript.

[101] Dr. Chak also explained that he was found not guilty at a Queen's Bench trial. He said that to his recollection, not a single Crown witness identified him or was certain that it was him. He testified that Messrs. Graham, Morezewich, and Racette did not identify him as the person responsible for the gun violence. He said that the judge apologized to him and said that he never wanted to see Dr. Chak in a courtroom again.

[102] I find that Dr. Chak was identified by witnesses at the criminal trial. Even though I am unable to ascertain the quality of the identification evidence, I have no reason to disbelieve the

evidence of Mr. Morezewich and Mr. Racette. They both testified that they identified Dr. Chak at the trial. As such, Dr. Chak is not a credible witness.

d) Should adverse inferences be drawn against Dr. Chak or against the Defendants?

[103] The Defendants argue that adverse inferences should be drawn against Dr. Chak as a result of certain positions he has taken in this trial, as follows:

- (i) Dr. Chak did not call, as witnesses in these proceedings, his alibi witnesses nor did he call his brother, Nagman Chak;
- (ii) Dr. Chak blocked the Defendants' attempts to obtain independent verification of the criminal proceedings and opposed efforts of the Defendants to obtain the preliminary inquiry transcript; and
- (iii) Dr. Chak refused to provide photographs of himself from 1993 and 1994 and refused to provide a current photograph of himself without eyeglasses.

[104] Conversely, the Plaintiff argues that adverse inferences should be drawn against the Defendants on the basis of, what he calls, the selective use of witnesses at this trial. The Plaintiff notes that 18 witnesses were called to testify at the criminal trial. Here, only three witnesses were called. The Plaintiff submits that the Court must, when balancing the totality of the evidence, draw appropriate inferences for those who did not testify, and diminish the weight of those who did.

[105] In *Weedon v Sherritt Inc*, 2004 ABCA 160, the Court of Appeal noted, at para 9:

Before a court can consider whether an adverse inference should be drawn from the failure of a witness to testify, the court must determine whether a *prima facie* case has been made out and the adverse inference is not to be substituted for proof of the facts necessary to make out the *prima facie* case.

See also *Pan v Gao*, 2020 BCCA 58 at para 44

[106] As will be discussed below, the Defendants have not made out a *prima facie* case that Dr. Chak was the shooter. As such, I may not draw any adverse inferences against the Plaintiff as a result of his failure to call evidence or his litigation strategy in these proceedings. Similarly, as the Defendants failed to make out a *prima facie* case, there is no benefit to the Court drawing an adverse interest against the Defendants, and I decline to do so.

Conclusions regarding the defence of justification

[107] While there is no requirement to prove Dr. Chak's identity as the shooter beyond a reasonable doubt, the quality of the evidence must nonetheless establish on a balance of probabilities that Dr. Chak was the shooter.

[108] Though there are only minor differences in how Messrs. Graham, Morezewich, and Racette described the events leading up to the shooting, their identification of Dr. Chak is weak and insufficient to establish on a balance of probabilities that Dr. Chak was the shooter.

[109] Although there were other witnesses at the preliminary inquiry that identified Dr. Chak as the shooter, the preliminary inquiry transcript is hearsay and is not admissible in these proceedings. Further, the circumstantial evidence presented in this case could support the theory

that Dr. Chak was the shooter; however, in the absence of evidence of sufficient quality to establish the identity of Dr. Chak as the shooter, it is insufficient to establish that Dr. Chak was the shooter. I find that the Defendants have failed to meet the requirements for the defence of justification in response to this claim in defamation.

[110] I find that the Plaintiff's claim in defamation has been made out.

Damages

[111] Damages are presumed where a claim in defamation is proved: *Defamation Act*, RSA 2000, c D-7, s 2. The Court must next consider the appropriate quantum and heads of damages to be awarded.

[112] The Plaintiff's position is that defamation published on the internet attracts greater damages because of its limitless reach. The Plaintiff seeks general damages in the amount of \$130,000, aggravated damages in the amount of \$30,000, and punitive damages in the amount of \$40,000.

[113] The Defendants' position is that an award of nominal damages is appropriate due to the lack of harm actually done by the Broadcast. They assert that the Court should not award substantial damages for defamation in this case because the Plaintiff has failed to prove actual harm caused by the publication.

a) General damages

[114] General damages are "intended to measure the damage to the plaintiff's reputation, and acknowledge that the allegations against the plaintiff are untrue": *Elkow v Sana*, 2020 ABCA 350 at para 20. The onus is on the Plaintiff to "elicit evidence establishing the measure of damages": *ATU v ICTU*, 1997 CanLII 14764, 195 AR 161 (ABQB) at para 325.

[115] The decision of the Supreme Court of Canada in *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 182 identifies five factors that are considered in setting general damages. These are enumerated as follows, in *Elkow* at para 21:

- (b) The plaintiff's position and standing;
- (c) The nature of the libel;
- (d) The mode and extent of the publication;
- (e) The possible effects of the libel statement upon the life of the plaintiff; and
- (f) The absence or refusal of an apology.

i. The Plaintiff's pre-existing position and standing

[116] The Broadcast occurred on February 25, 2014. I must consider Dr. Chak's pre-existing position and standing before this date.

[117] Dr. Chak was born in Toronto but moved to Edmonton when he was a young child. His parents still reside in Edmonton. Dr. Chak completed his undergraduate degree at the University of Alberta in 1998. In 1999, he was granted a masters degree in International Politics and Strategic Studies from the University of Bradford in the United Kingdom. In 2000, he enrolled in a doctoral program at the University of Durham in the United Kingdom. He completed the program in 2007.

[118] Although he completed the program and his thesis in 2007, he did not immediately complete the oral defence of his thesis. He volunteered with the Liberal Party of Canada and worked with Stephane Dion during the Liberal Leadership Convention in 2007. This led to Dr. Chak successfully running for nomination with the Liberal Party in 2007.

[119] It was at this time that negative information was reported about him in the press. Newspaper articles from the Edmonton Journal and the National Post were entered into evidence. These articles report that Dr. Chak failed to advise the Liberal Party of his 1993 criminal charges and that he had previously written controversial articles on Israel. The articles also allege that Dr. Chak claimed to have a Ph.D. even though the degree had not yet been conferred.

[120] Dr. Chak testified that it was in this period that Mr. Levant first alleged that Dr. Chak was involved with the discharge of a firearm. This allegation appears on a website published by Mr. Levant called WesternStandard.ca, which contains a blog dated April 27, 2007 titled, "Is Liberal candidate Farhan Chak a nut with a gun?" This article indicates that Dr. Chak was charged with use of a firearm during the commission of an offence.

[121] In response to the article on the Western Standard website, Dr. Chak retained counsel to write a letter to Mr. Levant demanding that Mr. Levant cease publishing defamatory material about him and remove this material from the Western Standard website. The letter did not indicate that Dr. Chak stood trial for the 1993 charges but was acquitted. This request was ignored.

[122] Dr. Chak met with Liberal Party managers to discuss his candidacy. He testified that during the meeting the allegations regarding the firearm were not discussed. The charges he had faced in 1993 were not an issue. The party was concerned that Dr. Chak's position on Palestine would cause difficulty with the Canadian Jewish community.

[123] Dr. Chak testified that after he resigned from the Liberal Party, he had difficulty securing employment. He initially went to Washington, DC to conduct research at the Centre for Christian-Muslim Understanding at Georgetown University. He was then hired as a professor at Qatar University.

[124] It is difficult to determine the extent of the damage caused to Dr. Chak's reputation by the 2014 Broadcast. His reputation was already negatively affected in 2007 by the news coverage of his resignation from the Liberal Party, particularly given that news reports in this period referred to the 1993 charges, his assertion that he had a Ph.D. when he did not, and his controversial writings. Further, an earlier 1993 article in the Edmonton Journal identified Dr. Chak as having been charged with offences arising out of the shooting at the Barry T's nightclub.

[125] I accept that the Broadcast in 2014 would have further harmed Dr. Chak's reputation but that any additional harm would have been minimal, given the earlier controversy surrounding his 2007 Liberal Party nomination and resignation.

ii. The nature of the libel

[126] The defamatory comments involved allegations of serious criminal activity. I accept that they were serious. The Statements also imply that Dr. Chak gave up his nomination for the Liberal Party of Canada because of the criminal charges against him. I find that a number of factors likely led to the resignation, including the claims regarding his alleged criminal activity. Including the reference to Dr. Chak's resignation from the Liberal Party does not render the defamatory comments more serious.

iii. The mode and extent of the publication

[127] The Broadcast occurred on February 25, 2014, during The Source with Ezra Levant, which aired on a cable channel called Sun News Network. It consisted of a one-hour Broadcast, 11 seconds of which contained the defamatory words. The Broadcast itself was a political commentary written and presented by Mr. Levant on the topic of human rights commissions and freedom of speech.

[128] Mr. Levant testified that he had previously been investigated by the Human Rights Commission. This led him to investigate human rights commissions and their effect on freedom of speech. In the Broadcast, he discussed one of the employees of the Alberta Human Rights Commission (HRC), Arman Chak, who is Dr. Chak's brother. Mr. Levant was of the view that some of the things Arman Chak wrote online were inconsistent with the intent of the HRC. This inquiry led Mr. Levant to learn of Dr. Chak. Mr. Levant described the comments he made with respect to Dr. Chak as being a vignette in the Broadcast.

[129] The Broadcast aired on one day only, at 8:00 pm and 10:00 pm, and then would have been re-broadcast through the night. The viewership statistics indicate that the Broadcast was seen by approximately 15,000 people across Canada. Mr. Levant testified that his show did not show up on the ratings because his viewership was excruciatingly low. The 8:00 pm broadcast had ratings of zero and the 10:00 pm broadcast had ratings of 0.1%. The Court was not provided with additional viewership information for re-broadcasts through the night.

[130] The Broadcast was made on cable television before streaming on the internet became common. Mr. Levant testified that he did not know if the Broadcast was put on YouTube. He testified that only 10 out of 100s of shows were YouTubed and that as a rule, his shows were not.

[131] In this period, some shows were uploaded to the Brightcove video server. Brightcove was a company that stored videos. If you clicked on a link on the Sun News Network's website or Ezrlevant.com, Brightcove would serve up an advertisement along with the video.

[132] Mr. Levant did not know whether this Broadcast was put on the Brightcove server, though he did acknowledge that his show was generally put on the Brightcove server. When Sun News shut down in February 2015, the Brightcove account expired, and the videos were deleted. The Brightcove server would have remained accessible likely a month after the network ended.

[133] Although Mr. Levant agreed that it was "pretty much impossible" to delete content from the internet, Mr. Levant testified that he did not know if the Broadcast was put on the internet. Dr. Chak testified that the Broadcast came to his attention in late February or early March of 2014 when someone sent him a message on Facebook telling him to look at what Mr. Levant was saying about him. At this point, Dr. Chak was living and working in Qatar.

[134] Dr. Chak testified that he was able to locate the Broadcast on a YouTube channel. He also found it on Mr. Levant's website and the Sun News website. He testified that the Broadcast was in many places at the beginning including a website about small dead animals. Dr. Chak researched the Broadcast and learned that Mr. Levant made similar comments in a book published in 2009 called *Shakedown – How our Government is Undermining Democracy in the Name of Human Rights*.

[135] The Defendants argue that the Plaintiff has not led any evidence that the Broadcast was or is available on YouTube. Dr. Chak testified that he believed it was on YouTube and that he

took a screenshot of the Broadcast in April 2014. The screenshot was entered as an exhibit in these proceedings (the Screenshot).

[136] The Screenshot has a URL from YouTube. It depicts a video containing side-by-side photos of Mr. Levant and Dr. Chak. The titles, Sun News, Roots in Radical Islam, and the Source with Ezra Levant are written under the photos. Under the video portion of the Screenshot, is the phrase, “Ezra Levant – Who is Arman Chak?” The Screenshot shows a play button and a timestamp of 1:51/11:43. The video was posted by “AlohaSnackbar01” and was published on February 25, 2014. At the time the Screenshot was taken the video had 402 views. Under the publication date is the following text:

On March 25th we might get a glimpse at the inner workings of the Canadian Human Rights Commission and learn a little more about the kinds of people who work there...

[137] The Defendants argue that the Screenshot is not from the Broadcast. They suggest that the Screenshot refers to an article entered as an exhibit titled, “Inside HRCs: Who is Arman Chak” that was written by Ezra Levant on March 15, 2008. This article begins as follows:

On March 25th we might get a glimpse at the inner workings of the Canadian Human Rights Commission and learn a little more about the kind of people who work there...

[138] I find that the Screenshot is not from the Broadcast. Whereas the Broadcast was an hour in length, the Screenshot shows a total length of 11 minutes and 43 seconds. Further, the words written on the Screenshot suggest that it is a reference to an earlier article written by Mr. Levant about Human Rights Commissions. While this earlier article refers to the nightclub shooting as well, that article is not the subject of this litigation.

[139] Although Dr. Chak testified that the Broadcast was available on YouTube, the Screenshot that he provided does not support this assertion. Given my earlier comments regarding Dr. Chak’s credibility as a witness, I attribute little weight to Dr. Chak’s evidence on this point. There is no evidence that the Broadcast was uploaded to YouTube or that it is still available on YouTube.

[140] Although Mr. Levant agreed in his evidence that once material is put on the internet, it can never be removed, there is no actual evidence that the Broadcast is currently available online. I accept that the Broadcast could have initially been available on the internet through the Brightcove server; however, no evidence was led that it continued to be available after Sun News Network shut down in February 2015. I find that the extent and dissemination of the Broadcast on the internet was limited.

iv. The possible effects of the libel statement upon the life of the plaintiff

[141] The Defendants argue that the Broadcast did not significantly impact Dr. Chak’s life. They argue that it is unlikely that people living in Qatar, holding opinions of Dr. Chak, would place any weight on Mr. Levant’s words. They point to Dr. Chak’s promotion to Associate Professor in 2014 which occurred shortly after the Broadcast aired, as evidence that the Broadcast did not harm Dr. Chak’s reputation in Qatar.

[142] Dr. Chak has lived in Doha, Qatar for 13 years. He is an Associate Professor of political science in the Department of International Affairs/Gulf Studies at Qatar University. He started as

an Assistant Professor in 2008 and was promoted to his current position in 2014. He sits on several committees at the university including the academic excellence committee and the recruitment committee. He was awarded two teaching excellence awards and has had student evaluations over 90% over the past 13 years. He speaks at conferences and regularly appears as a commentator on television and radio. He has written a book and has signed a contract for a second book.

[143] Dr. Chak testified that the Statements have had a devastating impact on his life. He explained that since the Broadcast he has developed health issues that include diabetes and high blood pressure. Although he had some health issues prior to the Broadcast, they worsened after the Broadcast.

[144] Dr. Chak testified that he constantly has to address the existence of the defamatory comments. At different times he has had students bring up the allegations to him. When this happens, he asks them to write down their concerns. Six letters written by students were entered as exhibits. These letters all describe the shock the students experienced when they discovered the materials about Dr. Chak that are online. The letters each include links to articles written in the Western Standard in 2007 and three of them contain a link to the YouTube video that is captured in the Screenshot. I find that the materials referenced by the students are materials that existed on the internet prior to the 2014 Broadcast.

[145] Dr. Chak testified that the Statements have limited his professional opportunities and that he has been unable to secure a position in Canada. He feels that the Broadcast affected his ability to work in Canada.

[146] I accept that the Broadcast caused Dr. Chak stress and frustration. No evidence was led regarding the impact the Broadcast had on Dr. Chak's reputation in Canada. While he asserts that he has been unable to obtain positions in Canada, no evidence is before the Court regarding the positions that he sought to obtain after the 2014 Broadcast. Dr. Chak's reputation in Qatar has not been harmed. The evidence shows that his reputation as a distinguished and well-represented professor at Qatar University has continued to grow since 2014.

v. The absence or refusal of an apology

[147] The Defendants acknowledge that there has been no apology or retraction of the Statements made in the Broadcast. They say that upon receiving a claim for damages from the Plaintiff, the Defendants took steps to determine whether the words complained of were accurate and whether an apology and retraction was warranted.

[148] The Defendants argue that the Plaintiff frustrated their attempts to obtain independent verification of the criminal proceedings. Although the Plaintiff initially indicated that the Defendants could obtain information about the criminal proceedings from the Court record, the Plaintiff then opposed efforts of the Defendants to obtain these records. The Defendants ultimately obtained an order for the records from the Court of Appeal.

[149] Once the Defendants obtained a copy of the preliminary inquiry transcript, they did not feel it was appropriate to issue a retraction. The transcript shows that four of five Barry T's employees identified Dr. Chak as the shooter.

[150] While I have found that the Defendants have not proven on a balance of probabilities that Dr. Chak was the shooter, I agree that based on the information the Defendants had, there was no

basis upon which to issue an apology. This is not a factor that contributes to the damages award that is warranted in this case.

vi. The stature and credibility of the person making the defamatory statement

[151] In addition to the factors identified in *Hill*, in *Elkow* at para 22, the Court acknowledged that “damage caused by defamation clearly depends in part on the stature and credibility of the person making the defamatory comments.”

[152] Mr. Levant is a well-known political commentator. His “reputation as a political commentator” can be considered in assessing the quantum of damages: *Ramsey v Pacific Press*, 2000 BCSC 1551 at para 149.

[153] As the Plaintiff points out in his materials, Mr. Levant acknowledged that he has been described as “a blowhard, a loudmouth, a soft motor, [and] a controversy entrepreneur.” The Globe and Mail also once said that Mr. Levant was “Canada’s most irritating person.” Mr. Levant accepts these descriptions as compliments.

[154] In *Awan v Levant*, 2016 ONCA 970 at para 99, the Court of Appeal noted that the trial judge in that matter considered that Mr. Levant’s “reputation as a right-wing provocateur... affect[s] the impact of his statements”, and this was accepted as a factor that lowers the damages award. The Plaintiff argues that this approach gives Mr. Levant a license to defame people and that the Broadcast was a serious commentary discussing political and social issues.

[155] While I agree that Mr. Levant’s reputation does not eliminate the effect of the defamation, he is known for creating controversy. In contrast to other commentators, one does not expect a balanced and neutral approach in Mr. Levant’s opinion pieces. I agree that Mr. Levant’s reputation reduces somewhat the damage caused by statements he makes.

b) Conclusion regarding general damages

[156] Dr. Chak has not presented any evidence of actual harm to his reputation as a result of the Statements contained the Broadcast. In fact, his status as a university professor and expert in his field has continued to grow since the Broadcast was made. Although the scope of publication of the Broadcast was relatively limited, it did reach an audience of several thousand people. Further, the Broadcast was likely on the Brightcove server until 2015. There is no evidence that it remains on the internet.

[157] That being said, I accept that Dr. Chak has suffered emotional and mental harm as a result of the Broadcast. The Broadcast is the last in a string of publications made by Mr. Levant regarding Dr. Chak’s 1993 charges. The initial publications were made around the time that Dr. Chak’s nomination for the Liberal Party of Canada was called into question. They were then repeated in a 2008 article that was purportedly about Dr. Chak’s brother. Later, they appeared again in Mr. Levant’s 2009 book. Although these earlier publications are not the subject of this litigation, I accept that having to again confront the Statements some seven years after Dr. Chak resigned from the Liberal Party would have caused him a great deal of stress.

[158] It is difficult to quantify damages for the stress and mental health consequences that Dr. Chak has experienced because of the Statements. In Alberta, damages for defamation, where there was evidence of emotional harm, but little evidence of reputational harm, have ranged from \$20,000 to \$75,000: See *Rodrigues v Rodrigues*, 2013 ABQB 718, *Pinsent v Sandstrom*, 2014

ABQB 269 and *Huff v Zuk*, 2019 ABQB 691, aff'd 2021 ABCA 60. Dr. Chak is entitled to an award of general damages in the amount of \$40,000 to compensate him for the harm he suffered as a result of the Statements.

c) Aggravated and punitive damages

[159] The Plaintiff seeks general, aggravated, and punitive damages; however, the Statement of Claim does not particularize aggravated and punitive damages. The Statement of Claim does not give any indication that non-compensatory damages are sought. When the trial began, the Plaintiff reduced the amount of damages being sought to a claim for \$200,000.

[160] In the written argument, submitted at the close of the case, the Plaintiff seeks damages in the amount of \$200,000 representing general, aggravated, and punitive damages. The Court is invited to apportion the damages as the Court deems just and appropriate but the Plaintiff asserts that an appropriate award of general damages is \$130,000, \$30,000 for aggravated damages, and \$40,000 for punitive damages. The Plaintiff states that Mr. Levant acted with malice and the damages award should reflect this.

[161] In response, the Defendants argue that aggravated and punitive damages cannot be awarded because they were not pled. In the alternative, they say that Mr. Levant did not act with malice and this case does not warrant an award of punitive damages.

[162] Rule 13.6(2)(c) of the *Alberta Rules of Court*, Alta Reg 124/2010 provides that a pleading must state the type of damages claimed. The issue addressed by this rule is one of notice. Thus, the precise amount of punitive damages is less important “so long as a claim in excess of the amount pleaded does not impair trial fairness”: *Gill v 1176520 Alberta Ltd*, 2020 ABQB 274 at para 238.

[163] The Plaintiff’s position is that Rule 1.3(2) allows a Court to grant a remedy whether or not it is claimed or sought in the action. See also *Bard v Canadian Natural Resources*, 2016 ABQB 267 at para 48. The Plaintiff argues that the facts in this case support an award of punitive and aggravated damages and as such, the Court has jurisdiction to award them.

[164] I agree that the Court’s jurisdiction to award damages is broad. Further, the Statement of Claim also seeks “such further and other relief as this Honourable Court may deem appropriate.” I also note that the Defendants made submissions, both written and in oral argument on the issue of aggravated and punitive damages. It cannot be said that they did not have an opportunity to consider these issues and respond accordingly.

i. Aggravated damages

[165] In addition to the five factors discussed in the context of general damages, above, a court may also consider the “conduct of the defendant before action, after action, and in court at the trial of the action”: *Hill* at para 182. While this factor overlaps to some extent in the consideration of general damages, the Defendants’ conduct is particularly relevant to the issue of aggravated damages. That being said, care must be used to ensure that this factor does not result in double counting by including it both under the heading of general damages as well as aggravated damages.

[166] The Court must consider whether Mr. Levant’s conduct was such that there was “some increase in the injury from [his] conduct to justify aggravated damages”: *Elkow* at para 32.

[167] Although the Plaintiff asserts that “malice is presumed on proof of publication of a false and defamatory comment”: see *JE v Alberta (Workers’ Compensation Board)*, 2015 ABQB 460 at para 57, I agree with the Defendants’ position that the reference to malice in *JE* is a reference to implied malice. This is because the caselaw establishes that there is a presumption of malice where a defamatory statement is published. There is no need to show an intention to defame in order to establish that a defamatory statement was made: see *Hill* at para 170. In contrast, in order to make out a claim for aggravated damages, the Plaintiff must establish that the Defendant “was motivated by actual malice:” *Hill* at para 190.

[168] The Plaintiff argues that Mr. Levant acted with malice when he made the Statements. The Plaintiff’s position is that the defamation was targeted and driven by Mr. Levant’s malice for Dr. Chak and his brother. The Plaintiff points to Mr. Levant’s other online publications that contain the same or similar statements, as well as Mr. Levant’s 2009 book that contains the same statements. The Plaintiff argues that this is the third instance in which Mr. Levant has made these statements, despite being asked to stop, despite the fact that Dr. Chak no longer lived in Canada, and despite the fact that Dr. Chak was no longer involved in Canadian politics.

[169] The Plaintiff further argues that there was no reason for the Statements to have been included in the Broadcast. The Broadcast was about human rights commissions, a matter that does not involve Dr. Chak. The Plaintiff says he was included in the Broadcast as a means of creating a villain for the larger story about human rights commissions.

[170] The Defendants’ position is that Mr. Levant’s inclusion of the Statements without indicating that Dr. Chak was acquitted of the charges, was a mistake. They say that Mr. Levant was not motivated by malice and that he believed the circumstances he asserted about Dr. Chak were factual because Mr. Levant had included them in his 2009 book.

[171] Was Mr. Levant’s failure to say that Dr. Chak was acquitted of the charges an error, or was it wanton disregard for the truth? In evidence, Mr. Levant acknowledged that he made a mistake and should have included a statement that Dr. Chak was acquitted of the charges. He recalled relying on what he wrote in his book and admitted that he did not do any further checks. At the time he made the Broadcast, he believed the words of the Statements were true. I agree that considered from this perspective, his conduct was careless and does not amount to malice.

[172] The real question is why the Statements were included in the Broadcast at all. This was a one-hour broadcast that dealt with human rights commissions. Mr. Levant admitted that Dr. Chak had nothing to do with human rights commissions but said Dr. Chak was used as a vignette.

[173] In order to award aggravated damages, I must be satisfied that Mr. Levant’s conduct resulted in an increase in the injury to the Defendant: *Elkow* at paras 32-33. I find that Mr. Levant used Dr. Chak in the vignette in a manner that was salacious and intended to increase the drama of the Broadcast. Dr. Chak had previously asked Mr. Levant to stop repeating these words. The fact that he did not stop and included the Statements in a Broadcast that was otherwise irrelevant to the matters being discussed resulted in increased injury to Dr. Chak. This warrants an award of aggravated damages in the amount of \$20,000.

ii. Punitive damages

[174] Punitive damages are awarded to punish or denounce wrongdoing. They are awarded in exceptional cases where it has been found that the Defendant’s conduct was so “malicious,

oppressive and high-handed that it offends the court's decency" and departs from the ordinary standards of behaviour: *Dentec Safety Specialists Inc v Degil Safety Products (1989) Inc*, 2012 ONSC 4721 at para 46.

[175] The Plaintiff argues that Mr. Levant has embarked on a defamatory campaign against Dr. Chak. The Broadcast is the third time Mr. Levant has published the Statements or similar words. The Plaintiff asserts that Mr. Levant has a history of villainizing individuals to make a point or tell a story.

[176] The Plaintiff further argues there is a pattern in Mr. Levant's political commentary and his various targets that discloses Islamophobia. In essence, Dr. Chak is one of several individuals that have been targeted by Mr. Levant because he is a Muslim.

[177] This allegation was not put to Mr. Levant on cross-examination. The Plaintiff points to what they say is a pattern in Mr. Levant's opinion pieces; however, the record is insufficient to conclude that Mr. Levant's is targeting Dr. Chak because he is Muslim.

[178] Mr. Levant's use of vignettes to increase the drama and controversy in his pieces can be risky if what he says amounts to defamation. However, the fact that he uses this method to increase the drama of his stories or commentary does not in and of itself amount to conduct that warrants sanction.

[179] I am not satisfied that this is an exceptional case that warrants punitive damages. I therefore decline to award punitive damages.

Conclusion

[180] I find that the Defendants have failed to make out the defence of justification in this case. The Plaintiff has succeeded in his claim in defamation. He is entitled to general damages in the amount of \$40,000 and aggravated damages in the amount of \$20,000.

[181] The Plaintiff is also entitled to prejudgment interest pursuant to the *Judgment Interest Act*, RSA 2000, c J-1 and costs.

Heard on the 4th day March, 8th, 9th, 10th, and 11th day of March, and the 3rd day of June, 2021.

Written Submissions filed on 19th April, 3rd May and 10th May, 2021.

Dated at the City of Edmonton, Alberta this 26th day of November, 2021.

S. Leonard
J.C.Q.B.A.

Appearances:

Robert O'Neill, Q.C.

Imran Qureshi

Aaron Hymes

for the Plaintiff

Barry Zalmanowitz

Sara Hart

for the Defendants