

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

SHIRLEY BROWNE

Plaintiff

and

TORONTO STAR NEWSPAPERS LIMITED, JAGODA PIKE, DALE BRAZAO
DON BABICK, AND CATHERINE MANUEL

Defendants

LEGAL BRIEF OF THE PLAINTIFF

(Subtitle)

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PART I: INTRODUCTION

1. The Plaintiff, Shirley Browne, was born in rural Guyana. She came to Canada at age 19, educated herself here (three university degrees), sponsored her family to come here, raised her children here and, when they were grown, started a small business, Whispering Pines, a bed-and-breakfast, in Jackson's Point.
2. In 2008, she took in Catherine "Kay" Manuel, a woman who was brought here from the Philippines by Terra Holman as a contract employee to work as a nanny. Terra Holman was a 'sister' from Shirley's mother's home / orphanage / shelter in Guyana. Terra Holman, for whatever reason (of considerable controversy), was unable or unwilling to fulfill her obligations to Kay. The facts will show that Shirley stepped in, offered a job, at first temporary and then, by agreement, to be made permanent. The Plaintiff's evidence will be that the job was easy (albeit not a child care job), that Shirley and Kay got on well, that Kay was treated as part of the family, and that Kay liked the job.
3. By all normal standards, Shirley Browne *saved* Kay, not abused her.

4. The Plaintiff complains that The Star's story defames her in all its essential allegations; it attacks her for being the exact opposite of what she is, a generous, sensible and successful immigrant woman and that The Star, for reasons that will be explored as part of the evidence, has refused to tell her side of the story.
 5. As the trial plays out, it will emerge that the Star defendants have been, respectfully, duplicitous in their prosecution of the action, attempting at every turn to vilify Ms. Browne.
 6. The picture of Ms. Browne in the story as abusive is grossly insulting and far from the truth. It attacks Ms. Browne for very thing she is not.
 7. The story was a front page story. It also had substantial distribution on The Star's web site and the Plaintiff will show that it is still accessible on TheStar's website. Ms. Browne business depends on internet publicity. Further, The Star's coverage of the first trial was biased.
 8. The Defendants persist in their defamation. The damages the Plaintiff has suffered are substantial.
- PART II: LAW OF DEFACTION, REPUTATION AND THE CHARTER OF RIGHTS AND FREEDOMS**
9. The law of defamation buttresses the fundamental Charter value of the right to reputation and to a right to a 'sense of self-worth.' According to the Supreme Court of Canada:

Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.

Joint Book of Authorities, Vol. 2, Tab 28, *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para 108.

10. This Charter value underlies all Charter rights:

Although it is not specifically mentioned in the Charter, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the Charter rights.

Joint Book of Authorities, Vol. 2, Tab 28, *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para 120.

11. The long-standing and fundamental purpose of an action in defamation is to allow a defamed party to redeem their reputation.

12. The Supreme Court of Canada (SCC) has considered the balance between the right to reputation and the right to freedom of expression set out in the Charter in two important cases. In both cases, the media interveners and the Defendant in this action, The Star, sought to persuade the court that the law of defamation was wholly inconsistent with what they conceived as 'freedom of the expression', i.e., the press'. In both cases the SCC rejected the argument.

Joint Book of Authorities, Vol. 2, Tab 28, *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.

Joint Book of Authorities, Vol. 2, Tab 26, *Grant v. Torstar Corp.*, 2009 SCC 61.

13. In *Hill v. Church of Scientology*, the SCC rejected the idea that the protection of reputation was inimical with freedom of expression. The SCC firmly and clearly held that personal integrity and reputation were fundamental 'Charter values' of as great weight as freedom of the press and that the law of defamation should be interpreted to be consistent with Charter values.

Joint Book of Authorities, Vol. 2, Tab 28, *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at paras 107, 116-117, 153-4.

14. In *Grant v. TorStar*, the SCC created a new defamation defence, responsible communication on matters of public interest, to assist the media. According to the

SCC, the new defence would uphold two of the three rationales for constitutional protection of free expression: the proper functioning of democracy and the quest for truth. The third rationale, 'self-fulfilment', has "little relevance to defamation."

Joint Book of Authorities, Vol. 2, Tab 26, *Grant v. Torstar Corp.*, 2009 SCC 61 at paras 48-51.

15. Further, *Grant* affirms the importance of balancing the protection of reputation and personal integrity, with the right to freedom of expression "within the law of defamation".

Joint Book of Authorities, Vol. 2, Tab 26, *Grant v. Torstar Corp.*, 2009 SCC 61 at paras 52-65.

16. The common law of defamation is now subject to scrutiny as to whether it violates Charter values, whether or not government action is involved. The SCC has upheld this proposition on several occasions including:

- a. *WIC Radio v. Simpson* – refused to abandon the principle that reputation underlies the Charter and should be balanced with the right to freedom of expression.

Joint Book of Authorities, Vol. 4., Tab 83, *WIC Radio v. Simpson*, 2008 SCC 40 at paras 29, 36 - 41.

- b. *Grant* – rejected arguments that the common law of defamation gave adequate consideration to section 2(b) rights and therefore allowed the new defence of responsible communication in the public interest to appropriate balance competing rights of freedom of expression and right to reputation.

Joint Book of Authorities, Vol. 2, Tab 26, *Grant v. Torstar Corp.*, 2009 SCC 61 at para 65.

17. The new defence of Responsible Communication grants the media relief from the supposed burden of proving some factual basis for an important news story in issue as is required in the traditional defences of Fair Comment and Justification. Now the

media can successfully defend the defamation if they prove the story was published in accordance with the standards of 'responsible communication'. What these standards are – as a matter of fact and law – is developing with standards only vaguely defined to date.

18. In this case, the Defendants pursue both branches of the law. Thus there are two strands of evidence and argument– the first strand is the traditional common law of defamation and the second is the new defence of Responsible Communication. The same evidence may be relevant to each but the evidence is judged by different criteria.

Joint Book of Authorities, Vol. 2, Tab 26, *Grant v. Torstar Corp.*, 2009 SCC 61 at paras 114-115.

PART III: TRADITIONAL DEFENCES TO DEFAMATION

A. THRESHOLD TEST – IS THERE A DEFAMATORY MEANING?

19. The Plaintiff asserts that the Defendants are responsible for damage arising from their publication in hard copy and on their continuing publication on The Star website. There is no dispute that the story was published and that the words complained of refer to the plaintiff, two important elements of an action in defamation.

Joint Book of Authorities, Vol. 2, Tab 26, *Grant v. Torstar Corp.*, 2009 SCC 61 at para 28.

20. The plaintiff must also prove that the words complained of defame her. The Plaintiff's Statement of Claim at paragraph pleads that the article is defamatory in its natural and ordinary meaning and in the alternative that it means that the plaintiff acted illegally towards Ms. Manuel, that she abused her and that she underpaid her. The Defendants did not plead any alternative meaning.
21. The test of 'defamatory meaning' is whether the publication tends to lower the plaintiff's reputation in the eyes of an average person. The relevant impression is that

which an ordinary person gets on first impression, not a later analysis or legalistic dissention of the words. Veiled allegations are equally defamatory.

Joint Book of Authorities, Vol. 1, Tab 7, *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at para 62.

Joint Book of Authorities, Vol. 3, Tab 40, *Lewis v. Daily Telegraph*, [1964] A.C. 234 (H.L.) at 258-260.

Joint Book of Authorities, Vol. 4, Tab 83, *WIC Radio v. Simpson*, 2008 SCC 40 at para 56.

Plaintiff's Second Supplementary Book of Authorities, Tab xx, *Gates v. The Standard*, 2004 CanLII 34365 (ON SC) at para 39.

Plaintiff's Second Supplementary Book of Authorities, Tab xx, Downard, Peter, *Libel* (3d) at 40 - 43.

22. The trier of fact should consider the words in the context of the whole article including the headlines, layout and photographs.

Joint Book of Authorities, Vol. 3, Tab 51, *P.G. Restaurant Ltd. v. Cariboo Press (1969) Ltd.*, 2005 BCCA 210 at paras 43 and 46.

Joint Book of Authorities, Vol. 3, Tab 50, *O'Malley v. O'Callaghan* (1992), 1 Alta L.R. (3d), 88, 89 D.L.R. (4th) 577 (Alta Q.B.) at para 15.

Plaintiff's Second Supplementary Book of Authorities, Tab xx, *Jiang v. Sing Tao Daily and Hai Tao Li*, 2014 ONSC 287 at paras 30-32.

Plaintiff's Second Supplementary Book of Authorities, Tab xx, Downard, Peter, *Libel* (3d) at 46-50.

23. The traditional rules tell us that the Judge determines whether the words are capable of a defamatory meanings and the jury decides whether they do have a defamatory meaning. An affirmative answer in these two inquiries is a threshold test as to whether the action might succeed.

Joint Book of Authorities, Vol. 2, Tab 29, *Hodgson v. Canadian Newspaper Co.* (1998), 39 O.R. (3d) 235 (Gen Div) at para 20.

Joint Book of Authorities, Vol. 2, Tab 37, *Lauffer v. Bucklaschuk* (1999), 145 Man R. (2d) 1 at paras. 25-35.

24. The trier of fact must determine whether there is one general charge (or 'sting'), or several separate 'stings'. Only in clear cases will the trier of fact determinate that there are separate and distinct charges.

Plaintiff's Supplementary Book of Authorities, Tab 7, *Brown on Defamation*, Vol. 5, Pleadings, Partial Plea of Justification, section 19.4(2)(d) at 19-148.

25. The defamatory sting is relevant in determining whether the defendant has successfully asserted the defences of Justification or Fair Comment. In the former defence, the defendant must prove that the sting is substantially true or "justified." In the latter, the defendant must prove that the sting is fair comment on underlying facts.

Joint Book of Authorities, Vol. 2, Tab 29, *Hodgson v. Canadian Newspaper Co.* (1998), 39 O.R. (3d) 235 (Gen Div) at para 427.

26. More than one defamatory sting can be alleged and the trier of fact can make a determination as to whether the words complained of are capable of bearing the meaning of each alleged sting.

Joint Book of Authorities, Vol. 2, Tab 29, *Hodgson v. Canadian Newspaper Co.* (1998), 39 O.R. (3d) 235 (Gen Div) at para 27.

Joint Book of Authorities, Vol. 4, Tab 68, *Slim v. Daily Telegraph*, [1968] 2 Q.B. 157 at 12.

Plaintiff's Second Supplementary Book of Authorities, Tab xx, *Jiang v. Sing Tao Daily and Hai Tao Li*, 2014 ONSC 287 at para 24.

Joint Book of Authorities, Vol. 3, Tab 50, *O'Malley v. O'Callaghan* (1992), 1 Alta L.R. (3d), 88, 89 D.L.R. (4th) 577 (Alta Q.B.) at para 16

27. In the context of the traditional common law defences of justification and fair comments, the intended meaning of the writer is irrelevant to finding the actual defamatory meaning of the words complained of. But when we get to the defence of 'responsible communication' the writer's intended meaning and lack of attention to unintended meanings and belief may be important.

Joint Book of Authorities, Vol. 2, Tab 29, *Hodgson v. Canadian Newspaper Co.* (1998), 39 O.R. (3d) 235 (Gen Div) at paras 426, 521-522.

Joint Book of Authorities, Vol. 2, Tab 26, *Grant v. Torstar Corp.*, 2009 SCC 61 at para 124.

Plaintiff's Supplementary Book of Authorities, Tab 2, *Brown on Defamation*, Vol. 1, Section 5.5(1)(b), p. 5-232.

28. Where the sting of the defamation is that the Plaintiff behaved illegally, the Defendant must establish the substantial truth of the allegations of illegal behavior to a standard commensurate with the seriousness of the offence. Whether an innuendo of illegality exists in this article and how the innuendo of illegality is justified in the pleadings, is an issue in this case.

Joint Book of Authorities, Vol. 1, Tab 17, *Ellacott v. C.L.*, [1999] O.J. No. 430 at para 65.

Joint Book of Authorities, Vol. 4, Tab 74, *TPG Technology v Canada (Ministry of Industry)*, 2012 ONCA 87 at para 11.

B. DEFENCE OF FAIR COMMENT

i. Fact or Comment

29. The traditional law provides that a Judge will rule whether the words are capable of being comment and the jury will determine whether they are comment. According to the court in *Ross v. New Brunswick Teacher's Association*, "[a] comment has been defined as the subjective expression of opinion in the form of a deduction, inference, conclusion, judgement, remark or observation which is generally incapable of proof." The trier of fact must make a 'value judgement' with respect to whether the words are comment.

Joint Book of Authorities, Vol. 1, Tab 17, *Ross v. Beutel*, 2001 NBCA 62 at para 56.

30. If the allegedly defamatory statements are facts, rather than comment, the defence of Fair Comment is not available, however, the defence of justification may be.

Joint Book of Authorities, Vol. 2, Tab 26, *WIC Radio v. Simpson*, 2008 SCC 40, at paras 26, 31 - 34.

31. The simplest test is this – are there facts in the article to underpin the comments, so that the comments can be understood by the reader to be comments based on the facts proved to be true. If the article has no facts to back up what might in other circumstances be thought to be a comment then the Defendant will have to justify the truth of the words.

Joint Book of Authorities, Vol. 1, Tab 5, *Bell v. Kingsbay PTY Ltd.* [2001] VSC 498, at para. 90.

Joint Book of Authorities, Vol. 2, Tab 36, *Kent v. Kehoe*, 2000 NSCA 3 at para 28.

Plaintiff's Second Supplementary Book of Authorities, Tab xx, *Brown on Defamation*, 15.4(2), at 15-100.

32. It is respectfully submitted that there is virtually nothing in this story that can be defended as comment and therefore the defence of Fair Comment is not available.

ii. **Test for Finding Fair Comment**

33. Notwithstanding the above, if some of the offending words in this case are found to be comment, the following test applies to successfully establish the defence of Fair Comment. The defendant has the burden of proving:

- a. The comment is on a matter of public interest;
- b. The comment is based on fact;
- c. A person could honestly express the opinion based on the proved facts (the objective test);

- d. The facts must be truly stated. This means in essence that the publisher cannot omit facts from the story that would affect its meaning; and
- e. A defendant cannot comment on facts he does not know at the time of writing.

Plaintiff's Supplementary Book of Authorities, Tab 1, *Brown on Defamation*, Vol. 1, Section 15.3(3) at 15-49 to 15- 51.

Plaintiff's Supplementary Book of Authorities, *Brown on Defamation*, Vol. 4, Section 15.3(1) at 15-25, 15.3(3) at 15-49 – 52.

Joint Book of Authorities, Vol. 3, Tab 60, *Ross v. New Brunswick Teachers Association*, 2001 CarswellNB 190 at para 55.

Joint Book of Authorities, Vol. 2, Tab 25, *Gouveia v. Toronto Star Newspaper Ltd.* (1998), [1998] O.J. No. 3830 at para. 11.

Plaintiff's Supplementary Book of Authorities, Tab 19, *Silkin v Beaverbrook Newspapers Ltd et al* [1958] 1 W.L.R. 743 at 746.

Joint Book of Authorities, Vol. 4, Tab 83, *WIC Radio v. Simpson*. 2008 SCC 40 at paras 28, 34 and 49.

- 34. Proof of malice on the part of the Defendants defeats Fairness and the defence of fair comment would fail. Malice is discussed at paragraphs xx-xx under "Damages", below.

Joint Book of Authorities, Vol. 4, Tab 83, *WIC Radio v. Simpson*. 2008 SCC 40 at paras 28, 34 and 49.

iii. Public Interest

- 35. The test of 'public interest' is also the threshold test for the defence of 'responsible journalism'. It is matter for argument in this case whether as a matter of law the test is the same.
- 36. According to the House of Lords in *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2006] UKHL 44, [2007] 1 AC 359, determining whether a matter is in the public interest is a two part analysis:

The first question is whether the subject matter of the Articles [as a whole] was a matter of public interest. In answering that question ... one should consider the article as a whole and not isolate the defamatory statement.

If the article as a whole concerned a matter of public interest, the next question is whether the inclusion of the defamatory statement was justifiable. The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article.

Joint Book of Authorities, Tab 33, *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2006] UKHL 44, [2007] 1 AC 359, at paras. 48 and 51.

iv. Truth of the Facts Underlying the Comment

37. The facts underlying the comment must be true. As stated in *WIC Radio* "If the factual foundation is unstated or unknown, or turns out to be false, the fair comment defence is not available."

Joint Book of Authorities, Vol. 4, Tab 83, *WIC Radio v. Simpson*. 2008 SCC 40 at para 31.

38. Not every fact in the story must be proved true, only those facts underlying the words complained of.

Joint Book of Authorities, Vol. 1, Tab 1, *Libel and Slander Act*, R.S.O. 1990, Chapter L.12, Section 23.

39. Misstatements of fact cannot be defended as fair comment.

Plaintiff's Second Supplementary Book of Authorities, Tab xx, *Brown on Defamation*, Vol. 4, 15.4(2) p. 15-105.

Plaintiff's Second Supplementary Book of Authorities, Tab xx, *Leech v. Leader Publishing Co., Ltd.*, 1926 CanLII 159 (SK CA) at para 106.

Plaintiff's Second Supplementary Book of Authorities, Tab xx, *Paletta v. Lethbridge Herald Company*, 1976 CanLII 283 (AB QB) at para 35.

40. It is not necessary that all the facts relied on are in the article in question if those facts are notorious. In this case, the article itself is the only source of information for readers.

Joint Book of Authorities, Vol. 4, Tab 83, *WTC Radio v. Simpson*, 2008 SCC 40 at para 34.

41. Finally, the facts relied on for the comment must also be known to the writer at the time of the comment, unlike a defence of Justification, which can be based on facts unknown at the time of publication and unknown to the reader. [Further by way of comparison, 'responsible communication' is generally thought to require some 'verification' of facts and allegations. But 'verification' is not the same as proving facts to be 'true'.]

42. The point of the defence is that if the facts are true and truly stated, the writer can comment – albeit harshly – and the readers, relying on the true facts they have before them, can make up their minds as to whether the writer believes the statement is true.

Joint Book of Authorities, Vol. 4, Tab 83, *WTC Radio v. Simpson*, 2008 SCC 40 at para. 31.

43. This is the heart and soul of the traditional balancing of interests in the law of defamation between reputation and freedom of expression – that readers are put in a position to make up their own mind based on true facts.

44. The Defendant cannot rely on a rolled-up plea to hide the necessity of proving the truth of defamatory statements of fact. Allegations of fact under a defence of fair comment must be non-defamatory. Defamatory facts must be proved under a plea of justification.

Joint Book of Authorities, Vol. 2, Tab 25, *Gouveia v. Toronto Star Newspaper Ltd.* (1998), [1998] O.J. No. 3830 at para 11.

C. Justification

45. The Defendant must particularize the facts it intends to justify and cannot go beyond those facts during discoveries. While this exposes the Plaintiff to discoveries that may uncover proof of a Justification defence not known to the writer at the time of publication it also exposes the Defendants to substantial damages if they fail in the Justification defence.

Joint Book of Authorities, Vol. 2, Tab 36, *Kent v. Kehoe*, 2000 NSCA 3 at paras 25-28.

46. The Defendant must prove 'the overall sting' is substantially true.

Joint Book of Authorities, Vol. 3, Tab 42, *Lougheed Estate v Wilson*, 2012 BCSC 169, paras 91 and 94-95.

Plaintiff's Supplementary Book of Authorities, Tab 3, *Brown on Defamation*, Ch. 10.4(1) at 10-81.

Plaintiff's Second Supplementary Book of Authorities, Tab xx, *Brown on Defamation*, Vol. 5, Ch.19.4(2)(a) at xx.

Plaintiff's Second Supplementary Book of Authorities, Tab xx, *Edwards v. Bell*, (1824) 1 Bing 403 at 409.

Joint Book of Authorities, Vol. 4, Tab 87, *Gatley, Defamation*, (9th Ed) ch. 11, Sec. 11.10 pp. 321-322, Sec. 11.12, p. 324.

Joint Book of Authorities, Vol. 3, Tab 47, *Makow v Winnipeg Sun*, 2003 MBQB 56, paras 59 and 61.

Joint Book of Authorities, Vol. 2, Tab 34, *Jay v. Hollinger Canadian Newspapers*, 2002 BCSC 1840, paras 4 and 6.

47. The Defendants' proof must address all the essential elements of the defamatory sting, but proof of every word is not required.

Joint Book of Authorities, Vol. 3, Tab 42, *Lougheed Estate v Wilson*, 2012 BCSC 169, at paras 91 – 95.

Joint Book of Authorities, Vol. 2, Tab 34, *Jay v. Hollinger*, 2002 BCSC 1840, at para 4.

Joint Book of Authorities, Vol. 3, Tab 47, *Makow v Winnipeg Sun*, 2003 MBQB 56 at para 59.

Joint Book of Authorities, Vol. 2, Tab 23, *Galloway v. Telegraph* [2004] EWHC 2786 (QB) at para 30.

Plaintiff's Supplementary Book of Authorities, Tab 3, *Brown on Defamation*, Vol. 3 Sect 10.4(1) (a) – (h) at 10-61.

Joint Book of Authorities, Vol.4, Tab 80, *Warman v National Post*, 2010 ONSC 3670 at para 130.

Joint Book of Authorities, Vol. 1, Tab 1, *Libel and Slander Act*, R.S.O. 1990, Chapter L.12, Section 22.

48. Literalism is not substantial truth, which is to say the Defendant may show that the article contains true facts, but those facts may not answer the sting. Proving the literal truth of the charges does not mean the substantial truth of the sting has been made out.

Plaintiff's Second Supplementary Book of Authorities, Tab xx, Downard, Peter, *Libel* (3d) at 106.

Plaintiff's Second Supplementary Book of Authorities, Tab xx, M.D. *Mineralsearch Inc. v. East Kootenay Newspapers Ltd.*, 2002 BCCA 42 (CanLII) at para 25.

49. At trial, the Defendants are restricted to proving that which they pleaded or particularized. The Defendants cannot justify a meaning they have not pleaded. The law does not allow the Defendant to 'put the Plaintiff on trial for her life.'

Joint Book of Authorities, Vol. 1, Tab 3, *Arnold v Butler*, [1908] 2 KB 151 at 155.

Joint Book of Authorities, Vol. 1, Tab 10, *Burstein v. Times Newspaper Ltd.* [2001] 1 W.L.R. 579 at para 40.

Joint Book of Authorities, Vol. 4, Tab 63, *Scott v Sampson*, (1882) 8 Q.B.D. 491 at 9.

Plaintiff's Supplementary Book of Authorities, Tab 9, *Brown on Defamation*, Vol. 5, Section 19.4 (2)(b) at 19-125.

Joint Book of Authorities, Vol. 2, Tab 36, *Kent v. Keboe*, 2000 NSCA 3 at para 28.

Plaintiff's Second Supplementary Book of Authorities, Tab xx, Downard, Peter, *Libel* (3d) at 112-113.

Joint Book of Authorities, Vol. 1, Tab 1, *Libel and Slander Act*, R.S.O. 1990, Chapter L.12, Section 21.

50. In this case, the Defendants have advanced several justification defences. For the Plaintiff's alleged defamatory meaning that she treated Ms. Manuel 'illegally,' they rely on the facts set out in paragraph 9.1 of the Statement of Defence. For the Plaintiff's alleged defamatory meaning that she underpaid Ms. Manuel, they rely on the material facts set out in paragraph 9.2 the Statement of Defence. And for the Plaintiff's alleged defamatory meaning that she abused Ms. Manuel, they rely on the material facts set out in paragraph 9.3 the Statement of Defence.
51. Where the sting is being guilty of a criminal or other offence the Defendants must prove the truth certainly on a balance of probabilities and on a higher standard commensurate with the seriousness of the allegation.

Joint Book of Authorities, Vol. 1, Tab 17 *Ellacott v C.L.* [1999] O.J. No. 430 at paras 60 – 65.

Joint Book of Authorities, Vol. 4, Tab 69, *Society for the Prevention of Cruelty to Animals v. Stone*, 2009 B.C.J. No. 1089 at para. 43.

52. Therefore, if the defamation relates to a criminal charge, in order to justify the defamation, the particulars of the Defendants' pleadings must set out this illegality with the "precision necessary for a criminal charge or an indictment, including the nature of the offence and the time and place it was committed."

Joint Book of Authorities, Vol. 4, Tab 69, *Society for the Prevention of Cruelty Towards Animals v. Stone*, [2009] B.C.J. No. 1089 (S.C.) at para 43.

53. Section 22 of the *Libel and Slander Act*, contemplates that the Justification defence for particular and separate charges will be determined separately.

Joint Book of Authorities, Vol. 1, Tab 1, *Libel and Slander Act*, R.S.O. 1990, c. L-12, section 22.

Plaintiff's Second Supplementary Book of Authorities, Tab xx, Downard, Peter, *Libel* (3d) at 109.

54. Where the Defendant substantially justifies one sting but not others there will be a finding that the defence of Justification has been made out where the net damage to reputation from unjustified allegations does not exceed that from the justified sting.

Plaintiff's Second Supplementary Book of Authorities, Tab xx, Downard, Peter, *Libel* (3d) at 108-109.

PART IV: DEFENCE OF RESPONSIBLE COMMUNICATION IN THE PUBLIC INTEREST

55. *Grant* sets out a two part test for a new defence of 'responsible journalism'. First, the defendant must establish the subject matter of the publication is 'in the public interest'. Second, the defendant must establish that the publication was "responsible" by reference to an open-ended list of factors enumerated in *Grant*.

Joint Book of Authorities, Vol. 2, Tab 26, *Grant v. Torstar Corp.*, 2009 SCC 61 at para 98.

A. In the public interest

56. *Grant* suggest some degree of deference to the judgment of editors regarding what is thought to be of public interest but if the trier of fact thinks parts of the article are of questionable public interest that is a factor to be considered in the second part of the test.

Joint Book of Authorities, Vol. 2, Tab 26, *Grant v. Torstar Corp.*, 2009 SCC 61 at para 109.

57. Many of the leading cases on 'responsible communication' deal with important public figures and issues and easily 'pass' the first part of the test, that the subject matter of the article in question is a matter of public interest. For example:

- i. Whether the Prime Minister of Ireland was corrupt;

Joint Book of Authorities, Vol. 3, Tab 58, *Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127 at 72.

- ii. Whether leading Saudi companies are being investigated for links to Osama Bin Laden.

Joint Book of Authorities, Vol. 2, Tab 32, *Jameel (Mohammed) v. The Wall Street Journal Europe*, [2004] EWHC 37 (QB) at para. 41.

- iii. Whether a leading businessman with connections to the Premier of Ontario had ‘fixed’ a planning process.

Joint Book of Authorities, Vol. 1, Tab 26, *Grant v. Torstar*, 2009 SCC 61 at para. 107.

- iv. Whether a member of parliament in Saskatchewan had misused “frankling” privileges available to him as member of parliament.

Joint Book of Authorities, Vol. 3, Tab 77, *Vellacott v. Saskatoon Star Phoenix Group Inc.*, 2012 SKQB 359.

58. Add Test in Jameel?

59. While illegal treatment of live-in caregivers ‘contract workers’ and ‘placement fees’ are properly matters ‘of public interest’, it is respectfully submitted that for much of the rest of the reach of the story is “over-broad” and ought not to have the protection of ‘responsible communication’ and weighs against the Defendants in the cumulative evaluation of ‘responsible communication’.

Joint Book of Authorities, Vol. 2, Tab 26, *Grant v. Torstar Corp.*, 2009 SCC 61 at paras 108 and 118.

B. Standards of Responsible Journalism, and Proof

60. With respect to the second part of the test the Defendants have the burden of proving they published the story in accordance with the “highest journalistic standards”. *Grant* provides a broad outline of appropriate standards. *Grant* discusses the standards to be

applied, but concluding by saying the test is open-ended and leaves the evaluation of whether the standard has been met to the trier of fact.

Joint Book of Authorities, Vol. 2, Tab 26, *Grant v. Torstar Corp.*, 2009 SCC 61 at paras 53 and 127.

61. The open-ended test raises the question of whether a media defendant can satisfy demonstrate that the article was published in accordance with the highest standards of responsible communication solely by reference to its own standards? Do common sense and decency and legal benchmarks such as the presumption of innocence also play a part?

Joint Book of Authorities, Vol. 2, Tab 26, *Grant v. Torstar*, 2009 SCC 61 at para 97.

62. The Plaintiff may refer to the standards of other media organizations. The Defendant, Toronto Star, has Guidelines regarding its publication. They will be put in evidence.

Joint Book of Authorities, Vol. 2, Tab 26, *Grant v. Torstar*, 2009 SCC 61 at paras 116-177.

63. The Plaintiff's position is that the Defendants have not discharged the burden on them to prove that their conduct, when considered in its totality, meets the test of 'responsible communication'. Some elements of that test are briefly outlined below.

64. The Plaintiff asserts that the defendants fail the requisite standard of Verification in that:

- i. A media defendant requires independent sources confirming key facts;
- ii. That the verification must address the sting of the defamation;
- iii. Alternately, if the source is not independent, it must be reliable;
- iv. Does the same complainant, telling her story through a different person constitute verification?
- v. Verification must be available at the time the article is published;

- vi. Can the Defendants satisfy the Court on the sufficiency verification if they refuse to disclose either the content or the identities of the sources?
- vii. There is a higher standard of verification the more serious the allegation of an offence;
- viii. Does the same complainant confirm her story by answering leading questions put to her by the reporter in multiple interviews constitute verification?

Joint Book of Authorities, Vol. 2, Tab 26, *Grant v. Torstar*, 2009 SCC 61 at para 114.

Joint Book of Authorities, Vol. 4, Tab 77, *Vellacott v Saskatoon StarPhoenix Group*, 2012 SKQB 359 at para. 82.

65. Sensationalism is also an element of responsible communication. While *Grant* does state that writers should not be held to a standard of 'stylistic blandness', 'distortion and sensationalism' will be considered in the assessment of whether the article was a piece of responsible communication.

Joint Book of Authorities, Vol. 1, Tab 6, *Bonnick v. Morris* [2002] UKPC 31 at para 26.

Joint Book of Authorities, Vol. 2, Tab 26, *Grant v. Torstar*, 2009 SCC 61 at para 123.

66. In assessing whether the article was a piece of responsible communication, the court can consider all meanings that the defamatory statements are capable of conveying, and is not appropriate to fix one single meaning of the statements if there is ambiguity.

Joint Book of Authorities, Vol. 1, Tab 6, *Bonnick v. Morris* [2002] UKPC 31 at para 25.

Joint Book of Authorities, Vol. 2, Tab 26, *Grant v. Torstar*, 2009 SCC 61 at para 124.

Joint Book of Authorities, Vol. 2, Tab 23, *Galloway v Telegraph*, [2004] EWHC 2786 (HC) at para 34.

67. Telling both Sides is undeniably an obligation of 'responsible communication'. According to *Grant* the Plaintiff's side of the case must be sought out and accurately reported.

Joint Book of Authorities, Vol. 2, Tab 26, *Grant v. Torstar*, 2009 SCC 61 at paras 116-117.

68. Where specific questions are put to a plaintiff and the plaintiff is given an opportunity to respond, but does not do so, courts have found that the burden to tell both sides has been discharged. However, courts have not addressed whether the obligation to tell both sides ends the moment the story is published, or if it continues after the publication, in particular where a response to the allegations is provided to the Plaintiff.

Plaintiff's Supplementary Book of Authorities, Tab 15, *Grant v. TorStar Corporation*, 2008 ONCA 796 at paras 18-19.

To be considered:

[Plaintiff's Second Supplementary Book of Authorities, Tab xx, *Jiang v. Sing Tao Daily and Hai Tao Li*, 2014 ONSC 287 at paras 59-60.]

[Plaintiff's Second Supplementary Book of Authorities, Tab xx, *Vigna v. Levant*, 2010 ONSC 6308 at para 82.]

69. The circumstances and content of Mr. Brazao's brief interviews with the Plaintiff Ms. Browne and her partner, Mr. Flaherty's, exchange with Ms. English, the Public Editor, will be in issue.
70. Star standards require accuracy and double check and skepticism of editors. Star standards – no standards - do not set up the reporter's mere 'belief' the allegations are true as the test. Indeed this is the opposite of double checking.
71. The court must consider the defendant's intended meaning in determining whether the defence is established but where ambiguity of language obscures meaning, responsible journalism demands clarity.

Joint Book of Authorities, Vol. 1, Tab 6, *Bonnick v. Morris* {2002} UKPC 31 at para 25.

Joint Book of Authorities, Vol. 2, Tab 26, *Grant v. Torstar Corp.*, 2009 SCC 61 at para 124.

72. Conduct of the journalist and fair treatment is also a consideration. Is an 'ambush interview', surreptitiously recorded evidence against "responsible journalism"?
73. Generally, the question is whether the conduct of the Defendant publisher is commensurate with the highest standards of responsible communication. There is no special category of investigative journalism with lower standards. Have these Defendants crossed the line and stopped being reporters (with the protection of 'responsible communication') become crusaders or tabloid sensationalists for whom the news is secondary.

PART V: DAMAGES

A. Reputation

74. Damages are about loss of reputation related to the subject matter of the libel, not whether the plaintiff is in fact a good or bad person or deserves her reputation. Incidents not known to the readers and incidents not properly before the court as Justification are not relevant.

Plaintiff's Supplementary Book of Authorities, Tab 10, *Brown on Defamation*, Vol. 6, Section 2 at pp.25-15 and 25-16 and Section 25.4(7).

Plaintiff's Supplementary Book of Authorities, Tab 13, *Brown on Defamation*, Vol 6, Section 25.4 at pp. 25-280 to 24-306

Joint Book of Authorities, Vol. 4, Tab 63, *Scott v. Sampson*, (1882) 8 Q.B.D. 491 at 9.

Joint Book of Authorities, Vol. 4, Tab 80, *Warman v. National Post*, 2010 ONSC 3670 at paras 148-154.

75. The list of factors that can be considered in assessing general damages about which evidence will be lead by the Plaintiff includes:

- i. Damage to reputation, include anecdotal evidence illustrating how some people reacted to the story;
- ii. Extent of the circulation 'hard copy' publication;
- iii. Repetition of the defamation by the Defendants, i.e. republication, on their own Internet site;
- iv. Consideration of the impact on the Plaintiff's income earning capacity, e.g. Whispering Pines business (not as Special Damages);
- v. Personal distress;
- vi. the Defendants refusal to apologize or report the plaintiff's side; and
- vii. Conduct of the action up to and including the trial itself;
- viii. Failed Justification defences;
- ix. Failure to apologize.

Plaintiff's Supplementary Book of Authorities, Tab 11, *Brown on Defamation*, Vol. 6, Section. 25.3(1) and 25.3(1.1) at pp. 25-31 to 25-52 and 25-57.

Joint Book of Authorities, Vol. 1, Tab 4, *Barrick Gold Corporation v. Lopebandia*, [2004] O.J. 2329 at paras 30-35.

Joint Book of Authorities, Vol. 3, Tab 59, *Rogacki v. Belz*, 2004 CarswellOnt 3586 (Ont. C.A.) at paras 50 -54.

Plaintiff's Supplementary Book of Authorities, Tab 18, *Rantzen v Mirror Group Newspapers Ltd.*, [1994] Q.B. 670 (C.A.) at 684.

Joint Book of Authorities, Vol. 2 Tab 25, *Gouveia v Toronto Star Newspapers Ltd.* [1998] O.J. No. 3830 at para 27.

76. Aggravated damages can be awarded as an additional amount to compensate the plaintiff for personal distress if the amount for general damages is thought to be

insufficient. The same list of factors can be considered for aggravated damages. The similarity in the factors to be considered is source of confusion in the case law.

Plaintiff's Supplementary Book of Authorities, Tab 12, *Brown on Defamation*, Vol. 6, Section 25.3(1.1) at 25-72.

77. *Rantzen* has been adopted by Canadian Court. In *John v Kim* the British Columbia Supreme Court found that the fact that the defendants continued throughout the hearing to rely on the truth of the defamatory statements and comments were an aggravating factor to consider in damages.

Plaintiff's Supplementary Book of Authorities, Tab 16, *John v. Kim*, 2007 BCSC 1224 at paras 97-98.

Joint Book of Authorities, Vol. 2, Tab 25, *Gouveia v. Toronto Star Newspaper Ltd.* (1998), [1998] O.J. No. 3830 at para xx.

78. General and aggravated damages are compensatory in nature while exemplary / punitive damages have to the purpose of punishing the Defendants for reprehensible conduct. Aggravated and exemplary/punitive damages are said to depend on proof (by the Plaintiff) of malice. (See Malice below.)

79. One of the fundamental purposes of a defamation action is to allow a Plaintiff to clear her name. This has been frustrated by the Defendants unfair coverage of the trial. The reporting of the trial was biased so that Ms. Browne's version of the facts was buried or ignored and the attacks on her featured. So again the Defendants prevented Ms Browne version of what happened from being conveyed to the public.

Joint Book of Authorities, Vol. 2, Tab 28. *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at paras 116-117.

80. Damages should be assessed so that the amount is such to signal that the Plaintiff has cleared her name. The Plaintiff will argue that the Defendants have by their conduct blocked Ms. Browne from telling her side – throughout this long ordeal - the Defendants made it necessary that substantial damages be awarded so that it will be signal that she has done so.

Plaintiff's Supplementary Book of Authorities, Tab 18, *Rantzen v Mirror Group Newspapers Ltd.*, [1994] Q.B. 670 (C.A.) at p. 684.

B. Mitigation of damages

81. A Defendant can only present evidence of mitigation based on its pleadings.

Plaintiff's Supplementary Book of Authorities, Tab 8, *Brown on Defamation*, Vol. 6, section 19.4(6) at 19-166.

C. Partial Justification

82. A defendant cannot introduce evidence to prove the truth of a defamatory charge for the sole purpose of mitigating damages. But if in their defence, the defendants partially justify some of the defamatory statements but not others, damages will be reduced accordingly based on the charges justified.

Plaintiff's Second Supplementary Book of Authorities, Tab xx, *Brown on Defamation*, Vol. 7, section 25.4(8) at 25-308.

Joint Book of Authorities, Vol. 3, Tab 43, *Louchansky v. Times Newspaper Ltd.*, [2002] EWHC 2726 (QB) 1 at para 68.

Joint Book of Authorities, Vol. 1, Tab 10, *Burstein v. Times Newspaper Ltd.*, [2001] 1 W.L.R. 579 at para 47.

D. Malice

83. Aggravated and punitive damages are sometimes said to require proof of 'malice'.
84. Malice can be found based on evidence of actions by the Defendants at any time up to the end of the trial.

Joint Book of Authorities, Vol. 2, Tab 28, *Hill v. Church of Scientology* at paras 192-194.

85. Party Defendants are responsible jointly for general damages but individually for aggravated and punitive damages relative to their individual conduct. The evidence on

conduct and malice may be different regarding the motives and behavior of the Reporter and his employer and thus the assessment of these damages may be different for the two defendants.

Joint Book of Authorities, Vol. 2, Tab 28, *Hill v. Church of Scientology of Toronto* at para 195.

86. But what constitutes malice is not entirely clear in cases where the Court has awarded aggravated and/or punitive damages. The case law suggests that malice may be found in a) knowing or being reckless with respect to the truth; b) acting for an improper purpose; or c) acting with spite or ill will toward the Plaintiff (sometimes referred to as acting intentionally to harm).

Joint Book of Authorities, Vol. 2, Tab 28, *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, at para 145

Joint Book of Authorities, Vol. 1, Tab 7, *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at para 79.

87. Hill says malice is spite or ill-will and includes "any indirect motive or ulterior purpose that conflicts with the sense of duty or the mutual interest which the occasion created."

Joint Book of Authorities, Vol. 2, Tab 28, *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para 145.

88. *Botiuk* says malice can be understood as ill will toward someone, but it also relates to any indirect motive, which conflicts with the sense of duty created by the occasion. Malice may be established by showing that the defendant either knew that he was not telling the truth, or was reckless in that regard and that the evaluation of "recklessness" is relative to the professional standards and responsibilities of the defamer.

Joint Book of Authorities, Vol. 1, Tab 7, *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at paras 79 and 103.

89. The standards of journalism used by the media defendant are relevant and possibly determinative of whether defendants conduct was improper and reckless for the purposes of determining malice.

90. Aggravated and punitive damages can be awarded where the Defendants actions have been “high handed or oppressive thereby increasing the Plaintiff’s humiliation and anxiety ...”

Joint Book of Authorities, Vol. 2, Tab 28, *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 at paras 188-196.

See also:

Plaintiff’s Second Supplementary Book of Authorities, Tab xx, *Murray v Toth*, 2012 ONSC 5815 at para 46.

Plaintiff’s Second Supplementary Book of Authorities, Tab xx, *Pate v Galway-Cavendish and Harvey (Township)*, 2011 ONSC 6620 at para 20.

Plaintiff’s Second Supplementary Book of Authorities, Tab xx, *Marshall v Watson Wyatt & Co.* [2002] O.J. No. 84 at para 44.

91. *Whiten v Pilot Insurance* is an insurance case which awarded substantial punitive damages against the insurer on behalf of the insured / claimant. It has helpful and informative reasoning applicable to this case. The Court held that Pilot had a contractual obligation to honour the claim, that the insured had an expectation of prompt payment, that the insurer had no basis for denying and fighting the claim. The right to punitive damages in that case were not analyzed in terms of malice *per se* but the Defendants’ obstinate behaviour and the Plaintiff’s reasonable expectation to be treated fairly.

Plaintiff’s Supplementary Book of Authorities, Tab 20, *Whiten v. Pilot Insurance Co.* [2002] 1 S.C.R. 595 at paras 79 and 94.

92. Another badge of malice is acting for an improper purpose. In *WTC*, Justice Binnie for the court opines that purpose should be evaluated in respect to individual allegations, whether the dominant purpose for each allegation is spite, etc.

Joint Book of Authorities, Vol. 4, Tab 83, *WTC Radio v. Simpson*, 2008 SCC 40 at para 53.

Adopted in:

Plaintiff’s Second Supplementary Book of Authorities, Tab xx, *Bernstein v. Poon*, 2015 ONSC 155 at 137.

93. In *Proulx v Quebec (Attorney General)*, the prosecutor's partial improper purpose constituted an improper purpose which was malice sufficient for a finding in favor of the Plaintiff.

Plaintiff's Second Supplementary Book of Authorities, Tab xx, *Proulx v. Quebec (Attorney General)*, [2001] 3 SCR 9, 2001 SCC 66 at para 45.

94. The evidence at trial will explore whether the Defendants' purposes were corrupted by improper motives; at the beginning and/or at any stage through the lengthy litigation and up to and including the conduct of this trial. The Plaintiff will not argue that the original publication was for an 'improper purpose' but rather that the conduct after publication and during the litigation and first trial was corrupted by 'improper purposes'.

Joint Book of Authorities, Vol. 2, Tab 31, *Horrocks v. Lowe*, [1975] A.C. 135 at 151.

95. *Grant* seems to suggest that proof of responsible communication *a priori* defeats malice.

Joint Book of Authorities, Vol. 2, Tab 26, *Grant v. Torstar*, 2009 SCC 61 at para 92.

96. The Plaintiff asserts and will present evidence at trial that the Defendants acted maliciously and should be liable for aggravated damages. The following factors were considered in *Rogacki v. Belz* in support of an award of aggravated damages:

- i. The defendant's failure to apologize to the respondent;
- ii. The fact that the plaintiff was required to endure a difficult and lengthy trial;
- iii. The plaintiff was subjected to a prolonged and hostile cross-examination;
- iv. the defence of justification was pleaded when, to the defendants' knowledge, it was bound to fail;
- v. the libel was repeated and republished to a wide audience in the course of the trial; and

- vi. The defendant's post-publication conduct was manifestly aimed at causing serious harm to the Plaintiff's reputation in the community and it served to increase her mental distress and humiliation.

Joint Book of Authorities, Vol. 3, Tab 59, *Rogacki v. Belz*, 2004 CarswellOnt 3586 (Ont. C.A.) at paras 41-59.

RESPECTFULLY SUBMITTED

APPENDIX A - LAW

Libel and Slander Act

Immigration and Refugee Act, sections xxx

ONTARIO LEGISLATION