[1998] O.J. No. 3830

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Gouveia v. Toronto Star Newspapers Ltd.

Peter **Gouveia,** Plaintiff and Toronto Star Newspapers Ltd., John Honderich, Haroon Siddiqui and Rosie DiManno, Defendants

Ontario Court of Justice (General Division)

Molloy J.

Heard: June 23, 1998
Judgment: September 24, 1998
Docket: 97-CU-12074OCM

Counsel: Charles M. Campbell and Richard E. Elliott, for the Plaintiff.

Paul B. Schabas and Vicki White, for the Defendants.

Subject: Torts; Civil Practice and Procedure; Evidence

Defamation --- Practice -- Pleadings -- Pleading fair comment -- Rolled-up plea

Columnist wrote newspaper article which stated that security guard assaulted homeless person and lied to police about assault -- Security guard brought action against columnist and newspaper for defamation -- "Rolled-up" plea made by defendant that to extent words complained of were statements of fact words were true and to extent words were expressions of opinion they were fair comment on matters of public interest -- Apart from "rolled-up" plea truth of words in article was not asserted in pleading -- "Rolled-up" plea was merely pleading of fair comment and comment not fair unless based upon true facts -- Unless justification pleaded generally only permissible to prove non-defamatory facts supporting comment -- Article contained defamatory statements of fact which required plea of justification -- Issue not raised at outset or at early stage of trial so as to permit columnist and newspaper to move to amend pleadings -- Both counsel referred in opening addresses to central issue of truth of allegations of fact in column -- By time issue raised jury heard evidence with respect to truth and risked tainted verdict if ordered to disregard evidence as to truth -- Defence of truth was left to jury but in question framed as if justification pleaded.

Defamation --- Damages -- Factors to be considered in award -- Unsupported plea of justification

[1998] O.J. No. 3830

Columnist wrote newspaper article which stated that security guard assaulted homeless person and lied to police about assault -- Security guard brought action against columnist and newspaper for defamation -- Statement of defence pleaded "rolled-up" plea that to extent words complained of were statements of fact words were true and to extent words were expressions of opinion they were fair comment on matters of public interest -- Ruling made that assertion of truth of defamatory facts by columnist and newspaper was capable of aggravating damages if jury found that statements of fact made in article about security guard were not true -- Consequences followed regardless of whether evidence of truth of those facts lead in support of plea of justification or of other plea such as "rolled-up" plea.

Defamation --- Damages -- Factors to be considered in award -- Miscellaneous factors

Columnist wrote newspaper article which stated that security guard assaulted homeless person and lied to police about assault -- Security guard brought action against columnist and newspaper for defamation -- Article did not identify security guard by name although security guard was identifiable to those people who knew him as security guard at shopping center which was named -- Result was publication to smaller group of people than if security guard's name was included in column -- Damages not mitigated by limited identification because newspaper published daily accounts of trial in paper and on Internet which named security guard -- Articles repeated original defamation as background -- No other media covered trial so name published in connection with incident solely due to newspaper's coverage -- Columnist and newspaper not permitted to take benefit of factor of limited publication which was subsequently eradicated by newspaper when it reported on trial -- Jury instructed that if privilege existed for articles, trial coverage still to be considered in determining ultimate extent of publication of defamatory words though initial publication limited.

Defamation --- Practice -- Conduct of trial -- Functions of judge and jury -- Miscellaneous issues

Columnist wrote newspaper article which stated that security guard assaulted homeless person and lied to police about assault -- Security guard brought action against columnist and newspaper for defamation -- Specific questions posed to jury which found that to extent any defamatory words were statements of fact facts were true but to extent words were comment they were not based on sufficient facts which were true and were not fair -- Jury assessed compensatory damages at $5000 -- Jury recommended that newspaper print correction in paper and on Internet -- Judgment issued for $5000 -- Clear that jury found for security guard on at least one ground -- No power to make declaratory judgment in jury trial and if findings of jury not sufficiently clear to constitute vindication only remedy was new trial which neither party wanted.

Defamation --- Practice -- Costs -- Award of costs -- General

Columnist wrote newspaper article which stated that security guard assaulted homeless person and lied to police about assault -- Security guard brought action against columnist and newspaper for defamation -- Action allowed -- Judgment issued for $5000 -- Costs awarded to security guard -- No reason to depart from normal rule that costs followed event -- Costs not awarded on small claims court scale because issues were complex, forum was appropriate, higher damages were possible and security guard entitled to jury trial -- Conduct of newspaper was reprehensible and entitled security guard to costs on solicitor and client scale -- Newspaper published articles about trial which were inaccurately slanted in its own favour and omitted accounts of witnesses who supported security guard -- None of articles published written by columnist so articles were not basis to award solicitor client costs against her -- Columnist and newspaper offered to settle action by paying $15,000 to charities which supported homeless persons -- Terms of settlement offer were not more favourable than award recovered as

security guard recovered award for himself, recovered costs on solicitor and client basis and not restrained by confidentiality clause contained in settlement offer.

Defamation --- Practice -- Costs -- Award of costs -- Where nominal damages awarded

Columnist wrote newspaper article which stated that security guard assaulted homeless person and lied to police about assault -- Security guard brought action against columnist and newspaper for defamation -- Action allowed -- Jury found that to extent any defamatory words were statements of fact facts were true but to extent that words were comment they were not based on sufficient true facts and were not fair -- Judgment issued for $5000 -- Costs awarded to security guard -- No way to determine whether jury considered award of damages nominal and inappropriate to reduce scale of costs on that basis.

Cases considered by Molloy J.:

Axelrod v. Beth Jacob of Kitchener, [1943] O.W.N. 708, [1944] 1 D.L.R. 255 (Ont. C.A.) -- considered

Boys v. Star Printing & Publishing Co. (1927), 60 O.L.R. 592, [1927] 3 D.L.R. 847 (Ont. C.A.) -- considered

Brown v. Moyer (1893), 20 O.A.R. 509 (Ont. C.A.) -- referred to

Corfax Benefit Systems Ltd. v. Fiducie Desjardins Inc. (1997), 37 O.R. (3d) 50 (Ont. Gen. Div.) -- referred to

Cugliari v. White (1994), (sub nom. Cugliardi v. White) 21 O.R. (3d) 225, 9 M.V.R. (3d) 237, C.E.B. & P.G.R. 8201 (Ont. Gen. Div.) -- referred to

Doyle v. Sparrow (1979), 27 O.R. (2d) 206, 106 D.L.R. (3d) 551 (Ont. C.A.) -- referred to

Georg v. Hassanali (1989), 18 R.F.L. (3d) 225, 33 E.T.R. 124 (Ont. H.C.) -- referred to

Hill v. Church of Scientology of Toronto, (sub nom. Hill v. Church of Scientology) 30 C.R.R. (2d) 189, 25 C.C.L.T. (2d) 89, 184 N.R. 1, 126 D.L.R. (4th) 129, 24 O.R. (3d) 865 (note), 84 O.A.C. 1, [1995] 2 S.C.R. 1130 (S.C.C.) -- considered

Hunger Project v. Council on Mind Abuse (C.O.M.A.) Inc. (1995), 34 C.P.C. (3d) 1, 22 O.R. (3d) 29, 121 D.L.R. (4th) 734 (Ont. Gen. Div.) -- referred to

Knott v. Telegram Printing Co. (1916), [1917] 1 W.W.R. 974, 27 Man. R. 336, 32 D.L.R. 409 --

considered

Knott v. Telegram Printing Co., [1917] 3 W.W.R. 335, 55 S.C.R. 631, 39 D.L.R. 762 (S.C.C.) -- referred to

Leech v. Leader Publishing Co., [1926] 1 W.W.R. 673, 20 Sask. L.R. 337, [1926] 2 D.L.R. 28 (Sask. C.A.) -- applied

Manitoba Free Press Co. v. Martin (1892), 21 S.C.R. 518 (S.C.C.) -- considered

Platt v. Time International of Canada Ltd., [1964] 2 O.R. 21, 44 D.L.R. (2d) 17 (Ont. H.C.) -- referred to

R. v. Carden (1879), 5 Q.B.D. 1, 49 L.J.M.C. 1 (Eng. Q.B.) -- considered

R. v. Flowers (1879), 44 J.P. 377 (Eng. Div. Ct.) -- applied

R. v. Scopelliti (1981), 34 O.R. (2d) 524, 63 C.C.C. (2d) 481 (Ont. C.A.) -- referred to

Rose v. Sabourin (1994), 31 C.P.C. (3d) 309, 118 D.L.R. (4th) 729 (Ont. Gen. Div.) -- referred to

Schultz v. Porter (1979), 9 Alta. L.R. (2d) 381, 26 A.R. 61 (Alta. T.D.) -- considered

Silkin v. Beaverbrook Newspapers Ltd., [1958] 1 W.L.R. 743, [1958] 2 All E.R. 516 (Eng. Q.B.) -- considered

Sutherland v. Stopes, [1925] A.C. 47, 94 L.J.K.B. 166 (U.K. H.L.) -- considered

Vogel v. Canadian Broadcasting Corp., 21 C.C.L.T. 105, 35 B.C.L.R. 7, [1982] 3 W.W.R. 97 (B.C. S.C.) -- applied

Vorvis v. Insurance Corp. of British Columbia, 25 C.C.E.L. 81, [1989] 1 S.C.R. 1085, [1989] 4 W.W.R. 218, 58 D.L.R. (4th) 193, 94 N.R. 321, 36 B.C.L.R. (2d) 273, 42 B.L.R. 111, 90 C.L.L.C. 14,035 (S.C.C.) -- referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

[1998] O.J. No. 3830

R. 49.10(2) -- referred to

R. 52.08 -- considered

R. 52.08(1)(c) -- considered

ACTION by security guard against columnist and newspaper for damages for libel; RULINGS as to necessity for plea of justification, consequences of pleading truth of defamatory facts reported in column, identification of security guard, award of damages, and costs award.

***Molloy J.*:**

Reasons for Judgment

1 This is a libel action arising from a column written by the defendant Rosie DiManno and published in the Toronto Star on February 10, 1997. In her column Ms. DiManno describes an incident which she witnessed on January 20, 1997 at Market Square, a shopping centre in Toronto. The purport of the column is that Ms DiManno saw the security guard at Market Square assault a homeless person and that afterwards the guard lied about it to the police. The column is predominantly a factual description of the assault with a number of observations by Ms DiManno which could be characterized as comment. The security guard is called a "goon" five times in the column and other pejorative terms are also used to describe him. Although the column does not identify the security guard by name, the plaintiff was the principal, if not only, security guard at Market Square and was therefore identifiable as the person referred to in the column. He sued for libel.

2 The defendants' statement of defence pleaded what has come to be known as the "rolled-up plea" as follows:

> 18 To the extent that the words complained of are statements of fact, they are true, and to the extent that the words complained of are expressions of opinion, they are fair comment on matters of public interest...

Apart from this paragraph, there was no other pleading in the statement of defence that the words in the column were true.

3 The trial proceeded for five days of evidence before a jury. At the conclusion of the evidence, I invited counsel to make submissions on what should be addressed in my jury charge. Following legal argument, I made a number of rulings, two of which are of sufficient legal complexity that I decided to issue written reasons. The first ruling relates to whether the defendants are permitted to argue the truth of defamatory statements of fact if the only defence pleaded is the rolled-up plea. The second is the use the jury may make of the fact that although the original DiManno column did not contain the plaintiff's name, the Toronto Star carried daily articles about the trial in which it did identify the plaintiff by name.

4 In addition to the two rulings referred to above, these Reasons will address the verdict which should be

recorded in light of what are alleged to be conflicting answers by the jury to the questions put to them, particularly when considered with an accompanying note from the jury recommending that the Toronto Star publish a correction. Finally, I will deal with the issue of costs. These reasons are organized under the following headings:

A. THE WORDS COMPLAINED OF (paras 5-6)

B. RULING ON THE ROLLED-UP PLEA (paras 7-20)

C. CONSEQUENCES OF ALLEGING TRUTH OF DEFAMATORY FACTS (paras 21-29)

D. RULING ON IDENTIFICATION OF THE PLAINTIFF (paras 30-32)

E. THE JURY'S FINDINGS (paras 33-40)

F. COSTS

1. The position of the parties (para 41)

2. Should the plaintiff receive any costs? (para 42)

3. Should costs be awarded on a small claims court scale? (para 43)

4. Are the damages nominal, and if so, does this affect the plaintiff's costs? (paras 44-46)

5. Was there conduct by the defendants to warrant solicitor and client costs? (para 47)

(a) Alleged misconduct by defence counsel during trial (para 48)

(i) Failure to produce witness statement (para 49)

(ii) Evidence of menacing conduct by the plaintiff (paras 50-51)

(iii) Mr. Ryan's propensity towards violence (paras 52-57)

(b) Toronto Star coverage of the trial (paras 58-78)

A. The Words Complained of

5 It was accepted in argument by both counsel that the words complained of, as set out in the statement of claim, are defamatory of the plaintiff in the sense that they are statements which would tend to lower a person in the estimation of right-thinking members of society generally or to expose him to hatred, contempt or ridicule. Counsel were also essentially in agreement as to the characterization of these words as being either fact or comment. The jury was given a copy of the entire column which was highlighted to show which were the words complained of, which of those words were agreed to be facts, and which were agreed to be comments. I concurred with the characterization given to those words by both counsel. For a few of the words, counsel could not agree on the appropriate characterization. I determined that those words could reasonably be considered to fall within either of the two categories and I therefore left it to the jury to decide how they should be categorized.

6 Set out below is an excerpt from the DiManno column which includes only the words complained of by the plaintiff. The words which are highlighted in bold were accepted by both parties to be *facts*; the words which were agreed to be *comment* are set out in italics; and the words capable of being either fact or comment are in regular type. The column begins with some general comments including that Ms DiManno had attended an afternoon movie at Market Square and that she observed a man "trudging through Market Square" with "a duffel bag slung over his shoulders". She says that he "wasn't dirty or dishevelled" and that "he didn't appear ill or disoriented". It is at this point in the column that the words complained of by the plaintiff begin, as follows (referring to the homeless person):

> But he sure looked scared.
>
> **That's because he was being tailed by another man, a** *bull dog type*, **tackle shoulders, trousers so** *deliberately* **tight on his over developed thighs** *it was almost indecent to look.*

While I watched, this man walked a couple of feet behind his prey, occasionally punching him in the back, trying to get a response, a rise.

He grabbed the duffel bag and then shoved it into the man's chest. Finally, he seized him in a headlock and threw him to the ground. They wrestled for several minute although the victim obviously **was not fighting back.**

"I told you to stay the hell out of here!" hissed the attacker.

"Leave me alone, I haven't done anything to you," said the man, now being punched in the head.

. . . . .

The young man [referring to the theatre ticket clerk whom Ms DiManno had asked to call security] **grinned and pointed toward the** *big lug* **in the** *too-tight* **pants, still roughing up the stranger: "That is security."**

Geez

So, I'm standing there, shrieking at this security *goon* **to knock it off, and he is pointedly ignoring me, even as the**victim, **now back on his feet, is whimpering and picking up his duffel bag and heading for the door, his attacker shoving and smacking him all the way.**

When the two get outside, a lone officer does show up. The security goon begins to spin a story, **about how he had been assaulted by this bum, how the bum had refused to leave the premises, how the bum had been bothering mall tenants.**

"He's lying", I piped up. Which infuriated the goon.

The cop took the "vagrant" aside. The man said: "I didn't do nothin' wrong. I'm from the Maritimes. I just got to Toronto, don't have no place to stay. I didn't do nothin'."

The officer, who looked kindly enough, said he didn't need me, he'd take care of it. The security goon blew steam out of his nose and would no doubt have happily punched me in the face, had there been no cops around. **The homeless guy wiped blood from his mouth.**

B. Ruling on the Rolled-up Plea

7 Mr. Campbell, on behalf of the plaintiff, argued that since the defendants had not pleaded justification they could not take the position before the jury that any defamatory statements of fact in the column were true. The

rolled-up plea, he submitted, is merely a pleading of fair comment. A comment cannot be considered fair unless it is based upon true facts. However, unless justification is also pleaded, the defendants can only prove those facts supporting the comment which are not themselves defamatory. Defamatory statements of fact which form the basis for comments must be justified in the same manner as any other defamatory statement of fact. Therefore, the plaintiff argued, upon determining that there are statements of fact by Ms DiManno which are defamatory of the plaintiff, the jury should proceed directly to assess damages without determining the truth of those statements.

8 It is clear that there are defamatory statements of fact about the plaintiff in the column. There are also words which could be construed as comment (*e.g.* "security goon", and "big lug"). However, the facts underlying such comments are themselves defamatory of the plaintiff. It would not be possible to prove a basis in fact for the defamatory comments without proving the truth of facts defamatory of the plaintiff. Therefore, if Mr. Campbell's argument is correct, the defendants' case is completely defeated. Mr. Campbell raised the possibility of the defendants being permitted to amend their statement of defence to plead justification at this stage. Although he did not consent to such an amendment, he pointed out that if the defendants sought to amend and I permitted them to do so, the plaintiff should be entitled to any advantage which would flow to a plaintiff who successfully defeats a justification plea. In particular, he argued that this could be a factor aggravating damages.

9 This issue had not previously been raised by Mr. Campbell. The action and trial had proceeded on the basis that there was an onus on the defendants to prove the truth of the assault by the plaintiff on the homeless person as described in Ms DiManno's column. There was no objection to any questions at discoveries relating to the truth of the factual elements of the column, nor were there any such objections at trial. Indeed, the thrust of the opening addresses by both counsel to the jury at the outset of trial was that the central issue for the determination of the jury would be the truth of the defendants' statements accusing the plaintiff of assaulting the homeless person. The main focus of the evidence at trial was the altercation between the plaintiff and the homeless person on January 20, 1997 and the plaintiff led the evidence of three eye witnesses to the incident as part of his own case.

10 Mr. Schabas, for the defendants, did not seek to amend to plead justification. Rather, he argued that the rolled-up plea is sufficient to enable a defendant to prove the truth of factual statements, regardless of whether or not they are defamatory. Further, he submitted that since the rolled-up plea is not a plea of justification, even if it is unsuccessful, it does not attract the negative consequences of a failed justification defence.

11 I agree with the propositions of law advanced by the plaintiff. If a person makes defamatory statements of fact about another, two potential defences are open to him: privilege or justification. The defence of fair comment has no application to defamatory statements of fact: *Gatley on Libel and Slander*, 9th ed. (1998), at p. 257. As was succinctly stated by Field J. in *R. v. Flowers* (1879), 44 J.P. 377 (Eng. Div. Ct.), (and as cited in *Manitoba Free Press Co. v. Martin* (1892), 21 S.C.R. 518 (S.C.C.)), "To state facts which are libellous is not comment or criticism on anything." It is well settled that the defence of fair comment can succeed if the facts upon which the comment is based are true: *Gatley* at p. 257-258. However, that does not mean that upon pleading fair comment, it is open to a defendant to prove the truth of the factual support for his comment if the facts are themselves defamatory. Indeed, the reverse is true. In the absence of a plea of justification, evidence with respect to the truth of defamatory facts is inadmissible. This principle is clear from the case law as well as from the leading texts on the subject. As stated in *Leech v. Leader Publishing Co.* (1926), 20 Sask. L.R. 337 (Sask. C.A.) at 389:

> ...the allegations of fact provable under the defence of fair comment must be non-defamatory; if they are defamatory they can only be proved under a plea of justification.

Gatley, at p. 257 states the principle as follows:

> If the facts stated in the publication as a basis for comment are themselves defamatory, the defendant must plead justification or privilege in relation to them, and fair comment will be no defence.

12 Both *Gatley* and the Court of Appeal in *Leech v. Leader Publishing Co.* cite with approval the remarks of Cockburn L.J. in *R. v. Carden* (1879), 5 Q.B.D. 1, at 8, 49 L.J.M.C. 1 (Eng. Q.B.):

> It is true that a comment upon given facts, which would otherwise be libellous, may assume a privileged character, because, though unjust and injurious, yet being founded on facts not in themselves libellous, it is a comment which any one is entitled to make upon a public man...
>
> On the other hand, to say that you may first libel a man, and then comment upon him, is obviously absurd ... You may comment on facts, and your comment, if made on a public man, may possibly escaped the penalty of libel, though injurious, because it is privileged; but the statement of facts must not be libellous or you must be prepared to prove the truth of it.

13 In *Manitoba Free Press Co. v. Martin* (1892), 21 S.C.R. 518 (S.C.C.), the Supreme Court of Canada dealt with a case in which an allegation of dishonesty and corruption had been made against the plaintiff and the defendant had pleaded fair comment. Over the objections of counsel for the plaintiff, the trial judge admitted substantial evidence directed to support the charge of corrupt dealing by the plaintiff. On appeal the Manitoba Court of Queen's Bench found this to have been improper and ordered a new trial. That decision was upheld by the Supreme Court of Canada, which held, per Patterson J. at p. 527 (referring to the evidence as to the truth of the corruption accusation):

> It was evidence that would have been properly receivable upon a plea justifying the statement complained of as being true, and it was not properly receivable without such a plea.

(See also: *Brown v. Moyer* (1893), 20 O.A.R. 509 (Ont. C.A.) at 513; *Boys v. Star Printing & Publishing Co.* (1927), 60 D.L.R. 592 (Ont. C.A.) at 607; Brown, *The Law of Defamation in Canada* (1994), at 19-56.2; Porter and Potts, *Canadian Libel Practice* (1986), at p. 185, para. 714).

14 The "rolled-up plea" is one which has been confounding lawyers and jurists for the better part of a century. Apparently, its use in libel pleadings began around 1890. At first, it was thought to be a combination of a plea of justification with one of fair comment. This, in my view, was a logical conclusion, as a plain reading of a standard rolled-up plea would lead one to believe that the defendant is pleading the truth of defamatory statements of fact but with respect to defamatory comments or opinions is merely asserting that they are fair comment on matters of public interest. That, however, is not the way the case law has developed. In 1925 the English House of Lords ruled in *Sutherland v. Stopes*, [1925] A.C. 47, 94 L.J.K.B. 166 (U.K. H.L.) that the rolled-up plea is merely a plea of fair comment, and not a plea of justification. This landmark decision is generally accepted as having conclusively determined that issue. *Sutherland v. Stopes* has been adopted by Canadian courts, the first significant decision in that regard being *Leech v. Leader Publishing Company Ltd.*, in which the Saskatchewan Court of Appeal made it clear that the rolled-up plea defence does not permit the truth of defamatory statements to be proven. Rather, it should be treated the same as a plea of fair comment. McKay J.A. held at p. 395:

> It is therefore clear that we must now hold that this "rolled-up plea" is a plea of fair comment only, and not in part justification. And having come to this conclusion, it follows that all the decisions as to what evidence is admissible under the ordinary plea of fair comment apply to this rolled-up plea...
>
> Such was the plea herein, and consequently there was no defence raised as to the truth of any defamatory statements appearing in the articles, as such can only be defended by a plea of justification, and in my opinion the learned trial judge should have so instructed the jury ... In this action, although there was no plea of justification, evidence was improperly admitted to prove the truth of the defamatory matter appearing in each of the said articles...

Since the trial judge had admitted evidence going to the truth of defamatory statements of fact and left the issue of the truth of those allegations to the jury, the Court of Appeal ordered a new trial.

15 The reasoning in *Sutherland v. Stopes* and *Leech v. Leader Publishing* was expressly adopted by the Ontario Court of Appeal in *Boys v. Star Printing and Publishing Co.* (1927), 40 O.L.R. 592 (Ont. C.A.). After determining that the rolled-up plea was a plea of fair comment and that it had no application to allegations of fact which were themselves defamatory, Riddell J.A. went on to state, in one paragraph at the end of the judgment, that these authorities did not apply to the case before the court, although his reasons for so finding are not set out. Subsequently, in *Axelrod v. Beth Jacob of Kitchener*, [1943] O.W.N. 708 (Ont. C.A.) at 712, the Court of Appeal noted that *Boys v. Star Printing* and *Sutherland v. Stopes* are not in conflict and held that the trial judge in the *Boys* case should have admitted evidence of the truth of stated facts in support of a rolled-up plea. In both *Axelrod* and *Boys* it is not clear whether the statements which were to be proven were facts which were themselves defamatory. I assume that they were not as that is the only way, in my opinion, to make any sense of the decisions.

16 A plea of justification requires the defendant to prove the truth of what was said about the plaintiff. Such a plea can be a dangerous one for defendants because an unsuccessful plea of justification can be a factor which aggravates damages: Brown, *The Law of Defamation in Canada*, 2nd ed. (1994), at pp. 17-7 and 22-42.1. It is for this reason that many defendants avoid the justification plea if the plea of fair comment is an available option. It is, however, a mistake for defendants to plead fair comment or a rolled-up plea if the subject matter of the alleged libel contains statements of fact which are themselves defamatory. In such situations, the defence of fair comment is simply not applicable, and the rolled-up plea does not change the situation. Both *Gatley* and *Brown* note this difficulty. *Gatley*, referring to the rolled- up plea, states at p. 693:

> Moreover, it may constitute a trap for the unwary pleader, for if he fails to recognize the limited nature of the plea and omits to include an accompanying plea of justification, he may be left without a complete defence in the event that the jury or other tribunal holds that some of the defamatory imputations in the publication are not comment but allegations of fact. As a result, the almost universal modern practice is to avoid the rolled-up plea and use the general plea of fair comment. If the pleader is in any doubt as to whether the words are indeed comment, as opposed to defamatory statements of fact, he should include a plea of justification in his defence.

In a similar vein, Brown observes at p. 19-58 and 19-59:

> The failure of counsel to recognize the limited nature of the rolled-up plea may have serious repercussions on his or her case. If it turns out that the comments are not comments at all then he or she cannot rely upon

> the rolled-up plea for the purpose of justifying the remarks...
>
> Considerable judicial criticism has been directed at the efficacy or need of a rolled-up plea and the confusion it may generate in the minds of unwary pleaders. In view of these difficulties the *Faulks Committee* has recommended its abolition...

The footnote following this comment notes that in 1985 the Law Reform Commission of British also recommended the abolition of the rolled-up plea.

17 In the case before me, the main thrust of the allegations against the plaintiff in the DiManno column is that while on duty as a security guard at Market Square, he assaulted a homeless person. The assault is described in some detail. There are some statements in the column which could be regarded as comment, but these statements flow entirely from the factual description of the assault and have no other context. Clearly these factual allegations are defamatory. In my opinion, the only basis upon which the defendants would be entitled to adduce evidence at trial to prove that the assault happened the way Ms DiManno described it in her column would be by pleading that those facts were true. In the absence of a plea of justification, no evidence is admissible to prove that Mr. Gouveia committed the assault alleged. That takes care of the vast majority of the column. The few remaining words which could be characterized as comment are completely dependent upon the truth of the defamatory facts and without such proof that defence must also fail. Therefore, on a strict application of the relevant law to this case, the failure of the defendants to plead truth entitles the plaintiff to judgment and the only matter to be left to the jury would be the assessment of damages.

18 As a practical matter, however, that result is not easily applied given the circumstances in which the issue arose in this case. If the issue had been raised at the outset of trial, or even at an early stage of the trial, I would have made my ruling on the admissibility of the evidence and the defendants would then have to consider their position. It may well be the case that an amendment would have been sought in order to formally plead justification. This may or may not have been granted, and may or may not have resulted in an adjournment or further discoveries. However, that is not how the matter arose. On the contrary, the entire trial was conducted as if justification had been properly raised as a defence. Both counsel referred in their opening addresses to the central issue of the truth of the allegations of fact made in Ms DiManno's column. Both counsel lead evidence as to the truth about what happened between the plaintiff and the homeless person described by Ms DiManno without any objections by the other. It was not until after all the evidence had been heard and both counsel had closed their cases that counsel for the plaintiff first raised this problem. Counsel for the defendants then argued that the rolled-up plea was a "mixture of justification and fair comment" without the adverse consequences of a failed justification plea (a point to which I will return). His position with respect to the factual elements of the allegations in the column is that they should be put to the jury with precisely the same instructions as would be given if justification had been pleaded (except as to adverse consequences if the defamatory facts were found to be untrue). In his submissions on the proposed content of my charge to the jury in this regard, he filed numerous authorities including cases on justification and excerpts from the chapters on "Justification" from the Brown and *Gatley* texts. He declined to seek an amendment to the statement of defence to specifically plead justification.

19 The difficulty here is that by the time the plaintiff raised this issue the jury had heard all of the evidence with respect to truth as well as both counsels' opening statements to the effect that the central issue for them to determine is the truth of the facts set out in the column. Even if I had instructed the jury that the issue of truth was not before them and that they should simply return a verdict with respect to damages, such a verdict would inevitably have been tainted by the evidence which they had already heard. Furthermore, if I am wrong with respect to the necessity of pleading justification and if I failed to leave the question of truth with the jury, then a new trial

would definitely be required. Since this jury had heard all of the evidence, it seemed to me that a question with respect to truth should be left to the jury so that it might be possible to avoid the cost of a new trial in the event I am found to have erred on this point. Furthermore, I could see no prejudice to the plaintiff if the question as to truth were left to the jury at this point. Plaintiff's counsel conducted his entire case, including the trial, as if justification had been properly pleaded and did not even himself realize the technical deficiency of the defendants' pleading until the evidence was closed. If counsel for the defendants had sought to amend his pleading at that point, I am hard pressed to think of a reason why such an amendment would not have been granted. The opportunity to amend was offered to the defendants, but they declined.

20 In these circumstances, I ruled that the defence of truth should be left to the jury but that it should be in a separate question, framed as if justification had been pleaded, so as to minimize the risk that a second trial might be necessary if I have erred on the law. Counsel for the defendants submitted that only a general verdict should be left to the jury so as to minimize any problems which might arise if the jury was confused by any specific question. With the benefit of hindsight, I recognize that there was obviously some wisdom to that position. However at the time, given the circumstances of this case, I considered it preferable to have the jury answer a series of questions so that their reasoning would be more apparent. In my charge to the jury, I urged them to answer the specific questions, but did tell them that they could, in their discretion, simply return a general verdict if they so chose. The questions left with the jury were:

1. Are the words complained of defamatory of the plaintiff? _____

2. To the extent that you find these defamatory words to be statements of fact, are the facts true? _____

3. To the extent that you find any of those defamatory words to be comment, are they based on sufficient facts which are true and are the comments fair? _____

4. If your answer to either Question 2 or 3 is "No", what amount do you assess as compensatory damages? _____

5. If you have awarded compensatory damages, should there be an additional amount for punitive damages and, if so, what amount do you assess _____

(a) Rosie DiManno _____

(b) Toronto Star Newspapers Ltd._____

Alternatively, you may return a general verdict as follows,

We, the jury find in favour of the_____

If the general verdict is in favour of the plaintiff, damages are assessed at:

Compensatory damages_____

Punitive damages, if any, against Rosie DiManno_____

Punitive damages, if any, against the Toronto Star_____

C. Consequences of Alleging Truth of Defamatory Facts

21 At the conclusion of the evidence and legal argument, I ruled that I would be instructing the jury that since the defendants had continued to assert the truth of defamatory facts, this could be a factor aggravating damages if the jury found that the statements of fact about the plaintiff were not true. In my opinion, this result follows regardless of whether the evidence of the truth of those facts is lead in support of a plea of justification or some other plea.

22 It has long been the law that an unsuccessful plea of justification may result in an increase in the damage award. If a defendant persists in asserting the truth of defamatory facts which are not in fact true, the impact of the libel will be intensified. This is particularly true where the plea is maintained through trial, but can also be a factor when justification is pleaded right up to the point of trial and then dropped: *Hill v. Church of Scientology of Toronto* (1995), 30 C.R.R. (2d) 189 (S.C.C.). If my previous ruling is wrong and the rolled-up plea does enable the defendant to prove the truth of defamatory facts, then in my view it should nevertheless attract the same adverse consequences as an unsuccessful justification plea, as in substance and in terms of their effect on the plaintiff they are indistinguishable.

23 The defendant relies on the following excerpt from Brown as authority for the proposition that these adverse consequences do not apply to the rolled- up plea (at p. 19-56.2):

> In effect, the rolled-up plea asserts that all the facts contained in the alleged libel are true, and if anything libellous remains it is comment which, when related to those facts, is fair and, therefore, as fully justified as facts. It does, however, permit a defendant to allege the truth of facts that may be defamatory on their face, but are necessary to support the comment, without aggravating the damages that can be assessed by the court if the plea of justification were made and the facts are later proved untrue.

24 Two authorities are foot-noted as supporting this proposition: *Knott v. Telegram Printing Co.* (1916), [1917] 1 W.W.R. 974 (Man. C.A.), aff'd (1917), 55 S.C.R. 631 (S.C.C.); and *Schultz v. Porter* (1979), 9 Alta. L.R. (2d) 381 (Alta. T.D.). Neither of these cases supports the proposition. In *Schultz v. Porter* there had been an allegation that the plaintiff had "deliberately and fraudulently misrepresented" an offer to purchase. Counsel conceded at trial that this allegation could not be supported. Justification was not pleaded, nor was there a rolled-up plea. The Court noted at p. 389 that the real issue was a defence of qualified privilege and whether it was rebutted by malice. In the result, the Court found that malice was established and that it defeated the qualified privilege plea. Furthermore, in assessing damages, a number of factors were taken into account including "the absence of an apology" and the defendant's "affirmation or re-affirmation in the witness box of the defamatory statements in issue". It therefore appears to me that this case does not support the proposition for which it is cited.

[1998] O.J. No. 3830

25 Similarly, the *Knott v. Telegram Printing* case actually stands for a proposition which is opposite to that for which it is cited. The defendant in that case pleaded justification and fair comment but dropped the justification plea right before trial. The jury returned a large damage award. The main issue before the Court of Appeal was whether that award could stand. The Court held that damages were within the province of the jury and that in the circumstances the damages awarded were not so excessive as to be unreasonable. A number of factors aggravating damages were cited, including that justification had been set up by the defendant and not withdrawn until the commencement of trial.

26 No other authority was cited to me for the proposition that a rolled-up plea enables truth to be pleaded while avoiding any adverse consequences for doing so. I find this suggestion to be wrong in law as well as wholly illogical. I agree with the observation made by Esson J. in considering the factors aggravating damages in *Vogel v. Canadian Broadcasting Corp.*, [1982] 3 W.W.R. 97 (B.C. S.C.) at 161:

> Apart from the belated and inadequate concession made in respect of the *Moran* case, the defendants continued to defend as strenuously as possible. The *Moran* concession was represented by them as a minor alteration in position. To the end, they maintained they had been right in respect of Rigg and Farris C.J.B.C. and right in asserting that the plaintiff had interfered with the course of justice to help his friends. **Although justification was not pleaded, the effect of maintaining that position was hardly less damaging to the plaintiff**. To the public, what was clear was that C.B.C. was unrepentant and was fighting the case, so that the natural inference to draw was that C.B.C. "Must have the goods on him". (Emphasis added)

27 It is the substance of the matter that counts, not the formal pleading. What is important to the assessment of damages is the conduct of the defendant and the effect of that conduct on the plaintiff. If the defendant persists in asserting the truth of defamatory facts, that is a factor to consider in assessing damages regardless of whether the defendant's formal pleading contains a rolled-up plea or a specific justification plea. It may be the case, as was argued by defence counsel, that more extensive evidence as to truth can be lead in support of a justification plea than would be the case under fair comment. However, this will not necessarily be done in every case. The extent to which damages are affected will depend on the particular circumstances of each case, including, where applicable, the extent to which the defendant engaged in a broadly based attack on the plaintiff's character rather than focussing solely on the specific libellous facts involved in the lawsuit. This is a flexible standard involving the exercise of discretion. The trier of fact is not required to award larger damages every time truth is alleged. It is merely one of the factors which may be taken into account.

28 It makes no sense to me that the conduct of a defendant in continuing to assert the truth of defamatory facts is a potential factor aggravating damages if the libel is comprised only of facts, but is not a factor if the libel also includes derogatory comments based on those same facts. In this case, almost all of the defamatory words in the DiManno column are statements of fact. If all of the comments were removed, the column would still be defamatory of the plaintiff. However, without the presence of any comments, it is clear that the only defence available to the defendants would be justification, with its attendant adverse damages consequences if unsuccessful. It is illogical to suggest that the defendants could improve their position by adding to the facts in the column some derogatory comments (such as calling the plaintiff a goon) and then defending on the basis that the facts upon which the comments are based are true. In both situations, the defendants would be continuing to assert the truth of the same facts. However, in the latter situation the defendant would also be arguing that the additional name-calling was in the circumstances fair comment. If the underlying facts alleged are not true, then the conduct of the defendant in the latter situation is clearly worse and the impact on the plaintiff is the same or worse. It makes no sense that the defendant should be in a better position by engaging in conduct which is worse.

29 In my opinion, the relevant factor should simply be the conduct of the defendants. The more extreme the conduct and the greater the discrepancy between the truth and what has been alleged by the defendant, the more likely that the plaintiff's damages will be aggravated. This will be so regardless of the formal defences set out in the statement of defence. In this case, the jury, in assessing damages, was entitled to take into account the conduct of the defendants in continuing to assert the truth of the defamatory facts in the column from the time of publication right up to and through the trial. The fact that the defendants could have gone further in attacking the character of the plaintiff or raising other defamatory facts in support of the allegations made in the DiManno column is merely a difference of degree, not one of kind. If they had gone further and been unsuccessful, the impact on damages would be more significant than otherwise would be the case. It is the assertion that defamatory facts are true which aggravates the damages. If, contrary to my ruling above, a defendant is entitled to prove the truth of defamatory facts as part of the rolled-up plea, then its conduct in doing so will attract the same adverse consequences. Thus, in this case, my ruling on this issue would have been the same regardless of my ruling on the nature of the rolled-up plea and how it was treated in this action.

D. Ruling on Identification of the Plaintiff

30 The original DiManno column did not identify the plaintiff by name. Therefore, although the plaintiff was identifiable to those people who knew him as the security guard at Market Square, this was publication to a smaller group of people than if his name had also been included in the column. The defendants argued that this was a mitigating factor in the assessment of damages which should be put to the jury. I agree that in most circumstances this would be an appropriate instruction, subject of course to the fact that, for reasons which are not apparent and were not explained, Ms DiManno did see fit to include the information that the incident occurred at Market Square, with the result that the plaintiff was identifiable as the security guard involved. However, that issue aside, I have considerable difficulty with the proposition that the jury should be told that damages are mitigated because of this limited identification of the plaintiff, while throughout the trial the Toronto Star published daily accounts of the trial in its newspaper and on the Internet, all of which identified the plaintiff by name. In each of these articles, of course, some background for the article was necessary which resulted in repeating the essence of the original defamation. No other media covered the trial and the trial did not otherwise attract public attention. Therefore, the fact that the plaintiff's name has now been published in connection with this incident is solely as a result of the Toronto Star coverage.

31 Newspaper reporting on trials is protected by privilege, which privilege is lost if there is evidence of malice or improper motives or if the coverage is not fair and balanced: *Gatley* at p. 310-318. The plaintiff raised the newspaper coverage as an issue at trial and The Star's daily articles were marked as exhibits. I instructed the jury to examine the newspaper articles and to determine whether the coverage was fair and balanced or if there was malice or improper motives. If either of these factors were found, the jury was told that the privilege was lost and they were therefore entitled to consider the articles to be evidence of malice for other purposes and as a factor aggravating damages.

32 However, even if the content of the daily coverage is otherwise privileged, it seems to me that this issue of identification of the plaintiff is a separate matter. It was entirely up to the defendants whether to cover the daily events at trial, and if they chose to cover it, whether to identify the plaintiff by name. They chose to do both. As long as the requirements for privilege are met, the defendants are protected from further action as a result of any republication of the original libel. But the defendants should not be permitted to take the benefit of a factor (limited publication) because it limited the harm to the plaintiff, while at the same time virtually eradicating the effect of that original benefit to the plaintiff by broadcasting his name to its millions of readers in Canada, not to mention worldwide on the Internet, during the course of the trial. In my opinion, all conduct of the defendants should be taken into account in determining whether the limited identification of the plaintiff in the original publication is a

factor relevant to damages. The defendants are not sheltered by privilege for this purpose. Therefore, the fact that they are solely responsible for the ultimate publication of the plaintiff's name in connection with the defamatory words written about him vitiates any benefit to which the defendants might have been entitled arising from their limited identification of the plaintiff in the first publication. Accordingly, I instructed the jury that regardless of whether the conditions of privilege were met, they could take the trial coverage into account in determining the ultimate extent of the publication of the defamatory words, even though the initial publication might only have been understood by a limited group of people as referring to the plaintiff.

E. The Jury's Findings

33 The jury deliberated for four hours immediately following my charge and then returned at 10:00 the next day for further deliberation until about 1:30 p.m. when they announced they had a verdict. During this time they asked no questions. They returned with their answers to the questions in a sealed envelope in which they also included an unsolicited handwritten recommendation. The specific questions, rather than the general verdict, were answered. The jury had been told that the first question was not contentious and, as expected, they answered it "yes", indicating that the words complained of were defamatory. The jury then answered "yes" to Question 2 and "no" to Question 3 as follows:

> 2. To the extent that you find any of those defamatory words to be statements of fact, are the facts true? Answer: Yes
>
> 3. To the extent that you find any of those words to be comment, are they based on sufficient facts which are true and are the comments fair? Answer: No

Compensatory damages were assessed at $5,000.00. Punitive damages were not awarded. Attached to the answers was a written note which stated, "We the jury recommend that the Toronto Star Ltd. publish a correction that will also appear on the Internet". Just before the words "a correction" the jury had printed but crossed out the letters "an ap", apparently having started to recommend "an apology" but then changing it to "a correction".

34 Upon reading the jury's answers to the questions, I asked counsel if they wanted any follow-up with the jury before the jurors were discharged. Both counsel declined this opportunity and the jury was discharged. Counsel for the plaintiff requested an adjournment until the next day to consider his position before judgment was entered, which request I granted.

35 Upon resumption the next day, counsel for the defendants submitted that I should merely enter judgment for $5000.00 in accordance with the jury's verdict. Counsel for the plaintiff argued that the jury's finding with respect to truth (Question 2) was perverse, or that it was at least inconsistent with its other findings and the note. He presented two options: (1) order a new trial with costs of this trial payable by the defendants to the plaintiff forthwith; or (2) determine the answers to Questions 2 and 3 to be perverse, substitute my own findings on these two questions, and then enter judgment for $5000.00. I raised with counsel the possibility of a third option: recalling the jury and requesting clarification of their answers to Questions 2 and 3. Both counsel opposed this suggestion on the grounds that it would be akin to asking the jury to give reasons. There is considerable merit to their concerns in this regard. Also, the Toronto Star had published a further article after the jury verdict including comments which I had made to counsel after the jury was discharged, which further complicates the matter. I therefore agreed with counsel that recalling the jury for clarification was not an appropriate option.

36 With respect to the first option (a new trial), counsel for the defendants opposed it and counsel for the plaintiffs submitted candidly that this was only a realistic option for the plaintiff if it was accompanied by a solicitor and client costs award for his costs to date, without which the plaintiff would not be in a position to finance another trial. I can see no basis for awarding the costs of this trial to the plaintiff if a new trial is ordered. It seems to me that the costs of the first trial would only be payable by the defendants if the defendants were unsuccessful on the second trial. If the defendants were completely successful on the second trial, it would clearly not be fair for them to have to pay any costs to the plaintiffs, including the costs of an aborted first trial. Therefore, the only realistic options presented were either to reject the jury answers as perverse and substitute my own determinations on those questions or to simply issue judgment for $5000.00. I reserved judgment on this point.

37 Upon further reflection, I have come to the conclusion that the proper course of action is simply to issue judgment for $5000.00. First of all, it is important to distinguish between jury findings which are perverse (in the sense that they are completely without any foundation in the evidence) and verdicts which are conflicting. In the case of a perverse verdict, the trial judge has no power to set aside the verdict and substitute his or her own determination. The finding by this jury that the defamatory facts are true may or may not be perverse, but that is a determination which only can be made by an appellate court: *Cugliari v. White* (1994), 21 O.R. (3d) 225 (Ont. Gen. Div.); *Rose v. Sabourin* (1994), 31 C.P.C. (3d) 309 (Ont. Gen. Div.). The trial judge does, however, have a number of available options in the event that a jury returns inconsistent findings. These are set out in Rule 52.08 which provides:

> 52 08.(1) Where the jury,
>
> (a) disagrees;
>
> (b) makes no finding on which judgment can be granted; or
>
> (c) answers some but not all of the questions directed to it or gives conflicting answers, so that judgment cannot be granted on its findings,
>
> the trial judge may direct that the action be retried with another jury at the same or any subsequent sitting, but where there is no evidence on which a judgment for the plaintiff could be based or where for any other reason the plaintiff is not entitled to judgment, the judge shall dismiss the action.
>
> (2) Where the answers given by a jury are sufficient to entitle a party to judgment on some but not all of the claims in the action, the judge may grant judgment on the claims in respect of which the answers are sufficient, and subrule (1) applies to the remaining claims.

38 The Rule contemplates that where judgment can be given, that should be done. It is only where judgment cannot be given that the trial judge has other options. Those options are either to order a new trial or to dismiss the plaintiff's claim, the latter option applying if the plaintiff is not entitled to judgment because of lack of evidence or some other reason (which is not the case here). There is no authority under the Rule for the trial judge to substitute his or her own findings for conflicting jury findings.

39 The relevant sub-section for the situation in this case is Rule 52.08 (1) (c) which provides that the trial judge may direct a new trial where the jury "gives conflicting answers, *so that judgment cannot be granted on its findings* ". This does not mean that a new trial should be ordered whenever there are conflicting answers. It is only in situations in which the conflicting answers are of such a nature that judgment cannot be granted upon them that the remedy of a new trial applies. If there is a basis for granting judgment notwithstanding the conflicting answers, then that should be done.

40 Counsel for the defendants submits that if I consider the jury findings in this case to be inconsistent, I should simply treat them as if the jury had rendered a general verdict in favour of the plaintiff. There is considerable merit in that submission. It is clear from the jury's award of $5000.00 in compensatory damages that it found in favour of the plaintiff at least on some ground. For the purposes of granting judgment, it is not necessary to know whether the jury found in favour of the plaintiff on both grounds (truth and fair comment), or just on one ground. The result is the same, a monetary judgment for $5000.00. I recognize the importance of vindication for a plaintiff in a libel action. In some cases, a finding that the defamatory statements made about him were not true may be more important to a plaintiff than any award of damages. However, it is not in my power to make a declaratory judgment in a jury trial. If the findings of this jury are not sufficiently clear to constitute vindication, then the only remedy for that is a new trial, which neither party wants. Accordingly, in my opinion, the appropriate disposition in this case is simply to grant judgment to the plaintiff in the amount of $5000.00.

F. Costs

1. The Position of the Parties

41 The plaintiff seeks costs of the action on a solicitor and client basis. The plaintiff alleges that such an award is justified because of the misconduct of the Toronto Star and its counsel during the trial and because the defendants continued to assert the truth of the factual allegations against the plaintiff throughout the trial. The defendants argue that the plaintiff should get no costs because the jury awarded only nominal damages and because of alleged misconduct by counsel for the plaintiff during the trial. Alternatively, the defendants say that costs should be awarded on a Small Claims Court scale because of the quantum of damages awarded by the jury. Finally, the defendants argue that they made an offer to settle which was more favourable than the judgment ultimately obtained by the plaintiff, provided that any costs to which the plaintiff is entitled are on a party and party scale or lower. The defendants' position is that even if the plaintiff is entitled to some costs, they should not be on a solicitor and client scale, particularly since the plaintiff was unsuccessful on the issue of factual truth which was the main issue in the trial. Therefore, the defendants argue that because of their settlement offer, the plaintiff should only receive costs up to the date of the offer, and the defendants should have their costs on a party and party scale thereafter.

2. Should the plaintiff receive any costs?

42 I see no reason to depart from the normal rule that costs follow the event. The plaintiff has been successful in obtaining judgment against the defendants and is therefore entitled to his costs of this action. In so finding, I reject the submission by Mr. Schabas (counsel for the defendants) that the plaintiff's entitlement to costs is affected by alleged acts of misconduct by Mr. Campbell (counsel for the plaintiff). Mr. Campbell did make a factual error in his address to the jury in his summary of Ms DiManno's evidence as to when and how often she checked police arrest reports before writing her column. However, this error was minor in nature and was corrected in my charge to the jury. Further, as I said at the time, I am absolutely satisfied with Mr. Campbell's explanation that this was

merely an inadvertent error on his part and that there was no attempt to deliberately mislead the jury. Mr. Schabas also alleged that Mr. Campbell in his address to the jury improperly suggested a range of damages. There is no merit to that submission. In discussing the issue of punitive damages against the Toronto Star, Mr. Campbell noted that the Toronto Star made a profit of $30 million last year. He told the jury that they should award punitive damages, even though this might be seen as a windfall for the plaintiff since any award which would punish the Toronto Star would be more than the plaintiff's yearly salary. There had not been any evidence as to the plaintiff's annual salary. I consider this comment to be innocuous. In any event, it clearly did not have any deleterious effects on the defendants as the jury did not make any award for punitive damages. Contrary to the assertion of counsel for defendants, I consider the conduct of Mr. Campbell throughout the trial to have met the highest standards of professional ethics and courtesy.

3. Should costs be awarded on a small claims court scale?

43 In my opinion, it was absolutely reasonable for the plaintiff to have brought his action in this court, notwithstanding the amount of damages awarded by the jury. The issues are complex and, without getting into the reasonableness of the quantum of damages awarded by the jury, it can at the very least be said that the damages could easily have been substantially higher. Furthermore, the plaintiff sought, and was entitled to, a jury trial. Indeed, I am advised that both parties were of the view prior to trial that this action ought to be tried by a jury. Therefore, in my opinion, this is not a case in which it is appropriate to penalize the plaintiff for having brought this action in this court.

4. Are the damages nominal, and if so, does this affect the plaintiff's costs?

44 In the course of legal argument following the completion of the evidence at trial, counsel for the defendants quite fairly conceded that this was not the sort of case in which it was necessary or appropriate to give the jury an instruction on contemptuous damages. I agreed. It therefore follows that I do not consider this to be an action which should not have been brought, regardless of the quantum of the damage award.

45 Both counsel also agreed that it was improper to suggest to the jury a range of damages or to provide any information as to damage awards in other libel cases. This is in keeping with the ruling of the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto* (1995), 30 C.R.R. (2d) 189 (S.C.C.), at 236 in which the Court noted that although there had been a legislative amendment to allow trial judges and counsel in Ontario to give guidance to juries concerning damage awards in personal injury actions, there was no such provision pertaining to libel actions. I am at a loss to understand how a jury in a libel action is in any different position in assessing general damages than a jury in a personal injury action would be. However, as was stated by the Supreme Court in *Hill v. Scientology* at p. 236, "If guidelines are to be provided to juries [in libel actions], then clearly this is a matter for legislation". Accordingly, the jury in this case was given no guidance as to the range of general compensatory damages except that counsel for the plaintiffs submitted that the damages should be "substantial" and counsel for the defendants submitted that if damages were awarded they should be "nominal". Many people would consider $5000.00 to be a lot of money. I have no way of determining whether this jury considered a $5000.00 award to be nominal or substantial. Further, if the jury meant to award nominal damages, I have no way of knowing whether this might have been because they considered that the injury to the plaintiff was minimal or that the libel itself was minimal, or both, or neither.

46 In short, I consider it neither possible nor desirable to draw any inference from the quantum of damages awarded by the jury so as to reduce the amount or scale of costs to which the plaintiff would otherwise be entitled.

5. Was there conduct by the defendants to warrant solicitor and client costs?

47 The plaintiff argues that the conduct of the defendants is sufficiently reprehensible as to entitle the plaintiff to his costs on a solicitor and client scale. The plaintiff points to: (a) alleged misconduct by counsel for the defendants in the course of the trial; (b) alleged unfairness and bias in the Toronto Star's newspaper coverage of the trial; and (c) the defendants' persistent allegation that the defamatory facts about him in the column were true.

(a) Alleged misconduct by defence counsel during trial

48 The plaintiff alleges three incidents of improper conduct by defence counsel during trial which, it is argued, support the plaintiff's claim for solicitor and client costs. They are: (i) the failure to produce a witness statement obtained by the defence; (ii) an improper suggestion to the jury that there was no evidence to support a conclusion that the homeless man involved in the incident at Market Square was a violent person; and (iii) an improper line of questioning designed to create the impression that the plaintiff had acted in a menacing manner towards Ms DiManno on an occasion subsequent to the publication of her column.

(i) Failure to produce witness statement

49 In March 1998, the defendants learned that Doug Ryan (the homeless person described in Ms DiManno's column as having been assaulted by the plaintiff) was in prison, having been sentenced in connection with an assault by him on a security guard (not the plaintiff) at Market Square in January 1998. Counsel for the defendants met with Mr. Ryan in jail and took a statement from him. Although the defence has had this statement since March, it was not disclosed to the plaintiff's counsel until Friday, June 12th and only then because plaintiff's counsel heard from a third party that there was such a statement and wrote on June 11th inquiring about it. The trial began on Monday, June 15th. When this matter was raised by counsel for the plaintiff at an early point in the trial, I suggested that if the plaintiff was prejudiced by this late disclosure, I was prepared to consider an adjournment with costs of the trial to that point to be borne by the defendants. However, the plaintiff did not want an adjournment and so the trial proceeded. The defendants did not call Mr. Ryan as a witness at trial. I did instruct the jury that Mr. Ryan was a material witness on an issue upon which the burden of proof lay with the defendants and that they were therefore entitled to draw an adverse inference from the unexplained failure of the defendants to call him as a witness at trial. In my opinion, nothing further needed to be done. There was no evidence that the statement of Mr. Ryan was deliberately withheld and no evidence that the plaintiff was prejudiced in any way by the late disclosure. I do not know, for example, that earlier disclosure would have made it possible for the plaintiff to reach Mr. Ryan or even that counsel for the plaintiff had made any efforts, successful or otherwise, to find Mr. Ryan prior to trial. While it certainly would have been better if the defence had made timely disclosure of its new evidence from Mr. Ryan, I do not consider this to be a matter which affects costs.

(ii) Evidence of menacing conduct by the plaintiff

50 Mr. Gouveia testified in chief that at the time of the incident at Market Square, Ms DiManno threatened him that "he would pay" for this. On cross-examination he was asked if he had seen Ms DiManno at Market Square subsequent to the column in issue appearing in the Toronto Star. He stated that he saw a woman in the bookstore one day that he initially thought might be her, but that he had then decided it wasn't her. In response to further questions, he denied following Ms DiManno from the bookstore to another location in the mall or following her outside the building. Counsel for the plaintiff objected to this line of evidence as being irrelevant to any issue in the

lawsuit. Mr. Schabas submitted that the evidence was directed towards showing that although Ms DiManno saw the plaintiff in the mall on a subsequent occasion she did not confront him in any way, but rather merely left without speaking to him. The relevance of this evidence was to rebut the plaintiff's suggestion that Ms DiManno had an animus towards the plaintiff. Although the probative value of such evidence was, in my view, slight, I ruled that I would allow the evidence for that limited purpose only. Later in the trial, when Ms DiManno was testifying in chief, she was asked by Mr. Schabas about the incident in the bookstore. Her evidence went beyond merely testifying that she had seen the plaintiff and that she had simply left without a confrontation. Rather, she said that the plaintiff was starting at her in the bookstore, that she then left and went to the gift shop, that the plaintiff followed her there, that he pretended to be looking at items in the store while continuing to watch her, that she then left and went to a phone booth outside the mall, and that he continued to follow her there. At this point Mr. Campbell objected and the jury was excluded while counsel addressed the issue. In the *voir dire* which followed it was learned that the balance of the evidence which the defendants intended to elicit was that Ms DiManno felt threatened, was afraid of Mr. Gouveia and didn't want him to know where she lived. Obviously, such evidence is irrelevant to any issue before the jury, as well as being prejudicial to the plaintiff. I ruled that there could be no more evidence on this point except to the effect that there had been no discussion between Ms DiManno and Mr. Gouveia and that Ms DiManno had simply left.

51 Counsel for the defendant did go further with this line of evidence than was contemplated by my earlier ruling on the limited extent of its admissibility. Therefore, the jury heard some irrelevant testimony. However, I do not consider this evidence to be seriously prejudicial to the plaintiff. Although, Mr. Campbell initially moved for a mistrial because of this evidence, he later withdrew that motion, conceding that any problem created by the evidence could be taken care of in my charge. Accordingly, I do not see this issue as having any impact on the costs to which the plaintiff is entitled.

(iii) Mr. Ryan's propensity towards violence

52 The plaintiff testified at trial that he did not assault Mr. Ryan, the homeless person described by Ms DiManno in her column. Rather, he alleged that he was jumped by Mr. Ryan and assaulted by him and that he was trying to restrain Mr. Ryan until the police arrived. He also testified to a long history of dealings with Mr. Ryan including problems with drunkenness and violent behaviour which had resulted in Mr. Ryan being permanently banned from the mall. Other business tenants of the mall also testified to knowing Mr. Ryan and to being aware of incidents of drunkenness and violence by him on previous occasions. I ruled that such evidence was admissible. In my opinion, it is relevant to show the history between the plaintiff and Mr. Ryan and the reasonableness of the force used by the plaintiff in light of the plaintiff's knowledge of Mr. Ryan's propensity towards violence. In addition, the evidence of Mr. Ryan's propensity towards violence is admissible to support the plaintiff's evidence that Mr. Ryan was the aggressor on this occasion: *R. v. Scopelliti* (1981), 63 C.C.C. (2d) 481 (Ont. C.A.).

53 The plaintiff had also intended to call as a witness at trial another security guard at Market Square who, during the course of his employment but subsequent to the incident involved in this action, had been assaulted by Doug Ryan. Mr. Ryan was charged criminally in connection with that incident, pleaded guilty to assault, and was sentenced to a period of imprisonment. I ruled that this evidence could not be called. My reasons for so ruling were given orally at the time and have been separately transcribed. For present purposes, suffice it to say that I found the prejudicial effect of such evidence outweighed its probative value. In so ruling, I was influenced by the fact that the plaintiff would be introducing other evidence with respect to Mr. Ryan's violent tendencies and by the fact that defence counsel stated on the record that he would not be "leading any evidence or suggesting in cross-examination" that Mr. Ryan did not have a propensity towards violence. I stated at the time of my ruling that I would revisit that issue if the defence took a contrary position during the trial.

54 Counsel for the defence did not violate the letter or spirit of his advice to the court during the evidentiary part of the trial. However, in his address to the jury at the end of the trial, Mr. Schabas told the jury that there was "not much evidence that Mr. Ryan is violent" and that there was "no evidence that he is the kind of person who would come up from behind and jump a security guard". Counsel for the plaintiff objected in particular to the latter statement as being contrary to the position Mr. Schabas took during the *voir dire* as well as improper in light of Mr. Ryan's criminal conviction for assaulting a security guard.

55 The first statement by Mr. Schabas to the effect that there was "not much evidence" of Mr. Ryan's violent propensity does not run afoul of a literal interpretation of his advice to the court that he would not be "calling evidence" or "suggesting in cross-examination" that Mr. Ryan was not violent. I must say that I shared Mr. Campbell's impression that Mr. Schabas would not be challenging the plaintiff's evidence with respect to Mr. Ryan's history of violence at all and I was surprised to hear him making submissions about the insufficiency of the evidence on propensity towards violence. However, upon reviewing the transcript of his precise words on the *voir dire*, it is apparent to me that he did not say anything about the position he would ultimately take on this point before the jury. I therefore accept his position that he did not *intend* to mislead the court on this point.

56 It is improper for counsel to suggest something to a jury which he knows to be untrue, even where the evidence to that effect is not before the jury. Likewise, it is wrong for counsel to suggest that evidence does not exist when it does exist but has been excluded for evidentiary or other reasons: see Ewaschuk, *Criminal Pleadings & Practice in Canada*, 2nd. ed., (1998) at paras 17:2070 and 17:2080 and cases referred to therein. In my view, it was improper for Mr. Schabas to comment adversely on the fact that there was "not much" evidence of violence when he knew that further evidence of violence was available and had only been excluded because of its highly prejudicial effect on the jury. Further, I consider his second statement (to the effect that there was no evidence that Mr. Ryan was "the sort of person" who would jump a security guard from behind) to be not only improper but also inconsistent with facts known to Mr. Schabas. The truth of the matter is that Mr. Ryan is not only the "sort of person" who would assault a security guard, he has a criminal conviction for having done so and, indeed, he pleaded guilty to that charge. The evidence of that subsequent assault was excluded by me after vigorous argument by Mr. Schabas as to its prejudicial effect, which submissions I accepted. I consider Mr. Schabas' rationalization that the criminal conviction did not involve "jumping a security guard from behind" to be simply hairsplitting. I agree with the submissions of counsel for the plaintiff that the manner in which Mr. Schabas dealt with this point before the jury was prejudicial to the plaintiff and, given the timing of it, could not be corrected by calling evidence to counteract it. In my charge to the jury I referred to the evidence of Mr. Ryan's violent propensity and included in my instructions on this point a specific direction that this evidence could be considered by the jury as supporting the plaintiff's evidence that he was repelling an attack upon him by Mr. Ryan and acting in self-defence rather than being the aggressor. However, I also cautioned the jury that even if they concluded that Mr. Ryan had been violent in the past, it did not necessarily follow that he had been the aggressor on this particular occasion. Unfortunately, it is difficult to determine if this direction would be likely to undo any harm that may have been done by Mr. Schabas' address on the point. It may well be the case that the damage was done, and could not be undone.

57 That said, I do not consider this incident to be grounds, in and of itself, for an order of solicitor and client costs. It was, however, improper conduct. As such it could be relevant to an award of solicitor and client costs, but only if there were other incidents of misconduct which were either numerous or serious in nature to be considered along with it.

(b) Toronto Star coverage of the trial

58 The Toronto Star had a reporter at the trial and published daily articles about the proceedings. Newspaper

reports of judicial proceedings are privileged if they are fair and accurate reports of those proceedings. The privilege is lost if the publication is motivated by malice rather than the public interest. The Toronto Star's managing editor testified that it is always the Star's policy to cover trials in which it is involved as a party. This, of course, does not necessarily rule out malice as a motivating factor as the policy itself may be more directed towards discouraging lawsuits than informing the public. The inevitable republication of the original libel which would occur during the course of newspaper coverage of a libel trial could be a deterrent to even the bravest plaintiff regardless of his or her confidence in ultimately succeeding at trial. However, there is no evidence in this case of any particular malice towards this plaintiff and insufficient evidence of malice towards plaintiffs generally to defeat the privilege. Accordingly, even though no other media in Toronto covered the trial, the mere fact that the Toronto Star chose to do so is not, in my view, improper and would not be a factor in determining costs, provided that the trial coverage was fair and accurate.

59 Unfortunately, the trial coverage in this case was not fair or accurate. On the contrary, the coverage was biased in favour of the position of the Toronto Star and Ms DiManno and against that of the plaintiff.

60 It is not necessary for a newspaper reporting on a trial to include an account of every witness or every piece of evidence. Neither is it necessary, nor indeed possible, for a newspaper to provide a verbatim account even of key testimony. However, the reporting must be balanced and impartial. As stated in *Gatley* at p.314-5:

> An abridged or condensed report of judicial proceedings must be fair, not garbled so as to produce misrepresentation, nor by suppression of some portion of the evidence giving an entirely false and unjust impression to the prejudice of one of the parties concerned. A report which accurately sets out one part of the proceedings and omits another which gives a different complexion to the whole case will not be privileged. It is not enough to report part of the proceedings correctly if, by leaving out other parts, you thereby create a false impression.

61 The Toronto Star's reporting of this trial accurately set out the evidence supporting the defendant's case. The newspaper coverage (although not the Internet) also gave a reasonably accurate report of the testimony given by the plaintiff at trial. However, the evidence of other witnesses supporting the plaintiff's version of the incident involving Mr. Ryan was completely ignored in the trial coverage.

62 All of the evidence with respect to the alleged assault by the plaintiff upon Mr. Ryan was heard in the first four days of the trial. The Toronto Star reports for these four days referred to the evidence of four witnesses: the plaintiff, Ms DiManno, Sugan Kathansamy (a movie box office clerk), and Renee Soeterik (a gift shop clerk in the mall). The evidence of Ms DiManno is accurately summarized. She is reported as having testified that she emerged from the movie theatre to see the plaintiff pushing Mr. Ryan in the back as the two proceeded across the mall and that the plaintiff eventually jumped on Ryan's back, put him in a headlock and repeatedly struck him with his fist. There is no reference in the Star's trial coverage to Ms DiManno's evidence that she then observed Mr. Gouveia pushing and smacking Mr. Ryan as he shoved him out of the mall, although this was part of her evidence at trial as well as referred to in her column.

63 Mr. Gouveia's version of the incident is also summarized with reasonable accuracy. He testified that he had escorted Mr. Ryan and other homeless people out of the mall and was returning to retrieve Mr. Ryan's sleeping bag which Mr. Ryan had forgotten. Mr. Ryan followed him and began punching him in the head. Mr. Gouveia then struggled with Mr. Ryan and is correctly reported to have said that he was using "submission moves" rather than attacking or assaulting Mr. Ryan. However, the newspaper coverage makes no reference to Mr. Gouveia's evidence

that during the struggle he directed a nearby shop-owner to call the police, nor does the coverage refer to Mr. Gouveia's evidence as to how Mr. Ryan left the mall. It was Mr. Gouveia's evidence that during the struggle Mr. Kim, the owner of a cafe in the mall, came over and attempted to persuade him to let Mr. Ryan go without laying criminal charges against him. Mr. Kim urged him to "take it outside" and, although initially reluctant, Mr. Gouveia ultimately agreed. Mr. Gouveia testified that it was Mr. Kim who actually escorted Mr. Ryan to the exit and that he, Mr. Gouveia, followed at a distance of about 16-17 feet. None of this is mentioned in the Star coverage.

64 Mr. Gouveia's evidence in chief started on the first day of the trial and continued into the second day. On the second day, the cross-examination and re-examination of the plaintiff were also completed and one other witness was heard, Sugan Kathansamy, who was the theatre box office clerk referred to in Ms DiManno's column. The Toronto Star coverage of the second day of the trial summarized Mr. Gouveia's evidence (as I referred to above). The only mention of Mr. Kanthansamy's evidence was as follows:

> Sugan Kanthasamy (*sic*) witnessed the incident and told court yesterday that DiManno's portrayal of conversations with him and a female witness were correct but condensed.

65 The Toronto Star coverage did not refer to any of Mr. Kathansamy's eye- witness account of the incident between Mr. Gouveia and Mr. Ryan. Mr. Kathansamy did not witness the entire incident as he was interrupted by Ms DiManno. However, he testified that before that interruption he saw Mr. Gouveia walking across the mall and that Mr. Ryan was following him. He also said that he saw Mr. Ryan jump on top of Mr. Gouveia and that this precipitated the struggle between the two men. At this point, he was interrupted by Ms DiManno. During his interaction with Ms DiManno he noticed that Mr. Kim (the cafe owner) was with Mr. Gouveia and Mr. Ryan near the bench where the struggle had occurred and he later glimpsed all three men leaving the mall. Although he did not watch them all the way out, he did not see any fighting or punching of Mr. Ryan as he was leaving the mall. Mr. Kathansamy's evidence with respect to the altercation between Mr. Gouveia and Mr. Ryan corroborates Mr. Gouveia's version of the incident (although it is not identical in some of the details). It directly contradicts Ms DiManno's evidence about the incident. The Toronto Star did not report any of Mr. Kathansamy's evidence about the incident itself, but did report one comment he made about Ms DiManno's column. He did testify that the column's version of the discussion involving himself, Ms DiManno and the lady with the English accent was "correct but condensed". He also testified that Ms DiManno had been very rude to the English lady, including using profanities, and that her description of Mr. Gouveia was wrong. Finally, he said that after reading Ms DiManno's column he did not think any less of Mr. Gouveia because he had actually seen what happened that day. None of this was reported by the Star. The one and only comment made by Mr. Kathansamy which could possibly be construed as supporting the defendants' position in the lawsuit was the one and only reference made to his evidence in the newspaper coverage of the trial, *i.e.* that Ms DiManno had correctly summarized her discussion with the English lady. The main thrust of his evidence, which was supportive of the plaintiff's position and contrary to the defendants, was omitted.

66 On the third day of the trial, the plaintiff called three witnesses: Lloyd Partridge (the owner of a bookstore in the mall who witnessed the incident with Mr. Ryan); Michael Kim (the cafe owner who both witnessed and was directly involved in the incident); and Renee Soeterik (a gift store clerk in the mall). The plaintiff was then recalled briefly in reply. After reading in various excerpts of the defendants' examinations for discovery, the plaintiff closed his case. The defendants' case started about mid-afternoon that day with the examination in chief of Ms DiManno, which was still in progress when the court recessed at the end of the day. The Toronto Star coverage of the third day of trial makes no mention of Mr. Kim or Mr. Partridge or the evidence given by either of them. The main focus of the article is a synopsis of Ms DiManno's evidence. There is also a reference to two aspects of Ms Soeterik's evidence, as follows:

> Renée Soeterik, a gift shop clerk in the mall at the time of the incident, told the six-member jury yesterday that while generally Gouveia was calm with the homeless people in the mall, she had seen him act in an "overzealous" manner in the past.
>
> She also said Gouveia had once shown her a tooth he carried around in his wallet and told her it belonged to a homeless man with whom he had fought.
>
> Gouveia denied Soeterik's account, saying she had her story confused.

67 Again, the evidence of Ms Soeterik which is reported is accurately summarized. However, the reporter saw fit to include in the article only that part of Ms Soeterik's evidence which supported the defendants' position and ignored everything which was critical of Ms DiManno or which supported the plaintiff. For example, Ms Soeterik testified that after reading Ms DiManno's column in the Toronto Star, she felt that Mr. Gouveia had not been fairly treated and she called Ms DiManno to discuss it with her. She had a long conversation with Ms DiManno in the course of which she accused Ms DiManno of being unprofessional in describing the size of Mr. Gouveia's thighs and speculating in the column that Mr. Gouveia wanted to hit her too. She also told Ms DiManno that she did not like the use of the word "goon" to describe Mr. Gouveia. She talked about this not being a black and white issue and described Mr. Gouveia as being a gentle and caring person who was on a first name basis with the homeless people around the mall. Ms Soeterik also testified about her own experiences with Mr. Ryan including an incident when he came into her store, tried to get a small child to give him money, stole a toy from the store, threatened Ms Soeterik, and grabbed her arm leaving a bruise. It is quite true, as reported by the Star, that Ms Soeterik also said that Mr. Gouveia could be "overzealous" at times and she did recount the story about the tooth, which was denied by Mr. Gouveia. However, these two statements were the only aspects of her testimony which could be construed as supporting the defendants and, again, this is the extent of the Star's report of her evidence.

68 The Toronto Star did not report any of the evidence of Mr. Partridge or Mr. Kim, both of whom were eye witnesses to the incident at the heart of the lawsuit. The evidence of Mr. Partridge and Mr. Kim corroborated key aspects of Mr. Gouveia's version of the incident involving Mr. Ryan and were directly contradictory of Ms DiManno's version. Mr. Partridge did not see the whole incident. However, he testified that he saw Mr. Ryan and Mr. Gouveia near the benches arguing and that Mr. Ryan repeatedly punched Mr. Gouveia. He said that Mr. Gouveia did not punch Mr. Ryan but that he did bring him down to the floor to subdue him and that he yelled out to Mr. Partridge to call the police, which he did. The details of the altercation given by Mr. Partridge are not identical to the plaintiff's version, but his evidence is generally corroborative particularly in respect of Mr. Ryan being the aggressor. Mr. Partridge also testified that he had observed Mr. Gouveia dealing with homeless people in and around the mall and found him to be "well behaved" and "very professional". None of Mr. Partridge's evidence was reported by the Toronto Star.

69 Mr. Kim testified that the first thing he saw in the argument between Mr. Gouveia and Mr. Ryan was Mr. Ryan hitting Mr. Gouveia in the face. He went over to help out because he was familiar with Mr. Ryan and had a rapport with him. He described Mr. Ryan as very strong, tall, usually drunk and violent when drunk (other witnesses also described Mr. Ryan as being substantially larger than Mr. Gouveia). Mr. Kim said that by the time he got to them, they were on the floor, with Mr. Gouveia on top trying to hold Mr. Ryan down and Mr. Ryan trying to get up. Mr. Kim said he was concerned that Mr. Gouveia might get hurt because Mr. Ryan was a very strong man. He therefore tried to defuse the situation. Mr. Gouveia wanted Mr. Ryan to wait at the benches for the police to arrive and Mr. Kim was trying to persuade Mr. Gouveia to "let it go". Ultimately, Mr. Kim said that he took Mr. Ryan outside with one hand on Mr. Ryan's arm and the other hand carrying Mr. Ryan's sleeping bag. He said Mr. Gouveia came outside after him, at about the time the police were arriving. None of Mr. Kim's evidence was

reported by the Toronto Star.

70 The Toronto Star report of the fourth day of the trial is a fair representation of the evidence given by Ms DiManno and by the Star's managing editor Mary Deanne Shears. The article mentions that during cross-examination of Ms DiManno counsel for the plaintiff "pointed out discrepancies between testimony given by DiManno and witnesses for the plaintiff". This is the only suggestion anywhere in the Star coverage that there was any discrepancy between the evidence of Ms DiManno and any witness other than the plaintiff. The extent or substance of the discrepancies is not mentioned.

71 In my opinion, the Toronto Star coverage of this trial is a gross mis- characterization of what actually took place in the courtroom. The impression a reader of the newspaper coverage would have of the trial is that there were two directly competing versions of the incident testified to at the trial: Ms DiManno's version which essentially confirmed what she said in her column; and Mr. Gouveia's version which was that he was acting in self defence and which is directly contradicted by Ms DiManno's evidence. The only other evidence provided to the reader is that a shop clerk described Mr. Gouveia as being generally calm but overzealous at times and that he carried around a tooth which he said belonged to a homeless man with whom he had fought. Also, the reader is told that Ms DiManno's report of her conversations with the box office clerk and the English lady were essentially accurate. The only eye witness testimony about the altercation which is included in the articles is that of the plaintiff and Ms DiManno, creating the impression that it was her word against his. This is not true. There were three independent eye witnesses all of whom directly contradicted Ms DiManno's version of the incident. None of this evidence was even mentioned by the Toronto Star. This, in my opinion, is not fair and accurate reporting.

72 There was also significant other evidence favourable to the plaintiff which was omitted from the Star coverage. For example, there was substantial evidence with respect to Mr. Gouveia's exemplary record in dealing with homeless people. He testified that for a period of time when he was younger, he had himself been homeless, living on the streets in Toronto. Since then, he said he has donated considerable time and money to a number of charities dealing with the homeless. He had known Mr. Ryan for over a year and dealt with him on an almost daily basis. He testified to having befriended Mr. Ryan, having given him food and money, and at Christmas time having lent him his Bell Calling Card so that he could call his mother in Halifax. The only complaint that he ever received as to the way he dealt with homeless people was his employer's criticism that he was too friendly and helpful to the homeless people around the mall and that he should be more verbally aggressive with them. There was also substantial evidence contradicting Ms DiManno's description of Mr. Gouveia as a "lug" or "bull dog type" with "over-developed" things as contrasted to her depiction of Mr. Ryan as a whimpering victim. Several witnesses commented on the inaccuracy of this description of Mr. Gouveia and Mr. Ryan was described by those who knew him as being well over 6 feet tall, strong, abusive and violent.

73 I am not suggesting for a moment that there was any obligation on the part of the Star to report every piece of information disclosed during the trial, nor that they were required to present all of the evidence favourable to the plaintiff. I mention this evidence merely to demonstrate the extent of the evidence which was omitted from the Star coverage. There was no evidence supporting Ms. DiManno's version of the incident other than her own testimony. The Toronto Star coverage created the exact opposite impression, *i.e.* that there was no evidence supporting Mr. Gouveia's version apart from his own evidence.

74 The situation with respect to the Internet coverage is even worse. The Toronto Star has a Website on which some, but not all, of the articles in its daily papers are published, thereby making them accessible worldwide. The Star's report of the first day of the trial was posted to the Internet, as was the report of the third day. The article reporting on the second day of the trial was not posted to the Internet. The second day of the trial was occupied

almost entirely by the plaintiff's evidence. The Star coverage of that day is therefore critical to a reader's understanding of the evidence supporting the plaintiff, particularly since the evidence of the plaintiff himself was the only evidence supporting the plaintiff which was reported at all. It was grossly unfair to the plaintiff to have omitted the report of that day's evidence from the Internet. Although the oversight with respect to the Internet was subsequently corrected by the Star, this was only done after the failure to include the report of that critical day was discovered by counsel for the plaintiff and an issue was made of it at trial.

75 In my opinion, the coverage of this trial by the Toronto Star falls well below accepted standards of responsible journalism. The Star's managing editor confirmed in her evidence at trial that the journalistic standards to which the Toronto Star ascribes include the obligation to give a fair and accurate report of trial proceedings, one which is balanced and not one-sided. Essentially, this is the same standard applied by law if the reporting of a trial is to be protected by privilege. This standard was not met by the Toronto Star. The overall coverage of the trial by the Star both in the newspaper and on the Internet was not balanced. It was one-sided in favour of the defendants. Further, the articles published on June 17 and June 18 (the second and third days of the trial) were particularly offensive in that they were not a fair representation of the trial proceedings that day. Those two articles improperly omitted evidence supportive of the plaintiff's position in the lawsuit and were biased in favour of the defendants.

76 I would find this calibre of trial reporting to be deplorable even if the Toronto Star was not a party to this litigation. The fact that the Star is a party to the action makes it all the more disgraceful. One-sided reporting is never acceptable; one-sided reporting in your own favour is reprehensible. The Toronto Star has a vast readership throughout Ontario. It apparently prides itself on having a reputation for accuracy. It can therefore be inferred that the Toronto Star expected thousands of readers to believe that the articles it published about this trial were an accurate reflection of what transpired in the courtroom. If those articles were believed, and there is no reason to think they were not, then a gross injustice has been done to Mr. Gouveia. He was affronted by what was said about him in Ms DiManno's column and he came to this court seeking justice. As a result of the Star's coverage of the trial, the gist of the original libel which had been published only once in January 1997 was republished day after day in the Toronto Star newspaper, as well as on the Internet. Mr. Gouveia is not a large and powerful publisher. He has no vehicle in which to publish his version of the facts which emerged throughout the trial. He cannot prevent the Toronto Star, or indeed any newspaper, from reporting on the trial proceedings. Nor should he be entitled to do so. However, he is entitled to expect that any coverage of the trial will fairly represent his side of the dispute as well as that of his adversaries in the lawsuit. This did not happen. Instead, the newspaper coverage rebroadcast the libel along with a summary of the evidence supporting the defendants' version of the central incident, but without any report of the substantial evidence supporting the plaintiff's position. The public was told by the Star that the evidence at trial consisted of two versions of the incident: that of a well- respected and popular columnist who was an eye witness to a brutal assault, and that of the security guard who is accused of the assault but who denies it, claiming to have acted in self-defence. That, in my view is a gross distortion of the truth. However, it is likely to have been believed by the thousands of people who read it, and it is reasonable to assume that this will have been at least as damaging, if not more damaging, than the original publication of the column in 1997. That is not justice. That is the abuse of journalistic privilege by a large and powerful publisher without regard to fairness or truth. In behaving in this manner, the Toronto Star not only wrongs the plaintiff, but also is disrespectful of our system of justice.

77 The issue of the unfairness of the press coverage was left to the jury as a factor which could be taken into account in assessing both compensatory and punitive damages. The jury was not asked to answer a specific question of fact about the fairness of the coverage. I do not consider the relatively low figure awarded by the jury for compensatory damages or the denial of punitive damages to fetter my discretion as to costs on this point. I am appalled that the Toronto Star acted as it did in its coverage of this trial. Further, upon being confronted at trial with the inaccuracy and bias in its reports, the Star remained uncontrite. Although the report of the second day of the trial was subsequently posted to the Internet site, there was no correction any where with respect to the failure,

for example, to report the eye-witness testimony of the three independent witnesses who testified and whose evidence directly contradicted that of Ms DiManno.

78 The conduct of a party during the course of a trial is a factor which can be taken into account in determining the scale of costs to be awarded: *Platt v. Time International of Canada Ltd.*, [1964] 2 O.R. 21 (Ont. H.C.); *Georg v. Hassanali* (1989), 18 R.F.L. (3d) 225 (Ont. H.C.). In my opinion, the conduct of the Toronto Star in publishing newspaper articles of the trial which were inaccurately slanted in its own favour is so improper as to entitle the plaintiff to full indemnity for his costs in this action. Accordingly, on the basis of the trial coverage alone, I would award costs to the plaintiff on a solicitor and client scale as against the defendant Toronto Star Newspapers Ltd. None of the offending articles reporting on the trial were written by Rosie DiManno. Accordingly, those articles do not form a basis for solicitor and client costs as against her.

c. Truth of the factual allegations in the DiManno column

79 The truth or falsity of the allegations made against the plaintiff in Ms DiManno's column are relevant to the scale of costs in two ways. On the one hand, the plaintiff argues that the defendants' conduct in continuing to assert throughout the trial that the defamatory statements of fact in the DiManno column are true warrants an award of solicitor and client costs against them. On the other hand, the defendant argues that the allegations are true, and that this conduct by the plaintiff is sufficiently blameworthy that he should not receive an award of solicitor and client costs even if such an award would otherwise be justified. Further, it is argued that the jury finding that the factual allegations are true means that the defendants have been largely successful at trial, even though the plaintiff did recover some damages in respect of the unfair comments made about him.

80 I agree with the submissions of the plaintiff that if the jury had found that the defamatory allegations made against the plaintiff are untrue, this would be a factor relevant to the appropriate scale of damages. The allegations made against the plaintiff by Ms DiManno are very serious. She accused him of assaulting a vulnerable member of our society in a brutal manner and without provocation. Prior to trial, the defendants were aware that the three independent eye-witness accounts of the incident directly contradict Ms DiManno's version of what happened. Further, the defendants were aware of the extensive criminal record and propensity towards violence of the alleged victim, Doug Ryan. Notwithstanding those circumstances the defendants persisted in maintaining the truth of the allegations. It did so at its peril. In my view, this situation is equivalent to (if not worse than) a party unsuccessfully pleading fraud, a situation which courts have recognized as warranting solicitor and client costs: *Corfax Benefit Systems Ltd. v. Fiducie Desjardins Inc.* (1997), 37 O.R. (3d) 50 (Ont. Gen. Div.). Thus, if the defendants in this case had been unsuccessful in establishing the truth of their allegations against the plaintiff, I would have considered this to be an appropriate situation in which to award solicitor and client costs.

81 If the jury had answered Question #2 (truth of the facts) differently, I would have no difficulty in finding that an award of solicitor and client costs is appropriate. The defendants argue that the jury's answer to Question #2 should simply be taken at face value as a finding that the defamatory statements of fact are true, *i.e.* that Mr. Gouveia assaulted Mr. Ryan as described in Ms DiManno's column. The plaintiff argues that the jury's answer to the question conflicts with its answer to Question #3 (fair comment) and with its note recommending a correction and that I should therefore disregard the jury's answer to Question #2. However, in order to justify a solicitor and client cost award on this basis, it would not be enough for me to find that the jury's verdict as to truth is unclear. I would also have to make my own findings as to the truth of the defamatory statements of fact.

82 I have considered whether, in light of the determinations I have already made in respect of the verdict to be

entered and the costs consequences of the Toronto Star trial coverage, it is necessary for me to deal with the jury's answer to Question #2. I have already found that the newspaper coverage of the trial was sufficiently unfair and prejudicial to the plaintiff to warrant an award of costs on a solicitor and client scale. Arguably, it is therefore not necessary for me to decide whether solicitor and client costs are also warranted because of an unsuccessful allegation of truth by the defendants.

83 However, the defendants argue that it is improper to award solicitor and client costs in this case in light of the jury finding that the facts written about the plaintiff in Ms DiManno's column are true. I recognize that a clear finding that the defamatory facts are true would mean that the defendants have been substantially successful at trial. I also recognize that such a finding would essentially be a determination that the plaintiff had committed a brutal and unprovoked assault on Mr. Ryan. Notwithstanding this, I am of the view that the defendants' misconduct in respect of its newspaper coverage of the trial was so reprehensible that a solicitor and client cost award would still be appropriate. Such an award is not merely to compensate the plaintiff. It is also partially punitive and is one way a court can express its disapproval of conduct which is so high-handed, shocking and arrogant as to demand condemnation by the Court as a deterrent: *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 (S.C.C.). I also note (as I have already stated above under the heading "B-RULING ON THE ROLLED-UP PLEA") that the defendants' pleading of fair comment only and their failure to plead justification made it improper for the defendants to allege the truth of defamatory statements of fact and that Question #2 was put to the jury over the objections of counsel for the defendants. Accordingly, I do not believe that the jury's answer to that question should be an obstacle to the plaintiff's right to recover a cost award to which he would otherwise be entitled.

84 In the result, therefore, it is not necessary for me to determine whether the jury's answer to Question #2 is contradictory or unclear in order to decide the costs issue. I would award solicitor and client costs to the plaintiff in any event.

6. Effect of the Defendants Settlement Offer on Costs

85 On May 8, 1998, the defendants made an offer to settle, the essential terms of which were that the defendants would pay $15,000.00 to certain designated charities providing support services to homeless persons, plus a further sum for the plaintiff's costs. It was a condition of the settlement that its terms remain confidential. The defendants acknowledge that this offer was structured so that funds would go only to charities and legal fees and so that no money would go into the pocket of the plaintiff. The defendants argue that if the plaintiff receives only party and party costs of the trial, his own legal expenses will exceed the $5000.00 damages awarded by the jury, whereas the settlement offer would have enabled him to come out of the action "whole" (*i.e.* not owing anything further to his own lawyers for legal fees). Therefore, it is said, the settlement offer is more favourable to the plaintiff than the judgment recovered at trial plus party and party costs.

86 I do not agree. It is not always possible to apply a strict dollars and cents analysis in determining the relative favourability of a settlement offer. This is particularly the case where the action, and any judgment to be obtained at trial, involves intangible elements such as the vindication of one's good name and reputation: *Hunger Project v. Council on Mind Abuse (C.O.M.A.) Inc.* (1995), 22 O.R. (3d) 29 (Ont. Gen. Div.). The defendants had refused to provide an apology or retraction. The confidentiality condition in the defendants' settlement offer meant that the plaintiff would not even be able to point to the monies paid by the defendants by way of settlement as some measure of vindication. Therefore, the evaluation of the settlement offer solely on the basis of the money involved, and without consideration of the confidentiality clause, does not fairly consider the plaintiff's legitimate and important interest in clearing his name. From this perspective, a judgment in favour of the plaintiff at trial, even though only for $5000.00, can be seen as more favourable to the plaintiff than the settlement offer.

87 In any event, the defendants' argument depends on the assumption that the plaintiff's bill from his own solicitors will exceed the $5000.00 damage award and any party and party costs he is awarded up to the date of the offer. I do not know that to be the case, and neither do the defendants. That is strictly a private matter between Mr. Gouveia and his solicitors and ought not to be the subject of speculation for the purposes of determining costs. The simple truth is that Mr. Gouveia personally received a judgment of $5000.00 from the jury, whereas under the settlement offer he would personally receive nothing.

88 Finally, the defendants acknowledge that their settlement offer could only be viewed as more favourable than the judgment if the plaintiff is awarded costs on a party and party basis. Since I have awarded costs on a solicitor and client basis, the plaintiff's recovery at trial is better than the settlement offer. Therefore, the costs consequences under Rule 49.10(2) do not apply.

7. Alternative Points

89 In fairness to the parties in the event that I am found to have erred on any of the above determinations, I will deal with two alternative points: (a) whether the jury's answer to Question #2 is sufficiently clear to be relied upon; and (b) what my finding would be on the truth of the defamatory statements of fact if it were necessary for me make such a ruling.

(a) Is the jury's answer to Question #2 clear?

90 I have ruled above that a solicitor and client cost award would be appropriate in this case even if the jury had made a clear finding as to the truth of the defamatory facts. In the event that I have erred in so ruling, I have considered whether the jury's finding as to truth is sufficiently clear to fetter my discretion as to costs. I find that it is not.

91 In my opinion, the jury's written answer to Question #2 (with respect to whether the facts are true) is most likely a mistake. At the very least, its meaning is unclear. It is very difficult to reconcile the jury's answers to Questions 2 and 3, particularly when considered in light of the jury's recommendation that the Toronto Star publish a correction. In some libel cases it is easily possible for the facts to be true and yet for the statements of opinion based on those facts to be unfair and therefore libellous. In this case, however, almost all of the words complained of were statements of fact and the few comments based on those facts were inextricably connected to the facts. The main position of the plaintiff was that the comments could not be fair because the facts were untrue. The plaintiff also submitted that the defence of fair comment was not available because of malice. It seems unlikely that the jury could have found malice while at the same time awarding only $5000.00 in damages and concluding that the facts were true (although since no guidance was given to the jury with respect to the appropriate range of damages one must be careful to read too much into the quantum of the award). Counsel for the defendants argued that the jury must have determined that the facts were true, but that the comments were so extreme that they could not be justified even on those facts. Again this is highly unlikely. The statements of fact were very strong. The opinion upon those facts consisted entirely of name- calling and pejorative descriptions of the plaintiff. If the statements of facts were found to be true, it is hard to imagine that the comments could be considered to be so unjustified as to be separately deserving of compensation to the plaintiff notwithstanding that he had committed the acts alleged in the column.

92 In submissions prior to my jury charge, Mr. Schabas took the position that if the facts upon which the

comments were based were substantially true, the plaintiff must prove that the opinions were not honestly held in order to defeat the defence of fair comment. Both counsel agreed that in the circumstances of this case it was appropriate to instruct the jury on this aspect of the fair comment defence in accordance with the standard described by Lord Diplock in *Silkin v. Beaverbrook Newspapers Ltd.*, [1958] 1 W.L.R. 743 (Eng. Q.B.). I included in my charge the following excerpt from page 747 of that decision:

> The expression "fair comment" is a little misleading. It may give you the impression that you, the jury, have to decide whether you agree with the comment, whether you think it is fair. If that were the question you had to decide, you realize that the limits of freedom which the law allows would be greatly curtailed. People are entitled to hold and to express freely on matters of public interest strong views, views which some of you, or indeed all of you may think are exaggerated, obstinate or prejudiced, provided -- and this the important thing -- that they are views which they honestly hold. The basis of our public life is that the crank, the enthusiast, may say what he honestly thinks just as much as the reasonable man or woman who sits on the jury, and it would be a sad day for freedom of speech in this country if a jury were to apply the test of whether it agrees with the comment instead of applying the true test: was this an opinion, however exaggerated, obstinate or prejudiced, which was honestly held by the writer?

93 I told the jury that, with respect to Ms DiManno, it was not necessary for the comments to be "moderate, or fair, or temperately stated" and that "as long as they are honestly held and based upon true facts then the test of fair comment is met". With respect to the letters to the editor, I instructed the jury that the test was not whether the Toronto Star honestly held the opinions stated by the letter-writers, but rather "whether it was possible for such opinions to be honestly held on the basis of the facts proved". In my view, this charge was very favourable to the position of the defendants. There is case law which supports an interpretation of "fairness" which is more generous to plaintiffs: *Doyle v. Sparrow* (1979), 27 O.R. (2d) 206 (Ont. C.A.). However, Mr. Campbell did not ask that the jury be instructed in accordance with this standard as he felt it was not appropriate on the facts of the case and might only serve to confuse the jury. I think he was right. Given the seriousness of the factual allegations, if the comments made by Ms DiManno were honestly held, then they were not so extreme that the fair comment defence would be negated no matter what standard was applied.

94 If the jury in this case found that Ms DiManno got her facts right, then in my view it cannot be possible on the evidence at trial that they went on to find that she did not honestly hold the views she expressed. Given the charge to the jury on the issue of fair comment, it is unreasonable to conclude that the jury could find the facts to be true but the comments unfair. I therefore consider that the answers to Question 2 and 3 are in conflict. Since the jury awarded damages, it is clear that they found in favour of the plaintiff on at least one of the two questions. Therefore, I conclude that it is the answer to Question #2 which is unreliable.

95 The note attached by the jury to its answers is also significant. The jury recommended that the Toronto Star publish a *correction*. Why would the jury ask the Star to publish a correction of libellous facts if those facts had been found to be true? It does not seem that the request for a correction is meant to refer to the comments in the column, such as "goon", as it would be difficult to "correct" such comments. Surely if the jury was referring only to the comments, they would have requested an apology for having used language which was too extreme, rather than a correction. And yet, the jury appears to have considered requesting an apology but ruled it out and instead recommended that a correction be published.

96 Although the awarding of costs is an exercise of judicial discretion, it is not usual to completely disregard jury findings in determining the appropriate cost award. As I have already stated, I consider this case to be one of those unusual situations in which I would award solicitor and client costs even if the jury's finding of truth were

clear. That being said, there is, in my view, sufficient doubt about what the jury intended by its answer to Question #2 that it would be improper to change an award I would otherwise have made solely because of that answer. In my opinion, I should simply treat the jury's findings as if they had rendered a general verdict in favour of the plaintiff without any specific findings as to truth. In that situation, there would be no clear finding that the facts were true and therefore the jury verdict would not fetter my discretion as to costs.

(b) Are the defamatory statements of fact true?

97 In the event I have erred in awarding solicitor and client costs based on the newspaper coverage of the trial, I have considered whether such an award is warranted based on the defendants' conduct in persisting to assert the truth of the defamatory statements of fact up to and throughout the trial even though those facts are untrue. Obviously such a finding could not be made if the jury answer to Question #2 is treated as being determinative of the issue of truth. However, as I have just stated, I consider the meaning of the jury's answer to this question to be unclear such that the jury verdict should be treated merely as a general verdict in favour of the plaintiff. In the absence of a ruling on truth by the jury, it would be necessary for me to make my own determination as to truth in order to deal with the plaintiff's claim to solicitor and client costs on this basis. As I stated above, if the factual statements made about the plaintiff were untrue, I would consider this to be grounds for an award of solicitor and client costs.

98 In my opinion, the defendants have failed to discharge their onus of proving that the defamatory statements of fact in Ms DiManno's column are true. I have no doubt that Ms DiManno witnessed an incident at Market Square which was troubling to her and in which the plaintiff dealt with Mr. Ryan in a manner which she considered to be unnecessarily violent. It may even be the case that the plaintiff did use more force than was necessary in the circumstances to subdue Mr. Ryan. However, Ms DiManno went far beyond that in her column. She described an incident which began with the plaintiff trailing after Mr. Ryan as he walked towards the central area of the mall, punching him in the back along the way. She then said that the plaintiff threw Mr. Ryan into a headlock, wrestled with him and punched him repeatedly. She said that Mr. Ryan, whom she described as the victim, was not fighting back. Finally, she said that Mr. Ryan headed for the exit with the plaintiff "shoving and smacking him all the way". None of the independent eye witnesses to this incident corroborated Ms DiManno's version of the event. On the contrary, all of the evidence was diametrically opposed to that of Ms DiManno.

99 Mr. Gouveia testified that he had previously escorted Mr. Ryan out of the mall and was returning to get his sleeping bag which had been left behind. He said that Mr. Ryan had followed him back into the mall, although he wasn't aware of that until they reached the central atrium area. I believe Mr. Gouveia's evidence on this point. It had the ring of truth to it. It is also supported by Mr. Kathansamy who testified that he saw Mr. Gouveia walking towards the center of the mall just before the altercation and that Mr. Ryan was following him, not the other way around as described by Ms DiManno. I found Mr. Kathansamy to be a fair and truthful witness. He was not a personal friend of the plaintiff and there was no reason for him to fabricate his testimony. Ms DiManno's evidence that Mr. Gouveia was pushing and shoving Mr. Ryan *into* the mall and towards the atrium also makes no sense. Mr. Ryan had been banned from the mall because of a prior incident of violence. Why would Mr. Gouveia be pushing Mr. Ryan *towards* the center of the mall rather than away from it? I therefore find that Ms DiManno's vivid description of Mr. Gouveia punching Mr. Ryan in the back as he followed Mr. Ryan towards the centre of the mall to be untrue. I find as a fact that it was Mr. Ryan who was following Mr. Gouveia towards the central area of the mall.

100 The evidence with respect to the struggle between Mr. Gouveia and Mr. Ryan in the atrium is less clear. There are inconsistencies in the evidence as to where the two men were standing and the sequence of events.

However, none of the three independent eye witnesses saw Mr. Gouveia punch Mr. Ryan. Only Ms DiManno testified to that fact. Also, all three of the eye witnesses characterized the altercation as being between Mr. Ryan as the aggressor and Mr. Gouveia as the person attacked, rather than the other way around as described by Ms DiManno. Mr. Kathansamy testified that he saw Mr. Ryan jump on Mr. Gouveia at the beginning of the struggle. Mr. Partridge testified that he saw Mr. Ryan punch Mr. Gouveia in the face and in the chest before Mr. Gouveia grabbed him in a head lock and took him to the ground. He said that Mr. Gouveia did not hit back. He also confirmed the plaintiff's evidence that he was the one who called the police and that he did so at the request of the plaintiff during the course of the struggle. Mr. Kim testified that the first thing he saw was Mr. Ryan punching Mr. Gouveia in the face and after that he saw both men struggling on the ground. He said that he went over to intervene because Mr. Ryan is very strong and he was concerned that Mr. Gouveia might get hurt.

101 There were some discrepancies in the details of the eye witnesses accounts of the incident between Mr. Gouveia and Mr. Ryan. However, none of these were material. It is not uncommon for there to be inconsistencies in the evidence of eye witnesses to an incident such as this one. Indeed, if all of the eye witnesses gave identical testimony one would have good reason to wonder about collusion. I am completely satisfied that there was no collusion between these witnesses. The minor variations in their accounts of the incident are easily understandable given the stress of the moment, the general confusion at the time of the struggle and the subsequent passage of time. What is most significant in my view is that the eye witnesses' accounts of the incident corroborate the essence of the plaintiff's evidence that it was Mr. Ryan who was the aggressor and that Mr. Gouveia was attempting to subdue him. This is directly at odds with Ms DiManno's version of the incident. Her version is totally unsupported and directly contradicted by everyone else who saw the event. There is no reason whatsoever for these witnesses to fabricate their evidence. Mr. Gouveia no longer works at Market Square and although all three witnesses thought well of him while he was a security guard there, they are not close friends and have no reason to lie on his behalf. I was impressed with the forthright way each of these gentlemen testified. I am satisfied that each of them was telling the truth to the best of his ability and that, notwithstanding slight variations, this evidence is reliable. I also note that it is clear that it was Mr. Gouveia who sent for the police. This would indeed be an unusual step to take if he had in fact been conducting himself in front of a number of eye witnesses in the manner described by Ms DiManno. Accordingly, I find that Ms DiManno's description of the altercation between Mr. Gouveia and Mr. Ryan was not the truth. It was Mr. Ryan who started the fight and Mr. Gouveia was merely trying to restrain him until the police arrived. I make no finding as to the degree of force used by Mr. Gouveia in this regard or the precise sequence of events that led to Mr. Ryan being put into a headlock by Mr. Gouveia. However, I have no hesitation in concluding that Mr. Gouveia did not pick a fight with Mr. Ryan, he did not seize him and throw him to the ground without reason or provocation, and he did not punch him repeatedly in the head while he had him on the ground. Ms DiManno's characterization of Mr. Ryan as the innocent victim and Mr. Gouveia as the attacker is wrong.

102 The next part of the incident described by Ms DiManno in her column was the departure of Mr. Ryan from the mall. She said that Mr. Ryan was "whimpering" and picking up his duffel bag and heading for the exit and that Mr. Gouveia was "shoving and smacking him all the way". I am satisfied that this simply did not happen. I accept the evidence of Mr. Kim on this point as being truthful and reliable. Mr. Kim said that he intervened in the struggle and tried to convince Mr. Gouveia to let the matter drop and to permit Mr. Ryan to leave the mall without laying charges against him. Mr. Kim said that he personally escorted Mr. Ryan from the mall, while holding Mr. Ryan's arm with one hand and carrying his sleeping bag in the other hand, and that Mr. Gouveia followed them out. Mr. Kim's evidence confirms the plaintiff's version of how Mr. Ryan left the mall. Mr. Kathansamy saw them only briefly as they left the mall but confirmed seeing Mr. Kim, along with Mr. Ryan and Mr. Gouveia, as they walked towards the exit. Ms DiManno testified that she did not see Mr. Kim with Mr. Ryan as he was leaving the mall. I find as a fact that it was Mr. Kim who escorted Mr. Ryan from the premises. Ms DiManno's description of Mr. Gouveia shoving and smacking Mr. Ryan all of the way out of the mall is untrue.

103 The onus is on the defendants to prove that the defamatory statements of fact are true. They have not come

close to discharging that onus. On the contrary, I am fully satisfied on the evidence that the statements of fact are not true. The only evidence supporting the defamatory facts in the column is that of Ms DiManno herself. I recognize that it is possible to accept the word of one witness and reject the contrary evidence of four other witnesses. Corroboration of Ms DiManno's evidence would not be required if I accepted it as reliable and credible. Ms DiManno testified in a very self-assured and earnest manner. It is quite possible that she herself believed that she was telling the truth. However, I simply do not accept that everybody else who saw the incident is lying or mistaken and that only Ms DiManno got it right. I found Mr. Gouveia to be a credible witness and his evidence is substantiated by all the eye witnesses with the exception of Ms DiManno. I note as well that even though the onus for proving truth is on the defendants, the only eye witnesses to testify were called by the plaintiff.

104 The incident occurred on January 20, 1997. Ms DiManno made no notes at the time. It was not until February 8 or 9, 1997 that she decided to write about the incident. She wrote the column on February 9. In the twenty days between the incident and the writing of the article, Ms DiManno did not make any notes and did not attempt to interview any of the witnesses to the incident. She said that during that time she told the story on a number of occasions to friends and colleagues and that she told the story in her neighbourhood bar a few times. Her decision to write about the incident, she said, was motivated by her anger about what happened and what she considered to be her responsibility as a city columnist to be an advocate for the vulnerable, including the homeless. I have no reason to doubt Ms DiManno's motivation and no reason to believe that prior to January 20 she bore any ill will or malice towards Mr. Gouveia. No doubt Ms DiManno saw some part of the incident on January 20th and was troubled by it. However, it is unlikely that she saw the whole thing. For present purposes, I do not need to determine why Ms DiManno got things so wrong in her column. It may have been reckless indifference towards the truth in order to tell a good story, as suggested by counsel for the plaintiff. Possibly, she misinterpreted the part of the incident she saw and this led to the addition of other details which fit with that interpretation but which were not accurate. Or it may be that with the passage of time and with no notes of the event, fuelled by anger and a concern for the plight of the homeless, Ms DiManno came to believe a version of the incident which did not reflect the truth of what actually happened.

105 But whatever the reason for the inaccuracy may have been, I am satisfied that the defamatory statements of fact in the column are simply not true. It is with considerable reluctance that I reach that conclusion. It would appear from the evidence at trial that Ms DiManno has a loyal following of readers and that she is regarded by her peers as having a good reputation for accuracy and integrity. I therefore do not make these factual findings lightly and I recognize the seriousness of such a finding against a journalist. Nevertheless, in my opinion, the evidence is clear. Ms DiManno's story is not true.

106 The defamatory statements made about Mr. Gouveia were very serious in nature. The defendants persisted in asserting the truth of those facts right up to and throughout the trial. The defendants were aware of the evidence to be given by all of the eye witnesses directly contradicting Ms DiManno's version of the events. The defendants were aware of Mr. Ryan's propensity for violence and of his criminal record. In my opinion, these circumstances support an award of solicitor and client costs in the plaintiff's favour, particularly when coupled with the biased coverage of the trial by The Star and the incidents of improper conduct by counsel during the trial to which I referred above.

H. Summary of Findings

107 The defendants failed to plead justification. The rolled-up plea is a plea of fair comment only and does not permit the proof of facts which are themselves defamatory. Therefore, based solely on the defendants' pleading, it would not have been open to the defendants to prove the truth of the defamatory statements of fact in the DiManno

column. However, the case had been conducted throughout as if the truth of the facts was the central issue to be determined by the jury. Counsel for the plaintiff did not raise this issue until all of the evidence was before the jury and both counsel had complete their jury addresses. In these circumstances, a specific question as to the truth of the defamatory statements of fact should be left to the jury.

108 Regardless of the formal pleadings, the defendants had alleged both prior to and during trial that the defamatory facts were true. If the formal plea had been one of justification, then it would be open to the jury to consider the fact that the defendants persisted in alleging truth as a factor aggravating damages. The same consequences apply if the defendants persisted in alleging the truth of defamatory facts in support of a formal plea of fair comment. It is the substance of the matter rather than the form of the pleading which governs.

109 Ordinarily, the fact that the column did not specifically name the plaintiff could be a mitigating factor reducing the damages to which the defendants might otherwise be exposed. However, the defendants cannot take advantage of a factor limiting damages when they have themselves destroyed the benefit of any such advantage by publishing daily reports of the trial proceedings and naming the plaintiff personally in all of them. Therefore, in considering the extent of the publication of the libel for the purposes of assessing damages, it was appropriate for the jury to consider the fact that the plaintiff's name had been subsequently published by the defendants.

110 It is not the finction of a trial judge to determine whether a jury finding is perverse. Although the trial judge may determine whether a jury has given conflicting answers, the remedy for this is to order a new trial, which was not sought by either party. In any event, there was no need to determine if the answers were conflicting in order to register a verdict. Even if the jury's answer with respect to truth could be seen as conflicting with its answer with respect to fair comment, there is no uncertainty about the amount of the judgment. Since it is clear that the jury intended to award $5000.00 in damages, it is not necessary to determine whether the basis for the award is because the defamatory statements of fact are true or because the comments are unfair, or both. In any of these circumstances, the ultimate judgment is the same. The appropriate disposition in this situation is simply to award judgment to the plaintiff for $5000.00.

111 This is not an appropriate case to deny costs to the plaintiff, not to award costs on a small claims court scale. It was reasonable for the plaintiff to bring his action in this court. There was no basis for the defendants' argument that there was any misconduct by counsel for the plaintiff, much less any misconduct which would disentitle the plaintiff to costs.

112 The conduct of the defendants during the trial was sufficiently reprehensible to warrant an award of solicitor and client costs to the plaintiff. The daily newspaper reports published by the Toronto Star were inaccurate, unfair to the plaintiff, and biased in favour of the defendants' position in the lawsuit. This conduct was egregious and warrants an award of solicitor and client costs, in and of its self. In addition, there was some improper conduct by counsel for the defendants in his closing address to the jury. Since, I have found this misconduct to be sufficient to support a solicitor and client cost award, it is not necessary to consider the plaintiff's submission that the plaintiff is entitled to solicitor and client costs because of the defendants' conduct in persisting to allege the truth of defamatory facts which were untrue.

113 It is not necessary for me to determine whether the jury's answer to Question #2 is clear. Even if the jury made a clear determination that the defamatory statements of fact are true, I would still award solicitor and client costs to the plaintiff.

114 The settlement offer made by the defendants was less favourable than the judgment obtained by the plaintiff at trial and therefore has no impact on costs. In determining the favourability of a settlement offer in a libel action it is relevant to consider that the defendants would not publish an apology or retraction and made their settlement offer conditional upon confidentiality.

115 Alternatively, if it would be an error to award solicitor and client costs in the face of a clear jury finding that the facts in the column were true, I have considered whether the jury's answer to Question #2 is clear. I have determined that when considered in light of the answer to Question #3 (re fair comment), my charge to the jury on the issue of fair comment, and the note recommending a correction, the jury's answer to Question #2 is probably a mistake. At the very least, it is unclear. It is certainly not sufficiently clear to operate as a fetter on my discretion as to costs so as to change the solicitor and client cost award that I otherwise would have made.

116 In the further alternative, if I have erred in awarding solicitor and client costs based solely on the newspaper coverage of the trial, I have considered the plaintiff's argument that such an award is also justified in light of the defendants' persistent allegation of the truth of the defamatory statements made about the plaintiff. Since I consider the jury's answer to Question #2 to be unclear, for these purposes I would treat the jury's answers as a general verdict in favour of the plaintiff. It would then be necessary to make a determination as to the truth of the defamatory facts. Based on the evidence at trial, I find that the defendants have not discharged their onus of proving the truth of the defamatory facts in Ms DiManno's column. Further, the conduct of the defendants in continuing to assert the truth of these false statements about the plaintiff is sufficiently serious in all of the circumstances to warrant an award of solicitor and client costs, particularly when considered together with the other factors I have noted.

H. Judgment

117 The plaintiff shall have judgment for $5000.00 together with interest from February 10, 1997 and costs. As against the defendant Toronto Star Newspapers Ltd., those costs shall be on a solicitor and client basis.

Action allowed; order accordingly.

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