THE HONOURABLE MR. JUSTICE R.T.P. GRAVELY

The Claim

[1] The plaintiff, Gates was president of Local 199 of the National Automobile Aerospace and Agricultural Implement Worker's Union of Canada (C.A.W.) at St. Catharines. The plaintiff, Martin was the vice-president. This action for libel is as a result of an article appearing in the February 5, 2000 edition of the Standard, a newspaper widely read in the St. Catharines area.

[2] The front-page article showed photographs of the plaintiff, Gates and the defendant, Harold Stubbert and illustrated a harassment policy being torn. The headline was "Did C.A.W. Practice What It Preaches?" and the sub-headline; "Union denies charge Local 199 president got easy treatment in harassment case". The article was authored by the defendant, Currie.

[3] The plaintiffs' complaints lie in two main areas. The first is that the article states, either directly or by inference, that Gates sexually harassed the defendant, Noreen Stubbert, that he got exceptionally lenient treatment because of his position as president of Local 199 and his friendly contacts with the National Union, that he had apologized for the sexual harassment but the apology was inadequate and insincere and that this was all contrary to the union's zero tolerance policy on sexual harassment which mandated a detailed investigation. Martin is said to be involved in the mishandling of the sexual harassment issue. The second is that the plaintiffs mistreated their office staff and Martin openly timed women during their washroom breaks.

[4] The action has been settled against all defendants except Noreen Stubbert, Harold Stubbert, Barb Furlanetto and Geri Sanson, all of whom are said to have been sources for Currie's article.

Factual Background

[5] An unfortunate chain of events led to this litigation.

[6] Gates and Martin gained office in the Local 199 elections of 1997. The defendant, Harold Stubbert, has been active in union politics for many years. He lost the vice-presidential race to Martin in that election. Noreen Stubbert is Harold Stubbert's wife and was employed as a secretary in the Local 199 office. She performed secretarial duties for Gates, Martin and Al Bratton, the financial secretary. The clerical staff are members of Local 343 of the Office and Professional Employees International Union, AFL-CIO Canadian Labour Congress (O.P.E.I.U.). Noreen Stubbert was the Representative for Local 343.

[7] Following the election of 1997 some tension developed between the staff and the incoming executive. Bob Dury, the National Representative of O.P.E.I.U., told Noreen Stubbert to keep a day-by-day diary which would reflect any difficulties with the new management.

[8] In October of 1999 the Collective Agreement between Local 343 of O.P.E.I.U. for the employees and C.A.W. Local 199 as the employer, came up for renewal. Having had no prior experience in these kinds of negotiations, Noreen Stubbert asked Dury to join her in the bargaining session on November 9, 1999. Present were Dury, Noreen Stubbert and Gail Ingwall representing the employees and Gates and Martin for C.A.W. Local 199, the employer.

[9] Local 199 had a policy that it would match for its clerical employees the same gains it attained with its employer, General Motors of Canada. Local 199 had recently obtained a wage increase of three percent in each of three years. It appears that everyone going into the meeting of November 22, with the exception of Dury, expected quick agreement on three percent. Gates, Martin, Noreen Stubbert and Ingwall were taken by surprise when Dury insisted on five percent. The session broke up with no agreement. Gates said he would have to bring the financial secretary Al Bratton into the picture before he could negotiate further.

[10] Noreen Stubbert said that following the meeting Gates appeared to be annoyed with her and slammed down a file on her desk. (Presumably Gates would not have

known that she was at odds with Dury about the amount claimed and that all the clerical staff were perfectly content with three percent).

The Conversation Between Gates and Furlanetto

[11] The defendant, Furlanetto, was a secretary at the national office of the CAW in St. Catharines. On November 9 and after the conclusion of the collective bargaining session, Gates was in the national office on union business when he fell into conversation with Furlanetto.

[12] While Gates and Furlanetto differ in their recollection of the conversation, they agree that they discussed the bargaining session and the way the staff were treated at the Local 199 hall. They agree that Gates said he had inherited many problems with the staff and particularly with Noreen Stubbert. It appears their conversation did not end amicably. Gates said he told Furlanetto to "stay out of the affairs of Local 199." Furlanetto's evidence was that Gates told her he was glad he was not working with her and she told him she was happy she was not working at 199.

[13] The critical difference between the two versions of the conversation is that, according to Furlanetto, Gates, in the course of his criticism of Noreen Stubbert, said that she "had an affair" with someone who worked on the Local 199 newspaper as well as Harold Stubbert before he and Noreen were married. Gates has always denied having said anything of this nature. On his behalf it was argued that when Gates had warned Furlanetto to "stay out of the affairs of Local 199", it was misinterpreted as a suggestion that Noreen had had "affairs".

[14] Furlanetto made notes of her conversation with Gates. She said this was done shortly after his visit. She added some notes later on in the afternoon and to those notes she appended later some references to November 12, 1999 and January 5, 2000. Mr. Waldmann, in extensive argument on the facts surrounding the Furlanetto conversation with Gates, urged that Gates' version should be accepted. He suggested the Furlanetto notes were not made on November 9 and investigation of the files at Local 199 showed that Furlanetto was in error while Gates was correct as to the reason

for his attendance at the national office. There was further evidence from which inferences of this nature should be drawn, including missing documents in the Local 199 offices, the alteration of Furlanetto's notes as they were copied, the failure to produce the notes until the Examination for Discovery, conflict of Furlanetto's notes with Noreen Stubbert's notes, inconsistencies between the notes and Furlanetto's evidence at trial and the inaccurate complaint letter of Harold Stubbert on November 9, 1999. This and much of the other evidence should lead to the inference that the notes were not made on November 9, but were probably done later with the assistance of Noreen Stubbert. Mr. Waldmann argues that while Gates made no notes, his evidence has been consistent since the beginning, namely that he said nothing to Furlanetto about Noreen Stubbert having had affairs and, in fact, had no knowledge about her personal life.

[15] I have not attempted to reproduce here every point made by Mr. Waldmann on this factual issue. I have reviewed all the evidence and I am satisfied that Furlanetto's recollection of the conversation is generally superior to that of Gates, that her evidence and her notes are substantially accurate and that she was correctly quoted in the article in the Standard.

Noreen Stubbert's Grievance and Harold Stubbert's Charge Against Gates

[16] When Gates left her office on November 9, Furlanetto telephoned Noreen Stubbert and related to her what Gates had said about her. Later in the day Furlanetto sent her a copy of the notes. Noreen Stubbert was extremely upset. She said that Gates' comments about her work performance did not bother her, but the reference to her "affairs" did. She said she was so distressed because the earlier relationship was something she was terribly ashamed of. It had happened eight years earlier. She had explained it all to her husband and she was totally shocked when it was referred to by Gates. While she acknowledged the one earlier relationship, she said that she did not have an "affair" with Harold Stubbert before they were married.

[17] When Gates heard of Noreen Stubbert's distress, he sought her out in the staff room and told her that Furlanetto was in error about this portion of their discussion.

[18] Noreen Stubbert consulted Dury and he told her the matter should be dealt with by a grievance. Dury prepared the grievance and it was signed by Noreen Stubbert on November 10. The grievance was on O.P.E.I.U. letterhead and was as follows:

GRIEVANCE – FORM

EMPLOYER: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) Local 199.

DATE: November 10, 1999

GRIEVOR: Noreen Stubbert

GRIEVANCE #: 11343-1

CLAIM: The Employer is in violation of the Agreement regarding discrimination and harassment based on sex. Comments, attitudes and innuendos made that are inappropriate and threatening, creating an unhealthy and unsafe working environment.

REDRESS: The employer is to ensure a healthy and safe working environment free from discrimination and harassment.

A written and verbal apology is to be made and acknowledgement of that apology by the Employer that they violated the Agreement regarding the claim.

Any other remedy sought by the Grievor to be appropriate in resolving and settling this grievance.

Noreen Stubbert

Grievor

[19] Dury contacted Gates and a meeting to discuss the grievance was organized for November 22.

[20] Meanwhile on November 9 the defendant, Harold Stubbert, chose to involve himself in the issue and wrote to the president of CAW Canada as follows:

> November 9, 1999
>
> Mr. Buzz Hargrove
> President, CAW Canada
> 205 Placer Court
> Willowdale, ONT.
> M2H 3H9
>
> Dear Brother Hargrove:
>
> I feel that you should be aware of a serious incident that occurred on November 9, 1999 at the Local 199 CAW Hall. Several members of the bargaining committee witnessed one of the secretaries crying uncontrollably because of a verbal sexual harassment committed against her by President Wayne Gates. As a result of this harassment, the employee is off work and under doctor's care. Her union has a grievance in the system and no doubt you will hear about it.
>
> This type of behaviour **would infuriate me under any circumstance**, but in this case **the person involved is my wife!** Certainly you can understand that I want justice and want it swiftly.
>
> I trust that you will investigate this matter and that I will hear from you soon!
>
> In solidarity
>
> Harold Stubbert
> 169 Lockhart Dr.
> St. Catharines, ONT
> L2T 1W7
> (905) 685-1346

[21] It is clear that Harold Stubbert had some of his facts wrong when he wrote the letter.

[22] On November 22 the grievance meeting was held. Present were Peter Kennedy assistant to the secretary-treasurer of the national office of CAW, Dury, Noreen Stubbert and Gates. The purpose of the meeting was to try and resolve the complaint to the satisfaction of all the parties involved.

[23] The most reliable account of this meeting, in my view, comes from Kennedy. He said there was a very wide-ranging discussion at the meeting including general allegations about a poisoned environment in the workplace, staff being watched, banging of files and so on. He said that Noreen Stubbert said she was not intimidated or harassed but she did feel uncomfortable. Dury had with him what he said was a written affidavit from Furlanetto outlining the allegations but would not give a copy to anyone else because he said he had no authority from Furlanetto to do so. Kennedy said he suggested to Dury that Furlanetto should come forward and give her side and this was declined by Dury. He said O.P.E.I.U. was looking for an apology while he was offering a full in-depth investigation not only of this harassment allegation but also of all the allegations in regard to the poisoned environment in the workplace. Gates was opposed to giving an apology for something he denied doing and was also very concerned about confidentiality. Eventually, Kennedy said, it was agreed that the parties would "take a look" at an apology of some kind. If the form of an apology could be agreed upon, then the grievance would be withdrawn. Everything was to remain confidential. When asked about CAW sexual harassment policies, he said an investigation would depend on the nature and seriousness of the incident and if the matter could be settled to the satisfaction of the victim it would normally not be necessary to investigate further.

[24] Dury said he thought the investigation offered was an investigation into the truth of whether Noreen Stubbert had had the alleged "affairs". He refused this investigation because it would serve no purpose. He is clearly wrong in this recollection. Noreen Stubbert has always frankly admitted her one romantic involvement and has only denied that she had a sexual relationship with Harold Stubbert prior to their marriage. Noreen Stubbert said she believed the offer for an investigation was just for an office meeting.

She had been through such a meeting in the past which she found not particularly useful and she did not want her personal life brought up in an office meeting. I am satisfied that the wide-ranging investigation spoken of by Kennedy was, in fact, offered and turned down by Dury and Noreen Stubbert. I am satisfied also that everyone involved in the meeting agreed that the discussions were confidential.

[25] On November 30 there was a further bargaining meeting with reference to the new contract. Agreement was quickly reached in all areas including a three percent increase. At the meeting, Local 199 offered to include the CAW harassment policy language and complaint procedure in the new agreement. O.P.E.I.U. turned down the offer as not being necessary.

[26] On December 2 Kennedy wrote to Noreen Stubbert:

> Dear Sister Stubbert:
>
> I write as a follow up to our meeting on November 22, 1999 regarding the harassment grievance filed on your behalf by OPEIU Local 343. As you know, a proposal was made at that time in an effort to resolve this matter despite the fact that the specifics of the allegations were not made available to CAW. To this point, I am not aware of any response to that proposal and am, therefore, constrained from any follow-up action which may be necessary.
>
> It is our desire to have this matter resolved as quickly as possible.
>
> In solidarity,
>
> PETER KENNEDY
> Assistant to the
> Secretary-Treasurer
>
> cc. B. Dury
> W. Gates
> PK/sgopeiu343/Stubbert

[27] Dury, on December 3, faxed to Gates a draft form of apology under cover of the following:

CONFIDENTIAL

NOTE: The following letter signed by you is what Noreen would expect to resolve the grievance.

It is further understood that the statement of the grievance would be confidential and that the letter would not be made public.

If you have any questions please contact me at 416 703-4448

[28] Thereafter, there were numbers of letters back and forth with different drafts of an apology and on December 9 Gates signed as follows:

Dear Noreen:

On November 9, 1999 I had a third-party conversation with an employee of the National Office. Some of my comments to this individual about you were viewed as unsuitable.

If my comments to this third-party at the National Office caused any anguish or stress, I apologize.

I believe that I have and always will treat the membership who elected me President, and all support staff with respect and dignity.

Yours truly,

Wayne Gates,
President,
CAW, Local 199

[29] On the same day, December 9, Dury advised Gates that the grievance was withdrawn without prejudice.

[30] On December 12 Harold Stubbert wrote to the President of CAW Canada. He said he was angry because it took so long to settle the grievance, that his wife

"accepted a less than satisfactory settlement to put closure to the issue", that there was no question as to Gates guilt and in keeping with the CAW zero tolerance policy he should be removed from office.

[31] On December 16 the defendant Currie faxed a message to Harold Stubbert:

> Hello Harold,
>
> I wonder if you would contact me as soon as possible. I have some questions about a tip I received this morning claiming that Wayne Gates has signed documents admitting to the sexual harassment of your spouse. I have been told this documentation has been forwarded to the CAW's national office. As you can appreciate, this is a very serious charge and I would be interested in talking with you and your wife about it. I am well versed in sexual harassment issues, having covered a tragic case that lasted more than two years involving a woman who was being sexually harassed and eventually killed by her obsessive boss at a Sears Canada store in Chatham. Of course, I am willing to protect the identity of any victim and I can certainly understand the reasons why she might be reluctant to speak out. But if this is true, I do think it would be something important to write about. We can discuss it further when you call me at 684-7251 ext. 251. Thank you.

[32] On December 17 Harold Stubbert wrote to the executive board of CAW Local 199 charging Gates with "conduct unbecoming a member" and requesting that he be removed from office immediately. He included a copy of the Furlanetto notes. On January 4, 2000 the executive board gave their decision on the charge:

> The findings of the board are that the charge is "improper" as stated in Article 24, section 3. Due to a resolve between the parties concerned. (OPEIU National rep, grievor). WWP'd.

[33] The copies of the Furlanetto notes that were distributed to the members of the executive board at the meeting were taken back and shredded in keeping with the policy of confidentiality. Nonetheless, details of this meeting were disclosed to the Standard.

[34] Harold Stubbert's appeal to the President from the findings of the executive board was dismissed. No appeal was taken from that decision.

Genesis of the Article in The Standard

[35] Harold Stubbert initially refused to participate in Currie's article but he said he agreed to do so when he felt he was getting nowhere with his request for action from his union. There were telephone conversations with Currie which were taped, a meeting at Harold Stubbert's home on December 17 and a meeting at the offices of the Standard where Harold Stubbert handed over some documentation. Most of the factual material in the article came from Harold Stubbert.

[36] Noreen Stubbert participated reluctantly. She shared whatever information she had with her husband, but she felt she was no longer involved, she had settled and that was the end of it as far as she was concerned. When she heard that the reporter had spoken to Gates she agreed to be interviewed by Currie.

Geri Sanson

[37] The defendant, Sanson is a Toronto lawyer specializing in human rights. Currie interviewed her by telephone and according to her, accurately reproduced her comments in the last eight paragraphs in the article in the Standard. The gist of her comments was that even though there was a grievance which was settled by an apology there should still have been an investigation by C.A.W. on the issue of sexual harassment.

Analysis

[38] Mr. Campbell, on behalf of Furlanetto, Harold Stubbert and Noreen Stubbert, concedes that those statements made by them to the extent that they were correctly reproduced in the article, were defamatory. For Furlanetto he raises the defence of justification and for Harold Stubbert and Noreen Stubbert the three defences of

justification, fair comment and qualified privilege. Mr. Orr raises the same three defences on behalf of Sanson.

Barb Furlanetto

Justification

[39] If the defendant establishes that defamatory facts are substantially true, the justification defence is established. It is the "sting" of the published words that must be justified. A proof of literal truth of the words is not sufficient if defamatory inferences may be drawn from them. The defendant has to prove not only that the facts are truly stated but also, that any comments upon them are correct.[1]

[40] Section 22 of the *Libel and Slander Act*[2] provides:

> A defense of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

[41] I have found that Furlanetto correctly stated the substance of Gates' remarks to her. She said nothing about Martin. The claim against her must be dismissed.

Harold Stubbert – Re: Gates

Justification

[42] The sting of Harold Stubbert's words is that Gates may have been guilty of sexual harassment but because of his position in the union, he received "easy treatment," that there was no investigation as required by union policy and the

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[1] Brown R., *Defamation Law: A. Primer*, Thompson Carswell, pp 95-101.
Sutherland v. Stopes, [1925] A.C. 47.
[2] R.S.O. 1980, c.L.12

appropriate inference is that there was a "cover-up" as Harold Stubbert had specifically informed Currie.

[43] Even giving the broadest of scope to s.22, the justification defence has not been established. I can find nothing improper in the way the grievance procedure was conducted or any evidence of special treatment being given to Gates in the processing of the grievance, the settling of it by the agreed-upon letter of apology or in the manner the executive board or the national union dealt with Harold Stubbert's charge that Gates was guilty of "conduct unbecoming a member."

[44] At the grievance meeting, O.P.E.I.U. was offered and refused a full in-depth investigation and a week later, turned down the offer to include the C.A.W. harassment policy language and complaint procedure in their new agreement.

[45] Noreen Stubbert and O.P.E.I.U. were insisting upon a written apology. The form of the apology was negotiated and settled between the parties and the grievance was withdrawn.

[46] In light of settlement of the grievance, the decision of the local executive was appropriate. No inference of "special treatment" or "cover-up" can properly be read into it, nor into the fact that the findings of the executive board were upheld on appeal.

[47] To the extent that it might be inferred that Gates was involved in the timing of washroom breaks, the actual facts do not support that inference.

[48] The defence of justification fails.

Fair Comment

[49] Anyone may make honest and fair comment upon true facts on a matter of public interest provided it is done without malice.[3] The facts relied upon for the comment must

[3] *Defamation Law: A Primer* supra, p.169

be spelled out with enough clarity to enable the reader to link the comment to the particular fact. "Any matter which does not indicate with reasonable clarity that it purports to be comment and not statement of fact cannot be protected by the plea of fair comment." [4]

[50] Section 23 of the *Libel and Slander Act*[5], provides:

> A defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

[51] It is not necessary to canvass all the requirements of the defence since the essential facts communicated by Harold Stubbert were untrue. This defence therefore fails.

Qualified Privilege

[52] For public policy reasons there are occasions where, in addition to being able to make fair comment on true facts and although absolute privilege may not exist, a person may make defamatory statements which are untrue.

[53] The privilege attaches to the occasion and occurs when there are reciprocal duties or interests sufficient to trigger the public interest in disclosure.

[54] The privilege is defeated if the dominant motive for publishing the statement is actual or express malice or if the limits of the duty or interest have been exceeded.[6]

[55] In ***Hill v. The Church of Scientology***[7] Cory J. quoted with approval the statement of Lord Atkinson in ***Adam v. Ward***[8]:

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[4] *Leenen v. Canadian Broadcasting Corp.* (2000), 48 O.R. (3d) 656 (S.C.J.) at 699, additional reasons at (2000), 2000 CarswellOnt 3327 (S.C.J.), affirmed (2001), 6 C.C.L.T. (3d) 97, 2001 CarswellOnt 2011, [2001] O.J. No. 229, 54 O.R. (3d) 612, 147 O.A.C. 317 (C.A.), leave to appeal refused (2002), 2002 CarswellOnt 374, 2002 CarswellOnt 375 (S.C.C.).

[5] R.S.O. 1990, c.L.12

[6] *Hill v. The Church of Scientology*, (1995), 126 D.L.R. 4th, 129 (S.C.C.) at p.171

[7] *Hill v. The Church of Scientology*, supra

> ...a privileged occasion is...an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

[56] Counsel argues on behalf of Harold Stubbert that C.A.W. policy requires members to speak out on sexual harassment issues and in circumstances where the union is not investigating the sexual harassment complaint, then, "going public" is the proper exercise of the duty. He also suggests that Harold Stubbert was required to speak up in defence of his wife.

[57] Counsel relies on ***Campbell v. Jones***[9]. Lawyers held a press conference in which they criticized the conduct of police officers and made allegations of racism. The *Handbook for Lawyers in Nova Scotia* 1990 imposed a series of duties on lawyers among which was "to encourage public respect for justice and to uphold and try to improve the administration of justice" and "...the lawyer should not hesitate to speak out against an injustice."

[58] Roscoe J.A. said, at p.25, "While I agree that not all public statements made by a lawyer are clothed in privilege upon merely the invocation of the duty to improve the administration of justice, a lawyer faced with a patent injustice, such as the violation of her client's Charter rights by law enforcement officers, has a substantial and compelling duty to ensure such injustice is remedied in an effective and timely manner. Such duty may well provide a basis for qualified privilege." The Court also held that publication to the world at large does not necessarily defeat the claim.

[59] While counsel argues that ***Campbell*** loosens the test of the right and interest to speak publicly, I am not satisfied, at least in the context of the facts here, that is so. The decision of the majority in ***Campbell*** turned on the various *Charter* rights found to have been engaged by the particular facts of that case. *Charter* values were also canvassed extensively in ***Hill***. In discussing the balance between freedom of expression and

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[8] *Adam v. Ward*, [1917] A.C. 309 (House of Lords) at p.334

[9] *Campbell v. Jones*, [2002] N.S.J. No. 450 (N.S.C.A.) Leave to appeal refused [2002] S.C.C.A. No. 543.

reputation, Cory J. reviewed the traditional common law in the context of the *Charter* and said at p. 170:

> In conclusion, in its application to the parties in this action, the common law of defamation complies with the underlying values of the *Charter* and there is no need to amend or alter it.

[60] In ***Campbell***, Roscoe J.A. quoted extensively from the principles set out in ***Hill***, reaffirmed the requirements of reciprocal duty and interest and concluded that in the circumstances the appellants had a duty to speak about events at the school, complaints filed against the respondent and *Charter* breaches they reasonably understood had taken place and that the members of the public in attendance at the meeting had a reciprocal interest in hearing about the exercise of the authority of the police in a neighbourhood school. The Court concluded (p.30), "In the whole context including the *Charter* rights and values implicated, the previous press coverage and the resulting community interest in the matter and given the position of the appellants as counsel for the girls, the occasion ought to have the protection afforded by the defence of qualified privilege."

[61] In ***Hill***, Cory J. said at p.158, "There can be no doubt that in libel cases the twin values of reputation and freedom of expression will clash." He went on to explain how those two opposing values must be balanced in the context of the facts at trial and in discussing the value generally to society of freedom of expression and reputation, he said at p.159,

> Certainly, defamatory statements are very tenuously related to the core values which underlie s.2(b). They are inimical to the search for truth. False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society.

[62] While acknowledging the critical importance of the *Charter* right of freedom of expression, Cory J. commented extensively on the value of the reputation of the individual:

At p.160:

> The other value to be balanced in a defamation action is the protection of the reputation of the individual. Although much has very properly been said and written about the importance of freedom of expression, little has been written of the importance of reputation. Yet, to most people, their good reputation is to be cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws.

And at p.164:

> The protection of a person's reputation is indeed worthy of protection in our democratic society and must be carefully balanced against the equally important right of freedom of expression.

[63] I conclude that, in the balancing exercise, the *Charter* value of freedom of expression is to be given no more weight in principle than the protection of the reputation of the individual.

[64] There is no suggestion in ***Hill*** or in ***Campbell*** that an organization purporting to impose duties on its members to speak up may thereby provide them with a licence to propagate untruths. Those obligations to an organization or to society can often be met by honest comment upon true facts. In any event, to create the privilege, even a legitimate duty to speak up is insufficient, there must also be a corresponding interest or duty on the receiver of the information.

[65] The St. Catharines Standard is a general interest newspaper widely read in St. Catharines and the surrounding area. In order to establish that the publication occurred on an occasion of qualified privilege, the defendant must show that:

1. Harold Stubbert had a duty or interest to communicate his information to the readers of the St. Catharines Standard;

2. the readers had an interest or duty in receiving the information, and

3. the reciprocal duties and interests were of sufficient importance that they outweighed the need to protect the reputation of the plaintiffs.

[66] If those three points are established by Harold Stubbert then the defence also may fail if the plaintiffs prove malice.

[67] It is always open to a defendant to show reciprocity of duties or interests sufficient to raise a public interest in disclosure even if the disclosure may turn out to be false and defamatory. But, in light of all the circumstances here I cannot see what value it would be to the readers of the Standard to receive untrue and defamatory comments from Harold Stubbert about employer/employee relationships at the Local 199 office and in particular, how Noreen Stubbert's grievance was dealt with. Nor can I see any basis upon which it would be the duty of Standard readers to receive such information, or that the occasion generated any legitimate interest or obligation on the part of Harold Stubbert to supply it. Even if these facts were capable of establishing some degree of value to Standard readers and some reciprocal legitimate interest in Harold Stubbert in conveying that information, the value of the information published is slight compared to the damage to reputation of the plaintiffs.

[68] In illustrating what is meant by the word "interest," Cunningham J. in ***Leenan v. Canadian Broadcasting Corporation et al***[10] said that a CBC television program was "of public interest" but not "in the public interest."

[69] Similarly, the statements made by Harold Stubbert reported in the Standard may have been "of interest" to its readers because of the suggestion of scandal within the union and conflict between Harold Stubbert and Gates. Martin said he and Gates met with the defendants, Currie and Firby of the Standard and when Gates asked why they were not reporting on important issues in G.M. such as job losses rather than on conflicts within the union, Firby's reply was "This stuff is sensational and it's sensationalism that sells newspapers." If Harold Stubbert's statements were of interest

[10] *Leenan v. Canadian Broadcasting Corporation et al*, supra at p.697.

to readers of the Standard, the statements affected the reader's interests only minimally, if at all. I find that qualified privilege did not attach to this occasion.

[70] All counsel tell me that the state of the law on qualified privilege is not clear. In the event that my reading of it is wrong, I will deal with malice. If qualified privilege ever attached to this occasion, it was lost by malice. Malice is not confined to spite or ill will. It includes any indirect motive or ulterior purpose that conflicts with the sense of duty, or the mutual interest which the occasion created. Malice is not necessarily present because a defendant is annoyed or dislikes the plaintiff or is indignant and resentful. It is the defendant's primary or predominant motive that is determinative.[11]

[71] It is not entirely clear what motive Harold Stubbert had in mind when he participated in the article in the Standard.

[72] In his letters to the president of C.A.W. Canada he expressed anger for the length of time it had taken to complete the grievance process and the effect this had on his wife and was asking that Gates be fired. Those were the points, he said, he wished to take up with Currie for the purpose of publication. He said also he felt obliged to challenge the national leadership to adhere to the sexual harassment policy, that he was infuriated about what happened, that someone had to be made accountable and when the union turned him down he decided to proceed to publication.

[73] In the telephone conversation with Currie on January 27th, 2000, the following exchange occurred:

> HAROLD S.: But, it wasn't, and I guess I had a stubborn nature. And my wife and I talked about it, because, and I'll be honest with you, I'll be honest with you, I mean if it hadn't of been for doing this, I probably would have killed the little son of a bitch.
>
> CURRIE: Hum.

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[11] *Hill v. The Church of Scientology*, supra, p.171;
Cherneskey v. Armadale Publishers Ltd. (1978), 90 D.L.R. (3d), 321, [1979] 1 S.C.R. 1067
Brown R. *Defamation Law: A Primer*, *supra* at p.188-191

HAROLD S.: Now I don't want you print that, but that, but that's my true feeling.

CURRIE: Yes.

HAROLD S.: But, so, what do I, what do I do? I have to deal with it because I feel that the, the CAW has a policy, and this is all about the policy and how the CAW has, it's not even about what happened...

CURRIE: It's not just about, it's not just about policy and politics, is it? It's, it's also about supporting your wife, isn't it at the core of it?

HAROLD S.: Absolutely. Absolutely. I mean, how...

CURRIE: Isn't that what you're saying?

HAROLD S.: I said to Hargrove in Toronto, I said, 'listen, how would you like it if this was your girlfriend? And his response to me was, 'Harold, don't go there."

[74] If Harold Stubbert felt he had a duty to expose the failure of his union's sexual harassment policy, it appears that other motives were more actively involved in his decision to publish, the predominant one being anger at Gates and the desire to have him punished for his conduct towards Noreen Stubbert. If he had been sincere in wishing to influence union policy on sexual harassment, he would have known from his lengthy experience in union politics that there were more effective methods of accomplishing this than going to the St. Catharines Standard. While he may have felt that he should not utilize his website for this purpose, there was a union newspaper to which he had regularly contributed in the past, there were union meetings and a pending election. All of these would have provided viable opportunities to influence union policy. I am satisfied that malice has been established.

[75] The defence of qualified privilege fails.

Harold Stubbert – Re: Martin

Justification

[76] Based on information from his wife, Harold Stubbert told Currie that Martin timed female staff during their washroom breaks. The defendants called witnesses who said Martin frequently came out of his office and looked at his watch and they believed he was timing washroom breaks.

[77] I have no hesitation in accepting Martin's evidence that it was not his practice to time washroom breaks and had never done so.

[78] There is no basis for the defence of justification.

Fair Comment

[79] There are no true facts to support this defence.

Qualified Privilege

[80] The facts do not establish the reciprocal duty or interest that would attach qualified privilege to the occasion and any duty or interest in communicating or receiving these untrue facts is of minimal importance in the context of the damage to the plaintiffs.

Malice

[81] Martin and Harold Stubbert were long time political opponents. Stubbert had hostile sentiments towards Martin and called him a "slime." Martin and Gates were associated with the alleged maltreatment of Noreen Stubbert. It is probable that the primary motive Harold Stubbert had in his communications about Martin was

punishment of Martin and Gates for their treatment of Noreen Stubbert. Harold Stubbert would know that going to the Standard was not the effective way of improving working conditions at the Local 199 office. Had the defence of qualified privilege been established, it would have been lost by malice.

Noreen Stubbert – Re: Gates

[82] Mr. Campbell admits that Noreen Stubbert's statements on the subject of C.A.W.'s handling of the sexual harassment grievance were correctly quoted and were defamatory but argues that the words are justified or are fair comment.

[83] The essential facts Noreen Stubbert communicated were incorrect, and, in addition, although initially reluctant to become involved, she cooperated with her husband in the information he supplied to Currie. Much of that information came from her. She is therefore a party to the statements made by Harold Stubbert and is jointly responsible with him for their publication.[12] The substance of the statements was untrue. Justification and fair comment do not provide a defence.

[84] As to qualified privilege, Mr. Campbell takes the position that not only was she responding to her duty to speak out, but she was also defending her own self-interest. As with Harold Stubbert, I find that the reciprocal duty and interest balance has not been established. There was no duty or interest in Noreen Stubbert to communicate untrue and defamatory comments to the readers of the Standard, nor was there any reciprocal duty or interest in the readers of the Standard to receive those statements. As to the argument that Noreen Stubbert had a duty to speak up in her own self-interest, that was not the case on the facts. She had settled her grievance and had treated the issue as closed. Currie and Harold Stubbert persuaded her to participate in the article in the Standard. She had no realistic self-interest. Even if there were some minimal reciprocal interests and duties, the value of the published information was substantially

[12] *Hill v. The Church of Scientology*, supra, p.179

overbalanced by the damage to reputation of the plaintiffs. The facts do not support the defence of qualified privilege.

Malice

[85] Again, it is perhaps useful that I deal with the issue of malice. The plaintiffs have not established malice on the part of Noreen Stubbert. I do not think that spite or ill will was a significant motive on her part, she was not seeking revenge or punishment nor was she reckless about her facts. I accept her evidence that when she found out that the article was going to be published, she wanted her side of the story to be reported accurately. She felt also that it would clear the air of many ill-founded rumours, for example, that Gates had been guilty of rape.

[86] Had the defence of qualified privilege applied here it would not have been lost by reason of malice.

Noreen Stubbert – Re: Martin

[87] Noreen Stubbert participated in the publication of the untrue facts about Martin and there is no basis for the defence of justification or fair comment. Nor do these facts pass the duty-interest test to give rise to qualified privilege. Had the occasion properly generated the defence of qualified privilege, it would not have been lost by reason of malice.

Geri Sanson

[88] Sanson has pursued a career in human rights law including issues of sexual harassment. She said she knew Currie from the past, respected his work and believed him to be accurate and trustworthy. She intended that comments she made to him be

published in the article in the Standard because the article dealt with what she believed to be important issues about sexual harassment.

Remarks Defamatory of the Plaintiffs?

[89] Mr. Orr argues that Sanson's comments are not defamatory of the plaintiffs, that they have very little to do with the bulk of the facts or "sting" present in the entire article, that Sanson is not responsible for the way Currie organized the article and absent the early part of the article, a reader of the Sanson comments would have no way of identifying the plaintiffs.

[90] While Currie did not mention the names of the plaintiffs in his telephone interview with Sanson, he did tell her there was a complaint that the president of the C.A.W. local in St. Catharines had sexually harassed one of his office assistants and that the executive board members improperly dismissed the complaint without investigation. Sanson surely must have anticipated that the article, when published, would provide sufficient information to enable readers to identify the plaintiffs.

[91] I am satisfied that Sanson's comments were published of and concerning the plaintiffs and were defamatory of them.

Fair Comment

[92] Sanson was entitled to comment honestly on substantially true facts on a matter of public interest.

[93] For the purpose of her comments, she said she assumed there was a complaint of sexual harassment, that it was made against one of the executives of the union, that there was either no investigation or an inadequate one, that the alleged harassment

was by an employer of an employee and that C.A.W. had a policy for reducing harassment in the work place.

[94] In the article in the Standard, Sanson did not make any pronouncements as to the validity of the sexual harassment complaint. Her comments were essentially confined to giving her opinion that every sexual harassment complaint should be thoroughly investigated. She explained why this was necessary, not just for the benefit of a complainant woman, but also for the person who is complained about, for setting the appropriate tone in an organization towards these issues and for addressing any power imbalance that might be generated as a result of improper comments.

[95] Bearing in mind the provisions of section 23[13], Sanson has established that the essential facts were present to provide a basis for her comments. Gates made comments about Noreen Stubbert to Furlanetto. Noreen Stubbert, through her union, filed against C.A.W. a grievance based on alleged sexual harassment. The complaint was made against a senior executive. Although Dury may have done some checking of facts, there was no investigation by C.A.W. C.A.W. had a policy for reducing harassment in the workplace. Sanson said it would make no difference to her opinion if the grievance procedure led to a settlement. While she interpreted, perhaps incorrectly, the provisions of the C.A.W. policy as requiring an investigation in every case, she also said the exact provisions of the policy are not determinative and that there should be a full and fair investigation of every complaint of sexual harassment in the workplace.

[96] I am satisfied Sanson honestly believed in the validity of her comments.

[97] Sanson's comments transcended the particular facts here and dealt generally with how organizations should properly deal with claims of sexual harassment. In my opinion, that is a matter of public interest.

[98] The elements of the defence of fair comment have been established.

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[13] *Libel and Slander Act, supra*

Malice

[99] I see no basis for a finding of malice. Sanson had no spite or ill will toward the plaintiffs. She was asked for a somewhat general opinion in a telephone conversation. She was not indifferent to the truth of what she was saying. She had found Currie to be reliable in the past, and in fact as I have found, the facts upon which she based her comments were essentially correct.

[100] The claim against Sanson is dismissed.

Damages

[101] Where the words are defamatory *per se*, damages are presumed and awarded at large. A plaintiff is entitled to compensatory damages for any injuries sustained by the defamatory publication. They are to compensate the plaintiff for the harm caused to reputation and for any hurt or injured feelings the publication may have caused. A court may make a separate award of aggravated damages where the conduct of the defendant is particularly high-handed or oppressive thereby increasing the likelihood that the plaintiff will suffer additional humiliation and anxiety. Punitive damages are based upon the wrong intended by the defendant rather than upon the injuries suffered by the plaintiff. They constitute a punishment for reprehensible conduct.[14]

Gates

[102] Gates lost the 2000 election by 263 votes and the 2003 election by 39 votes. Mr. Waldmann argues that the evidence establishes that had it not been for publication of the article in the Standard, Gates would have won both elections. Gates was a successful president and had headed up the negotiating team which arranged for substantial investments by G.M. in the St. Catharines plant, and also obtained a substantial wage increase for Local 199 members. Filed on behalf of Gates is a notice

[14] *Defamation Law – A Primer*, *supra* p.205-240

of special damages calculating a loss of income to Gates by virtue of his non re-election in the amount of $65,472.66. The defendants take no issue with the calculation of the amount of special damages but deny any causal connection between the publication of the article and the loss by Gates of the elections.

[103] The margins were narrow but I am not satisfied on the balance of probabilities that, absent the publication of the article, Gates would have won either election. Gates took the opportunity to defend himself in the article and had Kennedy's assistance in his defence. There were existing political factions, some supportive of Gates and Martin and some supportive of Harold Stubbert and others. There was a lay-off in the Components Plant prior to the 2000 election. There is no concrete evidence that anyone voted against Gates because of the article. The publication of the article may have caused Gates to lose, but the evidence is not present upon which I may hold that such was the case on the balance of probabilities. As Thomson J. said in **Otero v. Ewing**:[15]

> It is as impossible to say after an election what matters and considerations influenced the voters as it is to correctly divine beforehand how an election will go.

[104] Chantal Marotta is Gates' daughter. She described the effect of the article on him. She said he was unable to sleep, aged at least ten years and dropped about 20 pounds in two months. She said the family were unable to get him to eat. She said he was devoted to his work at the union and was usually in the union hall until 10:00 p.m. at nights. His life was taken away, she said.

[105] Rita DeLuca, Gates' wife, confirmed that Gates could not eat or sleep and was continuously trying to answer questions about the article from his family and co-workers, friends and colleagues. She said he was in elective positions for 20 years, he had a talent and passion for trade unionism and he loved and worked hard for the union and the men. His sister, Irene Lowell, confirmed the pain that Gates was in after the article was published.

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[15] 162 La. 453, 110So. 648 at 650, 56 A.L.R. 249 (1926), quoted by Brown at p. 211.

[106] Gates said he and his family had given their whole life to the trade union movement. He said when the article came out many people did not look at him or talk to him.

Martin

[107] Martin has been a member of Local 199 for about 31 years and has had various political offices since 1990. He has worked very hard for the union over the years and his reputation within the union was important to him. He said that when he first saw the article in the Standard it brought back to him his experiences with the worst of the G. M. bosses over the years, that he had spent a good part of his working life fighting things like that and to be accused of timing washroom breaks was terribly hurtful (At this point in giving his evidence, Martin was so emotionally wrought up, that he broke down in tears). He said he was devastated when he read the article, that he had spent a lot of hours away from his family negotiating for the members of the union and now began to receive constant calls at the union hall and at his home "asking me what time it was." At one of the grievance meetings he said that when a member said she was going to the washroom, another said to Martin "I'll time her for you." In March and April 2001, election leaflets were circulated that had the question "Why vote for someone who times washroom breaks?" He said a lot of the members thought that he was covering up since he was in charge of the Executive Board.

[108] Mrs. Mary Martin confirmed the humiliating effect of the article on her husband. She said he became terribly depressed, had sleepless nights and would not go out of the house. Even at local hockey games, people came up to him and said things like "time me." She said that comments are still made, i.e. "Gary, I'm going to the washroom, please check your watch." She said it was very difficult for him to try and explain what was going on to their children.

[109] It is obvious that with both Gates and Martin the article damaged their reputation in the community, but perhaps more importantly, both of them suffered significant mental anguish, embarrassment and humiliation as a result of the allegations made.

[110] While the plaintiffs suffered harm to reputation and mental distress, I find there is no basis for aggravated or punitive damages. The defendants are jointly responsible.

[111] I am told by Mr. Waldmann that his clients have settled with the Standard for $110,000, but of that amount, $70,000 represents costs. Each client, he said, received $20,000.

[112] Section 10 of the *Libel and Slander Act* provides:

> In an action for a libel in a newspaper or in a broadcast, the defendant may prove in mitigation of damages that the plaintiff has already brought action for, or has recovered damages, or has received or agreed to receive compensation in respect of a libel or libels to the same purport or effect as that for which such action is brought.

[113] The section applies here. The damage suffered by the plaintiffs was caused by the publication of the article in the Standard. The defendants Noreen Stubbert and Harold Stubbert contributed substantially to the publication and are liable together with the Standard for damages caused. The plaintiffs cannot recover twice for the same damage and the defendants must be given credit for the amounts already received by the plaintiffs.

[114] Mr. Campbell argues that the credit should be higher since the amount allocated for costs is unreasonably high. I have no evidence that would allow me to deal with this one way or the other and I proceed on Mr. Waldmann's assurance that the amounts are accurate and fair.

[115] I find that the total damages caused by publication of the article are $65,000 for each of Gates and Martin. The defendants will be credited with the $20,000 already received by each plaintiff.

[116] Each of the plaintiffs, then, will have judgment against the defendants, Harold Stubbert and Noreen Stubbert, in the amount of $45,000. The action is otherwise dismissed.

[117] If there is to be an argument on costs, a time may be arranged through the trial coordinator.

Gravely J.

Released: April13, 2004