COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Valley Traffic Systems Inc. v. Malak,* 2024 BCCA 370

Date: 20241106
Docket: CA49314

Between:

Valley Traffic Systems Inc., Philip Keith Jackman and Trevor Paine

Appellants
(Defendants)

And

Raoul Malak, Ansan Traffic Group Ltd., Ansan Industries Ltd. d.b.a. Ansan Traffic Control, Lanetec Traffic Control Inc., Western Traffic Ltd. d.b.a. Flaggirls Traffic Control, and Island Traffic Services Ltd.

Respondents
(Plaintiffs)

And

Remon Hanna

Respondent
(Defendant)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Fenlon
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated August 2, 2023 (*Malak v. Hanna*, 2023 BCSC 1337, Vancouver Docket S133981).

Counsel for the Appellants:	T.J. Moran C.L. Formosa
Counsel for the Respondents, Raoul Malak, Ansan Traffic Group Ltd., Ansan Industries Ltd. d.b.a. Ansan Traffic Control, Lanetec Traffic Control Inc., Western Traffic Ltd. d.b.a. Flaggirls Traffic Control, and Island Traffic Services Ltd.:	R.D. McConchie A. McConchie

Place and Date of Hearing:	Vancouver, British Columbia June 11–12, 2024
Place and Date of Judgment:	Vancouver, British Columbia November 6, 2024

Written Reasons by:
The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellants appeal a finding that they engaged in a common design to defame their direct competitors in the traffic control services industry, and the $1.5 million damage award. The appellants say the trial judge erred in assessing liability by (1) not applying the participation element of the test for common design torts, (2) drawing speculative inferences not supported by the evidence, (3) conflating credibility and factual findings, and (4) relying on hearsay evidence from an examination for discovery. They say the judge erred in (1) awarding the corporate respondents general damages without evidence of economic loss and by awarding the individual respondent damages for impact on third parties, (2) awarding aggravated damages without finding actual malice and duplicating compensation for factors addressed under general damages, (3) awarding punitive damages without assessing whether they were necessary, and (4) awarding the aggravated and punitive damages on a joint and several basis.

Held: Appeal dismissed. The judge did not err in finding the appellants engaged in a common design to defame the respondents. The award of general damages is not inordinately high. Given the real risk of over-compensation if both general and aggravated damages are awarded in defamation cases, the better course is to compensate a plaintiff for all impacts under general damages alone. However, in this case the judge did not double count and grounded the general and aggravated damage awards in different factors. Punitive and aggravated damages can be awarded on a joint and several basis against common design joint tortfeasors who engage in the same malicious conduct.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

[1] The trial judge found the appellants engaged in a common design to defame the respondents, who were their direct competitors in the traffic control services industry. They appeal this finding and the award of $1.5 million in damages.

Background

[2] The events giving rise to the underlying action began in late 2011, when the parties became aware that BC Hydro intended to request proposals for the largest traffic control services contract ever put out for bid in BC. The respondent Raoul Malak controlled the five corporate respondents [“The Ansan Group”]. The appellant Philip Jackman owned, and was president of, the appellant Valley Traffic Systems Inc. [“VTS”]. The appellant Trevor Paine was VTS’s Vice-President.

[3] Enter Remon Hanna who, although not a party to the present appeal, was a major player in the events in issue. Mr. Hanna had worked briefly for The Ansan Group beginning in 2010. After a bitter falling out with Mr. Malak in 2011, Mr. Hanna left his position and commenced litigation against The Ansan Group.

[4] Mr. Hanna approached VTS around January 2012, as the two competitors awaited BC Hydro's announcement of the tender process. After meeting with Mr. Jackman and Mr. Paine, he entered into a confidentiality and non-solicitation agreement to prepare a proposal for the BC Hydro work. VTS gave Mr. Hanna business cards describing him as VTS's senior contracts manager. At some point in 2012, VTS allegedly entered into a profit-sharing agreement with Mr. Hanna, pursuant to which he was to receive 75% of the profits from work done for BC Hydro on Vancouver Island, with VTS to receive the remaining 25%. VTS testified that notes about the agreement were made on a sticky note (not produced at trial), but the terms of the agreement were never recorded in a formal contract. It is common ground that VTS paid Mr. Hanna $2.4 million over the next five years.

[5] In June 2012, employees of The Ansan Group discovered a series of defamatory publications about Mr. Malak and his companies posted on various internet sites. The posts suggested Mr. Malak had engaged in money laundering, received kickbacks, and was involved in bribery and other criminal activity. The publications were also made known to Telus, and to then Premier Christy Clark and Rich Coleman, the minister responsible for BC Hydro.

[6] Mr. Malak took steps to shut down the defamation campaign, but similar defamatory publications continued to surface until the end of 2012. At the first trial, Mr. Hanna was found to be the author of the publications.

[7] Against the backdrop of the defamation campaign, BC Hydro issued its request for proposals in August 2012. In February 2013, it awarded the contract to VTS. In May 2013, Mr. Malak and The Ansan Group commenced the underlying defamation action, alleging that VTS, Mr. Jackman, Mr. Paine and Mr. Hanna were responsible for the defamatory publications.

The First Trial

[8] This appeal arises from the second trial in this proceeding. The first trial dealt with liability only. In reasons indexed at *Malak v. Hanna*, 2017 BCSC 1739, the judge found the appellants engaged in a common design of destroying, diminishing, or undermining the reputation of Mr. Malak and The Ansan Group through the publication of various defamatory materials to third parties: at paras. 296–303. He also found VTS to be directly and vicariously liable for the defamation: at paras. 337–338.

[9] VTS, Mr. Jackman and Mr. Paine appealed the finding that they were liable, but did not challenge the first trial judge's conclusion that Mr. Hanna was the author of the defamatory publications and that those publications defamed Mr. Malak. This Court allowed the appeal in part, setting aside most liability findings against Mr. Jackman, Mr. Paine and VTS and ordering a new trial: *Malak v. Hanna*, 2019 BCCA 106 [*First Appeal*].

The Second Trial

[10] Mr. Hanna did not attend the second trial, although he was notified of the requirement to attend. Consequently, at the request of Mr. Malak and The Ansan Group, the judge admitted parts of Mr. Hanna's evidence from his examination for discovery: at para. 31.

[11] The judge extensively reviewed the evidence of emails between Mr. Jackman, Mr. Paine, and Mr. Hanna, as well as emails they had sent to third parties sharing the defamatory publications: at paras. 57–81. He did not accept Mr. Jackman's and Mr. Paine's evidence on various matters, finding them not to be credible. For example, while they claimed to have hired Mr. Hanna because he brought useful skills for working on the response to BC Hydro's request for proposals, the judge found Mr. Hanna had limited experience and training for that role: at paras. 106–107. Similarly, the judge did not accept Mr. Jackman's and Mr. Paine's evidence that they were unaware of the defamatory publications or of Mr. Hanna's responsibility for them.

[12] Based on his findings and credibility assessments, the judge concluded that Mr. Paine, Mr. Jackman, and Mr. Hanna agreed to, and did, participate in a common design of carrying out a campaign of defamation against Mr. Malak and The Ansan Group: at para. 152. He also found that emails Mr. Jackman sent to several people in June and August 2012—either forwarding or hyperlinking the defamatory publications—were part of the campaign of defamation: at para. 152. He found Mr. Paine, Mr. Jackman, and Mr. Hanna intended to harm the reputation of Mr. Malak and The Ansan Group and knew their actions would injure them: at para. 154.

[13] The judge awarded Mr. Malak general damages of $500,000. He awarded The Ansan Group general damages of $300,000 to address inferred business losses.

[14] The judge awarded Mr. Malak $200,000 in aggravated damages on a joint and several basis to compensate for the malicious nature of the appellants' conduct. The judge also awarded him punitive damages of $500,000, finding they were necessary to denounce the appellants' conduct and deter them and others from seeking a competitive advantage by intentionally defaming a competitor. That award too was payable on a joint and several basis: at para. 335.

On Appeal

[15] The appellants say the judge made four errors of law in his liability assessment:

1. Not applying the participation element of the test for a common design tort;

2. Drawing speculative inferences unsupported by evidence, including that the $2.4 million VTS paid to Mr. Hanna was compensation for participating in the defamatory scheme;

3. Conflating credibility findings with factual findings; and

4. Relying on Mr. Hanna's hearsay evidence.

[16] Regarding damages, the appellants submit the judge erred by:

1. Awarding the corporate defendants **general damages** without evidence of economic loss;

2. Awarding Mr. Malak inordinately high **general damages**, including:

   a) taking into account the defamation's impact on third parties, and

   b) failing to assess the defamation's gravity, given evidence some recipients did not take the defamatory publications seriously.

3. Awarding **aggravated damages**

   a) without determining whether the appellants were motivated by actual malice, and

   b) that duplicated compensation for factors already addressed in general damages.

4. Awarding **punitive damages** without considering whether they were necessary in light of the compensatory awards made; and

5. Ordering that the respondents were jointly and severally liable for the punitive and aggravated damages.

[17] For the following reasons, I conclude that these errors are not made out and I would therefore dismiss the appeal.

Liability

A. Application of the test for common design

[18] At common law, there are three paths to joint liability: agency, vicarious liability and concerted action. Concerted action is a term used interchangeably with common design: *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*,

2022 BCCA 366 at para. 155. Concerted action liability may be imposed when the wrongdoers acted in furtherance of a common design: *Fullowka v. Pinkerton's of Canada Ltd*., 2010 SCC 5 at para. 154.

[19] The appellants acknowledge that the judge identified the correct framework for determining liability of joint tortfeasors, but contend he erred in its application by intermingling elements of unlawful means conspiracy, which was not pleaded. This, they say, led the judge to omit one of the elements of common design: the requirement that each joint tortfeasor must have assisted in some substantial way in the commission of the tort: *I.C.B.C. v. Stanley Cup Rioters*, 2016 BCSC 1108 at paras. 25–26, citing Lord Neuberger in *Sea Shepherd UK v. Fish & Fish Limited*, [2015] UKSC 10 at para. 55. The error is said to be demonstrated by the judge's statement that it was "not necessary … to find that Mr. Jackman and Mr. Paine were directly involved in the preparation and dissemination of defamatory publications …" (at para. 153).

[20] I cannot accede to this ground of appeal. Reasons for judgment must be read as a whole, not parsed line by line. It is evident that at para. 153 the judge was distinguishing between the need for Mr. Jackman and Mr. Paine to be directly involved in preparing and distributing the defamatory publications and the need for them to participate in some other substantial way in the campaign of defamation.

[21] In *Rutman v. Rabinowitz*, 2018 ONCA 80 at para. 35, leave to appeal to SCC ref'd, 2018 CanLII 73625, the Ontario Court of Appeal observed that concerted action liability is a fact-sensitive concept. At para. 35, the Court cited Bankes LJ's admonition in *The Koursk*, [1924] All E.R. Rep. 168, (Eng. C.A) at 151 that "(it) would be unwise to attempt to define the necessary amount of connection."

[22] I agree with the trial judge in the present case that it is not necessary for a joint tortfeasor in a common design to directly create or publish the defamatory content. Knowingly assisting, encouraging or even being present as a conspirator at the commission of the wrong could suffice, as could any form of inducement, incitement or persuasion that procures the commission of the wrong: John G.

Fleming in *The Law of Torts*, 8th ed. (Sydney: Law Book Co., 1992) at 302. Indeed, at the hearing of the appeal the appellants acknowledged that assistance such as paying someone to engage in, or help disseminate, a defamatory campaign could satisfy the participation requirement.

[23] In the present case, the judge found just that kind of assistance. He concluded the appellants had paid Mr. Hanna $2.4 million to carry out a campaign of defamation against Mr. Malak and The Ansan Group: at para. 152. He also found Mr. Jackman and Mr. Paine assisted in the campaign by forwarding emails with either defamatory publications or links to those publications: at para. 152. Although forwarding a link without more does not amount to publication (*Crookes v. Newton*, 2011 SCC 47 at para. 42), it can amount to assistance in the common design to defame.

[24] In finding that the appellants participated in the common design by paying Mr. Hanna to create and publish the defamatory content, the judge observed that VTS failed to explain why it paid Mr. Hanna $1.5 million after the first trial in which he was identified as the person responsible for creating the defamatory publications: at paras. 148–149. In this regard, the appellants take issue with the judge's finding that it was "more likely than not that VTS continued to pay Mr. Hanna approximately $1.5 million after the first trial decision to ensure that he did not seek to implicate" them on appeal (at para. 150). They say that in so doing, the court ignored the respondents' concession that such a conclusion was "pure speculation." However, the concession read in context was an acknowledgment that it would be speculative to assume Mr. Hanna *extorted* a further payment of $1.5 million to ensure his silence after the first trial. That concession did not preclude a finding that the appellants paid Mr. Hanna the rest of the $2.4 million after the first trial as part of their original deal, hoping he would keep his side of the bargain and remain quiet.

[25] Finally, the appellants say the evidence does not support the judge's inference that the appellants paid Mr. Hanna for his role in the defamation campaign,

rather than for his legitimate work for VTS. That issue brings us to the second ground of appeal, to which I now turn.

B. No evidence to support the inference that the appellants paid Mr. Hanna $2.4 million to compensate him for participating in the defamation scheme

[26] The appellants contend the judge reversed the onus of proof, effectively requiring the appellants to prove the $2.4 million they paid Mr. Hanna was justified, when the respondents had the burden of proving it was not justified. First, they say that without any such evidence from the respondents, the judge merely relied on conjecture and speculation, which is an error of law: *Lee v. Bolduc*, 2024 BCCA 7 at para. 21. Second, the appellants say the judge did not grapple with evidence from a BC Hydro employee, Adele Neuman, who testified that Mr. Hanna did supervisory work, setting up crews and working with BC Hydro to resolve issues.

[27] The latter criticism can be dealt with summarily. A trial judge is not required to refer to every piece of evidence or detail how they assessed each item: *Rooney v. Galloway*, 2024 BCCA 8 at para. 328, leave to appeal to SCC ref'd, 2024 CanLII 96614. The judge's conclusion that Mr. Hanna's work did not justify compensation of $2.4 million was based on the entire record before him. In this regard, he said:

> [145] … [W]ith respect to the argument that Mr. Hanna ended up performing work worth $2.4 million, the evidence does not establish that this was the case. Once the BC Hydro contract was awarded, one of Mr. Hanna's key tasks in managing BC Hydro work on Vancouver Island was to be reviewing subcontractor invoices; in actuality, this task was carried out by VTS employees at their offices in Langley. Although Mr. Jackman testified that Mr. Hanna was to carry out other management functions on traffic control work on Vancouver Island there was a dearth of evidence at trial concerning what Mr. Hanna actually did.
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> [146] In summary, the evidence does not establish, in consideration of business logic, that the work carried out by Mr. Hanna, both before and after the BC Hydro contract was awarded to VTS, justified the payments that were made to him.

[28] As for the submission that there was no evidence that VTS grossly overpaid Mr. Hanna for the work he did, I would respectfully disagree. There was evidence that Mr. Hanna worked in the traffic control industry for Mr. Malak for about one year

in 2010. He did not do any other traffic control work until he started working with VTS in January 2012: paras. 33–34. Mr. Hanna had no employees or equipment. VTS did not ask him for references and knew nothing about his experience preparing bids. Furthermore, Mr. Jackman had experience in that area. As the judge said, it was "unclear what additional value Mr. Hanna added to the preparation of a response to the RFP": at para. 44.

[29] The judge considered closely whether VTS grossly overpaid Mr. Hanna, saying:

> [93] Mr. Paine and Mr. [Jackman] provided limited testimony regarding the work actually performed by Mr. Hanna for VTS, both before and after the BC Hydro contract was awarded. As set out earlier, Mr. Paine testified that one of Mr. Hanna's functions was supposed to include reviewing bills submitted by subcontractors hired by VTS to perform work under the BC Hydro contract in locations including Vancouver Island and outside of the lower mainland. Mr. Paine agreed that no invoices were sent by subcontractors to Mr. Hanna's company, Advanced Traffic, but rather invoices were sent to VTS's staff who inputted requests for payment to BC Hydro under BC Hydro's Ariba billing system.
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> [94] Although Mr. Jackman testified that Mr. Hanna was supposed to look after subcontractors, set up meetings, obtain necessary approvals for things such as lane closures, deal with safety issues and be hands-on with dispatching, there was no evidence called at trial establishing the extent of this work actually carried out by Mr. Hanna.
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> [95] At approximately $500,000 per year, Mr. Hanna earned substantially more than the annual salary paid to VTS's staff and senior management. During his cross examination Mr. Jackman testified that Mr. Paine, VTS's senior employee, earned between $76,000 and $85,000 per year between 2012 and 2018. VTS dispatchers earned approximately $48,000 per year and some accounting staff working under Mr. Paine earned between $40,000 and $55,000 per year.
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> [Emphasis added.]

[30] Although Mr. Malak and The Ansan Group had the onus to show that the amount paid to Mr. Hanna was grossly disproportionate to the work done, at some point the practical burden shifted to the appellants to respond to the apparent disparity between value received and value contributed.

[31] The appellants submit the judge was "comparing apples and oranges" in contrasting Mr. Hanna's profit share with the annual salaries VTS paid Mr. Jackman,

Mr. Paine, and other VTS employees. However, the judge weighed the amount Mr. Hanna received and the business rationale for sharing profits and found it wanting. Further, VTS did not lead evidence that Mr. Jackman and Mr. Paine also received significant profit sharing or dividends from the BC Hydro contract.

[32] More generally, the appellants complain the judge drew several inferences based entirely on conjecture, using phrases such as “a possible inference” (at para. 111), “one possibility” (at para. 115), and “one explanation” (at para. 122). The appellants submit the judge therefore failed to make findings based on a balance of probabilities and to consider other possible inferences, explanations, and conclusions available to him on the evidence.

[33] In my view, the impugned language demonstrates that the judge was simply considering available inferences. His reasons, read as a whole, show he ultimately put all of the evidence together—what he described as “the isolated doings”—and drew an inference on a balance of probabilities that the common design was made out (at para. 152).

C. Using lack of credibility to make adverse factual findings

[34] The appellants argue the judge repeated the same legal error that led to this Court’s setting aside of the first trial judge’s liability finding—conflating credibility determinations with factual findings: *First Appeal* at paras. 113–119. The following example demonstrates this type of error. If a finder of fact does not believe a witness when they say “I did not go to Rome,” they cannot use that credibility determination as the only basis for finding that the witness did go to Rome.

[35] In my view, the judge did not make this error. Based on his adverse credibility assessment of the appellants, the judge “took their evidence off the scales”. However, he based his factual findings on the remaining evidence on the other side of the scales. Two examples relied on by the appellants demonstrate this point.

[36] First, the appellants point to the judge's rejection of their evidence that they did not realize Mr. Hanna was the author of the publications, which they say led the judge to find they did know Mr. Hanna was the author:

> [121] I find Mr. Jackman and Mr. Paine's testimony that they did not know that Mr. Hanna was the author of the defamatory publications not to be credible. I find it more likely that they knew that Mr. Hanna was the author and did not take steps to stop the publication of these materials, because the dissemination was part of the defendants' common design to defame the plaintiffs.

Although the finding that the appellants knew Mr. Hanna was the author of the defamatory publications follows immediately after the judge's rejection of their denial of such knowledge, the finding is based on several other facts. Those facts include, but are not limited to, the appellants' knowledge that Mr. Hanna detested, and had sued, Mr. Malak, and their own evidence that they suspected Mr. Hanna might be the author.

[37] Second, the judge's rejection of the appellants' evidence that they did not read a particular email was not the only reason he found they did read it. Rather, his conclusion was based on evidence that VTS was waiting for BC Hydro's decision on the contract bid, the subject line of the email ("Decision"), and the common sense inference that the appellants would therefore have opened the email when it arrived in their inbox.

[38] In summary, I would not accede to this ground of appeal.

D. Reliance on hearsay evidence

[39] The appellants submit that, faced with Mr. Hanna's non-attendance at trial, the judge erred by admitting and relying on his examination for discovery to make findings against the appellants. Out-of-court testimony is hearsay and therefore inadmissible unless certain traditional exceptions apply, or the evidence is determined to be both necessary and reliable. The appellants contend the judge failed to conduct a necessity and reliability assessment. Had he done so, they say he could not have admitted the evidence because Mr. Hanna was found to be an

unreliable witness at the first trial and the respondents had not proved that there was no other way to obtain his testimony.

[40] I do not agree that the judge was required to conduct a necessity and reliability assessment. The respondents relied on the traditional co-conspirator exception to the rule against hearsay to justify the admissibility and use of the discovery of evidence. An assessment of reliability and necessity is required only if a traditional exception to the hearsay rule is not available: *R v. Mapara*, 2005 SCC 23 at para. 15. I note that at trial the appellants did not object to the use of the co-conspirator exception.

[41] The appellants now contend on appeal that this exception to the hearsay rule does not apply in civil cases because *Rule* 12–5(46) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, displaced it. The *Rule* permits use of discovery evidence only against the party being examined, and effectively prohibits its use against other parties: *Middelkamp v. Fraser Valley Real Estate Board*, 1993 CanLII 2884 (B.C.C.A.) at paras. 7–8; *Main Acquisitions Consultants Inc. v. Yuen*, 2022 BCCA 249 at para. 96.

[42] I find it unnecessary to determine whether *Rule* 12–5(46) overrides the co-conspirator exception to the hearsay rule in civil cases. That is so because, even if the judge erred by admitting Mr. Hanna's examination for discovery evidence, it was not a material error. There was but little examination for discovery evidence read into the record and the judge placed little emphasis on it. At most, he considered (1) Mr. Hanna's evidence about his work experience before joining VTS—evidence that other witnesses also provided—and (2) the negotiation and timing of the alleged profit-sharing agreement entitling Mr. Hanna to 75% of VTS's profits from the BC Hydro contract work on Vancouver Island. Regarding the profit-sharing agreement, the judge said:

> [88] It is unclear when the alleged Profit-sharing Arrangement was made and who at VTS negotiated it. During his examination for discovery Mr. Paine testified that he was present when Mr. Jackman and Mr. Hanna discussed what compensation Mr. Hanna would receive for his involvement in preparing a response to the RFP. This suggests that the discussion took place prior to

> the award of the BC Hydro contract in February 2013. However, Mr. Paine also testified at discovery that the Profit-sharing Arrangement was not finalized until after the contract was awarded.
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> [89] Somewhat different than Mr. Paine's evidence, Mr. Jackman's testimony suggested that Mr. Paine negotiated the Profit-sharing Arrangement with Mr. Hanna.
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> [90] During cross-examination at trial Mr. Paine testified that discussions regarding a Profit-sharing Arrangement started after mid-September 2012, but there had been earlier oral assurances that if everything worked out well, there would be money in it for Mr. Hanna. This conflicts with Mr. Hanna's evidence that the profit-sharing Arrangement was agreed to by May 2012.
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> [Emphasis added.]

[43] Ultimately, the judge made no finding about the date on which the profit-sharing agreement was entered into or who at VTS negotiated it. He was concerned, rather, with whether it had been entered into. The judge noted the evidentiary inconsistencies but ultimately found it did not accord with business logic that the parties would not have reduced the lucrative and significant profit-sharing agreement to writing. He rejected Mr. Paine's evidence that he was "too busy" to do so, especially given VTS's earlier insistence that Mr. Hanna sign a detailed non-disclosure agreement when they initially dealt with him in January 2012: at para. 140. As a result, the judge found it was possible the alleged profit-sharing agreement "was a complete fabrication, meant to mask the true reason for payments made by VTS to Mr. Hanna, being compensation for carrying out a campaign of defamation to harm the business reputation of the plaintiffs": at para. 141.

[44] In short, the judge based his reasoning on this issue almost entirely on inconsistencies in the evidence of Mr. Paine and Mr. Jackman and the improbability of such an important agreement remaining undocumented. That finding did not depend on Mr. Hanna's evidence.

[45] I turn now to the grounds of appeal concerning the damage awards.

Damages

A. General damages awarded to The Ansan Group

[46] The judge awarded The Ansan Group $300,000 for reputational impact, inferred business losses, and likely impact on their ability to operate in the flagging industry: at para. 239.

[47] The appellants argue the award is inordinately high, primarily because corporations do not have feelings, cannot receive damages for personal distress, and "generally should not receive large awards for loss of reputation, unless economic loss is also shown": *WeGo Kayaking Ltd. et al v*. *Sewid*, et al, 2007 BCSC 49 at paras. 88–89, citing *Walker v. CFTO Ltd.*, 1987 CanLII 126 (ONCA). The Ansan Group did not establish actual economic loss, and in particular did not prove that they lost the BC Hydro contract due to the defamation campaign. The appellants point out that, despite the absence of direct evidence of economic loss, the judge awarded the largest sum ever made to a corporation in B.C. for defamation. Previous awards ranged from $25,000–$150,000.

[48] Courts review damage awards on a deferential standard and will only disturb them if they are based on a mistake of law or a palpable and overriding mistake in fact, or the award is so inordinately high or low that it must be a wholly erroneous estimate of the damage: *Lines v. W & D Logging Co. Ltd.,* 2009 BCCA 106 at paras. 8–9, leave to appeal to SCC ref'd, 2009 CanLII 59416, citing *Nance v. British Columbia Electric Railway Company Ld.*, 1951 CanLII 374 (JCPC).

[49] In my view, given the nature and persistence of the defamation in the present case, the judge did not err in inferring that The Ansan Group would likely suffer economic harm. He recognized that damages for a corporate plaintiff are intended to compensate for the harm to the corporation's goodwill and business reputation. The judge noted The Ansan Group relied on its reputation to attract and retain flaggers and flagging subcontract trucking companies needed to perform traffic control services: at para. 199. He found the defamatory publications accused The Ansan Group of money laundering, obtaining contracts though illegal kickbacks, secret

bribes, and other corrupt and illegal activities. The Ansan Group's customers were cities, municipalities, and utility companies. The judge took judicial notice of the fact that public or quasi-public bodies, like The Ansan Group's customers, generally wish to avoid public controversy. He therefore found that The Ansan Group's customers would be reluctant to be associated with alleged criminals or criminal groups—particularly those alleged to be involved with corruption and money laundering.

[50] In considering the mode and extent of publication, the judge found that the breadth and distribution of the articles were significant. The appellants published them online using domain names that included "ansangroup."

[51] The award of damages to The Ansan Group was high, but in these circumstances I cannot find that it was inordinately so. As Mr. Malak testified, the defamatory publications were an attack on the companies as well as on him personally. Mr. Malak was particularly worried that readers might take the accusations of kickback schemes seriously, especially procurement managers or directors of clients and potential clients. The judge cited his testimony that being "accused of being a drug dealer or a money launderer or a pimp… [were] very serious allegations… attacking my integrity and the integrity of my companies."

B. General damages awarded to Mr. Malak

[52] General damages are awarded to compensate a plaintiff for loss of reputation, injured feelings, stress, embarrassment, humiliation, mental and emotional distress, and personal hurt. They are intended to console and vindicate the plaintiff so that their reputation may be re-established: *Bent v. Platnick*, 2020 SCC 23 at para. 148, quoting Peter A. Downard, *The Law of Libel in Canada*, 4th ed. (Toronto: LexisNexis, 2018) at §14.2; *Pineau v. KMI Publishing and Events Ltd.*, 2022 BCCA 426 at paras. 51, 53. General damages for defamation are compensatory, "at large," and subject to the same highly deferential standard of review as non-pecuniary damages in personal injury cases: *Nazerali v. Mitchell*, 2018 BCCA 104 at para. 77 [*Nazerali*], leave to appeal to SCC ref'd, 2018 CanLII 73625. An appellate court may intervene only if the court concludes there was no

evidence upon which a trial judge could have reached their conclusion, the trial judge proceeded on a mistake in law or principle, or where the result reached is wholly erroneous: *Woelk v. Halvorson*, [1980] 2 S.C.R. 430 at 435.

[53] The appellants say the $500,000 award of general damages to Mr. Malak is inordinately high. They contend the judge erred in assessing those damages by considering the impact of the defamation campaign on third parties. He found Mr. Malak's knowledge that the campaign was affecting others "would likely have exacerbated the feelings of shame and embarrassment" he experienced: at para. 219. The appellants argue that considering the impact on third parties is inconsistent with *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 because *Hill* did not list third-party impacts as a factor to be taken into account in assessing general damages: *Hill* at para. 182. Moreover, they contend in any event there was no evidence to support the judge's finding of an impact on Mr. Malak.

[54] I see nothing in *Hill* that would preclude consideration of the plaintiff's awareness that others have been hurt by the defamation campaign. In *Vogel v. Canadian Broadcasting Corporation*, 1982 CanLII 801 (B.C.S.C.), Justice Esson, as he was then, considered just such impacts in assessing general damages:

> [176] It is relevant to consider, in relation to damages, the effect upon the plaintiff of the damage done to others. He was the primary target of the program, but he was not the only victim. The damage done to the character of others is most obvious in relation to the *Moran* case. The imputation was that Moran, his lawyer, and the Kootenay prosecutors had all participated in a plot to interfere with the course of justice, and it was implied that the Chief Judge of the Provincial Court had, at least, allowed himself to be used. It was also imputed to the prosecutors that they took part in a cover-up for the benefit of the plaintiff. Not only were Dr. Rigg and his family exposed to unpleasant publicity about a painful event, but Dr. Rigg was put in the position quite unfairly, of appearing to have abused a friendship to gain an improper advantage. The former Attorney General, it was implied, had not done his duty, and in the uproar which ensued from the program Mr. Williams, Mr. Gardom and other members of the government were exposed to weeks of loud criticism. Other examples could be given. The knowledge of the hurts gratuitously inflicted on others because of their dealings, real or imaginary, with the plaintiff was a source of distress to him. It arose most sharply in the case of Mr. Moran, who, alone of the three "friends" named in the program, had in fact been a friend of the plaintiff. As a result of the program, he lived the last few weeks of his life under a cloud of scandal and, when he died in early April, all of the honour which might normally have

> been paid him was, in the public notices of his death, overshadowed by his alleged part in the Vogel affair. For instance, the Sun's headline was "Lawyer involved in Vogel affair dies".
>
> [Emphasis added.]

[55] Although I agree that it would be an error for a judge to award damages to a plaintiff for harm done to third parties, that is not what occurred either here or in *Vogel*. Rather, the court in both cases considered the distress caused to the plaintiff from knowing that others had been hurt because of their relationship or dealings with the plaintiff.

[56] Nor do I agree that there was no evidence to support the judge's inference that the harm done to others affected Mr. Malak. Mr. Malak testified that the defamation impacted his wife, Ms. Chun. He described his concern that she was not accustomed to that sort of vicious attack and noted it was his job to assure her that they would deal with it "in the right way". The judge considered the impact on Mr. Malak of the defamatory allegations that employees at Telus and BC Hydro were directly involved with Mr. Malak's alleged kickback and bribery schemes. Mr. Atchison testified that publications alleging he was involved in a kickback scheme with The Ansan Group almost ended his career as a vendor-manager with Telus; his performance ratings dropped significantly, and he never received share bonuses again.

[57] Next, the appellants argue the judge gave insufficient weight to the evidence of witnesses who said they did not believe the allegations and saw them as a smear campaign. However, the weight the judge gave this evidence within the broad spectrum of evidence concerning the publications' distribution and impact was a matter uniquely within his purview. It is not a basis for appellate interference.

[58] Finally, the appellants argue that the award is inordinately high, well out of the typical range of general damages awarded to an individual for defamation in British Columbia, which the appellants peg at $25,000–$200,000. However, in *Hill*, the Supreme Court of Canada stated that "there is little to be gained from a detailed comparison of libel awards" (at para. 187). Assessing general damages for libel

depends on “a particular confluence” of the publication’s nature and circumstances, the victim’s position, and the defamer’s actions and motivations: *Hill* at para. 187. Accordingly, awards may vary widely. In *Hill* itself, decided in 1995, the Court upheld the jury’s general damages award of $300,000. This Court in *Nazerali* upheld an award of $400,000 in general damages.

[59] In summary, in the unique circumstances of this case, I cannot agree that the award of $500,000 is inordinately high.

C. Aggravated damages

[60] The appellants submit the judge made two errors of law in awarding Mr. Malak $200,000 in aggravated damages—first, not addressing whether there was evidence of malice on the part of Mr. Paine and Mr. Jackman to support awarding aggravated damages against them; and second, relying on the same factors to justify both aggravated and general damages, thereby overcompensating Mr. Malak.

[61] The first alleged error is based on the appellants’ position that finding a common design to defame does not equate to a finding that all tortfeasors acted with malice. They argue that their involvement in the dissemination of defamatory statements was extremely limited—forwarding hyperlinks or copies of the defamatory material to a handful of people. Thus, they argue Mr. Jackman’s and Mr. Paine’s conduct—separate from Mr. Hanna’s—did not meet the threshold for malice that is a prerequisite to an award of aggravated damages.

[62] I would not accede to this submission. The judge found that Mr. Paine and Mr. Jackman did far more than simply pass on a few emails and hyperlinks. To the contrary, he concluded they hired and paid Mr. Hanna a significant sum of money to engage in a widespread and malicious smear campaign in order to damage and weaken a commercial competitor. The judge’s finding that their conduct was malicious is well-founded on the evidence.

[63] I turn now to the second alleged error. There is some merit to the appellants' concern that aggravated damages can duplicate general damages. In *Nazerali*, this Court reviewed the current controversy in the law as to whether courts should make a separate award of aggravated damages for defamation given the potential for significant overlap in the criteria governing both awards. As the law stands, however, it is not an error of law to make separate awards of aggravated and general damages, provided the awards do not involve double counting: *Nazerali* at para. 76

[64] The appellants submit that the judge double-counted the following three factors in assessing aggravated damages:

1. the absence of a retraction;

2. the nature and seriousness of the defamation; and

3. the breadth of circulation.

[65] I do not agree that the judge double-counted these factors. To the contrary, in assessing general damages the judge expressly rejected absence of an apology or retraction as factors justifying a higher award: at para. 221. He considered the failure to apologize only in the assessment of aggravated damages.

[66] Nor would I accede to the submission that the judge double-counted the nature and seriousness of the defamation or the breadth of circulation. Although he mentioned both when assessing aggravated damages, he did so to infer that the appellants' conduct was "particularly high-handed, spiteful [and] malicious," and therefore added to the resulting distress, humiliation, indignation, and anxiety Mr. Malak experienced: at paras. 241, 246–250. The judge was alive to the potential for double-counting and took care not to compensate Mr. Malak for that particular additional stress and anxiety in the award of general damages. Those damages were grounded in "the significant impact of the multi-pronged, personal defamatory campaign on [Mr. Malak's] reputation, self-esteem and social life": at para. 237.

[67] I return here to the very real risk of overlapping awards for general and aggravated damages in defamation cases. There is an extremely fine line between awarding general damages for personal hurt, stress, embarrassment, humiliation, and mental and emotional distress, and awarding aggravated damages for hurt and upset caused by the malicious nature of the defamation.

[68] It is much easier to draw a bold line between these heads of damages in other actions. For example, in a wrongful dismissal action such as *Honda Canada Inc. v. Keays*, 2008 SCC 39, an employer's failure to give sufficient notice gives rise to damages for lost wages. Similarly, breach of an insurance contract as in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, gives rise to damages based on the amount of insurance that should have been paid to the insured. In both cases, those damages for breach of contract are distinct from aggravated damages that compensate for emotional distress caused by the high-handed or malicious manner in which the contract was breached.

[69] In contrast, both general and aggravated damages for defamation compensate for hurt and distress caused by the defendant's conduct. Aggravated damages augment or amplify general damages; they are not a discrete category: *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at para. 102. Since the defendant's conduct and its impact on the plaintiff already factor into assessing general damages, one is left to wonder why this impact is not simply addressed in full in that assessment. As this Court observed in *Kazakoff v. Taft*, 2018 BCCA 241:

> [51] The issue of double compensation can arise when the same factors are relied upon to justify awards under different heads of damages and has attracted critical commentary. *Brown on Defamation* includes the following commentary at chapter 25.3(1.1):
>
> > The Ontario Law Reform Commission, while not specifically referring to the law of defamation, has recommended the abolition of a separate award of aggravated damages. This recommendation should also be followed in actions for defamation, particularly in those jurisdictions which place no limitations on the award of punitive damages. A separate award of aggravated damages is a pernicious development in the law; it is absurd in theory and mischievous in practice. … [An] overlapping of factors necessarily will occur where aggravated damages are recognized as just another aspect of compensatory damages. In addition, by emphasizing the necessity of

> malicious conduct on the part of the defendant as an essential basis for an award of aggravated damages, there is a considerable overlap with punitive damages which also require evidence of malicious conduct. There is not only a risk of double counting, but there is in fact double counting where separate awards of compensatory, aggravated and punitive damages are made.
>
> [Emphasis added; footnotes removed.]

[70] In my view, it may be time to reconsider the use of aggravated damages in defamation cases. It would make sense instead to use general damages to compensate the plaintiff fully for the defendant's conduct, and to use punitive damages to deter and denounce, should the award of general damages prove insufficient to achieve that end. In light of *Hill* and other decisions of this Court, it is not open to us to preclude awards of aggravated damages in defamation cases. But I would go so far as to encourage trial judges to adopt this approach. It has the advantage of both avoiding any prospect of double-counting and discouraging appeals based on over-compensation.

[71] That said, applying the current state of the law, I see no basis to interfere with the judge's award of aggravated damages

D. Punitive damages

[72] As mentioned above, punitive damages may be awarded where a defendant's misconduct is so malicious, oppressive, and high-handed that it offends the court's sense of decency: *Hill* at para. 196. Their aim is not to compensate the plaintiff, but to punish the defendant when the combined awards of general and aggravated damages would be insufficient to achieve the goals of punishment and deterrence: *Hill* at para. 196.

[73] The appellants submit that the judge erred in awarding Mr. Malak and The Ansan Group collectively $500,000 in punitive damages without first determining whether the compensatory awards for general and aggravated damages were insufficient to achieve the objectives of punishment and deterrence.

[74] This ground of appeal can be addressed summarily. The judge clearly identified the need to consider whether punitive damages were rationally required to denounce and deter the appellants' conduct in light of the compensatory awards he had already made: at paras. 322–324. He thoroughly reviewed the need for an award beyond the $1 million awarded to that point, saying in part:

> [302] In the context of defamation, punitive damages are most applicable where an award of solely compensatory damages would result in nothing more than a license fee to continue the defamation: *Newson v. Kexco Publishing Co.,* 17 B.C.L.R. (3d) 176 at para. 35, 1995 CanLII 1182 (C.A.) [*Newson*].

[75] Under the heading "Are Punitive Damages Justified?", the judge continued:

> [304] In my view, the principles enunciated in *Whiten* justify an award for punitive damages in this case. There can be no doubt that the campaign of defamation carried out by the defendants pursuant to the common design was malicious. It was carefully planned and designed to impact Mr. Malak and the Ansan Group companies' reputations with the object of improving the chances of VTS of obtaining traffic control services work previously done, or potentially obtained in the future, by the Ansan Group companies.
>
> [305] Although, with respect to the BC Hydro contract, the defendants conduct did not result in taking this contract away from the plaintiffs, the defendants' attempt to do so is deserving of rebuke by way of an award of punitive damages. Such an award, beyond that made under the heads of general and aggravated damages, is justified for the purpose of denouncing the conduct of the defendants and deterring the defendants and others from seeking a competitive advantage by intentionally defaming a competitor.
>
> [Emphasis added.]

[76] As the Supreme Court of Canada observed in *Hill*, without punitive damages "awards of general and aggravated damages alone might simply be regarded as a license fee" for the wealthy to defame: at para. 199. That caution applies with particular force to those who expect to gain from a competitor's reputational downfall.

E. Joint and several liability

[77] The appellants claim the judge erred by awarding aggravated and punitive damages on a joint and several basis. They rely on the following passage in *Hill* at para. 195:

> … there cannot be joint and several responsibility for either aggravated or punitive damages since they arise from the misconduct of the particular defendant against whom they are awarded.
>
> [Emphasis added.]

[78] Although the statement appears categorical, it must be read in the context of that case. In *Hill*, the Court found malice as against the Church of Scientology, but not against the joint tortfeasor, Morris Manning: at para. 195. The case thus stands for the general and sound principle that an award of punitive damages, which requires proof of malice, cannot be made against individuals who have not joined in the malicious conduct. It would thus be an error to order joint and several liability for punitive damages against tortfeasors who have not engaged in their fellows' malicious conduct: *Dhillon v. Dhillon,* 2006 BCCA 524 at para. 101, citing Harvey McGregor, *McGregor on Damages,* 17th ed. (Sweet & Maxwell, 2003) at para. 11-043.

[79] In my view, *Hill* does not stand for the principle that punitive damages can never be awarded jointly and severally against joint tortfeasors who engage in the same malicious conduct. In *Dhillon*, Thackray J.A. for the majority found that if the conduct of other joint tortfeasors' also merits an award of aggravated or punitive damages, those damages may be awarded jointly and severally: at paras. 104, 107, citing with approval Linda L. Schlueter & Kenneth R. Redden, ed. *Punitive Damages* (Charlottesville: The Michie Company, 1989) Volume 1 at 135:

> [T]he generally accepted rule is that "each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm." [The question is] whether the defendants were acting "in concert." …[T]he defendants are in concert where: (1) the tortious act is done pursuant to a common design or plan to accomplish a tortious result; (2) one defendant knows that the other's conduct is a breach of duty, but he gives substantial assistance or encouragement to the other defendant; or (3) the defendants have an express or implied agreement to cooperate to accomplish a particular tortious result. Where the defendants are acting in concert, liability is similar to that of partners or under vicarious liability. Thus, the plaintiff should be able to recover the entire damage amount against either tortfeasor. [Footnotes omitted].
>
> [Emphasis added.]

[80] Here, the appellants engaged in a common design to defame the respondents to gain a competitive advantage. They hired Mr. Hanna to carry out a strategic campaign of defamation, were fully aware of its content and scope, and paid Mr. Hanna $2.4 million for his efforts. In these circumstances, the conduct of all of the defendants was equally worthy of rebuke. Accordingly, I see no basis to set aside the joint and several nature of the punitive and aggravated damage awards.

Disposition

[81] For the foregoing reasons, I would dismiss the appeal.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"