

COURT OF APPEAL FOR ONTARIO

CITATION: Whitfield v. Whitfield, 2016 ONCA 581

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Weiler, van Rensburg and Roberts J.J.A.

BETWEEN

Dr. Agnes Jane Whitfield

Plaintiff/Defendant by Counterclaim  
(Respondent)

and

Bryan Whitfield

Defendant/Plaintiff by Counterclaim  
(Appellant)

Marie Henein, Matthew R. Gourlay and Christine Mainville, for the appellant

Dr. Agnes Whitfield, acting in person

Heard: January 6, 2016

On appeal from the judgment of Justice J.R. McIsaac of the Superior Court of Justice, dated May 1, 2014, with reasons reported at 2014 ONSC 2745, and the order for costs, dated May 28, 2015, with reasons reported at 2015 ONSC 3422.

**Roberts J.A.:**

**Overview**

[1] At the heart of this appeal are the permissible uses that can be made of an expert's opinion concerning the credibility and reliability of a witness and the application of the defence of qualified privilege in the circumstances of this case.

[2] The appellant and the respondent are brother and sister. The respondent is now 65 years old. The appellant is in his seventies. The appellant appeals from the May 1, 2014 judgment that found him civilly liable to his sister for historic sexual and physical assaults that the respondent says started about 60 years ago and were repeated until over 40 years ago. The appellant also appeals the dismissal of his counterclaim against his sister for defamation. The appellant's counterclaim is founded on the publication and content of a series of the respondent's emails, letters and postcard communications sent to family members, lawyers, and a friend, which contained allegations of sexual and physical abuse, and formed the basis for her successful claim.

[3] The respondent testified that about 15 years ago when she turned 50 years of age, she recovered memories of horrific and repeated sexual and physical abuse at the hands of her brother that the respondent says occurred when she was 4 or 5 and continued until she was 20 years old.

[4] The main support for the respondent's evidence came from her expert witness, Dr. Sarah Maddocks. Dr. Maddocks is a psychologist who was retained by the respondent's prior lawyer to provide an opinion concerning an assessment of the respondent's alleged recovered traumatic memory, her mental status, diagnoses and prognosis, along with the impact of the alleged sexual assaults on the respondent, and her recommended treatment plan. She was qualified at trial "to give expert evidence generally in the area of psychology, and in particular in

relation to sexual victimization". She opined that, while she could not know for sure if all of the memories were depictions of actual events, there was a strong indication that the respondent had been sexually and physically abused by the appellant on a regular basis over a long period of time.

[5] The appellant denied that he had ever sexually or physically abused his sister. His denials of mistreatment were supported by his two older sisters and a woman who had worked for their family as a mother's helper.

[6] The trial turned on the credibility and reliability of the respective accounts of the appellant and the respondent. The trial judge found that the appellant and the respondent were equally credible as witnesses and that their respective versions of events were also equally compelling.

[7] As a result of this assessment, the trial judge determined that he needed to turn to the expert evidence of Dr. Maddocks "to resolve the litigation" with respect to the conflict between the different accounts given by the appellant and the respondent.

[8] The trial judge erred by relying on Dr. Maddocks' evidence for the impermissible use of corroborating the truth of the respondent's allegations of sexual and physical assault for the purpose of finding the appellant liable. In doing this, the trial judge abdicated to the expert his role of trier of fact.

[9] With respect to the counterclaim, the trial judge erred in determining that even if the respondent's allegations were not accepted as true, the defence of qualified privilege would apply to all of her communications to third parties alleging sexual and physical abuse by the appellant. This conclusion was marred by the trial judge's erroneous assessment that the allegations were in fact true. Further, he erred in law in finding that all of the recipients of the communications, including the respondent's former high school friend, had a duty or interest to receive the respondent's communications.

[10] As a result of the trial judge's errors, the judgment, including the dismissal of the counterclaim, must be set aside.

[11] For the reasons that follow, I would allow both the appeal and the appellant's counterclaim. As I will also explain, I would hold that a new trial is unnecessary and dismiss the respondent's action, allow the appellant's counterclaim, and order costs in favour of the appellant.

### **Issues**

[12] The appellant raises the following grounds of appeal with respect to the respondent's action:

- i. The trial judge erred in law in his reliance on and use of Dr. Maddocks' opinion evidence.

- ii. The trial judge misapprehended the “recovered memory” theory in finding that “repression” by adults is a recognized phenomenon when there was no evidence to support this conclusion.
- iii. The trial judge’s handling of the respondent’s refusal to participate in a defence psychological assessment rendered the trial unfair.
- iv. The trial judge erred in law in his approach to corroboration of the respondent’s alleged recovered memories.
- v. The trial judge erred in the manner in which he handled the respondent’s alleged “consistency” in her allegations.
- vi. The trial judge’s approach to the evidence was marred by palpable and overriding errors, including his flawed analysis of the credibility and reliability of the respondent’s allegations.
- vii. The reasons for judgment are legally insufficient.

[13] With respect to the counterclaim, the appellant submits that the trial judge erred in holding that, had the respondent’s action not been successful, the defence of qualified privilege would have applied to bar the defamation counterclaim.

### **Background Facts**

[14] The facts relevant to the disposition of this appeal are as follows.

[15] The appellant and respondent were raised with their two older sisters and lived for many years with their parents on the family farm. The respondent is the youngest of the four siblings and seven years younger than the appellant. Their sisters are in their mid-seventies. All of the siblings are accomplished in their professional lives: the two eldest sisters are, respectively, a pediatrician and a psychiatrist; the appellant is a retired College teacher; and the respondent is a university professor.

[16] Both parents have passed away. It was not until after the death of their mother in 1997 and the increasingly fractious administration of her estate that the respondent made any allegations of improper conduct against the appellant. As is evident from their affectionate exchange of correspondence up until that time, the respondent and the appellant had appeared to enjoy a very close relationship. Indeed, the appellant referred to the respondent as his favourite sister. According to their correspondence, the appellant and his family provided support to the respondent during her acrimonious divorce from her first husband and her estrangement from her daughters following the divorce.

[17] The respondent first disclosed her allegations against the appellant immediately following the conclusion of her mother's estate administration.

[18] The administration of the mother's estate was delayed for several years when the respondent refused to agree to sell the family cottage. The respondent

wanted to purchase the cottage from her siblings at just over a third of its appraised value. Her siblings declined to sell at that price. They instead obtained three appraisals and offered to sell at a price based on market value. They stated that, if the respondent did not want to purchase the cottage on those terms and did not agree to place it for sale on the market, they would institute legal proceedings. The respondent subsequently signed off on the sale of the family cottage.

[19] On July 26, 2001, following her execution of documentation to complete the sale of the cottage property, the respondent sent an email to the appellant, his wife and his daughters; her sisters and their families; her daughters; and a woman with whom she had been friends in high school. In this email, the respondent accused the appellant of physical cruelty while they were growing up, including twisting her arms and wrists, and trying to “murder” her by locking her up in the cold room in the dairy. She ended the transmission by directing him to have no further contact with her daughters and to remove himself as trustee of the grandchildren’s trust.

[20] The respondent’s family members did not support her allegations. The respondent sent requests to her sisters for confirmation of her allegations. They did not respond. However, the email sent to the appellant on July 30, 2001 by one of the respondent’s daughters reflected the family’s denial of the respondent’s allegations:

I am very sorry about the letter mom sent to you and rest assured I do not take it seriously. Mom is not well, and unfortunately this is not the first of this kind of accusation that she has made – accusing has become a *modus vivendi* for her – although this has been among the most cruel. I hope this will give you some perspective. Also rest assured that I do not support her desire to remove you from the trust.

Please do not take this letter to heart[.]

[21] The respondent persisted in her allegations against the appellant and over the next several months sent a series of emails to her siblings and their spouses, her daughters and her nieces and nephews. She sent some of the communications to the same former friend, and others to two lawyers (one was her own lawyer and the other was involved in the administration of her mother's estate). In these emails, details of the respondent's allegations of sexual abuse by the appellant began to appear.

*Evidence at trial*

[22] On December 17, 2002, the respondent commenced an action against the appellant, based on her allegations of sexual and physical abuse.

[23] At the trial, which commenced almost 10 years later in November 2012, the respondent testified that in July 2001, she started having flashbacks of various incidents of sexual and physical abuse by the appellant. These flashbacks continued for several years and were recorded in diaries that the respondent produced to Dr. Maddocks and at trial. The respondent claimed that,

excepting what the trial judge called one “vague and ambiguous incident” of the appellant’s lying down on top of her for 10 minutes in 1969 when their parents were away, her memories of all of the sexual and physical abuse were repressed for 30 years.

[24] According to her flashbacks, starting when she was 4 or 5 years old, which would have been around 1955 or 1956, her then 11 or 12-year-old brother would regularly come into her bedroom in the morning before he left for hockey practice. He would sodomize her or force her to fellate him. These acts of abuse also took place in various other locations in or around the family farm and at two other properties near the farm.

[25] According to the respondent, the appellant compelled her compliance by various acts of violence, including threatening to kill and actually killing one or two of the respondent’s pet rabbits by throwing them against the barn wall, putting a rope around her neck in the barn, forcing her head into the toilet and restraining her by the neck, and forcing her hand towards a hot pasteurizer. The respondent testified that the appellant threatened to shoot her with his BB gun and later his .22 rifle, and that the appellant shot in close proximity to her. She stated that their second eldest sister was complicit in the appellant’s use of the gun to threaten her.

[26] The respondent testified that this abuse continued without abatement until the appellant left for a make-up high school year in 1962-63, when the respondent would have been 11 or 12 years old, and then when he attended university; however, the appellant would resume the abuse when he returned home for holidays or co-op placements.

[27] The respondent recounted that on another occasion, during a visit to a cottage that the appellant had built on Eel's Lake, the appellant and one of his friends forced her to fellate them and to eat her own feces. On that same occasion, the appellant threatened her with his gun and tied her up and left her at a mine entrance near the cottage.

[28] The respondent further recalled that, when she was 16 years old and after the appellant had finished university and was teaching in Ottawa, their mother forced her to visit him. They shared his bedroom where the appellant forced her to fellate him.

[29] The respondent testified that in the summer of 1971, when she was 20 years old and after she had completed her third year of university in Europe, she accompanied the appellant on a trip to British Columbia at the behest of their mother. She said that she was forced to fellate the appellant on the train ride to obtain money because she had no other funds. She claimed that she was repeatedly raped in the course of this trip by the appellant and others: the

appellant prostituted her to a number of the males in attendance at a party on Vancouver Island to whom the appellant had sold drugs; the appellant prostituted her to a gang of construction workers while he went on a long hike; and, while hitchhiking with the appellant, she was raped by him and the driver of the car that picked them up. On cross-examination, the respondent recanted her complaint about the gang rape on Vancouver Island and conceded that she only had an "impression" that those rapes had taken place.

[30] Among others, the respondent called the following three witnesses: her physiotherapist, Nathalie Provençal; Dr. Maddocks; and the woman who had worked as a mother's helper for her family. None of these individuals had witnessed the abuse about which she testified. Rather, Ms. Provençal and Dr. Maddocks had observed dissociative episodes in which the respondent would assume the voices and characters of a little girl and boy and re-enact instances of abusive behaviour by the boy towards the girl. The former mother's helper testified that she witnessed nothing during her employment but also that she was absent during certain periods of time when the respondent was a child.

[31] Ms. Provençal testified that during her treatment of the respondent, which began in October 2005, she witnessed four episodes of the respondent's lapsing into some form of altered state where she took on the characters and voices of a little girl and a boy. During these episodes, in the voice of a little girl, the respondent would complain about a boy hurting and threatening her.

[32] Dr. Maddocks testified that towards the end of an interview with the respondent in December 2003, she witnessed the respondent enter into a dissociative episode of about three minutes. In particular, she said that the respondent rocked back and forth, hyperventilated and shouted “I’m really angry” and then “I’m really angry, you did nothing.”

[33] In her report dated July 15, 2004, which was filed at trial, Dr. Maddocks stated her opinion concerning the credibility and reliability of the respondent’s recalled memories. She acknowledged that the area of memory recovery is a very controversial field of inquiry. She also sounded a note of caution with respect to the accuracy of the respondent’s recalled memories, stating that “we cannot know for certain if all of the memories represent actual events”, also observing that the memories remained fragmented. Dr. Maddocks summarized her conclusions as follows:

In my opinion the recalled memories were not implanted and were consistent with the literature on types of recalled memory that have been found to refer to actual events. Whereas we cannot know for certain if all the memories are depictions of actual events, in considering all of the data, in my opinion, there is a strong indication that her brother severely sexually and physically abused her on a regular basis over a long period of time, starting when Dr. Whitfield was very young.

[34] At trial, Dr. Maddocks confirmed the contents of her report. During cross-examination, Dr. Maddocks agreed with various statements from the Canadian Psychological Association and the American Psychological Association, of which

she is a member. In particular, she agreed that recovered memories of early childhood abuse are a rare occurrence and may not be reliable. She also agreed that it is impossible, without other corroborative evidence, to distinguish a true recovered memory from a false one.

[35] The former mother's helper lived and worked on the farm between 1950 and 1957. During this period, she left her employ temporarily, once for six months and then on another occasion for two weeks. She left the farm for the last time when the respondent was six years old. She testified that she normally shared the respondent's bedroom with her and never saw the appellant abuse his sister. As far as she was concerned, he was nothing other than a normal boy.

[36] The appellant testified at trial. He categorically denied all allegations of abuse. In support of his defence, he called his sisters, who both testified that they never witnessed any abuse of the respondent by the appellant.

[37] The eldest sister is a pediatrician. She is three years older than the appellant and ten years older than the respondent. She lived at the farm on a full-time basis until she left home to attend university in September 1959, when the respondent would have been eight years old. The abuse of the respondent would have been ongoing for three or four years by this point. She testified that she never witnessed the appellant abusing the respondent.

[38] The second eldest sister is a psychiatrist. She is one year older than the appellant and eight years older than the respondent. She lived on the family farm until she left for university in the fall of 1960 when the respondent would have been nine years old. The abuse of the respondent would have been going on for four or five years by this point. This sister testified that she never witnessed any inappropriate behaviour on the part of the appellant towards the respondent nor did she ever hear the appellant threaten the respondent. In particular, she denied that she and the appellant ever threatened the respondent with guns or shot at her, or that the respondent ever complained to her about the alleged abuse.

*The trial judgment*

[39] The trial lasted 24 days and spanned the course of about one year. Judgment was granted on May 1, 2014 in favour of the respondent. The trial judge awarded the respondent \$250,000 for “aggravated general damages”, \$50,000 for punitive damages, and \$54,200 as special damages for future therapeutic care. On May 28, 2014, the trial judge awarded the respondent costs in the amount of \$97,000, inclusive of disbursements.

*Assessment of the evidence by the trial judge*

[40] The trial judge reviewed the evidence of all of the lay witnesses and came to the following conclusion concerning the litigation:

Up to this point of my analysis, the scales between the case for the plaintiff and that of the defendant are

relatively evenly balanced. Dr. Whitfield's complaints against her brother are, in my view, extremely compelling and I am satisfied that they are neither a product of a wilful decision to slander her brother nor are they a construction of false memories either intentionally or inadvertently implanted into the mind of the plaintiff by her own efforts or those of third parties. The denials of Bryan Whitfield being effectively unchallenged by his younger sister during cross-examination and being substantively buttressed to varying degrees by his two older sisters, are equally compelling.

[41] As a result of the even balance between the case for the appellant and the respondent, the trial judge turned to the evidence of Dr. Maddocks, stating: "That is why I find the evidence of Dr. Maddocks, including her report, to be of critical importance in resolving this litigation".

[42] The trial judge concluded that he could use Dr. Maddocks' evidence not simply in furtherance of the quantification of the respondent's claim for damages, but also to support the respondent's case on liability. The trial judge reasoned as follows:

My review of the pertinent jurisprudence does support the use of such evidence for this purpose: see *S.R.S. v. H.P.S.* (1999) 122 O.A.C. 351 (C.A.) at paras. 4-8. I am satisfied that the probative value of the evidence is significant in that it appears to be directly related to the abuse alleged and because it tends to corroborate the complaint of Dr. Whitfield whose claim may be suspect as it is based on recovered memories. Turning to the potential prejudicial effect of this evidence, as trial judge, I can be presumed not to allow it to disproportionately influence my analysis.... In the result,

I am satisfied that this part of Dr. Maddocks' opinion is available to support the plaintiff's case on liability.

[43] The trial judge also concluded that the episodes of disassociation that were witnessed by Ms. Provençal and Dr. Maddocks formed part of the recovery process of the respondent's repressed memories of the abuse that she suffered at the hands of the appellant over the period of some 15 years.

### **Analysis**

i. The respondent's action

[44] As noted earlier, the appellant raises seven grounds of appeal in relation to the trial judgment allowing the respondent's action. As I would allow the appeal on the first ground, that the trial judge erred in law by relying on Dr. Maddocks' evidence for the purpose of determining liability, it is not necessary to deal with the other grounds of appeal relating to the respondent's action.

#### *General principles*

[45] The role of an expert witness in the trial process has been the subject of much judicial and other consideration. It is well established that the purpose of expert testimony is to assist the trier of fact by providing information about a specialized field of inquiry which is likely to be outside the experience of a judge or jury: *R. v. J.-L.J.*, [2000] 2 S.C.R. 600, 2000 S.C.C. 51, at para. 56.

[46] There is no question that expert evidence is essential to the litigation process and that many cases involving highly technical areas could not be tried without it: *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 73.

[47] However, the nature of expert evidence and its allure of scientific infallibility give rise to the very real potential that it will “swallow whole the fact-finding function of the court”: *Abbey*, at para. 71. As a result, courts must remain vigilant to draw a firm line between the role of the expert and the role of the court to ensure that experts not be permitted to usurp the functions of the trier of fact: *J.-L.J.*, at paras. 25-26. Indeed, the closer the expert’s evidence approaches an opinion on an ultimate issue, the stricter must be the application of this principle: *J.-L.J.*, at para. 37.

[48] Nowhere is this distinction more important than in relation to the issues of credibility and reliability that a trier of fact is called upon to determine in every trial. Expert evidence on human conduct and the psychological and physical factors which may lead to certain behaviour relevant to credibility is permitted, provided the testimony goes beyond the ordinary experience of the trier of fact: *R. v. Marquard*, [1993] 4 S.C.R. 223, at pp. 248-49. Ultimate issues of credibility and reliability, however, are issues well within the experience of judges and juries and ones in respect of which no expert evidence is required: *R. v. Béland*, [1987] 2 S.C.R. 398, at pp. 415-16.

[49] These principles are illustrated in *Marquard*, which involved an allegation of aggravated assault of a child by her grandmother. At issue was the trial judge's direction to the jury that they could rely on the expert evidence called to corroborate the truth of the child's testimony. In ordering a new trial, the Supreme Court confirmed that the jury direction was erroneous because "the ultimate conclusion as to the credibility or truthfulness of a particular witness is for the trier of fact, and is not the proper subject of expert opinion": p. 248. The court explained why this is so, at p. 248:

A judge or jury who simply accepts an expert's opinion on the credibility of a witness would be abandoning its duty to itself determine the credibility of the witness. Credibility must always be the product of the judge or jury's view of the diverse ingredients it has perceived at trial, combined with experience, logic and an intuitive sense of the matter.... Credibility is a matter within the competence of lay people. Ordinary people draw conclusions about whether someone is lying or telling the truth on a daily basis. The expert who testifies on credibility is not sworn to the heavy duty of a judge or juror. Moreover, the expert's opinion may be founded on factors which are not in the evidence upon which the judge and juror are duty-bound to render a true verdict. Finally, credibility is a notoriously difficult problem, and the expert's opinion may be all too readily accepted by a frustrated jury as a convenient basis upon which to resolve its difficulties. All these considerations have contributed to the wise policy of the law in rejecting expert evidence on the truthfulness of witnesses.

*Application of the principles to the present case*

[50] I agree with the appellant's submissions that the trial judge's reliance on Dr. Maddocks' evidence went beyond its permissible uses. In particular, the trial judge erred in determining that he could use Dr. Maddocks' evidence to establish the respondent's claim and to find the appellant liable.

[51] The trial judge's reliance on the decision of *S.R.S. v. H.P.S.* (1999), 122 O.A.C. 351 (C.A.), at paras. 4-8, to corroborate the respondent's claim on liability was misplaced. This decision does not stand for the general proposition that expert evidence can be admitted as corroboration of a claimant's allegations of sexual abuse for the purpose of establishing liability.

[52] Rather, this court simply noted in *S.R.S.*, at para. 6, that expert opinion evidence about the *impact* of sexual abuse was widely accepted and that the evidence in that case was filed on consent, without any limitation as to its use by the trial judge, and without cross-examination. As a result, this court found no basis for the complaint by the appellant.

[53] The limited application of the decision in *S.R.S.* to the particular facts of that case is highlighted by the reference to *R. v. Olscamp* (1995), 95 C.C.C. (3d) 466 (Ont. C.J. (Gen. Div.)), addressing the admissibility of expert evidence concerning the impact of sexual abuse. In *Olscamp*, at p. 474, Charron J. stated the following general proposition referenced by this court in *S.R.S.*:

Expert opinion evidence about the general behavioural and psychological characteristics of child victims of sexual abuse has often been admitted in Canadian criminal trials. The admissibility of this kind of evidence for certain purposes has been confirmed by a number of Canadian Courts of Appeal and by the Supreme Court of Canada.... [Citations omitted.]

[54] Moreover, at p. 475, in rejecting the proffered expert evidence in the case before her, Charron J. reiterated the general caution expressed in *Marquard* about using expert evidence to determine issues of credibility:

Although the proposed evidence is certainly logically relevant to an issue in the case, its probative value, for the reasons set out earlier, is extremely limited. On the other hand, its prejudicial value can be overwhelming. This trial will turn on a question of credibility. Although a distinction can be made between evidence going to credibility alone and this kind of evidence admitted in support of the complainant's testimony, the line is a very fine one. The admission of evidence "dressed up in scientific language" (*Mohan*, at p. 411) in support of the complainant's testimony may well be given far more weight by the jury than it deserves and may even become determinative of the ultimate issue. The prejudicial effect of this evidence so far outweighs its low probative value that the matter cannot simply be left to be remedied by cross-examination and special instructions to the jury. The evidence should not be admitted. [Emphasis added.]

[55] Although the trial judge indicated in his reasons that he would not allow Dr. Maddocks' evidence "to disproportionately influence [his] analysis", it is clear that this is exactly what occurred in this case.

[56] The trial judge did not simply use Dr. Maddocks' evidence to explain the memory process in human beings and delayed recall in victims of historical sexual abuse or for the purpose of assessing the respondent's damages. There is no question that those uses would have been permissible.

[57] Rather, the trial judge expressly relied on Dr. Maddocks' evidence to resolve the litigation by tipping his otherwise evenly balanced assessment of the credibility and reliability of the appellant and the respondent. The trial judge erred by relying on Dr. Maddocks' evidence to corroborate the truth of the respondent's fragmented recovered memories. In doing this, he erroneously allowed the expert to usurp his role as trier of fact.

[58] As a result, the judgment must be set aside. Given the trial judge's determination, after considering and making findings based on the evidence of the lay witnesses, that "the scales between the case for the plaintiff and that of the defendant [were] relatively evenly balanced", a conclusion which is not tainted by the errors identified in these reasons, the respondent has failed to prove her claim on a balance of probabilities. The evidence of Dr. Maddocks was essential to a finding that the respondent had made out her case. That evidence was simply not available to the trial judge to resolve the contradictions between the parties' accounts. As such, the respondent's action must be dismissed.

ii. The appellant's counterclaim

[59] There is no dispute that the appellant met the burden of proving that the respondent's allegations were defamatory and that they were published. The onus then shifted to the respondent to prove on a balance of probabilities that her allegations were justified because they were true or that the defence of qualified privilege applied in the circumstances of this case. Given my conclusion above, the statements cannot be justified as having been true. The question is therefore whether the trial judge was correct to conclude that the respondent's statements were protected by qualified privilege.

[60] I agree with the appellant's submission that the trial judge's finding of qualified privilege was irreparably tainted by his erroneous findings that the respondent's allegations were true as supported by Dr. Maddocks' opinion. In my view, even if the defence of qualified privilege can be said to apply to the communications to the respondent's family and the two lawyers, it cannot apply to the communications to the respondent's former high school friend. As such, I would allow the appellant's appeal with respect to the counterclaim.

*Brief background*

[61] It is useful to set out a brief summary of the facts underlying the appellant's counterclaim. The communications at issue comprise emails, letters and postcards. Most were sent to the parties' family members, including the

respondent's daughters; the appellant, his wife and their two daughters; the eldest sister, her husband and their two children; and the second eldest sister and her husband. Several of the emails were also sent to the respondent's friend from high school, with whom she had not been friends for over 30 years since high school ended. These letters contained what the trial judge described as the respondent's efforts to "set the record straight" on the "marathon of sexual, emotional and physical abuse" that she claimed comprised the relationship between her and the appellant.

[62] The communications also include a letter sent by the respondent to the estate solicitor, with her siblings and her own lawyer copied, in which the respondent briefly described the abuse and her ongoing process of memory recovery. She expressed concern about the appellant's ability to exert pressure on her daughters due to his role as trustee of their father's estate. The two lawyers were later copied in an email sent by the respondent to her three daughters in which she again briefly described the assaults and begged her daughters to consider if they had any memories of inappropriate conduct by the appellant. Finally, she copied the lawyers on an email sent to her two older sisters in which she tried to enlist her sisters' help in encouraging the appellant to resign from his role as "Trustee of the Grandchildren's Trusts".

[63] The respondent relied on the defence of qualified privilege in the event her justification by way of truth failed. Although the trial judge found that the

respondent had made out her claim, he considered the counterclaim on the alternative basis of qualified privilege because of the extensive submissions that had been made on this point at trial.

*General principles*

[64] The defence of qualified privilege flows from the rationale that the interest sought to be protected by the statement is considered important enough to justify allowing a person to defame another without attracting liability: *R.T.C. Engineering Consultants Ltd. v. Ontario* (2002), 58 O.R. (3d) 726 (C.A.), at para. 15.

[65] Qualified privilege attaches to the occasion when a defamatory statement is made, not to the statement itself: *R.T.C. Engineering*, at para. 14. 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”: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 143. Two broad categories of privileged occasions relevant to this appeal include communications intended to protect or further the legitimate interests of the publisher; and communications intended to protect or further the legitimate interests of another: Raymond E. Brown, *Defamation Law: A Primer*, 2nd ed. (Toronto: Thomson Canada Limited, 2013) at p. 211.

[66] In assessing whether such an interest or duty exists, the test is whether persons of ordinary intelligence and moral principle, or the great majority of right-minded persons, would have considered it a duty to communicate the information to those to whom it was published: *Halls v. Mitchell*, [1928] S.C.R. 125, at pp. 132-33; Raymond E. Brown, *The Law of Defamation in Canada*, loose-leaf (2014-Rel. 3), 2nd ed. (Toronto: Thomson Reuters Canada Limited, 1999) at pp. 13-5, 13-103.

[67] In determining whether the defence of qualified privilege is applicable, context matters. Relevant factors include the nature of the statement, the circumstances under which it was made, and by whom and to whom it was made. Reciprocity of interest is essential, and at the very heart of the defence of qualified privilege – the defendant must have some interest in making the statement and those to whom the statement is made must have some interest in receiving it: *R.T.C. Engineering*, at para. 16.

[68] The privileged occasion must be created by the exigency of the circumstances and not by the state of mind of the person who communicates the information. That the person communicating the information believes in its truth is irrelevant to whether the occasion is privileged, although the lack of such a belief may constitute malice, causing the privilege to be lost: *R.T.C. Engineering*, at para. 18; *Ahmad v. Ontario Hydro*, 1997 CarswellOnt 2783 (C.A.), at para. 5.

[69] Further, the privilege is to be narrowly applied and does not extend to comments that go beyond the exigency of the occasion or which are communicated to those who have no interest in receiving them: *Hill*, at paras. 146-147; *R.T.C. Engineering*, at paras. 15, 18. Simply put, “to maintain privilege a defendant must communicate appropriate information to appropriate people”: *R.T.C. Engineering*, at para. 18.

*Application of the principles to the present case*

[70] The trial judge correctly stated the law on qualified privilege as follows:

The occasion of qualified privilege has been described as:

...an occasion where the person who makes the communication has an interest or 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. The reciprocity is essential....: see p. 47, *Annual Review* quoting *Adam v. Ward*, [1917] A.C. 309 (H.L.) at p. 334. [Emphasis in original.]

[71] As he acknowledged, the trial judge was required to determine this issue after assuming that the respondent had failed to demonstrate that her allegations were true. However, the trial judge failed to do this.

[72] Rather, the trial judge’s reasons indicate that he found that qualified privilege applied because the respondent’s allegations were true and supported

by Dr. Maddocks' opinion. Indeed, the trial judge chastised the respondent's family for their apparent insensitivity to the respondent:

Although some or all of them may have found the disclosures distasteful and offensive, they had not only an interest but a familial duty to consider this "dirty family secret" and give their sister, sister-in-law and aunt at least a tiny benefit of a doubt as to the validity of her claims. Any group of right-minded persons would have done so, especially when her complaints were supported to a significant degree by the report of Dr. Maddocks. The refusal by two professionals such as her two older sisters to do so simply boggles my mind. This attitude was not only insensitive to their younger sister, it shows, in my view, a profound absence of professional objectivity.

[73] The trial judge further erred when he determined that because the respondent "believed in her heart and soul that she had been the victim of unrelenting sexual abuse at the hands of her brother" she was entitled to make defamatory allegations of sexual abuse to other members of their family, her former high school friend, her lawyer and the estate solicitor. The respondent's subjective beliefs may be relevant to the question of whether she acted out of malice. But they are irrelevant to the question of whether the occasion itself was privileged.

[74] Unfortunately, the trial judge erred by conflating these criteria: his finding that the respondent honestly believed her allegations meant that she had an interest or duty to publish the information and that the recipients of her emails had a corresponding duty to give her "at least a tiny benefit of a doubt as to the

validity of her claims". By doing so and failing to analyze whether, objectively, the occasion was privileged, the trial judge erred.

[75] As a result, it is necessary to examine the availability of the defence of qualified privilege in this case.

[76] The respondent may have had an interest in sending email communications concerning the appellant's behaviour, for example to protect her family members, prevent future abuse or seek out emotional support. In turn, her family members may have had an interest in receiving the respondent's email communications about the appellant to consider whether they were affected by the allegations and should take any protective action: see e.g. *B. (P.) v. E. (R.V.)*, 2007 BCSC 1568, where family members were held to have an interest in receiving information from their relative who had accused her father of sexually assaulting her.

[77] Similarly, in communicating with her lawyer and the estate solicitor about her allegations, specifically in requesting that the appellant be removed as the trustee for the grandchildren's trusts, the respondent may have been acting to protect the interests of other persons, namely her daughters. The solicitors may have had an interest or duty to receive those communications, to assess if or how to respond to the request.

[78] However, there was no duty or interest on the part of the respondent's former high school friend to receive the respondent's communications. The respondent admitted that their friendship did not last after high school had ended and that they only briefly reconnected after the death of the respondent's mother. She did not testify as to her reason for copying the friend on the defamatory emails. There was no evidence that she asked her friend for assistance or advice, or that the friend ever responded to her communications. In these circumstances, there was no legitimate interest to be protected by the statements; as a result, they did not merit protection under the auspices of qualified privilege: *R.T.C. Engineering*, at para. 15; *Milgaard v. Mitchell* (1996), 151 Sask. R. 100 (Q.B.), at para. 36.

[79] The respondent has failed to demonstrate the defence of justification or qualified privilege with respect to the defamatory communications sent to her former high school friend. I would allow the counterclaim in the amount of \$5,000, as requested by the appellant.

### **Disposition**

[80] For these reasons, I would allow the appeal, dismiss the respondent's claim and allow the appellant's counterclaim in the amount of \$5,000.

**Costs**

[81] With respect to the costs of the appeal, the appellant claims his partial indemnity costs on appeal in the amount of \$50,000.

[82] The appellant was entirely successful on his appeal. As a result, there is no reason to depart from the ordinary practice that costs follow the event. Given the numerous pre-appeal procedures and attendances, and the voluminous materials filed by both parties, the amount claimed is fair, reasonable and proportionate, and ought to have been in the respondent's contemplation if she were unsuccessful. That this matter was conducted as a bilingual proceeding has no bearing on the amount of costs awarded.

[83] Accordingly, I would fix the appellant's appeal costs in the amount of \$50,000, inclusive of all amounts, and order that the respondent pay the appellant's appeal costs on or before September 22, 2016.

[84] Given the outcome of this appeal, the trial judge's costs award must also be set aside.

[85] The appellant did not make any submissions concerning his trial costs. If the parties cannot agree on the scale and quantum of costs to be awarded, they may forward written submissions of no more than five pages, including a costs outline, as follows: the appellant shall deliver and file his costs submissions by

August 5, 2016; the respondent shall deliver and file her responding costs submissions by August 26, 2016. There shall be no reply submissions.

Released: *KMK* JUL 20 2016

*L.B. Roberts JA.*  
*I agree K.M. Weber,*  
*I agree. K. in Roberts JA*