

Civil Litigation

Defamation awards must be proportionate to conduct, says lawyer of dispute between millionaires

By **Terry Davidson**

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A court's drastic reduction of an award given by a jury in a defamation lawsuit drives home the need to make a quantum proportionate to the conduct, says a lawyer of a "crazy" case involving a multimillionaire real estate broker suing a former associate for bad-mouthing him to business acquaintances over lunch.

The Court of Appeal of Manitoba's Jan. 17 ruling in *Chartier v. Bibeau*, 2022 MBCA 5 involves the court slashing \$500,000 in general damages given to prominent Winnipeg real estate executive Marcel Chartier, who, according to the written decision, sued former friend and business partner Serge Bibeau after Bibeau made a defamatory statement to two of Chartier's acquaintances.

It was noted in the decision that the remarks were made only to the two men and were not posted online or stated on television or the radio or to the news media.

The Appeal Court reduced the award to \$50,000 for general and aggravated damages.

The seeds that grew into the thorny Chartier-Bibeau confrontation were planted some time ago.

Chartier, a 45-year veteran in the industry, and Bibeau, who is also wealthy and successful in real estate, had been longtime friends and frequent partners in business deals.



Stephan Thliveris, Holloway Thliveris

According to the written decision, Bibeau had made as much as \$20 million from his dealings with Chartier.

In 2009, Chartier and his son approached Bibeau with an investment opportunity involving the development of a large piece of property, which would include an IKEA store. Each of the men would invest \$1.25 million and share equally in any profits or losses. Bibeau is described in the appeal decision as a silent investor in the project.

In 2015, the three met to talk about the divvying of profits, but Bibeau was unhappy with the "extent of the financial information provided," taking issue with a marketing fee he was being charged. That fee was subsequently refunded to him.

In the end, Bibeau made around \$2.7 million from the project, on top of the return of his initial investment.

In the summer of 2017, Bibeau met Darshan Kaila (Kaila) and his son — both business acquaintances of Chartier's — at a Winnipeg restaurant for lunch. Over the course of the meal, Bibeau made a defamatory statement about Chartier.

(The appeal decision notes that a business acquaintance of Bibeau had testified at trial that Bibeau had made similar comments to him in 2016, but no claim was advanced in relation to this.)

Chartier caught wind of what was said to Kaila and his son and sued Bibeau.

During the trial, Chartier testified that while he did not suffer any loss of business from the comments, they still "affected his reputation in his business, and affected him personally and from a health standpoint."

The trial judge provided his proposed instructions to the jury, but there were no objections to their content by either side.

The trial judge instructed the jury, which, in the end, found Bibeau had, indeed, said these things to Kaila and his son. They assessed general damages at \$500,000 but did not assess any punitive damages.

Before this, the trial judge had provided his proposed charge to the jury. No objection was made by either side when it came to the judge's instructions.

Bibeau turned to Manitoba's highest court in a bid to have the amount reduced to somewhere between \$500 and \$5,000. At appeal, he did not dispute the jury's decision that he had made the defamatory comments to Kaila and his son but argued the "quantum" of the award was unreasonable.

Chartier cross-appealed the jury's failure to award punitive damages, arguing that the jury "clearly

found intentional ... defamation which necessarily attracts punitive damages" and that there was a need to deter such behaviour.

He called for the damages award to be doubled to \$1 million to reflect the addition of punitive damages.

Chartier also attempted to bring forth fresh evidence of a secretly recorded, post-trial conversation between Bibeau and his sister, where Bibeau allegedly made further defamatory comments and threatened to shoot Chartier. There was also a second conversation between Chartier's lawyer, Bibeau's sister and a "third party."

Bibeau responded by introducing his own fresh evidence relating to "the context to the recorded conversations, the reason why they were made and an ultimatum by his sister described in other court proceedings as 'an effort by [his sister] to blackmail him.' "

The Appeal Court dismissed Chartier's fresh evidence, calling it "unclear and confusing on its face," of "questionable relevance" and having no impact on the question of the jury's award.

Bibeau's fresh evidence, contingent on the successful admission of Chartier's, was also dismissed.

Returning to the business at hand, Appeal Court Justice William Burnett, with Justices Christopher Mainella and Janice LeMaistre in agreement, found the jury's \$500,000 award to be excessive in this case.

"The defamatory comments were made orally on one occasion to two people," wrote Justice Burnett. "This was not a case of widespread or repeated publication of defamatory statements in the print media, radio, television or on the internet, and there was no actual effect on the plaintiff's reputation or business interests. ... The persons to whom the defamatory comments were made clearly did not believe them and continued to do business with the plaintiff."

The court pointed to the fact that civil jury trials are rare in Manitoba, and that "awards for defamation in that amount are virtually non-existent."

Justice Burnett noted the need for "judicial restraint" when it comes to altering an assessment of damages, but still found a need for intervention in this particular case.

"While the facts in this case are relatively straightforward, the quantification of damages is much less so. As has been observed on many occasions, there is no mathematical formula to determine an appropriate quantum of damages. I am fully aware of the defendant's conduct before and during the litigation, as well as his failure to apologize. I am also aware of the need for judicial restraint and caution before making any variation in the assessment of damages in this case. Having said all of that, it is my view that \$50,000 for general and aggravated damages would be at the upper end of a reasonable range in the present circumstances, and I would therefore award this amount."

When contacted by *The Lawyer's Daily*, Chartier's lawyer, Robert Tapper, of Tapper Cuddy LLP, declined to comment. He did, however, confirm they will seek leave to appeal to the Supreme Court of Canada.

Bibeau's lawyer, Stephan Thliveris, noted that civil juries do not reveal the reasoning behind their verdicts, but reckons the wealth of Bibeau and Chartier played a part in the decision to award such an amount.

"They awarded half a million dollars, presumably on the grounds that what we had here, in the middle of a pandemic, was a jury trial with one multimillionaire suing another multimillionaire, and they just randomly gave this obscene amount of money," said Thliveris, a partner with Winnipeg's Holloway Thliveris. "At the appellate level, the court clearly accepted our submissions, saying that the amount was shocking ... and completely unreasonable and slashed the award to \$50,000, which, with respect to the court ... \$50,000 is still incredibly high for something like this."

Thliveris said that if the case makes it to the Supreme Court, he and Bibeau will cross-appeal the \$50,000 award, which they feel is still "an outrageous amount."

He was asked about the significance of the Appeal Court's ruling.

"The significance is substantial, and it definitely shows clearly that in scenarios of defamation, where there is a very nominal mode in the extent of which the defamatory comments were published, that nominal damages are awarded, and I still believe, and we'll find out if it goes to the Supreme Court of Canada, I still believe \$50,000 is ... an outrageous amount."

Thliveris was asked to comment on the other side seeking leave to appeal to Canada's high court.

"I mean this sincerely in the utmost respect to Robert [Tapper]. ... I think this is not a useful use of court resources. I would be surprised if leave was granted. ... I would be bold enough to suggest ... our cross-appeal would be granted leave because even a \$50,000 award, that's a very dangerous precedent to set for the type of behaviour and the extent of the defamatory comments. ... That's crazy."

Thliveris said that if the parties involved were people making average incomes, the award may have been as low as \$1 in a case such as this.

"Which is very common in defamation matters where the mode and the extent of the defamatory comment is quite minimal. I think we would have seen \$1, maybe \$500 — something like that. ... I think the jury just figured, well, these rich guys, they should pay more, which is not a principle in law."

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