COURT OF APPEAL FOR YUKON

Citation: *Wood v. Van Bibber*,
2013 YKCA 15

Date: 20131216
Docket: YU721

Between:

Juanita Wood

Appellant
(Plaintiff)

And

Adam Van Bibber, Betty Baptiste and Selkirk First Nation

Respondents
(Defendants)

Before: The Honourable Madam Justice Levine
The Honourable Madam Justice Neilson
The Honourable Madam Justice Garson

On appeal from: An order of the Yukon Supreme Court, dated June 13, 2013
(*J.W. v. Van Bibber*, 2013 YKSC 58, Whitehorse Docket 09-A0031).

Counsel for the Appellant:	Self-Represented
Counsel for the Respondents:	D. Fendrick
Place and Date of Hearing:	Whitehorse, Yukon November 14, 2013
Place and Date of Judgment:	Vancouver, British Columbia December 16, 2013

Written Reasons by:
The Honourable Madam Justice Garson

Concurred in by:
The Honourable Madam Justice Levine
The Honourable Madam Justice Neilson

Summary:

The appellant, Juanita Wood, appealed from a Yukon Supreme Court judgment dismissing her claim in defamation. Ms. Wood claimed that defamatory statements were made about her by co-workers. The trial judge found that Ms. Wood did not prove that the statements were made. Even if she had done so, the alleged defamatory statements were all made in circumstances in which qualified privilege would apply, given that the communications were legitimately made in the course of the defendants' employment. The trial judge found no malice on the part of the defendants that would defeat the claimed qualified privilege.

On appeal, Ms. Wood argued that the trial judge erred in dismissing her claim. Ms. Wood's primary argument on appeal was that the judge made palpable and overriding errors in his findings of fact. She argued in the alternative that owing to the inadequate representation of her trial counsel, this Court should order a new trial.

Held: Appeal dismissed.

Ms. Wood did not demonstrate any palpable or overriding error in the judge's conclusions. The evidence was capable of supporting the conclusions which the trial judge reached.

As to the alternative ground of appeal, the alleged inadequate representation of counsel, the court held that such a ground of appeal could only succeed, in the civil context, in the rarest of cases, such as a case involving some overriding public interest, or one engaging the interest of a vulnerable person like a child.

Reasons for Judgment of the Honourable Madame Justice Garson:

Introduction

[1] The appellant, Juanita Wood, appeals from a Yukon Supreme Court judgment dismissing her claim in defamation. Ms. Wood claims that defamatory statements were made about her by two co-workers in the context of their employment with the Selkirk First Nation ("SFN") and that SFN is vicariously liable for their defamation. She argues that the trial judge erred in dismissing her claim. Ms. Wood's primary argument on appeal is that the judge below made palpable and overriding errors in his findings of fact. She argues in the alternative that owing to the incompetence of her trial counsel this Court should order a new trial. For the reasons that follow, I would dismiss the appeal.

Background Facts

[2] In November of 2007, Ms. Wood was seconded from the Government of Yukon ("YTG") to the SFN under a one-year Temporary Assignment agreement ("TA"). Her position was to be SFN's Executive Director, but in July 2008, she resigned that position to become Capital Works Director. Ms. Wood ceased working at SFN on December 2, 2008. The respondents, Adam Van Bibber and Betty Baptiste, worked with Ms. Wood at SFN when they purportedly made defamatory comments about her.

[3] At the relevant time, Mr. Van Bibber was an operations and maintenance worker within SFN's Department of Capital Works. While at no time during her tenure was Ms. Wood his direct supervisor, she was his superior and, after her transfer to Capital Works, he did, at times, report to her.

[4] Betty Baptiste was SFN's Personnel Officer and reported directly to Ms. Wood when the latter was Executive Director. When Ms. Wood moved to Capital Works she was no longer Ms. Baptiste's supervisor, but given the nature of their positions, had continued contact with her regarding personnel matters.

[5] Wayne Curry, Margie Baufeld and Melanie Harris were also involved in the events that gave rise to Ms. Wood's defamation claims. All three were witnesses at the trial.

[6] When the alleged defamatory comments were made, Wayne Curry was a self-employed excavator who frequently contracted with SFN. He is Adam Van Bibber's cousin and, some twenty-five or thirty years ago, he and Ms. Wood were involved in a brief relationship.

[7] In 2007−2008, Marge Baufeld was the YTG's Representative Public Service Consultant; her responsibilities included managing temporary assignments of YTG employees seconded to First Nation governments.

[8] Melanie Harris was YTG's Manager of Human Resources in the Department of Economic Development. Ms. Wood's permanent position with the YTG was within that department and it was anticipated she would return there when she completed her secondment.

[9] The first defamation claim concerns statements made by Mr. Van Bibber in which he accused Ms. Wood of sexual harassment. Ms. Wood denies the harassment, pleading that Mr. Van Bibber defamed her by making the accusation in a meeting on October 27, 2008.

[10] Ms. Wood says the allegedly defamatory comment was made by Mr. Van Bibber at a meeting with her and the SFN councillor responsible for Capital Works, Jeremy Harper. The meeting had been scheduled to discuss Mr. Van Bibber's work performance: Ms. Wood had concerns about his job performance, specifically his productivity. When Ms. Wood learned earlier that day that Mr. Van Bibber had made sexual harassment allegations against her, she suggested to Mr. Harper that the allegations should be addressed at the meeting. After discussing Mr. Van Bibber's job performance, Ms. Wood asked him to explain his allegations.

[11] Mr. Van Bibber related two incidents. The first occurred when he complained to Ms. Wood that the pipes in his bathroom were frozen. There is no dispute that she said he could use her bathroom at "anytime". His version of the incident is that her tone was sexual in nature. She says the offer was entirely innocent, and that she meant only to be nice by offering him a place to bathe his child.

[12] Mr. Van Bibber said the second incident occurred when he was assigned to repair a plumbing problem at Ms. Wood's home. As they walked into the house through the side door, he said she stepped over a pile of laundry by the washing machine saying, in a sexual way, "Don't look at my panties." Ms. Wood's version of this incident is that she merely stepped over some laundry that was covered by a towel and said, "Oh don't look at my dirty laundry".

[13] Ms. Wood pleaded that at the October 27th meeting Mr. Van Bibber spoke and published the words “sexually harassed” in reference to Ms. Wood and that these words are defamatory.

[14] Ms. Wood’s claim against Ms. Baptiste involves Ms. Baptiste communicating three statements to employees of YTG; specifically Ms. Harris and Ms. Baufeld. First, Ms. Wood says Ms. Baptiste defamed her by telling them about Mr. Van Bibber’s sexual harassment allegations.

[15] Next, she alleged that Ms. Baptiste had told Ms. Harris that a young man was being called “cougar meat” and that Ms. Wood was “cutting down First Nations people” and “had been called on it in a meeting”. The principle evidence that Ms. Baptiste made these statements was notes made by Ms. Harris on November 21, 2008, of a conversation she had with Ms. Baufeld, who was repeating to Ms. Harris a conversation she apparently had with Ms. Baptiste on an unspecified date.

[16] The last pleaded defamation involved Ms. Baptiste telling Ms. Harris about an incident between Ms. Wood and Mr. Curry that the appellant says implied she was unfit for her employment.

[17] There is no dispute about the facts underlying the incident between the appellant and Mr. Curry. Ms. Wood admits that she intentionally swerved an SFN truck into the path of Mr. Curry’s vehicle and then left three angry voice mails on his phone. Mr. Curry testified that her behaviour was “a little suicidal”. Ms. Wood described her own behaviour, and its possible consequences, in far more moderate terms, saying the vehicles were moving slowly and she entered only minimally into Mr. Curry’s lane. She says that on November 24, 2008, Ms. Baptiste gave an exaggerated account of the incident to Ms. Harris such that it would detrimentally affect her reputation with a reasonable person.

Reasons for Trial Judgment: 2013 YKSC 58

[18] Mr. Justice Gower dismissed Ms. Wood's claim in its entirety. The appellant takes no issue with the trial judge's statement of the applicable law. The trial judge defines a defamatory statement as "one whose publication tends to lower the reputation of the plaintiff in the estimation of other right-thinking members of society": para. 1, citing *MacDonald v. Tamitik Status of Women Assn.*, [1998] B.C.J. No. 2709 (B.C.S.C.).

[19] He discusses two lines of authority concerning what must be pleaded in a plaintiff's claim to be successful in a defamation case: the more traditional approach holds that the impugned words must be precisely set out in the statement of claim and proven at trial, while the more modern approach allows the plaintiff to plead and prove "substantially the same words as were spoken": paras. 57−60. The trial judge describes the relevant defences: most notably qualified privilege, which permits a speaker to make untrue defamatory statements but escape liability in limited circumstances: para. 65. Finally, Gower J. defines where qualified privilege can be defeated: namely when malice is accepted as the reason for the statement being made or when the statement exceeds the bounds of the privilege: para. 68.

[20] The trial judge begins his analysis by making global credibility findings concerning each of the key witnesses. He concludes that Ms. Wood's credibility "had been seriously compromised during the course of [the] proceedings" (at para. 10) whereas he finds Mr. Van Bibber and Ms. Baptiste "generally credible witnesses": para. 11. Gower J. notes that Mr. Curry's credibility had not been "significantly challenged" by Ms. Wood's counsel (para. 14) nor was the evidence of Ms. Harris and Ms. Baufeld, though its reliability was suspect: para. 15. For the trial judge, the case turned, at least in part, on the credibility and reliability of the parties and witnesses, and he found several reasons to disbelieve Ms. Wood (para. 10) and the evidence tendered to support her claim: paras. 81−86.

[21] The trial judge analysed the defamation claims against each party, beginning with Mr. Van Bibber and moving on to Ms. Baptiste. Gower J. concludes that

Mr. Van Bibber did not, in the meeting with Councillor Harper and Ms. Wood, make the comment that Ms. Wood had "sexually harassed" him. However, he acknowledges that an inference could be made from the context that Mr. Van Bibber had "effectively" accused the appellant of sexual harassment and that such a statement can, potentially, be defamatory.

[22] Assuming Mr. Van Bibber had effectively made the sexual harassment allegation, the trial judge goes on to analyze possible defences. He concludes that the defence of qualified privilege has been made out. He correctly states that, "An occasion is privileged if a statement is fairly made by a person discharging a public or private duty, providing it is made to a person who has a corresponding interest in receiving the information": at para. 65. The trial judge rejects Ms. Wood's argument that qualified privilege should not apply to Mr. Van Bibber's statement because, in making it, he was primarily motivated by malice. Gower J. found there was no evidence to support the claim of malice, the theory being that Mr. Van Bibber was trying to ensure Ms. Wood's temporary assignment at SFN was not renewed.

[23] Similarly, the trial judge concludes that it was reasonable to infer that Ms. Baptiste told Ms. Harris or Ms. Baufeld about Mr. Van Bibber's sexual harassment complaint and that, on its face, such a statement could be considered defamatory. However, Gower J. concludes that Ms. Baptiste's communication was also covered by qualified privilege: if Ms. Baptiste had communicated the sexual harassment complaint to the YTG employees it was because she had a duty or interest in so reporting and she did so, not out of malice as Ms. Wood argued, but because she believed reporting the allegation was compulsory.

[24] Gower J. found that the evidence could not support a finding that Ms. Baptiste had made the "cougar meat" and "cutting down First Nations people" comments to Ms. Baufeld or Ms. Harris. At trial, neither Ms. Baufeld nor Ms. Baptiste was asked whether Ms. Baptiste made the comments and the notes Ms. Harris made of the conversation between herself and Ms. Baufeld, where the comments were attributed to Ms. Baptiste, contained inaccuracies that undermined their reliability.

[25] Finally, the trial judge dismissed the claim concerning Ms. Baptiste's report of the swerving incident. Ms. Baptiste admitted she told Ms. Harris about the incident but did not recall using the words "crazy" and "fearful", as pleaded by Ms. Wood, to describe the appellant or how Mr. Curry felt about the incident. Further, the trial judge found Ms. Wood had "largely admitted the truth of this allegation": para. 94. The trial judge concluded that what Ms. Baptiste relayed to Ms. Harris was "essentially true in substance and in fact" and since, by definition, defamation cannot succeed when a statement is true, Ms. Wood's claim could not succeed. He further concluded that, even if he were wrong about the truth of Ms. Batiste's statement, the defences of justification and qualified privilege applied to the swerving incident statement and could not be defeated by either malice or exceeding the limits of the duty from which it arose.

[26] Because Ms. Wood failed to prove that either Mr. Van Bibber or Ms. Baptiste defamed her, it was not necessary for the trial judge to address the claim that SFN was vicariously liable. No order as to costs was made.

Issues on Appeal

[27] The appellant submits that the trial judge made the following errors:

1) He erred in deciding various evidentiary issues, namely:
    1) In his assessment of the contemporaneously written documentation.
    2) In failing to recognize clear and cogent evidence of an improper purpose related to Van Bibber's reporting of the sexual harassment complaint.
    3) In failing to recognize clear and cogent evidence of Van Bibber's malice towards the Appellant.
    4) In failing to recognize clear and cogent evidence of Baptiste's lack of honest belief in the truth of the allegation.
    5) In giving little or no weight to the Appellant's evidence.
    6) In failing to recognize evidence of Baptiste's recklessness in publishing the allegation to YG.
    7) In failing to give proper weight to evidence of Baptiste's malice
2) He made palpable and overriding errors in findings of fact;
3) He made palpable and overriding errors in inferences of fact;

4) He gave weight to extraneous or irrelevant matters;

5) He was biased against the Appellant.

6) He made palpable and overriding errors in his assessment of credibility issues;

7) He made palpable and overriding errors in his assessment of the reliability' issues.

[28] It is not generally helpful to consider witnesses' credibility broadly, but rather as part of the matrix of palpable and overriding errors. I would, therefore, restate the issues raised on appeal in the following way:

a) Assuming the October 27, 2008, statement made by Van Bibber was potentially defamatory, did the trial judge err in finding that it was protected by qualified privilege, and was not defeated by malice?

b) Did the trial judge err in finding that the respondent Baptiste did not make the defamatory comments regarding "cutting down First Nations people" and "cougar meat"?

c) Did the trial judge err in finding that the respondent Baptiste did not defame the appellant on November 24, 2008, by publishing the "swerving incident" on the basis that the description of the incident was true or, alternatively, the statement was protected by qualified privilege and not defeated by malice?

d) Did the trial judge err in finding that the respondent Baptiste did not defame the appellant when she repeated the allegations concerning sexual harassment to Ms. Baufeld and Ms. Harris because those statements were protected by qualified privilege and not defeated by malice?

e) Should this court order a new trial on the basis of alleged incompetency of counsel?

Analysis

Overview

[29] At the core of this dispute is Ms. Wood's unhappiness with how she was treated by SFN and, to some extent, YTG. It appears she felt driven from her position at SFN by unjustified and exaggerated accusations of sexual harassment which, she asserts, neither SFN nor YTG investigated.

[30] For example, in her factum, in addition to the relief she seeks in setting aside the trial judgment, Ms. Wood also seeks:

> An order awarding solicitor costs of the trial to the Appellant based on the complete disregard for the Appellant's rights; the disrespectful way in which the Temporary Assignment was terminated; the non-payment of a signed and approved overtime claim for persisting in a claim of justification re: the sexual harassment allegation without doing and due diligence; for forcing the Appellant to use the legal system to find out what she should have been told as an "employee" or "contractor".

Clearly, Ms. Wood continues to feel wronged by her employers; however, this defamation claim is not the forum in which broader employment and contractual complaints can be addressed.

[31] That being said, I recognize that the employment relations issues were almost inextricably wound up with the defamation claim: at least some of the evidence on the broader employment relationship was necessary to understand the factual matrix on which Ms. Wood's claim was premised. However, the trial judge's findings concerning Ms. Wood's decision to move from the Executive Director position to the Director of Capital Works, and Ms. Wood's claims concerning the adequacy of SFN's investigation into Mr. Van Bibber's sexual harassment allegation, are examples of issues that are beyond the scope of the claim before this Court. Such issues could not be comprehensively addressed in the court below and cannot be addressed in this Court. I will therefore confine my analysis to the pleaded defamation.

[32] Ms. Wood claimed damages against SFN on the basis of vicarious liability. As the trial judge dismissed Ms. Wood's claims in defamation, the claims against all

the defendants/respondents were dismissed including SFN. Similarly here, as I would dismiss the appeal, it is unnecessary to consider SFN's vicarious liability.

2. Claim against Adam Van Bibber

[33] I turn to the first claimed defamation: Mr. Van Bibber's comments, in the meeting with Mr. Harper, regarding Ms. Wood sexually harassing him.

[34] The trial judge accepted that, if it had been made, the statement was potentially defamatory. He then analyzed whether the defence of qualified privilege was made out: para. 65.

[35] The judge had no difficulty in finding that whatever statement Mr. Van Bibber made at the October 27th meeting was related in the context of an employment related inquiry. Mr. Harper was the SFN councillor responsible for Capital Works to whom both Ms. Wood and Mr. Van Bibber were ultimately responsible. As noted by the respondents, because the sexual harassment allegation was work-related, and it was a workplace meeting, Mr. Harper not only had a legitimate interest in attending the meeting but also in hearing about the allegation. Further, it was Ms. Wood who raised the topic in the first place.

[36] In concluding at para. 67 that qualified privilege protected the statement, the trial judge said:

> [67] At the October 27th meeting, the only person, besides the plaintiff and the defendant, who was present was Jeremy Harper. He was the councillor in charge of the Capital Works portfolio for SFN, and had a legitimate interest in attending the meeting. Both the plaintiff, who was then the Capital Works Director, and Van Bibber, who was an Operations and Maintenance worker within that department, were ultimately accountable to Harper for work-related matters. The alleged sexual harassment was clearly a work-related matter. Indeed, the topic was initially raised by the plaintiff herself at the meeting. Further, I am satisfied on a balance of probabilities that Van Bibber honestly believed that the two incidents giving rise to the complaint were capable of constituting reasonable grounds for sexual harassment. Thus, I have no difficulty in concluding that anything said by Van Bibber during the occasion of that meeting about being "sexually harassed" by the plaintiff would be protected by the defence of qualified privilege.

[37] According to Jeremy S. Williams, *The Law of Libel and Slander in Canada*, 2d ed. (Toronto: Butterworths, 1988) at 77:

> The privileged occasion can only be shown by demonstrating that there was a duty and a reciprocal interest in the subject-matter of the allegedly defamatory words.

[38] Lord Atkinson's explanation of privileged occasions in *London Association for Protection of Trade v. Greenlands Ltd*., [1916] 2 A.C. 15 at 35−36, further clarifies when such an occasion arises:

> It was decided as long ago, I think, as *Bromage v. Prosser*, and many times since, that if one person makes an inquiry of another touching the position or character of a third, and the person inquired or makes a reply which he bona fide believes to be true, and also bona fide believes that the inquirer desires the information, not merely to gratify idle curiosity, but for some purpose in which he, the inquirer, has a legitimate interest of his own, the occasion upon which the answer is communicated to him is a privileged occasion.
>
> This will be so, I think, whether either of the beliefs so formed by the person inquired of be reasonable or not--*Clark v. Molyneux*--and also whether the inquirer, in fact, desired the information for the purpose mentioned. It will be sufficient if the other person honestly believed he does so require it: *Waller v. Loch*.

[39] This approach was applied in *Hanly v. Pisces Productions Inc.*, [1981] 1 W.W.R. 369 (B.C.S.C.). In that case, the judge cited Lord Atkinson to decide that qualified privilege defeated a claim for defamation where the defendant employer provided a union with reasons for not hiring the plaintiff. The defendant truly believed in the truth of his reply and the union requesting the information had made the inquiry for a purpose. See also *Arnott v. College of Physicians & Surgeons (Saskatchewan)*, [1954] S.C.R. 538; *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3; and *Harrison v. British Columbia*, 2010 BCCA 220 at para. 67.

[40] In the circumstances of the October 27th meeting, the statements were very clearly part of a legitimate discussion necessary to, and in the course of, a meeting about problems arising in Mr. Van Bibber's employment. As already noted, it was Ms. Wood who raised the topic in an effort to confront Mr. Van Bibber with what she

considered to be a false allegation. The judge did not err in concluding that the defence of qualified privilege applied.

[41] The trial judge considered whether the qualified privilege defence was defeated by either malice, or exceeding the limits of the duty or interest giving rise to the privilege: para. 87. He concluded that the defence of qualified privilege was not defeated on either ground:

> [69] The plaintiff's counsel argued that Van Bibber made the complaint of sexual harassment for the ulterior purpose of preventing the plaintiff's contract from being renewed. Further, counsel submitted that Van Bibber did not want to continue working under the plaintiff because: (a) she was a demanding superior; and (b) she was bothering his cousin, Wayne Curry. Finally, counsel argued that there was a significant delay between the incidents giving rise to the sexual harassment complaint and the actual reporting of the complaint to Baptiste, and that this supports the inference that Van Bibber made the complaint for the strategic purpose of getting rid of the plaintiff. If the sexual harassment complaint was made for an ulterior purpose, malice is established and any defence of qualified privilege is defeated.

[42] Ms. Wood argues that Mr. Van Bibber did not have an honest belief that she sexually harassed him, but rather, he made the complaint for the ulterior purpose of preventing the plaintiff's temporary assignment from being renewed. She says that if the sexual harassment complaint was made for an ulterior purpose, malice is established and any defence of qualified privilege is thereby defeated. The appellant says the trial judge made a palpable and overriding error in finding that there was no malice.

[43] The theory that the complaint was timed to ensure Ms. Wood left SFN at the end of her one-year term was not put to Mr. Van Bibber in cross-examination. Thus, he was not given any opportunity to comment upon it. The question of Mr. Van Bibber's alleged malice turns, in part, on the evidence concerning Ms. Wood's contractual renewal. The facts are these:

- On September 24, 2008, Ms. Wood notified Ms. Harris, her supervisor at YTG, that she would terminate her SFN contract on the last day of her contract on November 18, 2008. Her last day of work, she told

Ms. Harris, would be October 31. She planned to return to her employment with YTG on November 24.

- On the same day Ms. Wood wrote to SFN notifying the Chief and Council that she would be leaving on November 18, 2008.
- By the meeting of October 27, 2008, she had notified her employer that she was leaving SFN.
- Ms. Wood testified that she had been encouraged to remain at SFN in the interim.
- On October 30, 2008, Ms. Wood wrote to YTG saying that she had changed her plans again and would not be staying at SFN.
- In early November Ms. Wood discussed extending her term with Chief and Council. She drafted, and Chief Darin Isaac signed, a letter to YTG dated November 6, 2008 requesting an extension of her term.

[44] The judge concluded that there was insufficient evidence from which to conclude that the defence of qualified privilege could be defeated by malice. He noted that there was no evidence that Mr. Van Bibber had any personal knowledge about the contract negotiations: para. 71. It was only after the October 27, 2008, meeting that Mr. Van Bibber told Betty Baptiste that he heard that Ms. Wood was leaving and if so, he would forget about the complaint. Further, the trial judge found there was little evidence that Mr. Van Bibber found Ms. Wood to be a demanding superior (para. 72), or that he wanted her employment at SFN to cease because she was bothering Mr. Curry.

[45] Similarly, the judge found that Mr. Van Bibber's statement was not given in circumstances that exceeded the limits of the duty or interest giving rise to the privilege. As counsel made no arguments relating to exceeding the duty's limits, Gower J. did not explore the issue beyond his conclusion that it did not apply.

[46] The judge's discussion of qualified privilege and malice was based on his conclusion that, in the context of the entire conversation at the October 27th meeting, Mr. Van Bibber "effective" accusation of sexual harassment could have been capable of being defamatory:

> [62] Strictly speaking, the plaintiff has not proven that Van Bibber spoke the alleged defamatory words. However, in the context of the entire conversation, one might conclude that Van Bibber was effectively accusing the plaintiff at that meeting that she had "sexually harassed" him. Such a statement could be potentially defamatory, as it was capable of lowering the plaintiff's reputation in that community in the estimation of other reasonable persons: *Atkinson v. McMillan*, 2009 YKSC 81, at para. 31.

[47] In the end though, the judge did not find that Mr. Van Bibber had made the pleaded statement at the October 27th meeting that Ms. Wood had "sexually harassed" him. He concluded:

> [116] I find that Van Bibber did not, at the meeting on October 27, 2008 with the plaintiff and Jeremy Harper, make the alleged defamatory statement that the plaintiff had "sexually harassed" him. In the alternative, if he did, then such a statement is protected by the defence of qualified privilege.

[48] The appellant does not argue that the judge misconstrued the law in respect to his conclusion about defamation, qualified privilege or malice. Rather, she argues that the judge ought to have inferred malice or that Mr. Van Bibber's statements exceeded the privilege. These arguments require Ms. Wood to establish that the judge made palpable and overriding errors in his findings of fact.

[49] In *Abraham v. Coblenz*, 2013 BCCA 512, Harris J.A. concisely summarized the standard of review applicable to appeals based on palpable and overriding error:

> [10] As is well-known, this Court is not a court of first instance. This Court must not interfere with a trial judge's findings of fact unless in reaching them the judge has committed a palpable and overriding error. The Court will interfere where the error is manifest or plainly seen, or where, for example, the judge has made findings of fact unsupported by any evidence, has ignored conclusive or relevant evidence, misunderstood the evidence or drawn erroneous conclusions from it: see, for example, *Toneguzzo-Norvell v. Burnaby Hospital*, [1994] 1 S.C.R. 114 at para 13. A palpable and overriding error is one that is "so obvious that it can easily be seen or known" and which must or may well have altered the result: see, *Housen v. Nikolaisen,* [2002] 2 S.C.R. 235 at 246.

> [11] In short, this Court is not entitled to interfere with a trial judge's finding of fact because it takes a different view of the evidence. Rather, in the words of Mr. Justice Lambert in *Van Mol (Guardian ad litem of) v. Ashmore,* 1999 BCCA 6 at para. 13, lv refd [1999] S.C.C.A. No. 117, the "task is to decide whether, on the basis of all the evidence, there was a body of evidence which was properly, judicially, and reasonably capable of supporting the conclusion which the trial judge reached".

[50] These comments are equally applicable to this appeal.

[51] The trial judge refused to infer malice. The facts he found were supported by the evidence. I find no misapprehension of the evidence. I would not accede to any of the grounds of appeal concerning the sexual harassment incident.

2. Claims against Betty Baptiste

[52] Ms. Wood pleads at para. 54 to 61 of her amended statement of claim:

> 54. The Plaintiff further says that, on or about November 21, 2008, Betty Baptiste published to an employee of Yukon Government believed to be Melanie Harris that a 25 year old male had reported that he was being teased by others as "cougar meat".
>
> 55. The Plaintiff says that these words refer to the Plaintiff and that they imply that she had sexually harassed Adam Van Bibber.
>
> 56. The Plaintiff further says that the statements by Betty Baptiste were defamatory in that they would have lowered the Plaintiff's reputation with a reasonable person.
>
> 57. The Plaintiff further says that these words were defamatory in that they imply that the Plaintiff was unfit for her employment.
>
> 58. On or about November 21, 2008, Betty Baptiste published to an employee of Yukon Government believed to be Melanie Harris that the Plaintiff was "cutting down First Nations people" and that she had been "called on it in meeting".
>
> 59. The Plaintiff says that these words refer to the Plaintiff and that they imply that she is racist and that she treated First Nations people in a disrespectful manner because of their race.
>
> 60. The Plaintiff further says that these words were defamatory in that they would have lowered the Plaintiff's reputation with a reasonable person.
>
> 61. The Plaintiff further says that these words were defamatory in that they imply that she was unfit for her employment.

a. "Cutting down First Nations people" and "cougar meat"

[53] The first defamation claim I will turn to relates to statements attributed to Ms. Baptiste. Ms. Wood says Ms. Baptiste used the words "cougar meat" and "cutting down First Nations people" when discussing the appellant with YTG employees, specifically Ms. Harris. Ms. Wood says these statements imply the appellant is racist.

[54] In dismissing this aspect of the claim, the judge held that the statement was not proven to have been made:

> [89] I treat this allegation the same as the previous one. Again, the attribution to Baptiste is two steps removed and unreliable for the reasons I just gave. As well, we do not know how much time passed between the original undocumented conversation between Baufeld and Baptiste and the subsequent conversation between Baufeld and Harris on November 21, 2008. Further, Baufeld was never specifically asked whether Baptiste made the statements to her. Further still, there was a significant inaccuracy in Harris' note of her conversation with Baufeld.
>
> [90] Moreover, Baptiste was not specifically asked whether she made such a statement to Baufeld. Rather, what Baptiste was asked about in direct examination was how she had an awkward discussion with the plaintiff about how to "conduct herself" in the workplace. Baptiste was worried about the plaintiff being "too direct" with SFN members, and that she might "get called" on that at a General Assembly. Baptiste explained that something similar happened to her when she attended one of her first General Assemblies with a former Executive Director. She said that "people called us on things and I left crying". There was no reference in that evidence to Baptiste acknowledging that the plaintiff was "cutting down First Nations people". In cross-examination, Baptiste was asked whether she remembered seeing Harris' notes from earlier in her testimony about the conversations she had with Baufeld and Baptiste. In particular, Baptiste was asked whether she recalled seeing the statement that the plaintiff had been "called" for "cutting down First Nations people". Baptiste's answer was "I recall seeing something like that, yeah." However, Baptiste did <u>not</u> specifically acknowledge that she had made such a statement to Baufeld, because she was never asked that question.
>
> [91] In the result, I find the evidence surrounding the statement to be unreliable and I give it no weight. In any event, as with the foregoing allegation, it is abundantly clear that Baptiste never made that statement to Melanie Harris on November 21, 2008, as was pled.

[55] The evidence concerning the publication of these statements is found in notes taken by Melanie Harris dated November 21, 2008, of a conversation she had with

Marge Baufeld. In that conversation, Ms. Baufeld relayed information she apparently received from Ms. Baptiste to Ms. Harris.

[56] The evidence is second or third-hand hearsay. Melanie Harris took notes of a conversation she had with Marge Baufeld about reports from Ms. Baptiste of statements relating to Ms. Wood.

[57] In order to succeed on this ground of appeal Ms. Wood must establish that the trial judge made a palpable and overriding error when he found that Ms. Baptiste had not made the allegedly defamatory statements to either Ms. Harris or Ms. Baufeld.

[58] Ms. Wood has not established that the trial judge made such an error in respect of the factual findings supporting his conclusion about publication of the alleged remarks. It is within the purview of the trial judge to weigh the evidence and conclude that there is insufficient proof of publication to establish that Ms. Baptiste made the comments pleaded.

[59] The trial judge thoroughly canvassed the evidence and found that its "reliability and therefore probative value… [was] tenuous at best": para. 80. Importantly, neither Ms. Baufeld nor Ms. Baptiste confirmed in their testimony that Ms. Baptiste had made comments about Ms. Wood "cutting down First Nations people" or the "cougar meat" statement, though both acknowledged speaking about the sexual harassment allegation in more general terms. The only evidence of Ms. Baptiste making those statements was Ms. Harris' notes which the trial judge found contained inaccuracies that undermined their reliability. The trial judge made no error in concluding that the evidence failed to support a finding that Ms. Baptiste published the alleged comments about "cougar meat" and "cutting down First Nations people".

b. Swerving Incident

[60] Ms. Wood also pleaded that Betty Baptiste defamed her by reporting to Ms. Harris the swerving incident involving Mr. Curry:

> On or about November 24, 2008, Betty Baptiste published to an employee of Yukon Government believed to be Melanie Harris that the plaintiff swerved a Selkirk First Nation vehicle at an individual three times, that she left messages on the individual's answering machine, that she needed closure from 25 years ago, that she was screaming and yelling, that the individual had reported the incident to the Royal Canadian Mounted Police and the plaintiff further says that Betty Baptiste used the words crazy and fearful in reference to the plaintiff in relation to these incidents.

[61] The alleged defamatory statements are contained in notes made by Melanie Harris in the course of her employment as a human resources manager with YTG. Ms. Harris made the notes based on a conversation with Ms. Baptiste. In her testimony, Ms. Baptiste did not adopt that portion of the notes in which Ms. Harris wrote that there were three swerving incidents, or that she had described Ms. Wood as "crazy" or "fearful". The trial judge found Ms. Baptiste to be credible. Ms. Harris testified that she had little recollection of the conversation.

[62] Though she minimized the incident, Ms. Wood admitted that she swerved at Mr. Curry. Mr. Curry characterized the incident in more serious terms than did Ms. Wood, saying her conduct was a "little suicidal". The judge preferred the evidence of Mr. Curry. Given that the judge found the statements essentially true, defamation could not be proven.

[63] The judge found that Mr. Curry "probably" told Mr. Van Bibber about the incident. Mr. Van Bibber told Ms. Baptiste who then told Ms. Harris. It is Ms. Baptiste's "publication" of the incident that is alleged to be defamatory. Again, however, the statement was given in an employment context to which the defence of qualified privilege clearly applies. Gower J. noted that the inaccuracy in the version reflected in Ms. Harris' notes was not evidence of malice on Ms. Baptiste's part. In employment relationships where the alleged defamation relates to reporting misconduct, and the occasion attracts qualified privilege, minor inaccuracies in a statement are not evidence of malice as long as the person making the report holds an honest belief in its accuracy: *Moores v. Salter*, [1982] 37 Nfld. & P.E.I.R. 128.

[64] In dismissing this aspect of the claim, the judge said:

> [98] … I find that what Baptiste relayed to Harris on November 24, 2008 was essentially true in substance and in fact. Furthermore, as I noted earlier, a true statement cannot, by definition, be defamatory. Therefore, this aspect of the plaintiffs claim must also fail.

[65] Essentially Ms. Wood's appeal on this ground rests on the basis that the judge ought to have believed her account of this incident rather than that of Mr. Curry. I cannot find any palpable and overriding error in the judge's findings of fact about the truth of the statement. As to the inaccuracy in Ms. Harris' note, the judge did not find these to be evidence of malice. I agree with the judge that these inaccuracies do not render the statement actionable.

c. Qualified Privilege and Malice

[66] Ms. Wood argues that the trial judge erred by finding Ms. Baptiste's statements to Ms. Harris and Ms. Baufeld concerning the allegation of sexual harassment to be covered by qualified privilege. She says Ms. Baptiste was reckless in publishing the defamatory allegations and motivated by ill-will. However, she has failed to show how the trial judge made a palpable and overriding error in concluding that Ms. Baptiste's claim to qualified privilege was justified. Ms. Baptiste reported an allegation of sexual harassment to the appropriate people at the YTG, in a manner appropriate to the circumstances.

[67] I would not accede to this ground of appeal.

3. Alleged incompetence of counsel

[68] Ms. Wood says that the results of the trial would have been different had she been adequately represented. On account of the alleged inadequate representation she seeks a new trial.

[69] Ms. Wood notes that her counsel did not challenge witnesses in cross-examination on critical points including the theory of her case. For example, she says that Mr. Van Bibber was not asked if he was motivated in making the sexual harassment allegations by his desire to see Ms. Wood's employment with SFN terminated. She notes two instances in which the trial judge specifically comments

on counsel's failure to put the appellant's theories to a witness in cross-examination: paras. 70 and 112. She also asserts that her counsel failed to plead the case properly, failed to consult with her about withdrawing certain claims, failed to protect her privacy in relation to medical records that were produced, provided her with erroneous information, failed to follow up on information produced at discovery, improperly investigated the claim and improperly threatened to withdraw her services.

[70] Ms. Wood applied to introduce fresh evidence to support this ground of appeal. The evidence consists primarily of e-mail communication with her counsel.

[71] In the civil law context, incompetent or ineffective representation of counsel is a ground of appeal in only the rarest of cases. As Catzman J.A. wrote for the Ontario Court of Appeal, *D.W. v. White* [2004], 189 O.A.C. 256:

> [55] … I would not be prepared to close the door to the viability of ineffective assistance of counsel as a ground for a new trial in a civil action. But… I would limit the availability of that ground of appeal to the rarest of cases, such as (and these are by way of example only) cases involving some overriding public interest or cases engaging the interests of vulnerable persons like children or persons under mental disability or cases in which one party to the litigation is somehow complicit in the failure of counsel opposite to attain a reasonable standard of representation. The present action is not such a case.

[72] I agree with this statement of the law and would say it is applicable to this case: see also *Kedmi v. Korem*, 2012 NSCA 124 at para. 8 and *White v. Conception Bay South (Town)*, 2013 NLCA 10 at paras. 14−15.

[73] There is no public interest element to this case. Nor does it involve the interests of vulnerable people as contemplated in cases where this Court and others have acknowledged the possibility of an appeal based on ineffective representation of counsel: *D.B. v. Director of Child, Family and Community Services*, 2002 BCCA 55 at para. 31; *Gligorevic v. McMaster*, 2012 ONCA 115; *Sheikh v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 238 (C.A.).

[74] There are good reasons for limiting the availability of such a ground of appeal. An important consideration is the necessity for finality in litigation. It would be unfair to a successful litigant to embroil that litigant in a dispute over the adequacy of the unsuccessful party's legal representation, a matter over which the successful party has no interest or concern, particularly considering other remedies that are available.

[75] Such a ground ought not to be entertained in this case. The judge made significantly adverse findings of credibility against Ms. Wood. It is difficult to see how those could be the result of ineffective assistance of counsel. In short there is no aspect of this case that would suggest this Court could or should embark on such an exercise.

[76] If, as Ms. Wood asserts, the outcome of the case would have been otherwise had her counsel conducted the case differently, her remedy lies elsewhere. I would not accede to this ground of appeal.

Disposition

[77] I would dismiss the application to introduce new evidence and dismiss the appeal.

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Madam Justice Levine"

I agree:

"The Honourable Madam Justice Neilson"