

CANADA / JUDGMENT

Weaver v. Ball

2020 BCCA 119

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 119 Weaver v. Ball

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Weaver v. Ball,

2020 BCCA 119

Date: 20200430

Docket: CA45088

Between:

Andrew Weaver

Appellant

(Plaintiff)

And

Timothy ("Tim") Ball

Respondent

(Defendant)

Before:

The Honourable Madam Justice Dickson

The Honourable Madam Justice Griffin

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated

February 13, 2018 (Weaver v. Ball, 2018 BCSC 205, Vancouver Docket S110682).

Counsel for the Appellant:

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Place and Date of Hearing:

Victoria, British Columbia

December 4, 2019

Written Submissions Received:

January 22 and 28, 2020

Place and Date of Judgment:

Vancouver, British Columbia

April 30, 2020

Written Reasons by:

The Honourable Madam Justice Griffin

Concurred in by:

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Abrioux

Summary:

The appellant appeals from the dismissal of his claim in defamation, arguing the judge erred in law and in fact in finding that an article written by the respondent (the "Article") was not defamatory. Held: Appeal allowed. While the judge did not err in his treatment of the defence pleading, he erred in giving undue weight to certain factors in concluding that the Article was not defamatory: subjective factors going to the Article's credibility; the appellant's subjective reaction to the Article; and the public nature of the debate around climate science. These factors may be relevant to the defence of fair comment or to damages but were wrongly considered as proof that the Article was not defamatory.

Reasons for Judgment of the Honourable Madam Justice Griffin:

- [1] Andrew Weaver appeals the dismissal of his claim in defamation against Timothy Ball.
- [2] The claim was based on an article that Dr. Ball wrote and forwarded to a website purporting to be a news site, which posted it. The article entitled "Corruption of Climate Science Has Created 30 Lost Years" (the "Article"), referred to Dr. Weaver in connection with the field of "corrupted" climate science.
- [3] Dr. Weaver argues on appeal that the trial judge erred in law and in fact in finding that the Article was not defamatory.

Background

- [4] The background facts are not at issue.
- [5] At the time material to the events at issue, Dr. Weaver was a professor in the School of Earth and Ocean Sciences at the University of Victoria. He had a Ph.D. in Applied Mathematics from the University of British Columbia and a Masters in Applied Mathematics from Cambridge University. As illustrated by his academic curriculum vitae, he had obtained many fellowships and awards and had published extensively in peer-reviewed journals. The media frequently interviewed him, and he was a leading voice in favour of the need to take action to address climate change. As part of his work as an academic, he was a lead author on a number of reports issued by the Intergovernmental Panel on Climate Change ("IPCC"), an international scientific body established to study issues related to climate change. He also taught several university courses including in climate modelling and atmospheric sciences.
- [6] While Dr. Weaver subsequently became a member of the Legislative Assembly and leader of the Green Party of British Columbia, his career as a politician is not relevant to this case.
- [7] Dr. Ball is a retired professor from the Department of Geography at the University of Winnipeg. He holds a Ph.D. from the Faculty of Science of Queen Mary College, University of London, for which his field of study was climatology.
- [8] Dr. Ball was a frequent speaker on the subject of climate change, appearing on a number of television and radio broadcasts and one film as well as at many public lectures. In reasons for judgment indexed as 2018 BCSC 205 (the "Reasons"), the judge fairly described him as a "climate change sceptic", holding the view that the concerns about climate change are overstated and not supported by true science: at para. 8.
- [9] As noted by the judge, Dr. Weaver and Dr. Ball had come into contact on a few occasions and were aware of each other's views.
- [10] On January 10, 2011, the Article written by Dr. Ball appeared on Canada Free Press's website. A copy of the content of the Article is appended to these reasons.

[11] The Article was entitled "Corruption of Climate Science Has Created 30 Lost Years", and following which the piece indicated it was written "By Dr. Tim Ball". The judge excerpted the most pertinent passages of the Article at para. 18 of the Reasons, which I now set out:

It's frightening how little climate science is known by both sides of the debate on human causation of global warming. I wrote this sentence before I saw a paper from Michigan State University that found, "Most college students in the United States do not grasp the scientific basis of the carbon cycle - an essential skill in understanding the causes and consequences of climate change."

The professor says students need to know because they must deal with the buildup of CO₂ causing climate change. This discloses his ignorance about the science of the carbon cycle and the role of CO₂ in climate. It's not surprising and caused by three major factors:

1. A function of the emotional, irrational, religious approach to environmentalism.
2. The political takeover of climate science
3. Funding directed to prove the political rather than the scientific agenda.

The dogmatism of politics and religion combined to suppress openness of ideas and the advance of knowledge critical to science.

We now have a generation (30 years) of people teaching, researching, or running government that has little knowledge because of lack of fundamental education. Because of them, the public is ill informed, don't [sic] understand the problem, and don't [sic] know the questions to ask. Correcting the education process will take time because there are insufficient people with the knowledge or expertise. Correcting and widening the research functions will take longer because of removing or re-educating current personnel and a lack of qualified replacements. Even if achieved, success is unlikely. There is the massive problem of inadequate data.

The blame begins with the political manipulations of Maurice Strong, but he only succeeded because of the so-called climate scientists. Among them, computer modelers caused the biggest problem. They needed to know the most, but knew the least. If they knew anything they would know there is inadequate data and understanding of the major components and mechanisms on which to build the models.

I responded to a newspaper article with a letter pointing out many errors. It elicited an invite from Andrew Weaver IPCC computer modeler. I entered his office with my backpack and he said, "I hope you don't have a microphone in that thing do you?" I remarked, "Someone's paranoia is showing." In the next twenty minutes I realized, because of 25 years of teaching, researching and publishing, he knew very little about climate. He received a phone call and I left his office. A student working outside said he heard my comments about the severe limitations of the computer models and and [sic] said he agreed. He simply wanted to get his degree and research money was available. Weaver claimed to be a climatologist, but removed that from his web page when it was pointed out he was a computer modeler.

Over the years Weaver consistently refused a debate. When a students [sic] group arranged one at the University of Victoria he refused to participate with his standard line about only dealing with "working" climatologists. His students showed up at my presentation and were talking to students outside the door, apparently attempting to deter them from entering. When they all finally came in they tried to interrupt the proceedings by constantly asking questions. They even had laptops and challenged with Internet sites supposedly contradicting what I said. It was shameless and not surprisingly their interpretation of events appeared on a smear blog site. For example, I showed the Milankovitch Effect and said it was not in the Intergovernmental Panel on Climate Change (IPCC) computer models. One student said he worked with the models and it is included. There's no doubt it is in some climate models, but not those of the IPCC.

Weaver has announced he will not participate in the next IPCC. He, like so many who got on the bandwagon of politics and funding, is abandoning the sinking ship. Most of his early funding was from Environment Canada until alternate arrangements were made. He began withdrawal in January 2010, "Senior Canadian climate scientist says the United Nations' panel on global warming has become tainted by political advocacy, that its chairman should resign, and that its approach to science should be overhauled."

He also said, "the leadership of the Intergovernmental Panel on Climate Change (IPCC) has allowed it to advocate for action on global warming, rather than serve simply as a neutral science advisory body." He knew this all along, partly because I told him. The question is what has he taught his students in the meantime? Judging by his responses to my questions and those asked by his students at my presentation, not much and very biased.

A former editor of an enlightened environmental journal said we need a committee of scientists from the many disciplines involved in climate science. Such a committee existed 25 years ago, and produced groundbreaking work. Environment Canada cut the funding because it challenged the political position that agency had already taken; the project died. Canada should reconstitute it because it was producing useful and non-political science - supposedly Weaver would now approve, but I don't think he's qualified to participate.

People who totally accepted the corrupted, limited and narrowly focused science of the IPCC have taught climate science for the last 30 years. They should all read Lamb's monumental two-volume set;

They'd learn that all issues now put forward as 'new' are not new at all. They only appear new because of the black hole that politicians, aided by a few climatically uneducated political scientists, have dragged climate science into over the last 30 years.

[12] Dr. Weaver came across the Article by a computer search of his name. He was upset by it, and found it had been republished on other websites. He retained counsel who wrote to Canada Free Press on January 14, 2011, demanding a retraction and an apology, which soon ensued on January 18, 2011.

[13] Dr. Weaver's counsel also demanded an apology from Dr. Ball, who retained counsel.

- [14] Dr. Ball did not immediately issue an apology, and Dr. Weaver filed a notice of civil claim ("NOCC") against him.
- [15] In Dr. Weaver's NOCC against Dr. Ball, he alleged that the words in the Article bore one or all of certain inferential meanings. These were set out at para. 65 of the Reasons:
- [65] In his [NOCC], Dr. Weaver alleges the following inferential meanings of the impugned words set out in the Article:
- a) He is not competent or qualified to teach climate science to university students;
 - b) He cheated Canadian taxpayers by accepting public funding for climate science research although he has little or no knowledge about climate science;
 - c) In the meeting in his office with Dr. Ball, he displayed symptoms of paranoia because he fears his incompetence, lack of academic qualifications and corrupt exploitation of the Canadian taxpayer will be exposed;
 - d) He bribed university students with research funds so they would participate in useless computer modeling studies which had little scientific value, with the objective of continuing to receive unwarranted personal financial benefit from government funding;
 - e) He dishonestly claimed on his website to be a "climatologist" but removed that claim when challenged by Dr. Ball;
 - f) He shuns involvement in public debate about global warming because it would publicly expose his professional incompetence, his inadequate knowledge about climate science, and his corrupt exploitation of public resources;
 - g) He shamefully conspired to have his students interrupt Dr. Ball's presentation at UVIC in order to suppress the truth by preventing honest and open debate about the existence of global warming and/or whether humans are causing or contributing to global warming;
 - h) He shamefully conspired with his students to deter people from attending Dr. Ball's UVIC presentation in order to stifle Dr. Ball's views and prevent people from learning that his views on global warming have no scientific basis;
 - i) He teaches his students little or nothing about climate science because he lacks the requisite knowledge, does not have academic qualifications, is nothing more than a computer technician, and is blinded by personal bias;
 - j) He knows that the reports of the IPCC concerning global warming are unscientific and corrupt, and is therefore dishonestly trying to dodge personal responsibility for his involvement in those reports by dissociating himself from the IPCC; and
 - k) He dishonestly obtained substantial public funding from Environment Canada for climate science research despite knowing that he lacked the necessary education, training, and intelligence to carry on competent research.

- [16] On March 3, 2011, Dr. Ball issued an apology as well as a response to civil claim ("RTCC"). As the implications of the apology on the claim for damages are not at issue on this appeal, I will not set it out in full, but it is set out in the Reasons at para. 30.
- [17] Dr. Weaver posted the Article and Dr. Ball's apology on a bulletin board outside his university office, known as the "wall of hate".
- [18] Dr. Ball admitted in his RTCC that he wrote the Article that was published on the internet website of Canada Free Press.
- [19] The RTCC stated that some of the statements alleged to be defamatory were true; others were opinion and fair comment; while others were subject to the defence of responsible communication.
- [20] Later in the proceeding, Dr. Ball sought to amend his RTCC. This application was opposed but was granted by a Master before trial: *Weaver v. Ball* (22 September 2017), Vancouver S110682 (B.C.S.C.) (the "Ruling"). As a result, Dr. Ball's amended response to civil claim ("ARTCC") pleaded a new para. 8.1 under Part 1:

8.1 In further answer to the meanings alleged in paragraph 4 of Part 1 of the [NOCC], and to the whole of the [NOCC], the overall gist or sting (the "Sting") of the Article insofar as it concerns the plaintiff is:

The plaintiff is qualified by conventional standards to teach climate science but should not be qualified because the conventional experience and training of climate science has been corrupted by political advocacy and limited by inadequate data, and his students have accordingly been taught a biased perspective.

- [21] Dr. Ball went on to plead that the above "Sting" was an opinion on a matter of public interest, and is protected speech under the defence of fair comment.

Trial Judgment

- [22] The judge dismissed the claim on the basis that Dr. Weaver had not met the test of establishing that the words were defamatory.
- [23] The judge concluded:
- [83] In summary, the Article is a poorly written opinion piece that offers Dr. Ball's views on conventional climate science and Dr. Weaver's role as a supporter and teacher of that science. While the Article is derogatory of Dr. Weaver, it is not defamatory, in that the impugned words do not genuinely threaten Dr. Weaver's reputation in the minds of reasonably thoughtful and informed readers. Dr. Weaver has therefore failed to establish the first element of the defamation test.
- [24] I will touch on aspects of the judge's reasoning when I address the issues raised on appeal.

Issues

[25] Dr. Weaver argues on appeal that the judge made errors in finding that the Article was not defamatory, as follows:

- a) the judge erred in law in finding that the Article was not defamatory, despite what Dr. Weaver says amounted to a defence admission in para. 8.1 of the ARTCC that the Article conveyed a defamatory sting; and,
- b) the judge erred in law and in fact in determining that the words were not defamatory, because the judge wrongly took into account or gave excessive weight to three factors:
 - i. subjective factors as to whether the Article had a sufficient air of credibility;
 - ii. Dr. Weaver's own subjective reactions to the Article; and
 - iii. the public nature of the debate about climate science.

(At paras. 75-82.)

[26] Dr. Ball disagrees that the judge made any such errors.

Legal Framework

Defamation Principles

[27] This appeal turns on the proper approach to determining whether statements constitute defamation.

[28] These principles were recently helpfully summarized by Justice Butler in *Level One Construction Ltd. v. Burnham*, 2019 BCCA 407 [Level One], a case where the plaintiffs also alleged that the words had defamatory inferential meanings:

[32] In *Grant v. Torstar Corp.*, 2009 SCC 61, the Court set out the three elements that must be proved for a successful action in defamation: (1) the impugned words are defamatory; (2) the words refer to the plaintiff; and (3) the words were published. A statement is defamatory if it would tend to lower the reputation of the person to whom it refers in the eyes of a reasonable person: at para. 28. Given the respondent's concession that the impugned statements referring to the appellants were published, the only question at trial and on appeal is whether the impugned statements were defamatory.

[33] Two distinct questions must be answered in order to determine if a statement is defamatory: 1) are the words reasonably capable of having a defamatory meaning; and, if so, 2) do the words used have a defamatory meaning. The first is a question of law and the second is a question of fact: *Northwest Organics, Limited Partnership v. Fandrich*, 2019 BCCA 309 at para. 62; *Kazakoff v. Taft*, 2018 BCCA 241 at paras. 21-22.

- [34] The standard of review that applies is not controversial. On questions of law, including whether the judge applied the correct legal test, the standard of review is correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8; *Northwest Organics* at para. 56. The standard of review for questions of fact is palpable and overriding error: *Housen* at para. 10.
- [35] In *Lawson v. Baines*, 2012 BCCA 117, at para. 13, the Court set out the three ways in which defamation can be proved:
- [13] ...
- a) If the literal meaning of the words complained of are defamatory;
 - b) If the words complained of are not defamatory in their natural and ordinary meaning, but their meaning based upon extrinsic circumstances unique to certain readers (the "legal" or "true" innuendo meaning) is defamatory; or
 - c) If the inferential meaning or impression left by the words complained of is defamatory (the "false" or "popular" innuendo meaning).
- [36] Here, the appellants rely on the inferential meaning or impression as set out in the allegations in the amended notice of civil claim. As explained in *Lawson*, at para. 23, when this means of proof is relied upon, the meaning must be determined objectively and no evidence concerning the meaning of the words is admissible:
- [23] The meaning of the remainder of the words complained of was determined by the trial judge, based upon the inferential meaning or impression left by the words complained of. Reliance on this means of proof requires that the meaning is that which the ordinary person, without special knowledge, will infer from the words complained of and this meaning must be determined objectively. Evidence concerning what the reasonable and ordinary meaning of the words is, or the sense in which they might be understood, or of facts giving rise to the inferences to be drawn from the words is inadmissible if this means of proof is relied upon: see *Hodgson v. Canadian Newspapers Co.* (1988), 39 O.R. (3d) 235 (Gen. Div.), varied on appeal as to damages (2000), 49 O.R. (3d) 161 (C.A.), leave to appeal dismissed (2001), [2000] S.C.C.A. No. 465 at para. 37, and the authorities referred to therein.
- [37] The impugned statement is to be judged by the standard of an ordinary, right-thinking member of society. The test to be applied was described by this Court in *Taseko Mines Ltd. v. Western Canada Wilderness Committee*, 2017 BCCA 431, at para. 42:
- [42] The applicable test of whether words are defamatory has been stated in a variety of terms. The defamatory meaning must be one which would be understood by reference to an ordinary and reasonable person, and not a meaning by someone who may be naturally inclined to attribute the best or worst meaning to words published about the plaintiff. The impugned words must be construed in their natural, normal, ordinary, plain, usual, fair, obvious, and commonly accepted sense. This is not an exhaustive list of appropriate adjectives, but an illustration of the applicable test: *Raymond E. Brown*, *Brown on*

Defamation -- Canada (Toronto: Thomson Reuters, 1994) (loose-leaf updated 2017, release 4), ch. 5 at 3, 16-23.

- [38] The test to discern whether the inferential meaning is defamatory is based on the natural and ordinary meaning a reasonable person would infer from the entirety of the publication: Taseko at para. 47.
- [39] In *Color Your World Corp. v. Canadian Broadcasting Corp.* (1998), 156 D.L.R. (4th) 27 (Ont. C.A.), at paras. 14-15, Justice Abella, as she then was, provides guidance on what the lowering of reputation means and the standard of an ordinary and reasonable person in defamation cases:

14 I take as my starting point the following definition of defamation:

A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him [or her] in the estimation of right-thinking members of society generally and in particular to cause him [or her] to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem. The statement is judged by the standard of an ordinary, right-thinking member of society. Hence the test is an objective one ...

(*Salmond on the Law of Torts*, 21st ed., by R.F.V. Heuston and R.A. Buckley (London: Sweet & Maxwell, 1996) at 140 citing *Sim v. Stretch* (1936), 52 T.L.R. 669 at 671, and *Vander Zalm v. Times Publishers* (1980), 109 D.L.R. (3d) (B.C. C.A.) at 531, 535, 543).

15 The standard of what constitutes a reasonable or ordinary member of the public is difficult to articulate. It should not be so low as to stifle free expression unduly, nor so high as to imperil the ability to protect the integrity of a person's reputation. The impressions about the content of any broadcast -- or written statement - should be assessed from the perspective of someone reasonable, that is, a person who is reasonably thoughtful and informed, rather than someone with an overly fragile sensibility. A degree of common sense must be attributed to viewers.

- [40] Lord Reid's description in *Lewis* [*Lewis v. Daily Telegraph Ltd.*, [1963] 2 All E.R. 151 (H.L.)], at 155, of the proper approach to the concept of the standard for defamation from the perspective of an ordinary person is frequently cited:

Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naïve. One must try to envisage people between these two extremes and see what is the most damaging meaning that they would put on the words in question.

[Emphasis added.]

- [29] In Level One, this Court found the trial judge to have erred in interpreting the standard of what constitutes defamation through the perspective of the "least harsh interpretation", rather than through the perspective of a reasonable, right-thinking person.

- [30] In the case at bar, the judge in the court below properly cited the applicable law for determining whether words are defamatory, noting in accord with the authorities cited in Level One above, that the test is an objective one determined by whether the words would tend to lower the plaintiff's reputation in the eyes of a reasonable or ordinary member of the public, as opposed to someone unduly sensitive: at paras. 36-37.
- [31] The judge held:
- [36] Words that tend to lower the plaintiff's reputation in the eyes of a reasonable person are defamatory: *Grant*, at para. 28. For example, allegations of dishonest conduct in an individual's professional life will typically meet this definition: *Botiuk*, at paras. 69, 92. The central question is whether the meaning conveyed by the impugned words genuinely threatened the plaintiff's actual reputation: *Vander Zalm v. Times Publishers* (1980), 109 D.L.R. (3d) 531 (B.C.C.A.) [*Vander Zalm*], at 535; *Dinyer-Fraser v. Laurentian Bank*, 2005 BCSC 225, at para. 153.
- [Emphasis in original.]
- [32] The phrase requiring that defamatory words must "genuinely threaten the plaintiff's actual reputation" was repeated by the judge throughout his analysis, and therefore bears some further explanation. The phrase appears to originate in *Weaver v. Corcoran*, 2017 BCCA 160 at para. 68 [*Weaver*], an earlier defamation case involving the same plaintiff.
- [33] For context, I will set out the paragraphs in *Weaver* describing the tort of defamation:
- [66] Two essential issues must be determined in a defamation action. The first is a threshold question: are the words complained of reasonably capable of bearing a defamatory meaning? This is a question of law subject to appellate review on a standard of correctness. If this threshold is met, the second question arises: do the words bear the defamatory meaning pleaded? This is a question of fact to be reviewed on a standard of reasonableness: *Lawson* at paras. 11-12.
- [67] The threshold question requires assessment of the range of possible meanings that words could reasonably bear and sets the outer limits of potential liability. In an action tried by a judge alone, it need not be asked and answered separately. As the trier of fact, the judge's function is to determine definitively whether the impugned words did, in fact, have a defamatory meaning. The threshold question is subsumed by this inquiry: *Mainstream Canada* [*Mainstream Canada v. Staniford*, 2013 BCCA 341] at para. 15.
- [68] Words that tend to lower the plaintiff's reputation in the eyes of a reasonable person are defamatory: *Grant v. Torstar Corp.*, 2009 SCC 61 at para. 28. For example, allegations of dishonourable or dishonest conduct in an individual's professional life will typically meet this definition: *Botiuk* at paras. 69, 92. The central question is whether the meaning conveyed by the impugned words genuinely threatened the plaintiff's actual reputation: *Vander Zalm v. Times Publishers et al.* (1980), 109 D.L.R. (3d) 531 at 535 (B.C.C.A.); *Dinyer-Fraser v. Laurentian Bank et al.*, 2005 BCSC 225 at paras. 153; *Best v. Weatherall*, 2008

BCSC 608 at para. 22, reversed on other grounds 2010 BCCA 202.

[69] The problem is that words are imprecise instruments of communication. The same words used in a particular context may lead different minds to reach different conclusions for different reasons. In determining whether impugned words, fairly construed, are defamatory, courts adopt an objective, common sense approach and avoid seizing upon the worst possible meaning. As Madam Justice Abella, then of the Ontario Court of Appeal, explained in *Color Your World Corp. v. Canadian Broadcasting Corp.* (1998), 156 D.L.R. (4th) 27 at para. 15 (Ont. C.A.), the words must be assessed, in context, from the perspective of a reasonable, right-thinking person, "that is, a person who is reasonably thoughtful and informed, rather than someone with an overly fragile sensibility".

[70] To obtain judgment, the plaintiff must prove three things: i) that the impugned words were defamatory; ii) that they referred to the plaintiff; and iii) that they were published, meaning that they were communicated to at least one other person. Where the plaintiff establishes these elements, falsity and damage are presumed and the onus shifts to the defendant to advance a defence in order to escape liability. Defamation is a tort of strict liability, so it is unnecessary to prove that the defendant was careless or intended to cause harm: *Grant* at paras. 28–29.

[Emphasis added.]

[34] The above passage in *Weaver* stated the classic test for defamatory words, as words that "tend to lower the plaintiff's reputation in the eyes of a reasonable person", citing the Supreme Court of Canada decision in *Grant v. Torstar Corp.*, 2009 SCC 61 [*Grant*].

[35] Following the statement of the classic test, this Court in *Weaver* stated that the central question was whether the meaning conveyed by the words "genuinely threatened the plaintiff's actual reputation". This phrase did not establish a higher threshold for proving that words are defamatory, as compared to the classic test, nor did it suggest that actual harm to reputation must be proven. Rather, it summarized the two key elements of the classic test stated in *Grant*, namely, that statements that might merely affect a person's wished-for reputation or pride, as opposed to a person's actual reputation, are not defamatory, nor are statements that are merely rude, abusive or insulting but that do not tend to affect reputation.

Pleadings Principles

[36] There are certain legal principles regarding pleadings which also arise on this appeal.

[37] Where, as here, a plaintiff claims that the complained of words bore an inferential meaning that is defamatory, the plaintiff must plead the alleged inferential meanings. In order to succeed, the plaintiff must prove, on a balance of probabilities, that the words complained of bore the meanings pleaded in the notice of civil claim or meanings that are substantially similar: *Lawson v. Baines*, 2011 BCSC 326 at para. 35, *aff'd* 2012 BCCA 117.

- [38] A defendant is permitted to plead that the words bore a different defamatory meaning than that pleaded by the plaintiff, and that defences apply to the different defamatory meaning: *Casses v. Canadian Broadcasting Corporation*, 2013 BCCA 200 [Casses].
- [39] However, the defendant is not permitted to raise a new libel, separate and distinct from the one that is the subject of the plaintiff's complaint: *Casses* at paras. 3-4, 7. This is to avoid the situation where the defendant attempts to use the platform of the defence to launch an additional irrelevant attack on the plaintiff: see *Casses* at paras. 4-5.
- [40] In *Casses*, this Court endorsed the evolution of common law pleadings rules as developed in England in *Polly Peck (Holdings) plc and others v. Trelford and others*, [1986] 2 All E.R. 84 (C.A.) [Polly Peck], and adopted in Ontario in *Pizza Pizza Ltd. v. Toronto Star Newspapers Ltd.* (1998), 167 D.L.R. (4th) 748 (Ont. Div. Ct.) [Pizza Pizza], *aff'd* (2000), 187 D.L.R. (4th) 761 (Ont. C.A.). Before this new approach, a defendant was limited to pleading a defence to the meaning of the words as pleaded by the plaintiff.
- [41] As explained in *Casses*, there are three good reasons for allowing a defendant to plead an alternative inferential meaning of the words, different to that alleged by the plaintiff. Justice Sharpe identified these reasons in the Ontario Divisional Court decision in *Pizza Pizza*, as summarized in *Casses* at para. 6:

a trier of fact should not be limited to a finding that the meaning of the sting is as pleaded by the plaintiff; the plaintiff should not have the exclusive right to define the issue for trial; and fairness dictates that the defendant be given the opportunity to provide a full explanation for its position because to hold otherwise would constitute "an unacceptable limitation of freedom of expression and freedom of the press".

[Citations omitted.]

- [42] Where a defendant does plead that the words bore a different inferential meaning, also defamatory, than that pleaded by the plaintiff, the issue as to the possible meanings of the words "will be confined to those pleaded" by both parties: *Polly Peck* at 102.

Analysis

Was There an Admission of Defamation in Dr. Ball's Defence Which the Judge Failed to Take into Account?

- [43] Dr. Weaver pleaded that the Article had several defamatory meanings, as set out above.
- [44] Dr. Ball disagreed that the Article had the defamatory meanings pleaded by Dr. Weaver. As noted above, Dr. Ball pleaded in para. 8.1 of the ARTCC that there was an alternative meaning that could be inferred from the Article:

8.1 In further answer to the meanings alleged in paragraph 4 of Part 1 of the [NOCC], and to the whole of the [NOCC], the overall gist or sting (the "Sting") of the Article insofar as it concerns the plaintiff is:

The plaintiff is qualified by conventional standards to teach climate science but should not be qualified because the conventional experience and training of climate science has been corrupted by political advocacy and limited by inadequate data, and his students have accordingly been taught a biased perspective.

[45] Dr. Weaver submits that Dr. Ball's pleading of an alternative meaning to the defamatory words amounted to an admission that the words were defamatory, albeit defamatory in a different way than that claimed by Dr. Weaver.

[46] Dr. Ball takes a different view. He submits that the pleading alleged an alternative meaning that admittedly could meet the test of defamation at law, but that it was not an admission that the words were in fact defamatory, a distinction noted in Level One at para. 33, set out above.

[47] Dr. Ball submits that at best his pleading was confusing and inconsistent, and that this is apparent when para. 8.1 is considered in the context of the entire ARTCC.

[48] In the ARTCC following the new para. 8.1, Dr. Ball pleaded the defence of fair comment as a defence to his pleaded alternative meaning:

- a) that the "Sting" quoted above, was an expression of opinion on a matter of public interest and was protected speech under the defence of fair comment (Part 1, para. 8.2); and
- b) the matter of public interest was the debate of climate change (Part 1, para. 8.4).

[49] Dr. Ball pleaded elsewhere in the ARTCC general denials that the words in the Article were in fact defamatory:

- a) the statements complained of "have not threatened or were not serious enough to threaten the Plaintiff's reputation, cause financial damage, reduce the Plaintiff's business or otherwise hurt the Plaintiff" (Part 1, para. 9b);
- b) "[n]o defamation actually alleged" (Part 3, para. 1b); and
- c) "in the context of the current global debate on the issue of climate change the allegedly defamatory statements in the [NOCC] do not tend to lower the Plaintiff in the estimation of society or otherwise harm the Plaintiff's reputation" (Part 3, para. 6).

[50] The amendment by way of para. 8.1 of the ARTCC was opposed by Dr. Weaver and so Dr. Ball needed to bring an application in chambers before a Master for leave to make the amendment, together with other amendments.

[51] In the application response opposing the amendments, counsel for Dr. Weaver wrote at para. 36:

The Proposed Alternative Meaning [proposed new para. 8.1 of the ARTCC] is not capable at law of being defamatory of the plaintiff.

[Citations omitted.]

[52] Relying on *Casses*, Dr. Weaver first took the position that para. 8.1 of the proposed amended pleading was not defamatory and so the amendment should not be allowed; but alternatively, if it was defamatory, it was impermissible as a separate and distinct libel.

[53] It appears from reading the transcript of submissions before the Master who heard the application to amend the pleading that counsel for Dr. Ball understood *Casses* and related case law in the same way as argued by Dr. Weaver: that the alternative meaning pleaded by the defendant must be an alternative defamatory meaning, not an alternative innocent meaning.

[54] Indeed, counsel for Dr. Ball submitted to the Master that in order for the defendant to plead an alternative meaning, it must be a defamatory meaning:

So, the only limitation on the defendant pleading what he, in this case, says the article is -- the only limitation is [that] it's got to be defamatory, that it is a defamatory meaning, and it's a meaning that relates to the existing pleas of the plaintiff.

... [A]s long as it's still above the defamation threshold, it's fine. Defendant's allowed to plead that and say, "This is what I say the sting is," and that sting is covered by fair comment.

[55] The above reference by counsel for Dr. Ball to the "sting" of the statement was a reference to a well-known term of art in defamation law. The "sting" is a term meant to describe the essence of the defamation and its seriousness, whether it is a passing irritant or a devastating blow: *Grant* at para. 111.

[56] There is no doubt based on his submissions in support of the amendment that counsel for Dr. Ball took the view that the proposed amendment, para. 8.1 of the ARTCC, was intended to plead an alternative defamatory meaning to that pleaded by Dr. Weaver, for which Dr. Ball advanced the defence of fair comment.

[57] However, at the same time, it is important to note that counsel for Dr. Ball also took the position in submissions before the Master that it would be up to the trial judge to determine whether that meaning was defamatory in fact.

[58] In approving the amendments, the Master left all such arguments to the trial judge: *Ruling* at paras. 5, 7-8.

[59] After the amendments were allowed, Dr. Weaver filed a reply pleading that argued that para. 8.1 of the ARTCC was an admission of something other than what it said, namely:

9. In reply to paragraph 8.1 of the [ARTCC], the plaintiff accepts the defendant's admission that the Article is defamatory of the plaintiff and meant that "the plaintiff was corrupted by political advocacy and limited by inadequate data, and his students have accordingly been taught a biased perspective" or a "slightly" different (i.e. substantially similar) meaning (the "Sting").

[Italicized in original.]

- [60] The judge did not accept Dr. Weaver's reply pleading as dictating the meaning of para. 8.1 of the ARTCC. In my view, the judge was correct in noting that "counsel's paraphrasing of that paragraph does not displace the actual language used": at para. 71.
- [61] Dr. Weaver argues on appeal that the judge made an error in not finding that the Article was defamatory at the very least in the way "admitted" by Dr. Ball in para. 8.1 of the ARTCC. Dr. Weaver argues as a matter of principle that any defence pleading of an alternative meaning must be of a defamatory meaning, otherwise the pleading would not be permitted.
- [62] The question of whether a defendant ought to be allowed to plead an innocent, non-defamatory inferential meaning of the words of which the plaintiff complains, is an interesting issue that was not decided in the court below and so need not be decided by this Court. Conventional wisdom appears to be that such a pleading would be irrelevant.
- [63] Nevertheless, not all defendants are well-versed in the technicalities of pleading defamation cases and a poorly informed defendant could make an error in pleading a meaning that is irrelevant without intending it to be an admission. In my view, the circumstances must be considered before concluding whether or not a defendant who advances such a pleading was making an admission of an alternative defamatory meaning.
- [64] Here, counsel for Dr. Ball was well-versed in the relevant technicalities of pleadings in defamation cases; described in the pleading that the alternative meaning was the "sting" of the Article; and made submissions acknowledging that this was a pleading of an alternative defamatory meaning, subject to the pleaded defence of fair comment.
- [65] Yet, at the same time, on the application to amend the defence pleading, counsel for Dr. Ball stated that the question of defamation was one for the trial judge; and in other paragraphs of the ARTCC, Dr. Ball pleaded that the words were not defamatory. Further, counsel for Dr. Weaver submitted before the Master that the pleading should not be allowed because it was not defamatory.
- [66] It cannot be said in all of these circumstances, that para. 8.1 of the ARTCC was unambiguously intended by the defendant and understood by the plaintiff to be an admission that Dr. Ball defamed Dr. Weaver.

- [67] In the circumstances, it is my view that para. 8.1 of the ARTCC was an admission that the Article bore at least the meaning set out in that paragraph, which could constitute defamation at law, but whether or not this meaning was in fact defamatory of Dr. Weaver was understood to be a question for the trial judge, subject to the defences raised by Dr. Ball.
- [68] I am of the view that the judge recognized that the words did at a minimum bear the meaning alleged by Dr. Ball at para. 8.1 of the ARTCC: see para. 71. I conclude he did not make any error in this regard.
- [69] However, as I will next examine, I am of the view that the judge erred in his approach to the question of whether these words were defamatory.

Defamation at Law and in Fact

- [70] Dr. Weaver submits that the judge erred both in law and in fact in finding that the words in the Article were not defamatory, by wrongly taking into account certain factors: subjective factors going to the credibility of the Article; Dr. Weaver's subjective reaction to the Article; and the public nature of the debate about climate science.
- [71] As mentioned, the judge accepted that in fact the Article did bear the "sting" pleaded by Dr. Ball in para. 8.1 of the ARTCC: at para. 71. The judge also held that the Article went further than this and made derogatory allegations directed at Dr. Weaver's professional competence:
- [69] Dr. Ball submits that the meaning conveyed in the Article, as reflected in para. 8.1, is that conventional climate science has been corrupted by political advocacy and is limited by inadequate data, and that accordingly, Dr. Weaver, as a supporter of the conventional view, has taught his students a biased perspective.
- [70] Dr. Weaver seeks to put a different meaning on para. 8.1. He submits that para. 8.1 alleges that he has been corrupted by political advocacy, both his own and that of others like Maurice Strong, who is referenced in the Article. Dr. Weaver relies on a statement made by the agent for Dr. Ball's counsel who appeared in Chambers on Dr. Ball's application to amend his [RTCC] and who is recorded in the transcript as saying that the "defendant's meaning is that Dr. Weaver was corrupted by political advocacy and limited by inadequate data, and his students have accordingly been taught a biased perspective".
- [71] I do not read para. 8.1 this way, and counsel's paraphrasing of that paragraph in court does not displace the actual language used. In my view, para. 8.1, as interpreted by Dr. Ball, accurately captures the sting of the Article.
- [72] That is not to say that the Article is wholly benign as it relates to Dr. Weaver. On Dr. Ball's own interpretation, the Article suggests that Dr. Weaver is not competent to teach climate science or, at least, teaches it from a biased perspective. The Article suggests further that Dr. Weaver would not be qualified to participate in a multi-disciplinary panel on climate science.

[73] These allegations are directed at Dr. Weaver's professional competence and are clearly derogatory of him. Indeed, it is quite apparent that this was Dr. Ball's intent. Why else would he include a description of Dr. Weaver's allegedly paranoid behaviour at the meeting in Dr. Weaver's office, given that it has no direct relevance to the central thesis of the Article? (I note again that Dr. Weaver denies Dr. Ball's version of that meeting.)

[Emphasis added.]

[72] I agree with the judge that the meaning of the words is directed at Dr. Weaver's professional competence. The words convey that Dr. Weaver is not professionally competent in his profession, teaches from a biased perspective, and is not qualified to participate (as he has done) in a multi-disciplinary panel on climate science. These words are, as the judge said, "clearly derogatory".

[73] It seems to me that objectively these words would tend to lower Dr. Weaver's reputation in the estimation of ordinary reasonable people and would thus meet the test of being defamatory. Why then did the judge find otherwise?

[74] The judge had the following three key reasons for finding that the test for defamation was not met:

- a) first, the article was poorly written and did not advance credible arguments, and the words lacked a sufficient air of credibility to make them believable to a reasonable person and was an opinion piece;
- b) second, Dr. Weaver did not consider his reputation to be genuinely threatened; and
- c) third, as a person who is at the forefront of a public debate, it could be expected that Dr. Weaver's actions and words will be subject to robust scrutiny and criticism.

(At paras. 75-82.)

[75] Respectfully, I find that the judge erred in his reasoning in respect of each of the above three factors.

Credibility of the Article

[76] Turning to the quality of the Article, the judge considered the poor quality of the writing in a subjective way in concluding it lacked credibility.

[77] The judge held:

[60] Further, despite Dr. Ball's history as an academic and a scientist, the Article is rife with errors and inaccuracies, which suggests a lack of attention to detail on Dr. Ball's part, if not an indifference to the truth. For example:

- a) He purports to cite a paper from Michigan State University stating that most college students do not understand the scientific basis of the carbon cycle, when in fact, he was referring to an online article written by a professor of education who was describing a study published in the science journal BioScience;
 - b) He suggests that Dr. Weaver has consistently refused to debate the climate change issue, an allegation not borne out in the evidence;
 - c) When describing his presentation at UVIC, he alleges that Dr. Weaver's students showed up to disrupt the presentation, which again, was not established on the evidence, and Dr. Ball had no basis for making that allegation in the Article; and
 - d) He alleges that Dr. Weaver had announced his intention to withdraw from the next IPCC and had advocated for the resignation of the IPCC chairman. Dr. Ball said he took this information from a newspaper article, the veracity of which he did not confirm, and which was disputed by Dr. Weaver.
- [61] While each of these errors, looked at individually, may seem quite minor, collectively, they illustrate that Dr. Ball's approach to gathering facts in support of his opinion or thesis is less than rigorous.
- [62] Dr. Ball is also less than forthright in the Article about his interaction with Dr. Weaver. He states that he met with Dr. Weaver in his office at Dr. Weaver's invitation and he recounts a rather odd conversation about whether he was recording their conversation. He fails to disclose however, that this meeting occurred in 1997, over thirteen years prior to the date on which he wrote the Article. I note that Dr. Weaver denies Dr. Ball's version of that conversation. Dr. Ball also fails to disclose the subsequent email exchange, referred to above, at para. 12, in which the two men engaged in a lengthy debate.
- [63] While Dr. Ball presents his central thesis that climate science has been corrupted by politics, the Article offers little in the way of support for that thesis, apart from vague references to missing or falsified data and political manipulation, unsubstantiated and erroneous references to Dr. Weaver as referred to above, and a recommendation that people read a 45-year-old text on climate science written by Professor Hubert Lamb.
- [64] Overall, even as an opinion piece, the Article presents as poorly written and it provides little in the way of credible support for Dr. Ball's thesis.
- [78] As can be seen from the passage just set out, the judge's observations as to the Article lacking credibility listed a number of errors and inaccuracies in the Article. But this was based on evidence that came out during the trial, not the content of the Article.
- [79] The conclusion that the Article was poorly written and was not credible was the judge's first reason for deciding that the words, while derogatory, did not "reach th[e] level" of meeting the test for defamation that the words "genuinely threaten the plaintiff's actual reputation", as follows:

- [74] However, not every derogatory statement is defamatory. The test again is whether the impugned words genuinely threaten the plaintiff's actual reputation (Weaver, at para. 68). Here, I am not satisfied that the impugned words of the Article reach that level. I reach this conclusion for the following reasons.
- [75] First, as discussed above, the Article is poorly written and does not advance credible arguments in favour of Dr. Ball's theory about the corruption of climate science. Simply put, a reasonably thoughtful and informed person who reads the Article is unlikely to place any stock in Dr. Ball's views, including his views of Dr. Weaver as a supporter of conventional climate science. In *Vellacott v. Saskatoon Star Phoenix Group Inc. et al*, 2012 SKQB 359 [Vellacott], the court found that certain published comments were not defamatory because they were so ludicrous and outrageous as to be unbelievable and therefore incapable of lowering the reputation of the plaintiff in the minds of right-thinking persons (at para. 70). While the impugned words here are not as hyperbolic as the words in Vellacott, they similarly lack a sufficient air of credibility to make them believable and therefore potentially defamatory.
- [Emphasis added.]
- [80] The judge cited the decision of *Vellacott v. Saskatoon StarPhoenix Group Inc.*, 2012 SKQB 359 [Vellacott], as support for the proposition that a ludicrous and outrageous statement might not be defamatory. In that case, the plaintiff was a Member of Parliament who was criticized for using MP mailing privileges to support his campaign to elect Stockwell Day as a leader of the Canadian Alliance party. The newspaper articles quoted persons who criticized the plaintiff in the strongest terms. One person used the word "crooked" and another used the word "steal" to refer to the plaintiff and his actions. The Court found both statements defamatory.
- [81] The Court in Vellacott found that a third statement was not defamatory. That was a statement suggesting persons supporting Mr. Day's leadership campaign were trying to do so on the basis of Christianity, and linked this and the purported abuse of mailing privileges to "shades of Jim and Tammy Faye Bakker". The article then explained how the Bakkers bilked religious followers out of millions of dollars. The Court suggested the statements were simply "hyperbole", and were so "outrageous, and the comparison so ludicrous, as to be unbelievable." As such, the Court found that the statements "would not have lowered a right-thinking person's opinion" of the plaintiff: at para. 70.
- [82] In my view, the statements found not to be defamatory in Vellacott are not analogous to the statements in the Article. As the judge noted, the statements in the Article at issue in the present case do not have the same hyperbole as the non-defamatory statements in Vellacott.

- [83] Here the judge's comment that the words were similar to those in Vellacott because "they lack a sufficient air of credibility to make them believable" was based on the judge's subjective understanding of the many flaws in the Article after hearing evidence as to the Article's errors and inaccuracies. These errors and inaccuracies are not apparent merely by reading the Article and cannot be said to be common knowledge.
- [84] The judge fell into error when determining the question of whether the Article was defamatory, by taking into account the poor quality of the writing of the Article in a subjective way based on evidence known to the Court but not to the ordinary and reasonable reader.
- [85] When inferential meanings are alleged, the meanings must be determined objectively, as an ordinary reasonable person without special knowledge: Level One at para. 36 set out above, citing *Lawson v. Baines*, 2012 BCCA 117 at para. 23.
- [86] While the judge acknowledged this principle at para. 37, with respect, he erroneously overlooked and failed to apply it when considering the quality of the Article.
- [87] At the same time, the judge gave undue weight to the fact that the Article was an opinion piece, as a factor that undermined its effective weight or credibility. I will come back to this point.

Dr. Weaver's Reaction to the Article

- [88] I turn to the second focus of the judge in determining that the Article was not defamatory: the impact of the Article on Dr. Weaver.
- [89] The judge held:
- [78] Second, despite professing to have been "saddened, sickened and dismayed" by the Article, I am not satisfied that Dr. Weaver himself perceived the Article as genuinely threatening his actual reputation. As noted, Dr. Weaver has been actively and publically engaged in the climate change discussion for many years. That included endorsing political candidates who advanced policies he agreed with and opposing candidates with whom he disagreed. It is also quite apparent that he enjoys the "thrust and parry" of that discussion and that he places little stock in opposing views such as those espoused by Dr. Ball, which Dr. Weaver characterized as "odd" and "bizarre". Dr. Weaver went so far as to post the Article on his "wall of hate" located outside his office, alongside other articles and correspondence from "climate doubters". It is apparent that he views such material as more of a "badge of honour" than a legitimate challenge to his character or reputation.

[Emphasis added.]

- [90] In my view it cannot be said that Dr. Weaver's reaction to the Article was proof that it was not defamatory. The question of whether the words are defamatory is judged objectively, through the perspective of the hypothetical reasonable person. There is no requirement to show actual harm: Grant at para. 28.
- [91] Further, even if it could be said that the reaction of the person allegedly defamed may be some circumstantial evidence from which inferences could be drawn of how a reasonable person would interpret the statement, I question the reasonableness of the inferences that were drawn in this case. It is not inconsistent with the fact of defamation for a person who is defamed to publicly refer to the words in some way, in an attempt to diminish the messenger or the message.
- [92] Further, the fact that there is a public climate change debate and that Dr. Weaver is confident in his understanding of climate science says little about how Dr. Weaver's reputation would be perceived by a reasonable person after reading the Article.
- [93] Dr. Weaver's reaction as interpreted by the judge might have been relevant to damages, but in my respectful view the judge erred in concluding it was proof that the statements were not defamatory.

Public Debate

- [94] As another aspect of the judge's analysis of the question of whether the words were defamatory, the judge considered the fact that Dr. Weaver was a figure who had involved himself in public debate on climate science. The judge treated this as a factor that ameliorated the derogatory impact of the words.
- [95] As mentioned, at the same time the judge took into account the nature of the Article as an "opinion piece" as support for his conclusion that the Article was not defamatory.
- [96] It is true that consideration of whether statements are defamatory needs to take into account the context of all the circumstances and the publication as a whole: *Taseko Mines Limited v. Western Canada Wilderness Committee*, 2017 BCCA 431 at para. 44 [Taseko]; *Northwest Organics, Limited Partnership v. Fandrich*, 2019 BCCA 309 at para. 68. Nevertheless, it is an error to not distinguish the fair comment defence from the question of whether or not the statements at issue are defamatory.
- [97] Respectfully, in my view, the judge's analysis erroneously blurred the lines between the question of whether statements are defamatory and the question of whether the fair comment defence applies.
- [98] The elements of the fair comment defence were summarized in the majority judgment in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 [WIC Radio], and set out in Level One at para. 55:
- (a) the comment must be on a matter of public interest;

- (b) the comment must be based on fact;
 - (c) the comment, though it can include inferences of fact, must be recognisable as comment;
 - (d) the comment must satisfy the following objective test: could any [person] honestly express that opinion on the proved facts?
 - (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice.
- [99] The concurring judgment of Justice LeBel in WIC Radio took a different approach than the majority. Justice LeBel treated the nature of the statements as opinion, and as a matter of public debate, as factors going to the determination of whether or not the statements were defamatory.
- [100] The approach of LeBel J. in WIC Radio is not the accepted approach: see Taseko at para. 52.
- [101] In respect of the nature of the Article as containing opinions, the judge in the court below adopted the approach of LeBel J. in WIC Radio and held:
- [76] Moreover, as noted above, the Article is clearly an opinion piece, and statements of opinion are generally evaluated differently than statements of fact. As stated by Mr. Justice LeBel in WIC Radio, at para. 71 of his concurring reasons:
- [71] Although distinguishing facts from comment may sometimes be difficult, a comment is by its subjective nature generally less capable of damaging someone's reputation than an objective statement of fact, because the public is much more likely to be influenced in its belief by a statement of fact than by a comment.
- [77] In my view, it is very unlikely that the Article and the opinions expressed therein had an impact on the views of anyone who read it, including their views, if any, of Dr. Weaver as a climate scientist. Rather, the reasonably thoughtful and informed reader would have recognized the Article as simply presenting one side of a highly charged public debate.
- [102] The statements in the Article may in part have been opinion, but the judge failed to recognize that these were ostensibly the opinion of a qualified person in the field, stating that another person in the field was unqualified, incompetent and biased. The subject matter of the Article was technical, and involved the field of climate science. The author bore the title "Dr." and referred to matters that suggested that the author had a degree of knowledge and expertise in the field that was greater than that of the ordinary reader. This would give the Article extra credit to an ordinary reasonable person.
- [103] On the facts of this case the opinion aspect of the Article was more relevant to the stage of analysis addressing the defence of fair comment and perhaps even damages.

- [104] The judge's consideration of the public nature of the debate also blurred the lines between the fair comment defence and the issue of whether statements are defamatory, once again adopting the approach of LeBel J. in *WIC Radio*. The judge held:
- [79] The issue of climate change is a matter of public interest and, as noted, Dr. Weaver has been at the forefront of public discussion. It has long been recognized that where someone enters the public arena, it is to be expected that his or her actions and words will be subject to robust scrutiny and criticism. For example, in *Lund v. Black Press Group Ltd.*, 2009 BCSC 937 [Lund], Mr. Justice Bracken stated, at para. 123:
- [123] It is important to any community that matters of public interest are debated freely and openly. Sometimes, in the heat of discussions over a controversial issue where strong personal differences exist, persons on one side or other of the debate make comments that offend. But the fact that they offend is not enough. The comments must go beyond strong criticisms of a public man acting in his capacity as a public official.
- [80] Similar observations were made by Chief Justice Nemetz in *Vander Zalm*, at 535 and 536. While the plaintiffs in both *Lund* and *Vander Zalm* were elected officials, in my view, the principle applies with equal force to others who actively engage in matters of public interest.
- [81] In *WIC Radio*, Justice LeBel again, in his concurring reasons said, at paras. 74-75:
- [74] Members of the public will generally have a more solid basis on which to evaluate a comment about a public figure than one about someone who is unknown. Thus, although public figures are certainly more open to criticism than those who avoid the public eye, this does not mean that their reputations are necessarily more vulnerable. In fact, public figures may have greater opportunity to influence their own reputations for the better.
- [75] People who voluntarily take part in debates on matters of public interest must expect a reaction from the public. Indeed, public response will often be one of the goals of self-expression. In the context of such debates (and at the risk of mixing metaphors), public figures are expected to have a thick skin and not to be too quick to cry foul when the discussion becomes heated. This is not to say that harm to one's reputation is the necessary price of being a public figure. Rather, it means that what may harm a private individual's reputation may not damage that of a figure about whom more is known and who may have had ample opportunity to express his or her own contrary views.
- [82] The law of defamation provides an important tool for protecting an individual's reputation from unjustified attack. However, it is not intended to stifle debate on matters of public interest nor to compensate for every perceived slight or to quash contrary view points, no matter how ill-conceived. Public debate on matters of importance is an essential element of a free and democratic society and lies at the heart of the Charter guarantee of freedom of expression. As Justice LeBel observes, such debate often includes critical and even offensive commentary, which is best met through engagement and well-reasoned rejoinder. It is only when the words used reach the level of genuinely threatening a person's actual reputation

that resort to the law of defamation is available. Such is not the case here.

- [105] It is uncontroversial that the law of defamation must be considered in context of the Charter value of freedom of expression, especially in respect of topics which are a matter of public interest.
- [106] A free press is critically important to a functioning democracy, to hold the powerful accountable and to inform the public of the truth.
- [107] In this digital age, the public forum for the free exchange of ideas is more and more often electronic. But many internet publications purport to report news and information without employing standards of professional journalism. A false statement damaging a person's reputation can spread widely and rapidly, instantly and often permanently available to anyone who uses an internet search engine. The collision between these interests, protection of reputation, and freedom of expression including freedom of the press, is inevitable.
- [108] Further complicating matters is the fact that litigation is a very imperfect tool for addressing damage to one's reputation. While it can sometimes provide a defamed person with the best or only opportunity for vindication, the award of damages for defamation might be less than the legal costs incurred. Unfortunately, defamation lawsuits can also be used as tools by the rich and powerful to harass their critics.
- [109] It is not easy to address the competing interests, but the common law of defamation in Canada has evolved in an attempt to do so.
- [110] Two leading Supreme Court of Canada decisions have carefully weighed the competing interests in light of Charter values, and have expanded the defences available to parties sued for defamation in relation to statements on topics that are a matter of public interest. In *WIC Radio*, the majority judgment of the Court relaxed the requirements of the fair comment defence; and in *Grant*, the Court recognized a new defence of "responsible communication on a matter of public interest."
- [111] I have already mentioned the elements of the fair comment defence.
- [112] The defence of "responsible communication on a matter of public interest" has two elements: first, the publication must be on a matter of public interest; and second, the defendant must show the publication was responsible, in that the defendant was diligent in trying to verify the allegations having regard to all relevant circumstances: *Grant* at para. 98.
- [113] In order for the responsible communication defence to succeed, there must have been some diligence on the part of the defendant in verifying the allegations. This requires consideration of a number of factors, including but not limited to: the public importance of the subject matter; the urgency of the matter; the status and reliability of the source; whether the plaintiff's side of the story was sought and accurately reported; whether

inclusion of the defamatory statement was justifiable; and whether the statement's public interest lay in the fact that it was made rather than its truth (known as "reportage"): Grant at paras. 111-121, 126.

- [114] The responsible communication defence was pleaded by Dr. Ball (although not in relation to para. 8.1 of the ARTCC), but has not been argued on appeal. It is obvious that the defence would not apply based on the judge's findings regarding the inaccuracies in the Article (at paras. 60-62), which would have been known to Dr. Ball, and the fact that in non-urgent circumstances, Dr. Ball did not attempt to obtain Dr. Weaver's point of view.
- [115] The public nature of the debate may also be taken into account in the award of general damages for defamation, as a reason to exercise restraint: *Derrickson v. Tomat* (1992), 88 D.L.R. (4th) 401 (B.C.C.A.) per Wood J.A.
- [116] Respectfully, while the public nature of the debate regarding climate science and the fact that many of the statements in the Article were opinion might have been factors going to the defence of fair comment or to the measure of damages in this case, the judge erred in giving these factors undue weight in support of his conclusion that the "derogatory" words were not in fact defamatory.
- [117] A person's reputation in their employment and profession is often key to their personal dignity and livelihood. Statements casting aspersions on a person's professional competence may tend to injure the person's reputation in their employment and therefore may be defamatory, even if they do not imply dishonesty or some other kind of moral blameworthiness. For example, courts have found defamatory: statements in a newspaper article by a theatre critic stating that the plaintiff's theatre direction was so bad he was asked not to return, in *Kerr v. Conlogue* (1992), 65 B.C.L.R. (2d) 70 (S.C.); and statements in a letter from an engineering employee of the provincial government to a consulting engineering firm, that engineers in another firm did not perform their work in compliance with design and performance requirements and certified a project complete when it was not, in *Hiltz and Seamone Co. v. Nova Scotia (Attorney General)* (1997), 164 N.S.R. (2d) 161 at paras. 32, 39 (S.C.), varied on other grounds (1999), 172 D.L.R. (4th) 488 (N.S.C.A.).
- [118] Objectively the statements in the Article taken together, on the judge's own findings, suggested that Dr. Weaver was not professionally competent or qualified and was academically biased in his chosen field of climate science. These statements were an attack on Dr. Weaver's qualifications as an academic. They were stated by someone who held himself out as qualified in a technical or academic field. An ordinary person, not unduly sensitive but reasonable, would read the Article as an attack on Dr. Weaver's professional competence and qualifications as an academic. These statements would tend to lower Dr. Weaver's standing in the community and therefore meet the classic test for defamation.

Conclusion and Remedy

[119] I have concluded that the judge erred in his approach in determining that the words in the Article were not defamatory of Dr. Weaver. Applying the classic test of whether the words have a tendency to injure the person's reputation in the estimation of reasonable right-thinking persons, the words were defamatory. A reasonable person would read the Article as alleging that Dr. Weaver was not professionally competent or qualified and was academically biased in his field of climate science.

[120] Dr. Ball submits that regardless of whether the words were defamatory, Dr. Weaver failed to prove publication of the Article, or alternatively, publication in British Columbia.

[121] Because of the judge's conclusion that the words were not defamatory, the judge did not address the issue of publication or whether the fair comment defence applies. I am of the view that determination of these issues requires consideration of the evidence including possible drawing of inferences, all of which is best done by a trial judge.

[122] I would allow the appeal and remit the matter to the trial court on the remaining issues, namely, publication, the applicability of the fair comment defence, and damages.

"The Honourable Madam Justice Griffin"

I AGREE:

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Mr. Justice Abrioux"

APPENDIX

Corruption of Climate Science Has Created 30 Lost Years

By Dr. Tim Ball Monday, January 10, 2011

It's frightening how little climate science is known by both sides of the debate on human causation of global warming. I wrote this sentence before I saw a paper from Michigan State University that found, "Most college students in the United States do not grasp the scientific basis of the carbon cycle - an essential skill in understanding the causes and consequences of climate change."

The professor says students need to know because they must deal with the buildup of CO₂ causing climate change. This discloses his ignorance about the science of the carbon cycle and the role of CO₂ in climate. It's not surprising and caused by three major factors:

1. A function of the emotional, irrational, religious approach to environmentalism.
2. The political takeover of climate science

3. Funding directed to prove the political rather than the scientific agenda.

The dogmatism of politics and religion combined to suppress openness of ideas and the advance of knowledge critical to science.

We now have a generation (30 years) of people teaching, researching, or running government that has little knowledge because of lack of fundamental education. Because of them, the public is ill informed, don't understand the problem, and don't know the questions to ask. Correcting the education process will take time because there are insufficient people with the knowledge or expertise. Correcting and widening the research functions will take longer because of removing or re-educating current personnel and a lack of qualified replacements. Even if achieved, success is unlikely. There is the massive problem of inadequate data.

Reduction in the number of weather stations, elimination of raw data by national governments, unexplained manipulations of existing data, lost data by people like Phil Jones, were all done to falsify the results and prevent scrutiny of their work. This couples with failure to fund research to recover and reconstruct historical data. In his autobiography Hubert Lamb said he founded the Climatic Research Unit (CRU) because "it was clear that the first and greatest need was to establish the facts of the past record of the natural climate in times before any side effects of human activities could well be important." The situation is worse now, sadly due to people at the CRU and government weather agencies.

The blame begins with the political manipulations of Maurice Strong, but he only succeeded because of the so-called climate scientists. Among them, computer modelers caused the biggest problem. They needed to know the most, but knew the least. If they knew anything they would know there is inadequate data and understanding of the major components and mechanisms on which to build the models.

I responded to a newspaper article with a letter pointing out many errors. It elicited an invite from Andrew Weaver IPCC computer modeler. I entered his office with my backpack and he said, "I hope you don't have a microphone in that thing do you?" I remarked, "Someone's paranoia is showing." In the next twenty minutes I realized, because of 25 years of teaching, researching and publishing, he knew very little about climate. He received a phone call and I left his office. A student working outside said he heard my comments about the severe limitations of the computer models and and said he agreed. He simply wanted to get his degree and research money was available. Weaver claimed to be a climatologist, but removed that from his web page when it was pointed out he was a computer modeler.

Over the years Weaver consistently refused a debate. When a students group arranged one at the University of Victoria he refused to participate with his standard line about only dealing with "working" climatologists. His students showed up at my presentation and were talking to students outside the door, apparently attempting to deter them from entering. When they all finally came in they tried to interrupt the proceedings by constantly asking questions. They even had laptops and challenged with Internet sites supposedly contradicting what I said. It was shameless and not surprisingly their interpretation of events appeared on a smear blog site. For example, I showed

the Milankovitch Effect and said it was not in the Intergovernmental Panel on Climate Change (IPCC) computer models. One student said he worked with the models and it is included. There's no doubt it is in some climate models, but not those of the IPCC.

Weaver has announced he will not participate in the next IPCC. He, like so many who got on the bandwagon of politics and funding, is abandoning the sinking ship. Most of his early funding was from Environment Canada until alternate arrangements were made. He began withdrawal in January 2010, "Senior Canadian climate scientist says the United Nations' panel on global warming has become tainted by political advocacy, that its chairman should resign, and that its approach to science should be overhauled."

He also said, "the leadership of the Intergovernmental Panel on Climate Change (IPCC) has allowed it to advocate for action on global warming, rather than serve simply as a neutral science advisory body." He knew this all along, partly because I told him. The question is what has he taught his students in the meantime? Judging by his responses to my questions and those asked by his students at my presentation, not much and very biased.

A former editor of an enlightened environmental journal said we need a committee of scientists from the many disciplines involved in climate science. Such a committee existed 25 years ago, and produced groundbreaking work. It was a joint project funded by The National Museum of Canada and Environment Canada under the title "Climatic Change in Canada During the Past 20,000 years." Each year a specific topic was considered and scientists presented material that was published in *Syllogeus*. For example, *Syllogeus* 5 examined Critical Periods in the Quaternary of Climatic History of Northern North America. All the problems that plague climate science such as tree rings, ice cores, circulation patterns and proxy data, among many others, were identified and researched. In the last meeting, I was elected Chair, and in my acceptance speech said, we need to consider carefully and scientifically the claims of global warming. Environment Canada cut the funding because it challenged the political position that agency had already taken; the project died. Canada should reconstitute it because it was producing useful and non-political science - supposedly Weaver would now approve, but I don't think he's qualified to participate.

People who totally accepted the corrupted, limited and narrowly focused science of the IPCC have taught climate science for the last 30 years. They should all read Lamb's monumental two-volume set;

Lamb, H.H., 1972, "Climate: Present, Past and Future. Vol. 1: Fundamentals and Climate Now." Methuen, London and 1977, "Climate: Present, Past and Future. Vol. 2: Climatic History and the Future".

They'd learn that all issues now put forward as 'new' are not new at all. They only appear new because of the black hole that politicians, aided by a few climatically uneducated political scientists, have dragged climate science into over the last 30 years.

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