COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Mainstream Canada v. Staniford,*
2013 BCCA 341

Date: 20130722
Docket: CA040316

Between:

Mainstream Canada, a division of EWOS Canada Ltd.

Appellant
(Plaintiff)

And

Don Staniford, and the said Don Staniford carrying on business as The Global Alliance Against Industrial Aquaculture

Respondents
(Defendants)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice Bennett

On appeal from: An order of the Supreme Court of British Columbia dated September 28, 2012 (*Mainstream Canada v. Staniford*, 2012 BCSC 1433, Vancouver Docket S111908)

Counsel for the Appellant:	D.K. Wotherspoon and G.R. Cameron
Counsel for the Respondents:	D.F. Sutherland and D.L. Kripp
Place and Date of Hearing:	Vancouver, British Columbia May 28, 2013
Place and Date of Judgment:	Vancouver, British Columbia July 22, 2013

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Madam Justice Bennett

Summary:

The appellant sought general and punitive damages for allegedly defamatory comments made by the respondent in various publications, as well as a permanent injunction restraining him from publishing similar words and images in the future. The trial judge found the defence of fair comment applied to the defamatory comments and dismissed the action. In holding that the defence applied, the judge found that a determined reader could have located the facts upon which the comments were based.

Held: appeal allowed. The trial judge erred in finding the test for the defence of fair comment was satisfied. The defamatory publications did not identify by a clear reference the facts upon which the comments were based that were contained in other documents. The trial judge's order dismissing the appellant's claim is set aside, and the permanent injunction is granted. As it is in the interests of justice for this Court to assess damages rather than order a new trial, the appellant is awarded general damages of $25,000 and punitive damages of $50,000. The respondent is punished for his misconduct during the trial by awarding the appellant special costs of the action.

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

[1] The appellant, Mainstream Canada ("Mainstream"), appeals from the order of the trial judge dismissing its defamation action against Don Staniford. Mainstream challenges the judge's findings that the defence of fair comment applied to the defamatory comments made in various publications by Mr. Staniford and that this defence was not defeated by malice on his part.

[2] Mainstream owns 27 salmon farm sites on the coasts of Vancouver Island, making it the second largest producer of farmed salmon in British Columbia. It is a division of EWOS Canada Ltd., an indirect wholly owned subsidiary of a Norwegian company. The other two largest producers of farmed salmon in British Columbia also have ties to Norway. In addition to operating salmon farms through its Mainstream division, EWOS Canada Ltd. produces fish feed for Mainstream's own farms, as well as for sale to its competitors.

[3] Mr. Staniford has dedicated himself to eradicating salmon farming. He received a Master of Science degree in 1993, with his thesis topic being the environmental impact of shellfish farming. He has been working with environmental

organizations over the past 15 years, and he has resided in British Columbia from time to time over the past decade. He has been involved in previous defamation litigation involving salmon farming in this province (see *Creative Salmon Company Ltd. v. Staniford*, 2007 BCSC 62, appeal allowed 2009 BCCA 61, 90 B.C.L.R. (4th) 328).

[4] After spending time in Europe, Mr. Staniford returned to British Columbia in 2010. He began setting up a website under the name of Global Alliance Against Industrial Aquaculture ("GAAIA"), which was launched in October 2010.

[5] In early January 2011, the British Columbia Salmon Farmers Association, of which Mainstream is a member, published a series of advertisements to promote farmed salmon. One of the advertisements stated "farmed salmon is natural, nutritious and free of contaminants" and "the only real difference between farmed and wild salmon is that the farmed ones know where their next meal is coming from".

The Publications

[6] The first of the publications in question was a press release sent to the media on January 31, 2011, and posted on the GAAIA website. It was headed "Salmon Farming Kills - Global Health Warning Issued on Farmed Salmon", and it began:

> The newly-formed Global Alliance Against Industrial Aquaculture (GAAIA) this week launched a smoking hot international campaign against Big Aquaculture. 'Salmon Farming Kills' employs similar graphic imagery to the 'Smoking Kills' campaigns against Big Tobacco and warns of the dangers of salmon farming … [underlining indicates hyperlinks on website].

Following that introduction were mock cigarette packages, each with the words "Norwegian Owned" and bearing Norway's coat of arms. The packages included words such as "Salmon Farming is Poison", "Salmon Farming is Toxic", "Salmon Farming Kills", and "Salmon Farming Seriously Damages Health".

[7] A complete copy of the press release was attached as Appendix "A" to the reasons for judgment of the trial judge (indexed as 2012 BCSC 1433). Some of the statements included in the press release were as follows:

> "Salmon farming kills around the world and should carry a global health warning," said Don Staniford, global coordinator for GAAIA in British Columbia …
>
> "Expensive PR campaigns promoting farmed salmon as 'safe' and 'sustainable' serve only to raise the alarm that salmon farms harm," said Kurt Oddekalv, leader of Norges Miljøvernforbund (Green Warriors of Norway) in Norway. "Salmon farmers are shooting themselves in the foot by denying peer-reviewed scientific evidence detailing human health and environment risks …"
>
> * * *
>
> "If the fish farmers want to play the same game as the cigarette manufacturers did for many years and live in denial they're welcome to it but it's not going to give rise to any solutions," said Canadian biologist Otto Langer (quoted in the documentary film *Farmed Salmon Exposed: The Global Reach of the Norwegian salmon farming industry* …
>
> "I would never feed a child farmed salmon," said Canadian scientist David Suzuki (as quoted in *The Toronto Star*). "It's poison!"
>
> * * *
>
> For more details on GAAIA please visit: www.gaaia.org
>
> For more details on 'Salmon Farming Kills' including photos please visit: http://www.gaaia.org/salmon-farms-kill [underlining indicates hyperlinks].

The version of the press release posted on the GAAIA website had additional mock cigarette packages with similar messages, including "Salmon Farms are Cancer".

[8] Mainstream also complained about other publications on the GAAIA website. In addition to the press release itself being published on the website, there was a link on the homepage under the name "Salmon Farming Kills". The link took the reader to several pages, which were attached as Appendix "B" to the reasons for judgment. These pages also displayed mock cigarette packages with messages similar to the ones in the press release. The text on these pages included:

> Put this in your pipe and smoke it.
>
> Are you sick and tired of Big Aquaculture blowing smoke on the health and safety of salmon farming? Do you think the PR campaigns and advertising by the salmon farming industry is all smoke and mirrors? Do you want the salmon farming industry to quit killing wild fish and polluting our global ocean?

The text also included the quotes from Otto Langer and David Suzuki contained in the press release.

[9] The GAAIA homepage also contained a link to pages of a blog posting entitled “GAAIA launches new ‘Salmon Farming Kills’ campaign at Seafood Summit”, which were attached as Appendix “C” to the reasons for judgment. These pages reproduced four of the advertisements published by the British Columbia Salmon Farmers’ Association, considered by Mr. Staniford to be “blatantly untrue” or “blatant lies”. The pages also showed mock cigarette packages, and the text made references to cigarette manufacturers and the tobacco industry.

Mainstream’s Claim of Defamation

[10] Before the trial judge dealt with Mr. Staniford’s defence of fair comment, it was necessary for her to answer the threshold question of whether the elements of a claim of defamation had been proven by Mainstream. Citing *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640 at para. 28, the judge explained that those elements were that (1) the impugned words were defamatory, in the sense that they would tend to lower Mainstream’s reputation in the eyes of a reasonable person; (2) the words referred to Mainstream; and (3) the words were published.

[11] Mainstream had pleaded that in their natural and ordinary meaning the words contained in the press release and on pages of the GAAIA website had ten meanings. Of those, the trial judge found the words were capable of bearing the following seven meanings, taken from para. 22 of Mainstream’s amended notice of civil claim:

> (a) Mainstream’s business and products kill people;
>
> (b) Mainstream’s business and products make people sick;
>
> (c) Mainstream’s products are unsafe for human consumption;
>
> (d) Mainstream has actively misled, deceived and lied to the public;
>
> (e) Mainstream is knowingly marketing a carcinogenic product that causes illness, death, and harm;
>
> …
>
> (g) Mainstream’s products are toxic and poisonous; [and]
>
> …
>
> (j) Mainstream engages in corrupt and immoral behaviour.

[12] The judge next considered the second element of a claim of defamation, and found that Mr. Staniford's words were of and concerning Mainstream. The third element of the claim, publication, was conceded by Mr. Staniford.

[13] As a result of these findings, the judge concluded that Mainstream had proved the three essential elements of its claim of defamation.

[14] Before I deal with the defence of fair comment, I would make an observation concerning the judge's conclusion that the words in question were defamatory. There is a distinction between (i) words being capable of having a defamatory meaning and (ii) words being found to have a defamatory meaning. The former is a question of law, and the latter is a question of fact. The distinction arises in trials by judge and jury – the judge decides as a matter of law whether the words are capable of having a defamatory meaning and the jury decides whether the words, in fact, have a defamatory meaning: see Patrick Milmo & W.V.H. Rogers, eds., *Gatley on Libel and Slander*, 11th ed. (London: Sweet & Maxwell, 2008) at para. 36.4, and Raymond E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, 2nd ed., loose-leaf (consulted on 28 June 2013), (Toronto: Carswell, 1999) vol. 1, c. 5 at 435-463.

[15] There was no jury in the present case, and it was not necessary for the judge to first determine whether the words in question were capable of having a defamatory meaning. As the trier of fact, it was the function of the judge to determine whether the words did, in fact, have a defamatory meaning.

[16] Although the judge expressed her findings in terms of the words in question being "capable" of having the seven meanings set out above, it is my view that, on a reading of her reasons as a whole, she did find the words had those seven meanings. There are two things that particularly lead me to this conclusion. First, in discussing the first of the asserted meanings, the judge said the following:

> [116] In my opinion, the pervasive linking between smoking and salmon farming, coupled with the use of the mock cigarette packages to illustrate Mr. Staniford's point, would lead an ordinary reader/viewer of the publications to infer that when Mr. Staniford is talking about killing, and unless he specifies

> otherwise, he is talking (at the very least) about killing humans and damaging human health. It is now accepted that that is what smoking cigarettes does. Mr. Staniford admits that tobacco products are notoriously harmful to human health.
>
> [117] Calling someone a killer, and asserting that it was knowingly selling products that were toxic, poison and harmful to human health, would tend to lower that person in the eyes of a reasonable person and is clearly defamatory.
>
> [118] I conclude therefore that Mr. Staniford's words are capable of bearing a defamatory meaning, as pleaded in para. 22(a), that "Mainstream's business and products kill people."
>
> [Underlining in original.]

Despite expressing her conclusion at para. 118 that the words "are capable of bearing a defamatory meaning", the judge's reasoning in paras. 116 and 117 shows that she found the words did bear that meaning and are "clearly defamatory". The judge then stated that she came to the same conclusions, for the same reasons, with respect to three of the other alleged defamatory meanings – (b), (c) and (g), and went on to state, at para. 120, that the remaining meanings – (d), (e) and (j) – were defamatory.

[17] The second thing that leads me to the view the judge did find the words to have those seven meanings is that she specifically stated, in para. 142 of her reasons, reiterated in the first paragraph of her supplementary reasons on costs (indexed as 2012 BCSC 1923), that Mr. Staniford's words were defamatory. It was necessary for her to reach this conclusion in order to find that Mainstream had proved the essential elements of a defamation claim; it would not have been sufficient to determine only that the words were capable of having a defamatory meaning.

Defence of Fair Comment

[18] In response to Mainstream's claim, Mr. Staniford had pleaded the defences of justification and fair comment. He abandoned the defence of justification on the third day of trial, and was left with the potential defence of fair comment.

[19] In *Grant v. Torstar Corp.*, the Supreme Court of Canada set out the test for the defence of fair comment at para. 31:

> As reformulated in *WIC Radio*, [*WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420] at para. 28, a defendant claiming fair comment must satisfy the following test: (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?; and (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice.

[20] At trial, Mainstream conceded that the statements in question concerned a matter of public interest, but argued that none of the second, third and fourth elements of the test was satisfied, and that, even if all of them were satisfied, the defence of fair comment was defeated because Mr. Staniford was actuated by express malice.

[21] In giving effect to the defence of fair comment, the trial judge made the following findings:

(a) the statements in question were comment, not fact;

(b) the statements in question were based on facts that were sufficiently stated or were known to readers because they were “notorious”;

(c) the objective test of whether any person could honestly express the opinion on the proved facts was satisfied because Mr. Staniford believed what he said; and

(d) although the statements in question were actuated by Mr. Staniford’s express malice towards Mainstream, the defence of fair comment was not defeated because he was not reckless and his dominant purpose was not to injure Mainstream out of spite or animosity.

On appeal, Mainstream challenges the last three of these findings.

[22] In order to succeed on the defence of fair comment, it was necessary for Mr. Staniford to satisfy each and every element of the test for the defence. If the

judge erred in finding that any one of the elements was satisfied, then the defence must fail and the appeal must be allowed.

[23] In my opinion, the judge did err in finding that the second element (i.e., the comment must be based on known facts) was satisfied. As a result, the appeal should be allowed, and it is not necessary to consider whether the judge erred in concluding the fourth element of the test was satisfied and the defence was not defeated by malice.

Comment To Be Based on Fact

[24] In order for the defence of fair comment to succeed, it is necessary for the comment to have a factual foundation or factual substratum. The comment must be an expression of opinion on a known set of facts, and the audience must be in a position to assess or evaluate the comment. The rationale for this requirement was explained over a century ago in the South African case decided by the Transvaal Supreme Court in *Roos v. Stent and Pretoria Printing Works, Ltd.*, 1909 T.S. 988 at 998 per Innes C.J.:

> But it is obvious that to entitle any publication to the benefit of this defence it must be clear to those who read it what the facts are and what comments are made upon them. And for two reasons. Because it is impossible to know whether the comments are fair unless we know what the facts are; and because the public must have an opportunity of judging the value of the comments.

[25] In *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, Mr. Justice Binnie agreed with this Court that “a properly disclosed or sufficiently indicated (or so notorious as to be already understood by the audience) factual foundation is an important objective limit to the fair comment defence” (para. 34). He also stated, at para. 31:

> What is important is that the facts be sufficiently stated or otherwise be known to the listeners that listeners are able to make up their own minds on the merits of [the] comment.

This passage was also quoted by the trial judge.

[26] In *Channel Seven Adelaide Pty Ltd v. Manock*, [2007] HCA 60, the High Court of Australia was called upon to decide for the purposes of the defence of fair comment whether it was sufficient for the "subject matter" of the comment to be notorious or sufficiently indicated. In their joint reasons on behalf of the majority of the Court, Gummow, Hayne and Heydon JJ. held that it was not sufficient, and that it is necessary for the facts on which the comments are based to be "sufficiently indicated or notorious to enable the viewers who saw the promotion to judge for themselves how far the opinions expressed in the 'comments' were well founded" (para. 74).

[27] In the course of their reasons, the majority of the Court commented on the required linkage between the comment and the supporting facts:

> [49] … a sufficient linkage between the comment alleged and the factual material relied on can appear in three ways: the factual material can be expressly stated in the same publication as that in which the comment appears (ie by "setting it out"); the factual material commented on, while not set out in the material, can be referred to (ie by being identified "by a clear reference"); and the factual material can be "notorious". Those propositions are supported by other authority in Australia, England, South Africa, Hong Kong and the United States.
>
> [Emphasis added; endnotes omitted.]

The phrase "by a clear reference" in the above passage comes from *Odgers on Libel and Slander*, 6th ed. (1929) at 166, which was quoted with approval in *Kemsley v. Foot*, [1952] A.C. 345 at 356 (H.L.). I should note that *Channel Seven Adelaide* was not cited to us at the hearing of this appeal, and I infer that it was also not cited to the trial judge.

[28] Although the countries listed at the end of para. 49 of *Channel Seven Adelaide* do not include Canada, it is my view that the statement contained in that paragraph is the law in Canada as well. There is no principled reason why the law in this regard should be different in Canada than the law in the listed common law countries. *Channel Seven Adelaide* was cited with approval by the Supreme Court of Canada at para. 49 of *WIC Radio* (albeit on another point), and the statement is consistent with the expression at para. 34 of *WIC Radio* that the factual foundation for the comment must be "properly disclosed", "sufficiently indicated" or "notorious".

[29] In the present case, the trial judge found that the facts upon which Mr. Staniford based his comments were as follows:

> [180] I find that the "facts" are these, and that Mr. Staniford was aware of all of them:
>
> (a) tobacco products are notoriously harmful to human health, and smoking tobacco products causes cancer and death. These are now accepted as facts, and have ceased to be a matter of scientific controversy;
>
> (b) in Canada, tobacco products require government-mandated health warnings. This is also a notorious fact;
>
> (c) "Big Tobacco" has a very poor corporate reputation. As Mr. LeGresley says in his report, "[T]he general public has come to distrust tobacco companies and to view them as dishonest." I conclude that this is a notorious fact;
>
> (d) since 2000, scientists have tested farmed and wild salmon and found in the flesh of the fish contaminants that are capable of causing cancer. The existence of the contaminants has been established to be true. Dr. Gallo, for example, accepted and did not disagree with the data used for the Hites Papers;
>
> (e) since 2000, scientists have researched the presence of those contaminants in farmed and wild salmon, and they have published (e.g., in the Hites Papers) the results of that research and their conclusions based on that research in peer-reviewed journals such as *Science*. These facts are true. However, the conclusions stated by the scientists concerning consumption of wild and farmed salmon are <u>not</u> facts. They are opinions;
>
> (f) Otto Langer made the following statement in the documentary "Farmed Salmon Exposed": "If the fish farmers want to play the same game as the cigarette manufacturers did for many years and live in denial they're welcome to it but it's not going to give rise to any solutions." I find this fact – that the statement was made – to be true;
>
> (g) Dr. David Suzuki made the following statement in the Toronto Star: "I would never feed a child farmed salmon. It's poison." I find this fact – that the statement was made – to be true;
>
> (h) in January 2011, the [British Columbia Salmon Farmers Association] launched a media campaign, which included the statement that "Farmed salmon is natural, nutritious and free of contaminants." I find these facts to be true.

Counsel are agreed that in item (h), like in items (f) and (g), the judge meant that it was the making of the statement (and not its contents) that she found to be true.

[30] The Hites Papers referred to in items (d) and (e) above were a series of similar papers authored by a group of scientists and published in scientific journals beginning in 2004. The first in the series was a paper entitled "Global Assessment of Organic Contaminants in Farmed Salmon" authored by Dr. Ronald Hites and other scientists. It was published in the January 2004 issue of the journal *Science*, a peer-reviewed scientific journal.

[31] As set out in the judge's reasons at para. 38, the abstract for the paper in *Science* read, in part, as follows:

> [T]he potential human health risks of farmed salmon consumption have not been examined rigorously. Having analyzed over 2 metric tons of farmed and wild salmon from around the world for organochlorine contaminants, we show that concentrations of these contaminants are significantly higher in farmed salmon than in wild. European-raised salmon have significantly greater contaminant loads than those raised in North and South America . . . Risk analysis indicates that consumption of farmed Atlantic salmon may pose health risks that detract from the beneficial effects of fish consumption.

The paper cited, among others, prior papers authored by Dr. Miriam Jacobs and Dr. Michael Easton.

[32] One of the other Hites Papers was entitled "Consumption advisories for salmon based on risk of cancer and noncancer health effects". It was published in the August 2005 issue of the journal, *Environmental Research*. Part of the abstract in the journal, set out at para. 74 of the judge's reasons, read as follows:

> The levels of dioxins/furans, polychlorinated biphenyls (PCBs), and chlorinated pesticides were determined in farmed salmon for eight regions in Europe, North America, and South America, in salmon fillets purchased in 16 cities in Europe and North America, and in five species of wild Pacific salmon. Upon application of US Environmental Protection Agency (USEPA) methods for developing fish consumption advisories for cancer from mixtures of all of these substance [sic] for which USEPA has reported a cancer slope factor, the most stringent recommendation, for farmed salmon from Northern Europe, was for consumption of at most one meal every 5 months in order to not exceed an elevated risk of cancer of more than 1 in 100,000. Farmed salmon from North and South America triggered advisories of between 0.4 and one meal per month. . . . Upon consideration of all of these organochlorine compounds as a mixture, even wild Pacific salmon triggered advisories of between one and less than five meals per month . . .

At trial, Mr. Staniford testified that this was a key paper because it concluded that consumption of farmed salmon carries an elevated risk of cancer. He said it was "at the top of my mind in terms of the statements on the [GAAIA] website and the cigarette packets in relation to cancer" and "integral to the link between salmon farming and cancer risks".

[33] There was also evidence at trial about another paper, FAO/WHO (2011), *Report of the Joint FAO/WHO Expert Consultation on the Risks and Benefits of Fish Consumption*, Rome, Food and Agriculture Organization of the United Nations; Geneva, World Health Organization, 50 pp. (*"Report No. 978"*). Its conclusions were included in the Executive Summary at the beginning of the report, as follows:

> - Among the general adult population, consumption of fish, particularly fatty fish, lowers the risk of mortality from coronary heart disease. There is an absence of probable or convincing evidence of risk of coronary heart disease associated with methylmercury. Potential cancer risks associated with dioxins are well below established coronary heart disease benefits from fish consumption.

According to an expert called as a witness by Mainstream at the trial, *Report No. 978* was based on the same data used by the authors of the paper published in the January 2004 issue of *Science*, and the different conclusions reached in the two studies were attributable to different models that were applied to the data. In his cross-examination, Mr. Staniford testified that he was aware of *Report No. 978* when he made the statements in question, but he was dismissive of it, asserting it overlooked peer-reviewed science papers.

[34] For his own part, Mr. Staniford admitted at trial he did not know whether farmed salmon sold by Mainstream in British Columbia is toxic to humans and he was not aware of any research showing that a person had developed cancer as a result of consuming farmed salmon.

[35] The January 31, 2011 press release issued by Mr. Staniford made reference to peer-reviewed scientific evidence in the quote from Kurt Oddekalv, but gave no details of the evidence. On the GAAIA website, there was a link for "Silent Spring of the Sea", a chapter written by Mr. Staniford for inclusion in a book called "A Stain

upon the Sea: West Coast Salmon Farming" published by Harbour Publishing in British Columbia in October 2004. The chapter made reference to a "paper published in January 2004 in the prestigious scientific journal *Science*" but the website did not contain a link to the paper. The website also contained links to two articles presented by Mr. Staniford in 2002 ("A Big Fish in a Small Pond" and "Sea Cage Fish Farming") which included among their references the papers authored by Dr. Jacobs and Dr. Easton, with website addresses at which they could be located.

[36] The reasoning of the trial judge on the issue of whether the facts upon which Mr. Staniford based his defamatory comments were made known to the readers of the comments was as follows:

> [182] The GAAIA Press Release (Appendix "A") mentions "peer-reviewed scientific evidence." Some of that research is cited in "Silent Spring of the Sea," for which there is a hyperlink at the GAAIA website. Some of it is also cited in the two 2002 papers for which there are links at the website. Both Otto Langer and Dr. Suzuki are quoted in the publications in issue. The [British Columbia Salmon Farmers Association] advertisements are also specifically set out in the publications in issue.
>
> [183] I think that it would take a determined reader to locate in the publications the facts on which Mr. Staniford's comments are being made. Despite that, I conclude that the facts are sufficiently stated, or otherwise known to readers (in the case of what I have called "notorious" facts), so that readers can make up their own minds about the merits of what Mr. Staniford has to say.

[37] With respect, it is my view that the judge erred in her reasoning. The facts that the judge found in para. 180 of her reasons to be the foundation of Mr. Staniford's comments fell into all three categories of facts identified in para. 49 of *Channel Seven Adelaide* and para. 34 of *WIC Radio*. The facts in items (a), (b) and (c) were notorious. The facts in items (f), (g) and (h) were contained in the defamatory publications. The facts in items (d) and (e) were neither notorious nor contained in the defamatory publications and, as a result, were required to be "identified 'by a clear reference'" (para. 49 of *Channel Seven Adelaide*) or "sufficiently indicated" (para. 34 of *WIC Radio*).

[38] By stating that it would take a determined reader to locate the facts upon which Mr. Staniford was basing his comments, the trial judge implicitly

acknowledged that there was not a clear reference to the facts that were neither notorious nor contained in the defamatory publications. However, she then proceeded to find the non-notorious facts to have been sufficiently stated. She erred by failing to distinguish between non-notorious facts stated in the defamatory publications and non-notorious facts stated elsewhere, and by failing to consider whether those latter facts were identified by a clear reference.

[39] In finding that Mr. Staniford's comments were based on the facts contained in items (d) and (e) of para. 180 of her reasons, the judge was referring to the scientific research that has been published in the articles that she defined as the Hites Papers. In my opinion, there was no reference (much less a clear reference) in the defamatory publications as to where those facts might be found on the GAAIA website, which, based on exhibit 4 at the trial (the second supplemental book of documents), consisted of approximately 70 printed pages, plus links to papers.

[40] For example, there was no reference in the defamatory publications to the Hites Paper, "Consumption advisories for salmon based on risk of cancer and noncancer health effects". An important aspect of the sting of the defamatory publications was the analogy made between the salmon farming industry and the tobacco industry. At para. 75 of her reasons for judgment, the judge accepted Mr. Staniford's evidence, to which I have already referred, that it was a key paper and was "at the top of my mind in terms of the statements on the [GAAIA] website and the cigarette packets in relation to cancer" and "integral to the link between salmon farming and cancer risks".

[41] In my view, a reference to this paper was essential to enable readers of the defamatory comments to be in a position to make up their own minds about the merits of the comments. Reference to this paper could not be found in Mr. Staniford's writings on the GAAIA website relied upon by the trial judge, "Silent Spring of the Sea", "A Big Fish in a Small Pond" and "Sea Cage Fish Farming", because the paper was published subsequent to those writings.

[42] Another example relates to papers authored by Dr. Jacobs and Dr. Easton. The trial judge relied on the fact that two of Mr. Staniford's articles linked to the GAAIA website contained website addresses for these papers. First, I do not understand how a reader of Mr. Staniford's comments was supposed to know that he or she was required to read these articles in order to ascertain the facts upon which Mr. Staniford was commenting. Second, the papers written by Dr. Jacobs and Dr. Easton were contained in a list of almost 480 references in the first article and a list of some 270 references in the second article. It is not realistic to expect that an average reader of Mr. Staniford's comments would have located these two papers. In my opinion, there was not a sufficient reference in the defamatory publications to these papers.

[43] In para. 183 of her reasons, the judge made reference to a "determined reader". If she was suggesting that it was sufficient for the facts upon which the defamatory comments were based to be known by determined readers who conducted research on the GAAIA website and beyond, then I respectfully disagree with her. This would mean that there would be a category of readers (i.e., the non-determined readers) that was not in a position to assess or evaluate Mr. Staniford's comments. In my opinion, the defence of fair comment is not intended to be available when only a portion of the audience was aware of the facts upon which a comment was made or could have been aware of those facts with relative ease without being required to use their own initiative to search out those facts.

[44] It may be that the judge approached the matter on the basis that the facts were sufficiently stated if they were contained somewhere on the GAAIA website or if they were contained in papers hyperlinked on the website (or if website addresses for the papers were given). If so, it is my view the judge erred in two respects.

[45] In its amended notice of civil claim, Mainstream alleged that the press release and specified pages on the GAAIA website (copies of which were attached to the amended notice of civil claim) contained defamatory comments. It did not allege that

all of the pages on the website contained defamatory comments. In my view, all of the pages on a website, together with all articles hyperlinked on the website, do not constitute a single publication (see *Crookes v. Newton*, 2011 SCC 47, [2011] 3 S.C.R. 269, where it was held that a hyperlink on a website does not, by itself, amount to publication of the hyperlinked document). It is not sufficient for the defence of fair comment for facts upon which the comments were made to be contained on website pages that were not alleged to contain defamatory comments or in hyperlinked documents unless those other pages or hyperlinked documents were identified by a clear reference to contain such facts.

[46] Whether hyperlinks in a defamatory publication on a website to other documents containing facts upon which the defamatory comment was made is sufficient will depend on the circumstances of each case. If the defamatory publication advises the reader that a hyperlinked document contains facts upon which the defamatory comment is based and sets out where in the document they are contained, then there may well be a sufficient reference to those facts. In this case, however, the readers of the defamatory publications were not advised which of the multitudinous hyperlinked documents in the publications or elsewhere on the GAAIA website contained facts upon which Mr. Staniford's comments were based.

[47] Second, such an approach would have ignored the separate existence of the January 31, 2011 press release, which was sent to the media as well as being published on the GAAIA website. Some of the facts upon which Mr. Staniford based his comments were neither contained in the press release nor notorious (i.e., the facts contained in items (d) and (e) of para. 180 of the judge's reasons), and, while there was a general reference to the website in the press release, there was nothing in it to inform the readers that the comments were based on facts to be found on the website, or setting out where on the website they could be found.

[48] In the result, it is my opinion that the facts upon which Mr. Staniford's defamatory comments were based were not all notorious, contained in the defamatory publications or sufficiently referenced to be contained in other specified

documents. All of the readers of the publications were not in a position to make up their own minds about the merits of what Mr. Staniford said in the publications. Accordingly, one of the elements of the defence of fair comment was not satisfied, and the defence was not available to Mr. Staniford. The judge erred in dismissing Mainstream's defamation claim.

Remedies

[49] In its amended notice of civil claim, Mainstream sought remedies in the form of an injunction, general damages, special damages and punitive damages. In its opening at trial, Mainstream indicated it was seeking general damages of $25,000 and punitive damages of $100,000. In its closing submissions, Mainstream requested a higher (but unspecified) amount of damages as a result of Mr. Staniford's misconduct during the trial.

[50] As the trial judge gave effect to the defence of fair comment and dismissed Mainstream's claim, she did not assess any damages. She did, however, deal with Mr. Staniford's misconduct in her supplementary reasons on costs. The misconduct, which the judge had described in paras. 88 to 92 of her main reasons, can be summarized as follows:

(a) he relaunched the GAAIA website during the trial and announced that an injunction would not stop him;

(b) in separate Facebook postings he accused a First Nation of accepting "blood money" from the plaintiff and he compared the trial to a kangaroo court; and

(c) he made "sexist and puerile" comments on Internet postings about two female witnesses called by the plaintiff and, after the incident was discussed in court, he repeated his comments in an interview that was posted on YouTube.

In her costs reasons at para. 15, the judge stated that by engaging in this conduct "Mr. Staniford demonstrated his disrespect for witnesses and his disdain

generally for the court and the judicial process". She held his conduct deserved a clear rebuke and, as a punishment, she awarded Mr. Staniford only 25% of the costs, at Scale B, and disbursements to which he would otherwise have been entitled.

[51] On the appeal being successful, Mainstream asks us to grant the injunction and, taking Mr. Staniford's misconduct into account, to award general and punitive damages in an amount in excess of $125,000.

[52] Under s. 9 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, this Court has the power to make any order that could have been made by the court appealed from, and this would include an order involving the assessment of damages. However, this Court will not generally conduct an assessment of damages because it will not be in a position to make the necessary findings of fact. The normal practice when an appeal is allowed in a circumstance where the trial judge did not assess damages is to remit the matter to the trial court for the assessment. Exceptions can be made in the interests of justice where, as here, the trial judge's reasons are comprehensive and the record is sufficient to allow this Court to reach its own conclusion: see *Pallos v. Insurance Corp. of British Columbia*, [1995] 3 W.W.R. 728, 100 B.C.L.R. (2d) 260 at para. 34 (C.A.); *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 52, 306 D.L.R. (4th) 1, leave to appeal refused [2009] S.C.C.A. 197; and *Grabarevic v. Northwest Publications Ltd.* (1968), 67 D.L.R. (2d) 748 at 752-753, 64 W.W.R. 283 (B.C.C.A.).

[53] In addition, there is greater scope for appellate courts in connection with punitive damages. This was explained by Mr. Justice Cory in a decision of the Supreme Court of Canada dealing with damages in a defamation case, *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 197, 126 D.L.R. (4th) 129:

> Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was

> the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?

Mr. Justice Cory also explained in *Hill* (at para. 187) that little is to be gained from a detailed comparison of general damage awards in defamation cases because of the uniqueness of each case.

[54] In my opinion, it is in the interests of justice for this Court to assess the general and punitive damages in the present case. It is not necessary for the Court to make any specific findings of fact, and the judge's reasons and the record are sufficient to enable us to assess the damages. Justice would not be served by requiring the parties to incur the costs of another trial.

[55] Mainstream has requested the Court take Mr. Staniford's misconduct during the trial into account when assessing the damages. While this is permissible (see *Brown on Defamation*, vol. 6, c. 25 at 82-86), I would prefer to express the Court's disapproval of Mr. Staniford's misconduct in the form of an award of costs. This is how the trial judge expressed her disapproval, and it is my view that this Court should do it in a similar fashion. As it will be Mainstream which will be entitled to the costs of the action as a result of this appeal being allowed, the appropriate way to punish Mr. Staniford for his reprehensible conduct in the litigation is to award Mainstream special costs against him: see *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740, 9 B.C.L.R. (3d) 242 (C.A.).

[56] I consider the amount of general damages claimed by Mainstream to be reasonable in all of the circumstances of the case. I would assess the general damages in the amount of $25,000.

[57] On the topic of punitive damages, there is one other case authority that is worth noting, namely, *Barrick Gold Corp. v. Lopehandia* (2004), 239 D.L.R. (4th) 577, 71 O.R. (3d) 416 (C.A.). In that case, the defendant had embarked on an Internet campaign against the plaintiff by posting messages attacking the plaintiff's claim to ownership of one of its holdings and accusing the plaintiff of criminal

misconduct. The trial judge awarded $15,000 for general damages and dismissed the plaintiff's claim for punitive damages.

[58] The Ontario Court of Appeal increased the amount of general damages to $75,000 and awarded punitive damages in the amount of $50,000. Mr. Justice Blair, for the majority, said the following about the appropriateness of punitive damages in that case:

> [64] Finally, punitive damages are simply required in a case such as this, in my view. Mr. Lopehandia's conduct is malicious and high-handed. It is unremitting and tenacious. It involves defamatory publications that are vicious, spiteful, wide-ranging in substance, and world-wide in scope. They involve the very type of misconduct that – in the words of Cory J. in *Hill* at p. 1208 – is "so malicious, oppressive and high-handed that it offends the court's sense of decency", calling for an award of punitive damages as a "means by which the jury or judge expresses its outrage at the egregious conduct of the defendant". While it is always important to balance freedom of expression and the interests of individuals and corporations in preserving their reputations, and while it is important not to inhibit the free exchange of information and ideas on the Internet by damage awards that are overly stifling, defendants such as Mr. Lopehandia must know that courts will not countenance the use of the Internet (or any other medium) for purposes of a defamatory campaign of the type engaged in here.

Most of the same things could be said in this case. For example, the trial judge said Mr. Staniford was "akin to a zealot" and "[v]irtually anything that conflicts with his view and vision is wrong, bad, disgraceful and worse" (para. 186); "Mr. Staniford seems incapable of conceding he might be wrong on some things" (para. 187); and "he cruelly and publicly mocks people who have a different point of view" (para. 188).

[59] In my opinion, the amount of punitive damages awarded in *Barrick Gold* is an appropriate amount in this case. I would award punitive damages in the amount of $50,000.

Conclusion

[60] I would allow the appeal and set aside the judge's order dismissing Mainstream's claim and her costs order. I would grant the injunction requested in

Mainstream's amended notice of civil claim, and I would award Mainstream general damages in the amount of $25,000 and punitive damages in the amount of $50,000. I would award Mainstream special costs of the action and party and party costs of this appeal.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Madam Justice Bennett"