# QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2017 SKQB 42**

Date: **2017 02 07**
Docket: QB 827 of 2010
Judicial Centre: Saskatoon

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BETWEEN:

KENNETH GRAHAM

PLAINTIFF

- and -

CHRIS PURDY, ROD NICKEL, STEVEN GIBB, CAMERON HUTCHINSON, DALE BRIN, JOHN DOE and CANWEST PUBLISHING INC.

DEFENDANTS

**Counsel:**

Alan McConchie — for the plaintiff
F. William Johnson, Q.C. — for the defendants

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JUDGMENT
February 7, 2017

D.E. LABACH J.

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## INTRODUCTION

[1] On November 24, 2009, Kenneth Graham commenced a libel action against Chris Purdy, Rod Nickel, Steven Gibb, Cameron Hutchinson, Dale Brin, John Doe and Canwest Publishing Inc. [collectively the defendants] alleging that the

defendants, acting alone or in concert, had published defamatory comments about him in a series of articles in the Star Phoenix newspaper and on websites owned and operated by the newspaper and Canwest Publishing Inc. As a result of the publication of these defamatory comments, Dr. Graham said that he suffered loss and damage to his professional and civic reputation and that such loss or damage will continue into the future in light of his professional standing.

[2] On June 7, 2010 the defendants filed a Statement of Defence to the claim wherein they did not deny publishing the words complained of, in the various articles complained of, but denied that the words were defamatory or that they were made with malice, deliberate calculation or recklessness. According to the defendants, the words complained of formed part of the defendants' series of fair and accurate contemporaneous reporting of the civil jury proceedings in a case involving Dr. Graham in the Saskatchewan Court of Queen's Bench and that such words fell under the umbrella of "responsible communication". As such, they have not published any retraction or apology nor does it appear that they have removed the alleged offensive articles from their websites. However, if any one or more of the alleged defamatory meanings are actionable, the defendants believe that Dr. Graham's reputation was so tarnished at the time of the publications complained of that he did not suffer any damages or loss of reputation at all.

**FACTS**

[3] On July 14, 1999, Lisa Baert went to the Lloydminster Hospital for a tubal ligation. This routine day surgery was performed by Dr. Graham, an obstetrician and gynecologist practicing in Lloydminster. Dr. Graham had done many tubal ligations and Ms. Baert's surgery appeared to go well. She was discharged later that day and returned home.

[4] On July 16, Ms. Baert was rushed back to the hospital in an ambulance, suffering from septic shock. Dr. Graham and a general surgeon operated on her and discovered a 2-millimetre puncture in her small bowel. The puncture had apparently occurred when Dr. Graham had done the tubal ligation two days earlier. The surgeon removed a small portion of Ms. Baert's bowel. While in surgery she went into cardiac arrest. They stabilized her and made arrangements to air lift her to the Royal Alexandra Hospital in Edmonton, Alberta.

[5] In Edmonton, Ms. Baert had to have both her hands and feet amputated. She suffered some brain damage. She spent a year in the hospital and at a rehabilitation centre before returning to Lloydminster to live in a care home.

[6] On October 8, 1999 Lisa Baert filed a claim in the Saskatchewan Court of Queen's Bench against Dr. Graham, the Lloydminster Hospital and several nurses alleging negligence.

[7] Prior to Baert's surgery, Dr. Graham had decided to leave Lloydminster. He did not care for the medical community there, his wife had gone back to Edmonton to practice psychiatry and he was getting tired of commuting to Edmonton every weekend. Unfortunately he was unable to find a position in Edmonton. Dawson Creek, British Columbia was looking for an obstetrician and gynecologist at this time and they offered him a job. He liked the city, the compensation was attractive and in November 1999, he moved to Dawson Creek to practice.

[8] On March 1, 2000 an article written by Jason Warick entitled "Botched Surgery Leaves Mom Helpless" appeared in the Saskatoon Star Phoenix newspaper. The article was about Ms. Baert's surgery. The article came to Dr. Graham's attention. He was shocked by it. He felt that it was inaccurate, inflammatory and very

one-sided. It described Ms. Baert's bowel as having been "sliced open" when there was only a small 2-millimetre puncture in it. The article said that he ignored Mr. Baert when he came out of the operating room but he did not. He spoke to Mr. Baert immediately following the surgery.

[9] On March 2 and 3, 2000, two more articles written by Jason Warick appeared in the Star Phoenix. The first, entitled "Mom Longs to be Home with Her Family", said that Ms. Baert's bowel had been "slit open" and it described her care as "grossly negligent, malicious, arrogant, and high-handed". The second article was entitled "Couple Fed Up with Long Wait for Compensation". This article referred to a "botched surgery", that Ms. Baert's "intestines were lacerated" and that the surgery was performed in a "grossly negligent, malicious, arrogant, and high-handed manner calculated to ignore the rights and objections and complaints of Lisa [Baert]". Dr. Graham was shocked by these articles and felt they were misleading.

[10] On March 9, 2000 an article entitled "Lawsuit News to Hospital that Hired Gynecologist" appeared in the Star Phoenix. This article said that the Dawson Creek Hospital and South Peace Health Council had no clue that Dr. Graham was facing the Baert lawsuit when they hired him. This however was false. The hospital and health council did know about the lawsuit before they hired Dr. Graham because he had told them about it.

[11] Prior to these articles appearing in the Star Phoenix, Dr. Graham had never had any complaints regarding his treatment of patients and was a doctor in good standing in both Saskatchewan and Alberta. However, the local newspaper in Dawson Creek picked up on these Star Phoenix articles, began reporting on them and started a phone line so patients could voice any complaints about Dr. Graham's treatment of them. In response, and on the advice of the Saskatchewan counsel representing him in

the Baert claim, Dr. Graham issued a press release and gave a press conference in Dawson Creek to counteract what he perceived to be a media smear campaign.

[12] In conjunction with his press release and press conference, his counsel sent a letter dated March 10, 2000 to the editor of the Star Phoenix complaining about the articles written by Jason Warick. The letter stated that the articles caused Dr. Graham irreparable damage both professionally and personally and put the newspaper on notice of his intention to bring an action in libel against them. These articles and the attention they were attracting in the community was giving Dr. Graham a bad reputation.

[13] In 2002, Dr. Graham performed a tubal ligation on Gloria Cooke at the Dawson Creek Hospital. Unbeknownst to the plaintiff, Ms. Cooke had had a previous surgery on her bowel and uterus. He noted this at the beginning of the surgery when he inserted a camera into her. This made the surgery somewhat more difficult but he continued. In the middle of Ms. Cooke's surgery, he received an urgent call about a pregnant woman in the maternity ward and problems with the baby's heart rate. He was the only obstetrician and gynecologist in Dawson Creek but finished Ms. Cooke's surgery before rushing off to deal with this other patient. He kept Ms. Cooke in the hospital overnight for observation. The next day she appeared fine so he discharged her with instructions.

[14] The day after her discharge, Ms. Cooke returned to the Dawson Creek Hospital complaining of shortness of breath and pain in her abdomen. Worried she was becoming septic and with no surgeon on call in Dawson Creek, arrangements were made for her to be transferred to Grande Prairie Hospital for immediate surgery. During her surgery in Grande Prairie, she was noted to have a small bowel

perforation. She was eventually transferred to Edmonton University Hospital for some further surgeries, following which she eventually made a full recovery.

[15] As a result of this incident, Dr. Graham voluntarily stopped performing laparoscopic surgeries and decided to take upgrading to assuage any negative public opinion in Dawson Creek. On December 11, 2002 an article appeared in the Vancouver Sun reporting on Ms. Cooke's complications and linking the plaintiff's voluntary suspension of laparoscopic surgeries to this and the Baert case. Similar articles appeared in the Peace River Block Daily News and the Alaska Highway News over the next number of weeks.

[16] On March 3, 2003 an article entitled "Local Mother 'Lucky to be Alive'" appeared in the Peace River Block Daily News. This was a story about Dana McLellan. Dr. Graham had performed surgery on her in February 2003 and inserted a catheter into her bladder. After surgery there was some blood in her urine. Dr. Graham called a specialist and they inserted a camera into her bladder. They noticed some blood and clots so they took her back into surgery and repaired a small cut in her bladder. Ms. McLellan was stable for a few days but eventually was transferred to Vancouver because of nursing requirements. The article made it sound as if Ms. McLellan almost died but that was not the case.

[17] On March 5, 2003 another article appeared in the Peace River Block Daily News. The byline in this article read "Third Patient Comes Forward: Complications Followed Surgery to Remove Cyst". This female patient had been referred to Dr. Graham because of chronic pelvic pain. When he performed surgery on her he noted a lot of adhesions and that her ovary was stuck to her bowel. He called a surgeon who attended and dissected the ovary off the bowel. In the course of performing the dissection, the surgeon cut the patient's urator. He brought this to the

surgeon's attention and she stitched it up. Unfortunately the patient developed leakage out of the stitches and had to be transferred to Prince George where a urologist fixed the problem. Although the article seemed to blame Dr. Graham for this woman's problems, he was not responsible for cutting her urator.

[18] Complaints were made to the British Columbia College of Physicians and Surgeons following these surgeries and Dr. Graham was investigated. The College issued a written report finding no evidence that Dr. Graham was not providing the appropriate level or standard of care to his patients and he was never disciplined. As regards the Gloria Cooke surgery, the College suggested that he should have stopped the surgery when he noted the tissue mass from the undisclosed surgery. Despite this, they did not find that his continuing with the surgery fell below the appropriate standard of patient care. Ms. Cooke eventually started a lawsuit against Dr. Graham. It was settled with no liability on his part.

[19] The Northern Health Authority also investigated his surgeries but never disciplined Dr. Graham, suspended his hospital privileges or pressured him to resign.

[20] With all the negative media publicity, Dr. Graham's income began to decline. While he was not shunned by colleagues, they made fewer referrals to him. He also began receiving hate mail. In May 2003, Dr. Graham suffered a heart attack and at the end of July 2003 had quintuple bypass surgery. He also began suffering some depression. Dr. Graham decided to cease practicing in Dawson Creek and he retired to St. Albert, Alberta.

[21] Dr. Graham and his wife had five children. On May 24, 2007, his oldest son committed suicide. On August 19 his wife died of cancer. On September 17 the

Baert trial began in Saskatchewan Court of Queen's Bench. The hospital and the nurses settled out of court but Dr. Graham continued to deny that he was negligent.

[22] The trial garnered considerable media interest both in Saskatchewan and across Canada. Chris Purdy, one of the reporters at the Star Phoenix newspaper, was sent to cover the trial. Prior to attending the trial, Ms. Purdy attempted to familiarize herself with the case. In that regard, she read articles that had previously been written about the case, she tried to find other stories the newspaper wrote about the case and she searched other jurisdictions to see if any other articles about the case came up.

[23] Ms. Purdy attended the first day of trial but did not attend each and every day of the trial thereafter. She tried to find out when certain witnesses would be testifying and would attend for their examinations-in-chief. She would not often stay for cross-examination because by that time she usually had the salient facts or she had to leave to get a story out to meet a deadline. She did however make a point of attending Dr. Graham's examination-in-chief and cross-examination as nobody had as yet heard his side of the story. She kept notes of all her attendances at the trial and what occurred when she was there.

[24] During the trial, Ms. Purdy observed a *voir dire*. The *voir dire* concerned an application to allow a number of people to testify in relation to "informed consent". It was during this *voir dire* that she learned the names of some of Dr. Graham's former patients or obtained them from Ms. Baert's counsel.

[25] Ms. Purdy attended court on November 22, 2007 to hear the closing arguments of Dr. Graham's counsel and then again on November 23 to hear the closing arguments of Ms. Baert's counsel. She next attended court on November 27 to hear the judge's charge to the jury. She made detailed notes of what she heard on all

of these dates. On November 28, 2007, after 51 days of trial, the jury found Dr. Graham not negligent for Ms. Baert's injuries.

[26] Ms. Purdy wrote a series of articles about the case during and after the trial. All of these articles were published in the Star Phoenix newspaper and/or on the newspaper's websites. Following closing submissions, she wrote an article entitled "Final Arguments in Surgery Suit Heard by Court". This article was published on page A13 of the November 24, 2007 edition of the Star Phoenix and appeared on its websites on that same date.

[27] On November 28, 2007, the day the verdict came down, neither Ms. Baert nor Dr. Graham were present in court. After the verdict, Ms. Purdy spoke to Ms. Baert's counsel regarding the possibility of an appeal. She later spoke to a number of people including Les Hurlburt, Lynn Laursen, Sharry Michels and Marleen Burgess. All of these people were either previous patients of Dr. Graham or relatives of his prior patients. She wrote an article entitled "Gynecologist Not Negligent in Tubal Ligation Lawsuit" and it was published on the newspaper's websites later on November 28.

[28] Dr. Graham was at home in St. Albert when the verdict came down. He received a call from his counsel advising of the result and was "over the moon" that he was found not negligent and finally exonerated. He organized a celebratory supper for him and his children that night at his residence.

[29] Donald Graham was living with his father at the time and working on his master's degree. He described his father as being very excited about the jury's decision and the case being finished. Another son, Mark, echoed these comments about his father's reaction to the verdict. Over supper, the Graham family spoke of

this being a point to move on from given everything their family had recently been through.

[30] After supper, Donald Graham went on the internet to search for any stories about the verdict and he came across Ms. Purdy's November 28 article. They all read the article and the mood changed. Dr. Graham was shocked, mad, dumbfounded, baffled and unhappy that there was nothing in the article about him being vindicated. He felt it was full of untruths and distortions and that it made it appear that he was lucky to have been exonerated in the trial. Nobody from the Star Phoenix had tried to contact him to discuss the verdict or the contents of this article. He felt depressed.

[31] Ms. Purdy wrote five more articles: November 29 (two articles), 30, December 1, 2007 and January 3, 2008. Nobody told her to write these articles but she discussed the information she obtained and the articles she wrote with her editors. Dr. Graham and his family read each of these articles and continued to be shocked, mad and dismayed and wondering if and when these articles would stop. After reading the November 30 article, Dr. Graham was depressed and felt that the newspaper was making the point that he was negligent and the jury was wrong to have exonerated him. The article made it sound as if the outcome of the trial would have been different had the jury heard from his other patients, that he should not have been given a licence to practice in British Columbia and that he should not have been working as a doctor. No one from the Star Phoenix contacted him to speak to him about the article, to ask him about the verdict or to get his view on an appeal. Dr. Graham was particularly upset and appalled after reading the December 1 article as this article was full of untruths. Still, no one from the newspaper tried to contact him to get his comment.

[32] On December 3, Dr. Graham's children prepared a letter to the Star Phoenix expressing their concerns and providing some rebuttal as to what was being written about their father. The Star Phoenix published this letter in the editorial section of the paper on December 14, 2007.

[33] Over the next number of months, Dr. Graham's children noticed a change in their father. He was not as happy or as talkative as he had been before. He stopped doing things with them and became preoccupied with these articles. The articles bothered him for days and weeks at a time. Dr. Graham, by his own admission, was depressed, not eating properly, unable to concentrate and had problems sleeping. He never sent a letter or a press release to the Star Phoenix as he did not think it was an appropriate thing to do. Over time, the effects lessened but he continued to have problems concentrating and sleeping.

[34] Eventually Dr. Graham decided to bring a lawsuit against the Star Phoenix to get back some of the vindication that was lost as a result of Ms. Purdy's articles. On November 18, 2009, counsel for Dr. Graham gave notice to Chris Purdy, her editors and publisher at the Star Phoenix and Canwest Publishing Inc., the then owners of the Star Phoenix, of their intention to bring an action for defamation as required by s. 15 of *The Libel and Slander Act*, RSS 1978, c L-14. On November 24, 2009 Dr. Graham filed a Statement of Claim in the Saskatchewan Court of Queen's Bench alleging that the defendants had published a series of articles containing defamatory comments about him in the Star Phoenix and on websites owned and operated by the Star Phoenix and Canwest Publishing Inc., between November 24, 2007 and January 3, 2008.

[35] The defendants filed a Statement of Defence on June 7, 2010 denying Dr. Graham's allegations. The parties were not able to resolve the claim at mediation or pre-trial settlement conference and eventually the claim was set down for trial.

[36] Sometime between the date Dr. Graham's claim was filed and the commencement of the trial, Canwest Publishing Inc. experienced financial difficulties and eventually its assets, including the Star Phoenix, were purchased by Postmedia Network Inc.

## ISSUES

[37] The issues in this case are as follows:

(a) Should the Statement of Claim be amended to add Postmedia Network Inc. as a defendant?

(b) Are the defendants, or any of them, liable in defamation to Dr. Graham?

(c) What damages, if any, is Dr. Graham entitled to?

(d) Is Dr. Graham entitled to an injunction requiring the defendants to remove certain content from websites under their control?

## ANALYSIS

### (a) Should the Statement of Claim be amended to add Postmedia Network Inc. as a defendant?

[38] Postmedia Network Inc. purchased Canwest Publishing Inc. after their claim was filed but before the trial in this matter commenced and are the current owners of the Star Phoenix newspaper and its websites. Pursuant to Rules 3-72 and 3-84 of *The Queen's Bench Rules*, counsel for Dr. Graham asks me to exercise my

discretion and allow the Statement of Claim to be amended to add Postmedia Network Inc. as a defendant. In their view, there is no prejudice to Postmedia Network Inc. if they are added as a defendant and in effect, while not formally named as a defendant to this point in time, have been defending this claim since purchasing Canwest Publishing Inc. and/or its assets.

[39] The defendants oppose this request on the basis that the two-year limitation period set forth in *The Limitations Act*, SS 2004, c L-16.1, in force at the time of the alleged defamation has expired, that there is no evidentiary basis upon which I could conclude that no party will suffer actual prejudice as a result of the requested amendment and, lastly, that there is no explanation for Dr. Graham's delay in seeking this amendment until after the conclusion of the evidence in the trial.

[40] Rules 3-72, 3-78 and 3-84 are relevant to this issue and specifically:

> 3-72(1) A party may amend the party's pleading, including an amendment to add, remove, substitute or correct the name of a party, as follows:
>
> ...
>
> (c) after a statement of defence is filed:
>
> (i) by agreement of the parties filed with the Court; or
>
> (ii) with the Court's prior permission, in any manner and on any terms that the Court considers just.
>
> ...
>
> (3) Parties shall make all amendments to their pleadings that are necessary to determine the real questions in issue between the parties.
>
> ...
>
> (8) Unless the Court orders otherwise, if a pleading is amended at a trial or hearing, the amended pleading does not need to be served and filed.
>
> ...
>
> 3-78 ...
>
> (2) Persons may be joined as defendants or respondents if:

> (a) a remedy is claimed against them, whether jointly or severally or in the alternative, arising out of the same transaction, occurrence or series of transactions or occurrences;
>
> (b) a common question of law or fact may arise in the proceeding;
>
> (c) there is doubt as to the person or persons from whom the plaintiff, petitioner or originating applicant is entitled to a remedy;
>
> (d) damage or loss has been caused to the same plaintiff, petitioner or originating applicant by more than one person, whether or not:
>
> (i) there is any factual connection between the several claims apart from the involvement of the plaintiff, petitioner or originating applicant; and
>
> (ii) there is doubt as to the respective amounts for which each may be liable; or
>
> (e) their presence in the proceeding may promote the convenient administration of justice.
>
> ...
>
> 3-84(1) At any stage of the action, the Court may order that any person be added as a party if:
>
> (a) that person ought to have been joined as a party; or
>
> (b) the person's presence as a party is necessary to enable the Court to adjudicate effectively and completely on the issues in the action.
>
> (2) At any stage of the action, the Court may grant leave to add, delete or substitute a party, or to correct the name of a party, and that leave shall be given, on any terms that the Court considers just, unless prejudice will result that cannot be compensated for by costs or an adjournment.
>
> ...

[41] In this case, at the time the articles complained of were written, Canwest Publishing Inc. owned the Star Phoenix, the newspaper that employed Chris Purdy, Rod Nickel, Steven Gibb, Cameron Hutchinson and Dale Brin. According to material on the court file, on January 8, 2010 the Ontario Superior Court of Justice made an order pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, in the matter of a plan of compromise or arrangement of Canwest Publishing Inc. and

other related companies. Sometime thereafter, but prior to the trial commencing, Postmedia Network Inc. purchased Canwest Publishing Inc. and/or its assets including the Star Phoenix. The evidence does not disclose the specific date this occurred. However, on the court file is a statement as to documents of the defendants dated November 22, 2012 wherein defendants' counsel identifies as being solicitors for Chris Purdy, Rod Nickel, Steven Gibb, Cameron Hutchinson, Dale Brin and Postmedia Network Inc., successor to Canwest Publishing Inc. There is also an affidavit of Rob McLaughlin filed on the court file sworn November 23, 2012 in which he states that he is the editor of the Star Phoenix and that Postmedia Network Inc. is the owner of the Star Phoenix newspaper. Finally, there is a letter on the court file dated November 25, 2014 from defendants' counsel requesting permission from the Court to dispense with the appearance of all the defendants at the December 2014 pre-trial conference. The reasons for this request included the following:

> (1) The defendants are all insured by the (formerly) Canwest Publishing and (now) Postmedia Network Inc. insurer, Hiscox Insurance, and thus have no personal financial exposure to the plaintiff;
>
> ...
>
> (3) None of the defendants is now employed by Postmedia Network Inc., owner of the Star Phoenix Newspaper, at that newspaper; and
>
> (4) Only the examination for discovery of the defendant Purdy was an "in-depth" discovery and there was understandably no examination of the proper officer of Postmedia Network Inc.

[42] Despite this, Dr. Graham's counsel neglected to make application to add or substitute Postmedia Network Inc. as a defendant prior to the trial commencing, at the conclusion of the plaintiff's case or at the end of the trial. In closing argument it was agreed that the parties would submit further written submissions on Dr. Graham's request for an injunction requiring the defendants to remove certain articles from websites under their control if these articles were found to be defamatory.

Unfortunately I neglected to provide the parties with appropriate direction for submission of any further argument at the end of closing submissions.

[43] On October 30, 2015 I received correspondence from Dr. Graham's counsel advising that he was writing on behalf of both counsel and requesting direction as to whether the parties may submit additional written material on two questions:

(i) Whether the Statement of Claim should be amended to substitute Postmedia Network Inc. (the current proprietor of the Star Phoenix) for the defendant Canwest Publishing Inc. (former proprietor of the Star Phoenix); and

(ii) Whether the plaintiff, if successful in establishing the defendants are liable in defamation, are entitled to an injunction requiring the defendants to remove certain content from websites under their control.

[44] On the basis of the request of the parties in closing argument and their mutual desire to provide written submissions to the Court on the aforementioned two questions, I instructed the Local Registrar to contact both counsel, advise them that I would receive written submissions on these points and gave them a deadline by which these submissions should be filed.

[45] Both counsel filed written submissions. In the defendants' written submission, counsel reiterated that these two outstanding issues are being raised with his agreement.

[46] I am satisfied that Postmedia Network Inc. was the successor to Canwest Publishing Inc. and at the time of trial, was the owner of the Star Phoenix newspaper. I am also satisfied that Postmedia Network Inc. was aware of the existence of Dr. Graham's claim including knowledge of the matters in issue. Counsel

that had been representing Canwest Publishing Inc. and the other defendants before Postmedia Network Inc. purchased the Star Phoenix continued to represent the defendants after the purchase. In documents filed with the Court, counsel began identifying that he was now representing Postmedia Network Inc. as successor to Canwest Publishing Inc. Counsel ran the trial and must have been receiving some instruction from Postmedia Network Inc. as to how to proceed.

[47] Rule 3-84(2) allows the Court to grant leave to add or substitute a party at any stage of the action unless prejudice will result that cannot be compensated for. It is clear that a trial judge has the discretion to add parties to an action however that discretion should not be exercised when it works an injustice to one of the parties. See *Bradford v Smith* (1989), 74 Sask R 193 (CA). While this rule gives the judge the power to add or substitute a party, the criteria to be applied by the Court in deciding whether a party ought to be joined as a defendant is set out in Rule 3-78(2). See *Lindsay v Lindsay* (1981), 15 Sask R 29 (QB) at para 4; *Scharnagl (Litigation Guardian of) v Tomilin*, 2005 SKCA 121 at para 18, 269 Sask R 259.

[48] Here, there is nothing that leads me to believe that Postmedia Network Inc. would suffer prejudice or an injustice if they were added as a defendant at this time. They purchased Canwest Publishing Inc. and/or its assets at least three years prior to trial and they are represented by the same lawyer that represented Canwest Publishing Inc. and the rest of the defendants. Both companies are insured by Hiscox Insurance and it appears that the insurer attended the pre-trial settlement conference on behalf of both companies. Counsel for the defendants admitted in correspondence that understandably no examination of the proper officer of Postmedia Network Inc. occurred as the more important discovery was of Chris Purdy. Postmedia Network Inc. is not being taken by surprise in the action and I am not convinced that the case, from the defendants' perspective, would have been handled differently had Postmedia

Network Inc. been added earlier in the action. The evidence remains the evidence; it did not change, become stale or lost simply because Postmedia Network Inc. purchased Canwest Publishing Inc. and/or its assets.

[49] The presence of Postmedia Network Inc. as a defendant will ultimately promote the convenient administration of justice as it will enable the Court to determine the real questions in issue between the parties and effectively and completely adjudicate on all the issues in the action. Moreover, given that the Court has no evidence as to the specific terms upon which Postmedia Network Inc. purchased Canwest Publishing Inc. and/or its assets, there may be some doubt as to which entity Dr. Graham is entitled to a remedy against if he is successful in his claim. For these reasons, Postmedia Network Inc. should be added as a defendant in this action.

[50] I am not convinced that adding Postmedia Network Inc. as a defendant deprives them of a defence under s. 5 of *The Limitations Act*. Section 5 states:

> 5 Unless otherwise provided in this *Act*, no proceedings shall be commenced with respect to a claim after two years from the day on which the claim is discovered.

[51] The articles complained of were published between November 24, 2007 and January 3, 2008, and it would appear that the limitation period expired some time ago. But in cases where it is alleged defamatory material was posted on an internet website, as in this case, "publication" takes place wherever and whenever a third party downloads or views the impugned material from the website. See *Elfarnawani v International Olympic Committee*, 2011 ONSC 6784 at para 31. Consequently, the limitation period begins to run each and every time defamatory content on the internet is downloaded and viewed. This was the conclusion reached by the British Columbia

Court of Appeal in *Carter v B.C. Federation of Foster Parents Association*, 2005 BCCA 398 at para 20, 257 DLR (4th) 133.

[52] It is not necessary for a plaintiff in every case to prove directly that the words complained of were brought to the actual knowledge of some third party. If, on the facts proved, it can reasonably be inferred that the words were brought to the knowledge of some third party, a *prima facie* case is established. See *Gaskin v Retail Credit Co.*, [1965] SCR 297.

[53] In *Bernstein v Poon*, 2015 ONSC 155, although it was proven that the defamatory material was posted on the defendant's website for at least one to two years prior to being removed, there was no direct evidence that anyone except the defendant and his legal representatives viewed the material. In concluding that there was more than ample evidence to support the drawing of an inference that the material on the website was viewed by third parties, Mew J. held that "[t]o find otherwise would be to ignore the realities of twenty-first century communication…".

[54] The defendants in the present case acknowledged that the articles in question remain on websites controlled by the Star Phoenix, Canwest Publishing Inc. and/or Postmedia Network Inc. It was part and parcel of their closing argument that to grant an injunction that the defamatory material be removed from their websites would be akin to erasing history. That being so, it is a reasonable conclusion that anyone with a search engine could have accessed that material within the last two years and as a result the limitation period would not have expired.

[55] Even if I am wrong in this reasoning, s. 20 of *The Limitations Act* allows the Court to add a party even after a limitation period has expired. This section states:

> 20 Notwithstanding the expiry of a limitation period after the commencement of a proceeding, a judge may allow an amendment to the pleadings that asserts a new claim or adds or substitutes parties if:
>
> (a) the claim asserted by the amendment, or by or against the new party, arises out of the same transaction or occurrence as the original claim; and
>
> (b) the judge is satisfied that no party will suffer actual prejudice as a result of the amendment.

[56] If both of the requirements set forth in the section are found to exist, the Court has an unfettered discretion to grant the application, however such discretion must be exercised judicially. See *Stockbrugger Estate v Wolfe Estate*, [1987] 4 WWR 759 (Sask CA).

[57] The claim against Postmedia Network Inc. arises out of the same transactions or occurrences as the original claim against the defendants and for the reasons aforementioned, I am satisfied that neither Dr. Graham, the other defendants nor Postmedia Network Inc. will suffer actual prejudice as a result of adding Postmedia Network Inc. as a defendant. Dr. Graham or his counsel gave no reason why they did not seek to amend their claim earlier, but as stated in *Callihoo v Lamoureux*, 2001 SKQB 392, 211 Sask R 36, even if there is negligence that is not necessarily fatal to the application. As a result, I would exercise my discretion and grant leave to add Postmedia Network Inc. as a defendant in this case.

**(b) Are the defendants, or any of them, liable in defamation to Dr. Graham?**

[58] Dr. Graham takes issue with seven articles written by Chris Purdy, the Star Phoenix reporter tasked with covering the Baert trial. The dates of these articles were November 24, 28, 29 (two articles), 30, December 1, 2007 and January 3, 2008. He alleges particular defamatory meanings to the words in each of these articles and

states that the articles as a whole convey a defamatory impression of him. He accuses the defendants of being actuated by express malice in the publication of these articles.

[59] The defendants argue that the words complained of in the different articles are not capable of bearing the defamatory meanings, either at all or to the extent alleged by Dr. Graham. They admit that five of the articles do contain some defamatory comments or meaning. They raise the defence of privilege set forth in s. 11 of *The Libel and Slander Act* and the defence of responsible communication in relation to some of the articles and deny that their predominant purpose in publishing the articles was to harm Dr. Graham's reputation or for any other malicious reason.

[60] Defamation occurs when words are published to a third person that contain an imputation which tends to lower the plaintiff in the estimation of right-thinking members of society generally or to expose him to hatred, contempt or ridicule. To be actionable, the words must be reasonably understood by others in a defamatory sense. Words may be defamatory in their natural and ordinary meaning, they may carry an implied meaning (the true innuendo), and/or an extended meaning (the false innuendo). Unless the literal meaning is plain and obvious, the plaintiff must plead what he alleges the words were intended to mean. See *Laufer v Bucklaschuk* (1999), 145 Man R (2d) 1 (CA) at para 23.

[61] The basic principles of the law of defamation were succinctly stated by McLachlin C.J. in *Grant v Torstar Corp.*, 2009 SCC 61, [2009] 3 SCR 640 [*Grant*]. There she said:

> 28 A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at

> least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed, though this rule has been subject to strong criticism: see, e.g., R. A. Smolla, "*Balancing Freedom of Expression and Protection of Reputation Under Canada's Charter of Rights and Freedoms*", in D. Schneiderman, ed., *Freedom of Expression and the Charter (1991)*, 272, at p. 282. (The only exception is that slander requires proof of special damages, unless the impugned words were slanderous per se: R. E. Brown, *The Law of Defamation in Canada* (2nd ed. (loose-leaf)), vol. 3, at pp. 25-2 and 25-3.) The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.
>
> 29 If the plaintiff proves the required elements, the onus then shifts to the defendant to advance a defence in order to escape liability.

[62] In this case, the parties agree that the words complained of referred to Dr. Graham and that the words were published. Where they disagree is whether some of the words or articles were defamatory and whether they were defamatory to the extent that Dr. Graham says they were.

[63] The role of the trial judge in determining whether or not words are defamatory was described by Hinkson J.A. (as he then was) in *Lawson v Baines*, 2012 BCCA 117 at paras 26 and 27, [2012] 7 WWR 429 [*Lawson*]:

> 26 The first task of a judge in a defamation case is to answer the "threshold question" of "whether the words cited are reasonably capable of a defamatory meaning": *Laufer v. Bucklaschuk* (1999), [2000] 2 W.W.R. 462 at 470-471 (Man. C.A.). The judge, if sitting alone, then plays a second role; as a finder of fact, in determining whether the words do, in fact, bear that defamatory meaning.
>
> 27 In executing the first role, the question is whether the words complained of are reasonably capable of being understood in a defamatory sense. In exercising this gatekeeper role, the judge must keep in mind that the question does not involve finding that the words are in fact defamatory, but concerns only what the words are capable of meaning. When performing this task, the judge must not stray from a "common sense construction" of these words (as it was termed in *Makow v. Winnipeg Sun*, 2003 MBQB 56, [2003] 11 W.W.R. 166, affirmed 2004 MBCA 41) and seize upon one marginal to that construction.

[64] In *Botiuk v Toronto Free Press Publications Ltd.*, [1995] 3 SCR 3 [*Botiuk*], Cory J. said:

> 62 For the purposes of these reasons, it is sufficient to observe that a publication which tends to lower a person in the estimation of right-thinking members of society, or to expose a person to hatred, contempt or ridicule, is defamatory and will attract liability. See *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067, at p. 1079. What is defamatory may be determined from the ordinary meaning of the published words themselves or from the surrounding circumstances. In *The Law of Defamation in Canada* (2nd ed. 1994), R. E. Brown stated the following at p. 1-15:
>
> > [A publication] may be defamatory in its plain and ordinary meaning or by virtue of extrinsic facts or circumstances, known to the listener or reader, which give it a defamatory meaning by way of innuendo different from that in which it ordinarily would be understood. In determining its meaning, the court may take into consideration all the circumstances of the case, including any reasonable implications the words may bear, the context in which the words are used, the audience to whom they were published and the manner in which they were presented.

[65] As I decide whether the words and/or articles in question were defamatory, both parties urge me to consider the context in which the words were published and the context of the articles. *Brown on Defamation*, loose-leaf (2012-Rel 4) 2d ed, vol 1 (Toronto: Carswell, 1999), stresses that context and circumstances are crucial in determining the defamatory sense of words. At pages 5-82 to 5-83:

> The defamatory communications must be viewed contextually. In determining whether they are defamatory, the words "must be considered in the context of the matter complained of as a whole." An alleged defamatory statement cannot be considered apart from the circumstances in which it was made. A word having different shades of meaning may derive color and significance from the nature of the act to which it is applied. "What is said and what is done always has its proper relation to time, place, conditions, and circumstances." Therefore, in determining the defamatory sense of language, "reference must be had, not only to the words or expressions themselves, but also to the circumstances under which they were used." This is particularly true where an innuendo has been pled.

[66] Besides arguing that the words were not defamatory, the defendants rely on the defence of privilege afforded newspapers under s. 11 of *The Libel and Slander Act* and the defence of responsible communication. Section 11 of *The Libel and Slander Act* reads as follows:

> 11(1) A fair and accurate report in a newspaper without comment, of proceedings publicly heard before a court of justice, if published contemporaneously with those proceedings, shall be absolutely privileged unless the defendant has refused or neglected to insert in the newspaper in which the report complained of appeared a reasonable letter or statement of explanation or contradiction by or on behalf of the plaintiff.
>
> (2) Nothing in this section authorizes the publication of blasphemous, seditious or indecent matter.

[67] The defence of responsible communication is a relatively new defence in Canadian law. Formally accepted by the Supreme Court of Canada in *Grant*, McLachlin C.J. described the elements of the new defence as follows:

> 126 The defence of public interest responsible communication is assessed with reference to the broad thrust of the publication in question. It will apply where:
>
> A. The publication is on a matter of public interest, and
>
> B. The publisher was diligent in trying to verify the allegation, having regard to:
>
> (a) the seriousness of the allegation;
> (b) the public importance of the matter;
> (c) the urgency of the matter;
> (d) the status and reliability of the source;
> (e) whether the plaintiff's side of the story was sought and accurately reported;
> (f) whether the inclusion of the defamatory statement was justifiable;
> (g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and
> (h) any other relevant circumstances.

[68] With this background in mind and since each publication is a separate cause of action for which an action lies (*Lambert v Roberts Drug Stores Ltd.*, [1933] 4 DLR 193 (Man CA), at para 6 [*Lambert*]), I will address each of the articles Dr. Graham complains of separately.

### (i) November 24, 2007 Article

[69] This article appeared both in the Star Phoenix newspaper and on internet sites controlled by the newspaper. The article reads as follows:

> **Final arguments in surgery suit heard by court**
>
> *The gynecologist who botched a routine tubal ligation operation on a Lloydminster mother, leaving her a quadriplegic with brain damage, clearly failed to provide her with a standard level of care, a jury has heard.*
>
> On Friday, lawyers for Lisa Baert began their closing arguments in the two-month civil trial in Saskatoon's Court of Queen's Bench.
>
> Because the lawyers need more time Monday to complete their case, Justice Grant Currie told the jury members – all women – they won't need to bring their suitcases until Tuesday, when they will be sequestered for their deliberations.
>
> "It's clear this case is about a young family whose lives were unimaginably changed," said lawyer Sandra Weber.
>
> *Lisa Baert was 21 when she went to the Lloydminster hospital in July 1999 for what is considered by many to be a safe, simple sterilization procedure, said Weber.*
>
> But her bowel was unknowingly punctured during the laparoscopic operation, allowing toxins to leak into her body.
>
> She was discharged from hospital but two days later was rushed back suffering from septic shock.
>
> Her hands and feet had to be amputated. And she also suffered major brain damage during cardiac arrests.
>
> She now lives in Saskatoon's Parkridge Centre.

Baert, her husband Mark and their two young sons are suing Dr. Kenneth Graham for more than $10 million for negligence. The Lloydminster hospital and several nurses originally named in the suit previously settled out of court.

"Dr. Graham failed Lisa Baert in a number of ways," said Weber.

She said Graham did not get Baert's informed consent for the surgery. When he met her in his office weeks before the operation, he spent only three minutes discussing the operation.

Mark testified when his wife returned home, and he asked her if the doctor had discussed risks of the upcoming surgery, she told him: "I don't believe he told me of any risks."

Weber also reminded the jury one of Graham's other patients, who had a tubal ligation that same day, testified she was unaware the bowel could be nicked during the surgery.

Graham testified it was his routine to briefly mention the risk of bowel perforation. But he would not tell patients the consequences of such an injury include septic shock or death, because the event is so rare.

"Even if a risk is rare, if the potential consequences are serious, that must be disclosed," Weber said.

She said Graham further failed Baert by proceeding with the surgery, after another doctor diagnosed her with postpartum depression and prescribed her anti-depressants.

Graham either didn't see the update in her chart, said Weber, or he ignored the vital piece of information.

She said Graham also admitted he was "crunched for time," with three other surgeries scheduled the same morning as Baert's operation.

He obviously used "improper technique," inserting the needle at a wrong angle or pushing it too deep into the abdomen, said Weber.

Graham was alerted to a possible problem when the surgical equipment gave a high pressure reading, an indication the needle had met an obstruction, such as the bowel, Weber said.

But he completed the surgery and didn't tell other staff or Baert of the problem so they could watch for symptoms.

> "The doctor's responsibility doesn't end when he puts in the last suture," Weber said. "Dr. Graham had the missing piece of the puzzle that he failed to communicate, and that started the whole process."
>
> Baert was discharged from hospital and given an instruction sheet from a nurse about how she should not take prescription drugs and should call the hospital or her doctor if she experienced more pain.
>
> Baert and a concerned neighbour allegedly called the hospital three times during the next two days, concerned about her increasing pain. They talked to unknown nurses who said Baert should wait out the pain and gave permission for her to take the neighbour's prescription pain killers.
>
> Graham's defence lawyers have argued the nurses obviously gave bad advice over the phone, and Baert should have followed the instructions by returning to the hospital.
>
> Graham's defence suggests the hospital and Baert carry about 75 per cent of the responsibility for what happened.
>
> Weber said Baert did nothing wrong, and Graham is to blame for 80 per cent of the incident. The hospital is responsible for the remaining 20 per cent.
>
> "Dr. Graham's negligence is by far the biggest factor," she said.
>
> [Italics are mine]

[70] Dr. Graham argues that the italicized portions of the article are false, malicious and defamatory and were understood to mean that he botched a routine tubal ligation operation on Lisa Baert causing her to become a quadriplegic with brain damage.

[71] Defendants' counsel says that this article is Ms. Purdy reporting on the submissions of Ms. Baert's counsel to the jury and that the natural and ordinary meaning of the words complained of is non-defamatory. Alternatively they rely on the privilege accorded to newspapers reporting on court proceedings pursuant to s. 11 of *The Libel and Slander Act* and the defence of responsible communication.

[72] Looking at the words specifically complained of by Dr. Graham in the context of the article as a whole, I am not satisfied that these words are reasonably capable of a defamatory meaning. An ordinary person reading these words would understand that these are the plaintiff's lawyer's arguments at the end of a lengthy trial. The impugned portions state as much when they end with "a jury has heard" and "said Weber". Early in the article it states that lawyers for Ms. Baert began their closing arguments in a trial and the different paragraphs are littered with references that Ms. Weber said this or she said that. An ordinary person reading this would be mindful that this trial is not finished, that no determination has yet been made as to whether Dr. Graham has done anything wrong and that what is being said here are arguments a jury is going to have to consider.

[73] Even if I am wrong in this conclusion, the words complained of are not actionable by reason of the privilege afforded the defendants under s. 11 of *The Libel and Slander Act*. The article was a fair and accurate contemporaneous reporting of the closing submissions made by the Baerts' lawyer to the jury. For both these reasons, the allegation that this November 24, 2007 article is defamatory is dismissed.

### (ii) November 28, 2007 Article

[74] This article was only published on the Star Phoenix internet sites. It read as follows:

> **Gynecologist not negligent in tubal ligation lawsuit**
>
> *The gynecologist found not negligent Wednesday in the case of a Lloydminster mother left with devastating injuries after a routine tubal ligation recently settled a second lawsuit with another patient who nearly died following the same surgery.*
>
> *Dr. Kenneth Graham settled the second suit out of court for an undisclosed sum earlier this month, said lawyer John Jordan of Nanaimo, B.C.*

*Jordan said his client, Gloria Cooke, was referred to Graham for the laparoscopic tubal ligation at Dawson Creek and District Hospital in 2002. He mistakenly punctured her bowel twice during the surgery.*

*"She almost died and struggled to hang on for a month," said Jordan.*

On Wednesday, after nine weeks of trial, a Saskatoon jury determined Graham was not negligent in his care of Lisa Baert when he punctured her bowel during a tubal ligation at the Lloydminster hospital in 1999.

*Baert went into septic shock and doctors had to amputate her hands and feet. She also suffered severe brain damage.*

Baert and her family were claiming more than $10 million in damages against Graham. Prior to trial, they reached an undisclosed settlement with the Lloydminster hospital and some nurses.

One of the six jurors, her bottom lip quivering as the verdict was read, wiped tears from her face and glanced at Baert's husband, Mark, and his three sons sitting in the courtroom.

The jurors did not have to be unanimous, but five of the six had to agree on each question posed in a six-page verdict sheet in order to reach their decision.

Baert, confined to a wheelchair and living at the Parkridge Centre long-term care home, was unable to make it to the courthouse for the verdict. And her husband did not talk to reporters when he left the building.

Graham, who no longer works as a doctor, also wasn't at the courthouse. His lawyer, Christine Glazer, said he was busy with personal matters.

She said the trial was difficult for her client and obviously the jury.

"I realize how difficult it would have been for the jury to reach the conclusion that it did," said Glazer. "But the jury did what it had to do, and that was set aside its emotion and look at the case objectively."

Baert's lawyers planned to call about 10 other patients during the trial, some – like Cooke – suffered complications during surgeries conducted by Graham.