

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

[138] In the pleadings, Dr. Graham claims against the defendants, jointly and severally, as follows:

- (a) General damages in the sum of \$2,000,000;
- (b) Aggravated damages in the sum of \$1,000,000;
- (c) Punitive damages in the sum of \$1,000,000;
- (d) Special damages in an amount to be particularized;
- ...

[139] In closing argument, Dr. Graham's counsel advised that they were only seeking general and aggravated damages. He argued that a general damages award in a defamation case is a very subjective determination and one that must be made where there is no tangible injury. He reminded me that aggravated damages ought not to be awarded unless malice has been shown but in his view there was considerable evidence of malice in this case. He took issue with any suggestion by the defendants that Dr. Graham had a bad reputation when he came to court. In his view, I must look at Dr. Graham's reputation at the time of the defamation. He urged me to approach the issue by asking myself "what is a sufficient sum that recognizes that this was a bad, unwarranted defamation?"

[140] Counsel referred me to a number of cases including *Hiltz and Seamone Co. v Nova Scotia (Attorney General)* (1999), 173 NSR (2d) 341 (CA) – \$200,000 general damages; *Universal Weld Overlays Inc. v Shaben*, 2001 ABQB 1009 – \$100,000 general damages and \$30,000 aggravated damages; *Myers v Canadian Broadcasting Corp.* (2001), 54 OR (3d) 626 (CA) – \$200,000 for general damages

and \$150,000 for aggravated damages; *Leenen v Canadian Broadcasting Corp.*, (2000), 48 OR (3d) 656 Ont. Sup. Ct.) [*Leenen*] – general damages of \$400,000 and aggravated damages of \$350,000; and *Fiola v LeBrun*, 2002 MBQB 312, 1169 Man R (2d) 172 – general damages of \$250,000 and \$100,000 aggravated damages.

[141] Defendants' counsel argued that Dr. Graham was only entitled to general damages in an amount not exceeding \$25,000. He stated that while little is to be gained from a detailed comparison of libel awards in other cases, the Court should use as an appropriate measure of the upper end of the range of damages, the Saskatchewan Court of Appeal's decision in *Rubin v Ross*, 2013 SKCA 21, 409 Sask R 202 (\$100,000 general damages) and the Saskatchewan Court of Queen's Bench decision in *Duke v Puts*, 2001 SKQB 130, 204 Sask R 130 (\$100,000 general damages and \$150,000 aggravated damages).

[142] He suggested that the Court pay particular attention to the factual background in this case and consider that Dr. Graham's reputation was already previously damaged at the time he brought his claim in the present case. He denied that there was any malice on behalf of the defendants or any of them.

[143] *Brown on Defamation*, vol 6 at 25-33 to 23-36, describes general compensatory damages as follows:

The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused.

In assessing the amount, consideration may be given to the damage which may yet accrue to the plaintiff as a natural consequence of the publication since in any action for defamation damages must be assessed once and for all.

... There must be some rational and appropriate relationship between the harm suffered by the plaintiff and the amount of damages awarded. Compensatory damages are not awarded to punish a defendant, nor should they be used to enrich the plaintiff at the expense of the offending party.

[144] In *Mann v International Assn. of Machinists and Aerospace Workers*, 2012 BCSC 181 [*Mann*], Masuhara J. discussed the principles governing an award of general damages:

[129] General damages for defamation are presumed. The plaintiff does not need to prove injury in order to recover an award for damages. However, damages must be based upon a firm factual basis and in a sensible manner: *Brown on Defamation*, vol. 6, ch. 25 at 2, 12; *Hill* at para. 164; *Halls v. Mitchell*, 1926 CanLII 357 (ON CA), [1927] 1 D.L.R. 163 (Ont. C.A.), per Riddell J.A. at 175, citing *Ratcliffe v. Evans*, [1892] 2 Q.B. 524 at 528 (C.A.); *Smith* (S.C.) at para. 91.

[130] General damages for defamation are at large, meaning that the court is entitled to make a subjective assessment without requiring proof of specific financial loss.

[131] There is no cap placed on damages for defamation: *Hill* at para. 168:

[132] Each case is unique. Accordingly, there is no formula for determining general compensatory damages. However, in *Hill* at para. 182 the following factors, were identified in determining an award of general damages:

- (a) the plaintiff's conduct, position and standing;
- (b) the nature of the defamation;
- (c) the mode and extent of publication;
- (d) the absence or refusal of any retraction or apology; and
- (e) the whole of the defendant's conduct from the time of publication to the end of trial.

[145] In *Leenen* the Court provided the following non-exhaustive list of factors to take into account in the assessment of general damages:

[205] ...

- (a) the seriousness of the defamatory statement;
- (b) the identity of the accuser;
- (c) the breadth of the distribution of the publication of the libel;
- (d) republication of the libel;
- (e) the failure to give the audience both sides of the picture and not presenting a balanced review;
- (f) the desire to increase one's professional reputation or to increase ratings of a particular program;
- (g) the conduct of the defendant and defendant's counsel through to the end of trial;
- (h) the absence or refusal of any retraction or apology;
- (i) the failure to establish a plea of justification.

[146] In *Hill* Cory J. described aggravated damages, what is required before they can be awarded and some of the factors a court can consider in assessing them:

188 Aggravated damages may be awarded in circumstances where the defendants' conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous statement. The nature of these damages was aptly described by Robins J.A. in *Walker v. CFTO Ltd.*, *supra*, [(1987), 59 OR (2d) 104] in these words at p. 111:

Where the defendant is guilty of insulting, high-handed, spiteful, malicious or oppressive conduct which increases the mental distress -- the humiliation, indignation, anxiety, grief, fear and the like -- suffered by the plaintiff as a result of being defamed, the plaintiff may be entitled to what has come to be known as "aggravated damages".

189 These damages take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct. Like general or special damages, they are compensatory in nature. Their assessment requires consideration by the jury of the entire conduct of the defendant prior to the publication of the libel and continuing through to the conclusion of the trial. They represent the expression of natural indignation of right-thinking people arising from the malicious conduct of the defendant.

190 If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff. See, for example, *Walker v. CFTO Ltd.*, *supra*, at p. 111; *Vogel*, *supra*, at p. 178 [[1982] 3 WWR 08]; *Kerr v. Conlogue* (1992), 65 B.C.L.R. (2d) 70 (S.C.), at p. 93; and *Cassell & Co. v. Broome*, *supra*, at pp. 825-26 [[1972] 1 All ER 801]. The malice may be established by intrinsic evidence derived from the libellous statement itself and the circumstances of its publication, or by extrinsic evidence pertaining to the surrounding circumstances which demonstrate that the defendant was motivated by an unjustifiable intention to injure the plaintiff. See *Taylor v. Despard*, *supra*, at p. 975 [[1956] OR 963].

191 There are a number of factors that a jury may properly take into account in assessing aggravated damages. For example, was there a withdrawal of the libellous statement made by the defendants and an apology tendered? If there was, this may go far to establishing that there was no malicious conduct on the part of the defendant warranting an award of aggravated damages. The jury may also consider whether there was a repetition of the libel, conduct that was calculated to deter the plaintiff from proceeding with the libel action, a prolonged and hostile cross-examination of the plaintiff or a plea of justification which the defendant knew was bound to fail. The general manner in which the defendant presented its case is also relevant. Further, it is appropriate for a jury to consider the conduct of the defendant at the time of the publication of the libel. For example, was it clearly aimed at obtaining the widest possible publicity in circumstances that were the most adverse possible to the plaintiff?

[147] As to what constitutes malice, it is more expansive than the everyday meaning of a desire to harm another. It includes spite or ill-will and relates to any indirect motive which conflicts with the sense of duty created by the occasion. Courts may infer a person's motive for publishing defamatory statements but only from what

the person said, did or knew. A defendant is actuated by actual or express malice if he or she publishes the words:

- (i) Knowing them to be false; or
- (ii) With reckless indifference whether they are true or false; or
- (iii) For the dominant purpose of injuring the plaintiff because of spite or animosity; or
- (iv) For some other dominant purpose which is improper or indirect.

A Court may consider the whole of the defendants' conduct and the context in which it was made, both current and former. See *Palen v Dagenais*, 2012 SKQB 383 at para 32, 406 Sask R 107; *Mann* at paras 96 to 98.

[148] In *Botiuk*, the Supreme Court of Canada said that the following comment from Lord Diplock in *Horrocks v Lowe*, [1975] AC 135 (HL) is generally representative of the Canadian position on recklessness:

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... what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, "honest belief". If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true... But despite the imperfection of the mental process by which the belief is arrived at it may still be "honest", that is, a positive belief that the conclusions they have reached are true. The law demands no more. [Emphasis added.]

[149] Ms. Purdy testified that as a journalist, she was familiar with journalistic best practices and specifically what those practices said about accuracy and fairness. As a diligent journalist, it was her practice to keep notebooks and record pertinent facts including leads, sources and their contact information and she did so in the course of covering the Baert trial.

[150] Ms. Purdy did not recall attending court on November 27, 2007 to listen to the judge's charge to the jury. However, she had 13 pages of notes about the charge so she believed that she was there. In her notes she wrote down that the judge told the jury "not every mistake constitutes negligence", "a bowel perforation sometimes happens with skilled surgeons using proper technique", "BP happens to even the most skilled surgeon" and "BP is inherent risk of surgery itself". Ms. Purdy agreed that these were important points in the judge's charge that a reader should or would want to know, however she acknowledged that she did not put them in any of her articles.

[151] Ms. Purdy testified that after the verdict came down on November 28, she wrote an article entitled "Gynecologist not negligent in tubal ligation lawsuit". She said that this article does not report solely on the jury's verdict in the case but includes allegations that Gloria Cooke and Dana McLellan suffered complications as a result of the surgery Dr. Graham performed upon them. She acknowledged that these were serious allegations being made by these two women and as a result, she would have spoken to another source to verify their information. She said that she spoke to John Jordan, Ms. Cooke's lawyer, but did not speak to Ms. Cooke and did not recall speaking to anyone else. She did not ask for or see Ms. Cooke's medical records and she did not call any of the doctors that treated Ms. Cooke. She did not speak to a medical professional about Ms. Cooke's allegations.

[152] Ms. Purdy said that in her notes from her discussions with Mr. Jordan, she recorded "pressure from maternity ward because baby in distress". She reluctantly admitted that this was some significant context that she did not mention in her article. She also admitted that she did not try contacting Dr. Graham's lawyer, she cannot say if she tried contacting Dr. Graham or left a message for him but agreed that there was nothing in the article about her trying to contact him.

[153] As well, Ms. Purdy said that all of her information about Dana McLellan came from previous newspaper articles. She did not recall trying to contact Ms. McLellan or the writer of the previous article. She did not believe that she tried to contact any of Ms. McLellan's medical doctors or obtain her medical records. She could not say that she tried to contact Dr. Graham to speak to him about Ms. McLellan's case.

[154] Ms. Purdy agreed that as an obstetrician and gynecologist, Dr. Graham would have performed many of the types of surgeries he performed on Ms. Cooke and Ms. McLellan. She acknowledged that she did not try to determine his rate of complication or try to compare his rate of complication to that of the average obstetrician/gynecologist. She indicated that that would have been helpful information to know.

[155] In one of the paragraphs in the article she stated that the British Columbia College of Physicians and Surgeons granted a licence to Dr. Graham "despite" Baert's injuries in Saskatchewan. She said that she chose to use the word "despite" because she felt that the College would have had to have considered the Baert case before giving Dr. Graham a licence. She admitted that she had not spoken to the College about this nor did she have any information that Dr. Graham had done anything wrong.

[156] Ms. Purdy did speak to Susan Prins of the College and was advised that the community Dr. Graham was working in did not have appropriate back-up in case of an emergency situation and that "no disciplinary measure is necessary". She did not report this in her article but instead chose to simply state that Dr. Graham's licence was not revoked. She was not sure why she chose those words.

[157] Ms. Purdy acknowledged that she spoke to someone at the Northern Health Authority and was advised that Dr. Graham was “never disciplined so no release of report and no penalty”. Despite knowing this information, she did not include this in her article.

[158] Ms. Purdy testified that the first November 29 article was just a reprint of the website article she had written on November 28. She did not recall whose decision it was to write the second article on November 29 entitled “Routine surgery became health nightmare”. She agreed that she did not refer to the verdict in the trial in this story and that a person reading this article would have no reason to think that Dr. Graham got acquitted in a negligence action.

[159] Ms. Purdy testified that the November 30 article was about the Baert family deciding to appeal the verdict and Mark Baert’s response to the verdict. She acknowledged that there was nothing in the article about Dr. Graham’s reaction to the verdict and admitted that she could not recall asking Dr. Graham for a comment, if he was unavailable or if he had no comment.

[160] Ms. Purdy testified that she wrote the December 1, 2007 article because a number of Dr. Graham’s previous patients were saying that they had suffered complications as a result of Dr. Graham performing surgery on them. In light of the Baert case she thought that this was important information to share with the public.

[161] According to Ms. Purdy, this article was about mistakes that Dr. Graham had made in relation to five other people besides Lisa Baert. She said that she spoke to Sharry Michels, Marleen Burgess and Lynn Laursen directly. She did not speak to Ms. Cooke directly. She obtained her information about Ms. Cooke from speaking to Ms. Cooke’s lawyer, John Jordan. She was unable to speak to Jessie

Hurlburt as she had passed away. Her information about Ms. Hurlburt came from a discussion she had with the deceased's son, Les Hurlburt. She invited all of these people to send her any documents supporting what they had told her. The only person that sent her anything was Les Hurlburt. He forwarded her a number of documents prior to December 1.

[162] Ms. Purdy said that she spoke to one other woman whose story she did not include in this article. She said that this person seemed to be talking about rumours. She could not trust what this woman was saying and she did not think it appropriate to report on that.

[163] Ms. Purdy acknowledged that prior to writing this article she never asked Sharry Michels for her medical or physiotherapy records, she did not recall speaking to any of her doctors, she did not try to contact her physiotherapist and speak to them about Ms. Michels' case and she did not know what a femoral artery was.

[164] Ms. Purdy said that she received a number of documents from Les Hurlburt about his mother Jessie, including medical records. She did not ask Mr. Hurlburt for any other medical information. She admitted that there were at least five other doctors referenced in these medical records but she took no steps to speak to any of them nor did she speak to any of Ms. Hurlburt's doctors. According to her, getting consent to speak to other doctors would have been time consuming. She said that she did not speak to a medical doctor about interpreting the documents for her. Instead, she relied on the documents and what Les Hurlburt told her.

[165] In the material she received from Mr. Hurlburt was correspondence between him and the Saskatchewan College of Physicians and Surgeons. She was aware that Mr. Hurlburt had filed a complaint with the College regarding

Dr. Graham's treatment of his mother but she did not read the complaint he sent to the College even though it was one of the documents he sent her. Another of the documents was a letter dated October 15, 1997 from Dr. Graham to the College responding to the Hurlburt complaint. She read this letter and in the letter, Dr. Graham referenced that Ms. Hurlburt had had bowel cancer surgery, was treated with chemotherapy and there were post-operative problems with stitches. When asked why she did not report this, she said that it had occurred in 1977 and she did not think it was relevant. However she admitted that she never spoke to a medical professional to find out if it was relevant or not. Ms. Purdy also acknowledged that elsewhere in the letter was an indication that the surgery that Dr. Graham had performed on Ms. Hurlburt was not a regular hysterectomy. Despite knowing this, she did not report this in her article either.

[166] Ms. Purdy also agreed that she read the College's response to Mr. Hurlburt after they had completed their investigation. After reading the response, she was aware that the investigation had found that Dr. Graham had done nothing wrong, they advised that suturing a bowel may inadvertently occur and it may be difficult to diagnose. She did not specifically report this in the article and despite knowing that Dr. Graham was not at fault, she still felt that it was newsworthy to include Ms. Hurlburt's case in the article.

[167] Ms. Purdy said that in terms of the Marleen Burgess information, she just relied on what Ms. Burgess had told her. She said that she only had a general understanding of what a hysterectomy was and did not believe that "complete hysterectomy" was a medical term. However, she did not speak to a medical professional or Ms. Burgess's doctors to find out what that term meant. Moreover she admitted that she made no effort to contact the doctor who told Ms. Burgess that her

insides were “a mess” to confirm whether or not that was indeed the case. In her view, she did not have the time to do it and she felt there would have been privacy issues.

[168] Ms. Purdy also admitted that she did nothing to confirm the information she received from Lynn Laursen. In their discussions, Ms. Laursen had mentioned a Dr. Gupta. Ms. Purdy confirmed that she did not try to contact this doctor even though she admitted that the doctor may have some important information for her story.

[169] Ms. Purdy did not recall if she made any attempt to contact Dr. Graham regarding any of these five people but she hoped that she would have. She did not however receive anything from Dr. Graham regarding any of these cases. She did not recall if there was a deadline for the story and did not know if she had more time to investigate it.

[170] Ms. Purdy denied writing the December 1 article about these other patients because she felt Ms. Baert did not get justice. According to Ms. Purdy, the jury’s verdict in the Baert case was not surprising to her. She thought it was fair given the evidence the jury heard and the questions they had to answer. She said that she agreed with the jury’s finding that Dr. Graham was not negligent. She had no basis to challenge their finding. She felt that she was doing her job and was providing fair and balanced reporting during the trial. She was not out to ruin Dr. Graham despite what he or his children thought. Ms. Purdy confirmed that she has never issued a retraction or an apology to Dr. Graham.

[171] Both parties called expert witnesses in this case. Dr. Graham called John Miller. Mr. Miller was a senior newsroom editor at the Toronto Star Newspaper for 18 years before moving on to be the chair of the School of Journalism at Ryerson University from 1986 to 1996. Thereafter until 2009, he was a professor at the School

of Journalism and now holds the title of Professor Emeritus. He was qualified with the consent of the defendants' counsel as an expert in journalism.

[172] Mr. Miller testified that journalists are expected to follow commonly accepted journalistic legal and ethical standards developed by the Canadian Association of Journalists. These standards stress, among other things, accuracy and verification. A journalist is to make every effort to verify the identities and backgrounds of their sources, seek documentation to support the reliability of those sources and their stories and be careful to distinguish between assertions and fact. The onus is on the journalist to verify all information even when it emerges on a deadline. Secondly, fairness. A journalist is to respect the rights of people involved in the news. Before a journalist publishes criticisms or accusations they must give people, companies or organizations that are being criticized or accused the opportunity to respond. They must make a genuine and reasonable effort to contact them and if they decline a comment, they must say so.

[173] Mr. Miller reviewed the articles written by Ms. Purdy on November 24, 28, 29 (two articles), 30, December 1, 2007 and January 3, 2008. The November 28, 2007 article entitled "Gynecologist Not Negligent in Tubal Ligation Lawsuit" and the November 29, 2007 article entitled "Gynecologist Not Negligent; Punctured Bowel Led to Brain Damage" were identical in content in his view and both fell short of the journalistic standard of care. According to Mr. Miller, the job of these stories was to report the jury's verdict in a complicated legal case that the newspaper had been covering for the last two months. These stories should have summarized the key testimony presented at the trial and if possible, highlight what evidence may have caused the jury to find Dr. Graham not negligent. Instead, a large portion of these stories talks about other cases involving Dr. Graham.

[174] These articles did not meet the journalistic standard of care for two reasons: firstly they were not a fair, balanced reporting of the verdict in the Baert trial. The information about Dr. Graham's defence was sparse, there was no reaction to the verdict from either Mr. Baert or Dr. Graham, there was no detail on what questions a jury was to answer and the reader was left wondering why Dr. Graham was found not negligent. Secondly, the investigative reporting of Dr. Graham's other patients should have been a stand-alone article written after the reporter had the opportunity to do a more thorough job of investigating the allegations.

[175] Mr. Miller was also of the view that Ms. Purdy's editors had a responsibility to make sure that the verdict in the trial was reported fully, fairly and accurately and that her information about Dr. Graham's other patients was verified. Unfortunately, he felt that they allowed inadmissible material to get in these articles and they never ensured that Ms. Purdy's information about Ms. Cooke or Ms. McLellan was verified with anyone. Instead, this was single-sourced and second-hand information from a lawyer and a newspaper article and there was little differentiation between what was verified as fact and what the sources merely alleged.

[176] It was Mr. Miller's opinion that the December 1, 2007 article entitled "Former Patient Wanted Chance to Confront Doctor" repeated some of the unverified information that appeared in the November 28 and 29 stories and added more cases. Again however, there was no attempt to verify the allegations these people were making with a doctor or to seek Dr. Graham's side of the story.

[177] He opined that this story did not need to run right after the Baert trial. There was time to wait until the information from these people could be verified and documentation received and analyzed, if necessary, by medical experts. There was

certainly time to wait until Dr. Graham could be interviewed to get his side of the story.

[178] Mr. Miller also reviewed the material that Les Hurlburt had sent to Ms. Purdy. He noted that this material contained a detailed explanation written by Dr. Graham of the care that he gave to Jessie Hurlburt and a statement from the Saskatchewan College of Physicians and Surgeons about why they found that he had done nothing wrong. Ms. Purdy chose to use very little of this information in the December 1 article and by choosing to do so, Mr. Miller felt her story became very one sided.

[179] Mr. Miller felt that the reporter did a slipshod investigation, the newspaper rushed this to print and by doing so vitiated any claim of responsible reporting. If the paper was going to publish this article they should have spoken to all the people and their doctors, followed up and documented any complaints made to the respective Colleges of Physicians and Surgeons, had medical professionals corroborate or explain the complaints and most importantly, talked to Dr. Graham to get his explanation of these complaints. Nothing like that occurred and as such, a reasonably intelligent reader looking at this December 1 story might ask if the newspaper was implying that the jury in the Baert trial was wrong.

[180] Mr. Miller was adamant that where there are accusations or implied criticisms of any person or institution, there must always be a rigorous attempt to obtain a response before publication and the response should be contained in the original story. He noted that not only was there no attempt to get Dr. Graham's side of the story in the November 28, 29 and December 1 articles aforementioned but there was also no attempt to do so in the second November 29 article and the November 30 article.

[181] In Mr. Miller's opinion, the November 28, 29 and December 1 articles written by Ms. Purdy fell short of journalism's recognized professional standards of care and her editors did not exercise ongoing oversight to ensure that her information was verified and her reports were handled responsibly.

[182] The defendants' expert, Patricia Bell, was also eminently qualified. Ms. Bell graduated in 1963 with an honour's degree in journalism from the University of Western Ontario. She worked for the Globe and Mail travelling Asia writing stories about social and medical issues and later as a freelance reporter. In 1983, she joined the Ottawa Citizen newspaper, writing education pieces and later moved to their editorial board. In 1999 she moved to Regina and became an assistant professor at the University of Regina, School of Journalism. Later she became the head of the School of Journalism and continues to teach there today. With the consent of Dr. Graham's counsel, Ms. Bell was qualified as an expert in the area of journalism.

[183] Ms. Bell testified that a journalist's professional responsibility is to tell stories that matter. In that regard, they should try to get as complete a story as possible, relying on more than one source so the story does not rely on a single perspective. Stories need to be verified, balanced and as complete as possible, presented with sufficient facts, details and explanations to allow readers to draw their own conclusions. Where there are accusations or implied criticisms of any person or institution there must always be a rigorous attempt to obtain a response before publication and the response should be contained in the original story.

[184] Ms. Bell was familiar with the Canadian Association of Journalists. The Association has a very comprehensive code of ethics that she subscribed to and believed in. She acknowledged that accuracy was the moral imperative of journalists and news organizations and should not be compromised even by deadlines. She said

that it was the journalist's responsibility to seek documentation, to support the reliability of sources and to be careful to distinguish between sources and fact. The onus was on the journalist to verify all information despite deadlines.

[185] She also agreed that the code of ethics spoke of fairness. She explained that journalists must give people, organizations or companies that are publicly accused or criticized an opportunity to respond before publishing those accusations or criticisms. Journalists must make a genuine and reasonable effort to contact them and if they decline to comment, they must say so.

[186] Ms. Bell reviewed Ms. Purdy's articles in the Baert case dated November 24, 28, 29 (two articles), 30, December 1, 2007 and January 3, 2008 and Ms. Purdy's notebooks. It was Ms. Bell's opinion that the November 28, 2007 article took into consideration the seriousness of the allegation, the public importance of the matter, the urgency of the matter and the status and reliability of the source. However, she felt that the main emphasis of this story should have been that the verdict came down and the jury found Dr. Graham not negligent. She said the article did not give sufficient coverage to the jury's decision that Dr. Graham was not negligent in performing Lisa Baert's tubal ligation. There was no mention in the story of the particular questions the judge asked the jury to consider and on which they based their decision. There was also no mention about either party's reaction to the jury's decision. This was imperative in her view. There was no indication if Ms. Purdy sought these reactions at all or was simply unable to get a response. In her opinion, this article was not complete and readers were left without enough information to consider whether they thought the jury got it right.

[187] Instead, she felt that Ms. Purdy took the first opportunity after the trial to tell people about the other complaints about Dr. Graham that she became aware of.

Ms. Bell found it disturbing that the verdict and these other complaints were not two separate stories. Even then, there was no indication that Ms. Purdy tried to get the other side of the complaints in the article. Ms. Bell felt that she should have been persistent in trying to get Dr. Graham's version of these complaints.

[188] Ms. Bell said that the November 29 article entitled "Gynecologist Not Negligent: Punctured Bowel Led to Brain Damage" was a fuller reporting of the November 28, 2007 website article and not simply a reprinting of it. By way of example, she said that this story included information that Mark Baert did not speak to reporters after the jury's verdict and that Dr. Graham was not present in the courtroom and his lawyer said he was busy with personal matters. For these reasons she felt that this story was more useful to readers than the November 28 story.

[189] With all due respect to Ms. Bell, I have carefully reviewed the copies of the November 28 website article, the November 29 website printout of the article and the November 29 newspaper article entered as exhibits in the trial and they are all identical in content. There is nothing different in any of these three documents with the exception of the byline in the November 28 article. Otherwise, the text of these three documents is the same. That being said, I cannot give any weight to her conclusion that the November 29 article is better written and more useful to readers than the November 28 article.

[190] Putting aside this problem with her testimony, she does acknowledge that this November 29 article is still missing detail about the judge's charge to the jury that would allow readers to understand exactly what they were being asked to consider in deciding whether Dr. Graham was negligent or not. She also admits that there is nothing indicating whether or not Dr. Graham's comments about the decision or about the further allegations being made against him were sought.

[191] Ms. Bell testified that the December 1, 2007 story was an attempt by the newspaper to bring information to the public that they needed to know. During the Baert case, Ms. Purdy found out about other complaints involving Dr. Graham and she determined that there was another story to be written. In her report, Ms. Bell said that it appeared that the publisher was diligent in trying to verify these allegations having regard to the seriousness of the allegations, the public importance of the matter, the urgency of the matter and the status and reliability of the sources. However, Ms. Bell then opined that this story did not have to come out this quickly. News is a perishable commodity so if a story needs to be investigated and checked, you do it as quickly as possible. But here, the information about these stories was not “perishable news”. The perishable element was only how they relate to the Baert case. As a result, Ms. Bell said that Ms. Purdy should have done more work and provided a more comprehensive story. What is not in this article is an explanation from Dr. Graham about what happened in these other cases. A diligent reporter would report on what occurred in court, would seek out professionals to explain things they did not understand, including legal help to assist them to understand legal issues. If a reporter did not accurately report on a factual or legal issue and left the reader with the wrong impression, this would not meet the standards of journalism.

[192] Although her report was to the contrary, Ms. Bell agreed in cross-examination that the inclusion of these other complaints in this article left the reader thinking that the jury in the Baert case got the decision wrong. The article tells readers that the jury was not allowed to hear from these other patients but what it fails to do, according to Ms. Bell, and what Ms. Purdy had a duty to tell the reader, was that these other people were only being called to talk about “informed consent” and not about their surgical complications.

[193] Ms. Bell ultimately reached a number of conclusions. Firstly, that there was not a stand-alone news story about the jury's decision in the Baert case with sufficient information that would allow a reader to make their own determination as to whether the jury reached the proper decision.

[194] Secondly, there was no response from Dr. Graham in any of the articles dated November 28, 29, 30 and December 1, 2007. The reader was not told whether this was because no attempts were made to obtain his response or whether requests for a response were denied. As such, the requirement of responsible communication was not met in any of these articles.

[195] Thirdly, while she felt there were some gaps in the overall coverage of the court case and the jury's decision, it did not appear to her that they were planned in order to subvert objectivity and truth in reporting. The reality of today's newspapers is that getting stories up on the paper's website has become the priority before considering how they would appear in the following day's newspaper. The size of newsrooms is eroding and the opportunities were rare for editors to stop and consider the big picture of how a court case might be covered and delivered in a substantial and balanced way. Given the strained economies of today's newspapers, she felt that the overall coverage of the Baert trial was sufficient, objective and balanced and reflected attention paid by Ms. Purdy to the seriousness, public importance and urgency of the issues as well as the status and reliability of the sources.

[196] I turn now to the issue of general damages. Dr. Graham had been a medical doctor specializing in obstetrics and gynecology. In 2003 he had a serious heart attack that required quintuple bypass surgery. He was also suffering from some

depression. As a result of these issues, sometime in the latter part of 2003 he retired from the practice of medicine and settled in St. Albert, Alberta.

[197] In 2007, his oldest son committed suicide. Shortly thereafter his wife died of cancer. In September 2007, the Lisa Baert claim against Dr. Graham went to trial. Understandably, at the time of trial he was grieving and depressed. On November 28, 2007 a jury found Dr. Graham not negligent for the devastating injuries suffered by Ms. Baert.

[198] Ms. Purdy, the Star Phoenix reporter who had been covering the trial, wrote a series of five articles between November 28, 2007 and December 1, 2007 containing defamatory comments about Dr. Graham. These articles were published within a week of the verdict: November 28, 29 (two articles), 30 and December 1, 2007. Defendants' counsel admitted that these five articles contained defamatory comments about Dr. Graham, although not to the extent that I eventually determined. All of these five articles, save for the November 28 article, appeared in the Star Phoenix newspaper and on the Star Phoenix websites. The November 28 article only appeared on the Star Phoenix websites.

[199] Generally speaking, the defamatory meaning of the words complained of in these articles were that Dr. Graham had negligently performed surgery on Lisa Baert, Gloria Cooke, Dana McLellan, Sharry Michels, Jessie Hurlburt, Marleen Burgess and Lynn Laursen and had nearly caused some of them death and all of them some specific injury. In some of the articles, the defamatory meaning of the words complained of were that Dr. Graham had failed to advise Ms. Baert or the attendant nurses that he had punctured Ms. Baert's bowel, that he did not properly advise Ms. Baert of the risks of tubal ligation surgery thereby not getting her informed consent, that the jury's verdict exonerating him of negligence for the Lisa Baert

injuries was wrong or perverse, that he misrepresented to Marleen Burgess that he had performed a complete hysterectomy on her and that he was habitually negligent in his surgical practice.

[200] Defamatory comments regarding Dr. Graham's negligent surgical treatment of Ms. Baert appeared in all five articles written by Ms. Purdy. Defamatory comments regarding his surgical treatment of Gloria Cooke appeared in four of the articles, and of his surgical treatment of the rest of the named individuals, in one of the articles. The defamatory meaning that Dr. Graham was habitually negligent in his surgical practice and that the jury's verdict exonerating him was wrong was repeated in two articles. No retraction or apology from the Star Phoenix has been published or forthcoming to date.

[201] There was no direct evidence before me as to how many households get the Star Phoenix newspaper, the extent of their readership base, how many people visit their websites to read the news or how many people viewed the impugned articles on the websites or downloaded them. I was however advised that all five of these articles remain on the Star Phoenix websites and are accessible to whoever wants to view them.

[202] From the outset of the Baerts' claim, Dr. Graham denied liability. The jury's verdict in the case was vindication for him but the euphoria of that vindication was short lived. While having a celebratory supper with his children the night the verdict came down, they came across the November 28 article on the Star Phoenix website. When Dr. Graham read the article, he was shocked, appalled and depressed. The byline referred to the Baert case but the article talked mainly about the complaints Gloria Cooke had made about him. He felt that the article contained a number of factual inaccuracies, that it implied that his medical licence should have

been revoked and made it appear that he was lucky to have been exonerated by the jury in the Baert case.

[203] Every day that a new article was published, Dr. Graham read it and continued to be shocked, appalled, dismayed and depressed by them. He was particularly upset after reading the December 1 article as he felt it was full of untruths. What was particularly troubling to him was that at no point in time, either before or after any of these articles were published, did anyone from the Star Phoenix ever try to contact him to get his comment on the verdict or the allegations these other people were making about him. He also found it upsetting that the articles did not report that he had been cleared of any wrongdoing as regards a number of these patients. A number of these people had made complaints to either the Saskatchewan or British Columbia Colleges of Physicians and Surgeons and in every instance, it was determined that he was not negligent. However, this and the fact that he had been found not liable in the Baert case was either not reported in the articles or very little was ever said about it.

[204] Defendants' counsel made a point of arguing that Dr. Graham had a bad reputation at the time the defamatory comments were made about him in 2007. Dr. Graham admitted that in 2002 and 2003 after people in Dawson Creek found out about the Baert case, complaints about his treatment of patients began occurring. He said that his reputation in Dawson Creek at this time was bad because of all the media hype. But he was investigated by different professional bodies and it was never determined that he did anything wrong. Then he had his own health issues and retired. In this context, I do not accept that Dr. Graham had a bad reputation in 2007 when Ms. Purdy wrote her articles defaming him.

[205] Dr. Graham's children noticed a change in their father over time. Two of his sons testified that the articles bothered him for days and weeks at a time, that he was not himself and he became preoccupied with the articles. Dr. Graham said that he was depressed, not eating or sleeping properly and was having problems concentrating. Over time, these problems lessened but he said that he still has problems sleeping and concentrating today.

[206] Both parties called expert witnesses in this case. Both experts were eminently qualified journalists in their own right. Both Mr. Miller and Ms. Bell agreed on a number of points including that some of the articles written by Ms. Purdy fell short of meeting journalism's recognized professional standards of care. However where the experts differ, I prefer Mr. Miller's testimony over that of Ms. Bell. There was an instance where Ms. Bell's opinion was not based on the evidence before me. She described reading an article written by Ms. Purdy on November 29 that she said was almost identical to the article Ms. Purdy wrote on November 28. She indicated that this November 29 article contained more fulsome facts that affected her view on how well the article was written. However, there was no difference in content between the two articles. I have no idea what Ms. Bell reviewed or what she was referring to.

[207] In her written report filed as an exhibit in the proceedings, Ms. Bell goes through the articles in question. Despite acknowledging that there was no indication that Ms. Purdy made any attempt to contact Dr. Graham and get his side of the story in any of the articles in question, she still concluded that Ms. Purdy's overall coverage of the case was sufficient, objective and balanced. I cannot accept this. For reasons which I will discuss more fully under the heading of aggravated damages, I am unable to accept that the articles written by Ms. Purdy between November 28, 2007 and January 3, 2008 were sufficient, objective and balanced.

[208] As I consider what is an appropriate award for general damages in this case, I am also surprised at the lack of editorial oversight of Ms. Purdy's articles. Ms. Purdy's immediate editor, the managing editor, the editor-in-chief and the general manager and publisher of the newspaper either disavowed having any role in overseeing Ms. Purdy or had no recollection of discussing these articles with Ms. Purdy or between themselves, reviewing these articles and offering any criticism, direction or instruction about them or authorizing her to pursue the other complaints made about Dr. Graham. This, despite evidence that the editors would get together daily to talk about stories that were being written by their reporters.

[209] Taking all these factors into account I conclude that an award of \$50,000 for general damages would be appropriate.

[210] There is no question in this case that the series of articles written by Ms. Purdy increased Dr. Graham's mental distress. He had just been vindicated in a lengthy trial and that was taken away from him almost immediately. The articles made him mad, dismayed, indignant and depressed. He felt that the reporter was suggesting that the jury was wrong and he was a negligent obstetrician/gynecologist. If aggravated damages are to be awarded in this instance, I must be satisfied that the defendants were motivated by actual or express malice.

[211] Ms. Purdy testified that she agreed with the jury's finding that Dr. Graham was not negligent in his treatment of Lisa Baert and that the jury's verdict was fair. I do not accept her testimony in this regard. All of the articles complained of by Dr. Graham were written the day the verdict came down or thereafter. The first two articles he complains of are identical. One was written by Ms. Purdy on November 28, 2007, the day of the jury's verdict and the other article was written the next day. Both Mr. Miller and Ms. Bell agreed that the purpose of these articles

should have been to report the jury's verdict that Dr. Graham was not negligent in performing Lisa Baert's tubal ligation. Such a story should have summarized the key testimony presented at the trial, what particular questions the judge asked the jury to consider and what evidence or factors may have caused the jury to decide as they did. If Ms. Purdy was satisfied that the jury had reached the correct decision, I would have expected that she would have focussed more on the verdict in the trial.

[212] These stories did none of that. What these stories did was introduce details about two other cases involving Dr. Graham. The first four paragraphs of the story talk about Gloria Cooke. As Mr. Miller opined, the reporter and/or her editors felt this information was more important than the verdict. So instead of a straightforward, contemporaneous and even-handed account of the jury's verdict, less than half of these articles had to do with information presented at the trial.

[213] The stories involving Gloria Cooke and Dana McLellan were legitimate stories but again, both experts agree that these stories should have been undertaken separate from a story about the jury's verdict. Moreover, Ms. Purdy included this information about Ms. Cooke and Ms. McLellan in both these articles without having ever spoken to either of them directly. She obtained her information from speaking to Ms. Cooke's lawyer and reading a dated newspaper article about Ms. McLellan. She did nothing to verify this information, she made no attempt to speak to Ms. Cooke or Ms. McLellan's medical doctors or get their medical records. Most troublesome was that Ms. Purdy made no attempt to speak to Dr. Graham to get his comment on the verdict or on the allegations made by Ms. Cooke and Ms. McLellan. By focusing on the Cooke and McLellan cases so soon after the verdict, Ms. Purdy is drawing attention to them. By not properly reporting on the verdict, she leaves the impression that the jury got it wrong in both these articles.

[214] Every one of the five articles after the verdict contains words whose defamatory meaning was that Dr. Graham negligently performed surgery on Lisa Baert thereby causing her certain injuries that included septic shock, amputation, cardiac arrest, severe brain damage, living in a long-term care home and becoming a quadriplegic. If Ms. Purdy honestly believed that the jury had made the right decision, then there would be no reason to keep repeating these words, phrases and paragraphs day after day in such a way that they were defamatory.

[215] The November 30, 2007 article is follow-up reporting. In this article, Ms. Purdy focuses on getting the Baerts' reaction to the jury's decision. But neither Ms. Purdy nor any other Star Phoenix reporter did a follow-up story on Dr. Graham's reaction to the jury's verdict. In Mr. Miller's view, writing this article increased the newspaper's obligation to report on Dr. Graham's reaction otherwise this could be considered an "implied taking of sides".

[216] Moreover, if this was just a follow-up article about the Baerts' reaction to the verdict then I have to wonder why Ms. Purdy felt she had to repeat the Gloria Cooke information in the story. That information had nothing to do with the Baerts' reaction to the verdict. It had everything to do with being critical of Dr. Graham and again suggesting that the jury got it wrong.

[217] The December 1, 2007 article reinforces my conclusion that Ms. Purdy felt that the jury was wrong in their verdict. Both experts again admit that this article did not have to run immediately after the trial and that Ms. Purdy should have taken more time to investigate the allegations made by these five other people properly and to verify their information. She did not do that. She did not speak to any medical professionals to verify the information these people gave her. She did not ask for these people's medical records or for permission to speak to their doctors. She

received some documents from Ms. Hurlburt's son that included a letter from Dr. Graham explaining his treatment of Ms. Hurlburt and a letter from the Saskatchewan College of Physicians and Surgeons advising that Dr. Graham was not negligent in his treatment of Ms. Hurlburt and the reasons why. Despite having this information, Ms. Purdy never included it in the report. Instead, she simply noted that the investigation found "no medical mismanagement" by Dr. Graham.

[218] This particular article contains five people's complaints about Dr. Graham's treatment of them in addition to the information about what happened to Ms. Baert. Yet again, Ms. Purdy made absolutely no effort to elicit a response or comment from Dr. Graham in relation to these complaints. Reading this series of articles culminating in this December 1 article leads to no other conclusion than that the jury was wrong to find Dr. Graham not negligent in his surgical treatment of Ms. Baert.

[219] Ms. Purdy described herself as a diligent journalist. She acknowledged being familiar with the journalistic standards of care and specifically those standards referencing accuracy and fairness. Yet she wrote five articles, four of which contained single source, unverified information about complaints made against Dr. Graham by other people and not once did she ever try to contact Dr. Graham to get his side of the story. This is contrary to the concepts of accuracy and fairness which Ms. Purdy said that she was aware of. The very fact that she failed to give Dr. Graham an opportunity to defend himself against these defamatory allegations is, in and of itself, evidence of malice. In *Leenen* at para. 145, Cunningham J. said:

[145] The failure of the defendant to provide the plaintiff with a fair opportunity to defend himself against defamatory allegations is evidence of malice: *Hodgson v. Canadian Newspaper Co.*, supra. As Holland J. stated in *Munro v. Toronto Sun Publishing Corp.* (1982), 39 O.R. (2d) 100 at p. 118, 21 C.C.L.T. 261 (H.C.J.):

. . . when the story is prepared -- and the paper has the "goods" on the person targeted in the story -- it is basic and necessary that that person be confronted with the story so that his reaction be obtained.

[220] However, I am additionally led to the inescapable conclusion that Ms. Purdy did not believe that the jury had reached the proper verdict in the Baert case. Rather than properly reporting on the jury's verdict, Ms. Purdy deliberately chose to report on other people who had made complaints about the surgical care Dr. Graham provided them. She did so without verifying this information or even seeking Dr. Graham's comment. Given her lack of proper investigation or verification of these complaints, she could not have reasonably believed that these complaints were true. By writing the articles that she did in the time frame that she did and in the fashion that she did, she could only have had one purpose in mind and that was to tell readers that Dr. Graham was negligent in his surgical practice and that the jury's verdict was wrong. I am satisfied that Ms. Purdy published the words complained of by Dr. Graham with reckless indifference as to their truth and as such, malice has been made out.

[221] Where an employee is acting in the course of his or her employment, any malice motivating his or her behaviour will be attributed to his or her employer. See *Sun Life Assurance Co. of Canada v Dalrymple*, [1965] SCR 302. Ms. Purdy was an employee of the Star Phoenix overseen by Rod Nickel, Cameron Hutchinson, Steven Gibb and Dale Brin and as such, her malice is attributed to all of them.

[222] In my view, given these findings, an award of \$50,000 for aggravated damages is appropriate.

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

[223] In *Astley v Verdun*, 2011 ONSC 3651, Chapnik J. said:

[20] It is well-settled law that, in appropriate circumstances, a court may grant an injunction to prevent a defendant from continuing to disseminate defamatory material that affects a plaintiff's reputation: see, for example, *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416, [2004] O.J. No. 2329 (C.A.), at paras. 77-79.

[21] Permanent injunctions have consistently been ordered after findings of defamation where either (1) there is a likelihood that the defendant will continue to publish defamatory statements despite the finding that he is liable to the plaintiff for defamation; or (2) there is a real possibility that the plaintiff will not receive any compensation, given that enforcement against the defendant of any damage award may not be possible: see *Hunter Dickinson Inc. v. Butler*, [2010] B.C.J. No. 1332, 2010 BCSC 939, at paras. 75-79; *Griffin v. Sullivan*, [2008] B.C.J. No. 1333, 2008 BCSC 827, at paras. 119-27; *Newman v. Halstead*, [2006] B.C.J. No. 59, 2006 BCSC 65 at paras. 297-301; *Cragg v. Stephens*, [2010] B.C.J. No. 1641, 2010 BCSC 1177, at paras. 34-35, 40.

[224] In the present case almost 9 ½ years have gone by since the defamatory articles in question were published by the Star Phoenix. Dr. Graham is retired, Ms. Baert has, unfortunately, deceased, none of the individual defendants remain employed with the Star Phoenix and the newspaper has been purchased by Postmedia Network Inc. There is no evidence before me that would lead me to conclude that in light of my decision, the defendants will continue to publish defamatory statements about Dr. Graham. There is also no reason for me to believe that there is a real possibility that Dr. Graham will not be able to collect his damage award from the defendants. Injunctive relief is an exceptional remedy that will not be imposed by the courts lightly. As such, I am not convinced that it is appropriate to grant an injunction in these circumstances and Dr. Graham's request in this regard is dismissed.

CONCLUSION

[225] Postmedia Network Inc. will be added as a defendant in this case. The defendants have jointly and severally defamed Dr. Graham in a series of articles written by Chris Purdy and published in the Star Phoenix newspaper and on its websites between November 28, 2007 and December 1, 2007. Dr. Graham is awarded general damages in the amount of \$50,000 and aggravated damages in the amount of \$50,000 together with pre-judgment interest pursuant to s. 5(1) of *The Pre-judgment Interest Act*, SS 1984-85-86, c P-22.2, and costs taxed in the appropriate column.



D.E. LABACH J.