COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Weaver v. Corcoran,*
2017 BCCA 160

Date: 20170421

Docket: CA42617

Between:

Andrew Weaver

Respondent

(Plaintiff)

And

Terence Corcoran, Peter Foster, Kevin Libin, Gordon Fisher, and National Post Inc. dba The National Post

Appellants

(Defendants)

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated February 5, 2015 (*Weaver v. Corcoran*, 2015 BCSC 165, Vancouver Docket No. S102698).

Counsel for the Appellants:	D.W. Burnett, Q.C.
Counsel for the Respondent:	R.D. McConchie A. McConchie
Place and Date of Hearing:	Vancouver, British Columbia September 7, 2016

Place and Date of Judgment:	Vancouver, British Columbia
	April 21, 2017

Written Reasons by:
The Honourable Madam Justice Dickson

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Mr. Justice Groberman

Summary:

The appellants submit the judge erred in finding them jointly liable in defamation for four articles written by three different authors employed by the same publication over a period of approximately two months. They say she erred in analysing the meaning of the articles in combination, in finding the articles referred to the plaintiff and in finding the defence of fair comment was not available. Held: appeal allowed, new trial ordered. Where separate publications are pleaded as being independently defamatory based on their literal or inferential meaning, the meaning of each should be determined independently, absent referability or other inextricable linkage, and joint liability should not be imposed unless it is pleaded and evidence in support is presented or admissions are made. The judge erred in analysing whether the articles were defamatory in combination and in imposing joint liability. With the exception of one article, there was no evidence of collaboration or referability. A new trial is needed for the necessary analysis to be undertaken and findings of fact to be made.

Reasons for Judgment of the Honourable Madam Justice Dickson:

Introduction

[1] In late 2009 and early 2010, *The National Post* published four articles, each of which referred to Dr. Andrew Weaver. Dr. Weaver is a well-known climate scientist and active participant in public discourse concerning climate change. Dr. Weaver claimed the articles defamed him by implying that he fabricated stories about the fossil fuel industry's involvement in criminal activity and engaged in deceitful, unscientific and incompetent conduct. In response, he sued *The National Post*, its publisher, and the authors of the articles, all of whom denied the alleged defamation and relied on the fair comment defence.

[2] In reasons indexed as 2015 BCSC 165, the trial judge found that Dr. Weaver was defamed by the impugned articles. She rejected the defence of fair comment and awarded $50,000 in general damages against all of the defendants, jointly and severally. She also ordered the appellants (defendants below) to remove the offending articles from the Internet and to publish a complete retraction in a form agreed to by Dr. Weaver.

[3] The appellants contend that the judge made several significant errors. They argue she erred in finding that Dr. Weaver was defamed based on a combined reading of the articles and in finding that some of their words concerned him. They also submit she erred in holding them all jointly and severally liable, confused comment with fact and misidentified the factual foundation of their comments, and erred further in ordering the retraction. Given the state of the record, the appellants seek an order setting aside the judgment below and dismissing Dr. Weaver's action. In the alternative, they seek a new trial.

[4] The central issue on appeal is when and how the meaning of one allegedly defamatory expression may be ascertained by reference to another. The possibilities are limited and, in my view, largely absent in this case. For the reasons that follow, I conclude that, with one exception, the judge erred in ascertaining the alleged defamatory meanings based on a combined reading of the articles, and in imposing joint liability on their authors. In the result, I would allow the appeal and order a new trial.

Background

The Parties

[5] The individual appellants, Terence Corcoran, Peter Foster and Kevin Libin, are journalists who write for *The National Post*, *Financial Post* and *FP Magazine*, all of which were published by the National Post Inc. dba *The National Post*. The impugned articles published by the *National Post* are *Weaver's Web*, *Weaver's Web II, Climate Agency Going Up in Flames*, and *So Much For Pure Science*. Mr. Corcoran wrote *Weaver's Web II* and *Climate Agency Going Up in Flames*, and contributed to *Weaver's Web*, which was written by Mr. Foster. Mr. Libin wrote *So Much For Pure Science*. The appellant, Gordon Fisher, is the publisher of *The National Post*.

[6] The respondent, Dr. Weaver, was a tenured professor in the School of Earth and Ocean Sciences Department at the University of Victoria when the articles were published. His *curriculum vitae* included several degrees and extensive publishing experience. Amongst others, his scholarly pursuits concerned climate dynamics, climate modeling and climate policy. A frequent commentator on climate change issues, from time to time Dr. Weaver publicly expressed concern that the fossil fuel industry was engaged in a propaganda campaign aimed at undermining the science of global warming and swaying public opinion.

[7] Over the course of his career, Dr. Weaver has contributed to the work of the Intergovernmental Panel on Climate Change (the IPCC), a Nobel Prize-winning scientific body which operates under the auspices of the United Nations. The IPCC's mandate is to assess the scientific, technical and socio-economic peer-reviewed literature relevant to the scientific basis of risk of human-induced climate change, as well as its potential impacts and options for mitigation and adaptation. At the behest of the Canadian government, Dr. Weaver was a lead author in IPCC reports for 1995, 2001, 2007 and 2013.

The Context

[8] The impugned articles were published against a backdrop of public debate on the causes and implications of climate change. At the material time, many scientists espoused the view that recent global temperatures demonstrate human-induced warming. Others countered that science has not clearly established this as true. The controversy was intensified by an event known as "Climategate".

[9] In late 2009, a large cache of emails was leaked or stolen from the University of East Anglia's Climate Research Unit (the "CRU"), which was responsible for collecting temperature data. According to some, the emails showed CRU researchers used imperfect data and questionable scientific practices in attempting to bolster their argument that global warming is genuine and caused by human action. According to others, sceptics misrepresented the emails in an effort to undermine an upcoming summit on climate change and discredit scientists who warn of climate change.

[10] While significant, Climategate was just one of several climate change controversies when the articles were published. Another concerned certain conduct and practices of the IPCC. The IPCC was criticised by some for including unduly pessimistic projections in its 2007 report, as was its chair, Dr. Rajendra Pachauri, for engaging in political advocacy. In an article published in *Der Spiegel*, a German news magazine, three prominent scientists called for IPCC reform and Dr. Pachauri's resignation.

[11] The impugned articles were published in this context of ongoing controversy. They were preceded by others in *The National Post* that referenced or were written by Dr. Weaver, some of which included errors later corrected by *The National Post*.

Salient Events Before and Around Publication

[12] In November 2008, there were two break-ins at Dr. Weaver's University of Victoria office. Some months later, there were reports of unsuccessful attempts to hack into computers at the Canadian Centre for Climate Modelling and Analysis, a government office in the same building, and unknown persons being observed in the area.

[13] In December 2009, an international summit on climate change was held in Copenhagen. In the run-up to the summit, many articles, reports and commentaries addressing a range of climate change issues, including Climategate, were widely published or broadcast. For example, in November 2009 Dr. Weaver and other IPCC lead authors wrote a report called *The Copenhagen Diagnosis.* In addition, on December 2, 2009, the Canadian Broadcasting Corporation broadcast a story about climate change and Climategate on *The National Newscast*.

[14] *The National Newscast* story touched on the hostility some scientists perceived about their work and views on climate change. In a clip included in the broadcast, Dr. Weaver stated:

Where it gets a little nasty is when you have your office broken into twice in the past year, which is my case, or I have colleagues, for example, whose computers have been - people have tried to hack into them. And, you know, I have other colleagues who, you know, people posing as network technicians are wandering the halls trying to get access to offices.

[15] On December 4, 2009, *The Globe and Mail* published an article co-authored by Dr. Weaver called *Responding to the Skeptics*. The article critiqued some of the arguments commonly advanced by climate change sceptics. The same day, an article was published in *The National Post* by journalist Megan O'Toole headed *People are trying to find anything; Security breaches*. Ms. O'Toole interviewed Dr. Weaver shortly before she wrote her article.

[16] In the O'Toole interview, Dr. Weaver referred to the 2008 break-ins at his office. He also discussed the recent attempted hackings of other climate researchers' computers and expressed the view that some in the fossil fuel industry engage in a disinformation campaign aimed at undermining the science of climate change. His remarks regarding the fossil fuel industry responded to Ms. O'Toole's questions about who would benefit from propagating disinformation and discrediting climate science. She reported in the article that "[Dr. Weaver] believes the campaign is driven by the fossil-fuel industry, citing 'the war for public opinion'".

Weaver's Web and Weaver's Web II

[17] Mr. Corcoran saw *The National Newscast* broadcast and read the O'Toole article. Long interested in the climate change controversy, he considered it desirable for *The National Post* to provide a comprehensive overview of Climategate. He obtained the broadcast script and a copy of the O'Toole article, both of which he forwarded to Mr. Foster. Shortly thereafter, Mr. Foster wrote *Weaver's Web*, which Mr. Corcoran reviewed and approved, and to which he contributed a passage.

[18] *Weaver's Web* was published on December 8, 2009 on the Internet, and on December 9, 2009 in the comment section of the *Financial Post* print edition. The article is subheaded *Is it unreasonable to suggest his charge of theft against the fossil fuel industry is totally without merit?* In it, Mr. Foster critiques *Responding to the Skeptics*, the recent article co-authored by Dr. Weaver. Amongst other things, he characterises Dr. Weaver as "Canada's warmest spinner-in-chief" and states that Dr. Weaver "charge[d]", "fingered" and "pointed to" the fossil fuel industry for the break-ins of his office.

[19] *Weaver's Web II*, by Mr. Corcoran, was published online the same day, and in the print edition of the *Financial Post* comment section the day after, December 10, 2009. It is subheaded *Climate modeler's break-in caper spreads across Canadian university, exposing Climategate as monster cross-disciplinary big-oil funded attack on psychology labs*. Mr. Corcoran begins by referencing *Weaver's Web* and Dr. Weaver, then announces "we have news: The break-in at Doc Weaver's office, which he linked to the evil fossil fuel industry's attempt to discredit global warming policy, turns out to have been one of numerous breakins at the University of Victoria." Later in the article, he refers again to Dr. Weaver's purported "blaming" of the oil industry for the break-in at his office.

[20] Dr. Weaver was shocked and distressed by *Weaver's Web* and *Weaver's Web II*. He testified that he considered them personal attacks which attributed to him things he did not say. However, he was busy with the end of the academic term and its associated responsibilities. As a result, he decided to try to ignore *Weaver's Web* and *Weaver's Web II*.

Climate Agency Going Up in Flames

[21] In January 2010, Dr. Weaver was contacted by two other journalists who wrote articles that, while not directly at issue in the proceedings, inform the relevant factual context. On January 24 and 25, 2010, Richard Foot, a journalist writing a story on the IPCC for *CanWest*,

interviewed Dr. Weaver for an article. On January 26, 2010, a correspondent for *Nature*, a scientific journal, asked him to comment on the *Der Spiegel* article calling for IPCC reform and Dr. Pachauri's resignation. Dr. Weaver responded to both journalists' questions and provided a copy of the *Der Spiegel* article to Mr. Foot.

[22] On January 26, 2010, *CanWest* published the Foot article; a shortened version appeared in *The National Post* the following day. The Foot article was headed *Canadian Scientist calls for overhaul of UN climate change panel.* In it, Mr. Foot wrote that Dr. Weaver stated the IPCC had become tainted by political advocacy, its chairman should resign and its approach to science should be overhauled. He also quoted Dr. Weaver directly:

"Some might argue we need a change in some of the upper leadership of the IPCC, who are perceived as becoming advocates," he told Canwest News Service. "I think that is a very legitimate question."

[23] Dr. Weaver was shocked again. While he acknowledged saying that Dr. Pachauri should "move on" and that the IPCC had "sometimes cross[ed] the lines into advocacy", he disputed the assertion that he had called for Dr. Pachauri's resignation. He expressed his concerns in an email exchange with Mr. Foot and set the record straight in widely published clarifications.

[24] On January 27, 2010, *The National Post* published the third article at issue, *Climate Agency Going Up in Flames* by Mr. Corcoran. The article appeared on the front page of the print edition of the *National Post* and online. Its subheading is *Exit of Canada's expert a sure sign IPCC in trouble*. It begins with a statement about a "catastrophic heat wave" closing in on the IPCC and asks "How hot is it getting in the scientific kitchen where they've been cooking the books…". Mr. Corcoran answers that is so "hot" that Dr. Weaver "is calling for replacement of IPCC leadership and institutional reform" and "heading for the exits". He goes on to critique Dr. Weaver's report, *The Copenhagen Diagnosis*, and states that he is "getting out while the getting's good", "blaming the IPCC's upper echelon for the looming crisis" and previously told "a cockamamie story about how his offices had also been broken into and that the fossil fuel industry might be responsible for both Climategate and his office break-in".

So Much For Pure Science

[25] On February 2, 2010, *The National Post* published the final article at issue, *So Much For Pure Science* by Mr. Libin. It appeared in the print edition of the *Financial Post Magazine* and online. The subheading is *'Climategate' raised questions about global warming. The ongoing debate about its impact raises questions about the the [sic] vested interests of climate science*. Near the beginning, Mr. Libin states that Dr. Weaver "zeroed in" on the identity of the hackers, whom he "figured" were "agents of Big Oil", when he was confronted with the hacked CRU emails. He also states that Dr. Weaver's "reflex to distract" is understandable because the success of his book and career "depend on the momentum of a global-warming panic". He goes on to discuss issues of bias in science, and concludes "No wonder some would prefer we focused on something else".

[26] After *So Much For Pure Science* was published Dr. Weaver's counsel contacted the appellants, alleging defamation with respect to the articles and requesting retractions and apologies. None were forthcoming. In their absence, he commenced the action on April 20, 2010.

The Pleadings

[27] The words that Dr. Weaver claimed defamed him are set out in an appendix to these reasons. The underlined portions of text are as contained in the statement of claim, which pleads that their literal meaning is "false, malicious and defamatory of and concerning the plaintiff". Several defamatory inferential meanings are also pleaded with respect to each article.

[28] Each of the impugned articles is pleaded as an individual defamatory expression under its own heading. *The National Post*, Mr. Fisher and the author of each article are alleged to have defamed Dr. Weaver by publishing the specific article in question. There is no pleading of conspiracy or other concerted action implicating the author of one article in the defamatory expression of another. Publication of allegedly defamatory reader postings and Internet republication are pleaded in connection with each article separately.

[29] The statement of claim also includes a further and alternative pleading alleging inferential meanings of the articles by way of legal innuendo. The "aggregate defamatory meanings" are alleged to have been "conveyed by the aggregation of data objects in response to inquiries or searches conducted in the electronic environment of the National Post Internet Sites by individual readers concerning the plaintiff, climate change, global warming, the IPCC and related topics". This pleading covers the period February 2, 2010 to April 9, 2010.

[30] Although concerted action by the articles' authors is not pleaded, there is a pleading that *The National Post*, Mr. Fisher and Mr. Corcoran are vicariously liable for their acts and omissions. There are also pleadings concerning republication, malice, damages and injunctive relief.

[31] The appellants' response to the claim is set out in a statement of defence filed on June 11, 2010. Amongst others, the statement of defence includes an admission that Mr. Fisher was the "Publisher" of *The National Post* and that the impugned words are quoted in the statement of claim with substantial accuracy.

[32] Like the statement of claim, the statement of defence deals with the impugned articles individually. The defamatory meanings alleged for each article are all denied. The appellants also plead the defence of fair comment in respect of each article and set out the facts upon which they rely in support of that defence.

[33] For *Weaver's Web*, the factual foundation pleaded is primarily the O'Toole interview and article, together with Dr. Weaver's public statements and writings. For *Climate Agency Going Up in Flames*, the statements Dr. Weaver made about the IPCC, as quoted in the Foot article, are added to the list. For *So Much For Pure Science*, Dr. Weaver's role as a public speaker and

author, together with their career benefits, are also added as part of the factual foundation pleaded in support.

Reasons of the Trial Judge

[34] The judge began her reasons by outlining the impugned words, summarising the parties' positions and identifying the issues for determination. Following a detailed review of events leading up to and surrounding publication, she asked whether Dr. Weaver had proved the elements of defamation, namely, that the words (i) would tend to lower his reputation in the eyes of a reasonable person, (ii) referred to him, and (iii) were published to at least one person other than him. In answering these questions, she considered the classic definition of defamation adopted by the Supreme Court of Canada in *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067: any imputation which may tend to lower the plaintiff in the estimation of right-thinking members of society generally or exposes him to hatred, contempt or ridicule. She also referred to authorities such as *Crookes v. Newton*, 2011 SCC 47, *Lawson v. Baines*, 2012 BCCA 117, and *Mainstream Canada v. Staniford*, 2013 BCCA 341, for the applicable principles, including the alternate means by which defamation can be proved.

[35] As noted, Dr. Weaver claimed the articles were defamatory in both their literal and inferential meanings. Accordingly, the judge decided to focus on the context in which they were published to ascertain their inferential meanings, noting that this included Climategate and the debate in the scientific community about climate change. She stated that the articles overlap and listed their general allegations, including: Dr. Weaver fabricated stories about fossil fuel industry involvement in his office break-ins to divert attention from the IPCC and Climategate; disassociated himself from the IPCC to avoid personal accountability because he knew its reports are unscientific; and engaged in manipulative, incompetent professional conduct: para. 137.

[36] The judge acknowledged the defendants' submission that, even if false, the words complained of did not impugn Dr. Weaver's character or otherwise defame him, but she rejected it. She held the articles, read together, were defamatory because they supported inferences that he is professionally incompetent, deceitful and unethical. In reaching this conclusion, the judge analysed the meanings and effect of the four articles in combination:

[140] While at first blush the articles may appear to be associated with actions such as commenting on various theories associated with climate warming in the media or the associated organizations, the reality is the combination and cumulative effect of these articles is such as to adversely impact on Dr. Weaver's reputation and integrity as a scientist. Imputations of dishonest behaviour on the part of a scientist or professor in that role can constitute defamation.

[37] In analysing the combined meanings of the articles, the judge emphasised the context of the Climategate controversy in which they were published. She found Dr. Weaver's name was consistently raised in that context without differentiation from the impugned scientists, which, she held, painted him with the same brush and led to the overall inference of a lack of integrity. She went on to find the inference in *Weaver's Web* and *Weaver's Web II* is that

Dr. Weaver fabricated a link between the fossil fuel industry and his office break-ins to deflect criticism from Climategate because it impacted his own scientific credibility:

[142] While the initial story that Dr. Weaver linked the fossil fuel industry with break-ins to his office in isolation may not by itself impact on his character, the inference in both *Weaver's Web* [by Mr. Foster] and *Weaver's Web II* [by Mr. Corcoran] is Dr. Weaver fabricated the linkage of the fossil fuel industry to break-ins to further his own interests when those break-ins had occurred throughout the university. Those interests were identified as deflecting criticism from the Climategate controversy as it impacted his own scientific credibility. The allegation he did so impacts on his ethical reputation. It creates the impression he concocted a false story in order to distract from the Climategate scandal in the press.

[38] The judge made similar findings on the inferential meanings of *Climate Agency Going Up in Flames* and *So Much For Pure Science*:

[143] The impression created by *Climate Agency Going Up in Flames* [Mr. Corcoran's second article], the third article at issue, was that Dr. Weaver knew or believed the IPCC reports concerning global warming were unscientific and fraudulent and sought to avoid personal responsibility by disassociating himself from that organization. There is an allegation of "cooking the books" in the scientific kitchen in *Climate Agency Going up in Flames*, painting a picture of deceit, with a clear impact on Dr. Weaver's character.

…

[146] The words in *So Much For Pure Science* [by Mr. Libin] continued the theme that Dr. Weaver was deceitful and had falsely accused the fossil fuel industry of being involved with the leaked or stolen emails from the CRU for the purposes of diverting public attention from the alleged misconduct of the CRU. More importantly, however the article again, by the inferential meaning of the words to an ordinary reader, contained the innuendo Dr. Weaver was not a competent or credible scientist by this action and was compromised by the receipt of financial rewards from the public purse. I agree the title *So Much for Pure Science* was a reference to impure or corrupt science. The first two paragraphs of the article then reference Dr. Weaver and his "reflex to distract" in this context.

[39] Recognising the need not to put the worst possible meaning on the impugned words, the judge asked what an ordinary person would infer from them. She concluded:

[150] In my view, a reasonable person, after a review of the combination of the articles would conclude that Dr. Weaver, in his position as a scientist and professor, is incompetent and/or deceitful. …

[151] Essentially, the synthesis of the allegations is to attribute by inference to Dr. Weaver misconduct concerning research in the area of climate change, such that Dr. Weaver's character is impugned with allegations of having an incompetent, inept, and unethical character. …

…

[154] A reading of the articles as a whole leads me to conclude an ordinary person would find the inferences from the words complained of defamatory. These inferences from the words complained of in the four articles are that Dr. Weaver has been deceitful to the public; attempted to distract the public from his academic failings in his research on climate change; and the public cannot trust what he says. Essentially, the inferences support the conclusion Dr. Weaver is incompetent, inept and unethical.

[40] After finding the combined meanings of the articles defamatory, the judge summarised the inferential meanings of each specific article. In doing so, she held that the defamatory meanings were "understood and intended by the defendants" as such in each case, concluding:

[168] I reiterate my conclusion that an ordinary reader would infer these meanings from an overall consideration of the articles; particularly the first three, which relatively quickly set the stage for the theme of deception and incompetence. The plaintiff's integrity and credibility as a professor and scientist was called into question, thereby damaging his personal and scientific reputation.

[41] The judge also found that the second element was met in that the impugned words referred to Dr. Weaver. Noting that he is named repeatedly in the articles and citing the objective test in *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, she held that Dr. Weaver is directly linked to the science and institutions labeled as deceitful and incompetent. As to the third element, publication, she applied the presumption that where the publisher is a newspaper there is publication, and found it was not rebutted.

[42] The judge rejected the defendants' submission that each article should be treated independently and that the authors of each article were only liable for the one they wrote, citing *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, for the proposition that all persons involved in the commission of a joint tort are jointly and severally liable for the injury. In explaining her view, she noted that Mr. Foster and Mr. Corcoran communicated on *Weaver's Web* and on the theme of alleged distraction and deceit which ran through all four articles. She also noted that all of the personal defendants work for the same publication which published the series of articles and emphasised again their cumulative effect, namely the defamatory theme of a lack of integrity, scientific incompetence and/or deceit. She went on to reject the submission that the claim against Mr. Fisher should be dismissed because there was no evidence of his role in connection with the words complained of. In sum, she concluded that the elements of defamation were all made out.

[43] The judge turned next to the defence of fair comment. Citing the test in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, she noted that comment must be presented as comment, not mixed up with fact, and the fair comment defence is unavailable if the comment's factual foundation is unstated, unknown, or false. She also identified what she saw as the two main areas of factual disagreement for fair comment purposes: the University of Victoria security breaches and the criticism of the IPCC and its leadership. In her view, the first area impacted all four articles; the second, only *Climate Agency Going Up in Flames*.

[44] The judge acknowledged the defendants' reliance on the O'Toole article and other statements made by Dr. Weaver as factual foundation for what they characterised as comment. However, following a detailed summary of the O'Toole interview, she held that the foundation for Dr. Weaver's alleged statements that the fossil fuel industry was responsible for the break-ins was not made out:

[204] While the defendants maintain Dr. Weaver invited people to connect the dots, it is evident the comments about the fossil fuel industry were made in the context of a series of questions about the "war for public opinion" - the propaganda campaign - not as to who broke into Dr. Weaver's office. Dr. Weaver's office was broken into twice within three days in 2008. He did not say the fossil fuel industry might be responsible for that break-in; nor did he implicate them in the other break-in incidents at the University of Victoria.

[45] As to the second area of disagreement, the criticism of the IPCC and its leadership, the judge stated:

[207] With respect to *Climate Agency Going up in Flames*, I find Dr. Weaver did not call for the resignation of Mr. Pachauri, but rather as noted indicated he should "move on". …

***

[217] The comment in *Climate Agency Going up in Flames*, that Dr. Weaver was disassociating himself from IPCC was false. While the defendants rely on the existence of Mr. Foot's article that same day in the same newspaper for their comments, I conclude the "fact of Dr. Weaver's exit; his calling for Mr. Pachauri's resignation and institutional reform" has not been established. The most Dr. Weaver said was that the organization needed procedural reorganization with respect to the composition of the working groups and that Mr. Pachauri should perhaps "move on".

[46] The judge found that Dr. Weaver did not say or do much of what was asserted in the impugned articles: paras. 225–233. She considered the factual foundation for these claims was substantially distorted or false and thus the fair comment defence was unavailable:

[237] This is particularly so due to the constant reference that Dr. Weaver had in effect concocted the story about the fossil fuel industry being behind the break-ins at his University of Victoria office (i.e., Dr. Weaver charges against the fossil industry; pointing to the shadowy culprits - the fossil fuel industry). These references appeared particularly in the first three articles: *Weaver's Web*, *Weaver's Web II* and *Climate Agency Going up in Flames*. This constant reference tainted each of the articles. The references underpinned further claims in the articles that directly impacted on Dr. Weaver's character.

[238] Essentially, the defendants extrapolated a statement from Ms. O'Toole's article and created a theme of deceit that tarnished Dr. Weaver's reputation; impacting on both the integrity and scientific competence of Dr. Weaver. In doing so, they took the risk the fact underpinning the inference was accurate. It was not. …

[47] However, the judge considered the critiques of the climate change debate in the articles non-defamatory because they did not go to Dr. Weaver's character: para. 242. She also characterised Mr. Corcoran's description of *The Copenhagen Diagnosis* as a piece of "agit-prop" (agitation propaganda) as opinion, incapable of proof: para. 243.

[48] Given her view that the factual foundation for the defamatory statements was not proven, the judge rejected the fair comment defence and proceeded no further with the fair comment analysis:

[241] I have concluded fair comment does not protect the defamatory statements about Dr. Weaver. The facts upon which they rely are not true. As such, I do not need to address whether any person could honestly express those opinions on the proven facts.

[49] The judge went on to deal with questions of malice, Internet re-publication and quantum of damages, none of which are appeal issues. She concluded her reasons by ordering the appellants to remove the articles and to publish a complete retraction in *The National Post* print edition, Internet sites and electronic databases in a form agreed to by Dr. Weaver.

Positions of the Parties

The Appellants

[50] The appellants contend that the judge erred in analysing the meanings of the impugned articles based on a combined reading and in imposing joint liability. In their submission, each publication was pleaded as a distinct cause of action and the meaning of each should have been considered individually. While conceding that *Weaver's Web* and *Weaver's Web II* are referable, they say the same is not true of *Climate Agency Going Up in Flames* and *So Much For Pure Science*. On the contrary, the latter articles were published elsewhere, much later, and did not refer to *Weaver's Web*, to *Weaver's Web II* or to one another. Nor, they say, was there proof of common readership, as would be required to establish legal innuendo.

[51] The appellants also concede that there was evidence of joint action by Mr. Foster and Mr. Corcoran with respect to *Weaver's Web*. There was, therefore, a basis upon which they could be held jointly and severally liable for that expression if it was defamatory. In contrast, however, there was no evidence of joint action by any author with any other author on any other article, nor was any pleaded. Further, there was no evidence of the role, if any, Mr. Fisher played in their publication.

[52] In any event, the appellants contend that none of the impugned articles bear a defamatory meaning when considered individually and in proper context. None allege or impute bad character or dishonesty to Dr. Weaver, they say, and some of the impugned words only concern other climate change scientists, not him. Particularly in light of Dr. Weaver's public advocacy, the appellants submit that the articles do not rise to the level of defamation. They also submit the judge erred in finding that *Climate Agency Going Up in Flames* states Dr. Weaver called for Dr. Pachauri's resignation when that statement was actually made in the Foot article.

[53] Moreover, the appellants contend that the judge failed to apply the correct test for the defence of fair comment. In doing so, they say, she failed to recognise that deductions, conclusions and judgments are comments and treated their comments as facts. For example, they submit that references to Dr. Weaver "blaming" or "fingering" the fossil fuel industry in the office break-ins and "heading for the [IPCC] exits" were comments, not factual assertions upon which the defence depended. They also submit that the judge ignored the pleadings regarding the factual foundation for their comments and focused instead on the truth of facts not placed in issue. She erred further, they say, in ordering a retraction without considering relevant authorities, many of which weigh against such an order.

[54] Given the foregoing, the appellants urge this Court to set aside the judgment. They also invite us to dismiss the action based on our own determinations on the meanings of the impugned words and, if necessary, the fair comment defence. In the alternative, they seek a new trial based on proper principles.

The Respondent

[55] Dr. Weaver responds that the judge's factual findings on the inferential meanings of the impugned words are entitled to appellate deference. The same is true, he says, of her findings that those words concerned him, a private citizen. In his submission, the judge's findings on the reasonable implications conveyed by each article are independent, unimpeachable and unaffected by her cumulative findings. In particular, he says, her conclusion that the individual meanings of each article are defamatory is reasonable given her finding that each involved imputations of moral fault and corruption on his part and linked him to science and institutions labelled as deceitful and incompetent.

[56] Dr. Weaver goes on to submit that it was open to the judge to consider the cumulative impact of the articles on common readers. The articles were all published in hard copy form and on the Internet, thus reaching a large body of potential readership. In these circumstances, he says, the judge was entitled to infer that someone must have read all four articles and it was reasonable for her to ascertain their inferential meanings in combination given the plea of aggregate defamatory meanings.

[57] Dr. Weaver submits further that the judge was entitled to impose joint and several liability for all four articles on *The National Post* and Mr. Fisher, both of whom are legally responsible for their publication. However, he accepts that Mr. Foster should not have been held jointly liable for the articles written by Mr. Corcoran and Mr. Libin, and acknowledges that it would have been preferable for her to make separate damages awards.

[58] As to fair comment, Dr. Weaver again emphasises the importance of appellate deference. Whether a subject of complaint is fact or comment and, if comment, fair, is, he says, a question of fact. Further, expressions of opinion must be recognisable as such and be supported by true facts, all of which the judge considered in making her findings. In his submission, those findings were reasonable, grounded in the evidence and should not be disturbed.

[59] Finally, Dr. Weaver submits that the judge's order requiring a retraction was rationally linked to the objective of redressing the harm caused by the appellants' defamatory expression. It was, therefore, an appropriate exercise of judicial discretion. In the overall result, he seeks an order dismissing the appeal.

Issues on Appeal

[60] The issues that emerge for determination are:

a) Did the judge err in finding that the articles defamed Dr. Weaver and, if so, how?

b) Did the judge err in holding Mr. Foster, Mr. Corcoran and Mr. Libin jointly liable for allegedly defamatory articles they did not write?

c) Did the judge err in holding Mr. Fisher jointly liable for publication of the allegedly defamatory articles?

d) Did the judge err in rejecting the defence of fair comment and, if so, how?

e) Did the judge err in ordering a complete retraction?

f) If the judge erred, should this Court decide the action or order a new trial?

[61] Several first principles of defamation law must be considered to resolve this multitude of issues. To the extent necessary to do so, an overview of the applicable principles precedes the discussion of each issue below.

Discussion

[62] The function of defamation law is to protect and vindicate reputation from harm that is unjustified. A good reputation fosters one's sense of self-worth and, as an aspect of personality, is related to the innate worthiness and dignity of the individual, an underlying value of the *Canadian Charter of Rights and Freedoms*. Once tarnished, good repute is hard to regain, with sometimes devastating consequences, particularly in a professional context. However, its protection must be balanced and reconciled with the *Charter* guarantee of freedom of expression, a recognised pillar of modern democracy: *Church of Scientology* at paras. 100–121; *WIC Radio* at paras. 2, 15; *Bou Malhab* at paras. 16–18; *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at paras. 91–92.

Pleadings in Defamation Actions

[63] The function of pleadings is to define and clarify the issues of fact and law for determination. Pleadings give opposing parties fair notice of the case to be met and set the boundaries and context for matters such as pre-trial discovery, presentation of evidence and

argument at trial. The plaintiff defines the issues by stating, succinctly, the material facts for each cause of action, namely, those necessary to support the complete cause. Upon seeing the case to be met, the defendant responds in a manner which allows the court to understand the issues of fact and law that must be decided: *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56 at para. 43; *Homalco Indian Band v. British Columbia*, [1998] B.C.J. No. 2703 at para. 5 (S.C.).

[64] In defamation actions, pleadings are exceptionally important. This is due in part to the serious nature of defamation allegations and the significance of context in assessing them in an appropriately informed, well-balanced way. Traditionally, defamation pleadings have attracted a more critical evaluation than those in other causes and have been held to a higher standard regarding the precision with which material facts must be pleaded. This enhanced judicial scrutiny is justified based on the need to avoid unwarranted "fishing expeditions" and the critical importance of the defendant knowing clearly the case to be met: *Laufer v. Bucklaschuk* (1999), 181 D.L.R. (4th) 83 at para. 24 (M.B.C.A.); *The Catalyst Capital Group Inc. v. Veritas Investment Research Corporation*, 2017 ONCA 85 at paras. 22–25.

[65] More recently, courts have applied greater flexibility when analysing defamation pleadings, at least in the early stages of a proceeding. While the need for enhanced scrutiny and precise pleadings remains, it is recognised that plaintiffs may be unable to provide full particulars of allegations prior to discovery. For this reason, where a plaintiff pleads a *prima facie* case of defamation, including all reasonably available particulars of defamatory material, the pleadings may stand despite a lack of detailed facts outside the plaintiff's knowledge: *Catalyst Capital Group* at paras. 25–29. Nevertheless, given the fundamental values at stake in a defamation action, it remains particularly important for parties to plead and adhere to clearly defined issues of fact and law.

The Tort of Defamation

[66] Two essential issues must be determined in a defamation action. The first is a threshold question: are the words complained of reasonably capable of bearing a defamatory meaning? This is a question of law subject to appellate review on a standard of correctness. If this threshold is met, the second question arises: do the words bear the defamatory meaning pleaded? This is a question of fact to be reviewed on a standard of reasonableness: *Lawson* at paras. 11–12.

[67] The threshold question requires assessment of the range of possible meanings that words could reasonably bear and sets the outer limits of potential liability. In an action tried by a judge alone, it need not be asked and answered separately. As the trier of fact, the judge's function is to determine definitively whether the impugned words did, in fact, have a defamatory meaning. The threshold question is subsumed by this inquiry: *Mainstream Canada* at para. 15.

[68] Words that tend to lower the plaintiff's reputation in the eyes of a reasonable person are defamatory: *Grant v. Torstar Corp.*, 2009 SCC 61 at para. 28. For example, allegations of dishonourable or dishonest conduct in an individual's professional life will typically meet this definition: *Botiuk* at paras. 69, 92. The central question is whether the meaning conveyed by the

impugned words genuinely threatened the plaintiff's actual reputation: *Vander Zalm v. Times Publishers et al.* (1980), 109 D.L.R. (3d) 531 at 535 (B.C.C.A.); *Dinyer-Fraser v. Laurentian Bank et al.*, 2005 BCSC 225 at paras. 153; *Best v. Weatherall*, 2008 BCSC 608 at para. 22, reversed on other grounds 2010 BCCA 202.

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

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

i) Proof of Defamatory Meaning

[71] Words may convey a defamatory meaning literally, inferentially or by legal innuendo. Literal meaning is conveyed directly; inferential meaning, indirectly; and legal innuendo, by extension based on extrinsic facts. These alternate means of proof were summarised by Hinkson J.A., as he then was, in *Lawson*:

[13] There are three alternate means by which defamation can be proven:

a) If the literal meaning of the words complained of are defamatory;

b) If the words complained of are not defamatory in their natural and ordinary meaning, but their meaning based upon extrinsic circumstances unique to certain readers (the "legal" or "true" innuendo meaning) is defamatory; or

c) If the inferential meaning or impression left by the words complained of is defamatory (the "false" or "popular" innuendo meaning).

[72] Where the literal meaning of words is in issue, it is unnecessary to go beyond the words themselves to prove that they are defamatory. Where a claim is based on the inferential meaning of words, the question is one of impression: what would the ordinary person infer from the words in the context in which they were used? Both literal and inferential defamatory meaning reside within the words, as part of their natural and ordinary meaning. In contrast, where legal

innuendo is pleaded the impugned words take on defamatory meaning from outside circumstances beyond general knowledge, but known to the recipient.

[73] In *Botiuk*, Mr. Justice Cory explained how defamatory meaning is to be determined:

[62] … 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.

[74] *Botiuk* was a defamation claim that involved a lawyer whose reputation was sullied by three publications which falsely implied he had misappropriated funds and thus cast doubt upon his personal and professional integrity. Mr. Botiuk sued several defendants associated with the publications in differing ways. The trial judge concluded that the combined effect of the three publications was defamatory, treating them as a single libel and the defendants as joint tortfeasors: paras. 38, 53. The Supreme Court of Canada upheld the judgment on the basis that the defendants were jointly liable because they acted in concert and published the impugned documents in furtherance of a common design: paras. 73–77.

[75] Mr. Justice Cory wrote the lead judgment in *Botiuk*. His analysis focused on joint liability, but he also dealt briefly with the issue of combined defamatory meaning. In doing so, he noted that one of the three impugned publications expressly adopted another. He also noted that the three impugned documents were "inextricably interrelated" by their terms: para. 76.

[76] Mr. Justice Major concurred, but sounded a note of caution, partly because he was not certain that all of the defamatory documents should have been treated as one libel. Nor was he certain, based on the record, that the necessary concerted action to support a finding of joint and several liability was made out: para. 125. However, he deferred to the trial judge on these points and accepted that, in some circumstances, closely intertwined publications may be appropriately considered together:

[123] … It was open to [the trial judge] to consider each act of publication as a separate cause of action. However, the trial judge had a discretion to combine the several closely related publications and to make a single award of damages in relation to those publications [citations omitted]. The various defamatory publications in these appeals were closely intertwined and no basis has been shown that would warrant interfering with that discretion.

[77] Canadian cases provide limited guidance on when separate publications or other material on a related subject are sufficiently intertwined to be read together for meaning. One commonly cited authority on the question is *Downey v. Armstrong* (1901), 1 O.L.R. 237 (C.A.). In *Downey*, the Court upheld a trial decision to admit an article published the day before the allegedly defamatory article, but found an article published the day after was inadmissible. The preceding article was admissible because it was referred to in the allegedly defamatory article and thus incorporated by reference into its overall meaning. Accordingly, "the defendant was entitled to have the whole connected document submitted to the jury as evidence in support of his defence that the alleged libel did not bear the meaning put upon it": at 239. However, the subsequent article was inadmissible because, logically, the meaning of the allegedly defamatory article could not be ascertained from another article that did not yet exist when it was published:

I am of opinion, however, that the article published by the plaintiff after the publication of the alleged libel was not admissible in evidence upon any ground. Being subsequent to the alleged libel complained of in the action, it cannot assist in the interpretation of that document, nor can it be used in mitigation of damages as having constituted any provocation for it. It is a publication libellous in its character, and might form the subject of a separate action by the person against whom it is directed, but cannot logically affect the result of the present one. ...

[78] In *Brown on Defamation*, 2nd ed. (Toronto: Carswell, 1999) (loose-leaf updated 2014, release 5) vol. 1, Professor Brown outlines the circumstances in which multiple statements and other materials may be read together to illuminate meaning. He explains that statements on a related subject which refer to one another should generally be read together when determining the allegedly defamatory meaning of impugned words. For example, a story or caption on the front page of a newspaper should be read in combination with the article to which it refers, even though the article itself is found elsewhere in the newspaper. Similarly, where provisions of one document are cited in another, depending on the circumstances and issues for determination, it may be appropriate to read the two together to ascertain the meaning of impugned words.

[79] Professor Brown also explains that a primary source of alleged defamation and other materials may form part of the same context for purposes of evaluating defamatory meaning. The surrounding circumstances and contemporaneity of the other material with the primary source should be considered to see if they are so intimately connected as to affect the way in which the impugned words would be understood. If so, they should be read together for meaning. This proposition stems from a decision of the Supreme Court of Western Australia, *Brown v. Marron*, [2001] WASC 100. In *Brown*, Owen J. stated, at para. 56:

There must be an intimate connection between the primary source of the alleged defamation and the other material which is said to form a part of the context. The primary and secondary sources must be so closely connected, interwoven or enmeshed that it is necessary to take them effectively as one transaction in order to arrive at the true import and meaning of what was written and said. The requisite degree of intimacy will usually … demand contemporaneity. It will be necessary to consider all of the surrounding circumstances to decide whether the secondary materials are so intimately connected with the primary sources that they are to be taken to be a part of the context which might affect the way in which the ordinary reasonable reader would understand the words complained of.

[80] Unlike this case, some of the Canadian authorities that touch on the question of combined defamatory meaning involve articles written as a series by the same journalist: see, for example, *McCrea v. Canada Newspapers Co.* (1993), 122 N.S.R. (2d) 411 (S.C.), affirmed (1993), 126 N.S.R. (2d) 212 (C.A.). Others are primarily concerned with statutory notice provisions. For example, in *Merling v. Southam Inc. et al.* (2000), 183 D.L.R. (4th) 748 (Ont. C.A.), the Court held that a series of 23 articles published over a six-month period in the same newspaper could not be treated as a single libel for purposes of allowing the plaintiff to bring an action outside a statutory notice period. In reaching this conclusion, Chief Justice McMurtry distinguished *Botiuk*, in part because all parties in that case accepted that the three impugned documents were to be considered together as creating a single act of libel. In contrast, each article in *Merling* was pleaded as a separate defamatory expression and understood as such at the time of publication:

[27] I am of the view that separate instances of alleged defamatory publications cannot be combined for notice purposes unless they depend on other publications for their defamatory meaning. The trier of fact may well be able to combine the defamations so found in an assessment of damages.

[81] *Misir v. Toronto Star Newspapers Ltd. et al.* (1997), 105 O.A.C. 270, was also distinguished in *Merling*. In *Misir*, only the last article in a series of twelve actually named the plaintiffs. In that circumstance, the court considered the combined effect of the articles for statutory notice purposes because, as Mr. Justice Laskin stated, a newspaper cannot avoid a libel action by publishing a series of defamatory articles but only linking the plaintiff by identifying him or her in the final article: para. 16. In emphasising the policy-driven basis of *Misir* and declining to follow the same approach in *Merling*, Chief Justice McMurtry explained:

[25] … In the special circumstances in *Misir*, Laskin J.A. held that the earlier articles were not reasonably capable of defaming the plaintiffs until the publication of the last article. Therefore, the notice provisions of the *Libel and Slander Ac*t did not apply before that time. …

[82] In *Misir*, Mr. Justice Laskin quoted at length with approval from an English Court of Appeal decision, *Hayward v. Thompson*, [1982] 1 Q.B. 47: paras. 16–17. In *Hayward*, the Court held that a series of articles may be considered together for some purposes in a defamation action, but not for others. In particular, where the issue is whether the plaintiff is referred to in a defamatory article, if it is part of a series, it may be considered together with subsequent articles published by the same party for purposes of identifying the plaintiff. However, where the article in question does not bear a defamatory meaning when it is published, a subsequent article may not be relied upon to render its meaning defamatory. Laskin J.A. quoted the decision of Sir Stanley Rees in *Hayward*, in which he states it is a well-established principle that:

… a writer of innocent matter cannot by reason of facts which came into existence subsequent to the original innocent publication become liable in damages for libel because the subsequent material attributes a defamatory meaning to the innocent publication. …

[83] As is apparent from the foregoing, the circumstances in which multiple publications may be read together to determine allegedly defamatory meaning of impugned words are limited by logic, case law and the pleadings. In my view, where separate publications are pleaded as independent causes of action, absent referability or other inextricable linkage, the meaning of each should be determined independently, in the immediate context in which the words are used. Where the meaning of a publication, so interpreted, is non-defamatory, its meaning cannot logically be altered by a subsequent publication. However, if one publication is referenced in or otherwise closely connected to another publication, depending on the pleadings, issues and circumstances of the case, it may be appropriate to read them together to ascertain their combined meaning.

ii) Of and Concerning the Plaintiff

[84] Once defamatory meaning is established, the plaintiff must go on to prove that the impugned words are "of or concerning" him or her. This is a factual question: *Booth v. British Columbia Television Broadcasting System* (1982), 139 D.L.R. (3d) 88 at 92 (B.C.C.A.). Where the plaintiff is not specifically named, the question is: would the statements lead reasonable people who know the plaintiff to conclude that they refer to the plaintiff? An immediate suspicion on a recipient's part is insufficient. The test is whether the recipient would, in light of the surrounding circumstances, reasonably believe that the person referred to in the defamatory statements is the plaintiff: *Butler v. Southam Inc.*, 2001 NSCA 121 at paras. 29–30, 39, *per* Cromwell J.A., as he then was; *Crookes* at para. 39.

[85] A series of defamatory statements may be considered together when determining whether a particular defamatory statement refers to the plaintiff without naming him or her: *Butler* at paras. 40–44; *Misir* at paras. 15–18. In addition, in some circumstances defamatory statements regarding a group may defame its individual members without referring to them individually: *Bou Malhab* at para. 49; *Butler* at para. 49. For example, an assertion that members of a small local club are all thieves may defame each member individually. As in all defamation claims, the core issue in a claim based on statements about a group is whether the impugned words, when viewed reasonably and in context, defamed the plaintiff: *Butler* at para. 53. A non-exhaustive list of relevant factors for consideration includes: i) the size of the group; ii) the nature of the group; iii) the plaintiff's relationship with the group; iv) the real target of the defamation; v) the seriousness of the allegations; vi) the plausibility of the allegations; and vii) other extrinsic factors related to the statements' maker or target, medium used and general context: *Bou Malhab* at paras. 58–78.

iii) Publication

[86] Finally, the plaintiff must prove publication. It must be established that the defendant has, by any act, conveyed the defamatory meaning concerning the plaintiff to a third party, who has received it. Traditionally, any act which transferred defamatory information to a third person was considered publication. However, in the modern age this has been modified to exclude entirely passive acts, such as some forms of referencing or hyperlinking of defamatory material. Where the acts at issue merely transmit information in a content-neutral way, without

expression, adoption or endorsement, they are generally not considered publication: *Crookes* at paras. 16, 21, 30, 48.

[87] Nevertheless, as emphasised in *Botiuk*, several parties may jointly publish the same defamatory statement in differing roles and capacities. After quoting from *Church of Scientology* for the principle that "[i]f one person writes a libel, another repeats it, and a third approves what is written, they all have made the defamatory libel", the Court in *Botiuk* found joint publication by all defendants: para. 76. It also held that the defendants' actions brought them within the third category of joint concurrent tortfeasors described by Professor Fleming:

[74] In *The Law of Torts* (8th ed. 1992), Fleming discusses the concept of joint concurrent tortfeasors. He states this at p. 255:

> A tort is imputed to several persons as joint tortfeasors in three instances: agency, vicarious liability, and concerted action. The first two will be considered later. The critical element of the third is that those participating in the commission of the tort must have acted in furtherance of a common design. … Broadly speaking, this means a conspiracy with all participants acting in furtherance of the wrong, <u>though it is probably not necessary that they should realise they committing a tort</u>. [Emphasis added]
>
> [Emphasis in text.]

[88] As previously noted, Mr. Justice Major was uncertain, based on the record, that the necessary concerted action to support a finding of joint liability was made out in *Botiuk*. However, he deferred to the trial judge on the point:

[124] … [The trial judge] must have concluded that all the appellants acted in concert with one another and that the defamatory statements were published in furtherance of a common design. …

…

[127] Depending on the circumstances of a given case, it may be necessary to assess each instance of publication as a separate cause of action. The question of whether the defendants acted jointly or in concert should be considered and where there is the absence of common action the defendants' liability ought to be assessed individually.

[89] Publishers are sometimes held jointly and personally liable for defamatory statements published in the newspapers that employ them. In some of those cases, liability is imposed based upon his or her role: *Lambert v. Roberts Drug Stores Ltd.*, [1933] 4 D.L.R. 193 at 195 (M.B.C.A.); *Popovich v. Lobay et al (No. 2)*, [1937] 3 D.L.R. 715 at 718 (M.B.C.A.); *Graham v. Purdy*, 2017 SKQB 42 at paras. 125–136. However, in others the Court has required evidence of active engagement beyond the corporate role of publisher to justify the imposition of joint liability: *Kent v. Postmedia Network Inc.*, 2015 ABQB 461 at paras. 46–80; see also *Crookes* at

paras. 82–87 and *Bunt v. Tilley*, [2007] 1 WLR 1243 at para. 23 (U.K. Q.B.). The Supreme Court of Canada has yet to provide definitive guidance on the point.

Did the judge err in finding that the articles defamed Dr. Weaver and, if so, how?

[90] The judge began her analysis of the meaning of the impugned words by reviewing the applicable principles of defamation law. She asked the correct question: did the impugned words adversely affect Dr. Weaver's professional reputation? I do not accept the appellants' contention that, understood in context, none of those words could reasonably be taken to impute bad character or dishonesty to Dr. Weaver. On the contrary, in my view it was open to the judge to attribute such an imputation to the impugned words in each article.

[91] The judge also correctly identified the three alternate means of proving defamation: literal meaning, inferential meaning, and legal innuendo. She characterised Dr. Weaver's complaint as relating to both the literal and inferential meaning of the impugned words and decided to focus on their inferential meanings, including "the facts and circumstances around the making of the statements". She also described Climategate and the climate change debate as noteworthy aspects of the relevant context: para. 135.

[92] The judge did not refer to the pleadings in her analysis. In particular, she did not note that each article was pleaded as an individual defamatory expression and separate cause of action, nor did she reference the alternate plea of aggregate defamatory meaning by innuendo. Rather, she noted the "distinct overlap" between the articles and synthesised their allegations of inferential defamatory meanings for purposes of analysis. She went on to determine the inferential meanings of the impugned words cumulatively, based on a combined reading of all four articles.

[93] The judge's reasons for adopting a combined approach to determining the meanings of the impugned words are unclear to me. Although the subject matter of the articles did overlap, three of the four had different authors, only one referred to another and only two were published in identical media on consecutive days. There was no pleading of conspiracy or concerted action by the authors and the impugned words in each article were pleaded as separate causes of action, with independently defamatory meanings. The judge made no finding of inextricable linkage, nor did she refer to evidence of a common design. In these circumstances, in my view, the judge erred in analysing the inferential meanings of the impugned words in the articles in combination.

[94] The inferential meaning of the impugned words resided within those words, considered in their immediate context. The immediate context for each was the entire article. While Climategate and the climate change debate were part of the general context for all four articles, except for the reference to *Weaver's Web* in *Weaver's Web II*, none was so closely connected to another that it was necessary to read them together to ascertain the true import of the impugned words. Nor could a subsequent article confer defamatory meaning upon an independent predecessor. For Dr. Weaver to establish a cause of action based on a combined reading of the

articles he needed to rely on extended defamatory meaning by innuendo, and to prove joint liability with respect to its publication.

[95] It is true that there was an alternate plea of aggregate defamatory meaning by innuendo. It is also true that, while she did not reference that plea, the judge did refer to innuendo five times in the course of her analysis: paras. 137, 145, 146, 151, 152. However, other than quoting from *Lawson*, she did not explain or analyse the difference between literal and inferential ordinary meaning, on the one hand, and extended meaning by legal innuendo, on the other. She also began her analysis by characterising Dr. Weaver's complaints as relating to the first and third forms of defamatory meaning identified in *Lawson* – literal and inferential meaning – and not the second form, legal innuendo: para. 130.

[96] The judge stated that the allegedly defamatory meanings of the impugned words were best ascertained by considering their inferential meanings: para. 135. As explained in *Lawson*, this means the impression created by the natural and ordinary meaning of the words. She went on to consider the impugned words in all four articles, first in combination and then separately, and concluded that each was individually defamatory: paras. 136–168. In doing so, she noted the continuing theme of deceit in the four articles, but did not explain how or why their extended meaning was defamatory, in combination, by innuendo, or expressly infer common readership. In my view, read overall, the judge's analysis cannot fairly be characterised as one of aggregate defamatory meaning by innuendo.

[97] Nor, in my view, can the judge's findings on the defamatory meanings of the impugned words in each article be disentangled from the cumulative, combined approach she adopted to their determination. For example, she held that some of the impugned words in *Weaver's Web* might be characterised as simply derogatory but they were elaborated upon and tainted by those in *Weaver's Web II*: para. 158. She also found that all of the defendants "understood and intended" the specific inferential defamatory meanings she ascribed to each article: paras. 156, 159, 162, 165. Most tellingly, following the summary of her findings on the specific meanings of each article, she reiterated her conclusion that "an ordinary reader would infer these meanings from an overall consideration of the articles; particularly the first three …": para. 168. She did so again in her publication analysis: para. 183. In sum, in my view, the judge's erroneous approach to combined defamatory meanings was pervasive and inextricable from her individual findings.

[98] Given my conclusion that the judge erred in analysing the inferential defamatory meanings of the impugned words in combination, it is unnecessary to consider in detail whether she also erred in finding that some of those words concern Dr. Weaver. However, the appellants seek guidance on the proper principles to be applied on a new trial if such an order is made. As that is the resolution I propose, I would emphasise that in cases where more than one defamatory article is published by the same party the court may look at all related articles in considering whether impugned words in a particular article refer to the plaintiff: *Butler* at para. 40, citing *Hayward*; *Misir* at paras. 15–18.

[99] As discussed below, Mr. Corcoran was involved in the publication of *Weaver's Web II* and *Climate Agency Going Up in Flames*, but not in *So Much For Pure Science*. Accordingly, in

the circumstances of this case, a combined reading of *Weaver's Web II* and *Climate Agency Going Up in Flames* would be permissible to assess which of their statements were "of and concerning" Dr. Weaver. On the other hand, none of the other articles could be read together with *So Much For Pure Science* for the same purpose because of their limited relatedness.

Did the judge err in holding Mr. Foster, Mr. Corcoran and Mr. Libin jointly liable for allegedly defamatory articles they did not write?

[100] On appeal, Dr. Weaver conceded that there was no evidence that Mr. Foster participated in joint action with Mr. Corcoran or Mr. Libin in connection with their respective articles. Accordingly, he conceded that Mr. Foster should not have been held jointly liable with respect to any of the other articles. For their part, the appellants conceded that there was evidence of joint action by Mr. Foster and Mr. Corcoran with respect to *Weaver's Web* and thus a basis upon which they could be held jointly liable for that publication if it was defamatory. However, they also submitted that there was no evidence of joint action by any author with any other author on any of the other articles. Therefore, they say, there was no other basis for imposing joint liability on Mr. Foster, Mr. Corcoran and Mr. Libin in connection with any article which they did not write.

[101] Both concessions were reasonable and justified on the evidence. The same is true of the appellants' submission on each article that an author did not write and to which he did not contribute. It follows that the judge did not err in holding Mr. Foster and Mr. Corcoran jointly liable with respect to *Weaver's Web* if it defamed Dr. Weaver and no defence was available. However, in the absence of any evidence or pleading of concerted action, she erred in imposing joint liability upon any author who did not write *Weaver's Web II*, *Climate Agency Going Up in Flames* and *So Much For Pure Science* if they defamed Dr. Weaver and no defence applied.

Did the judge err in holding Mr. Fisher jointly liable for publication of the allegedly defamatory articles?

[102] The judge also held Mr. Fisher jointly liable for publication of the four articles, but did not explain the factual basis for her decision: paras. 179–183. Although there was an admission in the pleadings that Mr. Fisher was the "Publisher" of *The National Post*, there is limited and competing recent authority on the extent to which holding that position should attract joint liability: see *Graham*, on the one hand, and *Kent*, on the other. Given the absence of a full factual context and in light of the fact that there must be a new trial, in my view it is undesirable to analyse this issue and I would decline to do so.

Did the judge err in rejecting the defence of fair comment and, if so, how?

[103] When a plaintiff proves the three elements of defamation, falsity and damage are presumed and the onus shifts to the defendant to establish an available defence to avoid liability. Where statements of facts are at issue, there are three possibilities: substantial truth (justification), protected context (privilege) and public interest responsible communication. Where the impugned expression is an opinion, defences of privilege or fair comment may be relied upon: *Grant* at paras. 28–32, 126.

[104] In *WIC Radio*, Mr. Justice Binnie described the fair comment defence as holding the balance in defamation law between two fundamental values: respect for individuals and protection of their reputations from unjustified harm, on the one hand, and freedom of expression and debate, on the other: para. 1. He also endorsed the following test for the fair comment defence:

> [28] … [referencing the formulation of the test in *Cherneskey*]:
>
> a) the comment must be on a matter of public interest;
>
> b) the comment must be based on fact;
>
> c) the comment, though it can include inferences of fact, must be recognisable as comment;
>
> d) the comment must satisfy the following objective test: could any [person] honestly express that opinion on the proved facts?
>
> e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice …
>
> [Emphasis deleted.]

[105] Comment is distinguishable from factual imputation. While a "comment" must be recognisable as such, it may include a deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof: *WIC Radio* at para. 26, citing *Ross v. New Brunswick Teachers' Assn*, 2001 NBCA 62 at para. 56. If the statement is a comment, the facts upon which it is based must be sufficiently stated, referenced or notorious to enable viewers and readers to make their own assessment of the merits of the comment. If the factual foundation is unstated, unknown or false, the defence is not available: *WIC Radio* at paras. 26, 31, 34; *Mainstream Canada* at paras. 24–28.

[106] As with the "of and concerning" issue, in light of my view that a new trial is required it is neither necessary nor desirable to consider in detail whether the judge erred in her analysis of the fair comment defence. This is particularly so due to the relationship between factual findings on defamatory meaning and the application of the defence. However, given the appellants' request for guidance on proper principles, I would make the following brief observations.

[107] It is not entirely clear to me which of the impugned words the judge considered factual assertions and which of them she considered comment. In analysing the fair comment defence, it is important clearly to distinguish between the two. It is also important to confine an analysis of the factual foundation said to justify a comment to that set out in the pleadings and relied upon by the defendants. I agree with the appellants that, on occasion, the judge's analysis of the relevant factual foundation for consideration overstepped that boundary.

Did the judge err in ordering a complete retraction?

[108] The judge did not explain her reasons for ordering the complete retraction. In these circumstances, it is unnecessary and undesirable to analyse this issue.

If the judge erred, should this Court decide the action or order a new trial?

[109] In some circumstances, appellate courts are able to decide a defamation action based on the record and it is in the interests of justice to do so: see, for example, *Best* at paras. 41-52; *Mainstream Canada* at para. 54. However, in others, given the nature and complexity of the issues for determination, an invitation to decide the action on appeal will be declined: see, for example, *Laufer* at paras. 60–61; *Creative Salmon Company Ltd. v. Staniford*, 2009 BCCA 61. In this case, the complex and interconnected nature of the factual issues, their multiplicity, and, as to some of them, the absence of findings below render the action unsuitable for appellate determination.

Conclusion

[110] In the result, I would allow the appeal and order a new trial.

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Mr. Justice Groberman"

Appendix

Headline: ***Weaver's Web***

* The headline and subheading of the article as it appears on the National Post Internet Sites read as follows: Peter Foster; *Weaver's Web*

Is it unreasonable to suggest his charge of theft against the fossil fuel industry is totally without merit?

Text:

The spinning from the climate industry in the wake of Climategate has been as fascinating as the incriminating emails themselves.

One demand being peddled by the powers-that-warm in Copenhagen and elsewhere is that we should all concentrate not on the damning emails, but on who was responsible for their "theft," which had to be carried out for money, which in turn obviously came from the fossil fuel industry.

These guilty-until-proven-innocent villains have also been fingered by Canada's warmest spinner-in-chief, Dr. Andrew Weaver. Dr. Weaver, who is Canada Research Chair in Climate Modelling and Analysis at the University of Victoria, claims that his office has been broken into twice, that colleagues have suffered hack attacks, and that mysterious men masquerading as technicians have attempted to penetrate the university's data defences.

There have been no arrests, and there are no suspects, but Dr. Weaver has no problem pointing to the shadowy culprits – the fossil fuel industry – thus joining his colleagues in the left coast Suzuki-PR-industrial complex.

Is this what the scientific method looks like? Is Dr. Weaver's hypothesis about fossil-fuel interests "falsifiable?" If Dr. Weaver has any evidence, he should produce it. Indeed, the University of Victoria should immediately launch an inquiry into these very serious allegations. Who knows what they might find? Was Dr. Weaver's office the only office broken into? If other offices in non-climate departments of the university also had computers stolen, might this suggest that the thefts were not related to climate change? Is it unreasonable to suggest that Dr. Weaver's charge against the fossil fuel industry is totally without merit?

Dr. Weaver has also been in the forefront of the warmist counterattack. On Monday, he co-authored a piece with Thomas Homer-Dixon in The Globe and Mail from which references to Climategate were conspicuously absent. The two academics boldly knocked down erroneous "skeptical" arguments without identifying who actually holds them. Strangely, apart from avoiding the "C" word, and appearing not to understand what solar climate theory actually involves, they also ignored the main point of scientific skepticism, which is that a link between human activity and a significant impact on the global climate has not been established. Meanwhile they make some distinctly dodgy arguments of their own.

They assert that the claim that warming has stopped is based on nefariously taking 1998 as a starting point. "The El Nino [ocean oscillation] event of 1998 was the strongest in a century," they write, "so it's not surprising that the

planet's surface temperature was sharply higher than it was in the years immediately before or after. To choose this year as the starting point for a trend line is misleading at best and dishonest at worst."

Call the campus police! But hang on, who first cherry-picked 1998 as a significant year? Climate alarmists such as Dr. Weaver! Indeed, in a piece in the Financial Post in September 1999, in which he sought to refute an article by skeptic Fred Singer, Dr. Weaver cited Climategate emailer Michael Mann's now-debunked hockey stick: "In the 1,000-year record," wrote Dr. Weaver, "1998 represented the warmest year, the 1990s the warmest decade and the 20th century the warmest century."

Far from citing El Nino as a factor in 1998, he quoted a study by paleoclimatologist Jonathan Overpeck that "failed to identify any natural mechanism for the unprecedented warming that led to 1998 being the warmest year in at least the past 1,200."

Mr. Overpeck, for the record, had noted in 1998 that "It's a good bet that the warming like we're seeing now is going to continue for decades." When it turned out to be a bad bet, at least for this decade, 1998 became a nuisance. However, Dr. Weaver tells us that "global temperatures are now about to resume their upward trend."

But apart from his implicit request to "trust me," doesn't saying that they will "resume their upward trend" admit that they've been flat?

….

Getting back to 1999, Dr. Weaver went on to write: "I don't understand Dr. Singer's suspicion of government-funded scientists ... Conspiracies require a motive, and I can't fathom what advantage would accrue from a government plot of climate change misinformation."

Anybody who can't fathom how scientists might be corrupted by government money, or why politicians and bureaucrats might embrace a theory that promises huge new powers, betrays an otherworldly innocence that should never be let outside the ivory tower. …

In the light of all this, the conclusion of Monday's piece ranks as chutzpah indeed: "The difference between science and ideology is that science tries to explain all known observations, whereas ideology selects only those observations that support a preconceived notion."

Say, like 1998 being all about man-made climate change then, but, 10 years later, when the models are all falling apart, not so much?

Headline: ***Weaver's Web II; Climate modeler's break-in caper spreads across Canadian university, exposing Climategate as monster cross-disciplinary big-oil funded attack on psychology labs"***

Text:

Following up on "Weaver's Web," Peter Foster's column on this page yesterday regarding Andrew Weaver, Canada's leading climate modeler and climate crime victim, we have news: The break-in at Doc Weaver's office, which he linked to the evil fossil fuel industry's attempt to discredit global warming policy, turns out to have been one of numerous breakins at the University of Victoria.

On Dec. 2, an official university-wide email warned that "there have been a number of office and lab breakins across campus in recent days – initially Science & Engineering buildings, but now Cornett & BEC. Psychology has had several offices and labs broken into, and last night there were break-ins in second-floor offices in BEC. Entry seems to be happening by jimmying/forcing locks."

This news comes from none other than Steve McIntyre (the man who broke Mr. Weaver's hockey stick) on his world-famous Climate Audit blog. A UVic informant sent Mr. McIntyre a copy of the internal email after reading that Doc Weaver was publicly blaming the oil industry for the break-in at his office at the university, where he is chair in Climate Modeling and Analysis. He says his computer was stolen and implied a connection to the Climategate email scandal at the Climatic Research Unit (CRU) a [sic] the University of East Anglia. Gosh those oil industry guys are smart and sophisticated – there they are wandering around the University of Victoria, jimmying locks in the psych labs. Look there: Are those lab tests on cognitive impairment part of the climate modelers tool kit?

…I have reason to believe – based on the same high-quality line of reasoning and evidence that led Doc Weaver to link his office break in to big oil….

Headline*: ***Climate Agency Going Up in Flames; Exit of Canada's expert a sure sign IPCC in trouble***

*The Headline and subheading of the article as it appears on the National Post Internet Sites read as follows: *Terence Corcoran: Heat wave closes in on the IPCC*

Insider Andrew Weaver is getting out while the going is good

Text:

A catastrophic heat wave appears to be closing in on the Intergovernmental Panel on Climate Change. How hot is it getting in the scientific kitchen where they've been cooking the books and spicing up the stew pots? So hot, apparently, that Andrew Weaver, probably Canada's leading climate scientist, is calling for replacement of IPCC leadership and institutional reform.

If Andrew Weaver is heading for the exits, it's a pretty sure sign that the United Nations agency is under monumental stress. …

For him to say, as he told Canwest News yesterday, that there has been some "dangerous crossing" of the line between climate advocacy and science at the IPCC is stunning in itself.

Not only is Mr. Weaver an IPCC insider. He has also, over the years, generated his own volume of climate advocacy that often seemed to have crossed that dangerous line between hype and science.

…

He has also made numerous television appearances linking current weather and temperature events with global warming, painting sensational pictures and dramatic links.

"When you see these [temperature] numbers, it's screaming out at you: 'This is global warming!"

Mr. Weaver is also one of the authors of The Copenhagen Diagnosis, an IPCC-related piece of agit-prop issued just before the recent Copenhagen meeting.

The Copenhagen Diagnosis is as manipulative a piece of policy advocacy as can be found…

That Mr. Weaver now thinks it necessary to set himself up as the voice of scientific reason, and as a moderate guardian of appropriate and measured commentary on the state of the world's climate, is firm evidence that the IPCC is in deep trouble. He's getting out while the getting's good, and blaming the IPCC's upper echelon for the looming crisis.

…

Mr. Weaver's acknowledgement that Climategate – the release/leak/theft of thousands of incriminating emails from a British climate centre showing deep infighting and number manipulation – demonstrates a problem is real news in itself. When Climategate broke as a story last November, Mr. Weaver dismissed it as unimportant and appeared in the media with a cockamamie story about how his offices had also been broken into and that the fossil-fuel industry might be responsible for both Climategate and his office break-in.

The latest IPCC fiasco looks even more damaging. In the 2007 IPCC report that Mr. Weaver said revealed climate change to be a barrage of intergalactic ballistic missiles, it turns out one of those missiles – a predicted melting of the Himalayan ice fields by 2035 – was a fraud. Not an accidental fraud, but a deliberately planted piece of science fiction. The IPCC author who planted that false Himalayan meltdown said the other day "we" did it because "we thought … it will impact policy makers and politicians and encourage them to take some concrete action."

Mr. Weaver told Canwest that the Himalayan incident is "one small thing" and not a sign of a "global conspiracy to drum up false evidence of global warming." We shall see. It is a safe bet that there have been other tweaks, twists, manipulations and distortions in IPCC science reports over the years. New

revelations are inevitable. Now is a good time to get out of the kitchen.
Mr. Weaver is the first out the door.

Headline: ***"So Much For Pure Science; 'Climategate' raised questions about global warming. The ongoing debate about its impact raises questions about the the [sic] vested interests of climate science"***

Text:

Confronted with the infamous hacked emails from the University of East Anglia's Climate Research Unit – suggesting scientists at one of the world's most influential climate labs conspired to manipulate data and censor research that cast doubt on anthropogenic global warming – one of Canada's more prominent scientists zeroed in on what he saw as the heart of the scandal. "The real story in this is, who are these people and why are they doing it?" demanded Andrew Weaver, a University of Victoria atmospheric scientist and contributor to the Intergovernmental Panel on Climate Change's reports blaming humans for altering the weather. He actually meant the hackers: agents of Big Oil, he figured. They "don't like" the research, "so they try to discredit it."

Really, CRU staff did the discrediting, with talk of "hiding" data and sabotaging journals publishing papers they disliked. The hacker simply revealed it. But Weaver's reflex to distract is understandable: The success of his book, Keeping Our Cool: Canada in a Warming World, and, to some extent, his career success, depend on the momentum of a global-warming panic. Just as discomforting, the events that have now been dubbed "Climategate" provide an important public service, reminding us that scientists, too, can be close-minded and crooked.

Environmental alarmists have long insinuated as much, baselessly smearing critical scientists – the esteemed MIT climatologist Richard Lindzen; former National Academy of Sciences president Frederick Seitz – as corrupt industry shills. James Hoggan, the chairman of the David Suzuki Foundation, calls skeptics "fake" scientists peddling "deception." But having implied that scientists can be led astray, why assume only IPCC types are immune? The climate panic is, after all, rather big business itself (as Weaver's publisher knows). The CRU alone lured $22 million in research grants….

It's naïve to presume that nowhere could there be vested interests in this great slush of shekels. But it isn't just money that can blind scientists to truth; they are, like us, mere emotional and fallible mortals. As David Resnik, the National Institute of Environmental Health Sciences bioethicist, has written, universities promote ethical research codes precisely because biases exist (though such codes are only as good as those upholding them). Bias happens, too, "when researchers fail to critically examine their work because they want to believe that their research is accurate," Resnik notes. Or where they see only "what they want or expect to see."

… If Climategate raises doubts about global warming, it also raises perhaps overdue ones about the credibility of the folks in white coats. No wonder some would prefer we focused on something else.