

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Weaver v. Ball*,
2018 BCSC 205

Date: 20180213
Docket: S110682
Registry: Vancouver

Between:

Andrew Weaver

Plaintiff

And

Timothy (“Tim”) Ball

Defendant

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for the Plaintiff:

R.D. McConchie

Counsel for the Defendant:

M.R. Scherr
D.T. Juteau

Place and Dates of Trial:

Vancouver, B.C.
October 16-20, 23-26, and 31, 2017
November 1, 2017

Place and Date of Judgment:

Vancouver, B.C.
February 13, 2018

Introduction

[1] On January 10, 2011, an article entitled “Corruption of Climate Science Has Created 30 Lost Years” (the “Article”) appeared on an internet website known as “Canada Free Press”. The Article was written by the defendant, Dr. Timothy Ball.

[2] The central thesis of the Article is that modern climate science has been corrupted by money and politics, and that there is inadequate data to support claims about humans’ contribution to climate change and global warming.

[3] The Article refers to the plaintiff, Dr. Andrew Weaver, in ways in which Dr. Weaver claims are libelous. He therefore brings this action in defamation seeking damages from Dr. Ball.

Background

[4] Dr. Weaver is a professor in the School of Earth and Ocean Sciences at the University of Victoria (“UVIC”), although he is presently on leave as he sits as a member of the legislative assembly of BC. He was first elected to the legislature in May 2013, and then was re-elected in May 2017. He is currently the leader of the BC Green Party.

[5] Dr. Ball is a retired professor from the Department of Geography at the University of Winnipeg, who holds a PhD in climatology and who taught in the field for many years.

[6] Both Dr. Weaver and Dr. Ball have been active in public and academic discussions surrounding the issue of climate change and global warming.

[7] Dr. Weaver is well-known as a leading voice in favour of the need to take action to address climate change. As part of his work, he has been a lead author on a number of reports issued by the Intergovernmental Panel on Climate Change (“IPCC”), an international scientific body established to study issues related to climate change.

[8] Dr. Ball, on the other hand, is what might be described as a climate change sceptic. As reflected in the Article, it is his view that the concerns about climate change are over-stated and not supported by true science.

[9] Prior to Dr. Ball writing the Article in January 2011, he and Dr. Weaver had come into contact on a few occasions, and were aware of each other's views.

[10] At some point, they both participated in a television debate or discussion about climate change, although Dr. Ball does not consider it to have been a true "debate" in the sense that there was no declared winner.

[11] They also met in Dr. Weaver's office at UVIC in 1997, an event that is referred to in the Article. According to Dr. Weaver, Dr. Ball came to his office and they discussed Dr. Ball's "bizarre" theories. After the meeting, Dr. Weaver sent Dr. Ball a full copy of the most recent IPCC study along with a cover letter that was quite congenial in nature. I will return to Dr. Ball's version of the meeting when I deal with the contents of the Article below.

[12] In March 1998, Dr. Ball and Dr. Weaver exchanged emails that were far less congenial. While Dr. Ball professed to have no recollection of the exchange, Dr. Weaver testified that he was responding to an email from Dr. Ball, which in part addressed their earlier meeting. Their email exchange included the following:

Dr. Ball: I was more than disconcerted with your lack of knowledge about climatology but then that has been my experience with climate modellers.

Dr. Weaver: Frankly, I was utterly appauled [sic] with your lack of understanding of basic physics and chemistry. I was "polite" to you by acknowledging your ideas. You have absolutely no idea what research I do! While you went to great pain to describe your "off the wall" theories you never once asked what I do! To call me a climate modeller clearly shows you have no idea! ... In my opinion, this is the difference between you and me. You shoot from the hip without checking the details of what you are saying. I do a thorough search of information before I make a statement on the science.

...

Dr. Ball: I will apologize if you are slighted by my remarks, but my discussions with you indicated a sad lack of knowledge about climatology and climate research, especially in Canada.

Dr. Weaver: Slighted is not to [sic] correct response. I find your comments in front of a large professional body where you personally malign a fellow colleague at best highly unprofessional and at worst an illegal and malicious slandering.

...

Dr. Ball: I am available anytime you want to convince me you know more about climatology than I was aware at our meeting. I have avoided your public presentations because I would be tempted to ask questions, but I too have friends have had reports about the inconsistency of your arguments.

Dr. Weaver: I will no longer waste my time either writing to you further or discussing science with you. I don't care whether you attend my lectures or not. I am not in the least bit concerned about the questions you would raise! I am surprised, if you seem so convinced of your views, why you would malign me behind my back in front of a bunch of high school teachers (that took courage!) yet you don't try to take me on at a public lecture. I am sure your questions would be trivial to answer. Its [sic] a shame your so called friends didnt [sic] challenge me if they felt there was an inconsistency. They should do so next time and I would welcome it!

Dr. Ball: Just for fun I urge you to take the opposite position and make the arguments against the inadequacy of models and the continued failure of model predictions. Find out how quickly you continue to receive the support of Environment Canada - worse experience the wrath of these monoliths who destroy the very essence of science, the right to challenge, question and test hypotheses. Mephistopheles lives.

Dr. Weaver: I do not do things like this just for fun. I have received funding from numerous sources (I do not hold an AES grant now as I did not bother applying for one last year!) I have always written my proposals (some with rather antiestablishment views) and I have always received high levels of funding. Good science, argued well is funded. Bad science is not.

This is the last communication that I will have with you on email or phone. If I see you at a meeting then I would argue the science publically. What I am most disappointed about is that I treated you as a colleague and gave serious time and consideration to your ideas. In return, you have maligned

me publically and disrespectfully, without leaving me an opportunity to defend myself.

[13] Obviously, Dr. Weaver and Dr. Ball have well-defined differences in opinion that were established well before Dr. Ball wrote the Article in January 2011.

[14] Another event that received considerable attention during the trial, and that is also addressed in the Article, is a presentation given by Dr. Ball at UVIC on April 7, 2010. The presentation was sponsored by the UVIC Conservative Club and was entitled “Climate Change: Science or Fiction”. In the Article, Dr. Ball alleges that Dr. Weaver refused to participate in the event; however, the organizer, Mr. Graham Noyes, testified that while he had inquired about Dr. Weaver attending, he was told by Dr. Weaver’s assistant that he was too busy. Dr. Weaver said he does not recall ever being asked directly to participate.

[15] According to Dr. Ball, just before his presentation, he observed a “melee” outside of the room and it appeared to him that there were people handing out pamphlets and blocking others from entering the room. Then, when the presentation began, a number of students sat in the first two rows and asked numerous questions. He characterized the students’ attitude towards him as “hostile”. Mr. Noyes characterized the actions of these students as disruptive and rude.

[16] During the trial, a video of the presentation was played along with an audio recording. While both the video and audio capture some lively exchanges between Dr. Ball and some of the students, it did not appear to me to involve anything more than what one would expect in a university setting, particularly given the controversial nature of the topic. That said, Dr. Ball testified that the recordings did not fully capture all of the rude and disruptive behaviour he says he witnessed.

[17] The relevance of this event stems from the manner in which Dr. Ball described it in the Article, which I now turn to.

[18] As noted above, the Article first appeared on the Canada Free Press website on January 10, 2011. The entire text of the Article is attached as Schedule "A" to these reasons, however, the most pertinent passages are set out below:

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

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

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

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

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

...

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

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

He simply wanted to get his degree and research money was available. Weaver claimed to be a climatologist, but removed that from his web page when it was pointed out he was a computer modeler.

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

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

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

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

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

...

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

[19] Dr. Ball entered into evidence numerous articles, academic writings, blog posts, and opinion pieces that he generically identified as materials he had read and reviewed prior to writing the Article. These were not submitted as evidence for the truth of their contents (and indeed could not have been), but rather, to establish that Dr. Ball is not alone in his beliefs concerning climate change.

[20] In a similar vein, Dr. Ball relies on three expert reports, which are described in general terms as follows:

- a) Dr. Judith Curry is a professor of Earth and Atmospheric Sciences at the Georgia Institute of Technology. The focus of her report is on the accuracy and reliability of global climate models. It is her opinion that such models are not fit for the purpose of determining the cause or causes of global warming and climate change;
- b) Dr. Nicola Scafetta is a professor of Atmospheric Science, Climatology and Oceanography at the University of Napoli Federico II, in Italy. His report addresses the issue of whether the computer models used by the IPCC make use of the Milankovitch cycles which, according to Dr. Scafetta, describe variation in the orbital parameters of the Earth. This is an issue addressed in the Article and raised by Dr. Weaver in his notice of civil claim; and
- c) Dr. David Legates is a professor in the College of Earth, Ocean and Environment at the University of Delaware. The rather limited focus of his report is on the question of whether there is consensus amongst experts on anthropogenic climate change. Dr. Legates' opinion is that there is not. He describes the level of consensus as "weak" and far from the 97-98% that is often presented.

[21] None of the experts were required to attend the trial for cross-examination.

[22] Dr. Weaver testified that he came across the Article by using a computer search of his name.

[23] According to Dr. Weaver, he was “stunned” by the suggestion in the Article that he was corrupt and unqualified to teach his students.

[24] Dr. Weaver subsequently searched the Article online and discovered that it had been republished on other websites. He described his reaction to the republications as “saddened, sickened and dismayed”.

[25] Dr. Weaver said that he printed the Article and posted it on a bulletin board located outside of his office that he has dubbed the “wall of hate”.

[26] Dr. Weaver very quickly retained counsel who wrote to Canada Free Press on January 14, 2011, demanding a retraction of the Article and an apology. Canada Free Press deleted the Article from its website on January 18, 2011, and published a retraction and apology which ran for a number of days.

[27] The terms of the retraction and apology were discussed by email exchange between Dr. Weaver’s counsel and Ms. Judi McLeod, the editor of Canada Free Press, although the final version was largely in the form requested by Dr. Weaver. It stated:

Apology to Dr. Andrew Weaver

On January 10, 2011, Canada Free Press began publishing on this website an article by Dr. Tim Ball entitled “Corruption of Climate Science Has Created 30 Lost Years” which contained untrue and disparaging statements about Dr. Andrew Weaver, who is a professor in the School of Earth and Ocean Sciences at the University of Victoria, British Columbia.

Contrary to what was stated in Dr. Ball’s article, Dr. Weaver: (1) never announced he will not participate in the next IPCC; (2) never said that the IPCC chairman should resign; (3) never called for the IPCC’s approach to science to be overhauled; and (4) did not begin withdrawing from the IPCC in January 2010.

As a result of a nomination process that began in January, 2010, Dr. Weaver became a Lead Author for Chapter 12: “Long-term Climate Change: Projections, Commitments and Irreversibility” of the Working Group I contribution to the Fifth Assessment Report of the IPCC. That work began in May, 2010. Dr. Ball’s article failed to mention these facts although they are publicly-available.

Dr. Tim Ball also wrongly suggested that Dr. Weaver tried to interfere with his presentation at the University of Victoria by having his students deter people

from attending and heckling him during the talk. CFP accepts without reservation there is no basis for such allegations.

CFP also wishes to dissociate itself from any suggestion that Dr. Weaver “knows very little about climate science.” We entirely accept that he has a well-deserved international reputation as a climate scientist and that Dr. Ball’s attack on his credentials is unjustified.

CFP sincerely apologizes to Dr. Weaver and expresses regret for the embarrassment and distress caused by the unfounded allegations in the article by Dr. Ball.

[28] Canada Free Press also forwarded a copy of its retraction and apology to other websites on which the Article had been republished.

[29] Dr. Weaver, through his counsel, also demanded an apology from Dr. Ball. Letters were sent to various email addresses associated with Dr. Ball. Dr. Ball retained counsel and negotiations ensued about the wording of an apology.

[30] Ultimately, on March 3, 2011, Dr. Ball issued the following apology:

My article entitled “Corruption of Climate Change has Created 30 Lost Years” contained untrue statements about Dr. Andrew Weaver, who is a professor in the School of Earth and Ocean Sciences at the University of Victoria, British Columbia. The article has since been withdrawn from the Internet website of Canada Free Press, where it was originally published in January 2011.

Contrary to what I stated in my article, Dr. Weaver: (1) never announced he will not participate in the next Intergovernmental Panel on Climate Change (“IPCC”); (2) never said that the IPCC chairman should resign; (3) never called for the IPCC’s approach to science to be overhauled; and (4) did not begin withdrawing from the IPCC in January 2010. I hereby unequivocally retract my suggestion that Dr. Weaver sought to dissociate himself from the scientific work of the IPCC.

As a result of a nomination process that began in January, 2010, Dr. Weaver became a Lead Author for Chapter 12: “Long-term Climate Change: Projections, Commitments and Irreversibility” of the Working Group I contribution to the Fifth Assessment Report of the IPCC. That work began in May, 2010. My article failed to mention these facts although they were publicly available.

I did not intend to suggest that Dr. Weaver tried to interfere with my presentation at the University of Victoria by having his students deter people from attending and heckling me during my talk. Further, I do not dispute Dr. Weaver’s credentials or competence as a climate scientist and university professor. While Dr. Weaver and I have different views on the cause of global warming, I acknowledge that Dr. Weaver has at all times acted honestly and with integrity.

I sincerely apologize to Dr. Weaver and express regret for the embarrassment and distress caused by my article.

[31] Dr. Ball's apology was substantially in the form requested by Dr. Weaver, with one exception. Dr. Weaver had proposed language stating that students had not been deterred from attending, that Dr. Ball had not been heckled, and that "students who attended were polite and respectful and asked their questions in a manner and form which is customary and entirely acceptable on such occasions". Dr. Ball declined to include this language because it was not consistent with how he perceived the students acted at his UVIC presentation.

[32] Dr. Ball forwarded his apology to the various websites on which the Article had been republished.

[33] Dr. Weaver posted Dr. Ball's apology alongside the Article on his "wall of hate".

Legal Framework

[34] The function of defamation law is to protect and vindicate reputation from unjustified harm. Reputation is integral to one's sense of self-worth and is related to the inherent dignity of the individual, an underlying value of the *Charter*. Once tarnished, restoring one's reputation may be difficult, especially in a professional context. However, its protection must be balanced with the *Charter* guarantee of freedom of expression, a recognised pillar of modern democracy: *Weaver v. Corcoran*, 2017 BCCA 160 [*Weaver*], at para. 62; *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 [*Botiuk*], at paras. 91-92.

[35] To establish a claim in defamation, a plaintiff must establish three elements: 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 v. Torstar Corp.*, 2009 SCC 61 [*Grant*], at paras. 28-29).

[36] Words that tend to lower the plaintiff's reputation in the eyes of a reasonable person are defamatory: *Grant*, at para. 28. For example, allegations of dishonest conduct in an individual's professional life will typically meet this definition: *Botiuk*, at paras. 69, 92. The central question is whether the meaning conveyed by the impugned words genuinely threatened the plaintiff's *actual* reputation: *Vander Zalm v. Times Publishers* (1980), 109 D.L.R. (3d) 531 (B.C.C.A.) [*Vander Zalm*], at 535; *Dinyer-Fraser v. Laurentian Bank*, 2005 BCSC 225, at para. 153.

[37] One of the challenges in defamation cases is that words are imprecise instruments of communication. The same words used in a particular context may lead different minds to reach divergent conclusions for variant reasons (*Weaver*, at para. 69). Not every criticism of a person or disparaging comment is defamatory. A defamatory statement is one that has a tendency to lower the reputation of the person to whom it refers in the estimation of right-thinking members of society generally and, in particular, to cause him or her to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem. The test is an objective one: *Color Your World Corp. v. Canadian Broadcasting Corp.* (1998), 156 D.L.R. (4th) 27 (Ont. C.A.) [*Color Your World*], at para. 14. In *Color Your World*, Justice Abella outlined the right-thinking person standard as follows:

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

[38] Whether a statement is defamatory is to be determined from the natural and ordinary meaning of the words. Further, the impugned statement must be considered in the context of the publication as a whole. The traditional axiom is that "the bane and the antidote must be taken together", that is, a statement taken out of

context may be considered defamatory but its “sting” may be neutralized by another part of the publication: *Lougheed Estate v. Wilson*, 2017 BCSC 1366 [*Lougheed Estate*], at para. 157.

[39] In *Lawson v. Baines*, 2012 BCCA 117, at para. 13, the Court of Appeal identified three alternate means by which a defamatory meaning may be established:

- 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).

[40] In the present case, Dr. Weaver submits that it is the inferential meaning of the impugned words that are defamatory. In *Taseko Mines Limited v. Western Canada Wilderness Committee*, 2017 BCCA 431, at para. 43, the Court of Appeal described an inferential meaning in these terms:

[43] An inferential meaning is the impression an ordinary, reasonable person would infer from the allegedly defamatory material. An inferentially defamatory meaning excludes any special knowledge that the recipient may have. The court is not limited to meanings offered by the parties, but the meaning offered by the plaintiff is to be treated as the most injurious meaning the words are capable of conveying: *Brown on Defamation*, ch. 5 at 26-27.

[41] Once defamatory meaning is established, the plaintiff must then prove that the impugned words are “of or concerning” him or her. In *Weaver*, the Court of Appeal described this element as follows, at para. 84:

[84] ... 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.

[42] Finally, the plaintiff must prove publication. In *Crookes v. Newton*, 2011 SCC 47, Justice Deschamps in concurring reasons said, at para. 80:

[80] ... To be published, defamatory words must be “communicated” (*Grant*, at para. 28). “Communication” means that a message is both sent in a comprehensible form, and received and understood. Publication does not occur until “the defamatory matter is brought by the defendant or his agent to the knowledge and understanding of some person other than the plaintiff” (*McNichol v. Grandy*, [1931] S.C.R. 696, at p. 704, *per* Duff J. (as he then was); *Brown*, at paras. 7.2 and 7.8; *Gatley on Libel and Slander* (11th ed. 2008), at p. 164).

[43] In the specific context of material posted to the internet, in *Crookes v. Yahoo*, 2007 BCSC 1325, *aff’d* 2008 BCCA 165, Justice Stromberg-Stein, as she then was, said at para. 26:

[26] With respect to internet communications, the site of the alleged defamation is where the damage to reputation occurs: *Dow Jones Co. Inc. v. Gutnick*, (2002), 194 Aust. L.R. 433 (H.C.); *Barrick Gold Corp. v. Blanchard and Co.*, [2003] O.J. No. 5817 (S.C.). It is when a person downloads the impugned material from the internet that the damage to the reputation may be done, and it is at that time and place that the tort of defamation is committed.

[44] In addition to the three well-established elements of the tort of defamation described above, Dr. Ball submits that Canadian law should now recognize a fourth element which would require a plaintiff to prove that the publication complained of “substantially affects in an adverse manner the attitude of other people towards him or has a tendency to do so”. Dr. Ball describes this element as introducing a threshold of seriousness into the tort so as to preclude *de minimis* claims in which there is no reasonable prospect of harm to reputation or damage and, in turn, striking a better balance between the legitimate objects of defamation law and the essential value of free expression enshrined in the *Charter*.

[45] Dr. Ball cites a number of United Kingdom authorities in which this approach has been adopted: *Cammish v. Hughes*, [2012] EWCA Civ 1655; *Lachaux v. Independent Print*, [2017] EWCA Civ 1334; *Thornton v. Telegraph Media Group Limited*, [2010] EWHC 1414 [*Thornton*].

[46] In *Thornton*, Justice Tugendhat reviewed various definitions of defamation that had developed in UK case law and concluded that whatever definition is adopted, it must include a qualification or threshold of seriousness (at para. 90). At para. 61, Justice Tugendhat cited with approval *Jameel v. Dow Jones & Co Inc.*, [2005] EWCA Civ 75, at para. 40, where the Court said:

We accept that in the rare case where a claimant brings an action for defamation in circumstances where his reputation has suffered no or minimal actual damage, this may constitute an interference with freedom of expression that is not necessary for the protection of the claimant's reputation. ...

[47] Dr. Ball submits that the present case is a good example of the need to incorporate a seriousness threshold into the law of defamation given the absence of evidence of any actual or likely damage to Dr. Weaver's reputation.

[48] In my view, whether Canadian law will or should follow the trend established in the UK authorities cited by Dr. Ball is a matter better left for appellate courts. That said, it is arguable that such a threshold is already present, at least implicitly, in the current law. This is reflected in the requirement that the impugned words be assessed from the perspective of a reasonably thoughtful and informed person, rather than someone with an overly fragile sensibility (*Color Your World*, at para. 15), as well as the requirement that the words must genuinely threaten the plaintiff's actual reputation (*Weaver*, at para. 68).

[49] Where a plaintiff proves the requisite elements for defamation, the burden shifts to the defendant to establish a defence in order to escape liability. Here, Dr. Ball relies on the defences of fair comment, responsible communication and qualified privilege.

[50] In *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 [*WIC Radio*], 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 and freedom of expression and debate: para. 1. At para. 28, Justice Binnie set out the elements of the fair comment defence:

- (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 man 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 in *WIC Radio*.]

[51] The defence of responsible communication protects defendants against liability for false and defamatory statements in circumstances where the publisher has acted responsibly in attempting to verify information on a matter of public interest. The defence is grounded in the conduct of the publisher rather than the content of the publication: *Lougheed Estate*, at para. 169.

[52] The test for responsible communication is set out in *Grant*, at para. 98. First, the publication must be on a matter of public interest. Second, the defendant must show that publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances.

[53] The principles governing the defence of qualified privilege are set out by the Court of Appeal in *Martin v. Lavigne*, 2011 BCCA 104 [*Martin*], at para. 33:

[33] The defence of qualified privilege arises at common law when the defamatory words are published in a manner and at a time that is “reasonably appropriate in the context of the circumstances existing on the occasion when that information was given”: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 147. In *Hill*, the Supreme Court of Canada summarized the common law defence of qualified privilege as follows:

[143] Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. As Lord Atkinson explained in *Adam v. Ward*, [1917] A.C. 309 (H.L.), at p. 334:

... a privileged occasion is ... an occasion where the person who makes a communication has an

interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

...

[144] The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with malice. Where the occasion is shown to be privileged, the bona fides of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff.

[Emphasis in *Martin*.]

The Parties' Positions

[54] Dr. Weaver submits that the inferential meaning of the words complained of in the Article is defamatory in that they convey to readers that Dr. Weaver is both incompetent and corrupt. He submits that the allegations contained in the Article struck at the heart of his role as a teacher and scientist.

[55] Dr. Weaver further submits that Dr. Ball has failed to establish the requisite elements of any of the defences advanced. Dr. Weaver seeks an award of general damages as well as aggravated damages.

[56] Dr. Ball submits that the Article is not defamatory in that a reasonable and right-thinking reader would not interpret the words used as an attack on the reputation of Dr. Weaver. Further, while the Article mentions Dr. Weaver, its focus is on climate science and politics more generally and thus it is not "of and concerning" Dr. Weaver. Dr. Ball also submits that there is no evidence of publication within this Court's jurisdiction, specifically, there is no evidence that anyone other than Dr. Weaver read the Article in BC.

[57] Alternatively, Dr. Ball relies on the defences of fair comment, qualified privilege and responsible communication. He submits that the statements made in the Article are clearly opinions on a matter of public interest. He submits further that

both he and Canada Free Press apologized to Dr. Weaver and that Dr. Weaver has suffered no loss, either financial or reputational.

Analysis

General Observations About the Article

[58] Before turning to the elements of the tort of defamation, it is first worth making some general observations about the Article, given that the impugned words must be considered in the context of the Article as a whole.

[59] I accept Dr. Ball's characterization that the Article is an opinion piece directed at an issue of public interest, namely, climate change and the role of humans in contributing to global warming. While Dr. Weaver is mentioned in the Article, he is not its primary focus.

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

- a) He purports to cite a paper from Michigan State University stating that most college students do not understand the scientific basis of the carbon cycle, when in fact, he was referring to an online article written by a professor of education who was describing a study published in the science journal BioScience;
- b) He suggests that Dr. Weaver has consistently refused to debate the climate change issue, an allegation not borne out in the evidence;
- c) When describing his presentation at UVIC, he alleges that Dr. Weaver's students showed up to disrupt the presentation, which again, was not established on the evidence, and Dr. Ball had no basis for making that allegation in the Article; and
- d) He alleges that Dr. Weaver had announced his intention to withdraw from the next IPCC and had advocated for the resignation of the IPCC

chairman. Dr. Ball said he took this information from a newspaper article, the veracity of which he did not confirm, and which was disputed by Dr. Weaver.

[61] While each of these errors, looked at individually, may seem quite minor, collectively, they illustrate that Dr. Ball's approach to gathering facts in support of his opinion or thesis is less than rigorous.

[62] Dr. Ball is also less than forthright in the Article about his interaction with Dr. Weaver. He states that he met with Dr. Weaver in his office at Dr. Weaver's invitation and he recounts a rather odd conversation about whether he was recording their conversation. He fails to disclose however, that this meeting occurred in 1997, over thirteen years prior to the date on which he wrote the Article. I note that Dr. Weaver denies Dr. Ball's version of that conversation. Dr. Ball also fails to disclose the subsequent email exchange, referred to above, at para. 12, in which the two men engaged in a lengthy debate.

[63] While Dr. Ball presents his central thesis that climate science has been corrupted by politics, the Article offers little in the way of support for that thesis, apart from vague references to missing or falsified data and political manipulation, unsubstantiated and erroneous references to Dr. Weaver as referred to above, and a recommendation that people read a 45-year-old text on climate science written by Professor Hubert Lamb.

[64] Overall, even as an opinion piece, the Article presents as poorly written and it provides little in the way of credible support for Dr. Ball's thesis.

Are the Words Defamatory?

[65] In his notice of civil claim, Dr. Weaver alleges the following inferential meanings of the impugned words set out in the Article:

- a) He is not competent or qualified to teach climate science to university students;

- b) He cheated Canadian taxpayers by accepting public funding for climate science research although he has little or no knowledge about climate science;
- c) In the meeting in his office with Dr. Ball, he displayed symptoms of paranoia because he fears his incompetence, lack of academic qualifications and corrupt exploitation of the Canadian taxpayer will be exposed;
- d) He bribed university students with research funds so they would participate in useless computer modeling studies which had little scientific value, with the objective of continuing to receive unwarranted personal financial benefit from government funding;
- e) He dishonestly claimed on his website to be a “climatologist” but removed that claim when challenged by Dr. Ball;
- f) He shuns involvement in public debate about global warming because it would publicly expose his professional incompetence, his inadequate knowledge about climate science, and his corrupt exploitation of public resources;
- g) He shamefully conspired to have his students interrupt Dr. Ball’s presentation at UVIC in order to suppress the truth by preventing honest and open debate about the existence of global warming and/or whether humans are causing or contributing to global warming;
- h) He shamefully conspired with his students to deter people from attending Dr. Ball’s UVIC presentation in order to stifle Dr. Ball’s views and prevent people from learning that his views on global warming have no scientific basis;

- i) He teaches his students little or nothing about climate science because he lacks the requisite knowledge, does not have academic qualifications, is nothing more than a computer technician, and is blinded by personal bias;
- j) He knows that the reports of the IPCC concerning global warming are unscientific and corrupt, and is therefore dishonestly trying to dodge personal responsibility for his involvement in those reports by dissociating himself from the IPCC; and
- k) He dishonestly obtained substantial public funding from Environment Canada for climate science research despite knowing that he lacked the necessary education, training, and intelligence to carry on competent research.

[66] I agree with Dr. Ball that many of the meanings advanced by Dr. Weaver are extreme and are not borne out when the words are considered from the perspective of a reasonable, right-thinking reader. This requires the court to assess the words objectively, and not to attribute the worst possible meaning or the meaning that might appear to the plaintiff or a person with an overly fragile sensibility (*Color Your World*, at para. 15).

[67] Specifically, I do not accept that the Article, read in its entirety and properly construed, alleges dishonesty on Dr. Weaver's part or attacks his character in the sense of imputing moral fault or blameworthiness. For example, despite the inferential meanings advanced by Dr. Weaver, there is no allegation, explicit or implicit, that Dr. Weaver cheated taxpayers, dishonestly obtained public funding or shamefully conspired with his students to disrupt Dr. Ball's presentation to suppress Dr. Ball's views.

[68] In para. 8.1 of his amended response to civil claim, Dr. Ball pleads that the gist or "sting" of the Article is as follows:

The plaintiff is qualified by conventional standards to teach climate science but should not be qualified because the conventional experience and training of climate science has been corrupted by political advocacy and limited by

inadequate data, and his students have accordingly been taught a biased perspective.

[69] Dr. Ball submits that the meaning conveyed in the Article, as reflected in para. 8.1, is that conventional climate science has been corrupted by political advocacy and is limited by inadequate data, and that accordingly, Dr. Weaver, as a supporter of the conventional view, has taught his students a biased perspective.

[70] Dr. Weaver seeks to put a different meaning on para. 8.1. He submits that para. 8.1 alleges that he has been corrupted by political advocacy, both his own and that of others like Maurice Strong, who is referenced in the Article. Dr. Weaver relies on a statement made by the agent for Dr. Ball's counsel who appeared in Chambers on Dr. Ball's application to amend his response to civil claim and who is recorded in the transcript as saying that the "defendant's meaning is that Dr. Weaver was corrupted by political advocacy and limited by inadequate data, and his students have accordingly been taught a biased perspective".

[71] I do not read para. 8.1 this way, and counsel's paraphrasing of that paragraph in court does not displace the actual language used. In my view, para. 8.1, as interpreted by Dr. Ball, accurately captures the sting of the Article.

[72] That is not to say that the Article is wholly benign as it relates to Dr. Weaver. On Dr. Ball's own interpretation, the Article suggests that Dr. Weaver is not competent to teach climate science or, at least, teaches it from a biased perspective. The Article suggests further that Dr. Weaver would not be qualified to participate in a multi-disciplinary panel on climate science.

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

[74] However, not every derogatory statement is defamatory. The test again is whether the impugned words genuinely threaten the plaintiff's actual reputation (*Weaver*, at para. 68). Here, I am not satisfied that the impugned words of the Article reach that level. I reach this conclusion for the following reasons.

[75] First, as discussed above, the Article is poorly written and does not advance credible arguments in favour of Dr. Ball's theory about the corruption of climate science. Simply put, a reasonably thoughtful and informed person who reads the Article is unlikely to place any stock in Dr. Ball's views, including his views of Dr. Weaver as a supporter of conventional climate science. In *Vellacott v. Saskatoon Star Phoenix Group Inc. et al*, 2012 SKQB 359 [*Vellacott*], the court found that certain published comments were not defamatory because they were so ludicrous and outrageous as to be unbelievable and therefore incapable of lowering the reputation of the plaintiff in the minds of right-thinking persons (at para. 70). While the impugned words here are not as hyperbolic as the words in *Vellacott*, they similarly lack a sufficient air of credibility to make them believable and therefore potentially defamatory.

[76] Moreover, as noted above, the Article is clearly an opinion piece, and statements of opinion are generally evaluated differently than statements of fact. As stated by Mr. Justice Lebel in *WIC Radio*, at para. 71 of his concurring reasons:

[71] Although distinguishing facts from comment may sometimes be difficult, a comment is by its subjective nature generally less capable of damaging someone's reputation than an objective statement of fact, because the public is much more likely to be influenced in its belief by a statement of fact than by a comment. ...

[77] In my view, it is very unlikely that the Article and the opinions expressed therein had an impact on the views of anyone who read it, including their views, if any, of Dr. Weaver as a climate scientist. Rather, the reasonably thoughtful and informed reader would have recognized the Article as simply presenting one side of a highly charged public debate.

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

[79] The issue of climate change is a matter of public interest and, as noted, Dr. Weaver has been at the forefront of public discussion. It has long been recognized that where someone enters the public arena, it is to be expected that his or her actions and words will be subject to robust scrutiny and criticism. For example, in *Lund v. Black Press Group Ltd.*, 2009 BCSC 937 [*Lund*], Mr. Justice Bracken stated, at para. 123:

[123] It is important to any community that matters of public interest are debated freely and openly. Sometimes, in the heat of discussions over a controversial issue where strong personal differences exist, persons on one side or other of the debate make comments that offend. But the fact that they offend is not enough. The comments must go beyond strong criticisms of a public man acting in his capacity as a public official. ...

[80] Similar observations were made by Chief Justice Nemetz in *Vander Zalm*, at 535 and 536. While the plaintiffs in both *Lund* and *Vander Zalm* were elected officials, in my view, the principle applies with equal force to others who actively engage in matters of public interest.

[81] In *WIC Radio*, Justice Lebel again, in his concurring reasons said, at paras. 74-75:

[74] Members of the public will generally have a more solid basis on which to evaluate a comment about a public figure than one about someone who is unknown. Thus, although public figures are certainly more open to criticism than those who avoid the public eye, this does not mean that their reputations are necessarily more vulnerable. In fact, public figures may have greater opportunity to influence their own reputations for the better.

[75] People who voluntarily take part in debates on matters of public interest must expect a reaction from the public. Indeed, public response will often be one of the goals of self-expression. In the context of such debates (and at the risk of mixing metaphors), public figures are expected to have a thick skin and not to be too quick to cry foul when the discussion becomes heated. This is not to say that harm to one's reputation is the necessary price of being a public figure. Rather, it means that what may harm a private individual's reputation may not damage that of a figure about whom more is known and who may have had ample opportunity to express his or her own contrary views.

[82] The law of defamation provides an important tool for protecting an individual's reputation from unjustified attack. However, it is not intended to stifle debate on matters of public interest nor to compensate for every perceived slight or to quash contrary view points, no matter how ill-conceived. Public debate on matters of importance is an essential element of a free and democratic society and lies at the heart of the *Charter* guarantee of freedom of expression. As Justice Lebel observes, such debate often includes critical and even offensive commentary, which is best met through engagement and well-reasoned rejoinder. It is only when the words used reach the level of genuinely threatening a person's actual reputation that resort to the law of defamation is available. Such is not the case here.

[83] In summary, the Article is a poorly written opinion piece that offers Dr. Ball's views on conventional climate science and Dr. Weaver's role as a supporter and teacher of that science. While the Article is derogatory of Dr. Weaver, it is not defamatory, in that the impugned words do not genuinely threaten Dr. Weaver's reputation in the minds of reasonably thoughtful and informed readers. Dr. Weaver has therefore failed to establish the first element of the defamation test.

[84] Given this finding, I need not consider whether Dr. Weaver has established that the Article was published in the sense that it was downloaded and read in BC by anyone other than him. I also need not address the defences raised by Dr. Ball.

Conclusion

[85] Dr. Weaver's claim is dismissed. If the parties cannot agree on costs, they may make arrangements to speak to the issue.

"Skolrood J."

Schedule "A"

Corruption of Climate Science Has Created 30 Lost Years

By Dr. Tim Ball Monday, January 10, 2011

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

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

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

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

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

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

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

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

Over the years Weaver consistently refused a debate. When a students [sic] group arranged one at the University of Victoria he refused to participate with his standard line about only dealing with “working” climatologists. His students showed up at my presentation and were talking to students outside the door, apparently attempting to

deter them from entering. When they all finally came in they tried to interrupt the proceedings by constantly asking questions. They even had laptops and challenged with Internet sites supposedly contradicting what I said. It was shameless and not surprisingly their interpretation of events appeared on a smear blog site. For example, I showed the Milankovitch Effect and said it was not in the Intergovernmental Panel on Climate Change (IPCC) computer models. One student said he worked with the models and it is included. There's no doubt it is in some climate models, but not those of the IPCC.

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

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

A former editor of an enlightened environmental journal said we need a committee of scientists from the many disciplines involved in climate science. Such a committee existed 25 years ago, and produced groundbreaking work. It was a joint project funded by The National Museum of Canada and Environment Canada under the title "*Climatic Change in Canada During the Past 20,000 years.*" Each year a specific topic was considered and scientists presented material that was published in *Syllogeus*. For example, *Syllogeus 5* examined *Critical Periods in the Quaternary of Climatic History of Northern North America*. All the problems that plague climate

science such as tree rings, ice cores, circulation patterns and proxy data, among many others, were identified and researched. In the last meeting, I was elected Chair, and in my acceptance speech said, we need to consider carefully and scientifically the claims of global warming. Environment Canada cut the funding because it challenged the political position that agency had already taken; the project died. Canada should reconstitute it because it was producing useful and non-political science – supposedly Weaver would now approve, but I don't think he's qualified to participate.

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

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

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