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Liability may lurk in the vitriol of reader comments

Score one for science, zero for journalistic integrity and a point for an interesting advance in the law of defamation.

The British Columbia Supreme Court found the *National Post* and three of its reporters liable for defaming B.C. climate scientist Andrew Weaver, in a series of articles that suggested that he distorted scientific data to promote a public agenda on climate change and benefit from government funding.

The four stories at issue in *Weaver v. Corcoran*, 2015 BCSC 165 followed a series of earlier pieces in which the *Post* took aim at the science – and scientists – behind research on global warming. Weaver, who had engaged in a dialogue with the reporters over the stories and elicited published apologies, was eventually pushed too far, and sued for defamation.

Justice Burke had no trouble finding that the words complained of in the four articles were defamatory. She found that they lowered Weaver's reputation in the eyes of a reasonable person, the words in fact referred to Weaver, and that they were published. Her analysis on the first point gave the defendants a tough road to climb in mounting any defence of fair comment:

> 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.

Indeed, in dealing with fair comment, Justice Burke found that the defendants failed to prove that the facts they were relying on were true. To the contrary, the defendants had "altered the complexion of the facts and omitted facts sufficiently fundamental that they undermine the accuracy of the facts expressed in the commentary".

The case also raised, for the first time in Canada, the question of reader comments, and specifically whether the operator of an Internet forum is liable for third-party postings. Building on

the Supreme Court's decision in *Crookes v. Newton* (2011 SCC 47), which held that hyperlinks are not publications, the Court found that a more nuanced approach was necessary for reader comments where the publication is through a content provider – the *Post* – rather than simply an Internet Service Provider.

Awareness of the nature of the reader posts is necessary to meet the test of publication. Until awareness of the offending posts occurs, the *National Post* was considered to be in a passive role in the dissemination of reader postings and not liable for their content. Once the offensive comments were brought to the paper's attention, however, if immediate action was not taken to deal with them, the newspaper would be considered publishers as of that date.

In this case, while the reader posts were "clearly offensive" and there was no reason for the *Post* to retain comments "of such vitriolic character", they were removed promptly such that the *Post* was not considered to have been their publisher. The question of the defence of fair comment or innocent dissemination of reader comments thus remains to be considered in Canadian law.