

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pritchard v. Van Nes*,
2016 BCSC 686

Date: 20160420
Docket: S28019
Registry: Chilliwack

Between:

Douglas James Pritchard

Plaintiff

And

Katherine Anne Van Nes (Vaney)

Defendant

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Plaintiff:

B. Vickers

Appearing on her own behalf:

K.A. Van Nes

Place and Dates of Trial:

New Westminster, B.C.
October 7 and 8, 2015

Place and Date of Judgment:

Chilliwack, B.C.
April 20, 2016

Introduction

[1] The plaintiff, Mr. Pritchard, is a school teacher. He and his family have been neighbours of the defendant Ms. Van Nes' family since 2008. There have been tensions between them since 2011. Those tensions have given rise to allegations of the defendant using her property in such a manner as to constitute a nuisance, interfering with the plaintiff's enjoyment of his property.

[2] The tensions also led to the defendant making a number of postings concerning the plaintiff on the internet social platform Facebook, on June 9, 2014. The comments included statements calling Mr. Pritchard a "nutter" and a "creep", and accusing him of using a system of cameras and mirrors to keep her backyard, and her children, under 24-hour surveillance. Ms. Van Nes had more than 2,000 Facebook "friends", any of whom may have had copies of Ms. Van Nes' posts transmitted to their own Facebook pages. Ms. Van Nes also had her privacy settings set to "Public", allowing her posts to be viewed not only by her more than 2,000 "friends", but by all Facebook users. Numerous comments made by Ms. Van Nes' "friends" contained more explicit denunciations of the plaintiff's alleged behaviour.

[3] In totality, the posts on the defendant's Facebook page made by the defendant and by others, in their natural meaning and by innuendo, bore the meaning that the plaintiff was a paedophile.

[4] The defendant's initial post to her Facebook page was copied by one of the defendant's "friends" and forwarded to the principal of the school where the plaintiff teaches.

[5] I will say at the outset that the defendant's allegations concerning Mr. Pritchard's behaviour and these attacks on his character were completely false and unjustified. Mr. Pritchard has, as a consequence of the defendant's thoughtless, reckless actions, suffered serious damage to his reputation, and for the reasons set out herein he is entitled to a substantial award of damages.

[6] Mr. Pritchard filed a Notice of Civil Claim on June 13, 2014 against Ms. Van Nes, claiming damages for nuisance and defamation. Ms. Van Nes did not defend the action, and on July 29, 2014 Mr. Pritchard obtained default judgment against her for damages and costs to be assessed.

[7] In this trial, Mr. Pritchard seeks orders for a permanent injunction, assessment of damages, and special costs. Ms. Van Nes attended at trial. She did not seek an adjournment and did not seek to have the default judgment set aside. Despite her not having defended the action, she was granted leave to cross-examine witnesses and to make a closing submission to the Court.

Background

[8] At the time of these events, in 2014, Mr. Pritchard was a 52 year-old middle school music teacher, having been in that position for about 3 years. He holds Bachelor of Arts, Bachelor of Education and Master of Education degrees. The school has about 600 students.

[9] In 2008, Mr. Pritchard, his wife, and two sons moved in next door to Ms. Van Nes and her family in Auguston, a subdivision of Abbotsford, B.C. Both parties continue to reside as neighbours till this day. At that time he was working for the RCMP as a curriculum developer. He did volunteer work with the middle school's jazz band program when one of his sons was attending there, became attracted to the music program, and eventually applied for and obtained a teaching position at the school. Mr. Pritchard continues to work at the middle school today.

[10] Prior to the Facebook post, Mr. Pritchard actively participated in extra-curricular activities, working with junior and senior concert bands involving over 100 students, a student choir, a jazz band, a rock band, and three drum lines involving over 70 students. As testified to by his school principal, Mr. Horton, the music program at the middle school grew significantly because of Mr. Pritchard's efforts. As evidenced in appreciation letters Mr. Pritchard received prior to the Facebook post, he has been much admired by his students, the students' parents, and his colleagues.

Evidence as to Nuisance Claim

[11] Problems between the two neighbours began in 2011 when Ms. Van Nes and her husband installed a large fish pond along her rear property line. The structure is on two levels, with water flowing along its length of approximately 20 or 25 feet, and flowing over two waterfalls. The

nuisance claim is largely based on the constant noise emanating from the water cascading over the rocks, which the plaintiff and his wife testified has disrupted their sleep. The plaintiff's evidence is that the waterfall has run day and night almost continuously since its construction in 2011; there was a brief period in the summer of 2012, when the defendant shut off the flow of water at night after the plaintiff complained to the municipality, but its operation was soon restored to 24 hours a day, 7 days a week.

[12] The plaintiff testified that during winter months he has been able to mitigate the effect of noise by shutting his windows. However, during the summer months he is left in a dilemma, as, without air conditioning, he is left to choose between closing the windows and overheating or having to endure the constant noise from the waterfalls.

[13] After the plaintiff began to complain to the defendant about the waterfalls, their relationship deteriorated. There followed a number of incidents of unneighbourly conduct on the part of the defendant and her family members. The nuisance claim is also based in part on these incidents, which the plaintiff submits were done with the intent of interfering with his use and enjoyment of his property. A detailed recounting of these events is unnecessary, but some description will assist in delineating the extent of the nuisance claim as a whole and in providing context for the defamatory Facebook posts. Those incidents, from the testimony of the plaintiff and his wife consisted of the following:

- a) The Van Nes' would host late night parties, which disrupted the sleep of Mr. Pritchard and his family. On one occasion in the summer of 2012, a few days after the plaintiff made a second complaint to the Van Nes' about the waterfalls, a loud explosion was heard in Ms. Van Nes' backyard during a party; the next day, she told the plaintiff it had been a ¼-stick of dynamite;
- b) Ms. Van Nes' two sons on more than one occasion would enter Mr. Pritchard's backyard without permission;
- c) The properties were not fenced, and on numerous occasions the Van Nes' dog wandered into his yard and defecated. Ms. Pritchard testified that she has made 24 complaints about the dog to the municipality: 10 before the June 2014 Facebook posts, and another 14 between June and October or November 2014; and,
- d) On several occasions, the Van Nes' would park one of their vehicles, or would allow visitors to park their vehicles, in front of a fire hydrant located in the plaintiff's front yard, partially blocking or impeding access to the plaintiff's driveway. Some of these incidents were reported by the plaintiff to the police. On the last of these occasions, Mr. Pritchard had been out driving with his teenage son, who was preparing for his driver's license road test. On returning home, they found their driveway had been partially blocked by a pickup truck, and his son had to manoeuvre around it. As soon as they were parked, the defendant appeared and began swearing and screaming at Mr. Pritchard's son, "My husband is parked illegally ... go ahead and call the [expletive] police"; as if goading the Pritchards to make yet another complaint with the authorities.

[14] I would note that the timing strongly suggests this incident was a motivation for the initial Facebook posts, which were made two days later. In her statement to the Court at the conclusion of the trial, Ms. Van Nes characterized her posting to Facebook as a form of “venting”. The fact that she was shouting and swearing, without provocation, seems to indicate, if not hostility, then at least a great deal of frustration with the state of the relationship with her neighbours, and the timing would appear consistent with her choosing to use Facebook as an outlet to express her feelings concerning same.

[15] Given the entry of the default judgment, I take the allegations of fact with respect to the private nuisance claim in the Notice of Civil Claim to be unchallenged, and accept them as true: *Sands and Associates Inc. v Dextras*, 2009 BCCA 430, at paras. 13-14; and *Learmouth v. Statham*, 2014 BCSC 19, at para 11.

[16] Mr. Pritchard seeks a permanent injunction preventing Ms. Van Nes from keeping her waterfall operating from 10pm until 7am, as well as an award of general damages for his nuisance claim as a whole.

Evidence as to Defamation Claim

[17] There are three other facts which must be understood as providing context to the Facebook posts.

[18] The first is that in response to a request from the municipality that she document her various complaints about the defendant’s family with photographs, Ms. Pritchard took a few photographs and videos of the waterfall and of the defendant’s dog being in her backyard, using her cell phone. The Pritchards do not have, and have not ever had, any form of video surveillance system monitoring the defendant’s property or their own property.

[19] The second is that Ms. Pritchard had hung a decorative mirror from the eaves at the rear of her house. This was intended only as a form of *feng shui* ornamentation. It was not a device to monitor the defendant’s property.

[20] The third is that between the parties’ backyard property line and the edge of the waterfall structure closest to the plaintiff’s property, the defendant had positioned a children’s “play centre” with swings, slide and a climbing apparatus. The defendant’s posts, as will be seen, stated that Mr. Pritchard had asked the municipality to require the Van Nes’ to position the play centre closer to his property. Mr. Pritchard denies this, and I accept his evidence.

[21] On June 9, 2014, Ms. Van Nes published a Facebook post with two photographs of Mr. Pritchard’s backyard and the aforementioned decorative mirror. Superimposed on the photos were the words:

My neighbour has mirrors hanging outside his home...Doug also videotapes my kids in the backyard 24/7! Well Doug ... Meet my mirror!

[22] She also posted to her Facebook page the following remarks (with punctuation as in the original):

Some of you who know me well know I've had a neighbour videotaping me and my family in the backyard over the summers.... Under the guise of keeping record of our dog...

Now that we have friends living with us with their 4 kids including young daughters we think it's borderline obsessive and not normal adult behavior...

Not to mention a red flag because Doug works for the Abbotsford school district on top of it all!!!!

The mirrors are a minor thing... It was the videotaping as well as his request to the city of Abbotsford to force us to move our play centre out of the covenanted forest area and closer to his property line that really, really made me feel as though this man may have a more serious problem.

[23] Over the next 21 hours, this posting prompted 57 further posts – 48 made by 36 different “friends” of the defendant, and 9 by the defendant herself. Some of the more egregious of the postings are as follows (with spellings and punctuation as in the originals):

a) From the defendant:

I'm guessing I may have to move the play centre if the city deems that necessary ... however it will most likely get move to somewhere else as I refuse to put the kids closer to this nutters yard.

b) From a “friend”:

If it's on covenanted land, that makes sense. But I'd still question if what he's doing is legal.

To which the defendant replied:

I know the police says it is, but so disturbing to hear the video camera moving back and forth when I'm close to the property line.

I interject to note there was no such video camera.

c) From a “friend”:

creepy...

d) From a “friend” who the plaintiff, in his testimony, identified as a retired Abbotsford school principal, a city councillor, and a father of one of his students:

in order for him to video your children I believe he has to have your permission to do so?? You may want to check that but other than that ... send an enraged Father!

e) From a “friend”:

Katie WTF!!!!!! no one is thinking this is out of norm in the law world cmon on!!!!
freeeeeeeeky

f) From a “friend”:

Sounds like a freak to me!

g) From a “friend”:

#creeper

h) From a “friend” who the plaintiff, in his testimony, identified as a local real estate agent – a point of some significance, as Ms. Pritchard works in that industry, as a mortgage broker:

This is extremely disturbing, and maddening! If you have some kind of intervention and would like more of a presence, I am more than happy to show up.

i) From a “friend”:

This is abnormal behaviour. Contact police again until they come talk to him.

j) From a “friend”:

Yikes. Creepfest.

k) From a “friend”:

I’m sure the local police would like to chat with him. Scumbag!

l) From a “friend”:

OMG... this guy was my neighbour it would ‘his’ nightmare!!!

I have a lot of tolerance but not for someone doing this... call your local peeps and the local media. Guarantee the huge attention will at least embarrass him.

To which the defendant replied:

Super stressed! I was just told my oldest will be taught music by him in middle school... Ewe

m) From a “friend”:

Sounds like he’s a total douchebag. You should get a camera and set it to watch him, and live feed it to the internet as well. But play hardcore gay porn sounds over the video feed...

To which the defendant replied:

Oh Robert you make me laugh man!

n) From a “friend”:

sounds like a person whom is very mentally disturbed//pedo wise ..scary [expletive]

o) From a “friend”:

Sounds like a peeper to me. This way beyond creepy! Would be tempted to put a sign on the lawn with an arrow pointing at his house that says “John Smith is video taping my children and there is no legal way to stop him” See what the general public does with that.

To which the defendant replied:

I just find it creepy that someone is willing to put so much time and energy into catching a dog wandering, child misbehaving or parking violation... Not saying he’s 100% a dirty birdy, just a creep

[24] As may be seen from the foregoing quotations, Mr. Pritchard was expressly referred to as a “pedo”, “creeper”, “nutter”, “freak”, “scumbag”, “peeper” and a “douchebag”.

[25] Two particularly disturbing posts were from a “friend” of the defendant identified as “Rick Parks”. They stated:

why don’t you just send this picture to his principal? He may have a legal right to video tape your children but is he not responsible as a teacher to not be a “creep” with his current and future students. Use his position as a teacher against him. I would also send it to the newspaper. shame is a powerful tool.

And:

PS I have shared this picture on my own timeline with my own thoughts – I would encourage others to do so as well. Why don’t we let the world know about Doug and his actions so other children, who he may teach in the future, are aware of what he does in his spare time.

The latter post concluded with a “smiley face” emoticon.

[26] It would appear that this Mr. Parks took it upon himself to attempt to shame the plaintiff, as on the morning of June 10, 2014, the day after the initial post by the defendant, a “Rick Parks” sent an email message to the plaintiff’s school principal. The email attaches the image, from Ms. Van Nes’ initial post, of the mirror, with the superimposed print. The email was date stamped as having been sent at 11:28 a.m., which would appear to correspond to approximately an hour to an hour-and-a-half after the two “Rick Parks” posts were made on Ms. Van Nes’ page. It bears the subject line, “Subject: Mr. Doug Pritchard”. It reads:

Hello Dexter

I am just letting you know that this photo is making its way around facebook as we speak. The photo shows a picture of one you teacher’s homes. The photo also shows that he has set up mirrors and a video camera in order to spy on his neighbours. I have no idea why he would do this but people are coming to their own conclusions very quickly. (apparently he has issues with their dog) The home on which he is spying contains small children. these children will be attending your school in the very near future and will be forced to take music with Doug. I hope you can imagine how unsettled that makes the mother of these children feel.

I think you have a very small window of opportunity before someone begins to publicly declare that your school has a potential paedophile as a staff member. They are not going to care about his reasons – they care that kids may be in danger.

I am not sure how you want to or can deal with this but it is at your doorstep whether you like it or not.

I have no connection to your school or to Doug. I do know the neighbor.

I wish you all the best as you deal with this.

[27] It bears repeating that contrary to what Mr. Parks said in his email, the photo posted on the defendant’s Facebook page did not show that the plaintiff had set up mirrors and a video camera to spy on the defendant.

[28] On the afternoon of June 10, 2014, a member of the community, Ms. Regnier, went to the school to tell Mr. Pritchard about the posts. Ms. Regnier’s two children had been students of the plaintiff and had participated in his extra-curricular band and drum line programs. She felt that he was an excellent teacher, someone who, as she testified, had brought the music program to life. She gave evidence that she went to the school to tell Mr. Pritchard there were posts on Facebook accusing him of paedophilic-like behaviour. Ms. Regnier did not know Ms. Van Nes; she testified that some of her own “friends” had commented on Ms. Van Nes’ post, and their comments showed up in Ms. Regnier’s “news feed”. She recognized the neighbour being described in the posts as Mr. Pritchard. She perceived that Mr. Pritchard was being accused of being a paedophile. Ms. Regnier accompanied Mr. Pritchard to the office of the school principal, Mr. Horton, to inform him.

[29] Mr. Horton testified that had, by this time, received Mr. Parks’ email. Mr. Horton contacted his superior, who, Mr. Horton testified, seemed shocked, asking Mr. Horton whether he believed the allegations; Mr. Horton said he did not, although he testified that he was concerned as the allegations reflected poorly on him and the school. He testified that if the allegations were substantiated, Mr. Pritchard would have had his teaching license revoked.

[30] Mr. Pritchard then telephoned his wife, who accessed Ms. Van Nes’ Facebook page and printed out the posts and Ms. Van Nes’ “friends” list. The plaintiff and his wife attended at a police

station to file a complaint.

[31] That evening, as Mr. Pritchard testified, Ms. Van Nes' husband came to their door. Mr. Pritchard asked him to leave their property; his response was, "What's she done now?" Again, Mr. Pritchard asked him to leave, and he did. A short time later a police officer came by the plaintiff's home in a cruiser to take the details of the complaint. All of the offending posts on Ms. Van Nes' page could still be viewed on Ms. Pritchard's phone just before the officer arrived, but by the time they attempted to access the page again to show the content to the officer, the posts were no longer accessible, having apparently been deleted. That was at about 8:30pm on June 10, 2014. The posts had been on Ms. Van Nes' Facebook page for roughly 27½ hours.

[32] However, the deletion apparently accomplished nothing in respect of the copies of Ms. Van Nes' posts that had by this time proliferated over Facebook. This would have included copies that made their way onto the Facebook pages of the defendant's "friends" who provided comments, and potentially other "friends" of hers whose own pages were set up to receive notifications of posts made by her. Copies also would also have spread to the pages of any others with whom the initial posts had been "shared", or persons such as Ms. Regnier who had had their Facebook page configured to receive posted comments of the defendant's "friends". Mr. Pritchard testified that the following day, June 11, after Ms. Van Nes had deleted the comments from her own page, Ms. Regnier returned to the school and showed Mr. Pritchard that Ms. Van Nes' initial post with the photograph of the mirror, and the comment that he was videotaping her kids "24/7" could still be seen on Ms. Regnier's own Facebook page. The phrase "gone viral" would seem to be an apt description.

[33] Mr. Pritchard testified as to the impact this incident has had. There was at least one child of one of Ms. Van Nes' "friends" who commented on the posts, who was removed from his music programs. The next time he organized a band trip out of town and sought parent volunteers to be chaperones, he was overwhelmed with offers; that had never previously been the case. He feels that he has lost the trust of parents and students. He dreads public performances with the school music groups. Mr. Pritchard finds he is now constantly guarded in his interactions with students; for example, whereas before he would adjust a student's fingers on an instrument, he now avoids any physical contact to shield himself from allegations of impropriety. He has cut back on his participation in extra-curricular activities. He has lost his love of teaching; he no longer finds it fun, and he wishes he had the means to get out of the profession. He considered responding to a private school's advertisement for a summer employment position but did not because of a concern that the posts were still "out there". Knowing that at least one prominent member of the community saw the posts and commented on them, he feels awkward, humiliated and stressed when out in public, wondering who might know about the Facebook posts and whether they believe the lies that were told about him.

[34] Mr. Pritchard also testified as to how frightened he was that some of the posts suggested he should be confronted or threatened. Mr. Pritchard and his wife both testified that a short time after the posts, their doorbell was rung late at night, and their car was "keyed" in their driveway, an 80 cm scratch that cost approximately \$2,000 to repair. His wife also testified to finding large rocks on their driveway and their front lawn.

[35] They also both testified that their two sons, both of whom attended the school where their father teaches, are aware of the Facebook posts, and have appeared to be upset and worried as to the consequences.

[36] Mr. Pritchard testified that he thinks it is unlikely that he could now get a job in another school district. He acknowledged that in fact he has no idea how far and wide the posts actually spread, but he spoke with conviction as to this belief, and I find the fact that he holds this belief to be an illustration of the terrible psychological impact this incident has had.

[37] Ms. Pritchard testified as to the reaction of two neighbours, in particular. A couple of weeks after the posts, one neighbour made a remark to her about the plaintiff videotaping children; she denied it, and he replied, "I thought I knew Doug, but I guess I didn't know the other side of him". Another neighbour, a parent of one of her husband's students, said to her a few months later that she had read the posts, and remarked, "You know, your husband could get fired".

[38] Mr. Horton confirmed Mr. Pritchard's evidence of his withdrawal from the school programs, testifying that Mr. Pritchard has cancelled the rock band and jazz band, and reduced his commitment to the choir by 50%. Mr. Horton testified, not surprisingly, that allegations of impropriety towards students, even if unsubstantiated, can end a teacher's career. Principals would avoid hiring a teacher against whom such allegations had been made, even if unsubstantiated. He testified that if he did not know Mr. Pritchard, he would not hire him, based on the kind of allegations that were made against him.

[39] Prior to trial, Ms. Van Nes made no apology to the plaintiff or his family. She deleted the offending posts from her Facebook page, but she has made no positive form of retraction or apology. She has done nothing to counter the effect of her posts having "gone viral". She insinuated in her cross-examination of Ms. Pritchard that she and her husband were unable to apologize because the Pritchards had asked them not to come onto their property; she gave no explanation as to why a letter could not have been sent.

[40] Ms. Van Nes made some remarks at the conclusion of the trial. In respect of the nuisance claim she acknowledged that the dog was her responsibility; it ought to have been kept under better control, and she has now gotten rid of it. She said that the waterfalls had to be run continuously because the structure is a fish pond, but she said she would now do whatever needs to be done to respond to the plaintiff's concerns.

[41] As to the defamatory comments, she acknowledged that "defamation is obviously awful", but she contended that she should not be held responsible for remarks made by others. She said that she was sorry that she used this way to "vent", but said that social media is "a large part of my life". She attempted to justify her belief that she was being watched by the plaintiff, but offered nothing more by way of explanation than her own suspicions or understanding. Her remarks to that effect were not testimony taken under oath and were not subject to being tested through cross-examination, and I give them no weight.

[42] As with the private nuisance claim, given the entry of the default judgment I take the allegations in the Notice of Civil Claim with respect to the defamation claim to be unchallenged, and

accept them as true.

[43] Mr. Pritchard seeks aggravated general damages and punitive damages in respect of the defamatory Facebook posts.

Discussion

Nuisance Claim

Liability for Nuisance

[44] I will note at the outset that in closing submissions counsel for the plaintiff acknowledged that the nuisance allegations are not intended as the real focus of this action.

[45] The principles that underlie claims in nuisance were reviewed by the Supreme Court of Canada in *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, at para. 77:

At common law, nuisance is a field of liability that focuses on the harm suffered rather than on prohibited conduct. Nuisance is defined as unreasonable interference with the use of land. Whether the interference results from intentional, negligent or non-faulty conduct is of no consequence provided that the harm can be characterized as a nuisance. The interference must be intolerable to an ordinary person. This is assessed by considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use and the utility of the activity. The interference must be substantial, which means that compensation will not be awarded for trivial annoyances.

[References omitted.]

[46] The tests, then, are whether Ms. Van Nes' actions interfered with the use and enjoyment of Mr. Pritchard's land, and if so whether such interference was unreasonable.

[47] I find the waterfall structure meets those tests. I do not have the benefit of any objective evidence such as noise level measurements. Nor do I have any evidence from any persons other than the plaintiff and his wife as to the noise level. However, I do not have any reason to conclude that the plaintiff was overly sensitive. On the whole, I accept Mr. Pritchard's evidence that the noise was a substantial interference causing him some distress, discomfort, and annoyance over the past four years. I find that the noise level caused by the waterfalls during the night was unreasonable, by objective standards. The severity of the nuisance, however, falls towards the lower end of the range giving rise to damages.

[48] I also find that, over the period of roughly two years, as alleged, the numerous times that Ms. Van Nes' dog trespassed onto and defecated on the plaintiff's property, constituted a nuisance.

[49] I characterize the misbehaviour of the defendant's sons, the late night noise from parties, and the issues surrounding parking to constitute unneighbourly acts that fall short of being nuisances. I have no doubt that these incidents aggravated the plaintiff and exacerbated his feelings of frustration over the waterfall and the dog, but alone or taken as a whole these unneighbourly acts do not warrant a finding of tortious liability sounding in damages.

Damages for Nuisance

[50] The plaintiff relies on three cases as to quantification of damages for the nuisance claim: *Aschenbrenner v. Yahemech*, 2010 BCSC 905; *Boggs v. Harris*, 2009 BCSC 789; and *Suzuki v. Munroe*, 2009 BCSC 1403.

[51] In *Aschenbrenner*, the plaintiffs moved into a home in Victoria and shortly thereafter installed a hot tub. The humming of the hot tub disturbed their defendant neighbour. The plaintiffs went to great lengths to reduce the noise from the hot tub. They even went so far as purchasing a \$700 new motor that ran quieter, and still the defendant was unsatisfied. The defendant engaged in sustained and numerous incidents of harassing and threatening the plaintiffs. Metzger J. found the defendant meant to annoy or irritate the plaintiffs by placing odorous compost bins next to the property line, subjecting the plaintiffs to compost smells almost on a daily basis. In one instance, the defendant placed fish offal in two compost bins on the hot summer day of the plaintiffs' daughter's graduation party on their back deck, and another time, the defendant made excessive noise moving rocks in the middle of the night. Metzger J. awarded \$2,000 in general damages for the nuisance claim.

[52] In *Boggs*, the plaintiffs moved into a condominium complex and attached to their unit was that of the defendants. Over the period of a little more than two years, the defendants deliberately caused excessive noise in their own unit to annoy the plaintiffs, such as pounding on the floor, on walls, moving and throwing chairs around, and playing loud music. There were at least 10 to 12 occasions of excessive noise. The plaintiffs, who had been in a same-sex relationship for about 30 years, claimed that the intentional nuisance directed at them was as a result of their sexual orientation. The defendants video- and audio-taped the plaintiffs several times, and had several confrontations where the defendants made insulting and offensive remarks against them. Halfyard J. stated that the incidents viewed in isolation were not serious, but they formed part of a lengthy course of misconduct which constitutes nuisance, and awarded \$7,500 for non-pecuniary damages.

[53] *Suzuki* is more factually similar to the present matter. In that case, the parties were, as in this matter, neighbours in a residential suburban community in Coquitlam, B.C. The plaintiffs, husband and wife, claimed that the noise emanating from a central air conditioning unit 18 feet away from the plaintiffs' bedroom window created a nuisance. This went on for a period of approximately 3 years. The plaintiffs' sleep was also disturbed, and the negative impact on the plaintiff wife's health was especially pronounced as the nuisance was a cause of some of her psychiatric challenges. Medical evidence supported her claim.

[54] The plaintiffs had evidence of professionally obtained noise level measurements, which found that the air conditioned produced 51 to 53 decibels. On the evidence, Verhoeven J. found that most people would consider an air conditioning unit operating in excess of 50 decibels only a few feet from their bedroom window as constituting a nuisance. Verhoeven J. ordered \$2,000 as damages to the husband and \$4,000 to the wife, whose distress and suffering was more severe. He acknowledged that the damage award would not eliminate the nuisance, but it was still justified in all the circumstances to provide some solace to the plaintiffs. Verhoeven J. also awarded a permanent injunction that did not allow the defendants to operate the air conditioner above a

certain decibel limit during the nights. He stated that the damage awards would be significantly higher if he were not also granting an injunction.

[55] I do not find the nuisance caused by the waterfall structure entirely similar to the disruption caused by a loud air conditioner near one's bedroom window. The waterfall structure was further away from Mr. Pritchard's bedroom and I would think that the distress and annoyance caused by a motorized sound is more so for ordinary people than that caused by a loud waterfall.

[56] I find a fair award in all the circumstances in respect of that nuisance is \$2,000. In respect of the issues surrounding the defendant's dog, I award a further \$500, for a total damages award in nuisance of \$2,500.

[57] In addition to damages, Mr. Pritchard also seeks a permanent injunction against Ms. Van Nes to require that the waterfall in her backyard cease operating from 10 p.m. to 7 a.m. As an equitable remedy, the court has the discretion to grant the injunction, based on various factors as outlined in *Suzuki* at para. 110: A number of factors are relevant in determining whether or not to grant an injunction. The inadequacy of damages is frequently considered, along with the nature of the plaintiff's injury and the balance of convenience between the parties: Sharpe, *Injunctions and Specific Performance* at paras. 1.60-1.140; *Boggs* at para.141; A.M. Linden & B. Feldthusen, *Canadian Tort Law*, 8th ed. (Markham: LexisNexis Canada Inc., 2006) at 594.

[58] In the present case, I view an award of damages for prospective harm as an inadequate remedy. The plaintiff and his wife are entitled not to have their sleep disturbed. Damages would be poor compensation for the loss of sleep. They are also entitled to the peace of mind that would follow from having the waterfall noise – a constant reminder of the fractious relationship with their neighbour – abated.

[59] I view the balance of convenience as favouring the plaintiffs. The burden imposed on them outweighs, significantly, the esthetic attraction enjoyed by the defendant.

[60] I also note Ms. Van Nes' statement to the court that she will do whatever is required.

[61] There will be a permanent injunction, enjoining the defendant and owners and occupiers of the property on which the defendant's residence is located from operating the waterfall structure between the hours of 10 p.m. and 7 a.m.

Defamation Claim

[62] The Plaintiff pleads that the posts on Facebook, in their natural and ordinary meaning, and by innuendo, meant and were understood to mean, *inter alia*, the following:

- a) that the Plaintiff was stalking and/or was obsessed with the Defendant's children;
- b) that the Plaintiff videotaped children in the backyard at all times;
- c) that the Plaintiff was a paedophile;
- d) that the Plaintiff's character was not of good standing;

- e) that the Plaintiff is dishonest; and
- f) that the Plaintiff acted in a way that should cause him to lose his job or face disciplinary action at his place of employment.

[63] There are three modes in which the defamation took place. There are Ms. Van Nes' own remarks, published by her to her own Facebook page; there is the republication of Ms. Van Nes' remarks, as they propagated through Facebook and, in one case, through email; and there are defamatory remarks made by third parties in reaction to Ms. Van Nes' post. The plaintiff submits the defendant is liable for all defamation that occurred in these three modes.

Defendant's Liability for her own Facebook Posts

[64] The elements required to establish a claim in defamation were summarized in *Grant v. Torstar Corp.*, 2009 SCC 61, at para. 28:

[28] A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed, though this rule has been subject to strong criticism... (The only exception is that slander requires proof of special damages, unless the impugned words were slanderous *per se*... The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.

[Citations omitted.]

[65] I find Mr. Pritchard has proven that Ms. Van Nes' initial Facebook posts and her subsequent replies to her "friends" comments were defamatory, in that they tended to lower the plaintiff's reputation in the eyes of a reasonable person. The ordinary and natural meaning of Van Nes' comments unequivocally described Mr. Pritchard as a "nutter", a "creep", and an abnormal person.

[66] Liability for defamation also arises in this case through the innuendo of the defendant's words. An innuendo is made where the defamatory meaning of words arises from inference or implication: *Hodgson v. Canadian Newspapers Co.*, (1998), 39 OR (3d) 235 (Ont. Gen. Div.); rev'd in part on other grounds, [(2000), 49 OR (3d) 161; leave to appeal ref'd [2000] S.C.C.A. No. 465. The innuendo must be one that a reasonable reader would draw from the words and it must not be one guided by any special knowledge, legal or otherwise: *Gatley on Libel and Slander*, 9th ed. (1998: Sweet & Maxwell), at 82, §3.15.

[67] Ms. Van Nes' initial Facebook posts suggest that Mr. Pritchard is obsessed with videotaping her and her family "under the guise" of keeping a record of her dog. She then mentions that her friends' four children "including young daughters" now reside with her. In this context she refers to his actions as borderline obsessive and abnormal. This implies that he now continuously has children under observation, coupling voyeurism with a prurient interest in young girls.

[68] The next sentence of her initial post supports the innuendo that he is a paedophile; she states there is a "red flag" in that he works for the school district. This term implies that his behaviour is alarming, as if he poses a threat to students.

[69] In the next sentence of the initial post, she reinforces the implied meaning of the foregoing by highlighting the “24/7” videotaping of her children. She then references what she purportedly understood to be his desire that she move the play centre out of the covenanted forest area – which would, it appears, have the effect of moving it closer to his property line – as if moving the children closer, so they could be observed, was his goal.

[70] In Ms. Van Nes’ first reply to her “friends” comments, she says she would refuse to put her kids closer to “this nutters yard”, again underscoring the importance of keeping children away. She says “ewe” at the thought of her oldest child attending music class with him – an expression of disgust and revulsion. What is implied by this expression is that the thought of this man, who she believed had some kind of inappropriate interest in children, being near or close to her child was disgusting and disturbing to her. Underlying that expression, “ewe”, is her assumption that this is how her remark would be understood.

[71] In her final reply comment, and after almost all the more inflammatory replies by her “friends” had been made, Ms. Van Nes makes a failed attempt of softening the impact of her defamatory remarks. She said, “...Not saying he’s 100% a dirty birdy, just a creep”. This comment, I find, only served to reinforce the defamation through innuendo.

[72] The finding of the defendant’s remarks having defamatory meaning by innuendo is also supported by the explicitly defamatory nature of the comments made by her “friends”. They clearly understood her meaning.

[73] Ms. Van Nes clearly identified Mr. Pritchard as the subject of her comments. She identified him by his first name, his occupation, the school and the school district in which he works, and by his position as her next-door neighbour.

[74] Without question, I find that the defendant’s remarks, by their ordinary and natural meaning taken together, and by innuendo, were defamatory in meaning that Mr. Pritchard was a paedophile and was unfit to teach.

[75] Ms. Van Nes’ defamatory comments were published to at least the 37 individuals who replied to her post. They were potentially, depending on notification settings, communicated to all of the defendant’s 2,059 “friends”. They were also potentially communicated to “friends” of the 37 individuals who made replies, such as Ms. Regnier. And they were, given Ms. Van Nes’ failure to use any privacy settings, viewable to the whole universe of Facebook users.

[76] I find Ms. Van Nes liable in damages for her publication of her own defamatory remarks.

Liability for Republication

[77] The plaintiff alleges having been injured as a result of the defamations and all repetitions and republications, and submits that Ms. Van Nes is liable for same.

[78] The law of liability for republication of defamatory statements is as stated by Professor Brown in his text, The Law of Defamation in Canada, 2nd ed. (Scarborough: Carswell, 1994), at 348-350:

Republication occurs where the person to whom the words were originally published communicates them to someone else. The general rule is that a person is responsible only for his or her own defamatory publications, and not for their repetition by others. There is no liability for a republication by a third person that the defendant neither authorized nor intended to be made.

There is no liability upon the original publisher of the libel when the repetition is the voluntary act of a free agent, over whom the original publisher had no control and for whose acts he is not responsible ...

However, there are several exceptions to this rule. The defendant may intend or authorize another to publish a defamatory communication on his or her behalf. Secondly, a defendant may publish it to someone who is under some moral, legal or social duty to repeat the information to another person. Thirdly, a defendant may be liable if the repetition was the natural and probable result of his or her publication. These rules apply only where the information repeated is the same or substantially the same so that the sum and substance of the original charge remains. Once the requirements have been satisfied, the plaintiff is entitled to recover damages from the defendant both for the original publication and for the republication by the person to whom it was initially published.

[Emphasis added; citation omitted.]

[79] There are two forms of republication in the present case: republication within Facebook, and republication through email, specifically Mr. Parks' email to the school principal Mr. Horton.

[80] Mr. Pritchard provided some evidence to the court, based on his personal knowledge, as to the operation of Facebook. No expert evidence was tendered. In my view, social media platforms and applications, Facebook in particular, are so ubiquitous that the court is able to take judicial notice of some aspects of their nature and operation.

[81] First, it is uncontroversial that the distribution of information – comments, photographs, videos, links to items of interest – amongst users is fundamental to the use of a social media platform such as Facebook.

[82] Second, Facebook in particular facilitates such distribution through its structure or architecture. An individual user's posts to their own page are automatically shared with "friends" who are linked to the user's page. As "friends" react by commenting, the "friends'" comments may be spread automatically to "friends of friends". Such comments are solicited implicitly through the medium's tools that allow "Comment" on a post and "Reply" to a comment (not to mention soliciting endorsement through use of the "Like" button). Further distribution may take place through the "Share" function. This is intended only as a generic description; no detailed evidence was presented as to the specific features in operation on Facebook at the time of this incident. Nevertheless, it appears from the evidence that these basic features all played a role in the dissemination of Ms. Van Nes' defamatory remarks.

[83] In my view the nature of Facebook as a social media platform and its structure mean that anyone posting remarks to a page must appreciate that some degree of dissemination at least, and possibly widespread dissemination, may follow. This is particularly true in the case of the defendant, who had no privacy settings in place and who had more than 2,000 "friends". The defendant must be taken to have implicitly authorized the republication of her posts. There is evidence from which widespread dissemination of the defamation through republication may be inferred. There is actual evidence of the republication at least to Ms. Regnier, who learned of the posts through the comments posted by several of her own "friends". There is the indirect evidence

through the comments made by neighbours who subsequently encountered Ms. Pritchard and remarked on the posts. And there is the possibility, at least, of republication having been made on Facebook by Mr. Parks; he stated in one of his comments that he had shared her post on his own Facebook page. Whether he did in fact do so has not been proven. If he did, such was implicitly authorized by Ms. Van Nes.

[84] All of this republication through Facebook was the natural and probable result of the defendant having posted her defamatory remarks. Ms. Van Nes is liable for all of the republication through Facebook.

[85] This brings us to the question of the defendant's liability for other forms of republication, specifically through email. Mr. Parks, after posting to Ms. Van Nes' timeline his encouragement to spread the news, stating "why don't we let the world know", then republished by sending to Mr. Horton the email message attaching Ms. Van Nes' photo of the mirror. Mr. Parks made editorial comments in that email, stating that the plaintiff was spying and referring to him as someone who would be understood by the public to be a potential paedophile; his editorialization merely summarized and made explicit the innuendo Ms. Van Nes had engaged in.

[86] I make no finding as to whether Mr. Parks was justified in reporting the activity on Ms. Van Nes' Facebook page to Mr. Pritchard's school principal. That issue, of course, is not before me. The essential point, with respect to the liability of the defendant, is that through the email Mr. Parks was republishing the defendant's own attacks on Mr. Pritchard's character.

[87] In my view, the implied authorization for republication that exists as a consequence of the nature of social media, and the structure of Facebook, is not limited to republication through the social media only. Ms. Van Nes ought to have known that her defamatory statements would spread, not only through Facebook. She is liable for republication through the email on that basis.

[88] I further find that Mr. Parks' statement, in his comment on the defendant's Facebook page, "why don't we let the world know", coupled with his statement that he had shared her post on his own page, served as effective notice to Ms. Van Nes of Mr. Parks having an intention to republish. This basis for a finding of liability requires consideration of whether that statement actually came to the attention of Ms. Van Nes; or, if it did not, whether that knowledge is to be imputed to her.

[89] I have no direct evidence as to whether the defendant actually viewed Mr. Parks' "let the world know" comment, either when he posted it to her page, when she next visited her page to post a reply, or at any other time prior to the email being sent to Mr Horton. However, she certainly had ample opportunity to do so. The printouts of the Facebook comments in evidence indicate that it was about one hour after Mr. Parks posted his comments that the defendant next posted her own reply comment, "I just find it creepy...". Given the social nature of Facebook, the defendant's own statement to the court as to its importance in her life, and the fact that, in the period of only a little more than a day after posting her initial comments, she made nine distinct replies of her own to comments made by others, before and after Mr. Parks' comments were posted, it is at least a fair assumption that Ms. Van Nes would have been actively scanning her Facebook page throughout this period to see what comments her "friends" had been making.

[90] I find, in the circumstances, that the defendant had constructive knowledge of Mr. Parks' comments, soon after they were made. Her silence, in the face of Mr. Parks' statement, "why don't we let the world know", therefore effectively served as authorization for any and all republication by him, not limited to republication through Facebook. Any person in the position of Mr. Parks would have reasonably assumed such authorization to have been given. I find that the defendant's failure to take positive steps to warn Mr. Parks not to take measures on his own, following his admonition to "let the world know", leads to her being deemed to have been a publisher of Mr. Parks' email to Mr. Pritchard's principal, Mr. Horton.

Defendant's Liability for Defamatory Third-Party Facebook Comments

[91] Liability for third-party defamatory comments on one's personal account, whether on Facebook or another internet-based platform, is still an emerging legal issue in Canadian law. Nevertheless, the law has evolved to the point where consistent principles may be identified.

[92] *Crookes v. Newton*, 2011 SCC 47, provides guidance as to what may constitute publication. The reasons of Deschamps J. (concurring in the result) are of particular assistance as to the issue of liability for third-party comments in that her analysis went further than that of the majority on this issue; the latter was centrally concerned only with liability of a webpage creator for hyperlinks to other internet pages containing defamatory material. At para. 55, Justice Deschamps reviewed the traditional test for publication:

[P]ublication has two components: (1) an act that makes the defamatory information available to a third party in a comprehensible form, and (2) the receipt of the information by a third party in such a way that it is understood.

[93] At para. 56, she held that given new technological developments in communication, the first component of publication needs to be reconsidered. She concluded (as did all the judges of the Court) that only deliberate acts can lead to liability.

[94] At para. 59 she stated:

[59] A more nuanced approach to revising the publication rule, and one that can be applied effectively to new media, would be for the Court to hold that in Canadian law, a reference to defamatory content can satisfy the requirements of the first component of publication if it makes the defamatory information *readily available* to a third party in a comprehensible form. In addition, the Court should make it clear that not every act, but only *deliberate* acts, can lead to liability for defamation.

[Emphasis in original.]

[95] Justice Deschamps concurred in the result of the majority judgment, but stated:

While I agree that improvements can be made, I do not share the view of my colleague Abella J. that the solution is to exclude references, including hyperlinks, from the scope of the publication rule. In my view, the proper approach is (1) to explicitly recognize the requirement of a deliberate act as part of the Canadian common law publication rule, and (2) to continue developing the rule incrementally in order to circumscribe the manner in which a deliberate act must make defamatory information available if it is to result in a finding of publication.

[96] Justice Deschamps reviewed the international caselaw at paras. 85 - 90, finding that it can be distilled down to the following rule:

The plaintiff must show that the act is deliberate. This requires showing that the defendant played more than a passive instrumental role in making the information available. (para. 91).

[97] Justice Deschamps referred to an oft-cited case, *Byrne v. Deane*, [1937] 1 K.B. 818 (C.A.), where the defendant owners of a golf club were found liable for defamatory remarks that had left posted on their property, over which they had complete control. Justice Deschamps stated that *Byrne* and the cases following it ground the rule that publication be founded in a deliberate act:

[87] *Byrne* and its progeny are consistent with the requirement that any finding of publication be grounded in a deliberate act. If a defendant was made aware (or had reason to be aware) of defamatory information over which he or she had sufficient control but decided to do nothing about it, this nonfeasance might amount to a deliberate act of approval, adoption, promotion, or ratification of the defamatory information... The inference is not automatic, but will depend on an assessment of the totality of the circumstances...

[Emphasis added; citation omitted.]

[98] Given the jurisprudence cited by Deschamps J., it appears that a deliberate action can encompass failure to act to remove the defamatory material once actual knowledge or constructive knowledge has been made out.

[99] Before *Crookes*, the British Columbia Court of Appeal was one of the first in Canada to address the issue of liability of online forum owners/operators for defamatory comments posted by third parties on their website, in *Carter v. B.C. Federation of Foster Parents Association*, 2005 BCCA 398. The Federation operated an online forum in which a defamatory posting regarding the plaintiff had been made. After discovering the posting, the plaintiff urged the board of directors of the Federation to shut down the forum as it was being misused. Sometime later, the plaintiff discovered that the defamatory posting had not been removed, although it was within the Federation's power to do so.

[100] The plaintiff's defamation action for the third party comment was dismissed on summary judgment because it was held to be time-barred on account of the "single publication rule" found in American authorities. The single publication rule states that the publication of defamatory matter gives rise to only one cause of action, which accrues at the time of the original publication, and that the statute of limitations runs from that date. As it had been more than two years before the plaintiff in *Carter* amended her statement of claim to include the online defamatory comment, it was held that the limitation period had passed.

[101] The Court reversed the summary judgment with respect to the matter of the third party defamatory comment on the forum over which the Federation had control, and remitted the matter back to trial. In doing so, Hall J.A. remarked as follows:

If defamatory comments are available in cyberspace to harm the reputation of an individual, it seems appropriate that the individual ought to have a remedy. In the instant case, the offending comment remained available on the internet because the defendant respondent did not take effective steps to have the offensive material removed in a timely way. (para. 20)

[Emphasis added.]

In determining that the Federation was a "publisher" of the defamatory information, the Court of Appeal stated that the analysis upon retrial would need to address the facts that the Federation had

obtained actual knowledge of the defamatory posting, and that it had been within the Federation's control to remove the posting.

[102] In *Weaver v. Corcoran*, 2015 BCSC 165, Madam Justice Burke dealt squarely with the issue of liability for third-party defamatory comments in the reply section of the on-line edition of the *National Post* newspaper. The plaintiff was a professor at the University of Victoria and a well-known scientist in the climate change field. He claimed that four articles published by the newspaper defamed him, and he sued the *National Post*, its publisher, and the journalists who authored the articles.

[103] The plaintiff Weaver also claimed that the defendants were liable for numerous reader postings made in response to each of the defaming articles. The defendants' position was that they were not the publishers of the reader comments because they had no control over the posts and were not involved in their making. They argued they played a passive instrumental role and took no deliberate action amounting to approval, adoption, promotion or ratification of the contents of the reader posts, citing *Home Equity Development Inc. v. Crow*, 2004 BCSC 124. Once the defendants had become aware of the defamatory reader postings and received the complaint from the plaintiff scientist, the postings were taken down within one or two days. The defendants argued it was unrealistic for them to screen the voluminous comments submitted by readers.

[104] Justice Burke reviewed the case law and concluded that in order to find liability the plaintiff must show an active or deliberate act in making the defamatory information available to others (para. 275). Ultimately, Burke J. held that it would be unreasonable to expect the *National Post* to pre-vet every comment before it was posted. The *National Post* and its columnists were said to have a passive instrumental role (para. 284):

Until awareness occurs, whether by internal review or specific complaints that are brought to the attention of the *National Post* or its columnists, the *National Post* can be considered to be in a passive instrumental role in the dissemination of the reader postings. It has taken no deliberate action amounting to approval or adoption of the contents of the reader posts. Once the offensive comments were brought to the attention of the defendants, however, if immediate action is not taken to deal with these comments, the defendants would be considered publishers as at that date.

[105] In passing, Burke J. acknowledged that in the case of a content provider such as the *National Post*, a more nuanced approach is necessary when reader comments are actively solicited. It is stated that many of the comments in issue attacked the character of the plaintiff in a vitriolic manner (para. 268). There appears to have been no allegation of the defendants' own defamatory content having instigated or incited the type of defamatory reader comments that were made.

[106] In *Niemela v. Malamas*, 2015 BCSC 1024, the plaintiff sought an interlocutory injunction compelling Google Inc. to block from its global search results 146 universal resource locators ("URLs") for websites containing defamatory comments about the plaintiff. This was in addition to a claim against Google for defamation. Madam Justice Fenlon had to determine whether the text accompanying the URLs listed in the Google search results, known as "snippets", made Google a publisher of the defamatory material. She found support for her analysis in *Metropolitan International Schools Ltd. v. Designtecnica Corp.*, [2009] EWHC 1765 (Q.B.), a similar case in

which Google was not found as a publisher of “snippets” because it had not “authorised or caused the snippet to appear on the user’s screen in any meaningful sense” (para. 51). The search results listed automatically, without “knowing involvement in the process of publication of the relevant words” (para. 49). In other words, Google had only a passive instrumental role, without any knowing mental element being engaged.

[107] Before endorsing this “passive instrument test” for publication, Fenlon J., as she then was, noted that while the majority judgment of Abella J. in *Crookes* had stopped short of expressly adopting the test, it did approve of the approach taken in *Metropolitan*, which had applied it. Justice Fenlon then reviewed *Weaver*, where Burke J. discussed the passive instrumental role that the *National Post* was found to have had in that case. Ultimately, she concluded that Google was a passive instrument and not a publisher of the snippets. Justice Fenlon clarified that she was not asked in that case to consider whether Google could be a publisher of snippets and search results after notice of the defamatory content had been received.

[108] In summary then, from the forgoing law it is apparent that *Carter*, *Weaver*, and *Niemela*, consistent with Deschamps J.’s reasons in *Crookes*, provide support for there being a test for establishing liability for third party defamatory material with three elements: 1) actual knowledge of the defamatory material posted by the third party, 2) a deliberate act that can include inaction in the face of actual knowledge, and 3) power and control over the defamatory content. After meeting these elements, it may be said that a defendant has adopted the third party defamatory material as their own.

[109] In the circumstances of the present case, the foregoing analysis leads to the conclusion that Ms. Van Nes was responsible for the defamatory comments of her “friends”. When the posts were printed off, on the afternoon of June 10th, her various replies were indicated as having been made 21 hours, 16 hours, 15 hours, 4 hours, and 3 hours previously. As I stated above, it is apparent, given the nine reply posts she made to her “friends” comments over that time period, that Ms. Van Nes had her Facebook page under, if not continuous, then at least constant viewing. I did not have evidence on the ability of a Facebook user to delete individual posts made on a user’s page; if the version of Facebook then in use did not provide users with that ability, then Ms. Van Nes had an obligation to delete her initial posts, and the comments, in their entirety, as soon as those “friends” began posting defamatory comments of their own. I find as a matter of fact that Ms. Van Nes acquired knowledge of the defamatory comments of her “friends”, if not as they were being made, then at least very shortly thereafter. She had control of her Facebook page. She failed to act by way of deleting those comments, or deleting the posts as a whole, within a reasonable time – a “reasonable time”, given the gravity of the defamatory remarks and the ease with which deletion could be accomplished, being immediately. She is liable to the plaintiff on that basis.

[110] Furthermore, I would find that in the circumstances of this case there ought not to be a legal requirement for a defendant in the position of Ms. Van Nes having actual knowledge of the existence of defamatory comments by her “friends” as a precondition to liability. The circumstances were such that she ought to have anticipated such posts would be made. I come to this conclusion for two reasons: the nature or structure of a social medium platform, and the content of Ms. Van Nes’ contribution to the posts.

[111] A user of a Facebook page is not in the same position as the defendant Newton in *Crookes*, the defendant Federation in *Carter*, or the respondent Google Inc. in *Niemala*. Those parties were only passively providing a platform or links to defamatory material. In the present case the entity in the analogous position would be Facebook, Inc., the owner of the software that creates the pages and the servers on which the content is stored. The user hosting a page of a social medium such as Facebook, on the other hand, is providing a forum for engagement with a circle of individuals who may share some degree of mutual familiarity. As noted above, the social nature of the medium is such that posts about concerns personal to the user may reasonably be expected to be discussed by “friends”.

[112] What these factors entail is that once she initiated events through having made an inflammatory post concerning a matter of personal concern, Ms. Van Nes ought reasonably to have expected her “friends” to make sympathetic replies. The “friends” comments were not unprovoked reactions; they were part of a conversation. And then, when they did comment, Ms. Van Nes – far from being the passive provider of an instrument for comment – continued as an active participant through making replies, prompting further comment. Those replies added fuel to the fire, compounding the chances of yet more defamatory comments being made.

[113] In other words, I would find that the nature of the medium, and the content of Ms. Van Nes’ initial posts, created a reasonable expectation of further defamatory statements being made. Even if it were the case that all she had meant to do was “vent”, I would find that she had a positive obligation to actively monitor and control posted comments. Her failure to do so allowed what may have only started off as thoughtless “venting” to snowball, and to become perceived as a call to action – offers of participation in confrontations and interventions, and recommendations of active steps being taken to shame the plaintiff publically – with devastating consequences. This fact pattern, in my view, is distinguishable from situations involving purely passive providers. The defendant ought to share in responsibility for the defamatory comments posted by third parties, from the time those comments were made, regardless of whether or when she actually became aware of them.

[114] I note that the liability of Facebook users for defamatory comments made by others purely on the basis that they ought to know of the potential for such comments being made was considered and rejected by the New Zealand Court of Appeal, in *Wishart v. Murray*, 2013 NZHC 540, rev’d in part 2014 NZCA 461. This was an appeal from an interlocutory order on an application to strike allegations in the respondent plaintiff’s statement of claim. The appellant defendants had published allegedly defamatory statements on a Twitter account and on a Facebook page concerning a book written by the respondent plaintiff, and had repeated the statements during a radio interview. The defendants had partially succeeded on an interlocutory application to strike the pleadings, but much of the statement of claim remained intact and the defendants brought on an appeal of the application judge’s refusal to strike those other portions of the claim.

[115] One of the claims against the defendants was in respect of their liability for third-party comments posted to the Facebook page. The application judge held this allegation to have been properly brought. He stated:

[117] Those who host Facebook pages or similar are not passive instruments or mere conduits of content posted on their Facebook page. They will be regarded as publishers of postings made by anonymous users in two circumstances. The first is if they know of the defamatory statement and fail to remove it within a reasonable time in circumstances that give rise to an inference that they are taking responsibility for it. A request by the person affected is not necessary. The second is where they do not know of the defamatory posting but ought, in the circumstances, to know that postings are being made that are likely to be defamatory.

[Emphasis added.]

[116] The Court of Appeal, however, expressed reservations as to finding liability on the basis of what a Facebook user ought to know. Two of their concerns had to do with perceived conflicts between that test and New Zealand legislation, including in particular the need to balance, under the New Zealand Bill of Rights, the right of freedom of expression against the interests of persons in protecting their reputation. The other concerns expressed by the Court had to do with issues in the law of defamation:

[137] The first concern is that, as Mr Rennie submitted, the ought to know test puts a Facebook page host who does not know of a defamatory comment on the page in a worse position than a host who actually does know. The latter will not be a publisher of the comment until a reasonable time for its removal has elapsed (and will not be a publisher at all if he or she removes it in that time). The former will be a publisher from the moment the comment is posted and unable to avoid that consequence by removing the comment from the Facebook page.

[138] The situation will be more complicated when a Facebook page host who ought to know of a defamatory comment on the page actually becomes aware of the comment. On the actual knowledge test, he or she can avoid being a publisher by removing the comment in a reasonable time. But removal of the comment in a reasonable time after becoming aware of it will not avail him or her if, before becoming aware of the comment, he or she ought to have known about it, because on the ought to know test he or she is a publisher as soon as the comment is posted. This seems to us to make the test very difficult to apply.

[139] The second concern is that the ought to know test makes the Facebook page host liable on a strict liability basis, solely on the basis of the existence of a defamatory comment. Once the comment exists, he or she cannot do anything to avoid being treated as its publisher.

[140] It can be argued that the ought to know test is not entirely a strict liability one, because it applies only where the circumstances are such that the host should reasonably anticipate the posting of a defamatory statement. That is akin to making the host liable for the defamatory comment because he or she has been negligent in not taking steps to prevent the defamatory comment being made. Imposing liability for damage to someone's reputation on the basis of negligence rather than an intentional act is contrary to the well-understood nature of the tort of defamation as an intentional tort.

...

[142] The fourth concern is that the ought to know test is uncertain in its application. Given the widespread use of Facebook, it is desirable that the law defines the boundaries with clarity and in a manner that Facebook page hosts can regulate their activities to avoid unanticipated risk.

[Citations omitted.]

[117] In my respectful view, the concerns expressed by the New Zealand Court of Appeal are addressed through limiting the imposition of liability to situations where the user's original posts are inflammatory, explicitly or implicitly inviting defamatory comment by others, or where the user thereafter becomes an active participant in the subsequent comments and replies. Ms. Van Nes qualifies under either of those grounds. Their concerns with respect to blurring the lines between negligence and defamation are, with respect, unfounded; foreseeability is already well-recognized as a component of the tests for liability for republication. It does no harm to the integrity of

defamation as a separate tort to extend the use of foreseeability by making it a test for liability for third-party comments.

[118] The need to balance rights referred to by the New Zealand Court of Appeal is of course a valid concern in Canada as well. In *Niemala*, Fenlon J. noted:

... the tenor of *Crookes* and of recent jurisprudence in England is to narrow the test for who is a publisher of defamatory material to those who do deliberate acts. In Canada this shift originates in the Supreme Court of Canada's recognition post-*Charter* "that what is at stake in an action for defamation is not only an individual's interest in protecting his or her reputation, but also the public's interest in protecting freedom of expression": *Crookes* at para. 31, citing *Hill v. Scientology*.

[119] However, at the same time the minority opinion of Deschamps J. in *Crookes*, at least, endorsed findings of liability in situations where the user "had reason to be aware" of defamation (*Crookes*, at para. 97). In my view the potential in the use of internet-based social media platforms for reputations to be ruined in an instant, through publication of defamatory statements to a virtually limitless audience, ought to lead to the common law responding, incrementally, in the direction of extending protection against harm in appropriate cases. This is such a case.

Damages for Defamation

[120] Defamation is a strict liability tort and damage is presumed: *Best v. Weatherall*, 2010 BCCA 202 at para. 45. Damages can be difficult to assess in defamation cases, but the court must strive to "achieve *restitutio in integrum*. Such an award should provide 'solatium, vindication and compensation...': *Best* at para. 46.

[121] The factors to be considered in assessing defamation awards are summarized in *Leenen v. Canadian Broadcasting Corp.* (2000), 48 OR (3d) 656, 50 CCLT (2d) 213, at para. 205; affirmed (2001), 54 O.R. (3d) 612; leave to appeal ref'd [2001] S.C.C.A. No. 432.

[205] In attempting to arrive at the appropriate level of general damages in a defamation case, one must always be aware of not only the damage inflicted to a person's reputation but also the fact that once damaged a reputation is very difficult to restore. Always mindful of the fine balance between freedom of speech and the protection of reputation, once the scales have been tipped through defamation, a plaintiff is entitled to be compensated not only for the injury caused by the damage to his integrity within his broad community but also for the suffering occasioned by the defamation. A number of cases ... established factors which might be considered in assessing the appropriate level of compensation. While not all inclusive, some of these factors are as follows:

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

[Citations omitted.]

[122] The seriousness of Ms. Van Nes' defamatory Facebook post, her replies, and the comments of her "friends" cannot be overstated. An accusation of paedophilic behaviour must be the single most effective means of destroying a teacher's reputation and career, not to mention the devastating effect on their life and individual dignity. The identity of Mr. Pritchard is especially relevant in this case. Through his engagement in extra-curricular activities he occupies a position of trust as a music teacher for children. Through hard work and dedication to his students, he had earned the community's respect and admiration, as clearly established on the evidence. I find that he now faces the challenge of repairing the damage Ms. Van Nes has caused, if that is even possible at this point.

[123] The vehicle through which Ms. Van Nes chose to publicize her defamatory accusations provided the court with further evidence of the damage to his reputation; that there were individual replies from 37 of Ms. Van Nes' Facebook "friends" within less than 24 hours clearly documents the quick degradation of Mr. Pritchard's estimation in the eyes of others.

[124] To say the least, recovering from false allegations of impropriety against children will not be easy for Mr. Pritchard. It is to be hoped that these reasons for judgment will assist. But the taint of suspicion is not easily expunged, and the reality is that regaining the stellar reputation he once enjoyed will not be quick or easy. In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, the pervading nature of defamation and its long term impact was succinctly stated:

[166] ...A defamatory statement can seep into the crevasses of the subconscious and lurk there ever ready to spring forth and spread its cancerous evil. The unfortunate impression left by a libel may last a lifetime. Seldom does the defamed person have the opportunity of replying and correcting the record in a manner that will truly remedy the situation.

[125] I have no difficulty in concluding that the defendant's conduct had a devastating impact on the plaintiff, which continues to this day and will continue into the future. That factor, in and of itself, merits a significant damages award.

[126] The plaintiff asks that I go further and award an even higher amount of general damages by reasons of aggravation. I am asked to find that the defamatory material itself supports the conclusion that the defendant's conduct was motivated by actual malice aimed at ruining his professional and personal reputation.

[127] An increase in the award for general damages on account of aggravation must be based on a finding that the defendant was motivated by actual malice, established through intrinsic or extrinsic evidence: as stated in *Hill*:

190. If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff The malice may be established by intrinsic evidence derived from the libellous statement itself and the circumstances of its publication, or by extrinsic evidence pertaining to the surrounding circumstances which demonstrate that the defendant was motivated by an unjustifiable intention to injure the plaintiff.

[Citations omitted.]

[128] *Hill* described some factors that may be taken into account in assessing aggravation:

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

[129] There has been no examination of discovery of the defendant, and so I have no admissions from her as to what prompted to act in the manner she did, nor as to the basis for the statements she made in her posts. This leaves me with the task of trying to infer malice from the extrinsic or intrinsic features of this case.

[130] Mr. Pritchard perceives the defendant's initial posts, and then the escalation that occurred as she encouraged comments with remarks like, "Oh Robert you make me laugh man", as an orchestrated campaign to malign his character and publically humiliate him. His perception is entirely understandable. But the impression I have of the defendant through her posts is of someone who was childish and shallow, and I do not credit her with that degree of forethought.

[131] I do not find that the claim of malice has been made out. Taken in its entirety, the evidence of the defendant's actions – her self-centred, unneighbourly conduct; her failure to respond reasonably to the plaintiff's various complaints, particularly regarding her dog; and her thoughtless Facebook posts – point just as much to narcissism as to animosity. Her belief that the decorative mirror hung on the exterior of the plaintiff's house was some sort of surveillance device was simply ridiculous, speaking, to be blunt, more of stupidity than malice.

[132] The defendant, as I see it, appears to have thoughtlessly taken to a social medium to give vent to her feelings, making reckless statements without any regard to the consequences. She certainly ought to have anticipated the potential impact of her remarks; whether she actually did so has not been proven.

[133] The defendant's subsequent actions bear none of the indicia of malice discussed at para. 191 of *Hill*: she removed the posts relatively quickly, probably when the gravity of the situation became apparent to her through the police presence at the plaintiff's home; she did not seek to publicize the proceedings, giving rise to further dissemination of the defamation; she did not file a defence.

[134] Aggravated damages are not in order, but given the seriousness of the allegations and the extent of the harm suffered, a significant award of general damages is. I award the plaintiff general damages for defamation of \$50,000.

[135] I further find this an appropriate case for an award of punitive damages, as a means of rebuking the plaintiff for her thoughtless, reckless behaviour. She acted without any consideration for the devastating nature of her remarks. With regard to the factors enunciated by the Supreme

Court of Canada in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, at para. 13, a punitive damages award must be proportionate to the defendant's blameworthiness, which in this case is high; the defendant's vulnerability, which is also high; the harm suffered by the plaintiff, which has been considerable; and the need to publically denounce the defendant and thus bring to the notice of the public the dangers of ill-considered remarks being made in social media and the serious consequences of such conduct.

[136] I award the plaintiff additional punitive damages of \$15,000.

Costs

[137] Having made no finding of malice on the part of the defendant, I am unable to find this to be a case of reprehensible conduct deserving of rebuke through an award of special costs. The plaintiff will have his costs, assessed at Scale B.

Conclusion

[138] Mr. Pritchard is awarded general damages of \$2,500 for his nuisance claim. With respect to the defamation claim, he is awarded \$50,000, and punitive damages of \$15,000. He is also entitled to his costs.

[139] There will also be a permanent injunction, enjoining the defendant and owners and occupiers of the property on which the defendant's residence is located from operating the waterfall structure between the hours of 10 p.m. and 7 a.m.

"A. Saunders J."