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## Citation Information

Downard, Peter A.. "The Defence of Responsible Communication." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 51. (2010).

<http://digitalcommons.osgoode.yorku.ca/sclr/vol51/iss1/7>

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# The Defence of Responsible Communication

Peter A. Downard\*

## I. INTRODUCTION

Defamatory statements of fact published in mass media give rise to a legal problem of particular difficulty. Defamatory statements of fact, as distinguished from statements of opinion or inherently debatable comment, purport to assert objective truth.<sup>1</sup> When a defamatory statement of fact is published by mass media, the breadth of the statement's dissemination is likely to maximize the harm to the person defamed. Where a mass media publisher is a large and influential corporation, a commonplace in Canadian life, the audience may be more likely to grant credibility to the publisher, and believe the defamation is true.

For the person defamed, the result may be profound harm to interests the law of defamation exists to protect: individual reputation, emotional security and dignity, and privacy.<sup>2</sup> Yet in recent decades there has been an

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<sup>1</sup> Statements of opinion or comment may be subject to the defence of fair comment. This is discussed further at a later point in this paper.

<sup>2</sup> *Grant v. Torstar Corp.*, [2009] S.C.J. No. 61, 2009 SCC 61, at paras. 58-59 (S.C.C.), *per* McLachlin C.J.C.; *WIC Radio Ltd. v. Simpson*, [2008] S.C.J. No. 41, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 1 (S.C.C.) [hereinafter "*WIC Radio*"], *per* Binnie J.; *Gilles E. Néron Communication Marketing Inc. v. Chambre des notaires du Québec*, [2004] S.C.J. No. 50, [2004] 3 S.C.R. 95, at para. 54 (S.C.C.), *per* LeBel J. The Supreme Court of Canada has recognized that reputation is an integral and fundamentally important aspect of every individual, which fosters self-image and self-worth, and is closely linked to the ability of the individual to participate in Canadian society: *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130, at para. 72 (S.C.C.) [hereinafter "*Hill*"], *per* Cory J.; *R. v. Lucas*, [1998] S.C.J. No. 28, [1998] 1 S.C.R. 439, at para. 48 (S.C.C.), *per* Cory J., and at para. 120, *per* McLachlin J. (dissenting in part on other grounds). It has been observed in the Supreme Court that privacy is at the heart of liberty in the modern state: *R. v. Dymont*, [1988] S.C.J. No. 82, [1988] 2 S.C.R. 417, at 427 (S.C.C.), *per* La Forest J.; *Edmonton Journal v. Alberta (Attorney General)*, [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326, at para. 21 (S.C.C.), *per* Cory J. [hereinafter "*Edmonton Journal*"]. The Supreme Court has recognized a person's reasonable expectation of privacy as a principle of fundamental justice within the meaning of s. 7 of the *Canadian Charter of Rights and Freedoms*, *infra*, note 5; *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at para. 62 (S.C.C.), *per* McLachlin and Iacobucci JJ. Privacy may also be consid-

increasing consciousness among legislators and the judiciary of the importance of freedom of expression in democratic societies. Free expression advances intelligent democratic self-government, the determination of truth and persons' individual self-fulfillment.<sup>3</sup> Freedom of expression protects listeners as well as speakers. It requires freedom of the press, since the ability of the public to receive information depends upon the ability of the press to obtain it and report it to the public.<sup>4</sup>

Freedom of expression jurisprudence under the *Canadian Charter of Rights and Freedoms*<sup>5</sup> has made clear that expression cases require a refined and searching analysis,<sup>6</sup> in which values must be sensitively weighed in their context.<sup>7</sup> Defamation cases are free speech cases in microcosm. The depth and importance of the values in conflict equally require that the court conduct a sensitive analysis of all relevant facts, with a view to arriving at a balanced approach evincing respect for all relevant values.<sup>8</sup>

Judicial appreciation of the important values at stake on both sides of cases involving defamatory statements of fact in mass media has led to recognition that the publication of such statements, when they relate to subjects of legitimate public interest, should in some circumstances be legally protected. As a result, Canadian law as to the availability of a

ered an aspect of the right to liberty in s. 7: *R. v. Sharpe*, [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45, at 72 (S.C.C.), per McLachlin J.

<sup>3</sup> *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712, at para. 56, per the Court; *Irwin Toy Ltd. v. Quebec*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at para. 53 (S.C.C.), per Dickson C.J.C., Lamer and Wilson JJ.; *R. v. Keegstra*, [1990] S.C.J. No. 13, [1990] 3 S.C.R. 697, at paras. 27 and 87-89 (S.C.C.), per Dickson C.J.C., and at paras. 168-182, per McLachlin J. (dissenting on other grounds).

<sup>4</sup> *Canadian Broadcasting Corp. v. Lessard*, [1991] S.C.J. No. 87, [1991] 3 S.C.R. 421, at 429-30 (S.C.C.), per La Forest J., and at 451, per McLachlin J. (dissenting on other grounds); *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] S.C.J. No. 88, [1991] 3 S.C.R. 459, at 475 (S.C.C.), per Cory J. As listeners and readers, members of the public have a right to information pertaining to governmental, legal and social institutions: *Edmonton Journal*, *supra*, note 2, at para. 10, per Cory J.; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (Re R. v. Carson)*, [1996] S.C.J. No. 38, [1996] 3 S.C.R. 480, at para. 23 (S.C.C.), per La Forest J.

<sup>5</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

<sup>6</sup> *Canada (Human Rights Commission) v. Taylor*, [1990] S.C.J. No. 129, [1990] 3 S.C.R. 892, at para. 31 (S.C.C.), per Dickson C.J.C.

<sup>7</sup> *R. v. Keegstra*, *supra*, note 3, at para. 47, per Dickson C.J.C.; *Ross v. New Brunswick School District No. 15*, [1996] S.C.J. No. 40, [1996] 1 S.C.R. 825, at para. 78 (S.C.C.), per La Forest J.; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] S.C.J. No. 65, [1990] 2 S.C.R. 232, at para. 28 (S.C.C.), per McLachlin J.

<sup>8</sup> *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835, at para. 72 (S.C.C.) [hereinafter "*Dagenais*"], per Lamer C.J.C.; *R. v. Mentuck*, [2001] S.C.J. No. 73, [2001] 3 S.C.R. 442, at para. 23 (S.C.C.), per Iacobucci J.; *WIC Radio*, *supra*, note 2, at para. 2, per Binnie J.

defence of privilege for publications in mass media has been in a state of evolution for many years.<sup>9</sup> That evolution has led to the recent recognition by the Supreme Court of Canada, in *Grant v. Torstar Corp.*,<sup>10</sup> of a new defence of responsible communication on matters of public interest.

## II. THE LAW PRIOR TO THE CHARTER

For many years prior to the entrenchment of the Charter in the Canadian Constitution, Canadian courts repeatedly rejected submissions that a publication of information in mass media could constitute an occasion of qualified privilege at common law.<sup>11</sup> That was so regardless of whether the subject matter involved the conduct of a person holding public office,<sup>12</sup> or was otherwise of public interest.<sup>13</sup>

In 1952, in *Douglas v. Tucker*,<sup>14</sup> Cartwright J. considered whether there was a common law privilege attaching to one elector's communication to

<sup>9</sup> *Cusson v. Quan*, [2007] O.J. No. 4348, 87 O.R. (3d) 241, at para. 44, *per* Sharpe J.A. (Ont. C.A.), *revid* on other grounds, *Quan v. Cusson*, [2009] S.C.J. No. 62, 2009 SCC 62 (S.C.C.); *Lee v. Globe & Mail*, [2001] O.J. No. 317, 6 C.P.C. (5th) 354, at para. 19 (Ont. S.C.J.), *per* Swinton J.; *Bennett Environmental Inc. v. Toronto Star Newspapers Ltd.*, [2004] O.J. No. 2456, at para. 11 (Ont. S.C.J.), *per* Himel J.

<sup>10</sup> *Supra*, note 2. To declare an interest, I was counsel for the appellant in *Grant*.  
<sup>11</sup> *Douglas v. Tucker*, [1952] S.C.J. No. 2, [1952] 1 S.C.R. 275, at 287 (S.C.C.), *per* Cartwright J.; *Globe and Mail Ltd. v. Boland*, [1960] S.C.J. No. 2, [1960] S.C.R. 203 (S.C.C.); *Banks v. Globe and Mail Ltd.*, [1961] S.C.J. No. 25, [1961] S.C.R. 474 (S.C.C.); *Jones v. Bennett*, [1969] S.C.J. No. 99, [1969] S.C.R. 277 (S.C.C.). The fact situations to which common law qualified privilege applies are referred to as occasions of qualified privilege: see *Minter v. Priest*, [1930] A.C. 558, at 571-72 (H.L.), *per* Viscount Dunedin. The common law rule is that an occasion of publication is privileged if the publisher has an interest or duty, legal, social, moral or personal, to publish the information in issue to the person to whom it is published, and the person to whom it is published has a corresponding interest or duty to receive it: see *Hill*, *supra*, note 2, at para. 143 (S.C.C.), *per* Cory J.; *RTC Engineering Consultants Ltd. v. Ontario (Ministry of the Solicitor General and Correctional Services)*, [2002] O.J. No. 1001, 58 O.R. (3d) 726, at 732 (Ont. C.A.), *per* Laskin J.A. An individual publishing a defamatory statement on an occasion of qualified privilege has a defence unless the plaintiff can prove malice on the part of the defendant, or that the defendant's publication exceeded the scope of the privilege: see *Hill*, *id.*, at paras. 144-146, *per* Cory J.; *Botiuk v. Toronto Free Press*, [1995] S.C.J. No. 69, [1995] 3 S.C.R. 3, at paras. 79-80 (S.C.C.), *per* Cory J.

<sup>12</sup> *Douglas v. Tucker*, *id.*, at 288, *per* Cartwright J.; *Banks v. Globe and Mail Ltd.*, *id.*, at 484, *per* Cartwright J.; *Doyle v. Sparrow*, [1979] O.J. No. 4487, 27 O.R. (2d) 206, at 208 (Ont. C.A.), *per* MacKinnon A.C.J.O.; *England v. Canadian Broadcasting Corp.*, [1979] N.W.T.J. No. 33, 97 D.L.R. (3d) 472, at 486 (N.W.T.S.C.), *per* Tallis J.; *Cherneskey v. Armadale Publishers Ltd.*, [1977] S.J. No. 230, 79 D.L.R. (3d) 180 (Sask. C.A.), *revid* on other grounds, [1979] S.C.J. No. 115, [1979] 1 S.C.R. 1067 (S.C.C.); *Bennett v. Stupich*, [1981] B.C.J. No. 1856, 125 D.L.R. (3d) 743 (B.C.S.C.); *Lawson v. Chabot*, [1974] B.C.J. No. 578, 48 D.L.R. (3d) 556 (B.C.S.C.); *Planned Parenthood Newfoundland/Labrador v. Fedorik*, [1982] N.J. No. 219, 135 D.L.R. (3d) 714 (Nfld. S.C.T.D.).

<sup>13</sup> *Lockhart v. Harrison*, [1928] All E.R. Rep. 149, at 152 (H.L.), *per* Lord Buckmaster; *Silkin v. Beaverbrook Newspapers Ltd.*, [1958] 1 W.L.R. 743, at 746 (H.L.), *per* Diplock J.

<sup>14</sup> *Supra*, note 11.

another of information regarding a candidate for public office which the elector believes to be true, and which is relevant to the candidate's fitness for office. "It is settled," he stated, "that whatever may be the extent of such a privilege it is lost if the publication is made in a newspaper."<sup>15</sup>

In the 1960 case of *Globe and Mail Ltd. v. Boland*,<sup>16</sup> an editorial stated that an "independent Conservative" candidate in a federal election had put forward an ex-Communist to make statements to the effect that the Liberal party was "Soft on Communism". The candidate was said to have done this to mislead immigrant voters. The trial judge held that the editorial was published on an occasion of qualified privilege. His finding was made on the basis that during a federal election a newspaper has a duty to publish political news and comment for the information and guidance of the public, and the public has a legitimate and vital interest in receiving that information. The Court of Appeal did not interfere. In the Supreme Court of Canada, Cartwright J. held that no privilege applied. He stated:

[T]he learned trial judge has confused the *right* which the publisher of a newspaper has, in common with all Her Majesty's subjects, to report truthfully and comment fairly upon matters of public interest with a *duty* of the sort which gives rise to an occasion of qualified privilege.<sup>17</sup>

Justice Cartwright held that it would not advance the "common convenience and welfare of society" to hold that newspaper publications relevant to a candidate's fitness for office are privileged. To do so "would mean that every man who offers himself as a candidate must be prepared to risk the loss of his reputation without redress" unless the candidate could prove malice.<sup>18</sup> To require such a sacrifice would "tend to deter sensitive and honourable men from seeking public positions of trust and responsibility"<sup>19</sup> and defeat the public interest in the "maintenance of the public character of public men".<sup>20</sup> A finding of privilege would thus "do the public more harm than good".<sup>21</sup> Justice Cartwright considered that the interests of newspapers and the public in information would be "sufficiently safeguarded" by the availability of the defence of fair comment where it is applicable.<sup>22</sup>

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<sup>15</sup> *Id.*, at 287-88.

<sup>16</sup> *Supra*, note 11.

<sup>17</sup> *Id.*, at 207 (emphasis in original).

<sup>18</sup> *Id.*, at 208.

<sup>19</sup> *Id.*, quoting *Gatley on Libel and Slander*, 4th ed., at 254.

<sup>20</sup> *Id.*, at 209, quoting *Campbell v. Spottiswoode* (1863), 122 E.R. 288, *per* Cockburn C.J.

<sup>21</sup> *Id.*, at 208, quoting *Post Publishing Co. v. Hallam*, 59 Fed. 530, at 540 (1893).

<sup>22</sup> *Id.*, at 209.

In 1961, in *Banks v. Globe and Mail Ltd.*,<sup>23</sup> the Supreme Court confirmed this position. In *Banks*, the newspaper published a lead editorial stating, among other things, that a union leader was a convicted criminal whose labour relations efforts had resulted in the dissolution of the merchant marine. The trial judge (who had also presided in *Boland*) held that qualified privilege is applicable to “editorial comment by a metropolitan newspaper upon matters of public interest”.<sup>24</sup> The Court of Appeal did not interfere. In the Supreme Court, Cartwright J. reversed the trial judge’s ruling. He repeated his statement in *Boland* that the press stands on the same footing as any citizen.<sup>25</sup> He dismissed as “untenable” the proposition that,

given proof of the existence of a subject-matter of wide public interest throughout Canada without proof of any other special circumstances, any newspaper in Canada (and *semble* therefore any individual) which sees fit to publish to the public at large statements of fact relevant to that subject-matter is to be held to be doing so on an occasion of qualified privilege. ...<sup>26</sup>

The issue of privilege for mass communications came before the Supreme Court again in 1969, in *Jones v. Bennett*.<sup>27</sup> In *Jones*, the plaintiff had been chairman of a provincial commission responsible for purchasing supplies needed by the public service. He was charged criminally with unlawfully accepting benefits, but was acquitted after a trial. While a Crown appeal on a point of law was pending, the provincial government introduced in the legislature a bill to provide for the deemed retirement of the plaintiff. While the bill was under debate in the legislature, the defendant, the Premier of British Columbia, spoke to a meeting of his political party. Newspaper reporters were visibly in attendance. He said, “I’m not going to talk about the Jones boy. I could say a lot, but let me just assure you of this; the position taken by the government is the right position.” Shortly afterward, the Crown appeal was struck out as being frivolous. The plaintiff then sued the Premier over his statement at the meeting.

In the Supreme Court, Cartwright J., now Chief Justice, rejected the Premier’s argument that “whenever the holder of high elective political

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<sup>23</sup> *Supra*, note 12.

<sup>24</sup> *Id.*, at 481.

<sup>25</sup> *Id.*, at 482.

<sup>26</sup> *Id.*, at 484.

<sup>27</sup> *Supra*, note 11.

office sees fit to give an account of his stewardship and of the actions of the government of which he is a member to supporters of the political party which he belongs he is speaking on an occasion of qualified privilege”.<sup>28</sup> Chief Justice Cartwright considered this to be an attempt to extend to the Premier a recognized privilege attaching to communications from one elector to other electors regarding matters relevant to the question of a candidate’s fitness for office, which the speaker honestly believes to be true. Although he was “far from deciding” that such an extension was warranted, Cartwright C.J.C. held that the argument was in any event defeated by the fact that newspaper reporters were visibly present at the meeting.<sup>29</sup> The claim to privilege failed given that “a plea of qualified privilege based on a ground of the sort relied on in the case at bar cannot be upheld where the words complained of are published to the public generally or, as it is sometimes expressed, ‘to the world’”.<sup>30</sup>

It remains that a path of liberalization in mass media cases has never been entirely closed. In *Banks*, the Supreme Court of Canada acknowledged that in some circumstances a publication to the public at large may be privileged at common law.<sup>31</sup> These included circumstances in which an individual had been attacked in the public press. The attack entitled the individual to make a privileged response to the same audience.<sup>32</sup> It was also acknowledged, based on English precedents, that privilege would apply to a publication of a medical tribunal that a doctor’s name had been erased from a medical register, on the ground that there was a duty “to give the public accurate information as to who is on the register and if the person’s name is erased accurate information of the cause of its erasure”.<sup>33</sup> In *Littleton v. Hamilton*, Dubin J.A., while stating that a subject of public interest alone is insufficient to justify a finding of privilege, contemplated the possibility of facts being proven which could give rise to “valid social reasons” and a “special duty” justifying a qualified privilege.<sup>34</sup>

Through the cautious expansion of recognized duties and interests, Canadian courts subsequently allowed some incremental expansion of qualified privilege. This was most notable in a series of cases involving

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<sup>28</sup> *Id.*, at 284.

<sup>29</sup> On this point see also *Lawson v. Chabot*, *supra*, note 12.

<sup>30</sup> *Jones v. Bennett*, *supra*, note 11, at 284-85.

<sup>31</sup> *Banks v. Globe and Mail Ltd.*, *supra*, note 11, at 483, *per* Cartwright J.

<sup>32</sup> *Id.*, at 483, *per* Cartwright J., citing *Adam v. Ward*, [1917] A.C. 309 (H.L.).

<sup>33</sup> *Id.*, at 483-84, *per* Cartwright J., citing *Allbutt v. General Council of Medical Education and Registration* (1889), 23 Q.B.D. 400.

<sup>34</sup> *Littleton v. Hamilton*, [1974] O.J. No. 1955, 4 O.R. (2d) 283, at 284-85 (Ont. C.A.), *per* Dubin J.A.

statements by public officials. In 1979, in *Stopforth v. Goyer*, the Ontario Court of Appeal held that a federal minister spoke to the media on an occasion of qualified privilege when he stated that a senior civil servant had been demoted for “misinformation or gross negligence” in connection with a matter that had been the subject of extensive questioning in the House of Commons.<sup>35</sup> Justice Jessup stated:

In my opinion the electorate, as represented by the media, has a real and *bona fide* interest in the demotion of a senior civil servant for an alleged dereliction of duty. It would want to know if the reasons given in the House were the real and only reasons for the demotion. The appellant had a corresponding public duty and interest in satisfying that interest of the electorate. Accordingly, there being no suggestion of malice, I would hold that the alleged defamatory statements were uttered on an occasion of qualified privilege.<sup>36</sup>

The conclusion that the words were spoken in the discharge of a duty was clearly a conclusion of policy by the appellate court. The trial judge had noted the defendant’s admission in cross-examination that he did not speak the defamatory words because he felt he had a duty to do so.<sup>37</sup>

In *Loos v. Robbins*,<sup>38</sup> the Saskatchewan Court of Appeal found an occasion of qualified privilege where a Minister of the provincial Crown made statements to the media regarding grounds for the dismissal of certain civil servants that cast doubt on their competence. In reaching this conclusion the court recognized a duty of a Minister to make a statement to the public about a matter of public interest regarding his or her department, when members of the public at large would have no such duty.<sup>39</sup>

In *Parlett v. Robinson*,<sup>40</sup> a Member of Parliament alleged at a news conference that the plaintiff had purchased products manufactured by a federal inmate and made a profit on their sale, thus exploiting inmate labour for his own profit. The defendant was the official spokesperson for his party on the relevant ministry. He only spoke out after receiving a constituent’s complaint and failing to persuade the responsible minister to investigate. The court held that these circumstances gave rise to a duty

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<sup>35</sup> [1979] O.J. No. 4128, 23 O.R. (2d) 696 (Ont. C.A.).

<sup>36</sup> *Id.*, at 699-700.

<sup>37</sup> [1978] O.J. No. 3432, 87 D.L.R. (3d) 373, at 383 (Ont. H.C.J.).

<sup>38</sup> [1987] S.J. No. 237, 37 D.L.R. (4th) 418 (Sask. C.A.).

<sup>39</sup> *Id.*, at 423-24, *per* Gerwing J.A.

<sup>40</sup> [1986] B.C.J. No. 594, 30 D.L.R. (4th) 247 (B.C.C.A.) [hereinafter “*Parlett*”].



to speak publicly that was sufficient to ground qualified privilege. Justice Hinkson stated:

When he failed to persuade the Minister to order the inquiry, if he held an honest belief that there had been impropriety within the Correctional Service with respect to taking advantage of the work of inmates, then it was the duty of the defendant to ventilate his concerns in a way that would persuade the Minister to have an investigation conducted into the matter.<sup>41</sup>

The court held that the “electorate in Canada” had a reciprocal “interest in knowing whether the administration of the Correctional Service is being properly conducted by the officials in the Department of the Solicitor General”.<sup>42</sup>

In *Baumann v. Turner*,<sup>43</sup> a British Columbia mayor was a proponent of the use of a particular source of water for his municipality. A citizen who was a professional engineer opposed him on this public issue. As a result of a letter from the engineer to the relevant ministry, a decision was made at the provincial level to oppose the mayor’s position. A letter to this effect was sent to the mayor by the ministry. The mayor subsequently learned that the editor of the local newspaper had a copy of the letter. The mayor wrote a letter to the relevant minister, which he provided to the newspaper. In his letter the mayor accused the citizen of having “misused his Professional Engineer’s certification in a political manner which is eroding my, and the community’s confidence in the competency and credibility of the Professional Engineer’s Association of B.C.” He went on to say that he had not proceeded with a complaint to the professional association about the citizen because council members “felt that the consequences to [the citizen] may be too severe in that he could lose his job and ability to provide for his young family”. The newspaper did not republish the statement, but the citizen sued the mayor for his limited publication of the letter. A majority of the British Colum-

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<sup>41</sup> *Id.*, at 256.

<sup>42</sup> *Id.*, at 256. In *McCartan Turkington Breen v. Times Newspapers Ltd.*, [2001] 2 A.C. 277 (H.L.) [hereinafter “*McCartan*”], Lord Cooke stated (at 301) that *Parlett* is “entirely consistent with” *Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127 (H.L.), discussed *infra*, note 75*ff.* [hereinafter “*Reynolds*”]. In *Grant v. Torstar Corp.*, *supra*, note 2, at para. 35, McLachlin C.J.C. cited *Parlett* and observed that “in suits against politicians expressing concerns to the electorate about the conduct of other public figures, courts have sometimes recognized that a politician’s ‘duty to ventilate’ matters of concern to the public could give rise to qualified privilege ...”.

<sup>43</sup> [1993] B.C.J. No. 1649, 105 D.L.R. (4th) 37 (B.C.C.A.).

bia Court of Appeal applied *Parlett* to hold that the mayor's publication of the letter was privileged. For the majority, Legg J.A. stated:

When Turner became aware on April 27th from his discussions with Shari Bishop, the editor of the *Squamish Times* that the newspaper had received a copy of the letter from the Minister to the appellant, he had a *bona fide* interest in ensuring that his response to the Minister's opposition to the Mashiter Creek Project was in the hands of the newspaper so that his disagreement with the Minister and [the citizen] could be available through the newspaper to his constituents.<sup>44</sup>

The mayor's constituents were held to have had a *bona fide* reciprocal interest in knowing of the mayor's opposition. In dissent, Southin J.A. held that the particular source of water used was a public issue, "but whether [the citizen] was abusing the standards of his profession was not", and publication to the newspaper was therefore unprotected.<sup>45</sup> The reasons of the majority in *Baumann* appear to treat the case as an instance of a privileged reply to criticism, in accordance with the traditional common law principle referred to by Cartwright J. in *Banks*.<sup>46</sup>

In *Camporese v. Parton*,<sup>47</sup> the British Columbia Supreme Court used an analysis of special factual circumstances to find an occasion of qualified privilege where a defamatory statement had been published in a newspaper. In *Camporese*, a newspaper columnist had commended the goods of the plaintiff to her readers. The columnist came to honestly believe that those goods posed a health risk. It was apparent that if the columnist's belief was correct, her readers could be endangered. They could have been misled by her previous column unless it was corrected. The court held that the columnist had a duty to communicate this infor-

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<sup>44</sup> *Id.*, at 56.

<sup>45</sup> *Id.*, at 51. In *Bridge Structural and Ornamental and Reinforcing Ironworkers v. Liberal Party of British Columbia*, [1997] B.C.J. No. 2357, 152 D.L.R. (4th) 547 (B.C.S.C.) [hereinafter "*B.S.O.I.W.*"], the British Columbia Supreme Court held that a media release provided to a legislative press gallery by an opposition party was published on an occasion of qualified privilege. Justice Macdonald stated (at 557) that opposition politicians "have both a duty and an interest to investigate and expose any impropriety or irregularity in the management of government monies by the government of the day, and to communicate their findings to the electorate", which has "a corresponding interest in receiving such information". The court declined to extend the benefit of this privilege to the media. *B.S.O.I.W.*, appears to be inconsistent with the earlier decision of the British Columbia Supreme Court in *Lawson v. Chabot*, *supra*, note 12. In *Lawson*, it was held that a provincial minister was not protected by privilege where he made statements regarding a union's position regarding a mediation commission because he made the statements to media representatives, and thus to the world at large.

<sup>46</sup> *Banks v. Globe and Mail Ltd.*, *supra*, note 11, at 483, *per* Cartwright J., citing *Adam v. Ward*, *supra*, note 32.

<sup>47</sup> [1983] B.C.J. No 2464, 150 D.L.R. (3d) 208 (B.C.S.C.) [hereinafter "*Camporese*"].

mation to her readers that was sufficient to ground a finding of qualified privilege. *Camporese* may be argued to be within a class of cases contemplated by Stephenson L.J. of the English Court of Appeal in *Blackshaw v. Lord*<sup>48</sup> as possibly giving rise to an occasion of privilege at common law. In *Blackshaw*, Stephenson L.J. stated:

There may be extreme cases where the urgency of communicating a warning is so great, or the source of the information so reliable, that publication of suspicion or speculation is justified; for example, where there is danger to the public from a suspected terrorist or the distribution of contaminated food or drugs ...<sup>49</sup>

### III. THE CHARTER AND *HILL V. CHURCH OF SCIENTOLOGY*

The sequence of liberalizing decisions described above coincided with the entrenchment of the Charter in the Constitution of Canada, including its guarantee of a fundamental freedom of expression, and the development of a richer body of freedom of expression jurisprudence than had previously existed in Canadian constitutional law.<sup>50</sup>

It is well established that the Charter only applies to the common law where the government relies upon the common law as authorizing government action that allegedly infringes a guaranteed right or freedom.<sup>51</sup> Private parties owe each other no constitutional duties and cannot found a cause of action upon a Charter right.<sup>52</sup> The Supreme Court has nevertheless made clear that the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution, including the Charter.<sup>53</sup> Thus, a party to private civil litigation can argue that a principle of the common law is inconsistent with Charter values.<sup>54</sup> Although it is the legislatures, and not the courts, that have major responsibility for law reform in a constitutional democracy, the courts may make incremental revisions to the

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<sup>48</sup> [1983] 2 All E.R. 311 (C.A.)

<sup>49</sup> *Id.*, at 327.

<sup>50</sup> *R. v. Keegstra*, *supra*, note 3, at para. 26, *per* Dickson C.J.C.

<sup>51</sup> *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573, at 598-99 (S.C.C.), *per* McIntyre J. [hereinafter "*Dolphin Delivery*"]; *Hill*, *supra*, note 2, at para. 83, *per* Cory J.

<sup>52</sup> *Hill*, *id.*, at para. 95, *per* Cory J.

<sup>53</sup> *Dolphin Delivery*, *supra*, note 51, at 603, *per* McIntyre J.; *Hill*, *id.*, at para. 91, *per* Cory J.

<sup>54</sup> *Hill*, *id.*, at paras. 95-98, *per* Cory J. See also *R. v. Salituro*, [1991] S.C.J. No. 97, [1991] 3 S.C.R. 654, at 675 (S.C.C.), *per* Iacobucci J.

common law to bring it into compliance with values enunciated in the Charter.<sup>55</sup>

The first major effort to modify qualified privilege after the entrenchment of the Charter was made in *Hill v. Church of Scientology of Toronto*.<sup>56</sup> In *Hill* it was argued in the Supreme Court of Canada that the values underlying the Charter require the adoption of the approach to libel claims by public officials that was established by the United States Supreme Court in *New York Times v. Sullivan*.<sup>57</sup> The central holding in *Sullivan* was that the First Amendment guarantee of freedom of speech and the press in the Constitution of the United States requires that a public official be prohibited from recovering damages for a defamatory falsehood relating to his or her official conduct unless it is proven that the statement was made with actual malice, and in particular, knowledge that it was false, or reckless disregard whether it was true or false.<sup>58</sup>

The Supreme Court unanimously declined to adopt the *Sullivan* approach. Justice Cory observed that *Sullivan* was a creature of its historical moment, in which a dramatic remedy was necessary to protect the civil rights movement in the southern United States.<sup>59</sup> He considered undesirable consequences said to have resulted from *Sullivan*, including the added cost and complexity of inquiries into the existence of malice, uncertainties as to who is a public official, and the effect the rule may have of “deprecating truth in public discourse”.<sup>60</sup>

Justice Cory held that defamatory statements are only “very tenuously related” to the values underlying the Charter’s guarantee of freedom of expression. He described defamatory statements as “inimical to the search for truth”, and incapable of enhancing individual self-development or participation in public affairs.<sup>61</sup> He considered such statements to be harmful to the interests of a free and democratic

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<sup>55</sup> *WIC Radio*, *supra*, note 2, at paras. 16, 36, *per* Binnie J.; *Hill*, *id.*, at paras. 91-92, *per* Cory J.; *Salituro*, *id.*, at 675, *per* Iacobucci J.; *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] S.C.J. No. 7, [2002] 1 S.C.R. 156, at paras. 19-20 and 106 (S.C.C.), *per* McLachlin C.J.C. and LeBel J.; *Dagenais*, *supra*, note 8, at paras. 69-73, *per* Lamer C.J.C.; *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at para. 57 (S.C.C.), *per* McLachlin and Iacobucci JJ.

<sup>56</sup> *Hill*, *id.*

<sup>57</sup> 376 U.S. 254 (1964) [hereinafter “*Sullivan*”]. The history of the case is reviewed in Anthony Lewis, *Make No Law* (New York: Random House, 1991).

<sup>58</sup> *Id.*, at 254-55, *per* Brennan J.

<sup>59</sup> *Id.*, at 1180-81.

<sup>60</sup> *Id.*, at 1182-83.

<sup>61</sup> *Hill*, *supra*, note 2, at 1174.

society.<sup>62</sup> Justice Cory also referred with approval to past concerns that privilege for the publication of defamatory statements regarding the fitness for public office of a person would deter “sensitive and honourable men” from seeking public office.<sup>63</sup> Justice Cory said that no compelling circumstances existed which required that the common law be modified so as to afford individuals less protection from defamation under the Charter. He stated:

Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish ... Those who publish statements should assume a reasonable level of responsibility.<sup>64</sup>

Notwithstanding the restrained approach of the Supreme Court in *Hill*, two years later the Ontario Court of Appeal allowed a successful plea of qualified privilege by a media defendant in *Grenier v. Southam Inc.*<sup>65</sup> The court’s decision on the point is perfunctory, and the material facts not apparent. The trial judge’s brief reasons on the issue were delivered orally. He considered that the evidence was “overwhelming” that the defendant newspaper had a “social and moral purpose” in writing the article in question. The gist of the article was that persons could get help when a member of their family had become obsessed with gospel preachers. The trial judge held that the reporter “had absolutely no malicious intent”, and “properly researched her material and believed that what she wrote was true”.<sup>66</sup> In its brief endorsement, the Court of Appeal stated only that “the trial judge specifically found on the evidence before him that there was a social and moral duty on the respondent to publish the article in question”, and “made no error” in finding that the article was published on an occasion of qualified privilege.<sup>67</sup>

In the same year, in *Moises v. Canadian Newspaper Co.*, the British Columbia Court of Appeal rejected an argument that Charter values required recognition of privilege where “words are published in good faith and the publisher carried out its duties in a responsible fashion and published a fair and balanced story”.<sup>68</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*, at 1174-75.

<sup>64</sup> *Id.*, at 1187.

<sup>65</sup> [1997] O.J. No. 2193 (Ont. C.A.).

<sup>66</sup> Transcript of supplementary reasons of Houston J. in *Grenier v. Southam Inc.*, August 27, 1993.

<sup>67</sup> *Supra*, note 65, at para. 7, *per* the Court (McKinlay, Catzman and Rosenberg JJ.A.).

<sup>68</sup> [1996] B.C.J. No. 1205, [1997] 1 W.W.R. 337, at 343, 348-53 (B.C.C.A.), *per* Williams J.A.

#### IV. THE *EUROPEAN CONVENTION* AND *REYNOLDS V. TIMES NEWSPAPERS*

Since 1998 the United Kingdom has experienced a re-evaluation of its laws affecting important individual freedoms, similar to the experience of Canada under the Charter. This has followed from the incorporation into the United Kingdom's domestic law of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.<sup>69</sup> The United Kingdom *Human Rights Act 1998*<sup>70</sup> requires that domestic courts have particular regard to freedom of expression in relevant cases, and that they develop and apply the common law in a manner consistent with the guarantee of freedom of expression in the *European Convention*.<sup>71</sup> The *Human Rights Act 1998* also requires that domestic

<sup>69</sup> (1953) Cmnd 8969 [hereinafter "*European Convention*"].

<sup>70</sup> (U.K.), 1998, c. 42, in force October 2000.

<sup>71</sup> Article 10 of the *European Convention* provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Section 12 of the U.K. *Human Rights Act 1998* provides:

Freedom of Expression

(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied—

- (a) that the applicant has taken all practicable steps to notify the respondent; or
- (b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

- (a) the extent to which—
  - (i) the material has, or is about to, become available to the public; or
  - (ii) it is, or would be, in the public interest for the material to be published;
- (b) any relevant privacy code.

(5) In this section—

"court" includes a tribunal; and

"relief" includes any remedy or order (other than in criminal proceedings).

courts take into account relevant decisions of the European Court of Human Rights.<sup>72</sup>

Prior to the United Kingdom's adoption of the *European Convention* as part of domestic law, there were signs in its jurisprudence, as in Canada's, that further expansion of common law privilege to protect publications in the public interest could be possible. Most notably, in the 1983 case of *Blackshaw v. Lord*,<sup>73</sup> Stephenson L.J. contemplated the expansion of qualified privilege to cover a communication to the general public where the particular facts of the case could be said to give rise to a sufficient reciprocal duty and interest. He stated:

Public interest and public benefit are necessary ... but not enough without more. There must be a duty to publish to the public at large and an interest in the public at large to receive the publication; and a section of the public is not enough.

The subject matter must be of public interest; its publication must be in the public interest. That nature of the matter published and its source and the position or status of the publisher distributing the information must be such as to create the duty to publish the information to the intended recipients ... Where damaging facts have been ascertained to be true, or been made the subject of a report, there may be a duty to report them ... But where damaging allegations or charges have been made and are still under investigation ... or have been authoritatively refuted ... there can be no duty to report them to the public.<sup>74</sup>

### 1. *Reynolds v. Times Newspapers*

In 1999, an analysis of this type was developed and adopted by the House of Lords in *Reynolds v. Times Newspapers Ltd.*<sup>75</sup> In *Reynolds*, the former prime minister of Ireland sued over a newspaper article. He said the article accused him of deliberately misleading the Irish legislature and lying to colleagues in a coalition government. The House of Lords,

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Section 4 of the *Human Rights Act 1988* also authorizes courts to declare the incompatibility of legislation with the *European Convention*. Section 4(6) provides, however, that such a declaration does not result in the law being invalid and unenforceable, as is the case under the Constitution of Canada where the Charter is contravened.

<sup>72</sup> *Human Rights Act 1998*, s. 2. Subsection 6(1) provides: "It is unlawful for a public authority to act in a way which is incompatible with a Convention right", subject to exceptions specified in subs. 6(2). Subsection 6(3) defines "public authority" as including "a court or tribunal".

<sup>73</sup> *Supra*, note 48.

<sup>74</sup> *Id.*, at 327.

<sup>75</sup> *Supra*, note 42.

like the Supreme Court of Canada in *Hill*, was asked to accept a broad submission. It was that qualified privilege should apply to all media publications arising out of the discussion of political matters concerning the conduct of government in a democratic society.<sup>76</sup> The Law Lords rejected the submission. They held that the proposed rule provided inadequate protection for reputation. The submission was also considered to be unsound in principle, as it would protect political speech, but not speech on other matters of serious public concern.<sup>77</sup> The Law Lords nevertheless broadened the availability of qualified privilege on a different basis.

To Lord Nicholls, the author of the lead opinion in *Reynolds*, the case involved the interaction of “two fundamental rights: freedom of expression and protection of reputation”.<sup>78</sup> He emphasized the importance of freedom of expression in representative democracy, the incorporation of the *European Convention* in United Kingdom domestic law, and the important role of media in communicating information and comment on matters of public interest.<sup>79</sup> He equally recognized that “reputation is an integral and important part of the dignity of the individual”, that a reputation damaged in national media may be damaged forever, and that the protection of reputation is conducive to the public good.<sup>80</sup> He observed that the *European Convention’s* guarantee of freedom of expression was subject to “such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others”.<sup>81</sup>

Weighing these considerations, the Law Lords unanimously held that the concepts of duty and interest may in some circumstances be applied to justify a finding of a privileged occasion for the communication to the public of information in the public interest.<sup>82</sup> The burden of proof of facts

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<sup>76</sup> *Id.*, at 200, *per* Lord Nicholls; at 209, *per* Lord Steyn; at 218, *per* Lord Cooke; and at 227-28, *per* Lord Hope. See also the report of counsel’s argument in the House of Lords, at 180.

<sup>77</sup> *Id.*, at 204, *per* Lord Nicholls; see also Lord Cooke, at 218-20, and Lord Hobhouse, at 239.

<sup>78</sup> *Id.*, at 190, *per* Lord Nicholls.

<sup>79</sup> *Id.*, at 200, *per* Lord Nicholls. See also *id.*, at 207-208, *per* Lord Steyn, and at 223, *per* Lord Cooke. See also *McCartan*, *supra*, note 42, at 300, *per* Lord Cooke.

<sup>80</sup> *Reynolds*, *id.*, at 201, *per* Lord Nicholls.

<sup>81</sup> *Id.*, at 201, *per* Lord Nicholls.

<sup>82</sup> *Id.*, at 202, *per* Lord Nicholls; at 213, *per* Lord Steyn; at 225, *per* Lord Cooke; at 234-35, *per* Lord Hope; and at 240, *per* Lord Hobhouse. In *Lange v. Atkinson*, [1999] UKPC 46, at para. 15, Lord Nicholls stated that

the established common law approach to the publication of misstatements of fact to the general public remains essentially sound. Whether such a publication is in the public interest or, in the conventional phraseology, whether there is a duty to publish to the intended recipients, depends upon the circumstances, including the nature of the matter published and its source or status.



supporting a privileged occasion would be on the defendant,<sup>83</sup> and the question whether the occasion was privileged would be one of law for the judge.<sup>84</sup> Lord Nicholls stated that, in media cases, privilege could be available if the publication met the standard of “responsible journalism, a standard which the media themselves espouse”.<sup>85</sup> He identified 10 specific factors relevant to the determination whether there has been a duty to publish, and a corresponding legitimate interest of the public in receiving the information:<sup>86</sup>

1. **The seriousness of the allegation.** The more serious the charge, the more the public is misinformed, and the individual harmed, if the allegation is not true.<sup>87</sup>
2. **The nature of the information.** The information itself, and the extent to which the subject matter is of public concern, should be considered.<sup>88</sup> Political matters are clearly of public interest. In addition, politicians inevitably and knowingly lay themselves open to close scrutiny of their every word and deed by journalists and the public at large. Lord Steyn added that speech about political matters should have a “higher value” for the purpose of qualified privilege analysis than “speech about private lives of politicians”.<sup>89</sup> In this area, however, it is also argued that protection of reputation in political life is conducive to the public good, since if the reputation of a public figure is debased falsely the public will be prevented from accurately assessing him or her.<sup>90</sup>
3. **The source of the information.** The court should consider whether the source has no direct knowledge of events, a bias (“an axe to grind”), or is being paid.<sup>91</sup> In political matters, the court should not prefer information derived from a government source over a source opposed to the government.<sup>92</sup>

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<sup>83</sup> *Id.*, at 203, *per* Lord Nicholls; and 239, *per* Lord Hobhouse.

<sup>84</sup> *Id.*, at 205, *per* Lord Nicholls; at 215-16, *per* Lord Steyn; at 226, *per* Lord Cooke; and at 236, *per* Lord Hope. See also *McCartan*, *supra*, note 42, at 302, *per* Lord Cooke.

<sup>85</sup> *Id.*, at 202, *per* Lord Nicholls.

<sup>86</sup> *Id.*, at 205, *per* Lord Nicholls.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*, at 215, *per* Lord Steyn.

<sup>90</sup> *Id.*, at 201, *per* Lord Nicholls; see also 213, *per* Lord Steyn; and 238, *per* Lord Hobhouse.

<sup>91</sup> *Id.* at 205, *per* Lord Nicholls. See also *GKR Karate (UK) Ltd. v. Yorkshire Post Newspapers Ltd.*, [2000] 2 All E.R. 931, at 938-39 (C.A.), *per* May L.J. [hereinafter “*GKR Karate*”].

<sup>92</sup> *Reynolds*, *supra*, note 42, at 213, *per* Lord Steyn.

4. **Steps taken to verify the information.** The court should take into account whether the defendant has taken steps to verify the accuracy of information.<sup>93</sup> The court may also consider what inquiries have been made to determine the reliability of a source.<sup>94</sup> Lord Nicholls has subsequently stated that responsible journalism demands that if the media propose to publish a defamatory imputation, they should have some factual basis for it.<sup>95</sup> A similar objection may be taken where a journalist has published material that does not rise above the quality of rumour.<sup>96</sup> In *Reynolds*, Lord Hobhouse stated that privilege could not apply “to speculation however intelligent”, let alone “casual gossip overheard by a journalist”.<sup>97</sup>

Subsequent to the decision in *Reynolds*, in *Loutchansky v. Times Newspapers Ltd.*, the English Court of Appeal held that the burden on the defendant is to show that the occasion of the publication was privileged on the basis of the facts known to the defendant at the time of publication.<sup>98</sup> Justice Brooke stated:

It was at the moment of publication that the defendants had to decide whether, given the information available to them then and the extent of the inquiries they had then made, they could properly consider they were under a duty to tell the public what they wrote about Mr. Loutchansky in their articles. They would of course have had to consider whether their sources would have

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<sup>93</sup> *Id.*, at 205, *per* Lord Nicholls; at 214, *per* Lord Steyn; at 225, *per* Lord Cooke.

<sup>94</sup> *Id.*, at 205, *per* Lord Nicholls. See also *Grobbelaar v. News Group Newspapers Ltd.*, [2001] 2 All E.R. 437, at 446 (C.A.), *per* Simon Brown L.J., and at 484, *per* Jonathan Parker J., *revd* on other grounds at [2002] 4 All E.R. 732 (H.L.).

<sup>95</sup> *Bonnick v. Morris*, [2003] 1 A.C. 300, at 308 (P.C.), *per* Lord Nicholls.

<sup>96</sup> In *Seaga v. Harper*, [2008] 1 All E.R. 965 (P.C.), the Privy Council held that a defence based on *Reynolds* privilege was not available where a politician made defamatory statements on the basis of information received from third parties, without questioning his sources as to the foundation for their information or carrying out any other investigation. Lord Carswell held (at 972) that the defendant had “failed to take sufficient care to check the reliability of the information which he disseminated”, which did not “rise above mere rumour”. The judges agreed with the trial judge’s conclusion that “merely to rely on the conclusions of the thought processes of other people without demonstrating the validity of those conclusions was ‘inadequate at best’” (see 972, *per* Lord Carswell).

<sup>97</sup> *Supra*, note 42, at 238-39, *per* Lord Hobhouse; *Bonnick v. Morris*, *supra*, note 95, at 310, *per* Lord Nicholls.

<sup>98</sup> [2001] 4 All E.R. 115, at 128 (C.A.), *per* Brooke L.J. See also *GKR Karate*, *supra*, note 91, at 938, *per* May L.J.

appeared to be reliable to reasonable and responsible journalists  
...

Sir Martin Nourse stated:

If a defendant acts on the basis of facts which he honestly and reasonably believes to be true, but which are later found to have been, through no fault of his own, untrue, he will not be deprived of his defence. Equally, facts which are unknown to him at the time of publication cannot have any bearing on the question whether he is under the requisite duty at that time.<sup>99</sup>

In *Bonnick v. Morris*,<sup>101</sup> the Privy Council agreed with this approach. In addition, Lord Nicholls observed that in some cases an allegedly defamatory statement may be framed in ambiguous terms, capable of both defamatory and non-defamatory interpretations. He held that if a defamatory meaning arises only by implication as a result of an ambiguous statement, that ambiguity may be taken into account in deciding whether a publisher has only been mistaken as to the meaning the words would likely be understood to bear, and has nevertheless acted responsibly.<sup>102</sup> Lord Nicholls stated that this approach should not be taken too far, however. He said ambiguity is best avoided as much as possible, and that the media should not be allowed to use ambiguity as a “screen behind which a journalist is ‘willing to wound, and yet afraid to strike’”.<sup>103</sup> The more obvious and serious a defamatory meaning, the less weight the court should attach to other possible meanings.<sup>104</sup>

5. **The status of the information.** The court should consider whether the information has particular status, such as where it has been produced by “an investigation which commands respect”.<sup>105</sup> A defendant may not have acted responsibly, for example, where it has simply purchased sensational information from a source with a

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<sup>99</sup> *Id.*, at 135.

<sup>100</sup> *Id.*, at 137.

<sup>101</sup> *Supra*, note 95.

<sup>102</sup> *Id.*, at 310, *per* Lord Nicholls.

<sup>103</sup> *Id.*, at 310, *per* Lord Nicholls.

<sup>104</sup> *Reynolds*, *supra*, note 42, at 205, *per* Lord Nicholls.

<sup>105</sup> *GKR Karate*, *supra*, note 91, at 939, *per* May L.J.

view to commercial profit, rather than having engaged in a substantial investigation.<sup>106</sup>

6. **Urgency.** The court should consider that “news is often a perishable commodity”, and that even a short delay in publication may deprive it of value and interest.<sup>107</sup> A publication motivated only by a desire to increase readership is unlikely to be protected.<sup>108</sup>
7. **Whether comment has been sought from the plaintiff.** The court should consider whether the plaintiff’s comment has been sought, since the plaintiff may have information others do not possess or have not disclosed.<sup>109</sup> In *Reynolds*, Lord Nicholls stated that such an approach will not always be necessary, but in some cases the failure to report a plaintiff’s side of the matter may be a weighty factor in determining whether privilege is available.<sup>110</sup> It has subsequently been observed that the manner in which comment from the plaintiff has been sought may also be appropriately considered. The court may consider, for example, where the plaintiff has been “ambushed” immediately prior to publication, in a manner that appears intended to put the plaintiff in discomfort and at a disadvantage.<sup>111</sup> The court may also properly consider whether the defendant has adequately put to the plaintiff the allegations it intended to publish.<sup>112</sup>
8. **Whether the article contained the gist of the plaintiff’s side of the story.** Whether or not the plaintiff has been approached for comment, the court should consider whether the gist of the plaintiff’s position has been stated. Where serious allegations are presented as fact and all reference to the plaintiff’s explanation is knowingly omitted from a publication, this alone may be sufficient to defeat a claim that the occasion of publication was privileged.<sup>113</sup> Although a journalist is entitled to disbelieve and refute explanations given, this does not entitle the journalist to make no mention

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<sup>106</sup> *Reynolds, supra*, note 42, at 205, *per* Lord Nicholls; at 215, *per* Lord Steyn.

<sup>107</sup> *Id.*, at 224, *per* Lord Cooke.

<sup>108</sup> *Id.*, at 205, *per* Lord Nicholls.

<sup>109</sup> *Id.*, at 205, *per* Lord Nicholls; at 213-14, *per* Lord Steyn.

<sup>110</sup> *Id.*, at 205, 206, *per* Lord Nicholls.

<sup>111</sup> *Galloway v. Telegraph Group Ltd.*, [2006] EWCA Civ 17, at para. 75 (C.A.), *per* Sir Anthony Clarke M.R.

<sup>112</sup> *Id.*, at paras. 42-44, *per* Sir Anthony Clarke M.R.

<sup>113</sup> *Reynolds, supra*, note 42, at 206, *per* Lord Nicholls.

of the plaintiff's explanation.<sup>114</sup> Lord Nicholls stated that "elementary fairness" normally requires that publication of a serious charge should be accompanied by the gist of any explanation given. Although a failure to report the explanation remains only a factor in the analysis of all the circumstances, Lord Nicholls considered that an article that fails to do so "faces an uphill task in claiming privilege" if the allegation proves to be false and the explanation true.<sup>115</sup>

9. **The tone of the article.** The court should consider the tone of the article. A newspaper is free to raise questions or call for an investigation, but it is not appropriate to adopt allegations as statements of fact.<sup>116</sup> A restrained and neutral tone may weigh in favour of a finding of privilege.<sup>117</sup>
10. **The circumstances of the publication.** The court should consider the circumstances of publication, including the timing.<sup>118</sup> It should be kept in mind that journalists act without the benefit of hindsight, and that matters obvious in retrospect "may have been far from clear in the heat of the moment".<sup>119</sup> Where the situation is one in which there are only "lingering doubts", the issue is appropriately resolved in favour of publication and a finding of a privileged occasion.<sup>120</sup> It has since been suggested, however, that timing may not support a conclusion that qualified privilege applies where publication has been timed solely to suit the defendant's own purposes.<sup>121</sup> Whether the required standard has been met by the media in a particular case is for the court, and not the journalist, to decide.

In 2005, in *Panday v. Gordon*,<sup>122</sup> Lord Nicholls stated generally that in cases of publications on matters of public interest,

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<sup>114</sup> *Id.*, at 203, *per* Lord Nicholls. See also at 213-14, *per* Lord Steyn, suggesting that a "failure to report the other side" will often be evidence tending to show that the occasion ought not to be protected by qualified privilege, but that may not always be so, such as where a person's explanation is "unintelligible or plain nonsense". See also *Bonnick v. Morris*, *supra*, note 95, at 308, *per* Lord Nicholls.

<sup>115</sup> *Id.*, at 206, *per* Lord Nicholls.

<sup>116</sup> *Bonnick v. Morris*, *supra*, note 95, at 310, *per* Lord Nicholls.

<sup>117</sup> *Reynolds*, *supra*, note 42, at 205, *per* Lord Nicholls.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*, at 224, *per* Lord Cooke.

<sup>121</sup> *Id.*, at 202-203, *per* Lord Nicholls; see also at 239, *per* Lord Hobhouse.

<sup>122</sup> [2006] 1 A.C. 427 (P.C.).

[w]hat is needed is that the area of privilege should be extended but, as a counter-balance, those who make statements at large on matters of public concern and seek to avail themselves of this extended area of privilege, in addition to acting honestly, should exercise a degree of care. This objective requirement should be elastic, enabling a court to have due regard to all the circumstances, including the importance of the subject matter of the statement, the gravity of the allegation, and the context in which it is made.<sup>123</sup>

## 2. *Jameel v. Wall Street Journal*

In 2006, in *Jameel v. Wall Street Journal Europe Srl*,<sup>124</sup> the House of Lords reaffirmed the extension of privilege formulated in *Reynolds*. In *Jameel*, a Saudi Arabian businessman had been named by the *Wall Street Journal* as a person whose companies' bank accounts were being monitored by the Kingdom's central bank to prevent them from being used, with his knowledge or not, for the funnelling of funds to terrorist organizations. On the evening before publication the newspaper attempted to contact the businessman for comment. It was told he was not available. The newspaper was requested to postpone publication so that the businessman might comment. The newspaper declined to do so, but reported that the businessman could not be reached for comment. For this reason, the Court of Appeal upheld the trial judge's ruling that *Reynolds* privilege was not available to the newspaper.<sup>125</sup> The House of Lords reversed and dismissed the plaintiff's action. The Law Lords considered that the refusal of the newspaper to wait for the businessman's comment was insufficient to deprive it of the *Reynolds* defence because the businessman would not likely have been in a position to verify whether or not the central bank was monitoring his accounts, and the newspaper's inability to obtain comment had been reported.<sup>126</sup> The newspaper had also obtained verification of the published information from the United States Department of the Treasury.<sup>127</sup>

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<sup>123</sup> *Id.*, at para. 14.

<sup>124</sup> [2007] 1 A.C. 359 (H.L.) [hereinafter "*Jameel*"].

<sup>125</sup> *Jameel v. Wall Street Journal Europe Srl (No. 2)*, [2005] EWCA Civ. 74, at paras. 88-89 (C.A.), *per* Lord Phillips M.R.

<sup>126</sup> *Jameel*, *supra*, note 124, at para. 35, *per* Lord Bingham; see also paras. 83-84, *per* Lord Hoffmann; and para. 139, *per* Lord Scott.

<sup>127</sup> *Id.*, at paras. 64-78, 86-87, *per* Lord Hoffmann; at para. 112, *per* Lord Hope; at para. 139, *per* Lord Scott; at para. 150, *per* Baroness Hale.

In the course of their opinions, some of the Law Lords expressed concern that lower courts had not applied *Reynolds* in accordance with its spirit.<sup>128</sup> Lord Bingham said *Reynolds* had been intended to give “much greater weight than the earlier law had done to the value of informed public debate on significant public issues”, and had a “liberalising intention”.<sup>129</sup> Similarly, Lord Hoffmann stated that in *Reynolds* the House had sought to provide “greater freedom for the press to publish stories of genuine public interest”.<sup>130</sup>

In *Jameel* the Law Lords also stated the elements of the *Reynolds* defence more concisely. Three compendious elements were emphasized:

1. **Material of public interest.** First, it must be shown that the material published is of “public interest”.<sup>131</sup> Although the Law Lords did not provide a specific definition of the “public interest” for this purpose, it was made clear that it is not sufficient that the material simply be such as to attract the interest of the public.<sup>132</sup> Lord Hoffmann observed that “newspapers are not often the best judges of where the line should be drawn”.<sup>133</sup> The article should be considered as a whole in deciding whether it related to a matter of public interest.<sup>134</sup>

The Law Lords emphasized the great importance of the *Jameel* article’s subject matter after the attacks of September 11, 2001; its tone; the absence of sensationalism or exaggeration; and its publication by a newspaper that was “respected, influential and unsensational”.<sup>135</sup> Lord Bingham stated that against this back-

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<sup>128</sup> *Id.*, at para. 38, *per* Lord Hoffmann; and at para. 146, *per* Baroness Hale.

<sup>129</sup> *Id.*, at paras. 28 and 35, *per* Lord Bingham.

<sup>130</sup> *Id.*, at para. 38, *per* Lord Hoffmann.

<sup>131</sup> *Id.*, at para. 31, *per* Lord Bingham; at para. 48, *per* Lord Hoffmann; at para. 147, *per* Baroness Hale.

<sup>132</sup> *Id.*, at para. 31, *per* Lord Bingham: “... [W]hat engages the interest of the public may not be material which engages the public interest.”

<sup>133</sup> *Id.*, at para. 49, *per* Lord Hoffmann. Similarly, Lord Scott said (at para. 138) that newspapers may publish information which is interesting to the public but is “trivial” or “unimportant”, and thus “of very little public interest”. Baroness Hale agreed, but indicated (at para. 147) that the standard to be met should not be so high as to amount to a test whether the public has had a “need to know” the information, which would be “far too limited”.

<sup>134</sup> *Id.*, at para. 34, *per* Lord Bingham; at para. 48, *per* Lord Hoffmann; at paras. 107, 111, *per* Lord Hope.

<sup>135</sup> *Id.*, at paras. 2, 35, *per* Lord Bingham; at para. 49, *per* Lord Hoffmann. See also paras. 149-150, *per* Baroness Hale; and para. 111, *per* Lord Hope.

ground, it was more readily acceptable that the inclusion of an inaccurate fact could be consistent with responsible journalism.<sup>136</sup>

2. **Whether inclusion of the defamatory statement is justified.** Second, the court is to consider whether or not the publisher's inclusion of the defamatory statement in the article was justified. Lord Hoffman said the existence of subject matter of public interest "does not allow the newspaper to drag in damaging allegations which serve no public purpose".<sup>137</sup> The "more serious the allegation," he said, "the more important it is that it should make a real contribution to the public interest element in the article".<sup>138</sup>

Lord Hoffmann considered this test met in the case before him. In *Jameel* the inclusion of the plaintiff's name was important to convey the message that Saudi cooperation with the monitoring of bank accounts for terrorist use "was not confined to a few companies on the fringe of Saudi society but extended to companies which were by any test within the heartland of the Saudi business world".<sup>139</sup> This was of significant public importance given public skepticism as to the extent to which the Kingdom was prepared to actively assist in anti-terrorism measures. Lord Scott agreed that the inclusion of the reference to the plaintiff's name was an important part of the story as a whole.<sup>140</sup>

3. **Responsible journalism.** Third, it must be shown that the persons involved in the publication have conducted themselves in a manner consistent with the standard of "responsible journalism".<sup>141</sup> The Law Lords emphasized, as Lord Nicholls had in *Reynolds*, that whether the test of "responsible journalism" is met will depend on all the circumstances.<sup>142</sup> Lord Hoffmann rejected the criticism that the concept of "responsible journalism" is too vague. He said it

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<sup>136</sup> *Id.*, at para. 34, *per* Lord Bingham.

<sup>137</sup> *Id.*, at para. 51, *per* Lord Hoffmann.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*, at para. 52, *per* Lord Hoffmann.

<sup>140</sup> *Id.*, at paras. 139, 142, *per* Lord Scott.

<sup>141</sup> *Id.*, at para. 32, *per* Lord Bingham; at paras. 53-54, *per* Lord Hoffmann; at paras. 105-107, *per* Lord Hope; at paras. 134-135, *per* Lord Scott; at para. 149, *per* Baroness Hale. The term "responsible journalism" was also restated by Lord Nicholls, sitting as a member of the Privy Council, in *Bonnick v. Morris*, *supra*, note 95, at 309, as a concise description of the journalistic conduct required by *Reynolds*. See also *Loutchansky v. Times (No. 2)*, [2002] 1 All E.R. 652, at 666-67 (C.A.), *per* Lord Phillips M.R.

<sup>142</sup> *Jameel, id.*, at para. 45, *per* Lord Hoffmann; at para. 130, *per* Lord Scott.



was no more so than standards such as “reasonable care” used elsewhere in the law. He considered that greater certainty will be provided in a developing body of case law, and that courts may obtain some guidance through reference to professional codes of practice.<sup>143</sup>

The Law Lords also reaffirmed the relevance of the specific factors identified by Lord Nicholls in *Reynolds*. Several Law Lords repeated that these factors were not a series of hurdles that must all be met by the defendant, but a number of keys or pointers that may be more or less indicative of the appropriate conclusion in all the circumstances of the case.<sup>144</sup> It was emphasized that a *Reynolds* analysis must be carried out in a practical and flexible manner.<sup>145</sup> Although it remains clear that whether the tests are met is a matter for the court, Lord Bingham stated that “[w]eight should ordinarily be given to the professional judgment of an editor or journalist in the absence of some indication that it was made in a casual, cavalier, slipshod or careless manner.”<sup>146</sup> The Law Lords did, however, emphasize the importance of three factors: verification, the publisher’s honest belief in the truth of the information published, and efforts to contact people named in the information.

As to verification, Lord Bingham stated that “there is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify”.<sup>147</sup> To be protected, the journalist should have “taken steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication”.<sup>148</sup> As to the publisher’s belief in the truth of the information published, Lord Hoffmann stated that in “most cases the *Reynolds* defence will not get off the ground unless the journalist honestly and reasonably believed that the statement was true”.<sup>149</sup> As to opportunity to comment, Lord Scott stated, “[f]airness to those whose names appear in newspapers may require, if it is practicable, an opportunity to comment being given to

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<sup>143</sup> *Id.*, at para. 55, *per* Lord Hoffmann.

<sup>144</sup> *Id.*, at para. 33, *per* Lord Bingham; see also paras. 47 and 56, *per* Lord Hoffmann; paras. 131, 138, *per* Lord Scott; para. 149, *per* Baroness Hale.

<sup>145</sup> *Id.*, at para. 56, *per* Lord Hoffmann; at para. 136, *per* Lord Scott.

<sup>146</sup> *Id.*, at para. 33, *per* Lord Bingham; see also para. 51, *per* Lord Hoffmann; and paras. 108, 111, *per* Lord Hope.

<sup>147</sup> *Id.*, at para. 32, *per* Lord Bingham.

<sup>148</sup> *Id.*, at para. 32, *per* Lord Bingham; see also paras. 58, 79-80, *per* Lord Hoffmann; para. 138, *per* Lord Scott; and para. 149, *per* Baroness Hale.

<sup>149</sup> *Id.*, at para. 62, *per* Lord Hoffmann.

them and/or an opportunity to have a response published by the newspaper.”<sup>150</sup>

In the course of their opinions, two of the Law Lords suggested that *Reynolds* had stretched the elastic concepts of duty and interest so far that *Reynolds* should no longer be regarded as developing a category of privilege at all, but a new substantive defence. Lord Hoffmann stated that it may be misleading to refer to the defence as a form of privilege, since it applies to the material in question, not the occasion upon which it has been published, and cannot be defeated by proof of malice “because the propriety of the conduct of the defendant is built into the conditions under which the material is privileged”.<sup>151</sup> Baroness Hale agreed, stating that a focus upon “a specific duty and a specific right to know” can easily lead to a “narrow and rigid approach which defeats its object”.<sup>152</sup> Lord Bingham, Lord Hope and Lord Scott continued to regard the relevant question to be whether a sufficient reciprocal duty and interest existed in the mass media context.<sup>153</sup> Lord Hoffmann also acknowledged that, “If the publication is in the public interest, the duty and interest are taken to exist.”<sup>154</sup>

In 2008, in *Seaga v. Harper*,<sup>155</sup> the Privy Council confirmed that the expanded privilege defence recognized in *Reynolds* and *Jameel* is not for the sole benefit of media organizations. The judges accepted that the defence could also apply to a publication by an individual citizen to a mass audience. This had previously been stated by Lord Hoffmann in *Jameel*.<sup>156</sup>

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<sup>150</sup> *Id.*, at para. 138, *per* Lord Scott.

<sup>151</sup> *Id.*, at para. 46, *per* Lord Hoffmann; see also para. 50. Similarly, in *Bonnick v. Morris*, *supra*, note 95, at 307, Lord Nicholls stated that “[m]atters relating to malice are to be considered in the context of deciding whether the publication attracted qualified privilege in accordance with the common law as developed by [*Reynolds*].”

<sup>152</sup> *Jameel, id.*, at para. 146, *per* Baroness Hale.

<sup>153</sup> *Id.*, at 376H-577A, *per* Lord Bingham; at 95E-F, *per* Lord Hope; and at 404B-C, *per* Lord Scott.

<sup>154</sup> *Id.*, at para. 50, *per* Lord Hoffmann.

<sup>155</sup> *Supra*, note 96, on appeal from the Court of Appeal from Jamaica.

<sup>156</sup> *Supra*, note 124, at para. 54; see also para. 146, *per* Baroness Hale. In *Reynolds, supra*, note 42, at 229, Lord Hope commented: “No individual or organisation, such as a newspaper or any other section of the media, can assert that it is entitled to the benefit of qualified privilege simply because of who or what that individual or organisation is or what it does.”

## V. DEVELOPMENTS IN AUSTRALIA AND NEW ZEALAND

The Australian High Court has based an extension of qualified privilege on its views that the Commonwealth Constitution of Australia includes an implied guarantee of freedom to discuss and publish regarding political matters, and that this implied freedom shapes and controls the common law.<sup>157</sup> Publications within the scope of this freedom are not actionable provided that the defendant establishes that it was unaware of the falsity of the material published, that it was not reckless as to its truth or falsity, and that it was reasonable in the circumstances to publish without having ascertained whether the material was true or false.<sup>158</sup> The Australian courts have stated that in determining whether a publication has been reasonable, regard should be had to factors such as whether steps were taken to verify the accuracy of the material published.<sup>159</sup>

New Zealand has adopted a categorical approach to the extension of qualified privilege to statements to the public regarding matters of public interest. In *Lange v. Atkinson*,<sup>160</sup> the New Zealand Court of Appeal held that qualified privilege applies to statements to the public about current, former or aspiring members of the legislature that are directly relevant to their capacity to meet their public responsibilities, and involve matters of public rather than private concern. The privilege may be defeated by proof of malice as traditionally defined at common law.<sup>161</sup>

The New Zealand Court of Appeal's decision was appealed to the Privy Council.<sup>162</sup> The Privy Council acknowledged that the issue called for "a value judgment which depends upon local political and social conditions", and that the New Zealand court was "entitled to maintain" the rule it had adopted.<sup>163</sup> It nevertheless remitted the case for reconsideration by the New Zealand court on the basis that it was appropriate to give it an opportunity to reconsider the issue in light of *Reynolds*.<sup>164</sup> The New Zealand Court of Appeal declined to adopt *Reynolds*.<sup>165</sup> In its view, the complex factual analysis introduced by *Reynolds* add significantly to un-

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<sup>157</sup> See the discussion in *Theophanous v. Herald & Weekly Times Ltd.*, [1994] HCA 46, at paras. 6-18, 52 (H.C.A.), per Mason C.J., Toohey and Gaudron JJ.

<sup>158</sup> *Id.*, at paras. 35-45, per Mason C.J., Toohey and Gaudron JJ.

<sup>159</sup> *Id.*, at para. 44, per Mason C.J., Toohey and Gaudron JJ.

<sup>160</sup> [1998] 3 N.Z.L.R. 424 (N.Z.C.A.).

<sup>161</sup> *Id.*

<sup>162</sup> *Lange v. Atkinson*, [1999] UKPC 46.

<sup>163</sup> *Id.*, at para. 16, per Lord Nicholls.

<sup>164</sup> *Id.*, at paras. 24-25, per Lord Nicholls.

<sup>165</sup> *Lange v. Atkinson*, [2000] 3 NZLR 385 (N.Z.C.A.).

certainty as to the practical boundaries of defamation law, thus creating an increased “chilling effect” upon the media. It expressed concern that the *Reynolds* approach reduced the role of the jury in freedom of speech cases, which traditionally decided whether the privilege had been lost. Finally, it considered that the populist character of New Zealand’s political system warranted a special status for speech with respect to political matters only.<sup>166</sup> The court did accept that a consideration of the *Reynolds* factors may be relevant to an issue whether a defendant had acted recklessly for the purpose of deciding whether qualified privilege is defeated by malice.<sup>167</sup>

## VI. CANADIAN LAW AFTER *REYNOLDS*

In 2000, in *Hodgson v. Canadian Newspapers Co.*, the Ontario Court of Appeal deferred a decision as to the status of *Reynolds* in Ontario.<sup>168</sup> Subsequently, in *Silva v. Toronto Star Newspapers Ltd.*,<sup>169</sup> that Court dismissed an appeal from the dismissal of a libel action based on a media publication of tenants’ claims of impropriety against an apartment building manager. The Court stated that it should not be taken as having agreed with the trial judge’s view that the occasion of publication was privileged.<sup>170</sup>

In *Myers v. Canadian Broadcasting Corp.*,<sup>171</sup> the trial judge considered *Reynolds* in deciding that no qualified privilege was available to a media defendant. She held that there had been no duty to broadcast the information in issue because, first, the broadcast involved an ongoing medical debate rather than “fresh news”; second, the subject of the broadcast was not of interest to other media; and third, the broadcast had “relied heavily on one discontented civil servant to support the hard-hitting program thesis”.<sup>172</sup> On appeal, the Ontario Court of Appeal stated only that it was not satisfied that the trial judge had made “any legal error of significance”.<sup>173</sup>

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> [2000] O.J. No. 2293, 49 O.R. (3d) 161 (Ont. C.A.).

<sup>169</sup> [1998] O.J. No. 6491, 167 D.L.R. (4th) 554 (Ont. Gen. Div.), appeal dismissed [2002] O.J. No. 1960, 215 D.L.R. (4th) 77 (Ont. C.A.).

<sup>170</sup> *Id.* (Ont. C.A.).

<sup>171</sup> [1999] O.J. No. 4380, 47 C.C.L.T. (2d) 272 (Ont. S.C.J.).

<sup>172</sup> *Id.*, at 298, *per* Bellamy J.

<sup>173</sup> [2001] O.J. No. 2228, at para. 13, 54 O.R. (3d) 626 (Ont. C.A.).

Similarly, the Ontario Court of Appeal declined to interfere with a rejection of qualified privilege by the trial judge in *Leenen v. Canadian Broadcasting Corp.*<sup>174</sup> In *Leenen* (which involved the same broadcast as *Myers*), the trial judge rejected a claim of qualified privilege on the basis that the broadcast in issue was not published in circumstances of urgency, and in his view, reported on “a crisis entirely the making of” the defendant.<sup>175</sup> He also held that the broadcast was contrary to the public interest because of its “real potential for harm by inciting panic amongst patients”, and because it “seriously undermined trust and confidence in Canada’s health care system”.<sup>176</sup>

In *Young v. Toronto Star Newspapers Ltd.*, the trial judge applied the *Reynolds* factors to determine that a newspaper article was not published on an occasion of qualified privilege, where the allegations in a report of judicial proceedings were serious, the newspaper took few steps to verify them, and the allegations had been demonstrated to be unfounded at the time of publication.<sup>177</sup> In dismissing an appeal, the Ontario Court of Appeal held that the article was not a fair and accurate report for the purpose of the statutory privilege available for reports of judicial proceedings. The Court did not address the subject of qualified privilege at common law.<sup>178</sup>

In 2002, in *Campbell v. Jones*,<sup>179</sup> a majority of the Nova Scotia Court of Appeal accepted that a defamatory statement communicated to the public at large had been published on an occasion of qualified privilege. In *Campbell*, lawyers made statements at a press conference that asserted as facts their clients’ complaints of racial discrimination by a police officer in detaining and searching children during the investigation of a theft. The majority did not decide the case on the basis of the *Reynolds* principles. Instead, the majority placed great weight on the particular status of lawyers in society, and statements in the province’s rules of professional conduct for lawyers that a lawyer has responsibilities “greater than those of a private citizen”, and “a duty to provide leadership in seeking im-

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<sup>174</sup> [2001] O.J. No. 2229, 54 O.R. (3d) 612 (Ont. C.A.).

<sup>175</sup> [2000] O.J. No. 1359, 50 C.C.L.T. (2d) 213, at 250-51 (Ont. S.C.J.), *per* Cunningham J.

<sup>176</sup> The trial judge also found malice: *id.*, at 250-51, *per* Cunningham J., *affd* [2001] O.J. No. 2229, 54 O.R. (3d) 612 (Ont. C.A.).

<sup>177</sup> [2003] O.J. No. 3100, 66 O.R. (3d) 170, at 223-24 (Ont. S.C.J.), *per* Rouleau J.

<sup>178</sup> [2005] O.J. No. 4216, 77 O.R. (3d) 680 (Ont. C.A.).

<sup>179</sup> [2002] N.S.J. No. 450, 220 D.L.R. (4th) 201 (N.S.C.A.).

provements to the legal system”.<sup>180</sup> The majority also supported its conclusion on the basis that public criticism of alleged systemic discrimination by police must be promptly made if it is to be effective. In dissent, Saunders J.A. considered that the lawyers had spoken prematurely, and had also lost the protection of privilege because “their statements were high handed and careless, void of any semblance of professional restraint or objectivity, were grossly unfair and far exceeded any legitimate purpose the press conference may have served”.<sup>181</sup> *Campbell* may be seen to make a deeper point about this area of the common law. The case appears to demonstrate clearly that the analytical concepts of duty and interest by which qualified privilege is ascertained, when adopted in the context of mass media cases, are required to become so elastic that they may be applied to justify positions as dramatically different as those of the majority and minority. *Campbell v. Jones* thus raised concern that the concepts of duty and interest may not be the best means by which to conduct a transparent and intelligible analysis of conflicts between free expression and individual interests in mass media libel cases.

In 2007, in *Cusson v. Quan*,<sup>182</sup> the Ontario Court of Appeal specifically — some might say “finally” — approved the decisions of the House of Lords in *Reynolds* and *Jameel*. The Court held that a media defendant should have a defence where it has acted in accordance with principles of “responsible journalism” in the public interest. As recognized by Sharpe J.A., the responsible journalism defence requires that the media defendant “satisfy the onus of demonstrating that it did take reasonable steps to ascertain the truth of the story by following the standards of responsible journalism when investigating, writing and publishing the defamatory statement”.<sup>183</sup> The defence requires “the media to conduct itself in a prudent and responsible manner”,<sup>184</sup> and should be available where the defendant can “show that it followed accepted standards of investigation and verification and formed an honest and reasonable belief in the truth of statements it published”.<sup>185</sup>

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<sup>180</sup> *Id.*, at 231, *per* Roscoe J.A.: “[A] lawyer faced with a patent injustice, such as the violation of her clients’ *Charter* rights by law enforcement officers, has a substantial and compelling duty to ensure such injustice is remedied in an effective and timely manner.”

<sup>181</sup> *Id.*, at 258, *per* Saunders J.A.

<sup>182</sup> *Supra*, note 9.

<sup>183</sup> *Id.*, at para. 138, *per* Sharpe J.A. (C.A.).

<sup>184</sup> *Id.*, at para. 137.

<sup>185</sup> *Id.*, at para. 35.

Justice Sharpe described the specific factors stated in *Reynolds* as useful “indicia of whether the media were truly acting in the public interest in the circumstances”.<sup>186</sup> Justice Sharpe stated that Canadian courts should not adopt the House of Lords’ decisions in this field in a “slavish or literal fashion”, but rather should develop the law in a manner that best reflects Canada’s legal values and culture.<sup>187</sup>

As outlined by Sharpe J.A., the defence will be defeated where the media has engaged in a lack of prudence and care falling short of the traditional malice standard. The plaintiff does not need to establish “deliberate or reckless falsehood” or other conduct traditionally recognized as constituting malice, such as “spite or ill-will”, or an “ulterior purpose”.<sup>188</sup> Justice Sharpe emphasized that the new defence constituted a “half-way house” between the traditional law and the alternative of providing the media with the full benefit of traditional qualified privilege.<sup>189</sup> He rejected the media appellants’ contention that qualified privilege in its traditional form should be extended to all media reports on matters of public interest,<sup>190</sup> so that plaintiffs would be obliged to prove malice when suing on a media report on such a matter.<sup>191</sup> He considered this to be contrary to the spirit of the Supreme Court’s rejection of a malice requirement in *Hill*, and that it would unduly minimize the protection of the important value of individual reputation.<sup>192</sup>

In *Reaburn v. Langen*,<sup>193</sup> the British Columbia Supreme Court held that a journalist’s conduct did not constitute responsible journalism where the journalist relied on a source with “an axe to grind”; adopted the source’s allegations as fact; used inflammatory phrases in his report; and omitted material facts from the report. Although the journalist had made an unsuccessful attempt to contact the plaintiffs prior to publication, the court held that this gave rise to a need to interview others who might have pertinent information. In addition, the court held that in these circumstances the defendant had exceeded the scope of any traditional qualified privilege at common law.

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<sup>186</sup> *Id.*, at para. 144.

<sup>187</sup> *Id.*, at para. 143.

<sup>188</sup> *Id.*, at paras. 40, 139.

<sup>189</sup> *Id.*, at paras. 139, 148.

<sup>190</sup> *Id.*, at para. 134.

<sup>191</sup> *Id.*, at para. 135.

<sup>192</sup> *Id.*, at para. 136.

<sup>193</sup> [2008] B.C.J. No. 1900, 2008 BCSC 1342 (B.C.S.C.).

## VII. THE DEFENCE OF RESPONSIBLE COMMUNICATION

In 1998, in *R. v. Lucas*,<sup>194</sup> the Supreme Court of Canada held that the wilful publication of defamatory statements that are known to be false and intended to defame is entitled to no Charter protection. Indeed, in *Lucas*, the Supreme Court held that such conduct may be subject to criminal sanction. Although the Court accepted that this type of defamatory speech falls within the scope of freedom of expression broadly stated in subsection 2(b) of the Charter,<sup>195</sup> it held that its criminal prohibition was a reasonable limit on the freedom under section 1.

The protection of an individual's reputation from wilful, defamatory and knowingly false attacks was recognized by the Supreme Court in *Lucas* as a pressing and substantial objective. The Court based this on the importance of protecting the innate dignity of the individual; the link between the individual's reputation and his or her capacity to participate in Canadian society; and the need to protect individuals from long-lasting or permanent harm that may be caused by a defamatory attack.<sup>196</sup> The Court's acceptance of this protection as a pressing and substantial objective was also informed by a recognition of Canada's international human rights commitments.<sup>197</sup> These included the recognition in the *International Covenant on Civil and Political Rights* that freedom of expression "carries with it special duties and responsibilities", which include "respect of the rights and reputations of others",<sup>198</sup> and the statement in the *Universal Declaration of Human Rights* that

no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.<sup>199</sup>

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<sup>194</sup> *Supra*, note 2.

<sup>195</sup> *Id.*, at para. 25, *per* Cory J. and at para. 112, *per* McLachlin J. (dissenting in part on other grounds); *R. v. Zundel*, [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731 (S.C.C.); *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] S.C.J. No. 30, [2007] 2 S.C.R. 610, at para. 60 (S.C.C.), *per* McLachlin C.J.C.

<sup>196</sup> *Lucas*, *id.*, at paras. 48 and 73, *per* Cory J. and at para. 120, *per* McLachlin J.

<sup>197</sup> *Id.*, at paras. 50, 67, *per* Cory J. The Supreme Court had previously recognized Canada's international human rights commitments as stating values and principles of a free and democratic society: see *R. v. Keegstra*, *supra*, note 3, at para. 66, *per* Dickson C.J.C.; *Slaight Communications Inc. v. Davidson*, [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038, at para. 23 (S.C.C.), *per* Dickson C.J.C.

<sup>198</sup> 999 U.N.T.S. 171 (1966), adopted by the United Nations in 1966 and in force in Canada since 1976.

<sup>199</sup> G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), art. 12. Additional international human rights conventions supported by Western democracies contain provisions to similar effect.



Having accepted that the crime of defamatory libel has a pressing and substantial objective, the Court held that the prohibition complied with the standard of minimal impairment of rights under section 1 of the Charter, given the obligation of the Crown to establish a subjective intention to defame. The Court stated that the deliberate publication of defamatory lies likely to expose a person to hatred, ridicule or contempt is so far removed from the core values of freedom of expression that it merits only scant protection as a matter of judicial policy.<sup>200</sup> Justice McLachlin observed that such expression may have some value to the extent that it focuses attention on issues of public concern, but that value is low, and is reduced further by the fact that public attention can be focused on issues without intentionally inflicting harm on the reputation of a person through the publication of known falsehoods.<sup>201</sup>

The Supreme Court thus established in *Lucas* that defamatory statements known to be false and intended to defame are entitled to no protection. It remained for the Supreme Court to consider the more difficult problem of the consistency with Charter values of the common law applicable to other types of defamatory statements. It may have been thought, after *Hill*, that the Court would not conduct a rigorous examina-

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The *European Convention* provides that freedom of expression carries with it duties and responsibilities, and may therefore be "subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or the rights of others". The House of Lords has held that a national libel law may, consistent with the *European Convention*, restrain the publication of defamatory material as a restriction prescribed by law and necessary and proportionate to the protection of the reputation and rights of others: see *Jameel*, *supra*, note 124, at para. 19, *per* Lord Bingham. Similarly, the *American Convention on Human Rights* provides that the exercise of free expression "shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure ... respect for the rights or reputations of others ...": O.A.S.T.S. No. 36, at 1. Article 13 provides:

Everyone has the right to freedom of thought and expression. ... The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: 1. respect for the rights or reputations of others ...

See also Article 11, which provides: "Everyone has the right to have his honor respected and his dignity recognized. 2. No one may be the object of ... unlawful attacks on his honor or reputation ... Everyone has the right to the protection of the law against such interference or attacks."

<sup>200</sup> *R. v. Lucas*, *supra*, note 2, at para. 48, *per* Cory J.

<sup>201</sup> *Id.*, at para. 121, *per* McLachlin J. (dissenting in part on other grounds). The Supreme Court rejected the argument that the criminal prohibition is an excessive limitation of expression because a civil cause of action may be available to the person defamed. The Court held that the criminal prohibition serves distinct and legitimate purposes of punishing socially reprehensible conduct, and discouraging persons from engaging in that conduct: see paras. 69-73, *per* Cory J., and para. 120, *per* McLachlin J. The Court considered that the criminal measure may also allow for a legal response to defamatory libel where the person defamed may otherwise be discouraged from commencing civil proceedings by the expense of litigation, or a minimal prospect of financial recovery from the defamer: see paras. 74-76, *per* Cory J. and para. 120, *per* McLachlin J.

tion of the common law of libel. Yet *Hill* was a case of malicious libel, arguably either within, or very close to, the class of defamatory speech held to be entirely beyond Charter protection in *Lucas*. *Hill* also expressly left open the status of defamatory publications by mass media.<sup>202</sup> It may also be argued that in *Hill*, the Court was asked to do too much in the submission that it should adopt the *Sullivan* “absence of malice” standard. In the absence of a more moderate alternative, the Court may have done less than it might have. In any event, the refined and searching analysis of free expression issues developed by the Court over the last 25 years made it inevitable that such an approach would ultimately have to be brought to bear upon more difficult types of defamatory speech than were considered in *Hill* and *Lucas*.

The Supreme Court first did so in 2008, in *WIC Radio Ltd. v. Simpson*,<sup>203</sup> by reviewing the law applicable to defamatory statements of comment on subjects of public interest. In libel law, a statement of comment, as distinguished from a statement of fact, is characterized by an element of subjectivity generally incapable of proof, while a statement of fact is capable of being determined to be accurate or not.<sup>204</sup> Comment most commonly includes expressions of opinion, but may also extend to inferences of fact that are inherently debatable on the facts of the case. Whether a statement is one of comment or fact is to be determined from the perspective of the reasonable viewer or reader.<sup>205</sup> It has long been established that the defence of fair comment may be available for defamatory statements of comment, as distinct from statements of fact, made on matters of public interest, without malice, on the basis of accurate facts, and which are “fair”.

In *WIC Radio*, the Supreme Court held that the established common law elements of the defence are consistent with Charter values, subject to the clarification that “fairness” for the purpose of the defence is to be judged on the objective standard of whether any person could honestly make the comment on the basis of the facts referred to by the person making the comment.<sup>206</sup> This is to be distinguished from a concept of “fairness” in the sense of correctness or approximate accuracy. It will be seen that the latitude for comments that any person could honestly make,

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<sup>202</sup> *Hill*, *supra*, note 2, at para. 139, *per* Cory J.

<sup>203</sup> *Supra*, note 2.

<sup>204</sup> *Id.*, at para. 26, *per* Binnie J.; see also *Ross v. New Brunswick Teachers' Assn.*, [2001] N.B.J. No. 198, 201 D.L.R. (4th) 75, at para. 56 (N.B.C.A.).

<sup>205</sup> *WIC Radio*, *id.*, at para. 27, *per* Binnie J.; see also *Ross*, *id.*, at para. 62.

<sup>206</sup> *WIC Radio*, *id.*, at paras. 49-51, *per* Binnie J.

as distinguished from a requirement that comments be reasonably correct, provides a wider scope of protection for comment on matters of public interest. As Binnie J. put it more concisely, “We live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones.”<sup>207</sup>

In its recent decision in *Grant v. Torstar Corp.*,<sup>208</sup> the Supreme Court turned to the common law applicable to defamatory statements of fact which relate to subjects of legitimate public interest and, unlike those stated in *Lucas* to be beyond the law’s protection, are not knowingly false. The Court squarely considered the matter in accordance with principles of freedom of expression analysis.

It is well established that the values underlying the Charter freedom of expression are, first, intelligent democratic self-government; second, the determination of truth through the open exchange of communication; and third, persons’ individual self-fulfillment as both speakers and listeners.<sup>209</sup> In *Grant*, the Court accepted that the publication of a defamatory fact which is not known to be false, and which relates to a subject matter of public interest, may advance the first two free expression values. It may do so by, first, facilitating “freewheeling” and productive debate on matters of democratic governance. Second, the publication may assist in the determination of the full truth on matters of public interest generally.<sup>210</sup> Only the third value underlying free expression, the fulfillment of the individual’s desire to express oneself, was considered to have insufficient weight to warrant protection for defamatory statements.<sup>211</sup> In light of this analysis, McLachlin C.J.C. made plain that the more conservative language of the Court in *Hill* should be read carefully. She said the

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<sup>207</sup> *Id.*, at para. 4, *per* Binnie J.; see also *Grant, supra*, note 2, at para. 31, *per* McLachlin C.J.C.

<sup>208</sup> *Grant, id.*

<sup>209</sup> *Id.*, at paras. 1, 47-50, *per* McLachlin C.J.C.; see also *Montreal (City) v. 2952-1366 Quebec Inc.*, [2005] S.C.J. No. 63, [2005] 3 S.C.R. 141, at para. 74 (S.C.C.), *per* McLachlin C.J.C. and Deschamps J.; *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J. No. 42, [2002] 2 S.C.R. 522, at para. 75 (S.C.C.), *per* Iacobucci J.; *R. v. Sharpe, supra*, note 2, at paras. 21, 23, *per* McLachlin C.J.C.; *Ford v. Quebec (Attorney General)*, *supra*, note 3, at para. 56, *per* the Court; *Irwin Toy Ltd., supra*, note 3, at para. 53, *per* Dickson C.J.C., Lamer and Wilson JJ.; *Canada (Human Rights Commission) v. Taylor*, [1990] S.C.J. No. 129, [1990] 3 S.C.R. 892, at para. 116 (S.C.C.), *per* McLachlin J. (dissenting on other grounds); *Keegstra, supra*, note 3, at paras. 27 and 87-89, *per* Dickson C.J.C., and at paras. 168-82, *per* McLachlin J. (dissenting on other grounds); *Committee for the Commonwealth of Canada v. Canada*, [1991] S.C.J. No. 3, [1991] 1 S.C.R. 139, at paras. 61-80 (S.C.C.), *per* La Forest J.; *R. v. Zundel*, [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731, at para. 22 (S.C.C.), *per* McLachlin J.

<sup>210</sup> *Grant, supra*, note 2, at paras. 52-53, *per* McLachlin C.J.C.

<sup>211</sup> *Id.*, at para. 7.

statement of Cory J. in *Hill* that “defamatory statements are very tenuously related to the core values which underlie s. 2(b)” must be read in the factual context of that case.<sup>212</sup>

In *Grant*, the Supreme Court also continued to be mindful of its established principle that in assessing the consistency of the common law with values underlying the Charter, the common law should reflect full and equal respect for all of those values.<sup>213</sup> A hierarchical approach, preferring some values over others, is to be avoided.<sup>214</sup> Having found potential free expression values in defamatory speech relating to subjects of legitimate public interest that is not known by the speaker to be false, it remained for the Court to take into account the “vital”<sup>215</sup> value of protecting individuals’ reputations and the “innate dignity of the individual”.<sup>216</sup> It restated its acknowledgment in *Lucas* that there is an “integral link between reputation and the fruitful participation of an individual in Canadian society”, both for private citizens and individuals participating in public life.<sup>217</sup> The Court also restated that defamation law may protect individuals’ reasonable expectations of privacy.<sup>218</sup>

For the Court in *Grant*, the tipping point in this balance was that at which, assuming a case involving a publication relating to a matter of legitimate public interest, legal and practical technicalities may intervene to give the plaintiff an unfair advantage over the defendant. The Court repeatedly expressed concern for the position of a journalist “who has checked sources and is satisfied that a statement is substantially true”,<sup>219</sup> who wishes to report “facts which a reasonable person would accept as reliable and which are relevant and important to public debate”,<sup>220</sup> and who has “a reasonable certainty” of the truth of the report.<sup>221</sup> Unless a defence is available on the basis of reasonable verification of the statement at the time of publication, the defendant may be defeated by an

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<sup>212</sup> *Id.*, at para. 57.

<sup>213</sup> *Id.*, at para. 61.

<sup>214</sup> *Dagenais*, *supra*, note 8, at para. 72, *per* Lamer C.J.C.; *R. v. Mentuck*, [2001] S.C.J. No. 73, [2001] 3 S.C.R. 442, at para. 23 (S.C.C.), *per* Iacobucci J.; *WIC Radio*, *supra*, note 2, at para. 2, *per* Binnie J.; *Hill*, *supra*, note 2, at paras. 107ff. and at para. 121, *per* Cory J.

<sup>215</sup> *Grant*, *supra*, note 2, at para. 41, *per* McLachlin C.J.C.

<sup>216</sup> *Id.*, at para. 58.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*, at para. 59.

<sup>219</sup> *Id.*, at para. 33.

<sup>220</sup> *Id.*, at para. 53.

<sup>221</sup> *Id.* Chief Justice McLachlin repeated that the Court’s concern was for “reliable statements that are connected to the democratic discourse and truth-finding rationales for freedom of expression” (at para. 64); and similarly, that the Court’s concern was for “statements that are reliable and important to public debate” (at para. 65).

inability to prove the substantial truth of the statement in a court of law on some date far in the future,<sup>222</sup> by reason of the unavailability of witnesses, an inability to meet the standards of the law of evidence, or some other practical impediment. In such circumstances the plaintiff may unfairly benefit from the imposition of a “standard of perfection”.<sup>223</sup> Where the statement in issue relates to a subject of public interest and was reliably verified at the time of publication, the plaintiff’s success on such a basis unduly restricts freedom of expression in the particular case. The legal regime which allows this will also inevitably stifle the communication of reliable statements on matters of public interest in other cases.<sup>224</sup>

While the Supreme Court appreciated that the concepts of duty and interest have for some time been used by courts to make qualified privilege available to mass media communications in an “*ad hoc* and incremental way”,<sup>225</sup> the Court considered that the threshold “remains high”<sup>226</sup> and “the criteria for reciprocal duty and interest” remained “unclear”.<sup>227</sup> As observed above regarding the split between majority and minority in *Campbell v. Jones*, the concepts of duty and interest are potentially so elastic that they may be applied in mass media cases to reach starkly opposed results. In *Grant*, the Supreme Court acknowledged that the concepts of duty and interest in traditional qualified privilege analysis involving job references, police reports and the like “are definable with some precision and involve a genuine reciprocity”, while a “reciprocal duty and interest involved in a journalistic publication to the world at large, by contrast, is largely notional”.<sup>228</sup>

The Supreme Court accordingly dispensed with traditional qualified privilege analysis, and instead formulated a test for a new defence of “responsible communication” specifically focused on the concepts of public interest and responsibility in mass media communications.<sup>229</sup> The defence was accordingly held to apply where a defamatory statement, first, relates to a subject of public interest, and second, has been responsibly verified by the defendant.<sup>230</sup>

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<sup>222</sup> *Id.*, at para. 33, *per* McLachlin C.J.C.; see also paras. 53 and 62.

<sup>223</sup> *Id.*, at para. 62; see also para. 53.

<sup>224</sup> *Id.*, at paras. 2, 39, 41, 52, 53, 57 and 62.

<sup>225</sup> *Id.*, at para. 35.

<sup>226</sup> *Id.*, at para. 37.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*, at para. 93.

<sup>229</sup> *Id.*, at paras. 88-95.

<sup>230</sup> *Id.*, at para. 98.

The publication in issue will relate to a matter of public interest if, read broadly and as a whole, it relates to a subject in which a segment of the community would have a genuine interest in receiving information.<sup>231</sup> The potential subject matter may thus be wide-ranging, including politics, science and the arts, the environment, religion or morality.<sup>232</sup> Few potential subjects are clearly excluded from potential consideration, although the Court made clear that subjects of public interest do not extend to matters of mere curiosity or prurient interest, or in which the person concerned has a reasonable expectation of privacy.<sup>233</sup>

A publication of a defamatory fact will be responsible if it is based upon information that “a reasonable person would accept as reliable”, even though it may not be possible, at a later stage in a courtroom, to prove the truth of the fact on the basis of admissible evidence.<sup>234</sup> To meet the standard of reliability the defendant must have acted carefully.<sup>235</sup> The degree of care required will vary from case to case. The more serious the defamatory statement, the “more thorough” the efforts at verification must be.<sup>236</sup> If a defendant’s source of information may be untrustworthy, has a bias or “axe to grind”, or wishes to be a confidential source, there may be a need to take other steps to verify a statement.<sup>237</sup> In most cases, it will be “inherently unfair” to publish the defamatory statement without giving the target an opportunity to respond, although the significance of this factor will vary in accordance with “the degree to which fulfilling its dictates would actually have bolstered the fairness and accuracy of the report”.<sup>238</sup> A great public importance or urgency of the publication may also be taken into account in deciding whether the publication was responsible.<sup>239</sup> If the defendant has acted maliciously, however, the defence cannot be available, since a defendant acting with malice “has by definition not acted responsibly”.<sup>240</sup> As the assessment of reliability is predominantly factual, it is for the trier of fact to determine.

Chief Justice McLachlin observed that under the former law, the practical difficulties faced by defendants, who were required to be certain at the point of publication that they could prove the truth of a defamatory

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<sup>231</sup> *Id.*, at para. 102.

<sup>232</sup> *Id.*, at paras. 102, 106.

<sup>233</sup> *Id.*, at paras. 102, 105.

<sup>234</sup> *Id.*, at paras. 53, 64, 65.

<sup>235</sup> *Id.*, at para. 62.

<sup>236</sup> *Id.*, at para. 111.

<sup>237</sup> *Id.*, at paras. 114-115.

<sup>238</sup> *Id.*, at paras. 116-117.

<sup>239</sup> *Id.*, at paras. 112-113.

<sup>240</sup> *Id.*, at para. 125; see also para. 92.

statement at a later trial, raised the spectre that “defamation lawsuits, real or threatened”, could “be a weapon by which the wealthy and privileged stifle the information and debate essential to a free society”.<sup>241</sup> She was equally cognizant, however, that in Canadian life a defendant mass media publisher may itself have significant power. Although McLachlin C.J.C. made clear that the new defence will be available to anyone who publishes on matters of public interest responsibly,<sup>242</sup> she also stated that it is “vital that the media act responsibly in reporting facts on matters of public concern, holding themselves to the highest journalistic standards”.<sup>243</sup> Chief Justice McLachlin accepted that libel law serves as “one of the comparatively few checks upon [the media’s] great power”.<sup>244</sup>

### VIII. THE CANADIAN ADOPTION OF “REPORTAGE”

It has long been a fundamental principle of defamation law that a defendant cannot defend a libel action on the basis that the defendant has only repeated what someone else has said.<sup>245</sup> This “repetition rule” has been adopted to deal with the possibility that a person intending to defame another may seek to frame a defamatory statement in an indirect manner, in the hope of avoiding civil liability. It has been observed that the repetition rule “in essence, prevents a defendant from hiding behind the fact that he is only repeating what others have alleged. He can accordingly not justify the libel by proving that the allegations have been made, but only by proving that they are true.”<sup>246</sup>

A number of recent United Kingdom cases, in the wake of the developments discussed above regarding media privilege, have accepted that certain reports of defamatory allegations, while nevertheless defamatory

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<sup>241</sup> *Id.*, at para. 39.

<sup>242</sup> *Id.*, at para. 96.

<sup>243</sup> *Id.*, at para. 53.

<sup>244</sup> *Id.*, at para. 62, quoting Kirby P. in *Ballina Shire Council v. Ringland* (1994), 33 N.S.W.L.R. 680, at 700 (C.A.).

<sup>245</sup> *Lewis v. Daily Telegraph Ltd.*, [1964] A.C. 234, at 260 (H.L.), *per* Lord Reid, and at 283, *per* Lord Devlin (“For the purpose of the law of libel a hearsay statement is the same as a direct statement, and that is all there is to it.”); see also *“Truth” (N.Z.) Ltd. v. Holloway*, [1960] 1 W.L.R. 997, at 1001-03 (P.C.), *per* Lord Denning. Similarly, it is no answer for a defendant to say that he or she has only repeated a rumour: see *Associated Newspapers Ltd. v. Dingle*, [1964] A.C. 371, at 410-11 (H.L.), *per* Lord Denning.

<sup>246</sup> *Jameel v. Times Newspapers Ltd.*, [2004] EWCA Civ. 983, at para. 29 (C.A.); *Shah v. Standard Chartered Bank*, [1998] 4 All E.R. 155 (C.A.); *Stern v. Piper*, [1996] 3 All E.R. 385 (C.A.).

by repetition, may be privileged.<sup>247</sup> “Reportage” has been coined as a name for this defence. In the United Kingdom, the defence of “reportage” may be available where two tests are met. First, the information reported must be in the public interest. Although this may include information alleging very serious misconduct, it may not go so far as to include information that is considered to be of a personal and scurrilous nature.<sup>248</sup> Second, the thrust of the report as a whole, judged objectively and in all the circumstances, must have the effect of reporting only the fact that the statement was made, rather than its truth. As such, the journalist must not have adopted the information, and must have reported the story in a fair, disinterested and neutral way.<sup>249</sup> The publication must also generally meet the standards of “responsible journalism” as articulated in the case law. If these standards are met, it is not necessary that the journalist have taken steps to verify the truth of the information reported.<sup>250</sup>

In *Jameel v. Wall Street Journal*,<sup>251</sup> the House of Lords accepted that the defence of “reportage” may be available to mass media in certain cases. Lord Hoffmann stated that the defence of “reportage” may apply in cases “in which the public interest lies simply in the fact that the statement was made”, provided that it is “clear that the publisher does not subscribe to any belief in its truth”.<sup>252</sup> Baroness Hale also referred to this, although she cautioned that if the publisher intends only to report what others have said, and does not believe the information to be true, “he would be well advised to make this clear ... In any case, the tone in which the information is conveyed will be relevant to whether or not the publisher behaved responsibly in passing it on”.<sup>253</sup>

American defamation law has recognized a defence of neutral “reportage”. In order for the defence to be established under American law, it has been stated that (1) the defendant must be a responsible, prominent organization; (2) the plaintiff must be a public figure; (3) the report must be accurate and disinterested; and (4) the accusations must be newsworthy as having been made in a current controversy on a sensitive issue. It

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<sup>247</sup> *Roberts v. Gable*, [2007] EWCA Civ. 721; *Al-Fagih v. HH Saudi Research and Marketing (UK) Ltd.*, [2002] EMLR 215 (C.A.); *Mark v. Associated Newspapers Ltd.*, [2002] EMLR 38 (C.A.); *Galloway v. Telegraph Group Ltd.*, [2006] EMLR 221 (C.A.).

<sup>248</sup> *Roberts v. Gable*, [2007] EWCA Civ 721, at para. 61, *per* Ward L.J. and at para. 76, *per* Sedley L.J.

<sup>249</sup> *Id.*, at para. 61, *per* Ward L.J.

<sup>250</sup> *Id.*

<sup>251</sup> *Supra*, note 124.

<sup>252</sup> *Id.*, at para. 62.

<sup>253</sup> *Id.*, at para. 149.



has been observed that these criteria have been met in relatively few cases.<sup>254</sup>

In *Moises v. Canadian Newspaper Co.*, the British Columbia Court of Appeal held that no defence is available in Canada for “neutral reportage” of defamatory statements made by others. The court rejected an argument that a publication is made an occasion of qualified privilege where the words published are a “fair report” on a matter of public interest.<sup>255</sup> The contrary was suggested in the 1989 Ontario Superior Court case of *Parsons v. Windsor Star*,<sup>256</sup> but that decision was subsequently criticized in the same court.<sup>257</sup>

In *Grant v. Torstar Corp.*, the Supreme Court of Canada recognized “reportage” as a type of responsible communication. The Supreme Court held that the defence will apply to a report which fairly reports both sides of a dispute which is itself a matter of public interest.<sup>258</sup> To qualify for protection, the report must, first, attribute the statement to a person, preferably identified; second, indicate expressly or implicitly that the truth has not been verified; third, set out both sides of the dispute fairly; and, fourth, provide the context in which the statements were made.<sup>259</sup>

## IX. CONCLUSION: THREE PILLARS

*Lucas*, *Grant* and *WIC Radio* may be seen as placing Canadian libel law on a foundation of three pillars: first, as established in *Lucas*,<sup>260</sup> knowingly false and malicious defamation is beyond the protection of the law; second, as established in *Grant*,<sup>261</sup> defamatory statements of fact which relate to subjects of legitimate public interest and are not known to be false at the time of publication will be protected if they constitute reliable information published responsibly; and third, as established in *WIC Radio*,<sup>262</sup> defamatory statements of comment on matters of public interest need not be responsible, as long as a person could have honestly expressed them on the relevant facts. These are foundational principles that may properly be said to be emblematic of a free and democratic society that values both freedom of expression and the protection of the individual.

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<sup>254</sup> *Roberts v. Gable*, *supra*, note 248, at para. 46, *per* Ward L.J.

<sup>255</sup> *Supra*, note 68, at 348-56, *per* Williams J.A.

<sup>256</sup> [1989] O.J. No. 1871, 63 D.L.R. (4th) 732 (Ont. Gen. Div.).

<sup>257</sup> *Hodgson v. Canadian Newspapers Co.*, [1998] O.J. No. 2682, 39 O.R. (3d) 235, at 375 (Ont. Gen. Div.), *per* Lane J. See also *Moises*, *supra*, note 68, at 354-55, *per* Williams J.A.

<sup>258</sup> *Grant*, *supra*, note 2, at para. 120, *per* McLachlin C.J.C.

<sup>259</sup> *Id.* at para. 120.

<sup>260</sup> *Supra*, note 2.

<sup>261</sup> *Supra*, note 2.

<sup>262</sup> *Supra*, note 2.