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Abstract
When comparing the seminal Supreme Court of Canada defamation decisions of the 1990s and 2000s, it is apparent that the Court’s view on the importance of protecting reputation has changed. Recent decisions hail the importance of using freedom of expression as a countervailing interest against the oft-criticized strictures of the common law of defamation. Fundamental alterations in the nature of mass and interactive media and in the nature of reputation are two phenomena informing this change. Increased attention to the theorizing of "reputation," the interest whose protection animates the entire tort of defamation, reveals that reputation is itself a highly constructed, contextual, and malleable artifact. This article proposes recasting the tort of defamation into two different tracks: one for public figures, who pose the highest risk of abusing the tort, and one for private plaintiffs, whose reputational interest is akin to traditional notions of reputation.

Keywords
Libel and slander; Reputation (Law); Canada

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Chasing Reputation: The Argument for Differential Treatment of “Public Figures” in Canadian Defamation Law

BOB TARANTINO *

When comparing the seminal Supreme Court of Canada defamation decisions of the 1990s and 2000s, it is apparent that the Court’s view on the importance of protecting reputation has changed. Recent decisions hail the importance of using freedom of expression as a countervailing interest against the oft-criticized strictures of the common law of defamation. Fundamental alterations in the nature of mass and interactive media and in the nature of reputation are two phenomena informing this change. Increased attention to the theorizing of “reputation,” the interest whose protection animates the entire tort of defamation, reveals that reputation is itself a highly constructed, contextual, and malleable artifact. This article proposes recasting the tort of defamation into two different tracks: one for public figures, who pose the highest risk of abusing the tort, and one for private plaintiffs, whose reputational interest is akin to traditional notions of reputation.

Lorsque l’on compare les arrêts annonciateurs en matière de diffamation, que la Cour Suprême du Canada a rendus dans les années 1990 et 2000, on voit l’évolution du point de vue de la Cour sur l’importance de protéger la réputation. Les arrêts récents saluent l’importance de recourir à la liberté d’expression en tant qu’intérêt compensateur des restrictions — souvent critiquées — que comporte la common law en matière de diffamation. Des altérations fondamentales de la nature des mass-médias et des médias interactifs, ainsi que de la nature même de la réputation, constituent deux phénomènes qui dessinent ce changement. Une attention accrue sur la théorisation de la « réputation, » intérêt dont la protection meut le délit entier de la diffamation, révèle que la réputation est en elle-même une création extrêmement élaborée, contextuelle et malléable. Cet article propose de rediriger le délit de diffamation sur deux voies différentes : l’une pour les personnalités publiques, qui présentent le plus grand risque d’abuser de ce délit; l’autre pour les plaignants privés, dont l’intérêt pour leur réputation est conforme aux notions traditionnelles de la réputation.

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IN THE FIRST FIFTEEN YEARS since the Supreme Court of Canada (SCC) described the protection of an individual’s reputation as something that is “of vital importance ... [and that] reflects the innate dignity of the individual, a concept which underlies all the [Canadian Charter of Rights and Freedoms’] rights,”2 Canadian courts, including the SCC itself, have dramatically shifted the fulcrum of defamation law away from protecting reputation in favour of freedom of expression. Whereas seminal SCC decisions on Canadian defamation law from the 1990s, such as Hill v. Church of Scientology of Toronto3 and R. v. Lucas,4 expound in detail the doctrinal imperative of protecting an individual’s reputation, recent appellate decisions devote comparatively little attention to its importance. Instead, these appellate decisions emphasize the need to modify defamation law so as to accord a broader ambit to the rights of freedom of expression and freedom of the media.

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3. Ibid.
This article explores the causes and implications of the decline of protecting reputation as the focal point of Canadian defamation law. In short, the nature of "reputation," and, hence, the nature of the interest that the tort of defamation strives to protect, has changed in light of the development and spread of mass and interactive communications technology. That nature has changed most drastically for certain members of society who can be referred to as "public figures." In light of that alteration of the underlying interest being protected, a corresponding change in the mechanism that is used to protect it is needed. It will be argued in this article that recent efforts at reforming defamation law are too tentative to accomplish the goals that the reformers assert they wish to achieve; if we are to take seriously the implications of the underlying motivations for the doctrinal shifts we have seen, then a more radical restructuring of Canadian defamation law is required.

A welcome development in some recent decisions is a movement away from describing the task of the courts as balancing reputation and expression, in preference to describing the undertaking as one of reconciling the competing interests—with reputation cast as the junior stakeholder. The privileging of expression over reputation can be profitably described as a mechanism employed by the courts to introduce a more nuanced understanding of reputation into Canadian defamation law—both in terms of how it is socially constructed and how the interest should be protected. While Canadian judges, like their Commonwealth siblings, are unwilling to adopt a \textit{New York Times v. Sullivan} type approach to defamation law (which would require public figure plaintiffs to prove actual malice in order to be successful at trial), doctrinal and technological developments point in favour of an adapted cause of action for public figure plaintiffs under Canadian law. To date, modifications made by Canadian courts have been entirely in the area of defences \textit{\textit{(i.e., introducing a "responsible communication on matters of public interest" defence and expanding the availability of the fair comment defence\textsuperscript{5})}}. But if courts are serious about circumscribing the chilling effect of defamation claims, modifications will need to be made to the structure of the tort in order to lessen the likelihood of

\begin{itemize}
\item \textsuperscript{5} WIC Radio Ltd. v. Simpson, [2008] 2 S.C.R. 420 at para. 2 [WIC Radio].
\item \textsuperscript{6} 376 U.S. 254 (1964) [Sullivan].
\item \textsuperscript{7} Grant v. Torstar Corp., [2009] 3 S.C.R. 640 at para. 7 [Grant].
\item \textsuperscript{8} WIC Radio, supra note 5.
\end{itemize}
actions being commenced in the first place and to blunt the impact of claims that are in fact brought.

Expressly conceptualizing reputation within its proper context (i.e., recognizing its contingent and constructed nature and taking account of the new mechanisms available to individuals to affect that construction) should lead to an adaptation of defamation law into two related but distinct causes of action: one for individuals who lack the resources and wherewithal to actively construct their reputation and one for public figure individuals who do possess those advantages. Assuming the Charter represents a restatement of our fundamental values, if courts meaningfully engage their responsibility to modify the common law in accordance with dynamic social processes, and if the current state of the media represents an elemental change in how information is disseminated, then a reassessment of the nature of reputation and how it is protected is required.

In setting out the argument that substantiates the foregoing claims, Parts I and II of this article delineate the current state of Canadian defamation law and the status of reputation. The recent Cusson v. Quan,9 Grant v. Torstar Corp.,10 and WIC Radio Ltd. v. Simpson11 decisions are compared to the Lucas and Hill decisions of the previous decade, giving special attention to the factors that motivated the greatly amplified weight recently accorded to freedom of expression. Part III argues that the conventional metric of reputation is mistaken, or at least no longer operative, and that Canadian courts are increasingly, if implicitly, acknowledging and espousing a revised conceptualization of reputation. Finally, Part IV argues that these developments require reconciliation to promote theoretical coherency and practical efficiency, obliging the courts to express their (to date) implicit acknowledgement of a proper understanding of the nature of reputation and the mediating effect of modern communications media (particularly the internet and the twenty-four hour news cycle). Doing so necessitates the development of a dual-tracked defamation tort that allows public figure "reputation creators" to "set the record straight," but to obtain recovery only where they can demonstrate actual losses, while retaining the protections in place in the current law for non-public figure individuals.

10. Supra note 7.
11. Supra note 5.
I. REPUTATION IN CANADIAN DEFAMATION LAW AFTER HILL AND LUCAS

Two significant defamation decisions, *Hill* and *Lucas*, were released by the SCC in the mid-1990s. Justice Cory wrote the majority reasons in both cases, and though the former case involved a civil claim for defamation while the latter involved a charge of criminal defamatory libel, two consistent themes are present: the level of importance accorded to the protection of an individual’s reputation and the notion that Canadian courts had, at the time of the decisions, struck the correct balance between the interests of reputation and freedom of expression.

The issue that occupies the bulk of the reasoning of the SCC in *Hill* is the constitutionality of the common law action for defamation. The appellants argued that

> the common law of defamation has failed to keep step with the evolution of Canadian society .... The guiding principles on which defamation is based place too much emphasis on the need to protect the reputation of plaintiffs at the expense of the freedom of expression of defendants.

They thus contended that the resulting situation was contrary to the guarantee of freedom of expression in section 2(b) of the *Charter*. Because no government action was implicated in this civil case, the SCC was not required to engage in a formal *R. v. Oakes* analysis (Oakes analysis); instead, it assessed whether the common law of defamation comported with “the underlying values

12. The other major issue in the decision was the proper quantum of damages in a defamation claim. In a moment of ill-advised theatricality, Morris Manning, a lawyer acting on behalf of the Church of Scientology, had read out to reporters assembled on the courthouse steps allegations contained in a notice of motion for criminal contempt proceedings that Manning intended to file against Crown prosecutor Casey Hill. The contempt proceedings were resolved in favour of Hill, with the allegations held to be untrue and without foundation. Hill commenced a successful action for libel against both Manning and the Church of Scientology, obtaining an award for defamation of the highest damages to date in Canadian history.


15. [1986] 1 S.C.R. 103. When a law infringes a *Charter*-guaranteed right, the Court determines whether that law constitutes a justifiable limitation on the right pursuant to s. 1 of the *Charter*. For an infringement to be justifiable, the objectives of the law must be pressing and substantial, and the means used to achieve the objectives must be proportional.
upon which the Charter is founded."\(^{16}\) In accordance with \textit{R.W.D.S.U. v. Dolphin Delivery Ltd.}\(^{17}\) and \textit{R. v. Salituro},\(^{18}\) the SCC undertook a free-ranging and contextual inquiry\(^{19}\) that sought "to balance, in a broad and flexible manner," any conflict between the values that inform an existing common law rule or doctrine and the values that inspired the provisions contained in the Charter.\(^{20}\) The \textit{Dolphin Delivery} analysis permits courts to engage in a principle-driven interrogation of the common law to ensure that it continues to "comply with prevailing social conditions and values."\(^{21}\) More importantly, adapting the common law is an obligation, inherent in the role of the courts as "custodians of the common law," whose duty it is to ensure that the common law "reflects the emerging needs and values of our society."\(^{22}\) The extent of any such adaptation is to be calibrated to the extent of changes in the societal context: while recognizing that "[j]udges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country,"\(^{23}\) such adaptation should be limited to "those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."\(^{24}\)

The SCC framed its reasoning in \textit{Hill} as a determination of whether the common law of defamation had struck an appropriate balance between the values of reputation and freedom of expression.\(^{25}\) In taking the opportunity to write at length about the "importance of reputation," it identified reputation as not only an important interest, but an interest having a value in democratic

\(^{16}\) \textit{Hill}, supra note 2 at para. 82.
\(^{17}\) [1986] 2 S.C.R. 573 [\textit{Dolphin Delivery}].
\(^{19}\) See \textit{Hill}, supra note 2 at para. 97. Here, the SCC described the analysis derived from \textit{Dolphin Delivery} as "more flexible" than a traditional \textit{Oakes} analysis.
\(^{20}\) \textit{Ibid.} at para. 86. See \textit{Constitution Act, 1982}, supra note 1, s. 52(1). The jurisdiction of the courts to review the common law to ensure that it comports with the values underlying the Charter is founded upon this section. It provides that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."
\(^{21}\) \textit{Hill}, \textit{ibid.} at para. 91.
\(^{22}\) \textit{Ibid.}, citing \textit{Salituro}, supra note 18 at 678.
\(^{24}\) \textit{Hill}, \textit{ibid.}
\(^{25}\) \textit{Ibid.} at para. 100.
societies co-extensive with that of freedom of expression.\textsuperscript{26} It is difficult to
overstate the tenor of the SCC's language regarding reputation—reputation
was described as "closely related to the innate worthiness and dignity of the
individual."\textsuperscript{27} The SCC posited that a good reputation underpins the funda-
mental political importance of the individual to democratic
societies.\textsuperscript{28} The
need to protect reputation was described as fundamental and vital not just to
the individual, but to democratic society as a whole.\textsuperscript{29} For all the rhetorical
flight, what actually constitutes a reputation was left unexamined, though
there are indications that the SCC conceived of reputation as an instrumental
good—it serves the "fundamentally important purpose of fostering our self-image
and sense of self-worth,"\textsuperscript{30} and it is the "fundamental foundation on which
people are able to interact with each other in social environments."\textsuperscript{31} The SCC
concluded that "the common law of defamation complies with the underlying
values of the Charter and there is no need to amend or alter it."\textsuperscript{32} Justice Cory
opined that he

simply [could not] see that the law of defamation is unduly restrictive or inhibiting.
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.\textsuperscript{33}

\begin{thebibliography}{9}
\bibitem{26} \textit{Ibid.} at para. 107. The SCC went on to state that "[reputation] is an attribute that must, just
as much as freedom of expression, be protected by society's laws."
\bibitem{27} \textit{Ibid.} See also at para. 117. Here, the SCC included a quotation from the United States
quoted the US SC as stating that "the right of a man to the protection of his own reputation ...
reflects no more than our basic concept of the essential dignity and worth of every
human being."
\bibitem{28} \textit{Hill}, \textit{ibid.} at para. 108.
\bibitem{29} \textit{Ibid.} at paras. 116-17. See also at para. 120. The SCC stated that "the good reputation of
the individual represents and reflects the innate dignity of the individual, a concept that
underlies all the Charter rights. It follows that the protection of the good reputation of an
individual is of fundamental importance to our democratic society."
\bibitem{30} \textit{Ibid.} at para. 117.
\bibitem{31} \textit{Ibid.}, citing David Lepofsky, "Making Sense of the Libel Chill Debate: Do Libel Laws 'Chill'
\bibitem{32} \textit{Hill}, \textit{ibid.} at para. 141.
\bibitem{33} \textit{Ibid.} at para. 137.
\end{thebibliography}
The SCC did, however, qualify its statement by noting that the media were not involved in the appeal and that its conclusion on the matter of the proper balance was limited to the application of the common law to the parties in the present action.34

Three years after the Hill decision, the SCC had an opportunity to pronounce on defamation law in the context of a criminal charge of defamatory libel in Lucas.35 The SCC undertook an Oakes analysis, conceding that the Criminal Code provisions did prima facie infringe on freedom of expression. The SCC reiterated its emphatic language from Hill regarding the fundamental importance of protecting reputation36 and set out a vigorous defence of the need for both a civil tort and a criminal offence as devices to further both the individual and state interest in protecting reputation.37 In concluding that the Criminal Code provision was a demonstrably justifiable limit on freedom of expression, and thus constitutional pursuant to the Oakes analysis, the SCC stated that

defamatory libel is far from and indeed inimical to the core values of freedom of expression. It would trivialize and demean the magnificent panoply of rights guaranteed by the Charter if a significant value was attached to the deliberate recounting of defamatory lies that are likely to expose a person to hatred, ridicule or contempt.

It is thus clear that defamatory libel is so far removed from the core values of freedom of expression that it merits but scant protection.38

After Hill and Lucas, the following assertion seemed to be indisputable: reputation is of critical importance, and while courts have both the power and the obligation to modify the common law of defamation to comport with changing social realities, in the eyes of the SCC in the mid- to late-1990s, the balance between reputation and expression effected by defamation law required no material change.39

34. Ibid. at paras. 139-41. The SCC posed the question of whether the defence of qualified privilege should be expanded to comply with Charter values and decided that only a marginal modification to extend the privilege to documents that were about to be filed with the court was necessary.
35. Lucas, supra note 4. See also Criminal Code, R.S.C. 1985, c. C-46, ss. 298-301.
36. Lucas, ibid. at para. 49.
37. Ibid. at para. 73ff. The Court read into the Criminal Code a requirement of intention to defame.
38. Ibid. at paras. 93-94.
II. REPUTATION IN CANADIAN DEFAMATION LAW AFTER WIC RADIO, CUSSON, AND GRANT

Within a dozen years of the decision in Lucas, the SCC delivered three further decisions that contain significant changes in rhetorical tone and substantive content with respect to the tort of defamation. What is most striking when reading the WIC Radio, Cusson, and Grant decisions is the change in tenor. Where previously the tort of defamation stood like a citadel surrounding it, reputation has now become the subject of criticism for the courts as the perceived need to foster free expression has moved to the fore. This Part offers an overview of the three decisions and attempts to synthesize the relevant changes and their importance.

A. WIC RADIO

In a forceful set of arguments in WIC Radio, the SCC held that defamation law had proven inimical to the exercise of the rights of freedom of expression and freedom of the press. The SCC expressed particular concern about the "chilling" effect that defamation law exerts on matters of public interest:

"The traditional elements of that tort of defamation may require modification to provide broader accommodation to the value of freedom of expression. There is concern that matters of public interest go unreported because publishers fear the ballooning cost and disruption of defending a defamation action ... . Public controversy can be a rough trade, and the law needs to accommodate its requirements."

As with Cusson and Grant, what is striking about WIC Radio is the drastic change in the language used to discuss defamation law. Abjuring detailed discussion about reputation, expression is acknowledged as the "very life blood of our freedom and free institutions." WIC Radio is similar to Hill in that it involved private litigants, and so the Charter did not directly govern. Unlike Hill, however, the case involved a media defendant, and the SCC elected to

40. Supra note 5. Rafe Mair, a radio "shock jock," during an on-air editorial about conservative social activist Kari Simpson, drew analogies between Simpson's public statements and the actions and activities of Adolf Hitler, skinheads, and the Ku Klux Klan. The SCC affirmed the trial judge's decision to dismiss Simpson's claim for libel.
41. Ibid. at para. 15.
42. Ibid. at para. 1.
exercise its inherent jurisdiction to modify the common law to accord with current social realities and Charter values. To effect this change, the "honest belief" element of the fair comment defence was modified to delete any reference to "fair-mindedness" and to require only that any person could honestly express the opinion on the basis of the proved facts (i.e., an "objective" honest belief test), as distinct from requiring that the defendant subjectively believed the expressed opinion. The SCC emphasized the "broad latitude" to be accorded to the defence, particularly where matters of public controversy were at play.

Of particular interest are three aspects of the SCC's reasoning: first, the recognition that defamation law requires a re-calibration to match current social realities; second, the articulation of what those social realities actually are, particularly as they relate to modern communications media; and third, the recognition that certain defamation plaintiffs can and should be treated in different ways. The SCC also subtly, but importantly, modified the description of its task. Unlike at the time of Hill, it is now engaged not in a balancing of competing interests, but in a "reconciliation" of those interests. Whereas "balancing" implies that some kind of external instrument is required to offset incommensurate weights (and thus the use of a device—such as the fair comment defence—as a fulcrum between reputation and expression), "reconciliation" implies a reduction of competing forces to states where they are consistent with one another. While balance requires the use of exogenous tools, reconciliation strives to make constituent parts congruent without the need for external devices.

The three aspects of the WIC Radio reasoning identified above merge in their articulation by the SCC. The traditional balancing act in defamation law is altered in light of the identity (or capacities) of the plaintiff. In several places, the SCC seems to perceive that there would be something inequitable (in a non-technical sense) about allowing the plaintiff to resort to a defamation claim in light of her own actions: "[T]he Court of Appeal unduly favoured protection of Kari Simpson's reputation in a rancourous public debate in which she had involved herself as a major protagonist." Simpson's "very public actions and words," which included making public speeches over a long period of time,

43. Ibid. at paras. 45-51.
44. Ibid. at para. 62.
45. Ibid. at para. 2. Justice Binnie explained that "[t]he Court's task is not to prefer one over the other by ordering a 'hierarchy' of rights, but to attempt a reconciliation" [citation omitted].
46. Ibid. at para. 4 [emphasis added].
were what had “earned” Simpson her reputation.\textsuperscript{47} She had, in an important sense, been an active participant in the public construction of her reputation. The interplay between Mair’s words and Simpson’s reputation is also the subject of attention: “Mair has a reputation for provoking controversy. … His listeners expect to hear extravagant opinions and … discount them accordingly.”\textsuperscript{48}

In canvassing the social circumstances in which Mair and Simpson were embedded, the SCC acknowledges that there is an element of theatricality to current public debate:

> In much modern media, personalities such as Rafe Mair are as much entertainers as journalists. The media regularly match up assailants who attack each other on a set topic. The audience understands that the combatants, like lawyers or a devil’s advocate, are arguing a brief. What is important in such a debate on matters of public interest is that all sides of an issue are forcefully presented …\textsuperscript{49}

The notable element of the foregoing passage is the SCC’s recognition that the parties are involved in a somewhat artificial endeavour; the notion of a dispassionate public measurement of truth values and reputations is belied. Multiple levels of dialogic activity occur, both between combatants and between the combatants and their audience. The audience is acknowledged as savvy about what is being presented to it. The public understands well, for example, the function of satirists who are called upon to blow into “outlandish caricature” public views and public figures.\textsuperscript{50} The public is also viewed as engaged enough to know when to discount the “sting” of a statement, depending on its source and context.\textsuperscript{51}

The concurring judgment of Justice LeBel is also notable for the robust manner in which it engages the experience of modern media. Justice LeBel parts from the majority reasoning with respect to the issue of whether Mair’s comments were prima facie defamatory. He contests the conclusion by encouraging a highly context-dependent analysis when assessing whether a statement is defamatory, stating that “[r]elevant factors to be considered … include: … how much is publicly known about the plaintiff; the nature of the audience; and the context of the

\textsuperscript{47} Ibid. at para. 7.
\textsuperscript{48} Ibid. at para. 5.
\textsuperscript{49} Ibid. at para. 47.
\textsuperscript{50} Ibid. at para. 48.
\textsuperscript{51} Ibid.
comment." According to Justice LeBel’s account, our relationship with mass and interactive media is an experiential one. He describes “an age when the public is exposed to an astounding quantity and variety of commentaries on issues of public interest, ranging from political debate in the House of Commons ... to a high school student's blog.” That volume of information prompts a filtering response from audience members. The audience does not take statements at face value, but evaluates them based on variables such as the audience member’s own knowledge and opinions about the speaker and the subject. Crucially, Justice LeBel’s account also recognizes that the class of defamation plaintiffs is made up of different types of actors whose relationships to their own reputations differ:

[Although public figures are certainly more open to criticism than those who avoid the public eye, this does not mean that their reputations are necessarily more vulnerable. In fact, public figures may have greater opportunity to influence their own reputations for the better.]

Justice LeBel’s reasons also properly draw attention to this nuance:

This is not to say that harm to one’s reputation is the necessary price of being a public figure. Rather it means that what may harm a private individual’s reputation may not damage that of a figure about whom more is known and who may have had ample opportunity to express his or her own contrary views.

That understanding of how the media impact defamation cases leads to an articulation of differential treatment. The notion that the public figure occupies a different position with respect to the tort itself and the interests that the tort is intended to serve is also embodied in the earlier jurisprudence. In its reasoning, the WIC Radio majority approvingly cited words written more than a century earlier by the Court of Appeal for Ontario in Macdonell v. Robinson: “Whoever seeks notoriety, or invites public attention, is said to challenge public criticism; and he cannot resort to the law courts, if that criticism be less favourable than

52. Ibid. at para. 69.
53. Ibid. at para. 73.
54. Ibid.
55. Ibid. at para. 74.
56. Ibid. at para. 75.
57. (1885), 12 O.A.R. 270 at 272 [Macdonell].
he anticipated." Justice LeBel expanded on this point, noting that entering the public arena entailed not just a detached understanding that response would occur, but an actual invitation of response: "[P]ublic response will often be one of the goals of self-expression."

B. CUSSON AND GRANT

The procedural histories of the Cusson and Grant cases are intertwined and so require some explanation. In November 2007, the Court of Appeal for Ontario rendered its decision in Cusson, wherein it accepted the arguments of the defendants and a number of media interveners and concluded that in order to properly reorient defamation law to accord with a new social reality, a new "public interest responsible journalism" (PIRJ) defence should be recognized as a component of Canadian defamation law. In crafting the new defence, the Court of Appeal for Ontario took inspiration in large part from the English House of Lords decisions of Reynolds v. Times Newspapers Ltd. and Jameel (Mohammed) v. Wall Street Journal Europe Sprl, which had developed a largely similar defence (often referred to as the "Reynolds privilege") over the last decade. However, because the Cusson defendants had not relied on the defence in trial pleadings, the Court of Appeal for Ontario held that they were not entitled to benefit from it and, accordingly, dismissed the appeal. One year later, in 2008, the Court of Appeal for Ontario rendered its decision in Grant v. Torstar Corp, wherein it reiterated that the PIRJ defence is part of Canadian defamation law and ordered a new trial on the basis that the trial judge had improperly charged the jury and had improperly usurped the role of the jury in deciding on the meaning of the impugned statements. Thus, at the appellate level, Cusson was the substantively more important decision, while Grant was concerned more with the minutiae of procedure; both cases were appealed to the SCC, where their relative significance was reversed.

58. WIC Radio, supra note 5 at para. 57, citing Macdonell, ibid.
59. WIC Radio, ibid. at para. 75.
60. Supra note 9.
61. [2001] 2 A.C. 127 [Reynolds].
The SCC issued its decisions in *Grant* and *Cusson* on the same day, describing them as “companion” decisions. Its decision in *Grant* became a landmark in Canadian defamation law, expanding upon the beachhead created by the Court of Appeal for Ontario in *Cusson* and confirming the existence of a new defence called, in its Canadian iteration, “responsible communication on matters of public interest” (RCPI). The RCPI defence is broader than the PIRJ defence created by the Court of Appeal for Ontario in a variety of ways, including the fact that it is not limited to media defendants but can be pleaded by any defendant. In contrast to its earlier prominence, the *Cusson* decision, in which a new trial was ordered so that the media defendants could make use of the RCPI defence, was reduced to a less important role.

While a comprehensive treatment of the RCPI defence is beyond the scope of this article, attention should be paid to the attitude toward reputation that the introduction of RCPI demonstrates. As the SCC phrased it, the issue in *Grant* and *Cusson* was “whether the defences to actions for defamatory statements of fact should be expanded, as has been done for statements of opinion [i.e., in *WIC Radio*], in recognition of the importance of freedom of expression in a free society.” Answering in the affirmative, the SCC created a broadly applicable new defence, which is available to any defendant who can demonstrate that the published statements were on a matter of public interest and that the “publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances.” Drawing on *Reynolds*, it identified a series of factors (described as “non-exhaustive but illustrative”) to be used in assessing whether a publication was “responsible,” including the seriousness of the allegation, the status and reliability of the source, and the presence or absence of steps taken to obtain the plaintiff’s response. A major distinction between RCPI and its *Reynolds*/*Jameel* antecedents is that RCPI is not a species of qualified privilege, but is rather a new defence

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64. *Cusson*, supra note 9 at para. 1.
65. *Grant*, supra note 7 at para. 97.
70. *Ibid.* at paras. 122, 126.
that, to echo the words of the Court of Appeal for Ontario, is a "sensible half-way house" between "traditional common law no-fault liability" and "the traditional qualified privilege requirement for proof of malice."  

Consistent with other defamation decisions, neither Cusson nor Grant expressly engages reputation as a discrete concept. However, the SCC does take pains to articulate that an imbalance of some kind has developed in defamation law. The march toward the adoption of the new defence began with the Court of Appeal for Ontario noting that the traditional formulation of defamation law "clearly favours the protection of reputation over freedom of expression."  

The court in Cusson paid particular attention to the development of the "Reynolds privilege" in England and observed that foreign courts have all concluded that the traditional common law standard unduly burdens freedom of expression and have all made appropriate modifications to achieve a more appropriate balance between protecting reputation on the one hand and the public's right to know on the other.  

The SCC in Grant stated that it is "simply beyond debate that the limited defences available to press-related defendants may have the effect of inhibiting political discourse and debate on matters of public importance, and impeding the cut and thrust of discussion necessary to discovery of the truth."  Taking particular note of juridical developments in other common law jurisdictions, the SCC took guidance from the fact that courts in many jurisdictions had modified their common law of defamation to "give more weight to the value of freedom of expression and robust public debate."  

Of particular interest is the new focus of concern for the courts when applying the new defence. The Court of Appeal for Ontario in Cusson approvingly cited Reynolds and Jameel in stating that courts "should be slow to conclude that a publication was not in the public interest," that "[a]ny lingering doubts should be resolved in favour of publication," and that the new defence is "to be applied

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71. Cusson (C.A.), supra note 9 at para. 139.
72. Ibid. at para. 37.
73. Ibid. at para. 122.
74. Supra note 7 at para. 57.
75. See generally infra note 139.
76. Grant, supra note 7 at para. 66ff.
77. Supra note 9 at paras. 90, 97.
in a media-friendly manner." In speaking about RCPI, the SCC similarly made reference to *Jameel* and *Reynolds* and held that, in order to "foster free expression and a free press, ... a degree of deference should be shown to the editorial judgment of the players, particularly professional editors and journalists." As expressly recognized by the courts, the importation of a PIRJ/RCPI defence alters the calculus of defamation law away from protecting an individual's reputation, in favour of unfettered speech by the media.80

Informing the decisions in *Cusson* and *Grant* is the view that the balance effected by the traditional common law regime no longer obtains. Whereas previously, society had made a "clear choice to forego a certain level of exposure, scrutiny and criticism on matters of public interest in the name of protecting individual reputation,"81 in light of the enactment of the *Charter*, the degree to which defamation law previously impinged on freedom of expression could no longer be tolerated.82 According to the Court of Appeal for Ontario in *Cusson*, "the inhibiting effect of traditional defamation law is incompatible with the climate of free and robust debate to which a democratic society aspires."83 Similarly, the SCC in *Grant* was forced to "conclude that the current law ... does not give adequate weight to the constitutional value of free expression. While the law must protect reputation, the level of protection currently accorded by the law ... is not justifiable."84 Left unsaid in the decisions is why this conclusion is so different from that reached by the SCC in *Hill* less than fifteen years earlier. While it is clear that the courts felt that the common law needed to be supplemented by PIRJ/RCPI in order to keep it "in step with the dynamic and evolving

79. *Grant*, supra note 7 at para. 73.
80. *Cusson* (C.A.), supra note 9 at para. 142. See also *Grant*, *ibid.* at para. 61.
81. *Cusson*, supra note 9 at para. 129.
82. See *Grant*, supra note 7 at para. 53. The SCC states that existing common law rules mean, in effect, that the publisher must be certain before publication that it can prove the statement to be true in a court of law, should a suit be filed. Verification of the facts and reliability of the sources may lead a publisher to a reasonable certainty of their truth, but that is different from knowing that one will be able to prove their truth in a court of law, perhaps years later. This, in turn, may have a chilling effect on what is published. Information that is reliable and in the public’s interest to know may never see the light of day.
83. *Supra* note 9 at para. 129.
84. *Supra* note 7 at para. 65.
fabric of our society” and to “give appropriate weight to the public interest in the free flow of information,” it is unclear why this had become such a pressing imperative since the previous decade, though brief mention was made of the new social reality to which defamation law needed to respond and which consisted of, inter alia, “the modern development of mass communications.”

The cumulative result of the Cusson, Grant, and WIC Radio decisions is a devaluation of the currency of “reputation,” certainly as compared to earlier decisions such as Hill and Lucas. This leaves one questioning what prompted the change. I submit that it is not that society now prizes free expression more than it once did, but that there is an increasing recognition that reputation is being reconstructed and reconfigured—in short, that the law of defamation is no longer the sole, or perhaps even the best, mechanism for protecting reputation, and so this law is in need of modification. To substantiate that claim, attention must be turned to the nature of reputation.

III. THE CONCEPT OF REPUTATION

Raymond Brown may only slightly exaggerate when he says, “Hardly anything good has been said about the law of defamation.” One US commentator opines that the tort “operates erratically at best, and perversely at worst,” complaining that plaintiffs are unable to “clear their names,” defendants are held liable for “unpredictable damages,” and the public is deprived of information. As outlined above, Canadian appellate courts are in the midst of a period of doctrinal revision stemming from a similar sense of disquiet with the tort. The factors giving rise to the general sense of dissatisfaction among litigants and commentators are the same that have prompted the decisive change in the courts’ stance on the appropriate balance in the law. Hill offers a hint as to what those factors are when referring to the fact that current defamation law is “essentially the product

85. Cusson (C.A.), supra note 9 at para. 139, citing Salituro, supra note 18 at 670.
86. Cusson (C.A.), ibid. at para. 133.
of its historical development up to the seventeenth century." The doctrine of the
tort is nearly three centuries out of date and does not accord with contemporary
conceptions of what an appropriate tort of defamation should look like.91

However, even that conclusion remains unnecessarily vague; what precisely
about the tort has failed to keep pace with current sensibilities? The lagging
indicator is the concept of reputation and the latent recognition that the strictures
of the tort do not harmonize with a modern understanding of what reputation
is and how it is created, sustained, and modified.92 Commentators and courts
are dissatisfied because defamation law has failed to keep pace with a more
sophisticated understanding of reputation and the impact of mass media and
interactive technologies, which makes the construction and repair of a reputation
markedly different from what it once was and was understood to be.

To appreciate the disjunction that has arisen in the tort of defamation, the
tort’s theoretical contours must be outlined. A basic formulation of the tort of
defamation is that a person may have a claim for damages where a third party
has uttered or written a statement that is “defamatory.” In order to qualify as
defamatory, the statement must “injure the reputation” of the plaintiff, and
such injury is manifested by a lowering of the plaintiff “in the estimation of
right-thinking members of society generally and in particular to cause him to be
regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem.”

In short, the reputation of an individual is what is protected by the tort—
however, as noted by the SCC in Hill, very little has been written by the courts
about that central concept and its constitutive elements. Numerous commenta-
tors, writing in both English and US contexts, have noted that the common law
has shied away from attempting to define reputation.93 Some have concluded

90. Supra note 2 at para. 116.
91. See generally Lawrence McNamara, Reputation and Defamation (Oxford: Oxford University
Press, 2007) at 35. McNamara explores the disjunction that has arisen between defamation
law conceptions of “defamatory” that are precedent-driven and modern liberal democratic
conceptions of what the purpose of the tort should be.
92. See David Rolph, Reputation, Celebrity and Defamation Law (Aldershot: Ashgate, 2008) at
186. See also McNamara, ibid.
supra note 5 at para. 67. See also Sim v. Stretch, [1936] 2 All E.R. 1237 at 1241 (H.L. (Eng.)).
94. Rolph, supra note 92 at 1.
Constitution” (1986) 74 Cal. L. Rev. 691. See also “Developments in the Law: Defamation”
that, as a jurisprudential matter, the courts have failed to locate reputation\(^\text{96}\) and that, as a practical matter, it is not necessary to do so.\(^\text{97}\) Others have argued that a proper assessment of the tort necessarily requires that its foundational elements be cogently articulated.\(^\text{98}\) The latter view is preferable. To assess whether the tort as it is currently constructed is properly performing its instrumental role requires an understanding of what reputation is—we need to know what is being protected in order to ask whether it is being protected well. A purposive approach to the law begins with the supposition that the law is a mechanism for accomplishing some objective. Identifying that objective is, therefore, critical.

Robert Post’s seminal article on reputation analysis posits three different concepts of reputation that “the common law of defamation has at various times in its history attempted to protect”: reputation as honour, property, and dignity.\(^\text{99}\) As conceded by Post, property, dignity, and honour do not comprise or exhaust the meaning of reputation, but they do inform its content. Post’s key insight is that reputation is a function of social interaction that “inheres in the social apprehension that we have of each other.”\(^\text{100}\) The apprehension is itself a “social judgment of the person based upon facts considered relevant by a community.”\(^\text{101}\) Reputation as honour, being rooted in the regard that is accorded to certain roles, occupations, or social strata, has largely declined as an operative concept, though it can assist in explaining certain quirks in the tort as presently constituted.\(^\text{102}\) The remaining two concepts offer powerful accounts of the interest that defamation aims to protect.

Post argues that reputation as property (which conceptualizes the interest as a “form of intangible property akin to goodwill”) is still an animating framework for modern defamation law, one which provides “an internally coherent account”

\(^{96}\) See e.g. Cottrell, \textit{ibid.} at 150. Cottrell notes that “the truth is that English law has not decided what the law of defamation protects and why.”

\(^{97}\) \textit{Ibid.} at 160.

\(^{98}\) McNamara, \textit{supra} note 91.

\(^{99}\) \textit{Supra} note 95 at 693.

\(^{100}\) \textit{Ibid.} at 692.

\(^{101}\) McNamara, \textit{supra} note 91 at 21.

\(^{102}\) Post, \textit{supra} note 95 at 707.
of many aspects of defamation law, though it does not do so comprehensively. One salient facet of reputation as property is that reputation is an asset that can be "earned," or at least is the "result of an individual's efforts and labour"; improperly impugning reputation then is to "unjustly destroy" the fruits of that work. This concept presupposes that reputation is something that is created—i.e., it is constituted, rather than bestowed.

Describing reputation as "dignity" will be familiar to any reader of Hill and Lucas. The precise relationship between reputation and dignity is found in the constitutive aspect of identity: the identity of the self is created by the internalization of the perspectives of others in the community—an individual's identity is "continuously being constituted through social interactions." The creation and maintenance of a public image is an assertion of autonomy, an extension of Ronald Dworkin's view of autonomy as the self-construction of identity. Thus, similar to the property account, dignity views reputation as constructed through time and not as static and dependent on role fulfilment. Dignity itself consists of the deference and demeanour properly owed to an individual by other members of the community, and the content and form of such owed deference and demeanour is communicated to other members of the community by means of an individual's reputation. Dignity is a vector of "the aspects of personal identity that stem from membership in the general community."

103. Ibid. at 693, 696.
104. Ibid. at 693.
105. Ibid. at 694.
106. Ibid. at 695.
107. Ibid. at 708-09.
108. Thomas Gibbons, "Defamation Reconsidered" (1996) 16 Oxford J. Legal Stud. 587; Ronald Dworkin, Life's Dominion (London: Harper Collins, 1993) at 224. A related notion was advanced in Hill, which states that the law of defamation "is the means by which the individual may protect his or her reputation which may well be the most distinguishing feature of his or her character, personality and, perhaps, identity." See Hill, supra note 2 at para. 137.
109. Post, supra note 95 at 715. Post's notion of reputation as dignity appears to rest on the notion that each individual is entitled to participate in society in accordance with the terms prescribed by the "reciprocal observance of rules of civility"—in short, so long as you act in accordance with certain parameters of conduct, you should be entitled to be admitted to the membership of the community and treated in a particular matter (at 716).
Because "the esteem in which we are held by others is an integral aspect of our own dignity and self-esteem,"\textsuperscript{110} the tort of defamation seeks to protect against unjustified diminutions of one's reputation that can lead to a disjunction between the dignity to which one is entitled and the signals that the community has received; it is that potential disjunction with which the tort is concerned.\textsuperscript{111} Post describes the successful defamation plaintiff as having engaged in a trial that results in a "rehabilitation" of reputation—the court's verdict confirms the plaintiff as worthy of respect.\textsuperscript{112} For Post, truth is an essential concern of the defamation trial, as it is the binary mechanism by which the court definitively pronounces on the plaintiff being entitled to either esteem or stigma. Having stated the goal in such terms, the question can be formulated of whether the tort does an adequate job of fixing the chasm that might open between dignity (understood as appropriate social response) and mistaken information that has been publicly circulated. In order to answer that, the question of how reputation is created must be engaged. Since reputation arises from social interaction, the methods and modes of that social interaction impact how reputation is created and modified.

Post's observation that reputation derives from mutual social apprehension is echoed in Jerome H. Skolnick's assertion that defamation is "a distinctively sociological tort"\textsuperscript{113} and Robert N. Bellah's claim that reputation is not a possession, but a "relation between persons."\textsuperscript{114} In modern liberal democracies, that relation between persons is mediated to a significant extent by communications technologies.\textsuperscript{115} This notion is further developed by Thomas Gibbons, who provides a perceptive account of reputation in the modern context.\textsuperscript{116} The crux of his critique is that defamation law fails to "recognize the media's part in creating public

\textsuperscript{110} Barendt, supra note 95 at 116.
\textsuperscript{111} See Post, supra note 95 at 712. Post notes that defamation law "provides an occasion for a court to resolve the ambiguity created when rules of civility [Post's term for rules of deference and demeanour] are violated." See also at 713. Here, Post describes a dual function for the tort: the individualist-oriented protection of dignity, coupled with a publicly-oriented policing of the "rules of civility."
\textsuperscript{112} Ibid. at 713.
\textsuperscript{113} "Foreword: The Sociological Tort of Defamation" (1986) 74 Cal. L. Rev. 677 at 677.
\textsuperscript{114} "The Meaning of Reputation in American Society" (1986) 74 Cal. L. Rev. 743 at 743.
\textsuperscript{115} For an early apprehension of the impact of this, see ibid. at 747.
\textsuperscript{116} Supra note 108.
images” and the role that mediated images play in the “social relationships of real people.”117 As per Gibbons, reputation is a process of evaluation and functions in a manner consonant with that postulated by Post—each individual engages in the presentation of “a self for public consumption,” which is (informally) evaluated by means of seeking evidence (i.e., information or statements) to bolster or discredit the presented self.118 Gibbons thus provides a mechanism for understanding how social relationships create reputation, a process that individuals can influence and even direct. The presentation process itself occupies different points along a spectrum: from the do-it-yourself style adopted by Kari Simpson, whereby an individual engages in grassroots public participation, to the engagement of a battery of public relations professionals.119 There is, therefore, a category of individuals who have the ability and desire not only to “promote their personal images through the media,” but who can “move to correct any inaccuracies which arise.”120 Because there is a constant presentation of new reputation-affecting information, a reputation is contingent and subject to reappraisal—but the law as it stands is reluctant to recognize this dynamic. That dynamic also has its own tempo, which appears to have increased in the modern era:

Many of our ideas about reputation are products of a simpler era. ... In today’s pluralistic society, much is tolerated and little is universally condemned. A congressman can be the subject of a sex scandal one year and win an election the next. An entertainer can pursue drug abuse to the brink of death and return more popular than ever. Behaviour that outrages adults can make a musician the idol of millions of teenagers. Even if one’s reputation is harmed, the victim is not condemned automatically to live out his life in disgrace. The mobility and anonymity of modern society make rehabilitation [of reputation] much easier.121

117. Ibid. at 587.
118. Ibid. at 591.
119. See e.g. Rolph, supra note 92 at 175, citing Chris Rojeck, Celebrity (London: Reaktion Books, 2001) at 10-11. Rolph describes this as the “institutionalised machinery of celebrity.” This involves the corps of “agents, publicists, marketing personnel, promoters, photographers, fitness trainers, wardrobe staff, cosmetics experts and personal assistants.”
120. Gibbons, supra note 108 at 611.
The cycle of modern mass and interactive media has implications for reputations and the tort intended to protect them. The SCC's reasoning in *WC Radio* is perhaps the first glimmer of an emerging acknowledgement that it is "vital to engage with the media's role in creating and damaging reputations." The impact of mass and interactive media, with their attendant capability of enabling the construction and ongoing modification of a worldwide profile, is significant enough for David Rolph to argue that a new concept of reputation—reputation as "celebrity"—has arisen to supplement Post's framework. Celebrity is not a separate concept of reputation, but is better conceived of as a new instantiation of reputation—it is a different manner in which reputations can be constructed. It provides an explanatory device for illustrating why Kari Simpson's reputation was the hinge on which a more robust fair comment defence turned—because her reputation was of a different type from others and therefore warranted different treatment. The constituent element of Simpson's "different type" of reputation is that it is constructed and maintained largely through the device of mass and interactive media. Unlike the traditional conception of reputation as property, which was formulated in a pre-media age and which relies largely on personal interactions, this form of reputation relies on impersonal interactions. Unlike reputation as dignity, which inheres in the individual qua individual and which can be understood as the core concept of reputation, reputation as celebrity is an additional construct that is layered on top of the subsidiary concepts of dignity and property.

Reputation as celebrity is almost entirely a modern phenomenon, emerging in the twentieth century with the pervasive penetration of the

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122. Rolph, *supra* note 92 at 37.
124. See also *ibid.* at 138ff, 162ff. Here, Rolph tracks similar treatment in Australian cases. This also helps to explain why the Court of Appeal for Ontario in *Cusson*, while eager to employ PIRJ, was unwilling to grant judgment in favour of the defendants—Cusson was a private individual who was thrust into the public spotlight. See *Cusson* (C.A.), *supra* note 9.
125. See Rolph, *ibid.* at 172.
126. Thus, every individual has a dignity-based reputation that arises from his or her status as a person. In addition to that, he or she may have a reputation derived from personal interactions with others, such as family, friends, and close associates. Finally, certain individuals will have a media-constructed reputation, which supersedes the others for purposes of defamation law.
internet providing a further catalyst.\textsuperscript{127} It is only with the proliferation of mass communications media (newspapers, periodicals, radio, and television), compounded with interactive media (the internet and its features, such as email, personalized websites, Facebook, et cetera), that one's ability to construct, maintain, modify, and repair one's reputation has taken on a power that outstrips defamation law. The key criterion of celebrity reputation is that its possessor has discursive power “to generate, shape and participate in public discourses” beyond that of the regular individual.\textsuperscript{128} A banal but telling example is that of the public figure, who can secure a media interview in order to rebut a contested allegation. The effect of celebrity reputation is practical: why should the blunt instrument of the traditional defamation tort be used to reify a reputation if the individual in question has the ability to protect his or her reputation far more quickly and effectively? The importance of protecting a reputation is ameliorated by and to the extent of the individual's ability to self-help. With respect to reputation creators, the public interest in ensuring the accuracy of information in the public sphere stands as the primary remaining rationale for judicial involvement. Just as there is a societal interest in protecting reputations, there is a societal interest in ensuring that the public record is accurate. The correction of defamatory lies, in addition to ameliorating the damage done to a reputation, is also about ensuring access to accurate information for decision making.\textsuperscript{129} The extensive reach of modern media means there is an even greater impetus for the courts to participate in truth determination, as a function of the societal interest in “reducing efforts to distort communication.”\textsuperscript{130} In line with Post’s conception of reputation as a community-oriented instrument for ensuring appropriate social responses, there is also a “community interest in knowing the truth of a defamatory charge.”\textsuperscript{131} But the nature of the court's ongoing role in truth determination need not remain static; the historic form of the tort of defamation is not the only possible or desirable one.

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\textsuperscript{127} Rolph, supra note 92 at 173.
\textsuperscript{128} Ibid. at 175.
\textsuperscript{129} See Hill, supra note 2 at para. 117; Grant, supra note 7 at para. 65.
\textsuperscript{130} Gibbons, supra note 108 at 591.
\textsuperscript{131} Skolnick, supra note 113 at 686.
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As reputation is an appraisal based on facts as measured against social values,\(^\text{132}\) it becomes critical to ensure the accuracy of the flow of information. The impact of mass and interactive media is not unidirectional; it enables both the creation and subsequent challenge of public images.\(^\text{133}\) Paradoxically, though aiming at ensuring the accuracy of information, if defamation law is applied in too restrictive a manner, it risks interrupting the flow of information; it may impede the willingness of individuals or media outlets to publish statements that may be viewed as defamatory, even if they are true. As it stands, current defamation law can be explained as being empirically concerned with ensuring the reliability of the "factual elements of constructing a reputation."\(^\text{134}\) This needs to be expressly articulated and advanced as a purposive criterion for the doctrine, subject to the demonstrated ability of an individual to construct his or her own reputation.

The nature of the internet and the communications it facilitates has altered the way in which readers interact with information.\(^\text{135}\) The interconnectivity and malleable nature of the information presented on the internet have implications for defamation law in particular. Whereas previously a defamatory statement published in the print edition of a newspaper was inviolate in that iteration (i.e., someone looking at the original publication in an archive might not know that the statement was later retracted or corrected unless they also saw the subsequent edition containing such retraction or correction), the ability of editors to

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133. Ibid. at 591.
134. Ibid. at 597.
135. See Kim von Arx, "LitOral: A New Form of Defamation Consciousness" (2002) 1 C.J.L.T. 63. Drawing on the work of Walter Ong, who argued that this transformative process began with media such as radio and television, von Arx argues that we are in the midst of a "secondary orality" (at 63). Underlying von Arx's analysis is a recognition that, at least in the online context, the protocols of communication have been altered. The fragmented, dynamic, and multi-noded nature of the internet means that readers are often engaged in a more interrogative relationship vis-à-vis online information—the validity of sources needs to be considered and the value of information discounted (or amplified) accordingly. The context of information presentation gives rise to a separate interrogatory function that questions the information itself, its source, and its mode of presentation. For example, information sent by means of Twitter.com may be discounted as to its veracity as compared to information disseminated by the website of a major metropolitan newspaper.
permanently correct statements (in digital archives) or otherwise provide an update about them (e.g., by means of hyperlinks to a correction or apology) means that the very nature of the original defamatory statement can be ameliorated.

The contingent nature of a reputation, particularly that of the public figure, has legal consequences, something that has long been recognized by Canadian courts, and that has now been reaffirmed by the SCC in WIC Radio. Entering into the public arena (which includes, at a minimum, deliberately using the media in an effort to construct a reputation or advance a certain agenda) results in a higher threshold for defamation, a legal thickening of the skin.136 The current shortcoming is that the law nominally accords the same level of protection to all individuals, notwithstanding that some “have the capacity and resources to mould their personal images to their own advantage,”137 while others do not. This is regrettable because the tort is being used to protect two very different types of interest: the reputation interest of public figures and the reputation interest of non-public figures. The tensions within and criticisms of the tort arise from the fact that, although it is a device meant to protect a more fragile interest (the reputation of a non-public figure), it is used to protect a more robust interest (the reputation of a public figure). But instead of identifying and expressly engaging in the underlying cause of the tensions and criticisms of the tort, the courts appear content to simply make use of devices such as the defences of fair comment and RCPI.

Until the development of the modern news and interactive infrastructure, with its virtually endless volume of content being broadcast and made constantly accessible, the tensions between defamation law and our social reality may have been sustainable—but they are becoming disconnected, and this is having an impact on freedom of expression. I submit it is this decoupling between defamation law and social reality that informs the decisions in Grant, Cusson, and WIC Radio. We have seen latent indications that the courts are coming to recognize this decoupling, so it is now incumbent to formulate arguments that further the efforts of the courts to modify the defences to a claim of defamation in a manner consistent with the law and the interests being served.

136. See also Grant, supra note 7 at para. 58. The SCC states that “people who enter public life cannot reasonably expect to be immune from criticism, some of it harsh and undeserved.”

137. Gibbons, supra note 108 at 597.
IV. A DEFAMATION TORT FOR PUBLIC FIGURES

A. INTRODUCTION

The project that confronts us, then, is to craft a proposal that takes account of the following imperatives: the need to respect the dignity of the individual and foster the search for truth, as articulated in *Hill* and *Lucas*; the rights of freedom of expression and freedom of the media, as given prominence in *Grant*, *Cusson*, and *WIC Radio*; the public interest in the dissemination of accurate information, as confirmed in *Hill*, *Cusson*, *Grant*, and *WIC Radio*; the need to reduce any inappropriate chilling effect that defamation claims exert over potential defendants, particularly media outlets; and the recognition of the development of reputation as celebrity and the impact of the development of mass and interactive media.

As noted by the SCC in *WIC Radio*, courts in numerous jurisdictions “have concluded that the traditional elements of the tort of defamation may require modification to provide broader accommodation to the value of freedom of expression,” but even that statement is more tentative than the facts warrant. Common law courts around the world over the last twenty years have enthusiastically modified the tort to respond to the criticisms levied against it and to accord with new social and legal realities. This has been seen in England, Australia, New Zealand, South Africa, and now Canada. The SCC’s statement in *WIC Radio* prompts a further question: if the traditional elements of the tort require modification, why limit the modifications solely to the scope or nature of available defences? Why not modify other elements of the tort? If the chilling effect of defamation law includes media outlets altering their behaviour in order to avoid the launching of an action in the first place (rather than just being able to successfully defend against an action), then surely the goal should be to

138. Supra note 5 at para. 15.
140. See Franklin, “Good Names,” supra note 89 at 13-22. Even though media defendants win “an overwhelming percentage of the cases that are being brought,” they are vociferous critics of the existing tort regime because of (a) the costs involved in defending actions and (b) the pernicious nature of self-censorship among media defendants and the negative implications it has on the dissemination of information (at 13). See also Dale M. Cendali, “Of Things to Come—The Actual Impact of *Herbert v. Lando* and a Proposed National Correction Statute” (1985) 22 Harv. J. on Legis. 441. Cendali observes that “[l]ibel attorneys claim
reduce the incidence of defamation claims and/or the stakes involved when a claim is launched, so as to lower the number of situations in which a threatened defamation claim functions to stifle expression.\footnote{141}

To achieve this goal, it is necessary to alter the manner in which defamation claims are brought. Empirical evidence indicates that merely tinkering with defences is insufficient to reduce claim incidence. A comprehensive study of media defamation litigation in England in the post-Reynolds environment found that while the rate of litigation had “slowed considerably,” the Reynolds privilege was not the only or even a primary reason for the decline.\footnote{142} The primary factors appear to have been legislative modifications—\footnote{143} including the introduction of an “offer to make amends” mechanism,\footnote{144} which creates a defence if an offer to publish a correction and apology is extended but not accepted, and a summary disposal procedure that enables courts to dismiss a plaintiff’s claim if it has no realistic prospect of success—\footnote{145} coupled with the rising costs of bringing suit and a broader change in civil litigation rules to encourage early settlements.\footnote{146} While the introduction of RCPI and a more

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\footnote{141} “[T]he fear of litigation is as great as the fear of the outcome.” Cendali, \textit{ibid.} at 471.


\footnote{143} \textit{Ibid.} at 1293-94. The authors of the study note that while the Reynolds privilege is a “positive and worthwhile addition,” what is required is a “culture of robust inquiry and publication that will turn upon the courts’ consistent message prompting cultural change” (at 1315-16) [emphasis added]. There is thus a dialectic that is effected. Cultural change has occurred, which obliges the courts to modify the law to take account of such change, which in turn prompts further cultural change—these processes are mutually constitutive, and once the dynamic has been set in motion, it is difficult to halt its progress. As discussed above, the changes afoot in Canada, as well as the lurking recognition in the judgments of a new conception of reputation, are evidence that this dynamic is currently at play in Canadian defamation law.

\footnote{144} \textit{Defamation Act} 1996 (U.K.), 1996, c. 31, ss. 2-4.

\footnote{145} \textit{Ibid.}, ss. 8-10.

\footnote{146} See Andrew Kenyon, “Defamation: Comparative Law and Practice” (University of Melbourne Legal Studies Research Paper No. 154, 2006), at n. 26, online: <http://ssrn.com/abstract=922182>. Kenyon provides as examples the Lord Chancellor’s Department, Civil Procedure Rules, Pre-action Protocol for Defamation (which came into effect on 2 October
robust fair comment defence may go some way in addressing the issue in Canada, they will not constitute an entire answer—and if we are to take seriously the SCC’s concern about the threat of self-censorship, then further developments are warranted. Indeed, RCPI may prove entirely antithetical to the express aims of the courts and the media, since a focus on the process of reporting and investigation will “inevitably increase the forensic complexity and financial expense of litigation” due to the “detailed factual analysis and wide-ranging balancing exercise envisioned” by defences such as RCPI and the Reynolds privilege.

Efforts to shield the media by means of adjusting standards of proof (such as the actual malice standard found in Sullivan) are effectively a “process standard” that has resulted in “the paradox that the law … invented to protect critics of public figures now makes [such critics] subject to a degree of intrusive-ness in their news gathering and writing process” that many media defendants find objectionable. Focusing on journalistic process avoids the determination of the truth of the impugned statements in favour of determining whether the steps taken by the defendant are consistent with ethical precepts, regardless of whether observance of those precepts results in the publication of an accurate statement. A move toward investigations of process will inevitably disappoint those who wish to lessen the impact of the “chilling effect,” unless courts are willing to address the tort in a more fundamental manner. Worse, moving to a process investigation means that “reputations may not be vindicated and some version of the truth may not be actually established,” thus undermining one

2000) and Lord Chancellor’s Department, Civil Procedure Rules, Rules & Practice Directions, Part 3 (which came into effect on 28 February 2000).

147. See WIC Radio, supra note 5 at para. 15.

148. Peter A. Downard, Libel (Markham: LexisNexis Canada, 2003) at 102. The SCC has noted this concern but has rejected it:

It is also argued that a defence based on the conduct of the defendant may lead to costly and lengthy litigation over questions of journalistic practice about which claimants can have no advance knowledge. … [T]he objection goes not so much to principle as to the particular test and procedures adopted. Whatever defence is accepted, it must be workable and fair to both plaintiff and defendant.

See Grant, supra note 7 at paras. 63-64.

149. Sullivan, supra note 6.


151. Gibbons, supra note 108 at 611.
of the animating goals of the tort. The defamation tort system itself has been attacked as being expensive, inefficient, and replete with perverse incentives. The aim should therefore be to prevent as many “chilling” claims (i.e., those brought by high profile plaintiffs with significant funds) from being brought as possible, while diverting those that are brought into a modified tort that is faster, less expensive to litigate, and less intrusive on freedom of expression.

There are at least two other compelling reasons for undertaking reforms to the tort beyond those that have thus far been articulated by the Canadian courts. The first relates to the motivations of defamation plaintiffs. Available evidence indicates that plaintiffs launch defamation claims notwithstanding the low prospect of a favourable verdict. Making victory more difficult to obtain (by making defences easier to access) will have little effect since “victory” (in the form of a favourable judgment for damages) is often not what plaintiffs are seeking—rather, “the major motivating factors are restoring reputation, correcting what plaintiffs view as falsity, and vengeance.” Potential monetary outcomes have little bearing on the decision to sue, and the commencement of the suit itself is an act of actualization with the result that “plaintiffs feel they have accomplished something simply by suing—even if they are later unsuccessful.” This apparent distortion is even more pronounced among the archetypal “chilling effect” plaintiffs—namely, “highly visible, public plaintiffs” who have sufficient monetary assets to wage a campaign of litigation attrition. The primary concern of most plaintiffs appears to be the perceived

156. Ibid. at 795, 797. If confronted with a repeated incident of perceived disparagement by a media outlet, overwhelming numbers of defamation plaintiffs—more than 80 per cent—would sue again.
falsity of the impugned statement, with a primary goal of “setting the record straight.”¹⁵⁷ Damages are rarely the motivating factor—instead, obtaining a public correction of the record dominates.¹⁵⁸ Randall P. Bezanson concluded that “most plaintiffs sue [because] they have no effective alternative for redressing reputational harm.”¹⁵⁹ There is a marked disjunction between the objectives of defamation plaintiffs on the one hand and the objectives set by the legal system and the assumptions inherent therein on the other—the latter focus on the “ascertainment of fault and imposition of money damages,” while the former seek to correct (perceived) misstatements and thereby vindicate (perceived) reputation.¹⁶⁰ The current structure of the tort assumes that monetary damages constitute an effective, and desired, remedy¹⁶¹—an assumption that does not accord with the views or desires of plaintiffs. As Bezanson concludes, “the failure of libel law to reflect the realities that exist in libel litigation accounts in large part” for the unhappiness with the tort expressed by so many. Moreover, “libel law today no longer reflects a set of assumptions that may have been sound in an earlier time.”¹⁶² A preferred solution is one that addresses the needs of both plaintiffs and defendants.

The second argument in favour of further modification of the tort is doctrinal. If the reputation as celebrity argument is correct, then celebrity plaintiffs are not entitled to the full panoply of assumptions and damages that go with a traditional defamation claim and should not be in a position to avail themselves of them. The WIC Radio reasoning acknowledges this in its approving recitation of Macdonell: entering the public arena modifies in some relevant sense the ability of an individual to resort to the courts.¹⁶³ Given a range of available options, the courts have elected to make modifications at the end of the process (i.e., defences), rather than at the beginning (i.e., standing and procedure). The Grant decision’s move away from truth and its focus instead on process is precisely the wrong thing to do since it neither satisfies plaintiffs (they will still want to sue), nor addresses defendants’ concerns (they will still need to spend inordinate amounts of money

¹⁵⁷. Ibid. at 800.
¹⁵⁸. Ibid. at 801.
¹⁵⁹. Ibid. at 807.
¹⁶⁰. Ibid. at 808.
¹⁶². Ibid. at 226-27.
¹⁶³. See WIC Radio, supra note 5 at para. 57, citing Macdonell, supra note 57.
to defend actions, resulting in a chilling effect)—and it is inconsistent with
the emphasis in Hill on the importance of truth. There is thus the need to
effect changes that comport with both imperatives: making defamation law
more compliant with freedom of expression and ensuring that mechanisms for
truth-seeking are enhanced.

B. PROPOSAL

Sustained criticism of the tort of defamation has given rise to a plethora of
proposed alternative mechanisms for addressing reputational harm. The
impetus for the changes that are present in current Canadian defamation juris-
prudence and academic commentary, guided by the incremental approach
required by Dolphin Delivery, lead to the following proposal, which contem-
plates the bifurcation of the tort of defamation into two separate (though
related and similar) causes of action: one for public figure plaintiffs and one for
private person plaintiffs. This proposal envisages that, but for the differences
described below, the tort would remain largely the same as currently mani-
ifested—the critical and distinctive element being the presence or absence of a
public figure. Where a public figure is present in the matrix of facts giving rise
to a claim of defamation, then a modification is called for in how the common
law treats that individual as a plaintiff. This proposal seeks to retain the broad
contours of the existing tort, with the following modifications:

- Public figure plaintiffs should be entitled to bring—indeed should,
subject to the remainder of this proposal, be limited to bringing—an
action that seeks to “correct the record”;

164. See also Adrienne Stone, “Defamation of Public Figures: North American Contrasts” (2005-
2006) 50 N.Y.L. Sch. L. Rev. 9 at 22-23.
165. See e.g. James H. Hulme, “Vindicating Reputation: An Alternative to Damages as a Remedy
Cendali, supra note 140; Marc A. Franklin, “A Declaratory Judgment Alternative to Current
(1989-1990) 31 Wm. & Mary L. Rev. 25; and John L. Diamond, “Rethinking Media
166. This proposal is an amalgam of elements from the concrete proposals advanced by Cendali,
ibid.; Hulme, ibid.; Franklin, “Good Names,” ibid.; Franklin, “Declaratory Judgment,” ibid.;
and Smolla & Gaertner, ibid. See also Gibbons, supra note 108. Gibbons provides a general
theoretical outline that roughly accords with the proposal.
• Public figure plaintiffs should be restricted in recovering damages from defendants, except for special damages that the plaintiff can prove and punitive damages in egregious situations (such as publication with malice);

• Public figure plaintiffs should bear the burden of proving the falsity of the impugned statement;

• Subject to having made a timely request for a correction, and having demonstrated falsity, a public figure plaintiff should be entitled to a court declaration as to the falsity of the impugned statement and an order that the defendant publish a prompt and relevant correction. Such correction would contain a positive substantive statement incorporating an acknowledgement that the defendant published incorrect and defamatory statements about the plaintiff and would also set out the truth relative to the impugned statement. Failure by the defendant to comply would result in the plaintiff being entitled to receive general and punitive damages; and

• Pre-trial discovery for the modified tort should be limited to the issues of standing, falsity, and, if the plaintiff so pleads, special damages.167

One primary goal of the modified action would be to reduce the multiplicity of issues being determined at trial; ideally, the only contentious issue would be the truth or falsity of the impugned statement.168 While absolute privileges and fair comment would remain, as those defences aim to preserve certain public interests that otherwise outweigh the plaintiff’s reputational interest, RCPI and qualified privileges would not be available. Because the modified action would drastically reduce liability and focus on determining the truth of the impugned statement, those defences would no longer be required.

Of the elements of the bifurcated tort listed above, the items listed below warrant extended discussion.

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167. Where a public figure plaintiff attempts to bring a standard defamation claim, the defendant could seek dismissal or summary judgment on the basis that the plaintiff should be bringing a modified action.

168. This assumes that the plaintiff can prove relatively easily that the defendant published a factual defamatory statement and that the statement referred to the plaintiff.
1. PUBLIC FIGURE PLAINTIFFS

The concept of the public figure has gained little purchase in Canadian defamation law, certainly not as a formal category of analysis. In the United States, by contrast, the distinction between public figures and private figures exists in multiple torts (such as breach of privacy and defamation). This critical analytical distinction gives rise to the requirement that a public figure defamation plaintiff, in addition to proving that the statement was false, must prove a defendant’s actual malice (i.e., knowledge of falsity or conscious disregard as to the truth) in order to win a defamation claim.169 The concept itself is fluid and nuanced, providing a purposive device that can be used to ascertain when the “second order” of defamation claim proposed herein is to be used. A cluster of metrics can be used to determine whether a particular plaintiff qualifies as a public figure. Under US case law, an individual qualifies as a public figure when public attention is focused on him by virtue of “accomplishments, fame, or mode of living, or [adoption of] a profession or calling” that provides the public with “a legitimate interest in his doings, his affairs, and his character.”170 US courts also look to whether the persons in question have “thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”171

The corollary of adopting a public figure distinction is the creation of a “private person” category. US defamation law allows private persons to prove and recover actual damages using a negligence standard (rather than the more stringent actual malice standard) on the basis that private persons are more vulnerable to injury than public figures and their reputations are more deserving of protection.173 That recognition is consistent with the argument advanced herein, namely that there is something qualitatively different about individuals who possess reputation as celebrity: their discursive power to yoke the media to their reputation-constructing ends.174 Discursive power is the ability not just to
erect a website putting his or her version of the story online (which virtually anyone can now do), but also the ability to cause mass media outlets to devote attention to his or her side of the story.

While Canadian courts have repeatedly expressed reluctance to embrace Sullivan-style changes regarding actual malice, three matters must be stressed: first, this proposal is markedly different from Sullivan and does not conflict with the reasons for which the SCC disparaged Sullivan; second, the public figure concept itself predates the Sullivan decision as a defence applicable in infringement of privacy cases and so can be relied on without being dragged into the vortex of debate over the advisability of Sullivan and its progeny; and third, Canadian defamation law already recognizes that certain plaintiffs require different treatment vis-à-vis the remedies available to them, which can be construed as a latent foundation for acceptance of the public figure concept. The public figure concept was entrenched in US defamation law in the concurring reasons in the Curtis Publishing Co. v. Butts decision, which expanded the reach of the Sullivan actual malice requirement beyond public officials. The rationales for the extension of the actual malice rule to public figures are congruent with those enunciated in the Cusson, Grant, and WIC Radio decisions: “the public need for uninhibited debate about the activities and opinions of those with informal political and social power.” Both concurring opinions in Butts expressly note the ability of the public figure to access and use communications media as a counter to criticism and as a positive self-help remedy in the form of a “tool for rebutting libels.” This is also congruent with the argument advanced in this article that the differential ability to access reputation as a celebrity warrants differential treatment with respect to access to the defamation tort and its remedies.

The public figure concept admits of a variety of sub-categories (such as those who strive for notoriety regardless of talent or profession) and exceptions (such as private individuals who unwillingly or unintentionally become the subject of public scrutiny). The question of whether a plaintiff is a public figure

175. See e.g. Grant, supra note 7 at paras. 44-46; Hill, supra note 2 at para. 127ff.
176. See WIC Radio, supra note 5 at para. 57. See also the discussion of Justice LeBel’s concurring judgment in WIC Radio in Part II(A), above.
177. 388 U.S. 133 (1967) [Butts].
178. Hancock, supra note 169 at 131.
179. Ibid. at 131-32. See also Butts, supra note 177 at paras. 155, 164.
should be heavily weighted toward a determination of whether the plaintiff has access to the media and, therefore, possesses discursive power. Greater recognition of the fact that Canadian courts have been willing to treat different plaintiffs differently (even if such treatment has been non-systematic because it is often unarticulated) would parallel developments in other areas of law, such as privacy law, where the "celebrity" status of a plaintiff is a factor to be taken into account when assessing whether there exists a reasonable expectation of privacy.\(^{180}\)

The public figure concept is also broader than the term "celebrity" implies—celebrity denotes an individual engaged in (or at least peripheral to) one of the entertainment industries (film, television, publishing, music, et cetera). To be meaningful, however, "public figure" must be broad enough to include not just celebrities, but also public officials and individuals who possess either policy-level public power or private power that is exercised in the public sphere. It needs to be broad enough to encompass such persons as public intellectuals, prominent business people, and NGO leaders, subject always to their capacity to wield discursive power.

2. **DAMAGES LIMITED TO PROVABLE ACTUAL DAMAGES AND PUNITIVE DAMAGES**

One critical element of the revised tort envisioned herein is the removal of the presumption of harm to reputation warranting general damages. A fundamental criticism of the current tort is that it incentivizes, and even rewards, plaintiffs where they have suffered no pecuniary loss and that the prospect of large (and unpredictable) damage awards results in self-censorship on the part of the media. The presumption that general damages must be awarded can be justified in the case of private figures. Given the importance of reputation to the private individual (as articulated in *Hill*), defendants (and, given their discursive power to damage reputations, media defendants in particular) are properly put on guard by having the potential for a defamation claim guide their actions. The current tort claim, imperfect though it may be, functions as the best method for vindicating the reputation of the private individual and guarding against malicious or unscrupulous media activities, as recognized in *Hill*. Private plaintiffs appear to be much more likely than public plaintiffs "to experience significant economic harm" from defamatory statements, but are less likely to have the financial resources to fight

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180. See *Campbell v. M.G.N. Ltd.*, [2004] 2 A.C. 457 (H.L. (Eng.)).
for recompense, particularly against a media defendant; such plaintiffs should, therefore, remain entitled to the standard compensatory damages presumption. Such concerns, however, play less of a role when dealing with public figures. Indeed, given the resources of public figures and the importance of free discussion about them and their activities, it is proper to remove the cudgel that the standard tort claim represents and remove the excessive disincentive from the media in reporting on public figures in a vigorous manner.

It is also important to retain the ability to access damages if they can be proven—if the plaintiff has suffered pecuniary loss, the argument against recovery for such loss is removed. Also to be avoided is a situation where the only relief is a correction—there are individuals who do genuinely suffer economic harm or situations where punitive damages are appropriate given the malicious conduct of the defendant. To ensure that defendants do not simply view the declaration/publication alternative as an acceptable price to pay for intentional libels and that wealthy plaintiffs do not simply launch actions to silence critics, the successful party should be entitled to a full indemnity from the losing party on legal fees. This will also incentivize defendants to keep the process moving as quickly as possible and to settle in some cases. Finally, the retention of punitive damages for public figures is likely a requirement under the authorities set forth in both *Dolphin Delivery* and *Hill*. Entirely stripping plaintiffs of any possibility of damages may be too radical a change to comport with the incremental requirements of *Charter*-driven common law change, and, given the imbalance in resources between plaintiffs and media outlets, the (rarely-invoked) spectre of punitive damages will continue to act as a check on unscrupulous outlets.

3. DECLARATION OF FALSITY

All Canadian superior courts have an inherent power to issue declaratory judgments. The burden should be on the public figure plaintiff to plead and

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182. For suggestions about how such loss could be proven, see Barendt, *supra* note 95 at 123-24. Barendt suggests a variety of ways that loss could be proven, including evidence that existing relationships have been damaged or that anticipated remunerative opportunities have been lost (e.g., demonstrating that chances for promotion have been damaged or that prospective performance opportunities have been withheld).


184. See *e.g.* *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 97.
demonstrate that the impugned statement was false. This addresses one of the most damaging criticisms of the traditional tort: Requiring a defendant to prove the truth of a statement, subject to the full burden of rules of evidence and the exigencies of journalistic practice (such as the need to rely on anonymous or confidential sources), leaves the defendant vulnerable to predatory defamation plaintiffs. Reversing the burden is justified by the nature of the plaintiff in question. That the burden currently falls on defendants is meant to incentivize defendants to exercise due care in their reporting and publication vis-à-vis the fragile reputation of the individual.\textsuperscript{185} But public figure plaintiffs not only have more robust reputations than the average individual, they also have the ability to reconstruct their reputations when damaged.

The court’s decision would include a simple declaration that the impugned statement was incorrect and a concise statement of the truth of the matter. To prove falsity, a plaintiff would need to demonstrate (on a balance of probabilities) that there exists lack of sufficient evidence to support the statement or that sufficient evidence that rebuts the statement exists. Such a standard meets the dual needs of establishing veracity while not being overly burdensome on media reporting resources (as RCPI may be).

4. ORDER TO PUBLISH CORRECTION

In order to properly protect the reputational interest of the plaintiff (and, it should be stressed again, even public figures have a protectible reputational interest), the declaration of falsity must be coupled with an order to disseminate the correction. It is difficult to improve on the following statement: “E]xculpation in the eyes of the world is not accomplished by quiet entry of a judgment on the musty rolls of a court.”\textsuperscript{186} The court-ordered publication would (1) contain a definitive statement that the earlier publication was incorrect and an indication of what the truth actually is and (2) need to be published in a manner consonant with the original publication—in short, in a similarly conspicuous timeslot or page location, using similar font sizes (for print media),

\textsuperscript{185} Hill, supra note 2 at para. 137.

\textsuperscript{186} Hulme, supra note 165 at 392, n. 90, citing Clarence Morris, “Inadvertent Newspaper Libel and Retraction” (1937-1938) 32 Ill. L. Rev. 36 at 38.
emphasis, and devotion of timespan (for broadcast media), with the goal of achieving dissemination at least as wide as the original publication.\textsuperscript{187}

It should be stressed that this relief is distinct from a plaintiff’s “right of reply,” whereby an outlet is obliged to accord airtime or column inches to the publication of a statement or column penned by the plaintiff.\textsuperscript{188} There are a number of reasons for preferring a statement of correction to a right of reply. A reply fails to address the public interest in “setting the record straight” and is also less desirable for plaintiffs seeking to vindicate their reputations, as a reply does not bear the authoritative imprimatur of the court. In the context of the public figure in particular, it is also unclear what the right of reply would really add to the situation, since the public figure already has the means at his or her disposal to disseminate (his or her version of) the truth. Also troubling is the intrusiveness of the right to reply—the courts would be functionally forcing media outlets to abdicate editorial control for a given period of time or amount of space in favour of an adverse party.\textsuperscript{189} It is for the latter reason that the US SC declared “right of reply” statutes to be unconstitutional;\textsuperscript{190} although that decision was made in the different constitutional landscape of the United States, there is reason to think that a similar result would occur in Canada.

There is an important difference between forcing an outlet to provide space for a reply and forcing an outlet to devote space to a correction, however. Critically, in a right of reply, there is no authoritative declaration as to the truth of the matter—rather, the right of reply functions only to further the conversation, as it were.\textsuperscript{191} However, where a court declaration regarding the matter has been

\textsuperscript{187} Dissemination would need to be at least as wide as for the original publication because there are conceivable situations in which a non-prominent original publication was amplified by subsequent outlets.

\textsuperscript{188} The "right of reply" is sometimes manifested in state-level statutes in the United States, the constitutionality of which is debatable following the decision in \textit{Miami Herald Publishing Co. v. Tornillo}, 418 U.S. 241 (1974) [\textit{Tornillo}]. This "right of reply" must be distinguished from that contained in many media ethics codes. The latter obliges a reporter to attempt to obtain comment from the subject of a potentially damaging report, while the former is a statutory remedy that obliges a media outlet (historically print outlets) to print a "reply" to a defamatory publication.

\textsuperscript{189} See Cendali, \textit{supra} note 140 at 476-77.

\textsuperscript{190} \textit{Tornillo}, \textit{supra} note 188.

\textsuperscript{191} Cendali, \textit{supra} note 140 at 477. Cendali notes that "stimulating the exchange of ideas" was not a sufficient basis for the US SC to warrant interference with editorial independence and free speech (at n. 272, citing \textit{Tornillo}, \textit{ibid.} at 258).
made, an even more fundamental Canadian constitutional value, one that underlies the right to free expression itself, has been engaged, i.e., the quest for truth. After the court has made a declaration as to the truth, asking a media outlet to turn over editorial control, not to an opposing party but to the court, is a very different matter. Indeed, it would be curious for a media outlet to argue that it was reluctant to publish a court-determined version of the truth.

V. POTENTIAL CRITICISMS

Before closing, I wish to address some foreseeable criticisms of the foregoing proposal.

A. THE SEARCH FOR TRUTH

An initial objection to the proposal may be that it is inappropriate for courts to be in the business of determining truth with respect to contested factual or historical statements. But while it is true that the law has not historically concerned itself with the accuracy of statements solely for the sake of promoting accuracy, the law should be prepared to do so where such accuracy is incidental to the protection of reputation and to the furthering of the values underlying freedom of expression. This is hardly a novel undertaking for courts. They have historically been called upon to decide truth where it has been raised as a defence to a libel claim. That court-determined truths are not absolute seems a peculiar argument to levy—if fully accepted, it radically undermines all areas of juridical endeavour, not merely defamation law. While recognizing that our efforts may be imperfect, we should strive to implement mechanisms that at least increase the possibility of properly identifying the truth. A distinction should also be drawn between courts as appropriate arbiters of competing opinions and courts as proper evaluators of factual misstatement—the former is a role for which courts are not suited, but that is already addressed by the fair comment defence.

192. Hill, supra note 2 at para. 104.
193. Many codified standards of journalism ethics make it incumbent on media outlets to promptly correct errors. See Cendali, supra note 140 at 491, n. 360.
194. See Diamond, supra note 165.
Courts are properly charged with assessing the accuracy of (purportedly) factual statements and facts that an audience would presume to be true as foundational for an expressed opinion.

B. VAGARIES OF A "PUBLIC FIGURE" TEST

The introduction of a public figure test suggests at least two criticisms. First, the test itself may be too vague for successful application. Second, assuming the test is workable, the technological changes that underpin the proposal herein do not argue in favour of dropping altogether the distinction between "public" and "private" figures. The first criticism casts itself too strongly: tort law in particular is replete with tests that require delineation by the courts. US courts, under the rubrics of a number of torts, have attempted over decades to give content to the term "public figure." Notably, despite a veritable flood of criticisms of the post-Sullivan tort of defamation by US commentators, the public figure test itself attracts relatively little opprobrium. Arguing that the concept of public figure is too arbitrary or vague overlooks that there will inevitably be a locus in the defamation analysis for effecting a reconciliation of the competing expression and reputation interests. The public figure concept is an appropriate device for courts to use in expressly engaging in this reconciliation. It is also preferable to deferring the question to later stages of the defamation action (such as in analyzing the RCPI or fair comment defences) because undertaking the reconciliation process at the beginning of the action (i.e., at a request for dismissal or summary judgment brought by the defendant arguing that the plaintiff is a public figure and thus not entitled to pursue a standard defamation claim) would result in fewer cases reaching trial and would avoid costly and invasive pre-trial discoveries.

The second criticism queries the validity of the distinction between public and private figures. However, as discussed in Part IV(B)(1), above, inherent in the concept of reputation as celebrity is the very notion that there is something relevantly special about public figures. The development of mass and interactive media has not rendered a previously vertical stratum of public and private figures

196. See Hancock, supra note 169 at 143. Hancock notes that the concept of the public figure "seems destined to vacillate in its meaning, as a permanent moving target, as long as it retains the role of expressing hotly contested compromises over the clash of free speech interests and the ancient interest in reputation protected by libel law."
into a horizontal landscape where all are equal participants (or generators of content and recipients of attention) in the stream of information. This article has advanced the argument that the reputations of some individuals are different in kind from the reputations of others—it is an argument in favour of a nuanced approach to addressing reputation by means of tort law, rather than an argument for a one-size-fits-all solution.

C. SULLIVAN

Another concern about this proposed public figure distinction is that it resembles the Sullivan approach rather too closely, which would represent a change in Canadian defamation law precluded by the express rejection in Hill (subsequently reaffirmed in WIC Radio and Grant) of adopting a Sullivan-style approach. Though there is a superficial similarity between Sullivan and this proposal (in that there would be a shifting of the burden of proof to the plaintiff and that fault, falsity, and damages would no longer be presumed and subject to rebuttal by the defendant), this proposal accords with the reasons given by the SCC in rejecting the adoption of Sullivan and, further, actually addresses the concerns raised by it. The fundamental criticism of Sullivan set out in Hill is that the actual malice inquiry shifts the focus of the tort away from determining the truth of the impugned statement and toward an inquiry into the conduct of the defendant, which deprives plaintiffs of an opportunity to establish falsity and increases the costs of litigation by involving parties in extensive (and meddlesome) discoveries about the news reporting process. The most damaging aspect of Sullivan, in the eyes of the SCC, is that potentially false statements of fact are left unrebutted, exacting "a major social cost by deprecating truth in public discourse." The proposal advanced in this article strives to work in precisely the opposite direction of Sullivan, while retaining the SCC's avowed goal of expanding the ambit of freedom of the media—toward, rather than away from, determinations of truth and falsity; and away from, rather than toward, complexity and increasing cost in litigation. In this regard, if anything, this proposal demonstrates greater fidelity to the aims of the SCC than the modifications contained in Grant, Cusson, and WIC Radio.

198. Ibid.
199. Ibid. at paras. 127-33.
200. Ibid. at para. 131.
D. FRACTURE

Finally, it might be generally argued that this proposal fractures defamation law too greatly—rather than simplifying the tort, this proposal results in needless complication. But defamation law is already fraught with cleavages, some understandable and some nonsensical. Additional complications arising from this proposal will at least be doctrinally consistent with the interests that animate the tort. There is also an emerging tendency to treat certain categories of plaintiffs and defendants differently. For example, US law recognizes a “sectional standards” approach, whereby a plaintiff who belongs to even a small subset of the community holding to irregular moral standards can recover if the plaintiff’s reputation is damaged within that community, and English courts have expressed at least an openness to such an approach. As Lawrence McNamara argues, courts should be prepared to recognize “diverse moral taxonomies,” with attendant implications for what will constitute a defamatory statement. Courts should likewise be prepared to recognize diverse plaintiffs, with attendant implications for what will constitute appropriate remedies. Simplification is an admirable goal, but not if it comes at the expense of the fundamental interests that the tort is designed to serve.

VI. CONCLUSION

Something has changed in the manner in which Canadian appellate courts engage defamation law. When comparing the seminal SCC defamation decisions of the 1990s to those of the 2000s, it is difficult to avoid concluding that the affinity once held for the paramount importance of protecting reputation has been eroded or, at the very least, has evolved to become markedly more nuanced. Freedom of expression is hailed as the countervailing interest that must be accorded increased weight when assessing the common law of defamation. But to merely cite the importance of freedom of expression is insufficient: Why nearly three decades after its introduction has the Charter suddenly become a vehicle for remarkable changes in Canadian defamation law?

This article identifies two phenomena that are mutually catalytic and that prompt the changes evidenced by the recent court decisions in WIC Radio, Cusson, and Grant: a fundamental alteration in the nature of mass and interactive media

201. McNamara, supra note 91 at 120-21.
203. Supra note 91 at 138.
and an attendant modification of the nature of reputation. Increased attention to the theorizing of reputation, the interest whose protection animates the entire tort of defamation, is rewarded by an appreciation of the fact that reputation is itself a highly constructed, contextual, and malleable artifact. In a society where mass and interactive media can be used to both articulate and damage reputation—but also to modify, ameliorate, and mitigate such damage—the manner in which the law needs to be wielded in order to protect that interest must itself necessarily be altered. This article posits that much of the criticism surrounding the tort of defamation is informed by a simple disconnect. Some plaintiffs do not need the tort of defamation to protect a reified reputation that is either not demonstrably damaged by defamatory statements or that is (comparatively) easily rectified by their own power. The complaint is that such plaintiffs in some meaningful sense misuse the tort in order to achieve other goals (such as the quieting of criticism). If that is correct, then the answer is not to tweak technical elements of the existing tort in order to achieve a proper calibration of the interests of reputation and free speech. Instead, the answer is to recast the tort into two different tracks, one for public figure plaintiffs, who pose the highest risk of abusing the tort, and one for private plaintiffs, whose reputational interest is more akin to the traditional notion of reputation that the existing tort seeks to protect.

The proposal described herein is guided by the need to take account of changing technology, while observing fidelity to the SCC’s reconciliation approach to defamation law; rather than introducing new tools to effect a balance, it seeks to curtail the extent of reputation-based protection to which certain plaintiffs are entitled. We have not seen the concepts discussed herein expressly addressed by Canadian courts on the terms used in this article because, due to a lack of prior articulation, Canadian courts are so unused to discussing reputation that they have not developed the syntax for it. Instead, they have been reduced to parsing an idiomatic discussion that revolves around “competing” interests of reputation and expression. It would be better to grapple with reputation as it actually exists in modern society and to reform doctrine in light of that reality, instead of tinkering with marginal facets of doctrine while labouring under received misperceptions.