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CHAPTER FIVE [16 caps bold; centre]

PRIVATE LAW, PUBLIC LAW, LIBEL LAW [16 caps bold; centre]

Ian Loveland [16 bold; centre]

From a Canadian constitutional law perspective, 1867 is most memorable for enactment of the BNA. From a British viewpoint, the year's key domestic initiative was the passage of Disraeli's electoral reform legislation. For the initial purpose of this chapter however, 1867's most noteworthy event was the publication of an article in *The Times* on 13 February. The article contained an accurate summary of parliamentary proceedings in which the integrity of a Mr Wason was substantially traduced. Mr Wason was legally barred from bringing defamation proceedings against either his critics or the publisher of Hansard,[1] and so sued Mr Walter, a proprietor of *The Times* instead.

Wason likely thought his prospects of success very good. In 1867, English libel law was a very claimant friendly construct.[2] Damage to reputation was presumed by mere publication of defamatory factual material. The primary defence was to prove (and the burden of proof lay on the defendant) that the defamatory material was true. Alternatively, the defendant could invoke the fair comment defence by proving that that defamatory material expressed opinion not fact (ie something not provable as true or false) on a matter of public interest, whereupon the burden would shift to the claimant to prove that the defendant was motivated by malice. In respect of factual material that was not true nor comment, in very limited circumstances defendants might invoke a defence of privilege, rooted either in statute or common law.

'Absolute privilege' - ie an indefeasible defence - attached to parliamentary and court proceedings. 'Qualified privilege' was an effective if not indefeasible defence. If the defendant persuaded the court that the publication was made on a privileged 'occasion', she/he would defeat the claim unless the claimant proved that the publication was made in circumstances of 'actual malice'; that the defendant knew the information was false or was reckless as to its falsity, and was motivated by a desire to cause damage to the claimant.

In terms of its *effect*, qualified privilege placed substantial doctrinal and evidential burdens on the claimant. In terms however of its *reach* it was very narrow. A relevant 'occasion' existed only in circumstances where the publisher and recipient had a reciprocal duty to share the information. This essentially required a pre-existing intimacy, be it professional or

[1] Speeches of the members of the Commons and Lords could not found a libel action because of the statutory exclusion provided by Art 9 of the Bill of Rights 1689 and the publishers of Hansard were similarly protected by the Parliamentary Papers Act 1840.

[2] See generally Loveland I (2000) *Political libels* ch 1.

personal, between the parties. Cliched examples would be a father writing a letter to his daughter to tell her that her fiancée was a charlatan, or a former employer writing a reference for a former employee to a prospective employer reporting that the employee was a bully. There was no assumption that publication to 'all the world' – which meant, despite the literal sense of the phrase, any person other than the dutybound recipient(s) - could attract qualified privilege.[3]

The doctrinal peg on which the defence then hung, and the reason for it, had been formulated in 1834 in *Toogood v Spyring:* qualified privilege would attach to statements:

> fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned…[S]uch communications are protected for the common convenience and welfare of society: and the law has not restricted the right to make them within any narrow limits.[4]

In relation to widespread dissemination of material about politicians in the early/mid nineteenth century, the 'common convenience and welfare of society' principle proved of very limited assistance to defendants. During the first election held after the passage of the 1832 Great Reform Act, the defendant in *Duncombe v Daniel*,[5] had, via letters published in a London newspaper, accused Duncombe (a candidate for election to the Commons) of fraud. Daniel's attempt to bring the material within the *Toogood* principle on the basis that he had a duty to publish such material and the electors[6] a duty to consider it was unsuccessful. The court concluded that: "However large the privilege of electors may be, it is extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens to stand in the situation of a candidate".[7]

The court's assumption that a person could 'happen' – as if by chance – to seek election to the Commons rather than to do so through a deliberate choice to enter the public sphere of governance is a curious one. Similarly, the "all the world" label was a hyperbolic legal fiction in the context of 1830s London. The 'world' in issue was the readership of the relevant newspaper. By the 1830s, many parts of Britain – and especially London – were awash with newspapers, journals and pamphlets disseminating all manner of conservative and radical political information. But insofar as *Duncombe* (nothwithstanding its roots in empirical fictions) correctly stated the common law – a common law which Parliament evinced no inclination to change – publishers published 'facts injurious' to political actors at their peril.

I. *Wason v Walter* (1868): a tentative recognition – soon forgotten in English law – of 'political libels [A heading; 14 bold]

[3] So in my above example if the father pinned a copy of the letter to a noticeboard in the fiancee's golf club the 'occasion(s)' (ie making the information available to anyone who passed by the noticeboard) would not be privileged, even though the content of the information remained unchanged. 'Occasion' is a poorly chosen label. What is really in issue is the identity of the audience to whom the information is made accessible.

[4] (1834) 1 CM&R 181 at 193.

[5] (1837) 8 Car and P 222; discussed in Loveland (2000) *Political libels* pp 19-20.

[6] Who then of course comprised only a tiny fraction of the (male) adult population.

[7] (1837) 8 Car and P 222 at 229.

The court's decision in *Wason v Walter* was authored by Cockburn CJ. As a judge, Cockburn is most likely remembered for his (to modern eyes) illiberal definition of obscenity in *R v Hicklin*.[8] But prior to joining the bench in 1856, Cockburn had run his practice at the bar, much of which was concerned with electoral law,[9] alongside a political career. He was a Liberal party MP for ten years in the 1850s and 1860s, serving as both Solicitor-General and Attorney-General.[10]

It is hard to resist the inference that *Wason* was influenced, if not driven, by Disraeli's electoral reform legislation. Although the 1832 statute has been garlanded with the label of the 'Great Reform Act', the 1867 legislation enfranchised many more people (just men of course) than its predecessor, and represented a substantial further step towards legal expression of the political theory that the legitimacy of the government system rested on the consent of (significant numbers) of the governed. Cockburn's judgment spoke very clearly to those values. Few members of even the recently enfranchised middle classes would regularly read Hansard itself, but in Cockburn's view the 'common convenience and welfare of (a slowly democratising) society' required that newspaper recirculation of such information should attract qualified privilege. It was not the 'occasion' of publication that was important, but the substance of the information. And it was not predominantly the 'right' of the publisher to publish that was thereby protected, but the 'right' of the public (in effect 'all the world') to receive the information:

[quote 10 normal] Where would our confidence be in the government of the country or in the legislature by which our laws are framed…. - where would be our attachment to the constitution under which we live – if the proceedings of the great council of the realm were shrouded in secrecy and concealed from the knowledge of the nation….
[Every] member of the educated portion of the community from the highest to the lowest looks with eager interest to the debate of either house, and considers it a part of the duty of the public journals to furnish an account of what passes there.[11]

Cockburn expressly recognised that his judgment was altering the common law, and took care to justify both the general principle that it was appropriate for the courts to do so and the application of that principle to this specific issue:

[quote 10 normal] Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied…
[W] who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties?[12]

Curiously perhaps, given the steady onward march of statutory reform which, step by step, created an almost universal franchise by 1928, Cockburn's methodology and its potential to

[8] (1868) LR 3 QB 360.

[9] Although most famously he had been the successful defence counsel in *R v McNaghten* (1843) 8 ER 718.

[10] Lobban (2004) 'Cockburn, Sir Alexander James Edmund, twelfth baronet' *Oxford Dictionary of National Biography*.

[11] (1868) LR 4 QB 73 at 89-90.

[12] Ibid at 93-94.

further alter the boundaries of English libel law in respect of 'political' information – the 'discharge of public duties' as he put it - disappeared virtually without trace from the English legal landscape during the next hundred years. This is perhaps because the judgment was narrowly construed as doing no more than providing an exception to the generally applicable libel law presumption that the reporting of a libellous comment was itself libellous; the exception arising because the speeches published in *Hansard* were themselves absolutely privileged and so their accurate repetition and/or summation should be protected at least to the extent of attracting qualified privilege. A wider construction of Cockburn's opinion, that he was presenting the common law as a mechanism that should regularly revisit the boundaries of libel law in respect of political matters as societal understandings about the legitimate basis of the governmental system evolved, did not achieve any great currency in English judicial circles.[13]

Parliament occasionally stepped into the field to extend qualified privilege to accurate reportage of the proceedings of various public bodies, but neither legislators nor the courts showed any enthusiasm for the idea that the print or broadcast media should enjoy the protection of qualified privilege for stories dealing with political or other public interest issues.

II. *Wason v Walter* : a tentative recognition – seized upon and built upon in American law – of 'political libels' [A heading; 14 bold; italic only because case name]

In contrast, Cockburn's judgment enjoyed a high profile in several United States State jurisdictions, where its inherent principle was stretched far beyond its initially limited reach to provide a rationale for extending qualified privilege at State common law and/or constitutional law to newspaper articles dealing not just with libels found in summaries or critiques of official records of the proceedings of governmental bodies, nor even just to such libels and those involving narrowly political questions (ie the opinion and behaviour of elected or appointed government officials or candidates for such roles), but also to stories dealing with much broader public interest issues.[14]

Innovation as State common law: *Coleman v McClennan* (1908) and *Press Co v Stewart* (1888) [B heading; 12 bold – italic only because case names]

The best example is the Kansas Supreme Court's 1908 decision in *Coleman v McClennan,*[15] in which the defendant newspaper owner had run an article accusing the claimant, then the State's Attorney-General, of corruption. Burch J devoted considerable attention to *Wason*, and then reasoned:

[quote 10 normal] [P]araphrasing this language, it is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the State and to society of

[13] *Wason* is of course an early example of what Canadians would style a 'living tree' approach to the task of judicial lawmaking; see fn – below and accompanying text.

[14] A selection is reviewed in Loveland I (2000) *Political libels* ch. 3. In addition to those discussed here, see especially *Ambrosious v O'Farrell* (1905) 199 Ill App 265 and *Ogren v Rockford Star* (1925) 237 Ill App 349 (Illinois): *Briggs v Garrett* (1886) 2 ATL 513: *State v Balch* (1884) 31 Kan 465 (Kansas): *Salinger v Cowles* (1922) 191 NW 167.

[15] (1908) 98 Pac 281.

such discussions is so vast and the advantage derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputation of individuals must yield to the public welfare.*[16]*

The most expansive application of the principle is the Pennsylvania case of *Press Co Ltd v Stewart*.[17] The libel in *Stewart* was an irreverent newspaper article which questioned the competence of a man running a journalism school. There was nothing 'political' in the governmental sense about the story, but the Pennsylvania Supreme Court nonetheless accepted Press Co's submissions that qualified privilege should apply:

[quote 10 normal] If we are asked why this article is so privileged, I answer because it was proper for public information. The plaintiff was holding himself out to the world as a teacher and guide of youth…This gave him a quasi-public character. Whether he was a proper person to instruct the young, and whether his school as a proper place for them to receive instruction, were matters of importance to the public, and the Press was in the strict line of its duty when it sought such information, and gave it to the public.

Such innovation – focused as in *Wason* on the nature of the information not the 'occasion' of publication - had been widely but by no means universally adopted in State jurisdictions, whether by legislation or judicially engineered alteration to State common or constitutional law, by the early 1960s. Such initiatives were State-specific in origin and territorial effect; even as late as the 1940s (and by 1926 the US Supreme Court had accepted that the substance of the First Amendment constrained the States through the mechanism of the Fourteenth Amendment)[18] the Supreme Court categorised libel alongside obscenity and 'fighting words' as speech not raising First Amendment issues.[19] And then in the early 1960s, *Coleman* was given extensive and approving consideration in the US Supreme Court's judgment in *Sullivan v New York Times.*[20]

And innovation as national constitutional law: to *Sullivan v The New York Times* (1964)

[B heading; 12 bold italic only because case name]

Sullivan is too well known to require more than brief mention here.[21] It ratio was that the publication of information relating to the political conduct of elected government officials could not found liability in libel unless the claimant proved that the information was false and that it was published with 'actual malice', by which was meant that the defendant knew the information was false or was recklessly careless in assuming it to be true.[22]

The *Sullivan* defence – applicable through the First and Fourteenth Amendments to all State and national defamation law – was more expansive than the traditional qualified privilege

[16] (1908) Pac 281 at 286.

[17] (1888) 119 Pa 584.

[18] *Gitlow v New York* (1925) 268 US 652.

[19] *Chaplinsky v New Hampshire* (1942) 315 US 568.

[20] (1964) 376 US 255.

[21] See generally Loveland (2000) op cit ch : Lewis (1991) *Make no law* ch 5: Kalven (1964) 'The New York Times Case: a note on the central meaning of the First Amendment' *Supreme Court Review* 267.

[22] To be proved to an enhanced standard of 'convincing clarity'.

defence in that it could apply to publication to 'all the world'. The moral rationales underpinning the judgment was that the American political tradition properly understood demanded that citizens had not just an entitlement but a responsibility constantly to evaluate the adequacy of their governing institutions and the people elected to staff them, and that the press had a vital role to play in facilitating that process. The 'balance' struck in *Sullivan* was a tripartite one; the reputations of political figures, the entitlement of publishers to publish and – the most important – of the public to consume (and ideally evaluate) the information. Orthodox libel law unacceptably deterred or 'chilled' the dissemination of such information. The *Sullivan* majority accepted that its actual malice test would inevitably result in publication of some false information. But that was presumed a price worth paying to reduce the amount of 'true' information that might otherwise be suppressed.[23]

III. Traditional perspectives on 'political libels' in England and Canada in the near *Sullivan* era: [A heading: 14 bold; italic only because case name]]

It was obviously not open to either Canadian or British courts in that era to lend any reform to libel law a national 'constitutional' status in normative terms. But in both jurisdictions, there was no normative impediment to prevent amendment of the common law in the *Sullivan* direction. Nor is the there are any obvious reason to think that the moral values underpinning *Sullivan*, essentially the premise that the legitimacy of the governmental system rested on the informed consent of the population, were less pertinent to British and Canadian society than to the United States. But the *Sullivan* rationale had had in the 1950s, and continued to have in the 1960s and 1970s, no significant bite in either jurisdiction.

In Canadian law – a provincial matter concerning 'property and civil rights' ?
[B heading: 12 bold]

Under the terms of the BNA 1867, civil defamation law within Canada was presumptively a matter reserved to provincial jurisdiction within the 'property and civil rights' provision of s.92(13).[24] Other than in Quebec, the Provinces initially retained English common law as the basis of their defamation provisions. In principle it would have been possible for the various Provinces (only 4 in 1867 but 10 by 1950) to have adopted quite different libel law regimes in respect of political or public interest libels. By the 1930s, such differentiation was clearly visible in the libel laws of American States, spanning the range from complete prohibition on suit even being brought for some types of political libel, through the application of an orthodox or modified qualified privilege defence being applied to political/public interest speech to simple replication of English common law.

In its early constitutional jurisprudence, the Canadian Supreme Court displayed considerable interest in and engagement with United States constitutional ideas, although that enthusiasm was never matched in Privy Council judgments on Canadian constitutional

[23] [REMOVE ?]Two judges, Black and Douglas J, had advocated complete immunity for such publications. 'How much' false information might be published under the *Sullivan* rule, and how much true information would be chilled under orthodox libel law, were matters of guesswork; as was any view on whether admirable candidates for political office would not seek it for fear of being subject to false reporting that could not be successfully challenged in libel proceedings; (or conversely whether rogues would be deterred from seeking office for fear their unacceptable behaviour might be more readily exposed).

[24] Criminal libel laws were a Dominion matter, per BNA 1867 s.91(27).

issues.[25] It was not until the 1980s, in early cases dealing with the interpretation and application of the Charter,[26] that the Canadian Court's initial interest re-awakened. In the libel context, that trend was nicely illustrated by a cluster of 1950s and 1960s cases which – with one very limited exception - attached no consideration at all either to United States authority or to the arguments which shaped it. In each case, the Court issued a brief, unanimous opinion authored by Cartwright J.

Douglas v Tucker (1952) [C heading; 12 italic]

The litigation in *Douglas v Tucker*[27] had an obvious political hue. During the 1948 provincial election campaign Douglas, then the Premier of Saskatchewan,[28] made speeches – and arranged for their press publication – suggesting that Tucker, leader of the Liberal opposition, was involved in fraudulent economic activities. Among the defences Douglas advanced was that the publication attracted qualified privilege because it was made:

[quote 10 normal] (a) by way of refutation of an allegation by the plaintiff which would injure the defendant, his Government, and the Co-operative Commonwealth Federation and with the sole desire of protecting as it was the defendant's duty to protect, the interests of his Government, those of the party of which he is leader, and his own interests.
(b) to citizens of the Province of Saskatchewan who had a legitimate interest in the election campaign then proceeding and in the matter referred to by the defendant which was one of its principal issues. The words were spoken in good faith and in the honest belief that they were true and without malice toward the plaintiff.[29]

The Supreme Court promptly dismissed this argument. It relied squarely on *Duncombe*:

[quote 10 normal] [33] *Duncombe v. Daniell* is cited as an authoritative statement of the law in Gatley on Libel and Slander (*supra*) at pages 251 and 278 and in Odgers on Libel and Slander, (*supra*), at pages 171 and 246. The principle which it enunciates, that the privilege of an elector will be lost if the publication is unduly wide, has been applied repeatedly, see for example: *Anderson v. Hunter*, *Bethell v. Mann* and *Lang v. Willis*.

[34] The view that a defamatory statement relating to a candidate for public office published in a newspaper is protected by qualified privilege by reason merely of the facts that an election is pending and that the statement, if true, would be relevant to the question of such candidate's fitness to hold office is, I think, untenable.

Tucker's counsel apparently made no resort to the case law of the United States jurisdictions where such an argument had been regarded not just as tenable but compelling. He had

[25] Compare for example the Privy Council's judgment in *R v Russell* (1882) 7 A.C. 829 on the important question of when the national Parliament could use its general 'peace order and good government' power in s.91, and the Canadian Supreme Court's previous judgment on the point in *Fredericton (City) v R* (1880) 3 SCR 505.

[26] See *Law Society of Upper Canada v Skapinker* [1984] 1 SCR 357 (on general interpretive techniques): *Hunter v Southam* [1984] 2 SCR 145 (on such techniques and the specific issue of 'unreasonable' searches and seizures of documents: *Big M Drug Mart* [1985] 1 SCR 295 (on religious freedoms).

[27] [1952] 1 SCR 275.

[28] Douglas led a party called the Co-operative Commonwealth Federation (the forerunner of the New Democrat Party). Douglas offers his own account of the proceedings at Thomas (ed) (1984) *The making of a socialist: recollections of T. C. Douglas* pp 260-262. Tucker's accusations did not derail the government's electoral prospects. At the election Douglas' CCF won 31 of the legislature's 52 seats. Tucker's Liberals won 19.

[29] [1952] 1 SCR 275 at para 15.

perhaps taken the view that to do so would be futile. However the three authorities referred to at para 33 of the judgment are not especially weighty supports for the orthodox positon.

Anderson v Hunter[30] is an 1891 five line judgment of the Scottish Court of Session in a *slander* case, and so necessarily one where mass media dissemination was not in point. *Bethell v Mann* – a 1919 English High Court judgment - occupies a half page in the Times Law Reports.[31] It certainly concerned a party political issue; the libel being a pamphlet circulated to local electors by the Labour opponent of a Liberal candidate for the Commons. The entirety of the court's consideration of the qualified privilege issues is this: "The Lord Chief Justice said that the fact that the leaflet was distributed broadcast [sic] would of itself prevent the occasion of the publication being held privileged".[32] *Lang v Willis*[33] was of more recent vintage (1934), although it was an Australian case which was yet one more stage in the bitter factional in-fighting which plagued the New South Wales Labour party in the 1920s and 1930s. Its relevance to *Tucker* is minimal. Firstly, it was also a slander case, so 'all the word' publication was again not in issue. Secondly, the case did not turn on common law qualified privilege – the point was not even pleaded at trial - but on an obscure provision (s.5) in the New South Wales Defamation Act 1912.[34] It is hard to believe Cartwright J had read the case; more likely that he just adopted segmented references to it in counsel's submissions.

Douglas was, all in all, a distinctly unimpressive exercise in legal reasoning.

Globe and Mail Ltd v Boland (1960) [C heading; 12 italic]

Cartwright J also delivered the Court's similarly flimsy judgment eight years later in *Globe & Mail Ltd v Boland.*[35] Mr Boland was an Independent Conservative candidate in the 1957 federal election. He had organised a stunt in which a supposedly former Communist revealed that the then Liberal government was and infiltrated by communists. *The Globe & Mail* denounced the stunt as McCarthyite scaremongering, calling it a: "disgusting performance' designed to mislead voters and 'a degradation to whole democratic system of government in Canada".

The trial judge accepted that qualified privilege attached to such an article. Although *Wason* was not cited, the judge (Spence J) had concluded:

[quote 10 normal] Surely no section of the public has a clearer duty to publish, for the information and guidance of the public, political news and comment, even critical comment, during a Federal Election in Canada than the

[30] (1891) 18 SLR 467.

[31] [1919] *The Times* October 29.

[32] Ibid.

[33] (1934) 52 CLR 637.

[34] [REMOVE?] The New South Wales legislature had shown remarkable phlegmatism in s.5 of the 1912 Act in accepting (by re-enacting a provision dating from 1847) that the rough and tumble of political argument in the State was habitually so fierce and so rooted in personal abuse, and so many politicians were presumptively seen by the wider public as scoundrels, that having one's honour, honesty or competence traduced by one's political opponents in the run-up to an election might not inflict any meaningful damages on a politician's reputation. Both Willis and Lang were such scarred political figures in 1934 that likely anything defamatory either said about the other would fall within s.5. See generally Nairn (1995) *The Big Fella: Jack Lang and the Australian Labour Party 1891-1949* chs 12 -13.

[35] [1960] SCR 203.

great Metropolitan daily newspaper such as the Defendant. Just as certainly the public, every citizen in Canada, has a legitimate and vital interest in receiving such publications.

The Ontario Court of Appeal had upheld that analysis.

Reversing the Court of Appeal, Cartwright J again invoked *Duncombe* and also found great assistance in a passage from the Privy Council judgment in *Arnold v the King Emperor* which had concluded that journalists enjoyed no greater protection in defamation proceedings than ordinary citizens.[36] One might suggest that Cartwright there entirely misses the point, which is that the information and its audience and not its publisher should be foremost in the court's mind. [37]

Boland is however notable for making a foray into American libel jurisprudence. Cartwright J was apparently convinced that accepting the defendant's argument would actually undermine the 'common convenience and welfare of society' because it would discourage worthy people from seeking public office. He adopted a similar view expressed by Taft J in 1893 in *Post Publishing Co. v Hallam.*[38] Taft offered no evidence to support that supposition in *Hallam*, and Cartwright offered none in *Boland.* That may well be because the proposition is unprovable. But what Cartwright also omitted was any allusion to judicial statements (albethey similarly un-evidenced) pointing in the opposite direction. *Coleman* offers an apposite example:

Without speaking for the other states in which the liberal rule applies [ie qualified privilege for political information], it may be said that there at least men of unimpeachable character from all political parties present themselves in sufficient numbers to fill the public offices and manage the public institutions.[39]

Banks v The Globe & Mail [C heading; 12 italic]

The article complained in *Banks*[40] was published in May 1957. Mr Banks was the director of the Seafarers International Union, a trade union which represented many maritime workers. The article accused him inter alia of engaging in a deliberate strategy to undermine the viability of the Canadian shipping fleets, of having an extensive criminal record in the United States and of having committed various crimes in Canada. At trial, *The Globe and Mail* successfully pleaded qualified privilege. The trial judge, in another *Wason-esque* charge to the jury, held that the scope of qualified privilege was dynamic and expanding:

[quote 10 normal] It is difficult to conceive a matter in which the public would be much more interested in the year 1957 than the most important topic of industrial relations….There is no more efficient organ for informing

[36] (1914) 30 TLR 462.

[37] The libel in *Arnold* was written and published in a newspaper by an experienced journalist, and was 'political' in a narrow sense in that it accused a British Imperial official of corruption. But in the context of Canada in 1960, reliance on *Arnold* as an authority is not immediately compelling. That is in (small) part because the case was a criminal libel prosecution, not a civil action. The (much) larger part is that this was not litigation arising in a country (India) that – qua British colony - even pretended to have a democratic basis to its governmental system.

[38] (1893) 59 Fed 540. *Hallam* is a federal district court decision, and so had very limited precedential value.

[39] (1908) 98 Pac 281 at 289.

[40] [1961] SCR 474.

the public and for disseminating to the public intelligent comment on such matters of public interest, than a great metropolitan newspaper.[41]

That reasoning was rejected in the Supreme Court as perfunctorily as it had been in *Douglas* and *Banks*. Cartwright J again delivered the sole judgment. He relied straightforwardly on his own opinions in those cases, and again invoked *Arnold*, to reach the same conclusion:

[quote 10 normal] [29] The decision of the learned trial judge in the case at bar, quoted above, appears to involve the proposition of law, which in my opinion is untenable, that given proof of the existence of a subject-matter of wide public interest throughout Canada without proof of any other special circumstances any newspaper in Canada (and *semble* therefore any individual) which sees fit to publish to the public at large statements of fact relevant to that subject-matter is to be held to be doing so on an occasion of qualified privilege.

Jones v Bennet (1968) [C heading; 12 italic]

Before *Jones v Bennet*[42] was decided in 1968 *Sullivan* – and several subsequent US Supreme Court decisions[43] – had confirmed that in that jurisdiction the proposition rejected in *Banks* was entirely tenable. But it seems that for Cartwright, now Chief Justice, and his colleagues, *Sullivan* and the ideas on which lay were not just unpersuasive but not even worthy of serious consideration.[44]

Bennet was the then Premier of British Columbia. Jones, the chairman of a government body, the Purchasing Commission,[45] was accused but acquitted of taking bribes. Jones declined government invitations to resign, and was eventually dismissed by the extraordinary device of what was essentially an Act of Attainder.[46] Jones took exception to a speech by Bennet in which Bennet somewhat cryptically said of the matter in a speech to his party members: "let me just assure of this: the position taken by the government is the right position".

Jones convinced the trial court that the words implied he was corrupt, notwithstanding his acquittal. On appeal, the BC Court of Appeal had accepted the defence of qualified privilege was made out, evidently on the basis of an unintended concession by Jones's counsel. On further appeal, the Supreme Court indicated that it might have been willing to consider (but likely would not have accepted) the argument that that privilege could attach to a speech

[41] Quoted at ibid [20].

[42] [1969] SCR 277.

[43] *Garrison v Louisiana* (1964) 379 US 64; *Rosenblatt v Baer* (1966) 383 US 75: *Curtis v Butts; Associated Press v Walker* (1967) 388 US 130.

[44] Canadian legal journals seemed not much interested either. The only contemporaneous piece exploring S*ullivan's* possible relevance to Canadian law seems to be Weller (1967) 'Defamation, enterprise liability and freedom of speech' *U of Toronto LJ* 278. (There were of course many fewer such journals then than there are now).

[45] An executive agency with extensive statutory responsibilities for public procurement.

[46] Splendidly titled, with not quite perfect accuracy, An Act to Provide for the Retirement of George Earnest Pascoe Jones 1965. The Act's effect (per s.2(3)) was retrospective:
http://www.bclaws.ca/civix/document/id/consol18/consol18/00_65063_01

made only to party members on political matters even if there was no pending election.[47] However, the Court declined to address that point since it also accepted that Bennet had intended that the speech would be reported in newspapers. Consequently, following its own judgments in *Tucker* and *Boland,* and in a decision intellectually skimpy even by the not very exacting standards set in those cases, the Court concluded simply that:

[10 normal] [I]t must be regarded as settled that a plea of qualified privilege based on a ground of the sort relied on in the case at bar cannot be upheld where the words complained of are published to the public generally….[48]

Sullivan did not engage the Court's attention, nor is there any indication that it was invoked by Bennet's counsel[49] to suggest that existing common law rules might be revisited.

A curious complacency ? [B heading; 12 bold]

It is unsurprising that the Canadian Supreme Court decided these cases (even the post-*Sullivan Bennet)* without considering American authorities and ideas. As noted above, the Court's early flirtation with United Stated jurisprudential ideas quickly disappeared. More surprising perhaps is the very limited – even feeble - nature of the judgments' treatment of freedom of political expression as an indigenously Canadian constitutional value. The cause for surprise is that in the 1950s the Court – led on the issue by Ivan Rand[50] – produced several judgments significantly extending the protection afforded to free expression against provincial intrusion. Most of those judgments were directed against the activities of the DuPlessis regime in Quebec, especially, although not entirely, in respect of its fierce attacks on Jehovah's witnesses in the province.[51] The judgments are notable for the way in which the Court, adopting a method similar to Cockburn's in *Wason,* drew on principles of political theory – of constitutional morality if you will – to structure its conclusions.

R v Boucher[52] is perhaps the best known case.[53] In *Boucher,* the Supreme Court lent a very narrow character to the crime of sedition, requiring not only that the crime required the

[47] Which conclusion would slightly have extended the *Duncombe* principle.

[48] [1969] SCR 277 at 285.

[49] [REMOVE ?] John Pippinette QC, apparently widely regarded as one of Canada's foremost post-war counsel. See Henderson G (2004) 'Book notes: *John J. Robinette, Peerless Mentor: An Appreciation*, by George D. Finlayson' *Osgoode Hall LJ* 541.

[50] While Rand is a celebrated figure Canadian legal circles, second perhaps only to Bora Laskin in the ranks of 'great' Canadian constitutional law scholars, he and his work are little known here. For a corrective see Kaplan (2009) *Canadian maverick: the life and times of Ivan C Rand*, and especially ch. 4 therein. Rand sat in *Douglas*, but had retired before the later cases were heard.

[51] The case in this context best known to English public lawyers is likely *Roncarelli v DuPlessis* [1959] SCR 121, which while instructive as to the gross venality of DuPlessis' administration was decided on quite mundane administrative law principles (taking account of an irrelevant consideration and/or bad faith) rather than abstract constitutional law reasoning.

[52] [1951] 1 DLR 657.

[53] The other notable decisions are *Saumur v City of Quebec* [1953] 2 SCR 299: *Chaput v Romain* [1955] SCR 834: *AG of Quebec v Begin* [1955] SCR 593, [1955] 5 DLR 394 and – DuPlessis' target here being leftist radicals rather than Jehovah's witnesses - *Switzman v Elbling* [1957] SCR 285. For an overview see Laskin (1966) 'Our civil liberties' *Queens Quarterly* 455.

incitement of violent conduct but also that such conduct be directed against governmental targets. For present purposes, *Boucher* is notable for the methodology that some members of the Court deployed; the particularistic nature of sedition as a crime was derived from much more pervasive values. So, for Ivan Rand:

> Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality…. Similarly in discontent, affection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and, as we believe, in the search for the constitution and truth of things generally.[54]

These sentiments seem consistent with *Sullivan's* approach to libel law. That they did not spill over into Canadian libel jurisprudence might be explained on the superficial basis that the aforementioned Quebec judgments arose in cases that in form as well as substance involved actions initiated by governmental bodies against private individuals, and in criminal rather than civil proceedings, whereas *Douglas* et al were civil actions that – as a matter of form at least – were between individuals. Such an argument is hardly compelling in substantive terms. That a criminal prosecution for seditious libel might be a less effective deterrent to the dissemination of political information by a newspaper than a civil suit for libel is not an especially contentious proposition. Douglas and Boland were both politicians suing over stories about their political activities: to characterise them as 'private citizens'[55] in that context is simplisitcally misleading.

In English law - for and against the *Wason* principle [B heading: 12; bold; left indent]

With very few exceptions, the English courts took a similarly unreceptive view of suggestions that political information be subject to a more benevolent libel law regime. Two cases sitting at different ends of the spectrum merit attention here.[56] The first is Pearson J's 1960 judgment in *Webb v Times Publishing;*[57] the second the Court of Appeal's 1984 decision in *Blackshaw v Lord.*[58]

Webb v Times Publishing [C heading; 12 italic]

Webb concerned an accurate *Times* summary of court proceedings in Switzerland which suggested the claimant was guilty of a murder of which he had been acquitted in England. The subject matter was not 'political' in a party sense, but could readily be seen as raising a broader 'governmental issue'. Such reports of court proceedings in Britain enjoyed a statutory qualified privilege. In extending that protection at common law to reports of foreign court proceedings, the High Court could be seen as simply replicating a narrow understanding

[54] [1951] 1 DLR 657 at [85].

[55] The label might more (but not wholly) defensibly be attached to Jones and Banks.

[56] The era is analysed more thoroughly in Loveland (2000) op cit ch 6.

[57] [1960] 2 QB 535.

[58] [1984] 1 QB 9 (CA).

of *Wason* in respect of a different category of 'official information'. But Pearson J's judgment also lends itself to characterisation as endorsing the broad reading of *Wason*, a case to which he expressly referred. Most notably Pearson J defined the 'balance' the law should strike as being between the audience's consumption interest and the claimant, not the publisher's publication interest and the claimant's reputation:

[10 normal] …..[A]nd most important, there is what may be called the balancing operation - balancing the advantages to the public of the reporting of judicial proceedings against the detriment to individuals of being incidentally defamed.[59]

As in *Wason*, what was important was not the 'occasion' of the article's publication, but its subject matter:

[10 normal] One has to look for a legitimate and proper interest as contrasted with an interest which is due to idle curiosity or a desire for gossip….There is thus a test available for deciding whether the subject-matter is appropriate for conferring privilege…. Sometimes a report of foreign judicial proceedings will have intrinsic world-wide importance, so that a reasonable man in any civilised country, wishing to be well-informed, will be glad to read it, and would think he ought to read it if he has the time available…That is the present case.[60]

The suggestion that the reasonable person *ought* to keep herself informed about 'English affairs', and should be able to rely upon the press to provide such information even if might turn out to be false, obviously echoes the values underlying *Wason* and *Sullivan*. But even as late as the mid-1980s, it was far from being accepted as an orthodoxy in English law.

Blackshaw v Lord [C heading; 12 italic]

Blackshaw offered the interesting spectacle of the High Court accepting an expansive reading of *Wason* and *Webb* and being promptly overruled by the Court of Appeal. The libel, an article by Lord in the *Daily Telegraph*, concerned a claim that a senior civil servant (Blackshaw) wasted large sums of public money through incompetence. The trial judge (Caulfield J) accepted that qualified privilege applied: it was "beyond argument" the article addressed an issue that: "It would be the duty of the press to bring it to the attention of the public and any right thinking person...who was interested in the running of the country would want to know those facts".[61]

The Court of Appeal saw no force in that contention. In reviewing what it considered the relevant authorities – including *Webb* but not *Wason* – it could not find any support for the suggestion that qualified privilege could attach to 'all the world' publication of such material, albeit that circulating it to MPs might well be so protected: "No privilege yet attaches to a statement on matter of public interest believed by the publisher to be true in relation to a matter in which he has exercised reasonable care".[62] There is nothing to suggest that the Court of Appeal would have taken a different view if the claimant had been a Minister rather than a civil servant.

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[59] [1960] 2 QB 535 at 561.

[60] Ibid at 569.

[61] Ibid.

[62] [1984] 1 QB 9 at 26.

Webb was read very narrowly, much as *Wason* had been read (in England though not in the United States) for much of the previous hundred years; ie being simply a fair summary of an 'official' source of information. If the *Telegraph* was to avail itself of qualified privilege, it could not rely on its own investigative reporting but would have to await the publication of some kind of governmental report or inquiry reaching the conclusions it had reached itself, and then accurately report those conclusions.

The judgment placed no weight on the public's interest in knowing that such maladministration might have occurred. As such it would fit very comfortably into Canada's *Douglas* line of authority. Indeed, the law on this point up to the 1980s is a nice illustration at a micro-level of the broader suggestion that Canada and Britain did indeed have 'constitutions similar in principle'.

IV. And the Charter makes no difference - *Hill v Church of Scientology* [A heading: 14 bold]

Sulllivan was perhaps an 'easy case' as a vehicle for constitutionalising libel law reform. The suit was essentially just another weapon used by racist Southern politicians to frustrate the desegregation of public education facilities mandated by *Brown v Board of Education* and *Cooper v Aaron*.[63] For proponents of the idea that the Charter might be deployed to impose *Sullivan*-esque reform on defamation law, the defendant in *Hill* was, in contrast, an unhappy flag-bearer. While it is likely safe to assume the crank status of Scientology had no bearing on the Court's reasoning and conclusion, it is also perfectly credible to assume given the evidence adduced at trial that Mr Hill would have won his case even if faced by a *Sullivan* defence.

The gist of the libel was the accusation that Mr Hill, a government lawyer, had deliberately connived in releasing privileged communications between the Church and its lawyers, communications ordered to be sealed by a court in one set of proceedings to a judge hearing another case, in order to discredit the Church. The evidence in the libel action indicated that the Church had already inspected the sealed documents and established that no tampering or release had occurred before the libellous accusation was made. That Mr Hill should have succeeded, and recovered quite substantial damages, is not in any sense – even a *Sullivan* sense - objectionable. What is objectionable about the Supreme Court's judgment is the intellectual poverty, in several respects, of its reasoning on the constitutional question of whether Ontario's libel law had to be amended to render it consistent with the 'values' inherent in s.2 of the Charter.[64]

On horizontal effect – from Charter rights to Charter values [B heading: 12 bold]

The above reference to 'Charter *values*' rather than 'Charter rights' arises because *Hill* was characterised by the Court as litigation between 'private' parties on a point purely of common

[63] Respectively (1954) 347 US 438 (*Brown 1*); (1955) 349 US 295 (*Brown 2*): (1958) 358 US 1 *Cooper*. For comment see inter alia Tushnett (1994) *Making civil rights law* chs. 18; Woodward (1966) *The strange career of Jim Crow* pp 154-181: Blaustein and Ferguson (1973) 'Avoidance, evasion and delay' in Becker and Feeley (eds.) *The impact of Supreme Court decisions.*

[64] [1995] 2 SCR 1130. The sole judgment was written by Cory J, and concurred by the other members of the Court; (then La Forest, Gonthier, McLachlin, Iacobucci and Major JJ).

law. As such, per *Dolphin Delivery*,[65] the interference which Ontario's libel laws worked on the defendants' freedom of expression could not breach s.2 of the Charter per se. Rather, the Charter was relevant to the case because its 'values' might require the Court to alter the content of the common law.

The general defensibility of that rationale has been explored in Nick Bamforth's chapter in this volume.[66] For present purposes, and accepting the 'correctness of the proposition, we might note simply the Court's ostensibly very surprising conclusion (at [77]) that the fact that the national government was funding Hill's claim had no bearing on whether or not the suit acquired a s.32 character. That conclusion is prima facie risible in theory and was unexplored as a matter of evidence. If Mr Hill had to run the risk of bearing the costs of a failed action, would he have taken it, against an opponent with very substantial resources? That seems most unlikely. Without that government funding – which was made available by what was surely a governmental decision in the s.32 sense – the claim would probably never have been brought. It is however a conclusion that typifies the whole thrust of the Court's judgment.

The value of reputation [B heading: 12 bold]

Cory J began his analysis of the apparently competing Charter values by considering the importance of reputation. Whether being accused of professional malpractice by the Church of Scientology – an organisation which hardly enjoys in either Canadian or British society the status of a voice of record or reason even on matters concerning little green people from galaxies far far away in times long long ago - would much damage one's professional or social standing is one might think debatable. But of course the common law has never required the damage inflicted by a libel to be empirically proven: the assumption is and has always been for the claimant a happy (and for the defendant an unhappy) fiction. Nonetheless, the Court's observation that the Church's libel cast severe aspersions on Mr Hill's professional integrity is uncontentious, as is the wider proposition that to accuse a person of inter alia dishonesty, violence, racism, misogyny, or child abuse may inflict significant damage on that person. Nor is there any difficulty in sustaining the proposition that it is perfectly proper for the law – be it statute or common law - in a modern democratic society to regard one's (good) reputation as matter deserving of legal protection when that society decides what is meant by the notion of freedom of expression.

What is however quite bizarre about the Court's reasoning in *Hill* is the route followed to reach this destination. S.1 of the Charter tells us of course that interferences with Charter rights are permissible if inter alia such interferences are "demonstrably justifiable in a free and democratic society". Why then begin a search for the value of reputation – as Cory J did - with visits to the Old Testament, pop into the (chronologically undefined) 'Roman era', alight briefly on the feudal Teutons and Normans, pass through England's Star Chamber, end with the observation that; "[119] The character of the law relating to libel and slander in the 20th century is essentially the product of its historical development up to the 17th century……"; but not then ask: 'How much weight should we give that history?'.

We might as credibly say that: "The character of the law relating to libel and slander in the 20th century is essentially the product" of societies where – inter alia - notions of democratic governance were non-existent; in which women were effectively the chattels of men; where

[65] *RWSDU v Dolphin Delivery* [1986] 2 SCR 573.

[66] In addition to Bamforth's discussion at pp ---- above, see also in this volume the chapters by Ewing at pp ---- and Hatzis at pp -----. See also Taylor's account of the curious priority given by the Court to 'values' rather than 'rights' in the context of family law and religious freedom; pp --- below.

non-white people could be bought and sold as slaves; and in which the forcible colonisation of foreign lands and the genocide of indigenous colonial populations was widely considered a perfectly legitimate tool of foreign policy and commercial development.

Interrogating one of Cory J's sources perhaps serves to make the point. At [112] he refers (indirectly as the quote is taken from *Carter-Ruck on libel and slander*) to Exodus 22.28 "Thou shall not revile the gods, nor curse the ruler of thy people". What this command (from God via Moses to the children of Israel) presumably means is that we not question whatever belief systems pass for society's one true religion (on pain of death, since we should surely read 22.28 alongside 22:20 "He that sacrificeth unto any god, save unto the LORD only, he shall be utterly destroyed") and one must not seek to question, let alone change the basis of the governmental system.[67] By the by, we might note that 22.29 requires everyone to hand over their first born son to God (but not daughter, since the vengeful God of Exodus does not really consider women to be people); and on the normalcy of the pain of death as a social regulator in Exodus' moral compass, we might recall that per 22.18 'witches' should be put to death; as should per 22.19 anyone who "lieth with a beast".[68] And when one has finished with the putting to death of witches and sexual 'deviants', one can take a break and enjoy the fruits (literally and metaphorically) of the ethnic cleansing and genocide of the Amorites, the Hittites, the Perizzites, and the Canaanites which one's God has promised (per 23.23, and 23.27 – 23.31) to carry out on one's behalf. One could go on – and on - to make similar observations about the 'Roman era', about Teutonic or Norman feudalism, et al. The point is simply that judge engaged in a juridic exercise based on the balancing of competing values, should be alert to the danger of overloading one side of the scales by piling it up with weights drawn uncritically from contexts in which notions of democratic governance play no part in constructing social morality. Accept by all means that the protection of reputation is an important value in modern society, but root its protection in societal contexts consistent with rather than abhorrent to those the Charter was designed to protect.

[REMOVE?] The balancing exercise undertaken by Cory J in *Hill* took an inappropriately simplistic approach to discerning the value of reputation and so lent that value an improperly burdensome weight. And in the context of a judicial exercise purportedly rooted in assessing the balance between competing forces, that is a problematic mis-step to take.

The value of untrue speech [B heading; 12 bold]

On the other side of the Court's scales, the question weighed was how much worth lay in promulgating *false* speech. By 1995, the Court had decided several free expression cases which identified s.2'S 'underlying values':[69]

[quote; 10 normal] (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-

[67] So 23:20 Behold, I send an Angel before thee, to keep thee in the way, and to bring thee into the place which I have prepared. 23:21 Beware of him, and obey his voice, provoke him not; for he will not pardon your transgressions: for my name is in him.

[68] 'Lie', one assumes, in the sexual rather than mendacity (defamation-relevant) sense.

[69] *Ford v Quebec* [1988] 2 SCR 712 ((Quebec's French-only signage law): *Irwin Toy v Quebec* [1989] 1 SCR 927 (television advertising targeting children): *Rocket v Royal College of Dental Surgeons* [1990] 2 SCR 232 (medical profession advertising): *R v Keegstra* [1990] 3 SCR 697 (hate speech): *R v Zundel* [1992] 2 SCR 731 (holocaust denial): *R v Butler* [1992] 1 SCR 452 (obscenity).The quotation comes from *Irwin* at 976 per Dickson CJ and Lamer and Wilson JJ.

fulfilment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.

The *Hill* Court could not see that any of those values would be served by extending greater protection to political libels. At [109], invoking *Boland*, Cory J asserted that:

[quote; 10 normal] 109 Certainly, defamatory statements are very tenuously related to the core values which underlie s. 2(*b*). They are inimical to the search for truth. False and injurious statement cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society.

We might for the moment accept that the 'core values' underlying s.2 were well-rooted in the Canada of 1960 when *Boland* was decided. But the proposition that false statements are 'inimical' to the 'search for truth' and 'healthy participation in the affairs of the community' is manifestly preposterous. A trite hypothetical scenario supports that point. A local newspaper published a story that politician A took a bribe from land developer X to smooth the passage of X's latest building project. The story prompts huge public concern and further press and then police investigation of A's activities. It transpires that A did not take a bribe from X. The story was false. But the investigations that only occurred because of the story reveal that A did in fact take bribes from developers Y and Z, and that developer X had paid such a bribe to politicians B and C.

Indeed, that the (even deliberate) propagation of false material might aid the truth and participation values was accepted by the Court *three years earlier* in *R v Zundel*,[70] in which Canada's retention of the obscure English offence of propagating false news was held incompatible with the Charter:

[10 normal] The first difficulty results from the premise that deliberate lies can never have value. Exaggeration -- even clear falsification -- may arguably serve useful social purposes linked to the values underlying freedom of expression. A person fighting cruelty against animals may knowingly cite false statistics in pursuit of his or her beliefs and with the purpose of communicating a more fundamental message, e.g., `cruelty to animals is increasing and must be stopped'. A doctor, in order to persuade people to be inoculated against a burgeoning epidemic, may exaggerate the number or geographical location of persons potentially infected with the virus……

Zundel was a 4-3 judgment, with Cory J (joined by Gonthier and Iacobucci JJ) among the dissentients. The dissent upheld the offence – then in s.181 of the Criminal Code – in part because it criminalised wilful (ie known) falsehoods. It is perhaps surprising that this point eluded all of the judges in *Hill*, including McLachlin J who authored the majority opinion in *Zundel*.

Hill's primary shortcoming however is exemplified by para 140 of the judgment:

(e) Conclusion: Should the Law of Defamation be Modified by Incorporating the Sullivan Principle?

[140] The *New York Times Co. v. Sullivan*, supra, decision has been criticized by judges and academic writers in the United States and elsewhere. It has not been followed in the United Kingdom or Australia. I can see no reason for adopting it in Canada in an action between private litigants. The law of defamation is essentially aimed at the prohibition of the publication of injurious false statements. It 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. I simply cannot 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

[70] [1992] 2 SCR 731 at 754-755.

publish. The law of defamation provides for the defences of fair comment and of qualified privilege in appropriate cases. Those who publish statements should assume a reasonable level of responsibility

That shortcoming is that [140] sets up the question before the court as a binary issue – the publisher's right to publish versus the claimant's right to reputation. That ignores altogether the interest of the audience (actual and potential) in receiving, evaluating and deciding how to respond (if at all) to the information. The omission is beyond trite, and not simply because that latter interest is manifestly the one underlying the reasoning in *Sullivan*. It is also because the Canadian Supreme court had already (and repeatedly) recognised the importance of the audience interest to s.2 analysis. That value is central to the analysis in *Ford* (Valerie Ford's two word shop sign (laine – wool) was a benefit to the non-French speaking wool-buying public); in *Irwin Toy* (adults might well want to know what new toys they could buy for their children); and in *Rocket* (a dentist's customers might wish to know about her specialised skills or services).

We might leave para 140 with the observation that its final sentence makes no sense at all in the light of Cory J's reasoning, which at no point countenanced the possibility that a distinction might validly be drawn between deliberate, reckless, negligent and innocent falsehood. 'A reasonable level of responsibility' is not what Ontario' libel law imposed. 'Reasonable responsibility' sounds like a negligence test. What Ontario's law imposed was 'strict responsibility'. 'Reasonable responsibility' would require a significant change to the law, albeit one that would be much less significant than adopting the orthodox qualified privilege test. The church perhaps overplayed its hand in its pleadings. The substantive leap from *Douglas* to *Sullivan* is vast. There are many points in between which would enhance – to very varying degrees – the protection afforded to disseminators of libellous political material.[71]

And demonising *Sullivan* [C heading; 12 bold]

Whatever the failings of the church's legal advisers – and their conduct of the litigation apparently left much to be desired – the Court seemed unwilling to countenance filling the gap. Cory J presented the choice before it as the status quo or *Sullivan*. And since his portrayal of *Sullivan* could best be described as feeble and selective misrepresentation, that the judgment opted for the status quo is hardly surprising.

So, as one example, Cory J referred to academic critiques critical of *Sullivan* but did not treat with any supporting the judgment. Similarly, at [135], Cory J invoked the United Supreme Court's decision in *Gertz v Robert Welch*[72] as a stick with which to beat *Sullivan*, noting that in *Gertz* the Court observed that : "There is no constitutional value in false statements of fact".[73] What Cory J omits to mention is that in the passage following the above quotation the Court explained why it was nonetheless necessary to extend some – and some substantial

[71] Cf Tingley's contemporaneous critique 'Reputation, freedom of expression and the tort of defamation in the United States and Canada: a deceptive polarity' *Alberta LR* 620 especially at 645-647. See also Boivin D (1997) 'Accommodating freedom of expression in the common law of defamation' *Queens LJ* 230: Ross J (1996) 'The common law of defamation fails to enter the age of the Charter' *Alberta LR* 117.

[72] (1974) 418 US 323.

[73] Ibid at 340.

- protection to such false statements.[74] Nor does Cory J acknowledge that *Gertz* did not overrule *Sullivan*. Certainly *Gertz* narrowed the scope of post-*Sullivan* extensions to the public figure route to the *Sullivan* defence (here that a lawyer's involvement qua professional in legal proceedings arising out of a political controversy did not make that lawyer a *Sullivan* public figure). *Gertz* also made it very clear that the *Sullivan* rationales should not apply to 'private' figures. But *Gertz* also introduced *two very important additional and generally applicable obstacles* to successful libel claims. Firstly, *Gertz* required that State law had to set *at least a negligence standard* (with the evidential burden on the claimant) as to falsity in *all* libel actions, irrespective of the defendant's identity. And secondly, in *all* libel actions punitive damages could only be recovered if the *Sullivan* test was met.

Cory's treatment of *Sullivan* and of – to borrow from then extant Charter s.2 jurisprudence – its 'underlying values', was distinctly shabby. But to that point of course, so had been its treatment in British law.

VI. But perhaps the ECHR does make a difference? From *Blackshaw* to *Reynolds – and Jameel* [A heading: 14 bold]

By the early 1990s, there were indications in the ECtHR'S case law that English libel law might breach Art 10 ECHR because it drew no meaningful distinction between defamatory material relating to political or governmental issues and purely private matters. The suggestion arose most clearly in *Lingens v Austria*,[75] in which the ECtHR observed:

> [42]…..The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.

The ECtHR did not specify just what this 'greater degree of tolerance' might entail in terms of defences to defamation actions. *Lingens* concerned Austrian criminal defamation law, which imposed strict liability on defendants. But the obvious implication of the above-quoted passage was that domestic defamation law should recognise a meaningful distinction in terms of defences between 'political' and non-political libels. The Court repeated the principle on several occasions in the next few years in case (both criminal and civil) arising in various jurisdictions.[76]

In the early 1990s in *Derbyshire County Council v Times Newspapers*,[77] the Court of Appeal had drawn on Art 10 to conclude that a government body could not bring a libel action, a conclusion endorsed (though in reliance on American and commonwealth authorities) by the House of Lords. Neither court however had indicated that politicians as individuals could not

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[74] In an example of poor practice, Cory took his reference to *Gertz* from a secondhand source, namely White J's very *Sullivan*-sceptical judgment in *Dun & Bradstreet Inc v Greenmoss Buliders Inc* (1985) 472 US 749.

[75] (1986) 8 EHRR 407.

[76] See also *Barfod v Denmark* (1989) 11 EHRR 493: *Oberschlik v Austria* (1991) 19 EHRR 389: *Castells v Spain* (1992) 14 EHRR 445: *Thorgeirson v Iceland* (1992) 14 EHRR 843.

[77] [1992] QB 770 (CA); [1993] AC 534 (HL). Discussed in Cumberbatch (1994) 'The quiet revolution in freedom of speech: a comment on Derbyshire CC v Times Newspapers Ltd' *NILQ* 219: Loveland (1994) 'Defamation of government: taking lessons from America ?' *Legal Studies* 206.

bring such actions, nor that they might face more effective defences should they do so.[78] That question was eventually broached in *Reynolds v Times Newspapers*.

The *Reynolds* defence [B heading: 12 bold]

Albert Reynolds, Ireland's former Taiesoch, sued over a story in the London edition of the *Sunday Times* which accused him of lying to the Dail. At trial and in the Court of Appeal,[79] the *Sunday Times* had unsuccessfully argued that qualified privilege should attach to the story, drawing both on the House of Lords' judgment in *Derbyshire* and the *Lingens* line of ECtHR case law. That conclusion was reversed on further appeal.

The ratio of the majority judgment in the House of Lords in *Reynolds*[80] and the reasoning underlying is too well known to require more than a brief account here. At first sight, *Reynolds* appeared to offer a curious tweak to the established qualified privilege defence. Crudely put, the defence seemed to be that if it was in the 'public interest' that the information in issue be published to 'all the world', then the publisher could not be liable in defamation if she/he/it established that the article's production and publication were carried out in accordance with a standard of 'responsible journalism'.

On the first 'public interest' issue, the *Reynolds* defence initially appears more favourable to media defendants than orthodox qualified privilege, inasmuch as it alters the traditional 'occasion' test from one of 'what is the information and to whom is it published' to one of 'is the information something that can properly be published to all the word'. Lord Nicholls' leading judgment had a certain circularity in defining this notion of public interest. It might include – but was not limited to - political information in the *Sullivan* sense: all matters of 'public concern' might fall within the defence. A list of factors would be relevant to answering this case-specific question;[81] among them the seriousness of the allegation in terms of its impact on the Claimant's reputation, the significance of the public interest issue, the source of the information, and the urgency of the need to publish.

The defendant would still bear the burden of proof on this point, as in qualified privilege. However, on the second issue, *Reynolds* appears much less favourable to the defendant than orthodox qualified privilege. This is because the defendant retains the burden of proof – to show the publication was 'responsible journalism – whereas under qualified privilege it is for the claimant to prove 'malice'.

That distinction per se suggests that styling the *Reynolds* defence as a form of privilege was misconceived. Furthermore, it seems that the defence collapses aspects of the first and second issues into each other. This becomes evident when one consider the illustrative factors listed by Lord Nicholls to which a court might have regard when deciding if a 'public interest' matter has arisen. Some of these factors – such as: "3. The source of the information …4. The steps taken to verify the information …7. Whether comment was sought from the defendant" - obviously go to the issue of the defendant's 'culpability' in publishing false information. Under traditional qualified privilege, those would be matters for the claimant to raise and prove. But to complicate matters further – and again to depart from the orthodox privilege defence – *Reynolds* rather suggested that the defendant would have to prove only

[78] A point noted and relied on by Cory J in *Hill* at [1995] 2 SCR 1130 [137].

[79] [1998] 3 WLR 862.

[80] [2001] 2 AC 127.

[81] Ibid at 205.

that she/he/it acted reasonably in the light of prevailing journalistic standards – ie a negligence test.

While the new defence had obvious complexities in its detail, it did appear to be driven by the Court's concern to underline the increased importance of providing protection for press discussion of political matters.[82] *Wason* and *Webb* were invoked in Lord Nicholls' reasoning,[83] as was the line of ECtHR authority flowing from *Lingens*.[84] Lord Nicholls had begun his analysis from an unusual position in the English libel law context, taking as took as his starting point the need for the common law to assist electors in making informed choices about who should govern their country. And towards the end of his judgment he offered a short passage which attracted much press attention, on the basis that his opinion opens a new legal era for conscientious investigative journalism:

[10 normal] Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.[85]

Despite this rhetoric, which would not be out of place in *Sullivan*, Lord Nicholls and his colleagues expressly disavowed any idea of importing that defence into English law. The Court likely did not appreciate *Sullivan's* roots in *Wason*, although its primary concern seemed to be that as 'malice' in the *Sullivan* sense was difficult for a claimant to prove, a *Sullivan* rule would result in too much false information entering the political arena.

From the perspective of media defendants publishing information which the public had 'a right to know', and more importantly of their readers, *Reynolds* marked a distinct improvement on the orthodox position. The defence was however confused and confusing in conceptual terms.[86] It also appeared to have a less significant impact in practice that the House of Lords had evidently intended. This perceived problem was recognised by the House of Lords, and addressed in unusually forthright terms five years later *in Jameel v Wall Street Journal Europe*.[87]

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[82] It is perhaps important to remember that Mr Reynolds won the case notwithstanding the new defence. This was primarily because the Times had published a quite different version of the article in its Irish edition, a version which did not impute dishonesty to Mr Reynolds, and because it has not given him an opportunity to respond to the allegations. Given the first point, Mr Reynolds might well have won under a *Sullivan* regime as well.

[83] Ibid at 204, where Lord Nicholls invokes – without citation – Cockburn's reference to the elasticity of the common law and its capacity to adapt to modern conditions.

[84] Ibid at 203-204.

[85] Ibid at 205.

[86] Cf Loveland (2000) 'A new legal landcape? Libel law and freedom pf political expression in the United Kingdom; *EHRLR* 476: Williams (2000) 'Defaming politicians: the not so common law' *MLR* 748.

[87] [2006] UKHL 44; [2007] 1 AC 359.

Clarifying *Reynolds* in *Jameel* [B heading: 12 bold]

The claimant in *Jameel* was a Saudi company which the *Wall Street Journal* identified as being on a list of organisation with suspected terrorist ties. The story was said to be based on information from anonymous US and Saudi government officials, and the claimant was not invited to comment on the story before publication. Those two factors, both explicitly identified in Lord Nicholls ten point list, had led the trial court to find the *Reynolds* defence did not apply, and that decision was upheld in the Court of Appeal.[88]

In reversing that judgment, several members of the House of Lords issued what was in effect a rebuke to the lower courts in general - and to the trial judge in *Jameel*, Eady J, in particular - for misapplying the *Reynolds* principle. Lord Hoffmann perhaps made the point most clearly. Referring to the ten points, he cautioned that they:

> [A] are not tests which the publication has to pass. In the hands of a judge hostile to the spirit of *Reynolds*, they can become ten hurdles at any of which the defence may fail. That is how Eady J treated them … [89]

The accusation of judicial 'hostility' was oversimplistic. The *Reynolds* defence can readily be seen as poorly conceived and poorly formulated. The court made some limited efforts to clarify the defence's doctrinal character in *Jameel*, suggesting that it should be seen as a new 'public interest defence' rather than a bastardised form of qualified privilege. In a more practical vein, the court also stressed that articles containing defamatory allegations had to be read as a whole; it was not appropriate for a trial court to treat such allegations in isolation. Relatedly, the judgment indicated that greater weight ought to be given to the defendant's editorial judgment in deciding that a story should be run.

Reynolds and *Jameel* had been decided alongside near contemporaneous developments in Australia and New Zealand, both triggered by cases brought by the former New Zealand Prime Minister David Lange. In *Lange v Atkinson*,[90] New Zealand's Court of Appeal embraced the more doctrinally straightforward – and for defendants much more useful – innovation of extending qualified privilege in its orthodox form to 'all the world' publications which addressed the claimant current or prospective fitness to hold elected political office. In Australia, the High Court modified the common law in *Lange v Australian Broadcasting Corporation*[91] to introduce a variant of qualified privilege in respect of material: "concerning government and political matters that affect the people of Australia".[92] The effect of the modified defence would however be less a favourable to defendants than the New Zealand variant: it would be for the defendant o prove that she/he it had a reasonable basis to believe the material was true and had taken appropriate steps to establish that it was indeed true. The *Lange* judgments provided valuable source material above and beyond that provided by *Reynolds* for Canadian courts when offered the opportunity to reconsider *Hill*.

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88 [2003] EWHC 37 (QB); [2004] EMLR 11: [2005] EWCA Civ 74; [2005] QB 904.

89 [2006] UKHL 44; [2007] 1 AC 359 at [56].

90 [2000] 3 NZLR 385. See Barber and Young (2001) 'Political libel in New Zealand' *LQR* 175: Atkin (2001) 'Defamation law in New Zealand 'refined' and 'amplified'' *Common Law World Review* 237: Loveland (2000) op cit pp 159-163.

91 (1997) 189 CLR 520; (1997) 71 AJLR 818. On *Lange*, and its place within the radical approach taken by the High Court to freedom of expression issues in the 1990s see Loveland (2000) op cit ch 8.

92 Ibid at 833 per Brennan J.

VI. Second (and third) thoughts on whether the Charter makes a difference

[A heading: 14 bold]

Reynolds had been decided alongside near contemporaneous developments in Australia and New Zealand, both triggered by cases brought by the former New Zealand Prime Minister David Lange. In *Lange v Atkinson*,[93] New Zealand's Court of Appeal embraced the more doctrinally straightforward – and for defendants much more useful – innovation of extending qualified privilege in its orthodox form to 'all the world' publications which addressed the claimant current or prospective fitness to hold elected political office. In Australia, the High Court modified the common law in *Lange v Australian Broadcasting Corporation*[94] to introduce a variant of qualified privilege in respect of material: "concerning government and political matters that affect the people of Australia".[95] The effect of the modified defence would however be less a favourable to defendants than the New Zealand variant: it would be fro he defendant o prove that she/he it had a reasonable basis to believe the material was true and had taken appropriate steps to establish that it was indeed true. The *Lange* judgments provided valuable source material above and beyond that provided by Reynolds for Canadian courts when offered the opportunity to reconsider the conclusion reached in *Hill*.

A differently composed Canadian Supreme Court compared to its *Hill* predecessor sat in *Simpson v Mair*[96] in 2007: only McLachlin (by 2007 as Chief Justice) sat in both cases.[97] The defendant Rafe Mair hosted a controversy-driven radio talk show, during which he suggested that Simpson, a prominent anti-gay rights campaigner, was engaging in hate-provoking activities which might provoke violence.

The defamatory material was treated as comment rather than fact, and so the central issue before the Supreme Court was whether the requirement in Canadian law that a person could not avail herself of the fair comment defence unless his comment was one a reasonable person could have made was consistent with Charter values.[98] The issue was resolved in Mair's favour, insofar as the Court held that fair comment could be applied even if only a person with prejudiced or exaggerated views could honestly express such an opinion. But for present purposes, the judgment's significance lay its hint that *Hill* was ripe for reconsideration.

Mair's counsel had pleaded – anticipating that the material might be characterised as fact – that Canadian law should modify *Hill* and accept what was styled a 'responsible journalism' defence modelled on (the above-mentioned) developments in Britain, Australia and New Zealand. While noting that this question would have to await 'another appeal', Binnie J (giving the leading judgment) briefly reviewed the relevant authorities (*Reynolds* and *Lange* (Australia) and *Lange* (New Zealand), and concluded the passage by saying that Canadian

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[93] [2000] 3 NZLR 385. See Barber and Young (2001) 'Political libel in New Zealand' *LQR* 175: Atkin B (2001) 'Defamation law in New Zealand 'refined' and 'amplified'' *Common Law World Review* 237: Loveland (2000) op cit pp 159-163.

[94] (1997) 189 CLR 520; (1997) 71 AJLR 818. On *Lange*, and its place within the radical approach taken by the High Court to freedom of expression issues in the 1990s see Loveland (2000) op cit ch 8.

[95] Ibid at 833 per Brennan J.

[96] [2008] 2 SCR 420.

[97] Bastaraches, Binnie, LeBel, Fish, Abella, Charron and Rothstein JJ also sat.

[98] This being – again – a 'horizontal' action.

law would 'necessarily evolve' and that what would be in issue would the scope of any such privilege and the location of the burden of proof.

Judgment in *Mair* was handed down on 27 June 2008. Barely a year later, the Supreme Court heard argument both in *Cusson v Quan et al*[99] and in *Grant v Torstar Corporation*.[100]

In Canada: the responsible communication defence in *Cusson* and *Grant* (2009) [B heading: 12 bold]

The claimant in *Cusson* was an Ottawa police officer who had, on his own initiative, gone to New York immediately after the Twin Towers attack to offer assistance to American rescue teams. *The Ottawa Citizen* newspaper subsequently ran several articles about Mr Cusson which portrayed his activities very unflatteringly. At trial, the defendants unsuccessfully ran justification and fair comment defences. The trial judge rejected their assertion that qualified privilege attached to the articles. Mr Cusson recovered $100,000 against *The Citizen*.

The claimant in *Grant v Torstar Corporation* was an Ontario property magnate with close ties to the then provincial Premier, Mike Harris, and Harris' Ontario Progressive Conservative party. Grant was seeking permission for a controversial land development, opposed by many local residents, who feared Grant was using his political influence to bypass normal zoning constraints. *The Toronto Star* reported on the controversy, in an article which included a comment from a local resident that "became the centrepiece of the litigation":[101] "Everyone thinks it's a done deal because of Grant's influence — but most of all his Mike Harris ties," says Lorrie Clark, who owns a cottage on Twin Lakes". Grant sued both *The Star* and Ms Clark, the latter settling before trial. The alleged sting was that Grant bribed Harris to smooth the path of Grant's proposed development. *The Star* ran two innovative defences: first that the Charter required that qualified privilege attach to the story; second, alternatively, that the Charter required a *Reynold*s-type defence of 'responsible journalism' for such stories, which would succeed if the defendant persuaded the court that the issue was a matter of public interest and that she/he/it had exercised reasonable care in establishing the truth of any allegations made. The trial court considered both defences precluded by *Hill;* Grant won the suit and recovered substantial damages.

Appeal in Ontario [C heading: 12 italic]

The Ontario Court of Appeal's judgment in *Cusson*[102] is a curious and/or ingenious decision in several respects, especially concerning what it tells us about notions of 'dialogue' in Charter jurisprudence and how such 'dialogue' might impact on orthodox notions of judicial hierarchies.[103] *The Citizen* raised two grounds of appeal: that the trial judge was wrong to reject the (pleaded) qualified privilege defence; and that it could invoke (although it had not pleaded at trial) a 'responsible journalism' defence.

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[99] [2009] |SCC 62.

[100] [2009] SCR 64.

[101] [2009] SCR 64 at [16].

[102] (2007) 87 OR (3d) 241.

[103] See the discussion in the introductory chapter at pp ---- above.

The Court of Appeal, in a judgment by Sharpe JA, accepted that the 'responsible journalism' defence, modelled on the *Reynolds/Jameel* principles could now properly be regarded as required by s.2. That conclusion was inspired by the observation that not just the United Kingdom but also Australian and New Zealand courts had recently accepted that their respective constitutions demanded more effective defences for in libel suits involving political or public interest material:

[10 normal] [122] While evolution of the law of defamation has produced a variety of solutions in different jurisdictions, the evolution away from the common law's traditional bias in favour of the protection of reputation is strikingly uniform. 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.

Sharpe J was also influenced[104] by several post-*Hill* first instance judgments in Ontario and other Canadian provinces in which courts countenanced the availability of qualified privilege in cases involving publication to 'all the world':

[10 normal] [71]…[O]ne can hardly quarrel with the proposition that the law of qualified privilege is in a state of "evolution" and "flux" and considerably more nuanced than would appear from a literal reading of the Douglas v Tucker line of cases….

More significantly, the factor which Sharpe J considered had to be balanced against the claimant's reputation was not the publisher's right to inform, but the audience's right to be informed:

[10 normal] [129] Under the traditional common law regime, society makes 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. That choice sacrifices freedom of expression to the protection of reputation to a degree that today cannot be sustained as consistent with Charter values.

Since the *Tucker* line of cases had been approved in *Hill*, the Court of Appeal could not simply discard them because of their pre-Charter origins:

[10 normal] [130]….. The Douglas v. Tucker line of cases was decided some 50 years ago in a very different legal context, one that gave preponderant consideration to protection of reputation. These cases bear the mark of the pre-Charter past, an era less concerned about the right of free expression and the need for open, vibrant political debate.

[132] That, of course, does not mean that we can or should simply ignore the Douglas v. Tucker line of decisions. Likewise, we must respect the Supreme Court's ruling in Hill v. Scientology. …

Rather than 'ignore' these cases, Sharpe JA asked what was the precise proposition they supported? In his view, *Hill's* ratio in dismissing *Sullivan* was that Charter values did not require *extension of the traditional qualified privilege defence* to political information. The *Tucker* line also rested on that premise. But *Hill* was not authority that *less protective* amendment was precluded. That is strictly speaking correct. The Church had pleaded only qualified privilege, rather than a selection of less effective defences. And since *Jameel* indicated that *Reynolds* was not a manifestation of qualified privilege, but a new, freestanding common law principle, *Hill* did not preclude Canadian courts adopting a similarly novel defence:

[104] Ibid at [63-71].

[10 normal] [133] Our task, it seems to me, is to interpret and apply the earlier decisions in light of the Charter values at issue and in light of the evolving body of jurisprudence that is plainly moving steadily towards broadening common law defamation defences to give appropriate weight to the public interest in the free flow of information.

But the Court of Appeal's judgment treads on less stable ground in suggesting that that Cory J also implicitly endorsed the responsible journalism idea in his comment that: "[138]…surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish". Sharpe JA's conclusion that this comment is: "[138]….entirely consistent with what the *Reynolds-Jameel* defence aims to achieve" might have some force if we slotted in the italicised addendum: "that they *take reasonable steps to try to* ascertain….". However those words are not there, a negligence based defence was never discussed in *Hill*, and *Hill* concluded with the stark observation that: "[144]…[T]he common law of defamation complies with the underlying values of the Charter and there is no need to amend or alter it".

Notwithstanding that statement, the Ontario Court of Appeal did amend the law. Its 'responsible journalism' defence while not following *Reynolds/Jameel:* "in a slavish or literal fashion" endorsed the principle enunciated in those cases:

[10 normal] [143]….The defence rests upon the broad principle that where a media defendant can show that it acted in accordance with the standards of responsible journalism in publishing a story that the public was entitled to hear, it has a defence even if it got some of its facts wrong….

[144] To avail itself of the public interest responsible journalism test a media defendant must show that it took reasonable steps I the circumstances to ensure that the story was fair and its contents were true and accurate……

The Court of Appeal was playing rather fast and loose here with traditional notions of precedent and judicial hierarchy, albeit expecting that the Supreme Court might now be ready to modify *Hill*. That expectation was likely reinforced by the Supreme Court's judgment some six or so months later in *Mair*.

But before that Supreme Court opportunity arose, the Ontario Court of Appeal also issued judgment in *Grant.*[105] None of the *Cussan* judges sat in *Grant.* The *Grant* bench approved both the reasoning and conclusions reached in *Cussan* and remitted the matter for a new trial. Its formulation of the new defence, rooted firmly in consideration of *Reynolds* and *Jameel*, was:

[10 normal] [43] …[T]he essence of the defence is that the matter reported is of public interest, that it was appropriate in that context to include the defamatory statement as part of the story, and that the publisher took reasonable and fair steps, given the defamatory statement, to verify the story including giving the subject of the story a chance to respond before publishing it.

Both *Cussan* and *Grant* were appealed to the Supreme Court, which used *Grant* as the vehicle to revisit *Hill*.

In the Supreme Court [C heading; 12 italic]

McLachlin CJC's leading judgment in *Grant*[106] broadly approved both the reasoning and result that Sharpe JA had offered in *Cusson*. She also adopted Sharpe JA's suggestion that

[105] [2008] 92 OR (3d) 561.

[106] [2009] SCR 64. The Court was unanimous, save for a brief concurrence by Abella J (para 142 et seq) relating to the respective roles of the judge and jury in applying the new defence.

Hill's ratio rejected *Sullivan* specifically, and not liberalising reform per se; while *Hill* was: "an affirmation of the common law of defamation's general conformity with the Charter, it does not close the door to further changes in specific rules and doctrines".[107] The door not being closed, a "fresh look"[108] could properly be taken. Again echoing Sharpe JA's opinion, McLachlin CJC saw the "tentative forays" post-*Hill* taken by provincial courts in giving an extended reach to qualified privilege and the liberalising trends in the case law of other Commonwealth countries as justification for taking such a look.

While the observation might sound fatuous, the place from which one begins a journey, and the amount of time one spends there, may have a significant bearing on where one ends up. In *Hill*, Cory J had begun his balancing analysis from the start point of protecting reputation, and wallowed indulgently in several democratically deficient swamps in doing so. In *Grant*, McLachlin CJC's 'argument from principle' (at [41] onwards) starts with the importance of freedom of political expression, rooting that value not in the Old Testament or the 'Roman era' (since one would not find it there) but in Ivan Rand's 1950s jurisprudence and the core rationales or underlying values of s.2, which she styled as "(1) democratic discourse; (2) truth-finding; and (3) self-fulfilment".[109] These issues are explored in [41-57]. The countervailing value of protecting reputation is set up in [58-60].

Were one to take quantity as one's guide to the relative importance of those competing values, reputation would seem much the inferior. More important perhaps is the qualitative presumption that underlies points (1) and (2); namely that it is the *audience's interest* in receiving the information rather than the writer/speaker's interest in disseminating it that is the central concern here:

[10 normal] [48] *First and foremost*, free expression is essential to the proper functioning of democratic governance. As Rand J. put it, "government by the free public opinion of an open society ... demands the condition of a virtually unobstructed access to and diffusion of ideas": *Switzman*, at p. 306; [emphasis added].

That starting point led McLachlin CJC on a judicial journey to recent developments in several Commonwealth jurisdictions, with most attention being directed to *Reynolds* and *Lange* in Australia and New Zealand.[110] The combination of indigenous (contemporary) Canadian principle and Commonwealth authority persuaded McLachlin CJC that a new defence – and not an extension of qualified privilege - was required which closely followed Sharpe JA's lead in *Cussan*:

[10 normal]…[98]…First, the publication must be on a matter of public interest. Second the defendant must show that the publication was responsible, in that he or she was diligent in trying to verify the allegations, having regard to all the relevant circumstances.

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[107] Ibid at [46]. McLachlin CJC was generous in her treatment of *Hill*, noting also at [57] that: "The statement in Hill (at para 106) that 'defamatory statements are very tenuously related to the core values which underlie s.2(b)' must be read in the context of that case". That context presumably being that the defendants in *Hill* knew their statements were false. For reasons relating one assumes both to questions of institutional prestige and legal certainty, Supreme Courts in many jurisdictions seem most reluctant to overrule their own decisions, even when those decisions are, as in *Hill*, palpably ill-founded.

[108] Ibid at [46].

[109] Ibid at [47].

[110] Save for a brief reference to *Sullivan* (and only in the context of what *Hill* decided), she did not engage with United States libel jurisprudence.

Much like the House of Lords in *Reynolds*, McLachlin CJC felt unable to offer any definitive guide to what might be a 'public interest' matter. Her most helpful suggestion was that issues currently regarded as triggering the fair comment defence would likely be public interest matters. This categorisation would go beyond governmental and political matters:

[10 normal] [104]…Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others; then it is a matter of public interest on which everyone is entitled to make fair comment…

As to the assessment of whether publication was 'responsible', McLachlin CJC appeared to borrow heavily from Lord Nicholls list methodology in *Reynolds*, offering[111] an interactive melange of seven factors (all with multiple sub-parts) to which a trial court should have regard: the seriousness of the allegation in terms of its effect on the claimant's reputation, the importance in a public interest sense of the material in issue, the reliability of the publisher's source(s) and whether or not the claimant had been afforded the opportunity to comment on any allegations prior to publication were all matters that would weigh heavily in the balance.

McLachlin CJC's judgment was perhaps a little better informed than Lord Nicholls' opinion in *Reynolds* as to the empirical effects of such an alteration of the law, in that she drew on (or at least alluded to) several academic sources which had investigated that issue;[112] she proceeded on the basis of informed surmise rather than complete guesswork. This criticism should not be overstated. There is no credible basis on which to predict – whether in Canada or Britain - how many 'true' stories would no longer be self-censored, or how much more (to coin a now topical phrase) fake news would be disseminated, or how many worthy candidates for elected or appointive government office would be deterred from seeking such posts[113] if the new defence were adopted.

The Supreme Court[114] also reversed the Court of Appeal in *Cussan* on the question of the availability of the new defence. McLachlan CJC's sole judgment recorded "some difficulty"[115] in understanding the Court of Appeal's reasoning, given that it had in essence not just considered but also accepted the premise that a new (albeit unpleaded) defence should be available. The case was thus remitted for a new trial.

Conclusions – a judicial or legislative responsibility ?

Grant was accorded a generally warm welcome in Canada's academic press.[116] This was primarily because of its doctrinal innovation. Some significance was also attached however to

[111] At [110-121].

[112] The most substantial being Kenyon (2004) 'Lange and Reynolds qualified privilege; Australian and English defamation law and practice' *Melbourne ULR* 406.

[113] The unreasoned assertion that many would be was an element of Cartwright J's judgment in *Boland*; pp ---- above.

[114] [2009] 3 SCR 712.

[115] Ibid at [34].

[116] See for example Dearden and Wagner (2009-10) 'Canadian libel law enters the 21st century: the public interest responsible communication defence' *Ottawa LR* 351: Jobb (2010-11) 'Responsible communication on

the fact that McLachlin CJC's judgment had been alert to a perceived flaw in the implementation of *Reynolds* and *Jameel* in the lower English courts; namely that Lord Nicholls' illustrative list was being construed as ten obstacles which the defendant – who bears the burden of proof - would, one by one, have to surmount. The consequence of this was that the new defence was having a much less significant practical effect than the House of Lords had intended. As noted above, the post-*Reynolds* and pre-*Grant* judgment in *Jameel* had been widely welcomed as sending corrective instructions to the lower courts to avoid adopting a narrow reading of *Reynolds*, although it seemed *Jameel* had a limited effect. McLachlin was presumably concerned to impress upon Canadian provincial courts to avoid a similarly unwelcome gap emerging in Canada's post-*Grant* libel practice.

That problem in the United Kingdom was returned to by the Supreme Court in 2012 in *Flood v Times Newspapers*.[117] The claimant was a police officer who asserted that *The Times* had accused him of corruption. For present purposes, the case's significance lies in the Court's endorsement of the sentiments expressed in *Jameel.*

Lord Phillips' leading judgment approved the suggestion made in *Jameel* that to classify the *Reynolds* defence as 'privilege' was "misleading"; a better term was simply "public interest defence".[118] More significantly perhaps, the Court again indicated that lower courts had continued to be less receptive than was desirable to the *Reynolds* defence, and should seek to be more so in future. None of the judges – nor counsel – saw any need to consider *Grant* or *Cussan*, nor to engage with any of the critical academic literature[119] which had reviewed *Reynolds'* doctrinal integrity and empirical effect. The intellectual insularity of *Flood* when compared to *Grant* is striking. It is certainly not a libel-specific phenomenon. As several contributions to this volume suggest, the Canadian Supreme Court casts its intellectual net much wider than its British counterpart when addressing contentious public law questions.[120]

As *Flood* progressed through the courts, the United Kingdom's Parliament was engaged in considering an overhaul of many of the traditional ingredients of defamation law, an overhaul which eventually resulted in the passage of the Defamation Act 2013. One feature of the 2013 Act was an explicit abolition (s.4(6)) of the *Reynolds* defence, and its replacement with a new statutory defence:

4.— Publication on matter of public interest

(1) It is a defence to an action for defamation for the defendant to show that—

(a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
(b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

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matters of public interest: a new defence updates Canada's defamation laws' *Journal of International Media and Entertainment Law* 195

[117] [2012] UKSC 11; [2012] 2 AC 273. For more extensive analysis see Tan (2013) 'The Reynolds privilege revitalised' *LQR* 27: Bennet (2012) 'Flood v Times Newspapers Ltd - Reynolds privilege returns to the UK's highest court' *Entertainment LR* 134: Dowrick (2012) 'Some brief thoughts on public interest: Flood v Times Newspapers Limited' *Communications Law* 98.

[118] Ibid at [27] and [38].

[119] Lord Phillips referred briefly [at] to passages in Gatley and Carter Ruck's latest editions, works best classified as professional rather than academic in nature.

[120] See especially Draghici's chapter at pp --- above: Taylor at pp --- below: Hatzis at pp ---- below.

S.4 appears to enact a generous rather than narrow reading of *Reynolds*, echoing in both form and substance much of what was said in *Flood.* While s.4(2) directs courts to have regard to all the circumstances of the case in assessing the s.4(1) test, s 4(3) instructs the court in doing so to disregard the defendant's failure to try to verify the truth of the published material, and s.4(4) instructs the court to pay particular attention to the issue of editorial judgment.

Although some of the initial commentary on the Act was sceptical about s.4's significance[121] - it can quite credibly be seen as removing *Reynolds* in form while relabelling it in substance - other more generic features of the 2013 Act may also work a liberalising effect on the publication of public interest material.[122]

The Act was also the result of an unusually exacting process of deliberation within Parliament, both on the *Reynolds* point and other aspects of libel law. It is certainly not fanciful to suggest that the intellectual quality of the legislative process leading to the 2013 Act was much enhanced by its reference to *Reynolds* and the rich vein of subsequent litigation which *Reynolds* triggered. Interaction between judicial and legislative lawmakers has become a normalised feature of Canada's constitutional landscape in the post-Charter era and is beginning to become established in the United Kingdom.[123]

Both jurisdiction have arrived, albeit by differing routes, at legal positions quite distinct from those which prevailed little more than twenty years ago, and which even though so hard fought in the courts appear to be acquiring a normalised moral status. The tangible difference that remains is of course that the United Kingdom's Parliament might at any juncture through ordinary legislation restore the pre-*Reynolds* position. For a Canadian province to reject *Grant* is more problematic, since any such legislation would require a s.33 notwithstanding declaration. It is of course possible that provincial legislatures or courts might tweak aspects of *Grant* without breaching s.2, but there is no credible prospect that *Grant* will be reversed by amendment of the Charter, given the super-majorities that amendment would require. For that reason alone, one might defensibly conclude that since 1982 the suggestion that Canada and the United Kingdom still share constitutions that are 'similar in principle' is on the surface poorly founded in terms both of principle and practice. As one digs a little deeper however, at least on the narrow point addressed in this chapter, similarities do emerge. And in chapter six, Gavin Phillipson and Tara Beattie dig down into the way in which the Canadian and the United Kingdom constitutions have addressed another contentious aspect of the law relating to freedom of expression – namely the regulation and criminalisation of pornography.

[121] Scott and Mullis (2014) 'Tilting at windmills: the Defamation Act 2013' *MLR* 87: Hooper, Waite and Murphy (2013) 'Defamation Act 2013 - what difference will it really make?' *Entertainment LR* 199.

[122] Notably the 'serious injury' requirement (s.1); the one year limitation period and single publication rule (s.8); and the academic and scientific journal privilege (s.6).

[123] See especially Draghici's discussion of the to-ing and fro-ing between courts and the United Kingdom Parliament over the assisted suicide issue at pp ------ above.