

# The Medium is not the Message: Reconciling Reputation and Free Expression in Cases of Internet Defamation

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## Article abstract

In this paper the author critiques the approach to defamation over the Internet taken to date by the Canadian common law courts. In the emerging jurisprudence, the courts have relied upon untenably broad generalizations about Internet technology, repeatedly equating it with traditional broadcast media and expressing grave concerns about the corresponding threat to reputation posed by online defamation. This has led the courts to hold that when defamatory words are transmitted using the Internet, this will vitiate the availability of any qualified privilege that would otherwise have immunized the defendant from liability under traditional defamation principles, and substantially increase any resulting award of damages. The author argues that this approach results in a failure to strike the appropriate balance between free expression and the protection of reputation. The jurisprudence can also be seen as a product of a long-standing and unfortunate analytical tendency in defamation law—primarily apparent through the libel/slander distinction—whereby common law courts attach extremely divergent legal consequences to impugned statements based on indefensibly broad generalizations about the degree of danger to personal reputation posed by the medium in which the statement was communicated. Drawing inspiration from a comparison to defamation under the civil law of Quebec, the author proposes a new approach that eschews reliance upon unhelpful analogies and generalizations about particular media including the Internet, and involves the examination of impugned statements on a case-by-case basis, paying careful attention to the context in which these were actually made.

# THE MEDIUM IS NOT THE MESSAGE: RECONCILING REPUTATION AND FREE EXPRESSION IN CASES OF INTERNET DEFAMATION

*Robert Danay\**

In this paper the author critiques the approach to defamation over the Internet taken to date by the Canadian common law courts. In the emerging jurisprudence, the courts have relied upon untenably broad generalizations about Internet technology, repeatedly equating it with traditional broadcast media and expressing grave concerns about the corresponding threat to reputation posed by online defamation. This has led the courts to hold that when defamatory words are transmitted using the Internet, this will vitiate the availability of any qualified privilege that would otherwise have immunized the defendant from liability under traditional defamation principles, and substantially increase any resulting award of damages. The author argues that this approach results in a failure to strike the appropriate balance between free expression and the protection of reputation. The jurisprudence can also be seen as a product of a long-standing and unfortunate analytical tendency in defamation law—primarily apparent through the libel/slander distinction—whereby common law courts attach extremely divergent legal consequences to impugned statements based on indefensibly broad generalizations about the degree of danger to personal reputation posed by the medium in which the statement was communicated. Drawing inspiration from a comparison to defamation under the civil law of Quebec, the author proposes a new approach that eschews reliance upon unhelpful analogies and generalizations about particular media including the Internet, and involves the examination of impugned statements on a case-by-case basis, paying careful attention to the context in which these were actually made.

Dans cet essai, l'auteur critique l'approche adoptée par les tribunaux de *common law* canadiens sur la question de la diffamation sur Internet. Dans la jurisprudence émergente, les tribunaux se sont basés sur des généralisations indéfendables quant à la technologie de l'Internet. Ils l'assimilent à de nombreuses reprises aux médias électroniques traditionnels et expriment de graves préoccupations quant à la menace correspondante que pose la diffamation en ligne pour la réputation. Cette approche a mené les tribunaux à statuer que lorsque des mots diffamatoires sont transmis sur Internet, les privilèges qualifiés qui auraient autrement immunisé le défendeur contre toute responsabilité, suivant les principes de la diffamation traditionnelle, sont viciés. Le montant des dommages-intérêts accordés augmente aussi de façon substantielle.

L'auteur soutient que cette approche ne permet pas d'établir l'équilibre approprié entre la libre expression et la protection de la réputation. La jurisprudence peut aussi être vue comme le produit d'une fâcheuse tendance analytique de longue date en matière de diffamation, tendance qui ressort surtout dans la distinction entre diffamation orale et écrite. Suivant cette tendance, les tribunaux de *common law* attachent des conséquences juridiques extrêmement divergentes à des déclarations en litige, selon qu'elles soient orales ou écrites. Ces conséquences sont basées sur des généralisations larges et indéfendables quant au degré de menace pour la réputation personnelle que pose le médium par lequel la déclaration a été communiquée. En s'inspirant d'une comparaison avec la diffamation en droit civil québécois, l'auteur propose une nouvelle approche qui évite les analogies et les généralisations peu utiles au sujet d'un média particulier, dont Internet. L'approche proposée implique un examen au cas par cas des déclarations contestées, prêtant une attention particulière au contexte dans lequel elles ont été énoncées.

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## Introduction

More than a century ago defamation law was mockingly derided by commentators as “old and out of date, moss-covered with age,”<sup>1</sup> “absurd in theory, and very often mischievous in its practical operation,”<sup>2</sup> and “infected with the foolish conceits, absurd paradoxes, superstition, and artificial reasoning of a semi-barbarous age.”<sup>3</sup> Indeed this “*enfant terrible* of the [common] law,”<sup>4</sup> whose long and convoluted historical journey can be traced back from the modern democratic and constitutional context to the Roman delict of *injuria* via the Star Chamber in England,<sup>5</sup> has for many decades been the subject of intense academic and judicial scorn.<sup>6</sup> Yet, despite being a rather ungainly composite of two sister torts—libel and slander—defamation law has persisted.

Notwithstanding its evident longevity, one would be forgiven for wondering whether this cause of action, which once served the decidedly medieval purpose of averting blood duels among easily inflamed British noblemen,<sup>7</sup> might be on a collision course with the emerging communications technologies of the digital age—especially the Internet. For, as we will see, the *medium* of an allegedly defamatory communication has always been—and indeed continues to be—one of the most important determinants of how a plaintiff in a common law defamation action will fare in meeting the requisite elements of the tort, fending off any defences that the defendant might raise, and collecting a significant damage award at the close of proceedings. It behooves us to ask: how will a tort, that over a

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<sup>1</sup> James C Courtney, “Absurdities of the Law of Slander and Libel” (1902) 36:4 Am Law Rev 552 at 552.

<sup>2</sup> Van Vechten Veeder, “The History and Theory of the Law of Defamation” (1903) 3:8 Colum L Rev 546 at 546.

<sup>3</sup> Courtney, *supra* note 1 at 552.

<sup>4</sup> As the tort was described in Donnelly: Richard C Donnelly, “The Law of Defamation: Proposals for Reform” (1949) 33:6 Minn L Rev 609 at 609 [Donnelly, “Proposals”].

<sup>5</sup> Veeder, *supra* note 2 at 550. The Star Chamber was composed of the “highest dignitaries of Church and State” including the chancellor, treasurer, Lord Privy Seal, a bishop, a temporal lord, and the two chief justices, or in their absence, two other judges as assistants. The court did not abide by any particular forms, was not bound by any rules of evidence, and heard only from its own appointed counsel (*ibid* at 562).

<sup>6</sup> See e.g. *Thorley v Lord Kerry* (1812), 4 Taunt 355, 128 ER 367 (CP) [*Thorley*]; W Reade Jr, “The Law of Slander, Its Present State, and Possible Improvement” (1866) 21:2 Law Mag & Law Rev 215; Veeder, *supra* note 2 at 546; William L Prosser, *Handbook of the Law of Torts* (St Paul, Minn: West Publishing, 1941) at 777, 807; Donnelly, “Proposals”, *supra* note 4; J Howard Toelle, “The Law of Defamation—Suggestions for Reform” (1948) 9 Mont L Rev 17.

<sup>7</sup> *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 117, 126 DLR (4th) 129 [*Hill*].

century ago was regarded as being “three hundred years behind the age”,<sup>8</sup> rationally assimilate communications technologies that could have scarcely been imagined even twenty-five years ago?

Though the jurisprudence is yet in its infancy, some alarming trends have already begun to emerge in the common law cases involving allegations of defamation using the Internet, sometimes referred to as “cyber-libel”.<sup>9</sup> Chief among these has been a tendency on the part of the courts to rely upon generalizations about the Internet that paint the medium as being uniformly dangerous to individual reputation. In this regard, the refrain that has peppered the emerging jurisprudence has been that the Internet is “instantaneous, seamless, interactive, blunt, borderless and far-reaching” and “potentially a medium of virtually limitless international defamation.”<sup>10</sup> Fuelled by these generalizations, Canadian courts have seemed to view their role in cyber-libel actions as that of a final bulwark against the defamatory excesses of those members of the general public who might abuse the tremendous new power entrusted to them by the Internet. This has led the courts to hold that when defamatory words are transmitted using the Internet, the availability of any qualified privilege that would otherwise have immunized the defendant from liability under traditional defamation principles will be vitiated, and will substantially increase any resulting award of damages.

These aspects of the emerging cyber-libel jurisprudence are of concern because they disrupt the delicate balance between the two competing constitutional values or goals that underpin the modern tort of defamation: protecting reputation (including personal dignity) and securing freedom of expression.<sup>11</sup> By treating the vast and diverse world of Internet communi-

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<sup>8</sup> Courtney, *supra* note 1 at 564.

<sup>9</sup> See Elizabeth F Judge, “Cybertorts in Canada: Trends and Themes in Cyber-Libel and Other Online Torts” in The Honourable Justice Todd Archibald & The Honourable Justice Randall Echlin, eds, *Annual Review of Civil Litigation 2005* (Toronto: Thomson Carswell, 2006) 149; *Barrick Gold Corp v Lopehandia* (2004), 71 OR (3d) 416 at para 28, 239 DLR (4th) 577 (CA) [*Barrick Gold*].

<sup>10</sup> *Ibid* at para 31; Matthew Collins, *The Law of Defamation and the Internet* (Oxford: Oxford University Press) at para 24.02; *Griffin v Sullivan*, 2008 BCSC 827 at para 97 (available on WL Can) [*Griffin*]; *Inform Cycle Ltd v Rebound Inc*, 2008 ABQB 369 at para 32, 438 AR 80; *Vaquero Energy Ltd v Weir*, 2004 ABQB 68 at para 18, 352 AR 191; *Sanjh Savera Weekly v Ajit Newspaper Advertising*, 2006 Carswell Ont 3777 (WL Can) at para 49 (Ont Sup Ct) *aff'd* 2008 ONCA 145 (available on CanLII); *Spiros Pizza & Spaghetti House Ltd v Riviera Pizza Inc*, 2005 ABQB 80 at para 96, 377 AR 266 [*Spiros*]. See also *Manson v Moffett*, 2008 CanLII 19789 (Ont Sup Ct) (“[b]y any reasonable definition, anything disseminated on the internet is intended for consumption by a wide audience and easily meets any reasonable definition of ‘publication’. Indeed, the very concept of a ‘worldwide web’ invites no other reasonable interpretation” at para 8).

<sup>11</sup> *Hill*, *supra* note 7 at paras 100-21.

cations as an undifferentiated and uniformly menacing whole, the courts improperly favour plaintiffs in most cyber-libel cases to the detriment of vibrant online free expression, and devalue individual dignity and reputation in cases involving other, less-feared media.

In order to fully appreciate the nature of the emerging cyber-libel jurisprudence, it is important to understand that it is actually the product of a long-standing, and unfortunate, analytical methodology that has woven itself into the very fabric of defamation law. This methodology, which can be traced back to the centuries-old distinction between libel and slander, flows from a judicial tendency among common law judges to attach disproportionate legal significance to the medium through which allegedly defamatory statements were made. Courts have historically relied upon crude generalizations about particular media and have tended to categorize them as being either extremely dangerous or presumptively unthreatening to reputation. In this calculation, the side of the fence that a particular medium fell was, and in many jurisdictions continues to be, crucial for potential plaintiffs since the legal consequences for being categorized one way or the other would often determine the outcome of their cases. Though the direct significance of the widely reviled libel-slander dichotomy has been dampened somewhat in Canada—at least in those provinces that have eliminated it by statute<sup>12</sup>—the judicial tendency to rely on generalizations characterizing new modes of communication as being tremendously pernicious persists in the emerging cyber-libel jurisprudence and has expressed itself through rulings dealing with the qualified privilege defence and the calculation of damages.

The link between judicial hostility toward the use of the Internet in emerging cyber-libel case law and the historical common law tendency to place too much emphasis on menacing caricatures of new communications media, is illustrated by a comparison with the civil law approach to the law of defamation in the province of Quebec—for cases both involving the Internet as well as in general. The law in this jurisdiction developed beyond the long shadow of the libel-slander dichotomy and pays scant atten-

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<sup>12</sup> The distinction has been eliminated in all Canadian provinces except British Columbia, Ontario, and Saskatchewan. It never applied under the civil law of Quebec. See *Defamation Act*, RSA 2000, c D-7, s 1(b); *The Defamation Act*, RSM 1987, c D20, s 1, CCSM c D20, s 1; *Defamation Act*, RSNS 1989, c 122, s 2(b); *Defamation Act*, RSNB 1973, c D-5, s 1; *Defamation Act*, RSPEI 1988, c D-5, s 1(b); *Defamation Act*, RSNL 1990, c D-3, s 2(b); *Defamation Act*, RSY 2002, c 52, s 1; *Defamation Act*, RSNWT 1988, c D-1, s 1. In Australia, the libel-slander distinction has been abolished in New South Wales, Queensland, and Tasmania. In the United States, it has been abolished in Illinois, New Mexico, Virginia, and Washington, and it never applied in Louisiana. See Raymond E Brown, *Defamation Law: A Primer*, 1st ed (Toronto: Thomson Carswell, 2003) at 12 [Brown, *Primer*].

tion to the particular medium in which defamatory imputations happen to have been conveyed. Rather, in each case the civil law courts look to the broader context in order to determine both liability and the quantum of damages. The essence of this approach, which can be easily transplanted into the common law context, represents the key to maintaining the appropriate balance between the two competing constitutional values in cyber-libel actions and in all defamation cases.

In Part II of this paper, I will attempt to elucidate the distrustful judicial stance toward Internet communications that has animated the Canadian common law cyber-libel jurisprudence to date. In Part III of the paper, I will argue that this approach is unjustifiably disruptive to the proper balance between free expression and protection of reputation. In Part IV, I will seek to demonstrate how the modern common law approach to cyber-libel is actually the product of an impoverished analytical methodology that has governed defamation law for centuries. In Part V of the paper, I will canvass the law of defamation in Quebec so as to draw the unwise aspects of the common law into sharper relief and to offer a potential avenue for reform. In Part VI, I will detail the contours of a more nuanced and less categorical approach to defamation adjudication in the digital age that takes inspiration from the civil law approach, and more appropriately reconciles freedom of expression and the vindication of personal reputation. Finally, in Part VII I will briefly discuss the Supreme Court of Canada's recent decision in *Grant v. Torstar Corp.*, which may mark the beginnings of a laudable turning point in the Canadian common law approach to cyber-libel along the lines advocated in Part VI.<sup>13</sup>

## I. The Canadian Common Law Approach to Cyber-Libel

The common law Canadian courts that have to date been faced with allegations of defamation over the Internet, have considered such communications to be "indiscriminate" and akin in many respects to defamatory statements made on broadcast radio or television. As a result, the present state of the law appears to be that the qualified privilege defence will rarely, if ever, be available in cases of cyber-libel, and resulting damage awards will be greatly increased where defamation is proven.

### A. *Defamation over the Internet and the Qualified Privilege Defence*

The defence of qualified privilege seeks to carve out a zone of communication within which, for reasons of general social utility, the "protection

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<sup>13</sup> 2009 SCC 61, [2009] 3 SCR 640 [*Grant*].

of reputation must yield to open and free discussion.”<sup>14</sup> The rationale for this defence is that, due to the public benefit in encouraging certain kinds of communications to be made, “no matter how harsh, hasty, untrue, or libellous the publication[,] ... the amount of public inconvenience from the restriction of freedom of speech or writing [if an action for defamation was available] would far outbalance that arising from the infliction of private injury.”<sup>15</sup> The legal effect of making out a claim for qualified privilege is that the inference that the words were published with malice is rebutted, which arises whenever a plaintiff proves that the defendant published defamatory words about them to a third party.<sup>16</sup>

It is important to note that qualified privilege does not attach to the impugned communication itself. Rather, the privilege attaches to the *occasion* at issue.<sup>17</sup> An occasion will be regarded as being privileged if it involves a communication made by a person in the discharge of a public or private duty and is communicated to an audience that has some corresponding interest or duty to receive the statement.<sup>18</sup> Such duties or interests (the categories of which are not closed) may be personal, social, business-related, financial, moral, or legal.<sup>19</sup> Classic examples of privileged occasions include the provision of employment references, business and credit reports, and complaints to police, regulatory bodies, or other public authorities.<sup>20</sup>

The privilege associated with a particular occasion will be lost if the statement is not commensurate with the occasion.<sup>21</sup> This will arise if the content of the information or the manner in which that information was communicated was not reasonably appropriate for the occasion.<sup>22</sup> For ex-

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<sup>14</sup> *Cusson v Quan*, 2007 ONCA 771 at para 37, 87 OR (3d) 241[Cusson], rev'd on other grounds 2009 SCC 62, 314 DLR (4th) 55. See also *Dinyer-Fraser v Laurentian Bank* 2005 BCSC 225 at para 196, 40 BCLR (4th) 39.

<sup>15</sup> *Huntley v Ward* (1859), 6 CB (NS) 514 at 517, 175 ER 848 [Huntley], cited in *Cusson*, *supra* note 14 at para 39.

<sup>16</sup> *Hill*, *supra* note 7 at para 144; *Horrocks v Lowe*, [1975] AC 135 at 149, [1974] 2 WLR 282 (HL (Eng)).

<sup>17</sup> *Campbell v Jones*, 2002 NSCA 128 at paras 31, 209 NSR (2d) 81 [Campbell] [emphasis added]; *Hill*, *supra* note 7 at para 143; *Adam v Ward*, [1917] AC 309 at 334 (HL (Eng)) [Adam].

<sup>18</sup> *Hill*, *supra* note 7 at para 143; *Campbell*, *supra* note 17 at paras 30-34.

<sup>19</sup> See *RTC Engineering Consultants Ltd v Ontario (Solicitor General)* (2002), 58 OR (3d) 726 at para 16, 156 OAC 96 (CA); *Hill*, *supra* note 7 at para 143; *Adam*, *supra* note 17 at 334.

<sup>20</sup> *Cusson*, *supra* note 14 at para 39.

<sup>21</sup> *Hill*, *supra* note 7 at para 146.

<sup>22</sup> *Ibid* at paras 146-47.

ample, if the words complained of were published to the public generally or, as it is sometimes expressed, “to the world”,<sup>23</sup> the qualified privilege will generally have been exceeded since it reached a large number of recipients who did not have the requisite interest in receiving the communication.<sup>24</sup> In this regard, statements communicated using certain media have been branded by courts and commentators as necessarily representing communications “to the world”. Citing a number of lower-court authorities from the 1970s,<sup>25</sup> Professor Brown maintains that newspapers, radio, and television publish information “indiscriminately” and must therefore be regarded as being publications “to the world” in respect of which the qualified privilege defence will be unavailable.<sup>26</sup>

The first case in Canada to directly deal with the availability of the qualified privilege defence in a cyber-libel action was *Christian Labour Association of Canada v. Retail Wholesale Union*, a decision by the British Columbia Supreme Court.<sup>27</sup> In this case, Justice Rice was faced with an application by way of summary trial to dismiss a defamation action. The underlying facts were not in dispute and the two parties were both unions with a history of competing for members. Statements alleging that the plaintiff was a “rat union” in the habit of signing substandard agreements were posted on the defendant’s website and remained online for about thirteen months. The defendant’s membership was about 2,300 and the total number of visits to the impugned page was estimated to be about

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<sup>23</sup> *Jones v Bennett*, [1969] SCR 277, 2 DLR (3d) 291.

<sup>24</sup> It should be noted that in some cases the courts have found that the qualified privilege associated with a particular occasion was not lost in a communication “to the world” where the matter at issue was one of general public interest and the party who published it owed a duty to communicate it to the general public. See e.g. *Camporese v Parton* (1983), 150 DLR (3d) 208 at 226-27, 47 BCLR 78 (SC (AD)); *Parlett v Robinson* (1986), 30 DLR (4th) 247, 5 BCLR (2d) 26 (CA); *Grenier v Southam Inc.*, 1997 CanLII 4460 (Ont CA); *Leenen v Canadian Broadcasting Corp* (2000), 48 OR (3d) 656 at para 695, 50 CCLT (2d) 213 (Sup Ct), aff’d (2001), 54 OR (3d) 612, 6 CCLT (3d) 97 (CA), leave to appeal to SCC refused (2002), 289 NR 200 (note), 164 OAC 200 (note); *Young v Toronto Star Newspapers Ltd* (2003), 66 OR (3d) 170, 18 CCLT (3d) 244 (Sup Ct), aff’d (2005), 77 OR (3d) 680, 259 DLR (4th) 127 (CA). As discussed in greater detail in Part VII below, the Supreme Court of Canada in *Grant*, found that the “to the world” limitation on the qualified privilege defence unduly impacted upon the right to freedom of expression. It thus created a new defence of “responsible communication” that would allow communications on matters of public interest to be inoculated from liability where certain steps to ascertain the truth of the facts asserted are taken (*supra* note 13).

<sup>25</sup> *Whitaker v Huntington* (1980), 15 CCLT 19 (BCSC); *Loan v MacLean* (1975), 58 DLR (3d) 228 (BCSC (AD)).

<sup>26</sup> Raymond E Brown, *The Law of Defamation in Canada*, vol 1, 2d ed (Scarborough, Ont: Carswell, 1994) at s 13.7(2)(i) [Brown, *Defamation*].

<sup>27</sup> *Christian Labour Association of Canada v Retail Wholesale Union*, 2003 BCSC 2000, 130 ACWS (3d) 643 [*Christian Labour Association*].

530. The parties were not able to provide conclusive evidence as to the identity of those that had accessed the posting, so it was unknown whether it had been viewed by individuals other than members of the defendant union to whom the message was directed. The defendant had not put in place any access controls such as user ID numbers or passwords that would have restricted the ability of non-union members to view the page.<sup>28</sup>

The parties agreed that the words complained of were defamatory. They also agreed that the defendant's members had an interest in receiving the union news such that the communication was made on an occasion of qualified privilege. Finally, the parties agreed that the general public did not have any legitimate interest in accessing the defamatory message.<sup>29</sup>

The only question to be determined by Justice Rice on the summary trial application was whether the availability of the qualified privilege defence had been lost by virtue of the fact that the impugned publication had been posted on the defendant's website. Justice Rice concluded that it had indeed been lost and, in arriving at this conclusion, the court focused on the absence of access controls to the defendant's website. On that basis, Justice Rice felt bound to conclude that "probably a significant number of those who accessed and presumably read the message were not within the group of interested persons entitled to receive the information."<sup>30</sup> Since the defendant was unable to adduce compelling evidence explaining why a posting on a website without restrictions was "reasonably necessary" under the circumstances, the court found that the qualified privilege associated with the occasion had been lost.<sup>31</sup>

The court in *Christian Labour Association* seemed to accept the basic proposition espoused by Professor Brown that certain media, such as radio and television, transmit publications in an "indiscriminate" way such that the qualified privilege defence will generally be lost when employed. Indeed, immediately preceding the court's analysis of the impugned web page, Justice Rice cited Professor Brown's views on the availability of the qualified privilege defence in cases of "indiscriminate publications"<sup>32</sup> and lamented that "there is no authority that either counsel or I could find on

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<sup>28</sup> *Ibid* at para 6.

<sup>29</sup> *Ibid*.

<sup>30</sup> *Ibid* at para 24.

<sup>31</sup> *Ibid* at paras 25-30.

<sup>32</sup> Brown, *Defamation*, *supra* note 26 at s 13.7(2)(i), cited in *Christian Labour Association*, *supra* note 27 at para 20.

this issue where the medium was a website.”<sup>33</sup> Ultimately, Justice Rice implicitly concluded that a web posting that is not protected by strict access controls does indeed represent an “indiscriminate” publication akin to a broadcast on radio or television, and ruled accordingly.

The court’s reasoning in *Christian Labour Association* was more recently endorsed by the Alberta Court of Appeal in *Angle v. LaPierre*.<sup>34</sup> This case involved a posting on a website devoted to critiquing the state of public education in Alberta. The posting was found by the trial judge to have been defamatory of both the defendant teachers and their union. In curtly dismissing the availability of the qualified privilege defence the Court of Appeal cited *Christian Labour Association* and did not even consider, as Justice Rice had, whether there was any evidence regarding the number or identity of those who would have likely visited the site. Rather, the court accepted an analytical framework pursuant to which statements “to the world” that are made using “indiscriminate” media such as television or radio are *automatically* disqualified from the protection of the qualified privilege defence. While it did not say so explicitly, the court appeared to suggest that any publication on the Web will be found to be “excessive”,<sup>35</sup> such that the qualified privilege defence will be unavailable unless it can be shown that various access controls limiting the scope of publication were either employed or were practically unreasonable to have been employed under the circumstances.

By equating all web publications—no matter how obscure in nature—with “indiscriminate” broadcasts such as traditional television or radio, the courts in *Christian Labour Association* and *Angle* effectively eviscerated the qualified privilege defence in respect of almost *any* posting made on the Web. This is so since the vast majority of online publications are not protected by overt access controls of any kind and are thus open to being labelled by the courts as being “indiscriminate.”

### *B. Defamation over the Internet and the Calculation of Damages*

With regard to the calculation of general damages in a defamation action, these are *presumed* from the very publication of the defamatory statement itself.<sup>36</sup> However, in determining the quantum of general damages, courts do not treat all defamatory publications alike. Some correla-

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<sup>33</sup> *Christian Labour Association*, *supra* note 27 at para 21.

<sup>34</sup> 2008 ABCA 120 at paras 16-20, 425 AR 378 [*Angle*].

<sup>35</sup> *Ibid* at para 16.

<sup>36</sup> *Hill*, *supra* note 7 at para 164, citing *Ley v Hamilton* (1935), 153 LT 384 at 386 (HL (Eng)).

tion between the severity of the damage to the reputation of the plaintiff and the resulting quantum must be sought. As such, in calculating damages, the trier of fact is required to consider, *inter alia*, the conduct of the plaintiff, the plaintiff's position and standing, the nature of the defamatory statement, the mode and extent of publication, and the absence of any retraction or apology.<sup>37</sup>

The leading Canadian case on the calculation of damages in cases of cyber-libel is *Barrick Gold*, a 2004 judgment of the Ontario Court of Appeal.<sup>38</sup> In this case the plaintiff, a publicly traded mining company and one of the world's leading producers of gold,<sup>39</sup> successfully obtained a default judgment at trial against the defendants, a private individual and his alter ego corporation. The personal defendant, Mr. Lopehandia, who apparently believed that one of the plaintiff's gold mines in Chile belonged to him, had engaged in a sustained online campaign over a number of years in which he posted increasingly outlandish and defamatory messages regarding the plaintiff on various online bulletin and message boards.

The trial judge, Justice Swinton, aptly described the defendant's postings as "emotional, often incoherent, rambling and highly critical."<sup>40</sup> Mr. Lopehandia accused the plaintiff of, *inter alia*, fraud, tax evasion, money laundering, manipulation of world gold prices, misrepresentation to government officials, pursuing organized crime, attempted murder, arson, genocide, and crimes against humanity. Since Mr. Lopehandia did not defend the action, the main question to be decided by Justice Swinton was the quantum of damages to be awarded. In this regard, the court awarded \$15,000 in general damages and no aggravated or punitive damages. In so ruling, the court reasoned that while the Internet empowered Mr. Lopehandia to spread his many messages around the world, the "emotional and highly intemperate" nature of the impugned statements would not have been taken seriously by reasonable readers.<sup>41</sup>

Though the plaintiff in *Barrick Gold* had been seeking \$250,000 in punitive damages, Justice Swinton declined to make an award under this heading. The court noted that in considering whether to award punitive damages, various factors must be examined including the level of blame-

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<sup>37</sup> *Ibid* at para 182, citing Philip Lewis, ed, *Gatley on Libel and Slander*, 8th ed (London, UK: Sweet & Maxwell, 1981) at para 1451.

<sup>38</sup> *Supra* note 9.

<sup>39</sup> *Barrick Gold Corp v Lopehandia*, 2003 CarswellOnt 6075 at para 4 (Sup Ct), rev'd (2004), *Barrick Gold*, *supra* note 9.

<sup>40</sup> *Ibid* at para 8.

<sup>41</sup> *Ibid* at para 38.

worthiness of the defendant's conduct, the financial or other vulnerability of the plaintiff, and the need for deterrence.<sup>42</sup> With regard to blameworthiness, the court noted that Mr. Lopehandia had persisted in his "conduct for a lengthy period of time, despite demands from Barrick that he desist."<sup>43</sup> However, the court found that this factor was mitigated by the "emotional and unreasoned tenor" of the messages and the fact that "no reasonable business person or investor" would have taken him seriously.<sup>44</sup> With regard to vulnerability, Justice Swinton found that the plaintiff was not vulnerable. To the contrary, the court held that "[t]his is not a case where the defendant is abusing power - indeed, the powerful party here is the plaintiff."<sup>45</sup> Finally, in declining to award any punitive damages, Justice Swinton held that an award of \$15,000 plus costs was a sufficient deterrent "in the case of most individuals sued for libel by a corporate plaintiff."<sup>46</sup>

On appeal, the plaintiff was successful in setting aside the quantum of damages awarded by the trial judge. In a majority decision written by Justice Blair, the Ontario Court of Appeal increased the general damages awarded to the plaintiff to \$75,000 and added \$50,000 in punitive damages. The theme that ran throughout Justice Blair's majority judgment was that defamatory communications made using the Internet are *extremely* dangerous to the reputations of individuals and corporations such that they should be heavily punished by the courts through the imposition of high damage awards.

Justice Blair first outlined a number of general considerations concerning Internet defamation to guide lower courts' assessment of damages in future cases. He began by characterizing communications over the Internet as being "instantaneous, seamless, inter-active, blunt, borderless and far-reaching."<sup>47</sup> Moreover, since such communications are often impersonal and anonymous, Justice Blair considered that there exists "a greater risk that ... defamatory remarks [will be] believed."<sup>48</sup> In sum, the

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<sup>42</sup> *Ibid* at para 46.

<sup>43</sup> *Ibid* at para 47.

<sup>44</sup> *Ibid* at para 49.

<sup>45</sup> *Ibid* at para 50 [emphasis added].

<sup>46</sup> *Ibid* at para 53.

<sup>47</sup> *Barrick Gold*, *supra* note 9 at para 32.

<sup>48</sup> *Ibid* at para 31. For a criticism of this view, see Judge, *supra* note 9 ("[i]dentity, including the speaker's credentials and any bias, has been an important criterion of credibility, and continues to be so in the age of the Internet. Speakers can be credible when they communicate online, but the Internet context has not introduced an entirely new epistemological framework for parsing credibility. The traditional notions that credibility turns on such factors as the identifiability of the speaker, the speaker's authority

court concluded that defamation over the Internet had a greater potential to damage reputation as compared with “its less pervasive cousins.”<sup>49</sup> As such, “[t]he mode and extent of publication is ... a particularly significant consideration in assessing damages in Internet defamation cases.”<sup>50</sup> In arriving at these conclusions, the majority of the court quoted extensively and approvingly from an article by Lyrissa Barnett Lidsky<sup>51</sup> in which the author underscores the Internet’s “tremendous power to harm reputation” due to its “extraordinary capacity ... to replicate almost endlessly any defamatory message.”<sup>52</sup>

Having articulated the general principles governing the calculation of damages in cases of cyber-libel, the court then went on to apply those principles to the case at bar. As noted above, this involved an almost ten-fold increase in the quantum of damages ordered by the lower court. In increasing the general damages awarded to \$75,000, Justice Blair reiterated “the distinctive capacity of the Internet to cause instantaneous, and irreparable, damage to the business reputation of an individual or corporation by reason of its interactive and globally all-pervasive nature and the characteristics of Internet communications.”<sup>53</sup> In awarding \$50,000 in punitive damages, the majority of the Court of Appeal held, *inter alia*, that Justice Swinton had misconceived the balance of power between Mr. Lopehandia and Barrick Gold. In particular, Justice Blair held that:

Barrick is not “the powerful party” in the context of the Internet. The impact of the Internet is to neutralize whatever “power” Barrick may have had, in terms of a communication battle with Mr. Lopehandia. In reality it is Barrick that is vulnerable to publications of this nature, and Mr. Lopehandia who is abusing his power. The Internet is one of the most powerful tools of communications ever invented and ... it is “potentially a medium of virtually limitless international defamation.”<sup>54</sup>

In sum, the analysis employed by the majority of the court in *Barrick Gold* was focused on the Internet as an extremely dangerous tool that can be abused by individuals of limited means, to ruinously defame otherwise powerful entities such as multinational gold mining corporations.

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and experience, other writings by the speaker, and any bias still hold true on the Internet as they did for print media” at 157).

<sup>49</sup> *Barrick Gold*, *supra* note 9 at para 34.

<sup>50</sup> *Ibid.*

<sup>51</sup> Lyrissa Barnett Lidsky, “Silencing John Doe: Defamation & Discourse in Cyberspace” (2000) 49:4 Duke LJ 855 at 862-65.

<sup>52</sup> *Ibid* at 863-64.

<sup>53</sup> *Barrick Gold*, *supra* note 9 at para 44.

<sup>54</sup> *Barrick Gold*, *supra* note 9 at 62 [references omitted].

The majority's decision in *Barrick Gold* has become the leading Canadian common law authority on the quantification of damages in cyber-libel cases and has been explicitly followed by a number of lower courts in order to justify increased damage awards.<sup>55</sup>

## II. Why This Matters: Constitutional and Normative Implications

The broad generalizations deployed by the Canadian courts in the emerging cyber-libel jurisprudence regarding the grave danger to personal reputation posed by Internet communications, and the stark legal consequences that flow from them, are of concern because such an approach sharply disrupts the delicate balance between freedom of expression and the protection of reputation that lies at the heart of defamation law.

In *Hill*, Justice Cory, writing for a majority of the Supreme Court of Canada observed that “[t]here can be no doubt that in libel cases the twin values of reputation and freedom of expression will clash.”<sup>56</sup> Justice Cory cited the holding of Justice Edgerton in *Sweeney v. Patterson*,<sup>57</sup> to the effect that whatever is “added to the field of libel is taken from the field of free debate.”<sup>58</sup> Ultimately, Justice Cory held that the right to free expression and the right to the protection of one's good reputation are two interests that are “equally important” and must be “carefully balanced” by the courts in crafting the contours of the tort of defamation.<sup>59</sup> By associating

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<sup>55</sup> See *Warman v Grosvenor* (2008), 92 OR (3d) 663 at para 77 (Sup Ct) [Warman]; *Griffin*, *supra* note 10 at para 97; *WeGo Kayaking Ltd v Sewid*, 2007 BCSC 49 at para 90, 154 ACWS (3d) 863; *Newman v Halstead*, 2006 BCSC 65 at para 256, 146 ACWS (3d) 153; *Spiros*, *supra* note 10 at para 96; *Hay v Partridge*, 2004 NUCJ 3 at para 3 (available on CanLII). But see *Reaburn v Langen*, 2008 BCSC 1342, 61 CCLT (3d) 227, in which the court awarded \$22,000 in damages stemming from the publication of an article in the Kootenay Chronicle newspaper and on the newspaper's website. The court found the fact that the “website was relatively unknown” to be a factor that tended to reduce the quantum of damages (*ibid* at 83). The court did not refer to the *Barrick Gold* decision or any other cases involving defamation over the Internet.

<sup>56</sup> *Supra* note 7 at para 103.

<sup>57</sup> 128 F 2d 457 at 458, 76 US App DC 23 (1942), cert denied 317 US 678, 63 S Ct 160 (1942).

<sup>58</sup> *Hill*, *supra* note 7 at para 100. See also *Cusson*, *supra* note 14 at para 127, citing *Derbyshire County Council v Times Newspapers Ltd*, [1993] AC 534 at 547, [1993] 1 All ER 1011 (HL (Eng)) and *Theophanous v Herald & Weekly Times Ltd*. (1994), 182 CLR 104, 124 ALR 1 at 19 (HCA).

<sup>59</sup> *Hill*, *supra* note 7 at para 121. More recently, in *WIC Radio Ltd v Simpson*, 2008 SCC 40, [2008] 2 SCR 420 [*WIC Radio*], the Supreme Court reaffirmed the importance of ensuring that the tort of defamation and its associated defences are crafted and applied in a manner that respects the appropriate balance between free expression and the protection of reputation.

draconian legal consequences with a particular media of communication such as the Internet—based on oversimplified caricatures about the dangers to individual reputation posed by those media—the courts ultimately undermine *both* freedom of expression and the vindication of individual reputation and dignity.

Consider, for example, the characterization by the courts in *Christian Labour Association* and *Angle* of all non-password protected web postings as “indiscriminate” publications that necessarily exceed any qualified privilege that a defendant may have had. This rule treats the billions upon billions of pages that make up the Web as alike, despite the well-known variability in the traffic that particular pages enjoy. Whereas some pages (e.g., Yahoo! or Google) might indeed enjoy such prolific and diverse traffic as to make it likely that any qualified privilege is exceeded no matter what the occasion, other pages might cater to such a specific and narrow audience (e.g., the union Web page in *Christian Labour Association* or the public school education page in *Angle*) that the privilege is preserved.<sup>60</sup>

It must be recalled that the rationale behind the defence of qualified privilege is that certain species of communication are so necessary to the public welfare that the damage caused by their restriction through defamation actions would outweigh any private harm that might incidentally arise from any occasional instances of defamation.<sup>61</sup> By relying on broad and indefensible generalizations about the “indiscriminate” nature of web postings, the courts throw out the proverbial baby with the bathwater. In cases where the traffic to a particular site is composed almost exclusively of individuals who would have had the requisite interest in accessing a particular posting, the imposition of a blanket rule negating the availability of the qualified privilege defence for *all* web pages undermines the very purpose for the existence of the qualified privilege defence. This, in turn, disrupts the appropriate balance at the heart of defamation law by

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<sup>60</sup> This is so since the qualified privilege defence remains available at common law where an impugned statement only “incidentally” reached individuals who did not have the requisite interest or duty to receive the communication (Brown, *Defamation*, *supra* note 26 at s 13.7(2)(b)). See e.g. *Pleau v Simpson-Sears Ltd* (1977), 15 OR (2d) 436, 75 DLR (3d) 747, (CA) (the defendant, a large department store, affixed posters on each of its in-store cash registers warning its employees about persons who had stolen the plaintiff’s wallet and were signing bad cheques in his name. Though the posters could be seen by persons passing the register (including customers who had no legitimate interest in the contents of the posters), the court held that to casual observers the publication was merely incidental and did not vitiate the privilege that had otherwise been established by the defendant). See also *Fisher v Rankin*, 27 DLR (3d) 746 at para 34, [1972] 4 WWR 705 (BCSC (AD)).

<sup>61</sup> *Huntley*, *supra* note 15, cited in *Cusson*, *supra* note 14 at para 39.

over-vindicating reputation at the cost of socially beneficial categories of free expression.

Similarly, the judicial attitude that publication over the Internet, no matter what the context, automatically increases the quantum of damages awarded in a defamation action, is also based on an indefensible over-generalization about the Internet that serves to disrupt the appropriate balance between free expression and the protection of reputation. The doctrinal error here is the repeated reliance on the *potential* harm of defamatory imputations over the Internet rather than a careful examination of the particular imputation at issue in any given case. Since many Internet communications will tend to reach only a very small audience (such as the union web page in *Christian Labour Association*), and since many of these are rambling, incoherent and unbelievable (such as those of Mr. Lopehandia in *Barrick Gold*), increased damage awards in all cases of cyber-libel overprotects individual reputation at the cost of free expression.

If oppressive damage awards against online critics are granted as a matter of course when no damage to a plaintiff's reputation was reasonably likely to have resulted, the obvious danger that will arise is that future critics will be intimidated into silence. This, in turn, would undermine one of the most promising features of the Internet, which is its well-known capacity to democratize the "marketplace of ideas"<sup>62</sup> so that less

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<sup>62</sup> The conceptual roots of the "marketplace of ideas" metaphor can be traced to the famous dissent by Oliver Wendell Holmes J in *Abrams v United States*, 250 US 616, 40 S Ct 17 (1919). It connotes an understanding of the right to free expression as a means of promoting free competition among ideas that vie for supremacy to the end of attaining the truth. See Thomas I Emerson, *The System of Freedom of Expression* (New York: Random House, 1970) at 627. The Supreme Court of Canada has repeatedly noted that a vibrant marketplace of ideas is an essential component of any functioning democracy. See e.g. *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 68, 161 DLR (4th) 385, where the Court held:

[A] functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" ... *No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top.* Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live [references omitted, emphasis added].

See also *Canada (Human rights commission) v Taylor*, [1990] 3 SCR 892, 75 DLR (4th) 577; *R v Keegstra*, [1990] 3 SCR 697, [1991] 2 WWR 1; *R v Butler*, [1992] 1 SCR 452, 89 DLR (4th) 449; *Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995, 105 DLR

powerful voices are able to meaningfully compete in the ongoing search for truth.<sup>63</sup> It is relevant to note that the institution of defamation proceedings by powerful litigants so as to silence impecunious online critics has become so common a phenomenon in the United States that it has spawned its own memorable moniker: the “cyber-SLAPP” (or Strategic Lawsuit Against Public Participation).<sup>64</sup> By allowing wealthy parties who have suffered no serious reputational harm (such as the plaintiff in *Barrick Gold*) to silence their online critics through the collection of inflated damage awards, the Canadian courts allow defamation actions involving the Internet to take on an unfortunate speech-chilling, cyber-SLAPP quality.

Treating publication on the Internet as an aggravating factor in the quantification of damages also serves to devalue the harm to reputation

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(4th) 577; *Native Women's Assn of Canada v Canada* [1994] 3 SCR 627, 119 DLR (4th) 224; *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 35, [2004] 1 SCR 827.

<sup>63</sup> Ironically, this very point was made rather forcefully by Lidsky in the article cited by Blair JA in *Barrick Gold* in support of the rule that increased damage awards ought to apply to cyber-libel cases: Lidsky, *supra* note 51, cited in *Barrick Gold*, *supra* note 9 (“[t]he chief threat posed by the new cases is that powerful corporate plaintiffs will use libel law to intimidate their critics into silence and, by doing so, will blunt the effectiveness of the Internet as a medium for empowering ordinary citizens to play a meaningful role in public discourse” at 945). See also David L Hudson, Jr, “Blogs and the First Amendment” (2006) 11 NEXUS: J Opinion 129 (the author describes the Internet as a “First Amendment fantasyland where freedom of expression [can] reach its zenith” at 129) See also Council of Europe, Committee of Ministers, *Declaration of the Committee of Ministers on human rights and the rule of law in the Information Society*, CM (2005) 56 final, May 13, 2000 (the Council emphasized that the Internet can provide “unprecedented opportunities for all to enjoy freedom of expression” at I(1)). For a contrary view on the promotion of free expression through the Internet, see e.g. Diane Rowland, “Gripping, Bitching and Speaking Your Mind: Defamation and Free Expression on the Internet” (2006) 110:3 Penn State L Rev 519 (“[a]lthough the Internet may provide the perfect forum for free speech where all citizens can participate equally, unfettered by barriers of race, class and religion, the participatory nature of the Internet and the ease of anonymous communication may also foster anti-social, malicious and immoral behaviour. The impact of this aspect of Internet communication is such that others may be deterred from entering the conversation” at 520).

<sup>64</sup> A cyber-SLAPP case typically involves anonymously posted online criticism of a corporation or public figure. The target of the criticism files a frivolous lawsuit, often but not always framed as a defamation action, in order to issue a subpoena to the website or Internet Service Provider (ISP) in question, discover the identity of the anonymous critic, and thereby intimidate them into silence. For an extensive list of American cyber-SLAPP cases, see cyberSLAPP.org, “Don’t chill online freedom of expression”, online: <<http://www.cyberslapp.org/search/>>. For a discussion of the phenomenon of cyber-SLAPP cases, see Joshua R Furman, “Cybersmear or Cyber-SLAPP: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation”, Comment (2002), 25:1 Seattle UL Rev 213; Sean P Trende “Defamation, Anti-SLAPP Legislation, and the Blogosphere: New Solutions for an Old Problem” (2006) 44:4 Duq L Rev 607.

and individual dignity that arises in cases involving non-Internet media. Consider the hypothetical case of a plaintiff who, during the course of a staff meeting, is falsely alleged by a co-worker to have been asleep on the job. She loses a promotion, the respect of her co-workers, and her health deteriorates. Now consider a case where an individual posts a comment on an online forum devoted to discussing a particular publicly traded company in which he falsely asserts that the company has lost money in the previous quarter. No one believes him and the company's stock price is unaffected. The application of the rule that publication over the Internet increases the quantum of damages shifts the focus away from harm to the plaintiff's reputation and toward irrelevant considerations about the danger presented by the medium in which the words were conveyed. This, in turn, might result in the artificial inflation of the quantum of damages in the online scenario relative to the workplace setting in a manner that does not reflect the true gravity of the injuries suffered by the two plaintiffs. Such a result would undermine the protection of reputation and individual dignity, one of the twin values at the heart of defamation law.

### III. Contextualizing the Emerging Cyber-Libel Jurisprudence

While the Internet and the many communications applications that it supports are still quite new, the mode of analysis employed by the Canadian courts in cases of cyber-libel to date, is not. Rather, the jurisprudence sketched out above can be understood as the by-product of an analytical paradigm that has seamlessly woven itself into the very fabric of defamation law over several centuries. This paradigm has emerged out of the longstanding distinction between libel and slander, and involves the use of extremely broad and unsustainable generalizations about the media through which impugned statements are transmitted in order to determine how particular defamation cases are assessed. To fully appreciate the paradigmatic link between today's cyber-libel jurisprudence and the archaic libel-slander dichotomy, the nature, history, and justifications for this rather reviled legal distinction must be briefly canvassed.

Libel and slander represent two distinct common law regimes for the adjudication of defamation actions. The rules that constitute the tort of libel are heavily tilted in favour of aggrieved plaintiffs, which has led some to characterize it as a form of "no-fault liability".<sup>65</sup> In order to establish a *prima facie* cause of action, a plaintiff need only show that the words complained of (1) are reasonably capable of defamatory meaning, (2) refer to the plaintiff, and (3) have been published to at least one third party.

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<sup>65</sup> *Cusson*, *supra* note 14 at para 34. See also *Grant*, *supra* note 13 at para 28 (the Court characterizes the tort as one of "strict liability").

The plaintiff is under no burden to demonstrate that the impugned statement is untrue or that the defendant was at fault in publishing those words. Most significantly, having proven each of the above three elements, the plaintiff need not demonstrate that any loss was suffered at all in order to collect damages. The tort of libel can therefore be said to presume falsity, fault, *and* damages.<sup>66</sup>

By contrast, where an impugned statement is governed by the law of slander, the rules are more heavily tilted in favour of defendants. Unless the impugned words can be slotted into one of four specific exceptions that constitute “slander *per se*”,<sup>67</sup> plaintiffs in slander actions must prove that they suffered special damages in order for the claim to be actionable. Given that what is at issue is damage to reputation, an inherently nebulous concept that is by nature difficult to prove, this evidentiary obligation tends to either completely negate or greatly reduce the value of many such claims.<sup>68</sup> The exceptions to the obligation to prove special damages, which evolved in a rather haphazard manner over time, depend on the substance of the slanderous imputation. They are: (1) words disparaging the reputation of the plaintiff in the plaintiff’s trade or profession, (2) words imputing the commission of a criminal offence, (3) words imputing a “loathsome or contagious disease”, and (4) words imputing “unchastity” to a woman.<sup>69</sup> Given the relative narrowness of these exceptions, the strategic advantage to defendants flowing from the characterization of impugned words as being slanderous rather than libellous, is significant and often determinative.

For present purposes, what is most significant about these parallel regimes is that the *sole* determinant of whether a plaintiff’s claim is governed by the plaintiff-friendly rules of libel or the defendant-friendly rules of slander, is the *medium* in which the impugned words were transmitted. Initially the distinction was made between messages communicated orally, which were governed by the law of slander, and messages in writing, which fell under the law of libel.<sup>70</sup>

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<sup>66</sup> *Ibid*; see also Patrick Milmo & WVH Rogers, eds, *Gatley on Libel and Slander*, 10th ed (London, UK: Sweet & Maxwell, 2004) at para 3.6.

<sup>67</sup> Brown, *Defamation*, *supra* note 26 at s 8.5.

<sup>68</sup> See Richard C Donnelly, “Defamation by Radio: A Reconsideration” (1948) 34:1 Iowa L Rev 12 (“[b]ecause of the inherent difficulty in proving special damage, recovery for defamation frequently depends upon the taxonomy adopted” at 13).

<sup>69</sup> Brown, *Defamation*, *supra* note 26 at s 8.5; Milmo & Rogers, *supra* note 66 at 79.

<sup>70</sup> Allen M Linden & Bruce Feldthusen, eds, *Canadian Tort Law*, 8th ed (Markham, Ont: LexisNexis Butterworths, 2006) at 774-75.

A practical problem with the application of this dichotomy, readily apparent even centuries ago, was that many defamation cases involve complaints about communications transmitted through media that are neither speech nor writing (e.g., non-verbal gestures), or contain elements of both (e.g., speeches read aloud from written scripts).<sup>71</sup> This practical difficulty has produced jurisprudence that is rife with inconsistency, unpredictability, and unprincipled distinctions. For example, the giving of an impromptu speech to an audience was often held by the courts to be slander, whereas the reading out of the very same defamatory words from a prepared text to an audience was regarded as being libellous, whether or not the audience knew of the script.<sup>72</sup> Whereas placing a lamp in front of a house so as to signify a brothel<sup>73</sup> or burning a person's likeness in effigy<sup>74</sup> were regarded as being libellous, a store owner who publicly prevented a customer from leaving a store in order to effect a search for suspected shoplifting had merely slandered the aggrieved customer.<sup>75</sup>

These practical difficulties emerged out of a fundamental flaw that lies at the very heart of the libel-slander dichotomy. In short, it was never reasonable to attach so much legal significance to the medium through which a particular communication was transmitted. This approach spawned an analytical paradigm that has perpetually distracted judges away from looking at the true context in which particular words were communicated in order to discern what effect they likely had on the plaintiff's reputation and dignity, and whether such an effect was legally justifiable under the circumstances. Instead, this approach has directed courts to classify and compare media based on necessarily vague generalizations about the *theoretical* danger to reputation that they posed or were assumed to pose. This analytical methodology necessarily reduced the rich and diverse media of communication into absurd and cartoonish caricatures.

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<sup>71</sup> See Julie C Sipe, "Old Stinking, Old Nasty, Old Itchy Old Toad': Defamation Law, Warts and All (A Call for Reform)" (2008) 41:1 Ind L Rev 137 ("[u]sing two descriptors, both written and oral, to demarcate the defamation universe utterly fails to define communications that are neither written nor oral, and it fails to define precisely communications that are both" at 145).

<sup>72</sup> Brown, *Primer*, *supra* note 12 at 82, citing *Forrester v Tyrrell* (1893) 9 TLR 257 (CA); *Robinson v Chambers (No 2)* [1946] NI 148 (KB); *Land v Delta Airlines*, 250 SE 2d 188, 147 Ga App 738, (Ct App, 1978).

<sup>73</sup> *Jeffries v Duncombe* (1809), 2 Camp 3, 170 ER 1061 (KB).

<sup>74</sup> *Eyre v Garlick* (1878), 42 JP 68 (QB).

<sup>75</sup> *Bennett v Norban*, 151 A 2d 476, 396 Pa 94 (1959); see also *Cook v Cox* (1814), 3 M & S 110 at 114, 105 ER 552 (KB) (the court included in the category of slander an "act or gesticulation, such as holding up an empty purse, or the like").

Take for example the oldest medium in defamation law: the use of oral speech. It is clear that the capacity to cause harm in this way is wildly variable depending on all of the relevant circumstances. On the one hand, being targeted in a speech by a respected politician before an audience of thousands might be far more damaging to an individual's reputation than having the same words uttered by an (apparently) deranged speaker in Hyde Park. On the other hand, a carefully targeted rumour spread quietly in a workplace could destroy a career, while a drunken toast given to a large audience at a wedding might be—no matter how vicious the barbs it contains—simply laughed off as innocuous tomfoolery. In short, the extent to which any particular communication is likely to have damaged a plaintiff's reputation will vary dramatically depending on innumerable factors that have little to do with the medium in which the words were communicated.

This obvious truth has long been recognized by common law courts and commentators. For example, in the 1812 case of *Thorley*, Chief Justice of the Common Pleas James Mansfield held that he could not “upon principle, make any difference between words written and words spoken, as to the right which arises on them of bringing an action.”<sup>76</sup> In this regard he noted:

[I]t is argued that written scandal is more generally diffused than words spoken, and is therefore actionable; but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed or a private letter: it is true that a newspaper may be very generally read, but that is all casual.<sup>77</sup>

Similarly, a Select Committee of the House of Lords concluded in 1843 that the distinctions between libel and slander as well as the distinction between regular slander and slander per se, “which are quite peculiar to the Law of England, do not rest on any solid Foundation.”<sup>78</sup> As such, the esteemed committee concluded that “wherever an Injury is done to Character by Defamation there ought to be Redress by Action.”<sup>79</sup>

When one of the witnesses before the Select Committee was asked whether there should be a legal distinction between words that were spoken and words that were written, the witness John Borthwick, Esq.—a seasoned Advocate at the Scottish Bar—testified:

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<sup>76</sup> *Supra* note 6 at 364.

<sup>77</sup> *Ibid* at 365.

<sup>78</sup> UK, HC, *Report from the Select Committee of the House of Lords appointed to consider the law of defamation and libel and to report thereon to the House, with the minutes of evidence taken before the committee, and an index*, sess 1843 (513) at iii.

<sup>79</sup> *Ibid* at iv.

I do not think there ought; and, in confirmation of my Opinion, I may perhaps be allowed to refer, it being Matter of moral as well as legal Principle, to the Authority of the great David Hume, who says, that in particular Circumstances even a Whisper may “fly as quickly and be as pernicious as a Pamphlet.”<sup>80</sup>

More than a century later, Professor Prosser disparaged the libel-slander dichotomy in part by noting the “wildfire spread of oral rumor and gossip in a small town”<sup>81</sup> and “the persistence of oral gossip about a citizen's misconduct thirty years after the event.”<sup>82</sup>

Professor Prosser was also among the many who have pointed out that the libel-slander dichotomy itself is less the product of principle than of unfortunate historical accident.<sup>83</sup> Before the seventeenth century, jurisdiction over defamation law in England was parceled out among a number of competing bodies including local, seigneurial, common law, ecclesiastical, and royal Star Chamber courts.<sup>84</sup> Each of these developed its own rules in respect of defamation claims that were reflective of its particular jurisdictional role and constraints.<sup>85</sup> A perpetual point of jurisdictional tension that left a lasting mark on defamation law was between the ecclesiastical and the common law courts (i.e., between the Church and the State). The ecclesiastical courts—which had for a long period of time jealously

<sup>80</sup> *Ibid* at 141.

<sup>81</sup> William L Prosser, “Libel Per Quod” (1960) 46:5 Va L Rev 839 at 843.

<sup>82</sup> *Ibid*. See also Nicholas St John Green, “Slander and Libel”, Book Review of *A Treatise on the Wrongs called Slander and Libel, and on the Remedy by Civil Action for those Wrongs*, 2d ed by John Townsend (1872) 6:4 Am Law Rev 593.

<sup>83</sup> JH Baker, *An Introduction to English Legal History*, 3d ed (London: Butterworths, 1990) at 508; Prosser, “Libel Per Quod”, *supra* note 81 (“[o]f all of the odd pieces of bric-a-brac upon exhibition in the old curiosity shop of the common law, surely one of the oddest is the distinction between the twin torts of libel and slander. It is a distinction unknown elsewhere in the civilized world. Arising out of old and long forgotten jurisdictional conflicts, and frozen into its present form in the seventeenth century by the rising tide of sentiment in favor of freedom of speech and of the press, it remains a senseless thing, for which no court and no writer has had a kind word for upwards of a century and a half” at 839 [footnotes omitted]). See also Veeder, *supra* note 2 at 546; Donnelly, “Proposals”, *supra* note 4; Toelle, *supra* note 6 at 17; E Hall Williams, “Committee on the Law of Defamation: the Porter Report”, Reports of Committees (1949) 12 Mod L Rev 217 at 219-20; *Williams v Riddle*, 140 SW 661 at 661, 145 Ky 459 (Ct App 1911); *Grein v La Poma*, 340 P 2d 766 at 768, 54 Wash 2d 844 (1959) (“[i]t is ... apparent that the hodgepodge of the law of slander is the result of historical accident for which no reason can be ascribed ... There ought not to be any distinction between oral and written defamation”); *Restatement (Second) of Torts* § 568 cmt b (1977) (“[t]his anomalous and unique distinction is in fact a survival of historical exigencies in the development of the common law jurisdiction over defamation”); MS Marks, “Damages for Defamation by Radio”, Notes and Comments (1946) 25:2 Chicago-Kent L Rev 142 at 142.

<sup>84</sup> See Veeder, *supra* note 2.

<sup>85</sup> Sipe, *supra* note 71 at 147.

guarded their jurisdiction over defamation law using the powerful threat of excommunication as leverage—traditionally punished defamation with orders for penance.<sup>86</sup> This impelled the common law courts to restrict their own jurisdiction, through the law of slander, to cases where “temporal” as opposed to “spiritual” damage could be actually proven in the form of pecuniary loss. This is the historical origin of the obligation to prove special damages in cases of slander. The categories of slander *per se*, which were developed by the courts in a haphazard and *ad hoc* fashion, were instances where—due to the nature of the imputation at issue—temporal damage was presumed.<sup>87</sup>

Beginning with the well-known case of *De Libellis Famosis* in 1605,<sup>88</sup> the dreaded royal Star Chamber<sup>89</sup> regulated written imputations through the law of libel by importing Roman criminal law. Though initially available only as a criminal remedy against seditious defamation,<sup>90</sup> the law of libel quickly evolved so as to encompass civil actions, and was not restricted to imputations made against the state or state officials.<sup>91</sup> This new body of law, which—unlike the common law of slander—considered all defamatory imputations to be actionable, was heavily influenced by the invention of what was then a powerful new medium of communication: the printing press. This technological advancement, combined with the ongoing phenomenon of the blood duel as a method for vindication of reputation, was regarded by the monarchy as being particularly dangerous to the stability of the State.<sup>92</sup> In this regard it is important to note the manner in which the law of libel, like the emerging cyber-libel case law catalogued above, represented a stern legal response to the emergence of a feared new technology for mass communication that threatened to dis-

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<sup>86</sup> Veeder, *supra* note 2 at 557. The usual ecclesiastical punishment for the offence was an acknowledgment of the baselessness of the imputation, which was made by the defamer (usually while wearing a white sheet) in the vestry room of the church in the presence of the clergyman and church wardens, and an apology to the person defamed (*ibid* at 551-52).

<sup>87</sup> Prosser, “Libel Per Quod”, *supra* note 81 at 841; Cecil Raitt, “Torts-Defamation—Defamation by Broadcast or ‘Defamacast’ is Actionable Per Se”, Note (1963) 9:2 Wayne L Rev 391 at 391.

<sup>88</sup> (1605), 5 Co Rep 125a at 125a, 77 ER 250 (KB), cited in *Hill*, *supra* note 7 at para 117 (the case involved an anonymous defendant who had “traduced and scandalized” the late archbishop of Canterbury and the then bishop of London).

<sup>89</sup> Veeder, *supra* note 2; *supra* note 5 and accompanying text.

<sup>90</sup> The punishment for libel varied “according to the quality of the offence” and included “fine or imprisonment, and if the case be exorbitant, by pillory and loss of [the offender’s] ears” (Veeder, *supra* note 2 at 565).

<sup>91</sup> *Hill*, *supra* note 7 at para 113; John W Broadfoot, “Defamation in Radio and Television – Past and Present” Comment (1963) 15:2 Mercer L Rev 450 at 451-52.

<sup>92</sup> *Hill*, *supra* note 7 at para 113; Veeder, *supra* note 2 at 561-62.

rupt existing power relations in society.<sup>93</sup> When the common law courts finally gained exclusive jurisdiction over all of defamation law in the late seventeenth century,<sup>94</sup> the Frankenstein-like hodgepodge of complicated and contradictory rules that emerged out of these old jurisdictional conflicts (including the libel-slander dichotomy) became a single body of unwieldy law.<sup>95</sup>

Yet despite its accidental origins and the persistence of withering criticism, the libel-slander dichotomy endured throughout most of the common law world into the twentieth century. At that point, many believed that the emergence of mass media such as radio and television—which appeared to truly defy any facile categorization as libel or slander—would finally ring the death knell for the distinction.<sup>96</sup> But, often citing the weight of historical precedent,<sup>97</sup> courts and commentators generally declined to jettison the distinction and instead took up the mantle and struggled with the awkward task of slotting twentieth century mass media into one of the two archaic categories by analogy to either writing or speech.<sup>98</sup>

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<sup>93</sup> Viewed in this light, the words of Blair JA take on a new dimension:

Barrick is not “the powerful party” in the context of the Internet. The impact of the Internet is to neutralize whatever “power” Barrick may have had, in terms of a communication battle with Mr. Lopehandia. In reality it is Barrick that is vulnerable to publications of this nature, and Mr. Lopehandia who is abusing his power. The Internet is one of the most powerful tools of communications ever invented and ... is “potentially a medium of virtually limitless international defamation” (*Barrick Gold*, *supra* note 9 at para 62).

<sup>94</sup> The distinction between libel and slander was first drawn expressly by Chief Baron Hale in *King v Lake* (1679), Hardr 470, 145 ER 552 (the Court of Exchequer held that, subject to a few established exceptions, words spoken would not be actionable on their own, but once written, malice would be presumed and actionable).

<sup>95</sup> Sipe, *supra* note 71 at 147; Reed R Callister, “Defamation: Elimination of Distinction between Libel and Slander as to the Showing of Special Damages”, Notes (1959) 33:1 S Cal L Rev 104 at 105-106.

<sup>96</sup> See e.g. Stuart Sprague, “Freedom of the Air” (1937) 8:1 Air L Rev 30 at 43; Raitt, *supra* note 87 at 393; Andrew J Newhouse, “Defamation by Radio: A New Tort” (1938) 17:4 Or L Rev 314 at 319; EEM, “Television Defamation—Libel or Slander?”, Note (1956) 42:1 Va L Rev 63 (“[t]o continue to apply the archaic distinctions between libel and slander to modern media of communication is manifestly ridiculous” at 74); Marks, *supra* note 83 at 142.

<sup>97</sup> See e.g. *Locke v Gibbons*, 299 NYS 188 at 192, 164 Misc 877 (Sup Ct 1937) [*Locke*]; *Jones v Jones*, (1916) 2 AC 481 at 493 (HL (Eng)).

<sup>98</sup> See Melissa A Troiano, “The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs” in *Bankruptcy 2.0(05): Chapters, Changes, and Challenges*, Comment (2006) 55:1 Am U L Rev 1447 at 1465; Keith Siver, “Good Samaritans in Cyberspace” (1997) 23:1 Rutgers Computer & Tech LJ 1 at 4.

The results of this comparative exercise were often inconsistent and incoherent. For example many American jurists and commentators, especially in the first half of the twentieth century, adopted a rigidly formalistic approach, pursuant to which the key criterion in determining the applicable legal regime for a given medium was whether it involved or could somehow be tied to writing, in which case the rules of libel would apply, or to the transmission of sounds, in which case rules of slander would apply. This analysis produced the distinction between those cases where an impugned statement made during a radio or televised broadcast was made based on a script, to which—due to the supposed connection to writing—the rules of libel would apply, and broadcasts of “extemporaneous” commentary, which were governed by the rules of slander.<sup>99</sup>

Other American jurists and commentators contended that the controlling criterion in classifying statements made using broadcast technology as being either libel or slander, ought to be the *permanence* of the medium in question.<sup>100</sup> Under this analysis, if a communication was merely fleeting in nature it was likely less harmful and, as a result, it was argued that the rules of slander ought to apply to radio or televised broadcasts.<sup>101</sup> This meant that radio and television defamation—even if broadcast to millions—was far easier to defend than simple written defamation. In recognition of the obvious illogic and unfairness of this approach, many courts and commentators—especially in the latter half of the twentieth century—finally settled upon the capacity for mass dissemination, and the presumed harm to reputation flowing from such dissemination, as the controlling criterion in determining whether a statement made using a particular medium ought to be considered libel or slander. Pursuant to this analysis, all radio and television broadcasts were to be treated under

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<sup>99</sup> With regard to radio broadcasts, see *Meldrum v Australian Broadcasting Co Ltd*, [1932] VLR 425 (VSC); *Locke*, *supra* note 97, *aff'd* 2 NYS 2d 1015, 253 AD 887 (1938); *Hartmann v Winchell*, 73 NE 2d 30, 296 NY 296 (Ct App 1947); *Charles Parker Co v Silver City Crystal Co*, 116 A 2d 440, 142 Conn 605 (Sup Ct Err 1955). In terms of televised broadcasts, see *Remington v Bentley*, 88 F Supp 166 (NY Dist Ct 1949) (the court held, “I accept the [radio] analogy to the extent that it applies to extemporaneous oral expression, and I feel that the additional factor of pictorial representation along with the statements adds no more to the form of defamation than would the circumstance of a great audience in a stadium or the like listening to the spoken word” at 169).

<sup>100</sup> See e.g. *Ostrowe v Lee*, 175 NE 505, 256 NY 36, Cardozo CJ (1931) (“[w]hat gives the sting to the writing is its permanence of form. The spoken word dissolves, but the written one abides and ‘perpetuates the scandal’” at 506).

<sup>101</sup> *Ibid.*

the more stringent rules of libel.<sup>102</sup> This common law development has been codified in most of Canada's provincial defamation statutes.<sup>103</sup>

Though the difficulties in slotting television and radio broadcasts into the old categories of libel and slander now appear to be more or less resolved, the emergence of Internet communications technologies clearly has the potential to reopen these old wounds and shine a light once again on the archaic libel-slander distinction. As a result of the vast and ever-expanding diversity of applications that are supported by Internet technology, such a debate could prove far more intractable than that pertaining to radio and television in the twentieth century.<sup>104</sup> Fortunately, in part because the libel-slander distinction has been statutorily abolished in sev-

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<sup>102</sup> See e.g. *Shor v Billingsley*, 158 NYS 2d 476, 4 Misc 2d 857 (Sup Ct 1957) as discussed in Leo L. McCormick, "Torts—Defamation—Defamatory Telecast as Libel Rather than Slander" (1957) 26:1 U Kan City L Rev 69; *First Independent Baptist Church of Arab v Southerland*, 373 So 2d 647 (Ala 1979); *Matherson v Marchello*, 473 NYS 2d 988, 100 AD 2d 233 (Sup Ct App Div 1984); *McLaughlin v Rosanio, Bailets & Talamo, Inc.*, 751 A 2d 1066 at 1076, 331 NJ Super 303 (Super Ct App Div 2000). See also Donnelly, "Proposals", *supra* note 4 at 612; Raitt, *supra* note 87.

<sup>103</sup> In those jurisdictions that have abolished the distinction between libel and slander, there is no need to expressly provide that broadcasting is governed by the rules of libel (see *supra* note 12 and accompanying text). Of the three provinces that have not abolished the distinction (Ontario, British Columbia, and Saskatchewan), two (British Columbia and Ontario) have statutorily deemed broadcasting to be libel. See *Libel and Slander Act*, RSO 1990, c L12, s 2 ("[d]efamatory words ... in a broadcast shall be deemed to be published and to constitute libel") and *Libel and Slander Act* RSBC 1996, c 263, s 2.

<sup>104</sup> An example that would represent just the very tip of the iceberg is the debate over whether "blogs", which are but one of the innumerable forms of expression supported by the Internet, ought to be covered by the laws of libel or slander. It has been argued that blogs ought to be subject to the law of slander; see Glenn Harlan Reynolds, "Libel in the Blogosphere: Some Preliminary Thoughts" (2006) 84:5 Wash U L Rev 1157. In this regard he notes that, unlike newspapers, blog errors "can be corrected within minutes" (*ibid* at 1163). Moreover, blogs according to Reynolds, are unlike traditional mass media news outlets—which are subject to the law of libel—in that they exist in a "low-trust culture" such that readers do not generally view particular blogs as being authoritative (*ibid* at 1159). Finally, Reynolds argues that—due to the universal accessibility of the Internet—individuals that are defamed in blogs have a much greater ability to respond to accusations made against them than is the case in traditional "high cost" media such as newspapers, radio, or television (*ibid* at 1166). Anthony Ciolli argues the opposite view, see "Defamatory Internet Speech: A Defense of the Status Quo" (2007) 25:4 QLR 853. He suggests that Reynolds "wrongly assumes that the blogosphere is a culturally homogeneous community, when in reality the blogosphere is a highly fractured entity where no one core set of values or norms has been universally accepted" (*ibid* at 854). Moreover, Ciolli criticizes Reynolds for assuming that the blogosphere is an "insular community" and for his suggestion that blogs are not as authoritative as traditional news media (*ibid* at 854-55, 859-62). He thus suggests that the law of libel ought to apply to Internet defamation, including that which takes place in the blogosphere (*ibid*).

eral Canadian provinces, which now treat all defamation as libel,<sup>105</sup> and in part because all parties and the courts seemed to have simply assumed without discussion that Internet defamation should be governed by the rules of libel (hence the term “cyber-libel”), this debate has not yet come to pass.<sup>106</sup>

Though the awkward debate as to whether Internet defamation is libel or slander may have been temporarily averted, the unfortunate analytical methodology associated with this archaic common law dichotomy has, in any event, infected the emerging Canadian cyber-libel jurisprudence. As we have seen, in both the areas of the qualified privilege defence and the quantification of damages, the courts have repeatedly relied

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<sup>105</sup> See *supra* note 12 and accompanying text.

<sup>106</sup> The closest that we have come to such a debate has been in the context of determining whether a publication over the Internet constitutes “broadcasting” under the Ontario *Libel and Slander Act* (*supra* note 103). Under s 1(1), “broadcasting” is defined as “the dissemination of writing, signs, signals, pictures and sounds of all kinds, intended to be received by the public either directly or through the medium of relay stations, by means of, (a) any form of wireless radioelectric communication utilizing Hertzian waves, including radiotelegraph and radiotelephone, or (b) cables, wires, fibre-optic linkages or laser beams.” If Internet publication was covered by this definition then, pursuant to s 5(1), a plaintiff would be barred from bringing an action “unless the plaintiff has, within six weeks after the alleged libel has come to the plaintiff’s knowledge, given to the defendant notice in writing, specifying the matter complained of.” In *Bahlhieda v Santa* (2003), 64 OR (3d) 599, 16 CCLT (3d) 108 (Sup Ct) (cited to OR) the court granted the defendant’s motion for summary judgment on the basis that publication over the Internet *did* constitute broadcasting and the requisite notice had not been given. In so concluding, the court canvassed competing expert opinions as to the “nature” of the Internet. One expert argued that publication using the Internet was not a broadcast since, unlike traditional broadcast media, it employs “pull” technology (*ibid* at paras 37-38). This means that the technology is “pulled” into the user’s computer when the data is downloaded. By contrast, traditional radio and television employ “push” technology, “with the programs being unilaterally produced and ‘pushed’ to a waiting audience that simply turns on the radio or television” (*ibid* at para 37). The other expert argued that Internet is akin to radio and television broadcasting in terms of (1) the immediacy of access, (2) its transient nature, (3) electronic distribution in the same manner over the same physical plant, and (4) the potential to be received by hundreds of thousands of people (*ibid* at para 43). The court concluded that “[t]he purpose of broadcasting definition is to single out information which is transmitted to mass audiences, where maximum harm to reputation can be done” (*ibid* at para 51). Since “[t]he Internet, sometimes more than traditional broadcast media ... reaches a mass audience,” thus “placing material on the Internet, via a website ... constitutes broadcasting within the meaning of the *Libel and Slander Act*” (*ibid* at para 52). However, this ruling was overturned on appeal on the basis that the matter was not appropriate for disposal by way of summary judgment due to the need to resolve conflicting expert evidence (*Bahlhieda v Santa* (2003), 68 OR (3d) 115, 233 DLR (4th) 382 (CA)). Though the issue has come up on a number of subsequent occasions, it has never been conclusively resolved, see e.g. *Janssen-Ortho Inc v Amgen Canada Inc* (2005), 256 DLR (4th) 407, 199 OAC 89 (Ont CA); *Warman v Fromm*, 2008 ONCA 842, 62 CCLT (3d) 246, leave to appeal to SCC refused, 32990 (April 23, 2009).

upon menacing caricatures of Internet media (e.g., “instantaneous, omnipresent, borderless and far-reaching”)<sup>107</sup> so as to apply a set of legal rules that are plainly tilted in favour of aggrieved plaintiffs (i.e., no qualified privilege defence and increased damage awards). In my view, the Internet demagoguery that has marked the emerging cyber-libel jurisprudence simply would not have arisen had the common law courts not been so perennially fixated on assessing particular media for their potential to harm reputation, and then dealing with particular cases differently based on that assessment.

If the twin values of free expression and protection of reputation are to be appropriately reconciled in the digital age, the common law courts in Canada must finally abandon their tendency toward media demagoguery, and begin to focus on the entire context in which particular defamatory words were conveyed. Fortunately, the law of defamation in Quebec affords an excellent demonstration of just how such an approach should proceed.

#### IV. A More “Civil” Approach: Defamation Law in Quebec

A brief sketch of defamation law in the Province of Quebec not only provides further support for the thesis that the hostility toward Internet publications in the emerging cyber-libel jurisprudence is an outgrowth of an analytical approach that has its roots in the historical development of libel and slander law, it also provides a fruitful template for reform of the common law. Since the law of defamation in Quebec (a civil law jurisdiction) developed largely free from the historical shackles of the common law libel-slander dichotomy, the courts and the provincial legislature have never distinguished among different defamatory imputations based upon the medium used in particular cases. This, in turn, has translated into a cyber-libel jurisprudence (though that term is not employed in Quebec) that remains largely free from the use of broad generalizations about the dangers posed by Internet defamation and the use of legal rules that tend to favour plaintiffs over defendants. The analysis under Quebec civil law, on the whole, remains highly contextual and case-specific, where both the existence of liability and the quantum of damages awarded in any given case are determined on the basis of all of the relevant circumstances.

Though Quebec civil law does not provide for a specific form of action for defamation, the general rules that apply to questions of civil liability as laid down in the *Civil Code of Québec* (specifically article 1457)<sup>108</sup> do

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<sup>107</sup> *Barrick Gold*, *supra* note 9, cited in *Warman*, *supra* note 55 at para 77.

<sup>108</sup> Art 1457 CCQ provides, “[e]very person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause in-

permit the collection of damages for an interference with reputation.<sup>109</sup> Pursuant to these general rules of civil liability, a plaintiff must establish on a balance of probabilities, the existence of an injury, a wrongful act or “fault”, and a causal connection between the two.<sup>110</sup> For a plaintiff to establish that they suffered an injury in a defamation case, the plaintiff must prove that the impugned words were defamatory. Defamatory words are those that, from the perspective of a reasonable person, would have brought discredit to the plaintiff’s reputation.<sup>111</sup> The determination of fault is a question of fact that must take into account all of the relevant circumstances.<sup>112</sup> A wrongful act may be either malicious or the result of simple negligence without any intent to harm. In either instance, a civil fault entitling the victim to reparation will arise.<sup>113</sup>

Unlike the situation at common law, there is no formal distinction drawn under Quebec civil law in its treatment of written and oral imputations. The absence of any such distinction, or indeed any particular attention given to the medium through which the defamatory words were communicated, is evident from the following summary of the law by Beaudoin and Deslauriers:

Any injury to reputation, be it verbal (speech, songs, mimicry) or written (letter, legal proceeding, caricature, portrait, etc.), public (newspaper or magazine articles, books, radio or television commentary) or private (letter, pamphlet, report, brief), whether merely abusive or also defamatory, or whether arising from an assertion, imputation, or insinuation, constitutes a fault which, if it gives rise to damage, must be punished by pecuniary compensation.<sup>114</sup>

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jury to another. Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature” (paras 2-3).

<sup>109</sup> See *Prud’homme v Prud’homme*, 2002 SCC 85 at para 32, [2002] 4 SCR 663 [*Prud’homme*]; Nicole Vallières, *La presse et la diffamation : rapport soumis au ministre des Communications du Québec* (Montréal: Wilson & Lafleur, 1985) at 43; *Houde c Benoit*, [1943] BR 713 at 720; *Société Radio-Canada c Radio Sept-Îles Inc*, [1994] RJQ 1811 at 1818, [1994] RRA 444 (CA) [*Sept-Îles*].

<sup>110</sup> *Ibid.*

<sup>111</sup> *Prud’homme*, *supra* note 109 at para 34; *Sept-Îles*, *supra* note 109.

<sup>112</sup> *Prud’homme*, *supra* note 109 at para 38.

<sup>113</sup> See Jean Pineau & Monique Ouellette, *Théorie de la responsabilité civile*, 2d ed (Montréal: Thémis, 1980) at 63-64.

<sup>114</sup> Jean-Louis Beaudoin & Patrice Deslauriers, *La Responsabilité civile*, 5th ed (Cowansville, Que: Yvon Blais, 1998) at para 475 [references omitted] cited and translated in *Bou Malhab c Diffusion Métromédia CMR Inc*, 2006 QCCS 2124 at para 98, [2006] RJQ 1145.

Though the common law defences of qualified privilege and fair comment are not available under Quebec civil law per se, the criteria for these defences are circumstances that must be considered in assessing fault.<sup>115</sup> Thus, a defendant can argue that no wrongful act arose on the basis that they were communicating their opinion on a matter of interest to the public, or that there was a duty to communicate the impugned words to the recipients in question.<sup>116</sup>

The calculation of damages, like the determination of whether sufficient fault to sustain liability is present, is a highly contextual analysis that eschews any fixed formulation.<sup>117</sup> In addition to any material injury that can be proven (e.g., loss of income, decreased clientele, etc.) a plaintiff in a defamation action can collect damages for moral prejudice, which is roughly the equivalent of general damages at common law. In this regard, Beaudoin and Deslauriers note:

[T]he analysis of factors influencing the assessment of moral prejudice is complex. *The first is the seriousness of the act.* Is it merely a discourteous or impolite comment, or is it a full-fledged attack? *The defamer's intent*, while of no importance in establishing the existence of a wrong, may be relevant when it comes to assessing the prejudice ... The dissemination of the defamation is also of some consequence. Widespread publicity should logically justify a more generous award than publicity within a small circle, *unless the circle was carefully targeted.* *The condition of the parties, the consequences of the act for the victim* and those close to him, *the duration of the attack*, and the permanence or impermanence of the effects are also to be considered. Finally, the existence of an apology or retraction ... may constitute a factor mitigating the prejudice.<sup>118</sup>

Thus, while the relative scope of publication is a factor in the calculation of damages, the particular medium that might have been employed is not itself a relevant consideration.

The relative lack of emphasis placed on the medium of communication under the civil law can be observed directly in Quebec's emerging Internet

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<sup>115</sup> *Prud'homme*, *supra* note 109 at paras 58-63.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Aubry v Éditions Vice-Versa Inc.*, [1998] 1 SCR 591 at para 72, 157 DLR (4th) 577.

<sup>118</sup> Jean-Louis Baudouin and Patrice Deslauriers, *La responsabilité civile*, 6th ed (Cowansville, Que: Yvon Blais, 2003) at para 551 [emphasis added, footnotes omitted], cited with approval and translated in *Doucet c Normandeau*, 2006 QCCQ 3151 at para 203 (available on CanLII). See also *Galarneau c Azrak*, 2008 QCCQ 2647 at para 23 (available on CanLII); *Rizzuto c Rocheleau*, [1996] RRA 448 at 456-57, JE 96-989 (Que CS), followed in *Abou-Khalil c Diop*, 2008 QCCS 1921 at para 22 (available on CanLII) [*Diop*], *aff'd* on other grounds 2008 QCCA 1606 (available on CanLII), *rev'd* on other grounds 2009 QCCA 521 (available on CanLII).

defamation jurisprudence. Though there have been a number of such cases to date,<sup>119</sup> questions of liability and the quantification of damages have never devolved into any sustained invective about the Internet as “potentially a medium of virtually limitless international defamation”<sup>120</sup> as has been the case in the common law jurisprudence. Nor have any hard-and-fast rules that apply specifically to Internet communications been developed. Two brief examples are sufficient to illustrate the contextual approach to cyber-libel in Quebec.

In *Bilodeau c. Savard*<sup>121</sup> the Quebec Court (Civil Division) awarded \$2,000 to the plaintiff, a consultant who treated compulsive gambling, as

<sup>119</sup> See e.g. *Lamarre c. Allard*, 2008 QCCS 5266, [2009] RJQ 89; *3095-4333 Québec inc c Service de transport STCH inc*, 2007 QCCS 2442, [2007] RRA 731; *Lacroix c Dicaire* 2005 CanLII 41500 (Que CS) [*Lacroix*]; *Sasseville c Vincent* 2004 CanLII 56890 (Que CS); *Gosselin c Vincent* [2004] RRA 630 (available on CanLII) (Que CS); *Buchwald c 2640-7999 Québec Inc* [2003] RRA 1427 (available on CanLII) (Que CS); *Association des médecins traitant l'obésité c Breton*, [2003] RRA 848, JE 2003-1339 (Que CS); *Graf c Duhaime* [2003] RRA 1004 (available on CanLII) (Que CS); *Caron c Rassemblement des employés techniciens ambulanciers du Québec* (RETAQ), 2003 CanLII 738 (Que CS), aff'd REJB 2004-61201 (WL Can) (Que CA).

<sup>120</sup> See Collins, *supra* note 10. The broadest generalization of such a nature that has appeared in the case law to date is in *Lacroix* where the court noted that in posting the impugned words on a website, the defendant “a utilisé un moyen de communication puissant, l'internet, afin de s'assurer de détruire plus largement la réputation” (*supra*, note 119 at para 75). Another case in which the elevated potential of the Internet to injure reputation was mentioned is *Prud'homme c Rawdon (Municipalité de)*, 2008 QCCA 1985 (available on CanLII) [*Rawdon*]. In that case the Court of Appeal entertained an application for leave to appeal from an interlocutory judgment of the Superior Court that had dismissed the defendant's motion to strike the action of the respondent, the municipality of Rawdon. The main basis for the motion to strike was an argument to the effect that it was contrary to the right to free expression in s 2(b) of the *Canadian Charter of Rights and Freedoms* for a municipality to sue a person for defamation (Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]). In dismissing the application for leave to appeal, Morissette JA noted some pre-*Charter* case law that did seem to suggest that a municipality could not sue a person in defamation. However, the court considered that the use of the Internet by the defendant *might* raise a question as to whether that case law was applicable to the case at bar. In this regard the court observed:

[T]he use and the abuse of recent technology, and in particular of the Internet, by anonymous pamphleteers, *may* ... call for a contextual reconsideration of the limits of free of speech that is defamatory. Addressing a small crowd in the flesh and from the north-east corner of Hyde Park is one thing, connecting from a suburban basement, and by means of the Internet, with a vast and anonymous multitude in the cyberspace may be quite another thing. *It may be that*, technologically, the medium, so enhances the message as to radically alter its impact and oblige its originator to exercise a degree of caution not expected of orators around Speakers' Corner (*Rawdon*, *supra* note 130 at para 12) [emphasis added].

<sup>121</sup> 2007 QCCQ 5127 (available on CanLII).

a result of defamatory allegations published by the defendant, who was a relative of the plaintiff. The impugned allegations were published by the defendant on the plaintiff's own website for one day, and suggested that the plaintiff had misrepresented the effectiveness of his treatment methods to the media. The court carefully examined the context in which the impugned statement was made and concluded that while the defamatory statement was unmeasured and motivated by malice on the part of defendant—which led to the requisite fault—it had caused only minor damage to the plaintiff's reputation, likely restricted to his own family circle.<sup>122</sup> The fact that the message at issue was transmitted using the Internet did not play a significant role in the decision.

By contrast, in *Diop*,<sup>123</sup> the fact that the words in question were transmitted using the Internet did play a role in the final determination of the Quebec Superior Court. The court awarded the plaintiff, a Senegalese businessman, \$100,000 in moral damages and \$25,000 in punitive damages over defamatory articles published on the defendant's blog. These articles falsely alleged, *inter alia*, that the plaintiff had been arrested at the airport in Paris, France in possession of two suitcases containing eight million euros. In awarding \$125,000 in damages, the court noted that the blog in question was extremely popular; the defendant testified that he had a loyal readership of 15,000 to 25,000 in Senegal alone.<sup>124</sup> However, the extent of the publication was just one factor in the overall circumstances canvassed by the court. These included the fact that the plaintiff was a well-known and well-regarded businessman, that the defendant had acted deliberately in publishing the impugned articles, and that the broadly-diffused charges against the plaintiff were serious, false, and had caused him tremendous ongoing personal embarrassment.<sup>125</sup> What the court did not do was to simply rely on a boilerplate assumption that all materials posted on the Internet are inherently dangerous to reputation and thus deserving of increased monetary compensation.

As a result of the contextual approach to the establishment of fault and the quantification of damages in defamation actions, a distinction can be drawn between Quebec civil law and Canadian common law in the relative emphasis placed upon the medium through which impugned messages are communicated. While the common law, beginning with the libel-slander dichotomy through to the present day cyber-libel jurisprudence, has for centuries focused on ascribing broad and often menacing

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<sup>122</sup> *Ibid* at paras 17-24.

<sup>123</sup> *Supra* note 118.

<sup>124</sup> *Ibid* at para 17.

<sup>125</sup> *Ibid* at paras 18-30.

generalizations to particular media, and attaching significant legal consequences as a result, there has been no such reasoning under the civil law's more contextual methodology. With its focus on all the relevant circumstances in each case, and not on any untenable generalizations about the danger to reputation posed by particular media, the approach of the Quebec courts to defamation law appropriately reconciles the twin values of free expression and individual reputation, which apply with equal force in that jurisdiction.<sup>126</sup>

## V. A Prescription for Reform: A Move from Caricature to Context

Quebec's civil law approach to defamation points the way forward to a more balanced approach to cyber-libel adjudication in Canadian common law courts. In attempting to transplant the civil law defamation methodology into the common law context, the prescription is simple: courts must treat each and every cyber-libel case on its own merits without relying on any sweeping generalizations about the broad reach and dangers of Internet publications. This applies both to the availability of the qualified privilege defence and to the quantification of damages.

### A. *Qualified Privilege: A Case-by-Case Assessment*

That an impugned publication was made using the Internet should not—on its own—have *any* effect on the availability of the qualified privilege defence. In determining whether the privilege associated with a particular occasion has been lost in any given case, a court should examine the impugned Internet publication with a view to determining approximately how many times it was actually accessed and by whom, as well as the extent to which the likely audience had the requisite interest in receiving it.

Courts must avoid assuming—as was done in *Christian Labour Association* and *Angle*—that because a publication was posted on the Web it *necessarily* reached an audience that did not have the requisite interest. If the publication at issue happens to be concerned, for example, with an obscure topic or was posted to an obscure website, courts should not shy away from concluding that in all likelihood, the number of uninterested persons—as defined by the particular occasion at issue—who accessed the page, was only reasonably incidental such that the privilege attaching to the occasion was not exceeded.<sup>127</sup>

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<sup>126</sup> *Prud'homme*, *supra* note 109 at paras 38-44.

<sup>127</sup> See *supra* note 60 and accompanying text.

Parties to cyber-libel actions should assist the courts in this regard by adducing as much evidence identifying the likely scope of the impugned publication as is practically available. Expert-opinion evidence may be of particular utility since the mechanics of the Web and other Internet applications will often be outside the ordinary knowledge of many judges. Educating the court about the nature and scope of the specific online publication at issue might also reduce the chance that the availability of the qualified privilege defence will be denied based on nothing more than broad generalizations about the dangers of Internet defamation.

### *B. Quantification of Damages*

Just like the qualified privilege defence, the calculation of damages in cyber-libel cases should be undertaken on a case-by-case basis, taking into account all of the relevant circumstances. Courts should strive to eschew any preconceived notions as to the *potential* dangers posed by defamatory statements conveyed using the Internet or any other medium. Rather, the focus should be on the reality of the defamatory statement that is actually before the court. Did it *actually* reach a wide audience? If it did, was it the sort of statement that would have been given any credence by reasonable persons in that audience? Such an approach would implicitly recognize the wide diversity of communications and speakers on the Internet, many of which involve communications among very small groups of individuals.<sup>128</sup>

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<sup>128</sup> The trial level decision of Swinton J in *Barrick Gold* represents an excellent example of the approach advocated here (see *supra* note 39). A similar example from England is *Keith-Smith v Williams* [2006] EWHC 860 (QB) (available on BAILII) in which the plaintiff, a prominent politician, launched successful defamation proceedings against the defendant who had posted repeated claims about the plaintiff on a publicly accessible Yahoo! discussion board with a membership of approximately 100. In these posts the defendant claimed that the plaintiff was a “nonce”, a sexual offender, a racist bigot, a Nazi, and that he had sexually harassed a female colleague. In awarding damages to the plaintiff in the amount of £10,000 MacDuff J reasoned:

The published statement upon which reliance is placed in the pleadings is clearly seriously defamatory. In once sense those statements have been made to a restricted audience. In fact, it is very likely that few people have read those statements. However, they were available to the whole world, at least to that part of the world which has a computer or access to a computer and knows how to go on to the internet and to find the various sites upon it. But fortunately, as a matter of fact, few people have likely picked up on these defamatory statements and I suspect that many of those who have read them dismissed them as being the rantings of a person who was not to be believed (at para 17).

### C. Summary

The ruined reputations of innocent parties that are defamed using Internet media should never be casually shrugged off as unavoidable road kill on the information superhighway.<sup>129</sup> Nor should the suppression of vibrant online speech, which promotes many of the core values underlying the constitutional protection of free expression itself,<sup>130</sup> be countenanced by the courts based on facile generalizations about the Internet and its well-known capacity for unleashing “virtually limitless international defamation.”<sup>131</sup> The way forward is for common law judges to jettison their age old propensity for becoming distracted by the medium in which impugned words were communicated, and to instead focus on examining the full context of each case so as to assess the nature and scope of the asserted attack on a plaintiff’s reputation. Such an approach, which would adopt the spirit of the civil law of defamation in Quebec, is the best way to reconcile the competing constitutional values of freedom of expression and vindication of reputation in accordance with the dictates of the Supreme Court of Canada.

### Conclusion: *Grant v. Torstar Corp.*—A Potential Turning Point?

While it does not represent a fundamental shift in the jurisprudence analyzed above, the recent decision of the Supreme Court of Canada in *Grant* may signal the beginnings of an important judicial retrenchment from both the stance of hostility toward Internet communications in particular, and the more general fixation on the medium in which the impugned communication was made in defamation cases.<sup>132</sup>

In short, the Court in *Grant* reassessed the defence of qualified privilege and concluded that it offered insufficient protection for free expres-

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<sup>129</sup> This phraseology is borrowed from *WIC Radio*, *supra* note 59 (the Court held that “[a]n individual’s reputation is not to be treated as regrettable but unavoidable road kill on the highway of public controversy, but nor should an overly solicitous regard for personal reputation be permitted to ‘chill’ freewheeling debate on matters of public interest” at para 2).

<sup>130</sup> The Supreme Court of Canada has held that these values are threefold: (1) seeking and attaining truth, (2) encouraging participation in social and political decision making, and (3) cultivating individual self-fulfillment and human flourishing. See *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927 at 976, 58 DLR (4th) 577; *R v Sharpe*, 2001 SCC at para 23, [2001] 1 SCR 45; *Montréal (City) v 2952-1366 Québec Inc.*, 2005 SCC 62 at para 68, [2005] 3 SCR 141. For a discussion of the connection between the protection of free expression under the *Charter* (*supra* note 120) and the use of Internet technology see C Ian Kyer, “Technology and Personal Freedom” (2007) 56 UNBLJ 36.

<sup>131</sup> Collins, *supra*, note 10.

<sup>132</sup> *Supra* note 13.

sion and was thus inconsistent with the applicable *Charter* values.<sup>133</sup> Chief Justice McLachlin, writing for the Court, found that—especially insofar as news media outlets are concerned—the need to establish a reciprocal duty as between the defendant and the public at large, unduly limited freedom of expression in favour of protecting reputation.<sup>134</sup> The Court thus created a new defence of “responsible communication on matters of public interest” that will be available in respect of assertions of fact on a matter of public interest where the defendant was diligent in trying to verify the allegation—having regard to an open list of enumerated considerations.<sup>135</sup>

Though the defendants in *Grant* and its companion case of *Cusson v. Quan*<sup>136</sup> were part of a traditional media outlet, the Supreme Court of Canada considered whether the new defence would also apply to those who were not professional journalists. In concluding that the defence would be open to “anyone who publishes material of public interest in *any medium*,”<sup>137</sup> the Court noted that

the traditional media are rapidly being complemented by new ways of communicating on matters of public interest, many of them online, which do not involve journalists. These new disseminators of news and information should, absent good reasons for exclusion, be subject to the same laws as established media outlets.<sup>138</sup>

The Supreme Court of Canada’s approach to this new defence is commendable in a number of ways. By explicitly making the defence available to communications made in any medium, the Court borrowed a page from the civil law textbook and eschewed the improper focus on the mode of communication that has bedevilled the common law for so long. The test that the Court adopted—which assesses whether the defendant acted responsibly by looking to factors such as the seriousness of the allegation, the public importance of the matter, its urgency, the status and reliability of the source, and “any other relevant circumstances”<sup>139</sup>—introduces precisely the sort of medium-blind context sensitivity into the analysis that I have advocated above. Finally, the Court should be applauded for avoid-

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<sup>133</sup> *Charter*, *supra* note 120.

<sup>134</sup> *Grant*, *supra* note 13 at paras 38-40.

<sup>135</sup> *Ibid* at paras 97, 126.

<sup>136</sup> 2009 SCC 62, 314 DLR (4th) 55.

<sup>137</sup> *Grant*, *supra* note 13 at para 96 [emphasis added], citing *Jameel v Wall Street Journal Europe Sprl*, [2006] UKHL 44 at 54, [2007] 1 AC 359.

<sup>138</sup> *Ibid*.

<sup>139</sup> *Ibid* at para 126.

ing the kind of demonization of Internet communications that has marred much of the emerging cyber-libel jurisprudence to date.

However, the Court in *Grant* did not eliminate the qualified privilege defence, it merely opened up a new defence for defamatory statements of fact that are made on matters of public interest. Where the subject matter of an online publication cannot be slotted into the nebulous “public interest” category (i.e., a subject matter “inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached”<sup>140</sup>), the antiquated rules associated with the qualified privilege defence will still apply. Similarly, because the Court’s ruling did not address the issue of damages, this area of the law remains improperly calibrated, as I have argued above.

Ultimately, whether or not the *Grant* decision represents a fundamental shift in the common law courts’ attitude toward defamation law remains unknown, both in terms of the age old propensity to focus far too much on the medium in which the impugned publication was made, and the more recent judicial hostility toward Internet communications. Nevertheless, the ruling suggests that with the libel-slander dichotomy receding into the rear-view mirror in most Canadian jurisdictions, the courts may yet begin to nurture the “*enfant terrible* of the [common] law”<sup>141</sup> into digital age maturity.

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<sup>140</sup> *Ibid* at para 105, citing Brown, *Defamation*, *supra* note 27 at s 15.5(1) [footnotes omitted].

<sup>141</sup> Donnelly, “Proposals”, *supra* note 4.