RE-THINKING THE COMMON LAW OF DEFAMATION: STRIKING A NEW BALANCE BETWEEN FREEDOM OF EXPRESSION AND THE PROTECTION OF THE INDIVIDUAL'S REPUTATION

by

CAROLIN ANNE BAYER

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~~Department of~~ Faculty of Law

The University of British Columbia
Vancouver, Canada

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ABSTRACT

Reputational interests are protected against defamatory and injurious statements by the common law of defamation, which permits the targeted individual to recover damages for the injury to his reputation. At the same time, this body of common law sets limits to the constitutional right to free expression of the person who made the penalized communication. However, since s.32(1) of the *Canadian Charter of Rights and Freedoms* - according to the Supreme Court of Canada - restricts the Charter's application to the actions of legislative, executive and administrative branches of government, the Charter will be at best a bit player in defamation litigation governed by common law rule.

This thesis deals with the tension between promoting free speech and protecting a person's reputation, i.e. with the questions whether the common law of defamation has achieved the correct balance between the protection of the individual's reputation and freedom of expression, or whether it needs to be modified in order to better accord with the Charter.

An important component of this thesis is its review of the decision of *Hill v. Church of Scientology*, where the Supreme Court of Canada addressed the question of whether defamation law needs to be reconsidered in light of the Charter protection of free expression, and found the balance struck by the current law to be appropriate. A critical look at this decision, and more generally at the law of defamation itself, particularly its presumptions of falsity, malice and damages, will reveal the problems with the common law's resistance to making any major allowance for free expression.

The author will argue that the Charter should apply to the common law in the same way as it applies to statutory law and that defamation law in particular would, in all probability, not survive the test under s.1 of the Charter, concerning the justification of a limitation to a fundamental right. It will be concluded that the common law of defamation needs to be modified, i.e. that it must accord significantly more weight to freedom of expression in order to be consistent with the Charter.

Insofar as the extent of such modification is concerned, the author will propose first of all to give the element of fault a more significant role in the common law of defamation. In addition, she will argue that the common law presumptions should be abolished. In sum, the author's reform proposal requires the plaintiff to prove not only that the words he complains of are defamatory, identify him and are published to a third person, but also that they are false, did indeed cause damage to his reputation and that the defendant acted with fault, i.e. intentionally or negligently, when publishing the defamatory falsehoods.

TABLE OF CONTENTS

INTRODUCTION

Canadian courts have long followed the traditional common law rules for defamation cases, created to vindicate injury to personal reputation. In recent years, the decision was taken by the federal and nine of the provincial governments to entrench freedom of expression as a constitutional guarantee in the *Canadian Charter of Rights and Freedoms*, promising that everyone in Canada has the right to freedom of thought, belief, opinion and expression. Freedom of expression and the individual's reputation are both generally highly valued in western society and regarded as deserving special protection. At the same time, a certain tension exists between these two interests. In some contexts, notably the law of defamation, they inevitably collide and whatever protections are added to the one must be taken away from the other. This tension in the relationship between free expression and reputational interests is the subject matter of my thesis.

Defamation law existed long before the Charter came into force. Until very recently, this law developed without consideration having to be given to constitutionally entrenched values, particularly freedom of expression, and has tended to favour the protection of reputation. The focus of this work, therefore, is the question whether the current law of defamation takes the principles of freedom of expression sufficiently into account, or whether the guarantees of freedom of expression should be interpreted to modify the common law of defamation.

I will argue that the balancing of the values in the existing common law regime is no longer reflective of contemporary views as to the significance of freedom of expression and I will submit a proposal to adjust the entire common law in order to bring it into accord with what I contend are the Charter's and society's demands.

With respect to both the content and the structure of this thesis, I should point out that I am writing from the vantage point of a law student from a civil law tradition, and for an audience of those from both, civil and common law traditions. In the first five chapters of my thesis I will, therefore, limit myself to simply describing various areas of law and legal theory in order to make this work comprehensible for the whole body of my audience. In the concluding chapter, I will draw on the material set out in the entry chapters and examine it critically.

The first chapter deals with the philosophical assessment of the two competing values at the centre of my thesis. When weighing the right to free speech against another interest, it is important to ask why we have chosen to protect free speech, which of the rationales is served by the particular expressive activity in question. Moreover, it is material to check whether the interest which comes into conflict with freedom of expression does not itself constitute a fundamental right worthy of protection. In view of this, the first chapter will investigate both the philosophical foundations of freedom of expression and the reasons for protecting the individual's reputation. Since, in my opinion, the common law of defamation does not take the right to free expression sufficiently into account the rationales underlying freedom of expression are particularly important. I will demonstrate that these rationales provide strong support for the constitutional protection of some of what is presently considered defamatory speech and consequently, for the modification of the common law of defamation in order to bring it into accord with the Charter value of freedom of expression.

The next step is to throw light on the two relevant sources of law - the Charter and the common law of defamation - with regard to the interests at issue. Thus, in the second chapter, the current common law of defamation will be described. At this point, I will not take constitutional considerations into account, but simply outline the body of defamation law uncritically,

explaining its historical context and general framework, the elements of the cause of action and the defences available. In my opinion, this representation is necessary in order to provide an overview of the matter that I will discuss and critique at a later point in the thesis. In this chapter I will set the stage for the critical assessment that will follow in the last chapter.

For the same reason, namely to ensure a better understanding, chapter three introduces the *Canadian Charter of Rights and Freedoms*, particularly focussing on freedom of expression. After briefly referring to the Charter's historical background and explaining its application, I will elaborate on the structure of the analysis used by the court in freedom of expression cases. Thus, the scope of the right to freedom of expression will be defined, and how this fundamental right can be limited under s.1 of the Charter will be examined.

Chapter four temporarily departs from the main subject of the thesis. It describes how Germany, as a civil law jurisdiction, deals with the balancing of the colliding values in the hope that this very different approach gives some inspiration for finding an appropriate equilibrium within Canadian defamation law. I will explain the concept and structure of German constitutional scrutiny with regard to freedom of expression. Also, I will introduce some basic features of German constitutional law such as, for instance, the indirect effect of basic rights and how the basic rights establish an objective order of values that pervades the entire legal system and, therefore, also influences the content of private law.

My intention, with regard to this chapter, is not so much to compare the Canadian and German way of balancing freedom of expression and personal reputation, but rather to demonstrate that other western liberal democratic countries have come to widely divergent conclusions. By presenting a conception of defamation law in which freedom of expression receives much

stronger protection, the reader possibly will be convinced more easily of the necessity of strengthening this right in Canadian law as well.

In Chapter five, two important decisions, *New York Times v. Sullivan* and *Theophanous v. Herald Weekly Times*, will be addressed in order to lay the groundwork for the dealing with the solution adopted by the Canadian Supreme Court in *Hill v. Church of Scientology of Toronto*. The Supreme Court of Canada referred to both of those decisions in the *Hill* case, in which it addressed for the first time the question whether the common law of defamation needs to be modified in light of the Charter.

To ensure a full comprehension of this case, I consider it necessary to give an overview of the mentioned decisions made in the U.S. and in Australia, two other common law countries, especially since they represent possible proposals for modifications to the common law of defamation.

Finally, chapter six tackles the main issues of whether Canadian defamation law indeed needs to be modified in order to comply with the Charter and what such a modification might look like.

I will introduce and examine the most important Canadian case with regard to the relationship between the competing interests, *Hill v. Church of Scientology*. My critical review of the Court's decision in this case leads me to the conviction that the Supreme Court of Canada erroneously minimized the Charter's impact on the common law of defamation. I will then discuss why, according to the Supreme Court, the Charter does not apply to court orders and the common law, and I will argue that this view is irreconcilable with the Charter itself. My conclusion is that the common law of defamation should be subject to Charter scrutiny in the same way statutory laws are, i.e. it should be tested against s.1 of the Charter.

I will also have a more general critical look at this juncture, at the law of defamation as outlined in Chapter 2. The ingredients necessary to make out a defamation action and the common law presumptions of falsity, damages and malice will be examined with regard to their consistency with the Charter, particularly with freedom of expression. I will argue that the common law of defamation has a chilling effect on free speech, that it protects the interest of reputation to a disproportionate degree, disregarding the significance of s.2(b), in sum, that it is not concerned with balancing the competing values at all.

I will take note of some of the proposals that have been made in the past to modify the common law of defamation, namely the introduction of a qualified privilege for the communication media, the actual malice standard, absolute immunity for all political discussion and the adoption of a defence of due diligence. While acknowledging the value of these proposals, I am of the opinion that they are not sufficient to secure an appropriate protection of freedom of expression. My suggestions are to do away with the presumptions of falsity, malice and damages and give the principle of fault a more significant role within the common law rules that govern defamation.

Based on the rationales that support free expression in general and defamatory speech in particular, the criticism of the law of defamation, as well as the Supreme Court's decision in *Hill*, I will conclude that the plaintiff, in all defamation cases, must establish not only that the words he complains of are defamatory, refer to him, and were published to a third person, but also that the allegations were false, indeed damaged his reputation, and that the defendant acted at least negligently in publishing the defamatory falsehoods which injured the plaintiff's reputation.

CHAPTER 1:

The two Values in Philosophical Terms

As I have already stated, it is material to ask what purposes are served by the freedom claimed, when weighing the right to freedom of expression against other interests. Moreover, it is important to find out whether the interest which comes into conflict with freedom of expression, i.e. personal reputation, is not itself a fundamental right equally worth of protection. Therefore, I will precede the analysis of the relationship between the competing interests with a description of the philosophical foundations of freedom of expression and of the significance of personal reputation.

A. The Philosophical Foundations of Freedom of Expression

Much has been said about the great importance of freedom of expression. It has been referred to as 'the matrix, the indispensable condition of nearly every other form of freedom.'[1] It has been considered as 'little less vital to man's mind and spirit than breathing is to his physical existence.'[2] It has been regarded as the 'liberty that underlies the existence of virtually all other rights and liberties.'[3] John Stuart Mill stated that 'if all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing

[1] Cardozo J. in *Palko v. Connecticut* 302 U.S. 319, at p.327 (1937).
[2] Rand J. in *Switzman v. Elbling*, [1957] S.C.R.285, at p.306; in *Boucher v. King*, [1951] S.C.R. 265 Rand J. also held (at p.288) that 'freedom on though and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life.'
[3] Daivd Lepofsky, "Towards a Purposive Approach to Freedom of Expression and its Limitations", The Cambridge Lectures 1989, Les editions Yvon Blais Inc., at p.12; Cardozo J. in *Palco v. Connecticut*, 302 U.S. 319 (1937), at para.17.

mankind.'[4] Often, freedom of expression is looked upon as the most fundamental human right and it has been the focal point for many of the most important human rights advances of modern history.

The Supreme Court of Canada has accepted three different rationales to explain why freedom of expression receives constitutional protection in s.2(b) of the Canadian Charter of Rights and Freedoms: (1) free speech constitutes a fundamental component of democracy, (2) it promotes the discovery of truth and (3) it plays an important role as an instrument of personal self-fulfilment. In *Irwin Toy*[5] the Court summarized these rationales by saying that seeking and attaining the truth is an inherently good activity, participating in social and political decision-making is to be fostered and encouraged and the diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in an essentially tolerant environment not only for the sake of those who convey a meaning but also for the sake of those to whom it is conveyed.

I. The Argument from Democracy

The argument that free speech is a necessary prerequisite for a democratic government is the most commonly recognized rationale for freedom of expression.

In the Canadian context the link between freedom of expression and the idea of democratic government is easy to explain. Prior to the Charter the Canadian Constitution did not specifically protect freedom of expression. If the courts wanted to give any protection to this freedom they had to find some basis for it in the form of government set out in the Constitution. They recognized that the value of an informed and intelligent citizenry was implicit in the choice of a parliamentary form of government.[6]

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[4] *On Liberty and Considerations on Representative Government*, (Basil Blackwell, Oxford, 1946), at p.14.
[5] [1989] 1 S.C.R. 927, at p.976.
[6] Richard Moon, "The Scope of Freedom of Expression", (1985) 23 Osgoode Hall Law Journal (1-2) 331 at p.339.

Indeed, freedom of expression had been regarded as one of the basic values of a free society before it received explicit protection by the Canadian Charter of Rights and Freedoms.[7] Pre-Charter cases focused on political expression, as it constitutes a fundamental component of democracy. Cannon J., for example, acknowledged in *Reference Alberta Legislation* that 'democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation...'[8] Similarly, Abbott J. stated in a later case that 'the right of free expression of opinion and of criticism, upon matters of public policy and public administration, and the right to discuss and debate such matters, whether they be social, economic or political, are essential to the working of a parliamentary democracy.'[9]

Historically, the tradition of liberal democracy has been linked to a theory of social contract[10] that sees the basis of the state's legitimacy in the consent of the governed. Although the state and law should provide the citizens with as much space as possible to pursue their own interests, law is still necessary as public manifestation of the common will since individuals live in conditions of interdependence and need some sort of regulation of their interactions.[11] As a consequence, individuals enter into a social contract and thereby consent to government power to secure their lives, liberty and property. But this consent is limited to the protection of rights and interests that they cannot adequately safeguard. They do not give the state authority to interfere in other domains.

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[7] See for instance *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, where McIntyre J. held at p.583 that freedom of expression is not a creature of the Charter but one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society.

[8] [1938] 2 D.L.R. 81, at p.119 (Cannon J.).

[9] *Switzman v. Elbling*, [1957] S.C.R. 285, at p.326 (Abbott J.).

[10] John Locke elaborates on the conception of consent and civil government in *Treatise of Civil Government and a Letter concerning Toleration*, (Appleton-Century-Crofts, New York, 1965).

[11] Richard F. Devlin, "Mapping Legal Theory", (1994) 32 Alberta Law Review 602, at p.610.

This idea in a way forms the basis of Meiklejohn's concept of 'self-government', government by consent.[12] According to him, a democratic government is one that is responsible to its citizenry and seeks to represent their interests. It must give people an opportunity to formulate their views on matters of public importance and to express those views to their political representatives in order to act democratically.[13] In view of this, the purpose of free speech is to give every voting member the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.[14]

Today, democracy generally is accepted as the proper way of organizing a state. It can be understood as a system which acknowledges that ultimate political power resides in the population at large, who either directly or through their elected representatives control the operation of government.[15] To realize this idea a structure is usually necessary that provides frequent and open elections with universal suffrage and with some principle of majority rule. The main feature of democracy that distinguishes it from other forms of government accordingly is that government is selected by and representative of the people and that it derives its powers from the consent of the governed.

If democracy rests finally on the choices of the citizens and on their consent, they must all be free to discuss and debate issues of public or private concern in order to actually exercise their right of consent. Without freedom of open discussion and freedom to form judgements, the

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[12] Alexander Meiklejohn, *Political Freedom*, (Harper and Brothers Publishers, New York, 1948); At p.14 he says that at the bottom of every plan of self-government is a basic agreement, in which all the citizens have joined that all matters of public policy shall be decided by corporate action, that such decisions shall be equally binding on all citizens whether they agree with them or not and that if need be they shall by due legal procedure be enforced upon anyone who refuses to conform to them. Meiklejohn's argumentation is guided by the procedure of the traditional American town meeting whose final aim is the voting of wise decisions in order to promote the welfare of the community.

[13] In Richard Moon, "The Scope of Freedom of Expression", (1985) 23 Osgoode Hall Law Review 331, at p.335.

[14] Ibid, at p.75.

public cannot truly consent to the continued rule of a government.[16] It is crucial to make all relevant information available to the citizens, to provide them with all the information they need to make their decisions. Without this full information an intelligent vote is not possible and, therefore, denying access to that information could be equated with denying the right to vote.[17]

Giving the governed freedom of expression allows them to express political opposition and encourages them to criticise government and the way in which the affairs of society are managed by the state.[18] This is particularly important since through the political process most of the immediate decisions on the survival, welfare and progress of a society are made where the state especially is tempted to repress opposition.[19] If the government could restrict expression it would be enabled to suppress such critical and dissenting views. As a consequence, the public's ability to revoke its consent and to appoint a new government, which is more representative, would be severely restrained.[20]

This rationale supports the protection of defamatory speech as well. Matters of public importance, which must be open to discussion, certainly comprise stories about political activities and the conduct of public officials. If citizens truly are to be allowed to discuss and debate such issues this must mean that they can state their actual opinion even if this will result in defamatory allegations. Political speech has a core status. Therefore, the limits of acceptable criticism must be wider in so far as politicians are concerned; the government and government officials must endure a greater degree of criticism. However, critical communications might

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[15] Frederik Schauer, *Free Speech: a philosophical Inquiry*, (Cambridge University Press, Cambridge, 1982), at pp.36.
[16] David Lepofsky, supra n.3, at p.7; Thomas Emerson, *Towards a General Theory of the First Amendment*, (Random House, New York, 1966), at p.10.
[17] Schauer, supra n.15, at p.38.
[18] Gita Honwana Welch, "The Meaning and Significance of the Freedom of Expression", in Robert Martin, *Speaking Freely* (Irwin Law, Toronto, 1999), at p.79.
[19] Emerson, supra n.16, at p.9.

easily be considered as defamatory by the courts. To seriously apply the rationale of democracy means that even defamatory criticism has to be accepted as participation in social and political decision-making.

Freedom of expression, however, is not only regarded as essential to the working of a parliamentary democracy but also serves other valuable political functions, such as the accommodation of interests, the enhancement of social stability as well as the deterrence of abuse of authority.

Government can only be brought closer to the will of its people if the latter make their views known to their representatives. Accordingly, the greater the public participation in the governing process through freedom of expression, the more responsive is a government and the better it will serve the wishes of the people.[21] The democratic machinery of government will be improved to the extent that free speech is allowed.

Closely connected to this aspect is the idea of achieving a balance between stability and change. In today's dynamic society change is inevitable since views and ideas frequently alter. Suppression of free speech might prevent social change for some time but it cannot erase thought or belief. Instead it conceals the real problems that a society is confronted with and drives opposition underground. To suppress discussion means to substitute force for reason which hinders rational judgement and promotes inflexibility. Society will be prevented from

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[20] Lepofsky, supra n.3, at p.7.

[21] Lepofsky, supra n.3, at p.7; Emerson, supra n.16, at p.10. Certainly, it could be argued that free expression does not produce an adequate reflection of the spectrum of desires and interests because the wishes of the powerful and rich will be given more voice with the result that there is a persuasive inequality, impairing the interest accommodation. However, it is never possible to assess interests in a society without any distortion. And the suppression of certain desires held by members of the privileged group would probably not result in a more accurate account of what citizens want as a whole.

adjusting to changing circumstances or from developing new ideas. The result is general stagnation. When change is finally forced on the community it will come in a more violent and radical form.[22]

It is the government's responsibility to foster change and reform in society in accordance with the public's wishes. Government has to maintain economic and social conditions under which a democratic system can operate and it is crucial that the corresponding social, economic and political reforms are implemented in a constructive and non-destabilizing way.[23]

Freedom of expression provides a framework in which change can take place without destroying society. Since free communication allows people to indicate their wishes an appropriate assessment of interests is more likely with the result that competing interests and desires can more easily be adjusted.[24] Furthermore, a process of open discussion serves to legitimate majority decisions in the minds of opponents. People who had full freedom to state their position and to persuade others to adopt it are more ready to accept a majority decision that goes against them. If they had a part in the decision-making process they recognize that they have been treated fairly and have done everything within their power.[25] Otherwise, those who disagree still have the possibility to vent their dissatisfaction and resentment in public in a non-violent manner by exercising their freedom of expression. Thus, free speech can help to achieve social stability and it promotes a peaceful progress towards an ongoing improvement.

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[22] Emerson, supra n.16, at pp.11.

[23] Lepofsky, supra n.3, at p.9; Emerson, supra n.16, at p.14.

[24] Kent Greenawalt, *Fighting Words; Individuals, Communities and Liberties of Speech*, (Princeton University Press, Princeton, New Jersey, 1995) at p.5; Thomas Emerson, *The System of Freedom of Expression*, (Random House, New York, 1970) at p.7.

[25] Kent Greenawalt, *Speech, Crime, and the Uses of Language*, (Oxford University Press, New York, 1989) at p.25; Emerson, supra n.16, at p.12; Lepofsky, supra n.3, at p.9.

Of central importance is also that free speech serves as a check on abuse of authority. Wherever choice is involved in human life people's actions partly depend on what they think will become known. If they are confident that what they do can be kept secret they are more likely to perform acts which are commonly regarded as wrong. Government authorities like everybody else in a position of power are inevitably tempted to use their power to their benefit and in corrupt ways. Elected officials, however, are very sensitive to public opinion. Being subject to public scrutiny they are less likely to yield to the temptation, i.e. the threat of exposure of their misconduct can restrain them from personal abuses of their office.[26] Therefore, freedom of expression, which enables the public to carefully scrutinize and critically discuss the conduct of public officials, makes possible holding governmental officials properly accountable to the electorate[27] and thus fosters public confidence in governmental institutions.[28]

This last aspect is particularly important with regard to defamatory expression. If a public official is reproached for certain misconduct the allegations in this connection will almost necessarily be potentially defamatory. The idea of public scrutiny as a check on abuse is conceivable only if defamatory speech is protected by freedom of expression as well.

The argument from democracy, however, only regards political expression as worthy of constitutional protection although the wording of s.2(b) suggests a much broader understanding of freedom of expression. Thus, this rationale does not account for the full scope of the right but only for a narrow sector of it.

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[26] Greenawalt, supra n.25, at p.26; detailed: Vincent Blasi, "The checking Value in First Amendment Theory", American Bar Foundation Research Journal 1977, pp.521.
[27] Greenawalt, supra n.25, at p.26; Schauer, supra n.15, at p.35.

II. Truth Discovery

Another argument to justify the protection of freedom of expression is that free speech promotes the discovery of truth and is an essential process for advancing knowledge.[29]

John Milton[30] at first brought forth the argument from truth by proceeding on the assumption that the absence of government restriction on publishing will enable society to locate truth and reject error. Later, John Stuart Mill[31] contended that if voice is given to a wide variety of views over the long run true views are more likely to emerge than if government suppresses what it deems to be false. This liberal concept has more recently been described in terms of the maintenance of a free marketplace of ideas by the American judge Holmes, who held that 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'.[32] Truth will most likely surface when all opinions may freely be expressed, when there is an open and unregulated market for the trade in ideas.[33]

The core principle of these theories is that freedom of expression is a means of identifying and accepting truth and that truth has the power to prevail in the adversary process or at least is more likely to emerge if no idea is excluded from the discussion.

The idea is that if people are exposed over a period of time to various assertions they are likely to sort out which are more nearly true.[34] On the one hand, human judgement, which is subject to emotion, prejudice or personal interest, suffers from lack of information or inadequate thinking and therefore may err. It must remain incomplete and subject to further extension or

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[28] The checking function of freedom of expression can be extended to public power in general. Judges, for instance, daily discharge important public authority. The openness of courts to public attendance ensures that judges fulfil their duties free from arbitrariness and abuse by subjecting them to pubic scrutiny.

[29] This argument is premised on the initial assumption that the search for truth is a desirable goal. But certainly a society with more knowledge is better off than one with less.

[30] In *Areopagitica* (University Tutorial Press, London, 1968; from 1644).

[31] In *On Liberty* (from 1859) supra n.4.

[32] In *Abrahams v. United States* (1919), 250 U.S. 616, at p.630.

[33] Schauer, supra n.15, at p.16.

[34] Greenawalt, supra n.25, at p.16.

modification. As a consequence, an individual who seeks knowledge and truth must hear all sides of the question, especially as presented by those who have a different opinion, in order to arrive at the most rational judgement. Accordingly, open discussion, free exchange of ideas and the freedom to criticize are necessary conditions for the effective functioning of the process of searching for truth.[35]

On the other hand, scepticism is advisable even with respect to accepted beliefs and widely acknowledged truth. As the past has shown in cases such as for instance Copernicus or Einstein, advances in human knowledge have often resulted from challenging so far unquestioned assumptions.[36] Every age has held opinions which have been deemed false by subsequent ages and certainly many views that are at present generally regarded as true will in future times be rejected.[37] Therefore, no opinion can be immune from challenge, particularly not in a constantly changing world, and discussion must be kept open no matter how widely acknowledged an opinion may seem to be.

Arguably, free expression of ideas might not indeed lead to truth. History provides enough examples where truth did not prevail, at least in the short run. However, a policy of nonregulation at least leaves open the theoretical possibility that error can be corrected and assists in promoting the truth in a way which would be impossible without freedom of expression.

Mill, as one of the early advocates of this idea, argues that the opinion which is attempted to be suppressed by authority may possibly be true or may contain a portion of truth. He continues that if the opinion is right the human race is deprived of the opportunity of exchanging error for

[35] Emerson, supra n.16, at p.7; Schauer, supra n.15, at p.15.
[36] Emerson, supra n.16, at p.8.
[37] Mill, supra n.4, at p.16.

truth and that even if a new opinion is false it should not be stifled for its presentation and the discussion about it compel a rethinking and retesting of the already accepted and attacked opinion. The collision with error leads to a clearer perception and livelier impression of truth, which results in a deeper understanding of the reasons for holding the accepted opinion and its meaning can be fully appreciated.[38]

He points out that the only justification for suppressing an opinion is that those who decide to suppress it are infallible in their judgement of the truth. If public authorities refuse to hear an opinion because they are sure this opinion is false they assume that their certainty is an absolute certainty. But no individual or group can be infallible and there is no such thing as absolute certainty; thus, all silencing of discussion is an assumption of infallibility.[39]

The difficulty of determining whether a communication is true or false also has implications for defamatory speech. Although defamatory in nature a statement still might be true and thus, the person identified in it is not entitled to be protected against it since he does not deserve a good reputation in this connection. Thus, in order to avoid the suppression of right ideas even defamatory speech should be *prima facie* protected.

In a way, Mill's line of argument supports the concept of content neutrality laid down in *Irwin Toy*[40] according to which expression cannot be excluded from the scope of s.2(b) on the basis of the content or meaning being conveyed. In view of the infallibility necessary to decide whether

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[38] Mill, supra n.4, at p.15; see also Emerson, supra n.16, at p.8.

[39] Mill, supra n.4, at p.15. With regard to this, Greenawalt (in *Fighting Words*, supra n.24, at p.5) as well as Dworkin (*Freedom's Law - the Moral Reading of the American Constitution*, Harvard University Press, Cambridge, Massachusetts, 1996, at p.204) pointed out that while human judgement in general has to be looked at with scepticism this scepticism applies even more to the motives and abilities of those to whom people grant political power. Especially where the political area is concerned government's own view of truth is to be distrusted since officials want to stay in office and promote their interests. The state's self-serving tendency motivates the state to repress speech critical of its policies. A principle of freedom of expression allows people to voice their scepticism where the power of any authority to distinguish truth from falsity is concerned.

[40] *Irwin Toy Ltd. v. Québec*, [1989] 1 S.C.R. 927, atp.969.

a communication is true or false it is preferable to protect expression independently of its content. Proceeding from this premise, defamatory content is irrelevant with respect to s.2(b) protection.

Although the confidence placed in the reasoning power of people and the faith in the ability of reason to distinguish truth from falsehood is based on a rather optimistic view of the rationality and perfectibility of humanity[41], and although an increase of knowledge can only be achieved at the expense of tolerating many unsound ideas with the risk that the public might accept false opinions despite their falsity and act in accordance with them the advantages of unregulated expression outweigh the disadvantages connected with it.[42]

Allowing free expression of opinion will increase the number of alternatives and challenges to received views. To raise the number of ideas in circulation, again, will in all probability increase the total number of correct ideas. Despite the circumstance that the public may not be able to identify most effectively the truth and sound policies, the public is very suitable for offering the multitude of ideas necessary to advance knowledge simply because of its size and diversity.[43] Therefore, the population at large holds a valuable function in the truth-seeking process.[44] Even though a 'marketplace' of ideas might not present the best solution and the population at large might not be able to discern truth, the critical question is how well truth will advance in conditions other than freedom and how far constraints on conversation imposed by the government will serve the truth. Although individuals may not be trustworthy in their evaluations it may be even more suspect to let government decide what people may hear and see. Certainly, a process of rational thinking where we listen to other (opposing) positions and

[41] Schauer, supra n.15, at p.26.
[42] Robert F. Ladenson, "A Philosophy of Free Expression and its Constitutional Applications", (Rowman and Littlefield, New Jersey, 1983) stated at p.34 that although unregulated expression of attitudes and beliefs occasionally leads to serious trouble total regulation virtually guarantees it.
[43] Schauer, supra n.15, at p.27.

consider the possibility that we might be wrong is preferable to government selecting truth and suppressing 'apparent falsehoods'.[45]

At the same time a 'marketplace of ideas' increases the total bank of knowledge in society through the acquisition of new ideas. It serves public education. Members of society profit from the aggregated information by being enabled to increase their level of education.[46] Diversity and pluralism in society will be fostered because freedom of expression allows the presentation of a multitude of opinions and ideas. This is especially important in Canada where the Canadian Charter expressly contains the commitment to the enhancement of multiculturalism in its s.27.[47] In a society with freedom of expression individuals and groups can feel free to exercise and manifest to others their cultural and ideological diversity.[48] People who all differ in their attitudes, desires, motivations and abilities can openly display their opinions and choices and therefore produce a great variety of ideas and stimulate individuals. Society may profit from this diversity because it encourages experimentation with alternative policies, life styles or governmental organizations.[49] In accordance with this idea, the Supreme Court of Canada held in *Irwin Toy*[50] that the protection of freedom of expression is 'fundamental because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.'

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[44] Schauer, supra n.15, at p.28.
[45] Schauer, supra n.15, at pp.27, 34; Greenawalt, supra n.25, at pp.20-22.
[46] Lepofsky, supra n.3, at p.11; Ronald A. Cass mentioned in "First Amendment Access to Government Facilities", (1979) 65 Va.L.Rev. 1287, at p.1311 the benefits of improved knowledge in any field.
[47] S.27 demands that the Charter 'shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians' to constitutionally ensue that Charter rights will be construed in a manner which promotes this heritage.'
[48] Lepofsky, supra n.3, at p.11.
[49] Schauer, supra n.15, at pp.66.
[50] [1989] 1 S.C.R. 927, at p.968.

Finally, it promotes tolerance to allow a broad variety of views and to acknowledge the right of everybody to speak and express their attitudes.[51] Of course the promotion of tolerance is not a primary justification for freedom of expression but in a tolerant society where people can feel free to be different there probably is a greater cohesion and a greater potential to use the existing diversity in an advantageous and innovative way.

Like the argument from democracy, the truth rationale also is under-inclusive. Often there are forms of artistic, commercial or political expression that has purposes other than the search for truth, for instance, they might intend to shock, entertain, or motivate without contributing to truth discovery. Such expression will not be covered by the argument from truth.

III. Freedom of Expression and Individuality

The above-described arguments from democracy and truth value open communication for what it does, for its positive effects.[52] They treat free speech as a means, for instance a means of ensuring the proper functioning of a democratic state or as a means of identifying truth, and not as an end in itself. Emphasis is on the interests of and the benefits to society as a whole rather than on concerns for the well-being of individuals[53] and the values that underlie those previous arguments are more social than individual. The following groups of arguments, on the other hand, focus on free speech as an autonomous value and on the individual as such. For instance, they regard the individual's capacity and freedom to form one's own views, impressions and opinions and to discuss these with others without restraint or fear of official scrutiny or censorship as a pre-requisite to one's growth, maturation and self-fulfilment.[54] Here expression is seen as being of intrinsic worth to the individual, an important element of individual

[51] Greenawalt, supra n.25, at p.29.
[52] This is what Greenawalt refers to as consequentialist justifications for free speech.
[53] Schauer, supra n.15, at p.47.

autonomy and self-realization. Individual well-being is regarded as an end in itself.

One argument for freedom of expression in this category is based on the conception of individual autonomy. To begin with, communication is fundamental to human existence. It is important for the welfare of the individual to have the opportunity of relating to others and exchanging ideas with others.[55] While the state may legitimately exercise power within its domain there is a sphere that belongs to the individual himself, a private area that concerns matters which are not the government's business. It is the private domain of the mind that is under the exclusive control of the individual and beyond the reach of state power. In this area the individual is truly autonomous.[56]

As a consequence, the individual should be free to articulate his own judgements on circumstances and persons and to communicate them to others even if they might be defamatory in nature.

Scanlon characterizes autonomy as making one's own choices and not being subject to the dictates of others in one's decisions. It means a capacity in the individual to make judgements and to give intelligent direction to his life. An autonomous person cannot accept without independent consideration the judgement of others as to what he should believe or what he should do.[57] Therefore, in order to regard himself as autonomous, a person must see himself as sovereign in making his decisions. In all matters of choice the ultimate choice has to rest with

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[54] Lepofsky, supra n.3, at p11.

[55] The German writer Thomas Mann (1875-1955) observed that speech is civilization itself and the word, even the most contradictory word, preserves contact - it is silence which isolates. And George Orwell described in 1984 (from 1949) how the individual becomes a prisoner within his body and mind as a result of official monitoring of his thoughts, beliefs and speech.

[56] Schauer, supra n.15, at p.68.

[57] Thomas Scanlon, "A Theory of Expression", Philosophy and Public Affairs, vol.I (1971), 203, printed in Schauer, *The Philosophy of Law*, (Hartcourt Brace College Publishers, Philadelphia, 1996) 356, at p.364.

the individual.[58]

The premise of Scanlon's argument for freedom of expression is that the powers of the state are limited to those that citizens can recognize while still regarding themselves as equal, autonomous and rational agents.[59] The government is morally bound to respect the autonomy of individuals and has to treat them as capable of making decisions for themselves and of forming intelligent conceptions of how their lives should be lived.

Therefore, it is necessary that an individual's decision ought to be as informed and intelligent as possible.[60] Freedom of choice requires a free flow of information to the individual. The individual has a right to receive this information and, beyond it, without governmental intrusion into the process of choice, i.e. government ought not to restrict it. If government tries to prevent an individual from receiving information and ideas from others on the grounds that it believes he is not capable of making judgements for himself and because it wants to protect him from coming to have false beliefs it fails to show this individual the required respect. In that case government does not recognize the individual's autonomy. Especially in questions of faith, matters of moral religious or philosophic doctrine, it is obvious that the state has no authority to ultimately make decisions for individuals. Therefore, the state has no mandate to limit the information upon which a choice may be made by the individual for the individual. Governmental prohibition in that respect interferes with the individual's exercise of autonomy whereas allowing all ideas to be expressed fosters individualism and freedom of choice. Thus, freedom of expression is thought to promote autonomy because it affords people the opportunity to hear competing positions and to explore options in conversations with others and thereby supports and encourages independent judgement and considered decisions.

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[58] For example, when the law requires or prohibits a certain action the autonomous individual can still decide whether to obey the law or to violate it and take the consequences.

[59] Scanlon, supra n.57, at p.363.

The idea that an individual's decision ought to be as informed as possible in order to promote his autonomy resembles the concept of the citizens' consent as described within the argument of democracy, but on a more general level. This idea similarly supports the protection of defamatory expression: It is an end in itself (and essential for autonomy) to communicate your own opinion and to receive the opinion of others. To listen to communications which a court at trial regards as defamatory also contributes to the forming of an opinion and the making of a decision. In case the allegations are false they may certainly have negative effects with the result that the reputational interests of the person concerned should prevail in the end. However, it is possible that the imputations are true, in which case their expression can be helpful for the decision-making process of their recipient. For this reason, speech which is defamatory should not *per se* be excluded from the constitutional protection of expression. Otherwise, communications important for the process by which persons consciously choose from among alternatives might be suppressed.

One positive effect of such personal autonomy is that individuals who decide for themselves usually act and live in a better way than those who passively submit to authority. For instance, if people work out a style of life for themselves, their life is probably more fulfilling than one that they would achieve by simply confirming to standards set by others.[61] Apart from this, society at large and the state itself may benefit from the satisfaction of individual interests. As John Stuart Mill already observed: the worth of a State, in the long run, is the worth of the individuals composing it and with small men no great thing can really be accomplished. Mill is convinced that the human race collectively and over the long run benefits from cultivation of individuality and believes that the more one's individuality is developed the more valuable one becomes

[60] Schauer, supra n.15, at p.69; In *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 323, a case that dealt with commercial expression, the Supreme Court of Canada noted that enhancing the ability to make informed choices is an important public interest.

oneself, and therefore, the more potentially valuable one becomes to others.[62]

Similar to the concept of autonomy is that of self-development which proceeds from the assumption that the achievement of self-realization commences with development of the mind. The basis of this concept is the premise that the proper end of man is the realization of his character and potentialities as a human being. Man's faculties of reason and thinking are the core of self-development since they distinguish humanity from other forms of animal life. Through the development of man's powers such as the capacity to think in abstract terms, to use language and to communicate his thoughts and emotions, man finds his meaning and place in the world and the fullest use of these powers is his ultimate goal.[63]

The process of intellectual self-development, however, can only operate effectively when there is communication of thoughts and beliefs and the exchange of different ideas since minds do not develop in a vacuum or in isolation. Characteristically human capacities such as rational thought, moral judgement and emotional attachment can only develop by means of social interaction. A society of some kind and communication with one another are essential if individuals are to develop as thinking beings.[64]

It happens, for example, that a person has a certain train of thought which does not fully develop and become clear until it has to be articulated to someone else in an intelligible form. Communication enables the speaker to better understand his own thoughts, to clarify and to give

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[61] Greenawalt, supra n.25, at p.32.

[62] However, this theory does not mean that freedom of expression will actually produce fully autonomous individuals. The claim is that people will be more autonomous under these circumstances than under a regime of substantial suppression. Regarding societies in history shows that comparative autonomy of individuals is linked to relative freedom of opinion. But regardless of whether free speech actually promotes autonomy and rational decision, at any rate, to grant this liberty constitutes a public recognition of people as autonomous. (Greenawalt, supra n.25, at p.27; as well as in *Fighting Words*, supra n.24, at p.5).

[63] Emerson, supra n.16, at p.4; Schauer, supra n.15, at p.54.

[64] Richard Moon, "The Scope of Freedom of Expression", 23 Osgoode Hall Law Journal (1-2), 1985, 331, at pp.346.

form to them. At the same time, it is advantageous to the recipient to receive and assess the information presented to him. He benefits from the knowledge that others share with him. He may, for instance, not have imagined a certain possibility which has been suggested to him by another person and, thus, is made aware of having choices. His capacity for thought and his self-development are furthered as well.[65] Thus, freedom to communicate is a vital aspect of the development of one's personality and integrity.

In connection with freedom of expression, the aspect of human dignity also needs to be mentioned. The willingness of others to listen to what one has to say generates self-respect. It is a sign of respect to acknowledge that the choices of one individual are as worthy as those of anyone else. When a person's ideas are suppressed society is saying that his ideas are not worthy, that they are not as good as those of most other people. Censorship is degrading and conveys the impression of undesirability or inferiority of the beliefs concerned. There is something particularly dehumanizing about telling a person that he cannot communicate his beliefs; to deny someone the respect of listening to what he has to say or to exclude him from the possibility of speaking is to deprive him of his dignity. And since the expression of beliefs and feelings are closely tied to one's personality, restriction of expression may offend one's sense of dignity to an even greater degree than other restrictions. According to this view, suppression of belief, opinion and expression is an affront to the dignity of the individual and a negation of man's essential nature.[66]

At the same time, to suppress certain beliefs is like treating the person who firmly holds them as an unequal member of society because his ideas are regarded as not being of equal value with everyone else's ideas. To favour some points of views over others and to impose selective

[65] Moon, ibid, at pp.352; Schauer, supra n.15, at p.55.
[66] Emerson, supra n.16, at p.5; Greenawalt, supra n.25, at p.28, 33f; Schauer, supra n.15, at p.62.

restrictions based on the content of ideas infringes the principle of equality.[67]

However, the argument that free expression is a pre-requisite for autonomy or individual self-fulfilment is in danger of being a general argument for individual liberty without actually explaining why expression, in contrast to other self-fulfilling activities, deserves special constitutional protection.

IV. Final Remarks

All the above-mentioned arguments have distinct values but are nevertheless interdependent and linked to each other. Certainly, each of the concepts has its flaws and weaknesses. No one rationale alone is likely to be adequate or to give an independent argument for the principle of free expression. (The arguments from democracy and from truth, for instance, do not account for the full scope of freedom of expression, while the arguments referring to individual self-fulfilment or autonomy are said to be over-inclusive.) However, there is no need to adopt just one justification. The different justifications may assume various degrees of importance depending on the circumstances of the situation. Even though one theory in itself might not be sufficient to justify freedom of expression all of them collectively create significant support for this fundamental right.

B. The Significance of an Individual's Reputation

The reputation of a person is the esteem in which he is held, or the goodwill entertained towards him, or the confidence reposed in him by other persons, whether in respect of his personal character, his private or domestic life, his public, social, professional, or business qualifications,

[67] Schauer, supra n.15, at p.63; Greenawalt, supra n.25, at p.33.

qualities, competence, dealings, conduct, or status, or his financial credit.[68] A good reputation is built up by a lifetime of conduct and its possession is conducive to happiness in life and contentment. The loss of it brings shame, misery and heartache. It is not like material things in life that one may have today, lose tomorrow and repossess again the next day. Once lost, it is practically impossible to be regained.[69]

In the words of William Shakespeare, 'spotless reputation' is 'the purest treasure mortal times afford; that away, men are but gilded loam or painted clay'.[70] And according to Steward J.[71] 'The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty.'

Reputation is and always has been regarded as an important value which the law must protect. It has been described as the fundamental foundation on which people are able to interact with each other in social environments[72], as the most dearly prized attribute of civilized man[73] and as a measure of the cultural and democratic quality of a society. [74] Some form of legal or social constraints on defamatory publications is to be found in all stages of civilization, however imperfect, remote and proximate to barbarism.[75]

I. Historical Protection of Reputation

The interest of persons in protecting their good reputation was acknowledged early in the development of the common law and it continues to receive strong protection under the tort of defamation. However, society's recognition of how vulnerable reputation is and how easily a

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[68] Spencer Bower, *Bower on Actionable Defamation*, 2nd ed. (Butterworths, London, 1923), at p.3.
[69] *O'Donnell v. Philadelphia Record Co.*, 356 Pa. 307, 51 A 2d 775 (1947); 319a-320a, by Gordon J.
[70] Shakespeare, 1564 - 1616, in *Richard II.*
[71] *Rosenblatt v. Baer,* 383 U.S. 75, at p.92 (1966).
[72] David Lepofsky, "Making Sense of the Libel Chill Debate: do Libels 'chill' the Exercise of Freedom of Expression?", (1994) 4 N.J.C.L. 169, at p. 197.
[73] John Fleming, *The Law of Torts*, 9th ed. (LBC, Toronto, 1998), at p.580.
[74] Raymond Brown, *The Law of Defamation in Canada*, Vol.I, (Carswell, Toronto, 1987), at p.4.

false statement about a person can occasion damage traces back to times long before the common law of defamation. Originally, the common law derives from the Bible, the Mosaic code and the Talmud, a collection of sayings of the Jewish rabbis covering the first six centuries after Christ.[76] In the Mosaic code[77] for example, which existed some fifteen centuries before the Christian era, it says in *Exodus* XXIII 1 'Thou shalt not raise a false report: put not thine hand with the wicked to be an unrighteous witness'. The Bible, for instance, referred to reputation in Ecclesiastes[78] by stating that 'a good name is better than precious ointment' and that 'a good name is rather to be chosen than great riches'.[79]

The offence of making a false statement, which is likely to injure the reputation of another, has always been regarded as a serious one. Under Roman law, at the time of the Decemvirs (450 BC), written defamation was actually punishable by death. Further measures of punishment during the Roman era varied from the loss of the right to make a will, to imprisonment, exile for life, or forfeiture of property. In the case of slander, a person could be made liable for payment of damages.[80] The Anglo-Saxons likewise imposed a form of brutal punishment known as *Lex Talionis*, which remained in force until the end of the reign of King Canute (1016-39). Under this law it was decreed that if a man was found guilty of slander his tongue should be removed.[81] These severe sanctions illustrate the importance that has always been placed upon reputation.

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[75] Ibid, at p.4.
[76] Peter Frederick Carter-Ruck, *Carter-Ruck on Libel and Slander*, (3rd ed., Butterworths, London, 1985), at p.16.
[77] The laws of Judaea.
[78] Chapter 7, verse 1.
[79] Proverbs 22:1 in the Bible.
[80] Carter-Ruck, supra n.76, at p.17.
[81] Carter-Ruck, supra n.76, at p.18.

II. Value and Importance of Reputation

Although a good reputation is regarded as an integral and fundamentally important aspect of every individual it does not expressly receive protection by the Canadian Charter. The common law, on the other hand, acknowledging reputation as an inherent personal right, explicitly places the character and good name of individuals under protection by means of the tort of defamation. This law serves to protect various values connected with the individual's good reputation.

1. Dignitary Value and Privacy

First, one's reputation is a core feature of one's personal dignity and worth as a human being. Accordingly, reputation was given quasi-constitutional status as a reflection of the interest in individual dignity and privacy in *Hill v. Church of Scientology of Toronto*[82], where the Supreme Court of Canada dealt with the assessment of reputation in detail.

After stressing that democracy has recognized the fundamental importance of an individual and that this importance must be based upon the good repute of a person, the Court stated that a democratic society has an interest in ensuring that its members can enjoy and protect their good reputation. The Court held that a good reputation is closely related to the innate worthiness and dignity of the individual, and that it represents and reflects this innate dignity, a concept that underlies all the Charter rights.

That the individual's good name is considered to be an interest involving personality and human dignity also is made clear by the fact that in many actions for defamation a substantial award for damages is permitted even if there is no evidence of any monetary loss. In that case, protection is provided to the 'personality-aspect' of reputation.[83] With regard to this, the American judge Powell explained that 'actual injury is not limited to out-of-pocket loss. Indeed, the more

customary types of actual harm inflicted by defamatory falsehoods include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.'[84]

In emphasizing the importance of reputation, the Supreme Court went even further in *Hill* by pointing out the intimate relationship of reputation and the right to privacy, which has been accorded constitutional protection in s.8 of the Charter. (Privacy, in this respect, was said to be grounded in man's physical and moral autonomy and to be essential for the well-being of the individual. Also, the invasion of privacy can be particularly destructive if carried out by media establishments because of the power of the broadcast media to formulate and plant impressions in the minds of members of the audience.[85])

However, the court correspondingly concluded that the publication of defamatory comments not only is an affront to the individual's dignity but also constitutes an invasion of this individual's personal privacy. [86]

The Court's decision probably follows from the realization that the human being is foremost a social animal, designed to live in an intensively interactive society and not in isolation. The interaction with others, with family, friends and the public at large, is the basis for joy, secure accomplishments and growth as individuals, and its foundation is one's reputation.[87] Social relations, however, can be severely undermined by a bad reputation. In this respect, 'character assassination' deprives the individual of his social environment and has been said to be the worst

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[82] (1995) 26 D.L.R. (4th) 129, at pp.160.
[83] Laurence H. Eldredge, *The Law of Defamation*, (Bobbs-Merill Co., Indianapolis, 1978), at p.2.
[84] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, at p.350.
[85] Lepofsky, supra n.72, at p.198.
[86] Ibid, at pp.160, 163, 164; for privacy also Eldredge, supra n.83, at p.3.
[87] Lepofsky, supra n.72, at p.197.

that can be done to him apart from murder, bodily harm and robbery of all his possessions.[88] The consequences of spreading defamatory allegations can be serious and include numerous social behaviour mechanisms. For instance, the defamation can lead to stigmatisation of the person concerned, to withdrawal of social recognition, to social isolation and fundamental loss of assurance and self-devaluation.[89] The defamed individual practically has no possibility to liberate himself from the disgrace and isolation following the attack. This is sometimes a sufficient reason to retire from one's professional and public life, to leave one's home or even commit suicide.[90] The free development of the personality is thereby permanently impeded.

A person is strongly affected by what he believes other people think of him. The regard of those about him more completely conditions his behaviour than any other one factor and it likewise adds more to his stature as a person than any other one factor.[91] Someone who thinks that he appears to be ridiculous in the eyes of others can suffer an agony of emotional distress which may be even stronger than the pain from physical injury.[92] Numerous subjective harms can be involved in injury to reputation, such as hurt feelings, anxieties worthy of psychiatric concern, or bodily hurts to be treated by other medical means, i.e. it can be a major source of severe psychological stress to undermine someone's capacity to operate in a social environment.

Besides actual economic deprivations and loss of power and influence, the individual above all suffers from the loss of love and affection, respect for and from others as well as possible self respect, potential for self and social fulfilment, generally a loss of status, or, specifically a loss of some enjoyed or enjoyable relationships with others.[93] In view of this it can be said that reputation serves the important purpose of fostering an individual's self-image and sense of self-

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[88] Martin Kriele, "Ehrschutz und Meinungsfreiheit", NJW 1994, 1897.
[89] BVerfGE 97, 391.
[90] Kriele, supra n.88, at p.1897.
[91] Eldredge, supra n.83, at p.12.
[92] Eldredge, supra n.83, at p.11.
[93] Walter Probert, "Defamation: A Camouflage of Psychic Interests: The Beginning of behavioural Analysis", (1962) 15 Vand. L. Rev. 1173, at p.1174.

worth.

Thus, since a person's standing in the community with his friends neighbours and prospective acquaintances is of great value he is entitled to have his relations with him unimpaired by defamatory harms.[94]

2. Economic Value

Apart from having this dignitary value, reputation also has economic worth. This aspect of the interest in reputation is primarily a property interest; it refers to the monetary value of a good name. Reputation plays an important role in achieving and maintaining personal status, prestige and power in society and as a foundation for success in a professional career.[95] A person with a poor reputation, for example, will encounter difficulty finding and keeping a job and gaining a livelihood since a bad reputation is a deterrent in obtaining almost any kind of lawful employment.[96] Attacks on an individual's reputation can generate extensive economic damage, especially in a time when modern systems of mass communication have the power to disseminate defamatory statements to a vast number of persons. Such attacks destroy the individual's efforts and labour carried out to earn a good reputation, for instance to become known as creditworthy or to achieve a name for quality workmanship. This is particularly serious since such repute is only built up and established slowly by integrity, honourable conduct and right living but is easy and quickly ruined.

To understand how easily reputation can be harmed in an economic sense one only has to contemplate the following. In a state of civil society, where people are bound together in a system of mutual aid, trust and confidence, each individual, considered as a single and isolated

[94] Eldredge, supra n.83, at p.12.
[95] Philip Osborne, *The Law of Torts* (Irwin Law, Toronto, 2000), at p.354.
[96] Allen M. Linden, *Canadian Tort Law*, 6th ed. (Butterworths, Toronto, Vancouver, 1997), at p.657.

being, is weak and depends on others for the comforts as well as for the necessaries of life, for security of person and property. For example, people have to trust their physicians in time of sickness or their lawyer when confronted with legal problems.[97] When it is necessary for a person to select an agent to help him in the varied connections of life he might not be able to properly exercise his power of selection on his mere personal knowledge, founded on his own actual experience. In all probability, he will place some reliance on the knowledge and information of others with respect to the abilities, skills, diligence, integrity and honour of another person whom he is interested to employ. From these united experiences of others he derives a general character of a certain person.[98]

But this character is susceptible of injury. The report of one single unworthy or dishonourable act can at once be fatal and destroy a good reputation. Even a suspicion of such an act may lead to evil consequences. A person who is about to deposit a large amount of money in the responsibility of a banker, for instance, will certainly be influenced by an report he casually hears, saying that this particular banker went bankrupt. He might not be able to verify or refute this report to his satisfaction and the natural result will be that he chooses some other institution. Others who hear of this account will act accordingly and, thus, a false alarm might be adequate to the destruction of credit and consequent ruin.[99] This example illustrates the economic dangers existing with respect to reputation.

3. Further Values

One more argument made in favour of the protection of reputation is that this protection will foster the freedom of expression of libel victims. As a consequence of being seriously libelled, the victim's credibility in the community might be so substantially undermined that it impairs

[97] Henry Coleman/Thomas Starkie, *Folkard on Slander and Libel*, (5th ed., Butterworths, London, 1891), at p.11.
[98] Ibid, at p.12.
[99] Ibid, at p.13.

his ability to have others listen to him or take him seriously. The law of defamation, by protecting the victim's reputation, can counteract such impairment and therefore serves the value of freedom of expression.[100]

Another point of view is, that protecting reputation is fundamental for democracy. The reason suggested is that persons who are more sensitive might be deterred from entering the political and public arena for fear of being exposed to campaigns of defamation without being offered adequate protection. Since those who are sensitive concerning their honour and reputation allegedly are the ones with an especially strong sense of justice and truth whose participation in the democratic life would be particularly desirable, their deterrence results in an intellectual and moral loss of quality in democracy.[101]

III. Final Remarks

It has been said that 'the right of every man to the character and reputation which his conduct deserves, stands on the same footing with his rights to the enjoyment of his life, liberty, health, property and all the comforts and advantages which appertain to a state of civil society, inasmuch as security of character and reputation are essential to the enjoyment of every other right and privilege incident to such a state.'[102] Only in possession of a good reputation can a person enjoy the great charm of social life, which is constituted by the reciprocation of good offices, of mutual aid and friendship. The importance of protecting the individual's reputation has to be kept in mind when balancing this value and conflicting interests.

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[100] Lepofsky, supra n.72, at p.200.
[101] Kriele, supra n.88, at p.1998.
[102] 'Folkard', supra n.97, at p.14.

CHAPTER 2:

The pre-Charter Law of Defamation

This chapter gives a neutral overview of the common law of defamation as the source of law that protects the interest in personal reputation, on of the competing values this thesis deals with. At this point I will disregard constitutional considerations with respect to defamation law but rather outline its general framework, structure and functioning to ensure a better understanding of the critical assessment of this particular common law rule, which will follow in chapter six.

A. Historical Development of the Law of Defamation

The common law of defamation is not the deliberate product of any period but rather an evolutionary creation, a mass, which has grown by aggregation with very little intervention from legislatures.[1] It was influenced by Roman law, partly stems from the Anglo-Saxons and is in part based upon common law and statute.

The early common law consisted merely of a series of exceptions to entire license of speech and therefore was a process of selection. In the seventeenth century the invention of the printing press prompted its development and led to the formal distinction between libel and slander that does still exist. To generalize, the written, more permanent form of defamation is considered to be libel, which is actionable per se, that is, actionable without proof of temporal loss. Slander, on the other hand, is spoken defamation and in order to recover for slander the plaintiff must plead and prove special damages.[2]

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[1] In the meantime each province and territory has enacted its own Libel and Slander or Defamation Acts such as for instance the Libel and Slander Act, R.S.B.C. 1979, c.234 in British Columbia.

[2] That is, unless the slanderous imputation is actionable *per se* by way of exception. Certain categories were established that are treated in the same way as libel: the imputation of a crime, the allegation of someone suffering

In the middle ages, defamation, at that time only slander, was one of the most common torts brought before the local courts.[3] Before the Norman Conquest in 1066 both secular and spiritual officials tried their cases in these local, or seigniorial courts. Then, as a result of the separation of spiritual and temporal courts by William the Conqueror, ecclesiastical courts were established which administered only the canon law. Since the Church claimed the power to correct the sinner for his soul's health, ordinary cases of defamation at first fell within the ecclesiastical jurisdiction.[4] But the Church's penance was little calculated to satisfy victims of defamation. Apart from that, the tyranny and corruption of the ecclesiastical courts aroused antipathy. This, as well as the growing power of the king's courts, contributed to the decline in importance of the ecclesiastical courts. Eventually, the common law courts took upon themselves to administer and enforce the whole law of the land. Actions for defamation, however, only became common in these courts late in the sixteenth century.[5]

In 1275 the statutory offence known as *De Scandalis Magnatum*, slander of magnates, was enacted. It marked the beginning of a series of statutes which had a significant bearing upon the law of defamation. These statutes were criminal in character. Their purpose was to preserve the peace and to protect prominent people of high positions, i.e. they were directed rather against sedition, political scandal and turbulence than against defamation.[6]

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from a contagious decease (which is likely to cause social rejection) and accusations affecting the plaintiff in his professional capacity, i.e. in his business, trade, profession or office.

[3] R.C. Donnelly, "History of Defamation", [1949] Wisc. L. Rev. 99, at p.100.

[4] Van Veechten Veeder, "The History and Theory of the Law of Defamation", (1903) 3 Colum. L. Rev. 546, at pp.550; Donnelly, supra n.3, at p.104. There, defamation was punished as a sin; its penance was an acknowledgement of the baselessness of the imputation usually required to be performed in public and an apology to God as well as to the person defamed.

[5] Peter Frederick Carter-Ruck, *Carter-Ruck on Libel and Slander*, (3rd ed., Butterworths, London, 1985), at p.19; Veeder, supra n.4, at p.552; Donnelly, supra n.3, at p.106.

[6] Veeder, supra n.4, at pp.553; Carter-Ruck, supra n.5, at p.19.

These statutes were administered by the Star Chamber, a tribunal composed of the highest dignitaries of Church and State.[7] The Star Chamber exercised practically unlimited authority, i.e. was a court with unrestrained power, bound by no rules of evidence. It was determined to get rid of duelling, a still common method of vindication, and therefore the law of defamation began to develop quickly in order to provide a substitute for this ancient remedy.[8] At any rate, the Star Chamber did not concern itself with personal character but with public order.

There was as yet no distinction at common law between slander and libel. In view of the general illiteracy of the population, defamatory writing was not widespread and therefore rather harmless. But the invention of the printing press changed the situation. An uncontrolled press was immediately perceived as a serious threat to the public order and the Crown, and from the very beginning Church and State alike assumed to control the press. Political and religious discussion was suppressed with the utmost severity. The printing of unlicensed works was punished severely, and printing was further restrained by patents and monopolies. The number of presses and the whole matter of printing were strictly limited. But all repressive measures, as well as the civil action for defamation, were found to be inadequate to sufficiently suppress the rising tide of public opinion.[9]

In view of this, the Star Chamber imported the Roman criminal law and first set it forth in the case De *Libellis Famosis* in 1609. This case was the formal starting point of the English law of libel. The period between his case and the abolition of the Star Chamber in 1641 was the period during which the foundation of the modern law of libel was laid.[10]

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[7] The Star Chamber consisted of the chancellor, treasurer, lord pivy seal, a bishop, a temporal lord, and the two chief justices. Later the president of the pivy council was added.
[8] Donnelly, supra n.3, at p.113; Carter-Ruck, supra n.5, at p.20; Veeder, supra n.4, at p.562.
[9] Veeder, supra n.4, at pp.561, 568; Donnelly, supra n.3, at pp.117.
[10] Donnelly, supra n.3, at p.118; Veeder, supra n.4, at p.566.

The Roman law had two sets of provisions for defamation, the comparatively mild law of *injuria* and the severe provisions of the *libellus famosus*.[11] Libellous songs[12], which fell within the latter category, were punished as a crime. The Roman *libellus famosus* was not based upon the form of the publication but upon the character of the matter published, the extent of its diffusion and its anonymous nature, i.e. there was no distinction between speech and writing.[13] But the Star Chamber adopted provisions of this law without regard to Roman limitations. The Star Chamber introduced a new kind of actionable defamation based upon mere form and furnished it with certain additions, such as the principle that libel is punishable as a crime because it tends to a breach of peace, in order to apply the law to its own use.[14] This principle of criminal libel aimed directly at printing and was an instrument of suppression. Thus, the Roman law of the *libellus famosus* became part of the English common law.

The Star Chamber began to punish the crime of political libel, i.e. at first, the formal distinction between spoken and written word concerning defamation of a political kind. But then the Star Chamber extended its jurisdiction to non-political libels. Eventually, the distinction between libel and slander was introduced into civil law and finally, tort damages were awarded to the person defamed.[15] The presumption of damages in case of a defamatory writing added yet another means of censorship.

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[11] Veeder, supra n.4, at p.563.

[12] For centuries the song and ballad writers were the only spokesmen of the people in political affairs. They gave voice to popular criticism, discontent and rejoicing. The music added its own significance; Veeder, supra n.4, at p.554.

[13] Veeder, supra n.4, at pp.563-565.

[14] Veeder, supra n.4, at pp.566, 567; Donnelly, supra n.3, at p.118.

B. The Current Law of Defamation

I. The General Framework of the Law of Defamation

Defamation is essentially a strict liability tort. The defendant's liability exists regardless of his intention to make a defamatory statement. It is of no relevance whether the defendant was aware of the defamatory meaning the statement conveyed or if he took reasonable care to ensure that it was not defamatory. Finally, it does not make any difference whether he intended to refer to the plaintiff, or to cause him any damage if in fact he did. The only exception, where intention or negligence on the part of the defendant is necessary, concerns the act of publishing the defamatory communication since the fact of publication alone is actionable. So whatever someone publishes he publishes at his own risk.

The plaintiff has to establish three things to make out a prima facie cause of action. The material he complains about must be defamatory, it must refer to the plaintiff and it must be published to a third person. Once it is established that defamatory words were published of the plaintiff the burden shifts to the defendant who can maintain that one of the common law defences applies in the case. In this respect, a defamatory statement is not actionable if it for example constitutes the truth, is privileged or is fair comment etc. The defences are very important and central to most defamation litigation. They have the function of balancing the values of reputation and freedom of expression, i.e. they 'give substance to the principle of freedom of expression'.[16]

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[15] Donnelly, supra n.3, at p.118; For the first time the distinction between libel and slander in civil action was drawn in *King v. Lake* (1670), 145 E.R. 552 and it was finally settled in *Thorley v. Kerry* (1812) 128 E.R. 367.

II. The Defamation Action

1. A Defamatory Statement

First of all, regardless of the form of publication, the utterance complained of has to be defamatory. As long as those to whom it is published do not understand the communication in a defamatory sense there will be no cause of action. In general a defamatory statement may be defined as one that tends to lower the esteem or respect in which a person is held by others in the community or as 'publication, which tends to injure reputation in the popular sense'.

There is no ultimate test to determine whether a communication is defamatory. Instead there exist a variety of views as to how to define the term 'defamatory'. One classic judicial formula describes defamation as 'calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule or causes him to be shunned or avoided'.[17] In another case[18] the definition 'false statement about a man to his discredit' was offered. But there is no single definition that is precise enough to capture every aspect of libel without including too much or omitting something that ought to be included. At any rate, the communication has to tend so to harm the reputation of a person as to diminish the respect and confidence in which others hold this person.[19]

Of course defamation is not limited to an individual's private sphere like a person's reputation for honour, honesty or integrity. Included are also disparagements of someone's reputation in

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[16] Dickson J. in *Chernesky v. Armadale Publishers Ltd.*, (1978), 90 D.L.R. (3rd) 321, at p.343.
[17] *Parmiter v. Coupland* (1860), 6 M. & W. 105, at p.108.
[18] *Scott v. Sampson* (1882), 8 Q.B.D. 491, at p.503.
[19] In *Murphy v. LaMarsh*[19][(1970), 73 W.W.R. 114, at p.118] Wilson C.J. tried to illustrate this understanding by suggesting that it is defamatory to attribute a shameful action, character, course of action or condition to a man such as accusing him of having stolen something, being dishonest, living on the avails of prostitution or having the pox. For example it has been held to be defamatory to suggest that someone permits immorality to be practised by others, that someone has engaged in conduct that is disgraceful or unlawful, or that a person lacks integrity. Actionable is also to say someone is bankrupt or insolvent or to accuse a person of misusing or abusing a position of trust. It was even held to be defamatory to call someone drunk or hideously ugly, or suggest he is a homosexual.

business, trade, profession or office.[20] However, the manner and surrounding circumstances in which the words are spoken play an important role in deciding whether an utterance can be regarded as defamatory.[21]

Since one's reputation is regarded as a 'personal' attribute, only defamation of living people is actionable. Injured relatives or friends, who neither have a derivative cause of action nor a direct claim for injury to their feelings, [22] cannot bring forward an action for defamation of a deceased person unless they are personally defamed.

Apart from that, non-natural persons may also be entitled to recover damages. The business interests or goodwill of a corporation certainly can be damaged by defamatory attacks such as imputation of insolvency or dishonest conduct of their affairs. Thus, a corporation may sue for defamation as long as the defamation has been directed against its 'business character' and not only against the individuals associated with it.[23]

Another question is that of what standard to apply to determine whether a statement is defamatory. The people that have to think less of the person concerned are commonly referred to as 'the right-thinking members of society'[24] or as the 'reasonable or ordinary members of the public'[25], which is problematical in so far as an increasing diversity of views and attitudes exists in modern and multicultural society, making it difficult to determine a single standard of 'right-

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[20] Therefore it is defamatory to accuse someone of incompetence or to imply a lack of creditworthiness. In *Caldwell v. McBride* [(1988), 45 C.C.L.T. 150] it was even held to be defamatory to accuse a professional gambler of cheating with the explanation this accusation was injurious to his professional reputation and would disrupt his source of income.

[21] So for instance statements of abuse or insulting name-calling made in anger might not be perceived as being defamatory if the speaker intended to abuse and is so understood by the hearer, e.g. it makes a difference whether someone deliberately makes an insulting remark or lets himself be carried away in a quarrel.

[22] John G. Fleming, *The Law of Torts*, (LBC, Toronto, 1998) says at p.585 that 'defamation does not survive for the benefit of the plaintiff's estate.'

[23] *Price v. Chicoutimi Pulp Co.*, (1915) 23 D.L.R. 116, at p.122 (S.C.C.).

[24] *Sim v. Stretch*, [1936] 2 All E.R. 1237, at p.1240.

[25] *Color Your World Corp. v. Canadian Broadcasting Corp.* (1998), 38 O.R. (3rd) 97 at 106.

thinking' or 'ordinary'. The question whether a person is liable cannot only depend on the view of a majority.[26] A statement can also be defamatory if it tends to lower a person in the estimation of members of a segment of society as long as it concerns the estimation of a substantial and respectable segment of society, i.e. the views of minorities are to be taken into consideration. However, the courts restrict this to what those of 'fair average intelligence'[27] would think, or 'ordinary decent folk in the community, taken in general'.[28]

The words complained of often can be understood in different senses, one being defamatory but the other innocent. Decisive is the meaning which would be reasonably attributed to the words by ordinary sensible people, without special knowledge, who are neither unusually suspicious nor unusually naïve[29] on condition that they are capable of understanding the publication in a defamatory sense. It is the natural and ordinary meaning that is given to words in a defamatory publication; 'what the ordinary man would infer without special knowledge'.[30] This includes implications, which a reasonable reader guided by general knowledge would draw from the words.[31] Apart from this, the publication is to be seen in its context and taken as a whole, not the offending part isolated. The circumstances in which a communication is made, time and place or even the speaker's tone of voice, accompanying gestures or facial expressions, may make a difference. They may reveal that words, which seemed to be defamatory at first glance in fact, are innocent.

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[26] See *Peck v. Tribune Co.* (1909), 214 U.S. 185, at p.190; *Quigley v. Creation Ltd.*, [1971] I.R. 269, at p.272.
[27] *Slayter v. Daily Telegraph* (1908), 6 C.L.R. 1, at p.7.
[28] *Gardiner v. Fairfax* (1942), 42 S.R. (N.S.W.) 171, at p.172. Certain views have to be excluded since a person may be defamed in the eyes of citizens who are not right thinking at all. It can appear that views of a small minority are so anti-social that their recognition by the courts would be unworthy.
[29] *Lewis v. Daily Telegraph*, [1964] A.C. 234, at p.249 (per Lord Reid), or at p 286 (Lord Devlin).
[30] Lord Reid in *Lewis v. Daily Telegraph,* supra n.29, at p.258; also in *Toley v. J.S. Fry & Sons Ltd.*, [1931] A.C. 333, 'inference drawn by the ordinary man or woman', 'natural inference'.
[31] *Jones v. Skelton*, [1963] 1 W.L.R. 1362, at p.1370 (Lord Morris).

However, there are also words, which *prima facie* seem to be innocent, but become capable of a defamatory meaning by reason of the circumstances surrounding their publication.[32] Such implied or allusive statements are in general called innuendo.[33] (Each innuendo is a separate cause of action.[34])

The plaintiff must specifically plead a legal innuendo if he thinks the ordinary meaning of the publication does not sufficiently reflect the defamatory element. Furthermore, he has to prove the underlying facts or circumstances giving the words their additional meaning, i.e. the extrinsic facts. However, he neither has to prove that the defendant knew of these special circumstances that make up the innuendo nor that there actually was a publication to someone who understood the defamatory meaning.[35] The plaintiff only has to show that reasonable people with knowledge of the extrinsic facts would have understood the communication to be defamatory.[36]

2. Reference to the Plaintiff: Identification

An essential element of the tort of defamation is that the words complained of are published 'of the plaintiff'[37], i.e. that the plaintiff is identified in the statement. In most cases the plaintiff is named but he may also be identified by description or context, or extrinsic facts may be adduced to show that the defamatory statement was spoken of and concerning him. Especially if the

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[32] They may, for instance, have a technical or slang meaning other than the ordinary one that may not be apparent to everyone. Their secondary meaning may depend on some special knowledge not everybody possesses, or it might be derived from the words by reading between the lines. Perhaps the special meaning can only be understood with the aid of additional, extrinsic information.

[33] Courts differentiate between 'popular' (or 'false') and 'legal' (or 'true') innuendoes. The first is included in the natural and ordinary meaning of words and can be interpreted as defamatory by reasonable persons without the establishment of extraneous facts. The latter arises in cases where the defamatory sense of the statement results from facts or circumstances, which are not part of general knowledge, i.e. it has an additional meaning beyond the ordinary and natural one. B.V.H. Rogers, *Winfield & Jolowicz on Tort*, (15th ed., Sweet Maxwell, Toronto, 1998) at p.403 and Lewis Klar, *Tort Law*, (2nd ed., Carswell, London, 1996), at p.557.

[34] *Grubb v. Bristol United Press Ltd.*, [1963] 1 Q.B. 309, at p.327.

[35] Since *Hulton & Co. V. Jones,* [1910] A.C. 20 it is, according to Scrutton L.J., "impossible for the person publishing a statement which, to those who know certain facts, is capable of a defamatory meaning...to defend himself by saying: 'I...did not mean to injure the plaintiff.' "

plaintiff is not explicitly mentioned the test of identification is whether (some) reasonable people, being aware of the defamatory meaning, would take the view that this defamation refers to the plaintiff; whether an ordinary reader would reasonably identify the plaintiff as the person defamed.[38]

In view of this the intention of the publisher is not to be taken into account. The defamer's intent or negligence in making reference to the plaintiff is irrelevant. In *Youssoupoff v. Metro-Goldwyn-Meyer*[39] it was held that a publisher, who had never heard of the particular person concerned and who did not have the intention to defame anyone, is liable if 'reasonable people knowing some of the circumstances would take the libel complained of to relate to the plaintiff.' To a similar effect is the case of *Hulton v. Jones*[40], which dealt with a publication defamatory of a person whom the defendants thought to be fictitious while, unknown to them, there in fact existed a person with this name. The defendant's honest belief that no such person existed, apart from a lack of intention to defame, was not regarded as a defence.

3. Publication

The civil law of defamation, in contrast to the criminal law, is concerned with injury to reputation rather than with insult. Saying defamatory remarks to another person's face without any third person hearing it may injure the addressee's feelings but does not cause any loss of esteem in the eyes of others or affect his reputation. Therefore the communication to at least one person other than the person defamed is essential. Publication of the defamation is the actionable wrong.

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[36] *Hough v. London Express Newspaper Ltd.*, [1940] 2 K.B. 507 (C.A.).
[37] Simon L.C. in *Knupffer v. London Express Newspaper Ltd.*, [1944] A.C. 116 (H.L.), at p.118.
[38] *Morgan v. Odhams Press*, [1971] 1 W.L.R. 1239 (H.L.); *Taylor v. Massey* (1891), 20 O.R. 09 (C.A.).
[39] (1934), 50 T.L.R. 581 Scrutton L.J. at p.583.

This does not require that the communication be made to a large audience. Publication to a single individual is sufficient as long as it is a third party, other than the plaintiff himself, who actually heard or read the statement. Moreover this individual must have understood what was communicated so that it is not sufficient if the offending words were spoken in a language unknown to the listener.[41]

With regard to the publication of a defamatory matter the onus is on the plaintiff to prove that there was responsibility on the part of the defendant.[42] If the latter intended publication or if publication is due to a lack of care, he is liable. An accidental publication, however, is not actionable.[43] So if the defendant can clear himself of negligence, i.e. if the exercise of reasonable care could not have avoided the publication, he can escape responsibility. But the case *Byrne v. Deane*[44] shows that his duty of care can go very far. According to the holding there a person may even become responsible for a libel, when, being aware of the defamatory publication and having the power to remove, he fails to exercise this power. Responsibility of a person in control of premises therefore may derive from knowingly permitting a libel to remain after reasonable opportunity to remove it.[45]

Every participant in the publication is liable. So liability extends to those who composed the libel including press agencies or advertisers, and to those who are responsible for its distribution

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[40] [1910] A.C. 20 (H.L.); although it might have been of influence that in this case there was some recklessness on the part of the defendants: the plaintiff actually had previously worked for them!
[41] *Economopoulous v. A.G. Pollard Co.* (1914), 105 N.E. 896 (Mass. S.C.).
[42] Lamont J. in *McNichol v. Grandy*, [1932] 1 D.L.R. 225.
[43] Fleming, supra n.22, at p.599.
[44] [1937] 2 All E.R. 204.
[45] Ibid. at p.838; Apart from the fault element with respect to publication, liability in general does not depend on the intention of the defamer. As mentioned before it is irrelevant if he meant to convey a defamatory meaning at all or to refer to the plaintiff. Even accidental typographical or similar errors with the result that a defamatory meaning is conveyed, though unintentionally, do not release the defendant from liability. (For example in *Upton v. Times-Democrat* (1900), 104 La. 141 the word „cultured", referring to a gentlemen, mistakenly was substituted by "coloured") The absence of fault, which is intention, negligence or recklessness, is of no relevance.

and dissemination, no matter to which degree they were involved.[46] Moreover, every single communication of a defamatory matter is treated as a separate publication, so even if a copy of a book that contains defamatory words is sold years after it originally appeared a new cause of action might arise.[47] Each person who repeats a libel is liable for it. A plaintiff may take different actions against different defendants for publication of the same defamatory matter. The reason for this principle is that the new publication further impairs the plaintiff's reputation. (However, publications might be summed up and damages assessed for the entire issue.[48])

Republication, on the other hand, is something different. Usually the defendant is not responsible if another person republishes a defamatory statement. Under certain circumstances this changes, for example when it was foreseeable[49] that others would publish or republish the statement, or if the republication was authorized or intended by the originator. For instance, a person who gives an interview to a newspaper reporter will be liable for the publication of his statements in the newspaper (as long as it is an accurate account of what has been said.)[50]

III. Defences

A number of reactions are available for the defendant to face the plaintiff's action. He can deny that the words complained of were published at all or at least by him, that they refer to the plaintiff or that they are capable of being reasonably understood in a defamatory sense. He can

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[46] However, there is a distinction between producers and subordinate distributors. Primary participants are those actively engaged in the dissemination, for instance writers, editors and publishers. They underlie a stricter standard of liability. On the other hand, mechanical disseminators such as newsagents, booksellers or libraries, who take a subordinate part as pure distributors, are treated more benevolently. According to Romer L.J. in *Vizitelly v. Mudie's Select Library Ltd.* ([1900] 2 Q.B. 170, at p.180] such a subordinate distributor may not be liable on condition that he had no knowledge of any defamatory content in the material he disseminated in the ordinary way of his business, that he had no reason to be suspicious that the material contained defamatory material, and that he has exercised reasonable and practical steps to scrutinize the material. Since the distributor still is liable *prima facie* the burden of proof is on him to displace the presumption of publication and escape liability.

[47] See *Duke of Brunswick v. Hamer* (1849), 14 Q.B. 185.

[48] *Toomey V. Mirror Newspapers* (1985), 1 N.S.W.L.R. 173.

[49] *Sims v. Wran,* [1984] 1 N.S.W.L.R. 317.

also plead that he was an innocent disseminator or that the words were published unintentionally. As far as it concerns an action for slander the defendant can allege that special damages are necessary and that these either were not shown or that they were too remote.[51]

Apart from this, the law of defamation designated special defences such as justification, i.e. that the words complained of were true in substance and in fact. Furthermore it can be pleaded that they were published on an occasion of absolute, or qualified privilege respectively, or that they were fair comment on a matter of public interest. Finally apology and retraction are possible as partial defences.

Those defences are of great importance in the law of defamation, especially since the requirements for a statement to be regarded as defamatory are low. Without the defences to defamation, all critical public and private communication would suffer from censorship and as a result the right to criticise or voice unpopular social or political opinions would be very strongly restricted. Therefore the mentioned defences have the function of protecting the value of free speech and of restoring a balance between the protection of the reputation and the freedom of expression.

1. Justification

Truth is valued too much to attach a penalty to its publication. Therefore it is a complete defence to a civil action for defamation. After all, defamation protects the plaintiff's reputation and if the reputation can be damaged by the truth it is unworthy of protection by the law. This plaintiff is not entitled to recover damages.

The defendant has to prove the truth of his statement since its falsity is presumed once it is

[50] *Hay v. Bingham* (1905), 11 O.L.R. 148 (C.A.); *Douglas v. Tucker*, [1952] 1 S.C.R. 275.
[51] Raymond Brown, *The Law of Defamation in Canada*, (Vol.I, Carswell, Toronto, 1987), at p.360.

shown that the statement is defamatory.[52] The substance of the statement has to be true; namely the substance of all material statements contained in the libel and every meaning attributed to the words complained of. Where the plaintiff relies on a legal innuendo, the defence of justification must meet this innuendo, i.e. not only the literal meaning but also the inferential one, or the innuendo has to be true.[53]

There must be a substantial justification of the whole in order to succeed. But it is not necessary to prove every minute detail and to establish the truth of each and every word used by the defendant. Inaccuracy of minor details is therefore harmless.[54] However, if the defamation consists of a number of different allegations and the defendant is not in the position to prove the truth of every relevant component, the plaintiff will be entitled to judgement even though the unproved charge alone might not have caused appreciable damage in view of the truth of the rest.[55]

To allege that one merely repeats a rumour is no justification, even if expressing doubts or disbelief, and regardless of whether one is giving a verbatim account of what one has been told.[56] Finally the intent of the defendant when making the true but defamatory statement is irrelevant so that malice does not defeat the defence of justification. In this respect, the common law gives priority to free speech instead of investigating the publisher's motives, especially since emphasis lies on injury of the reputation and not the intention of the defendant.

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[52] *Beevis v. Dawson*, [1957] 1 Q.B. 195; *Belt v. Lawes* (1882), 51 L.J.Q.B. 359, at p.361.
[53] *Irish People's Assurance Society v. City of Dublin Assurance Co Ltd.*, [1929] I.R. 25.
[54] The justification must meet 'the sting of the charge' as said in *Edwards v. Bell* (1824), 1 Bing. 403, at p.409; Lord Shaw in *Sutherland v. Stopes*, [1925] A.C. 47 held at p.79 that 'there may be mistakes here and there in what has been said which would make no substantial difference to the quality of the alleged libel…'.
[55] Fleming, supra n.22, at p. 611.
[56] *Stubbs Ltd. v. Mazure,* [1920] A.C. 66; *Wake v. Fairfax*, [1973] 1 N.S.W.L.R. 43.

2. Privilege

On some occasions the public interest in promoting a frank communication is greater than the interest of protecting an individual's reputation. As Lord Scrutton said in *More v. Weaver*[57]: "there are certain relations of life in which it is so important that persons engaged in them should be able to speak freely that the law takes risk of their abusing the occasion..." These are referred to as privileged occasions.

Absolute privilege provides a complete immunity from liability on the grounds of public policy even if the statement is made with malice. Qualified privilege, on the other hand, only offers conditional immunity and is defeated by malice.[58] At any rate, the privilege attaches to the occasion and not to particular speakers or the contents of a communication.[59]

a) Absolute Privilege

Absolute Privilege is designed to secure efficient functioning of governmental institutions, i.e. to facilitate the operations of all branches of government by absolutely protecting speakers in certain situations so that they are able to speak and to carry out their duties freely without fear of liability for defamation. Those speakers do not have to face an action in defamation, regardless of their motive or the truth of their statement[60] - they are totally immune from liability.

Protected by this privilege are judicial and parliamentary proceedings as well as high executive

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[57] [1928] 2 K.B. 520.

[58] Apart from this, there are also privileged reports. While it is in general no defence to simply report defamatory allegations of another person there are certain circumstances under which reports receive the protection of absolute or qualified privilege. Thus privileged are fair and accurate reports of official (parliamentary or judicial) proceedings open to the public. The reason for this exception can be found in the public interest in being fully informed on the administration of public affairs; the public has a right to be informed about all aspects of proceedings to which it has the right of access. Those of the public who were not able to obtain admission due to lack of capacity have a right to know what had happened just as those who were present.

[59] *Dingle v. Assoc Newspapers*, [1961] 2 Q.B. 162, at p. 188; *Minter v. Priest*, [1931] A.C. 558, at 571-572; The question of whether an occasion gives the privilege is a question of law and has to be determined by the judge. Then the jury has to decide the question of fact whether it actually was a privileged communication, i.e. whether the party has used the privilege properly.

[60] The issue of truth technically only arises where the defendant pleads the defence of justification. Otherwise a statement, once regarded to be defamatory, is legally assumed to be false as the case proceeds.

communications but also marital communications.

(i) Judicial Proceedings

First of all, communications made in the course of not only judicial proceedings but also of quasi-judicial proceedings are covered by absolute privilege based on considerations of public policy and convenience.[61] This privilege is not confined to statements made in court but it also extends to steps in preparation of judicial proceedings.[62] Included is every person concerned in judicial proceedings such as judge, jury, advocates (i.e. barristers, solicitors and parties appearing on their own behalf), witnesses and parties participating. Participants of judicial proceedings in general should not be influenced by fear of possible defamation action. For instance, to expose a judge to the risk of actions from every disappointed suitor would affect his efficiency and freedom as a judge doing his duty.[63] The same applies for a counsel who otherwise would be threatened by actions of persons whose conduct he may have denounced[64] and witnesses who might be deterred from testifying because they fear actions brought forward by persons whom they give evidence against.[65]

Professional communications made between solicitor and client in preparation of litigation as well as those between potential witnesses and parties or their legal advisers are also protected. [66] Furthermore, the privilege extends to 'quasi-legal authorities'[67], i.e. to tribunals, which carry out

[61] *Royal Aquarium and Summer and Winter Gardens Society v. Parkinson*, [1892] 1 Q.B. 431, at p.442.
[62] Fleming, supra n.22, at p.618.
[63] *More v. Weaver,* [1928] 2 K.B. 520, Lord Scrutton, at p.522.
[64] *More v. Weaver,* ibid, at p.522.
[65] *Seaman v. Netherclift* (1876), 2 C.P.D.53; *Hargreaves v. Bretherton*, [1959] 1 Q.B. 45.
[66] *More v. Weaver*, supra n.63; *Watson v. Mc'Ewan*, [1905] A.C. 480; *Hasselblad v. Orbinson*, [1985] Q.B. 475 (C.A.). However, protected are only those remarks that are 'relevant' to the issue. Especially in the relationship between solicitor and client the privilege only extends to matters related to the litigation, excluding irrelevant gossip dropped in the course of the interview.
[67] *Sussman v. Eales* (1985), 33 C.C.L.T.156 (Ont. H.C.).

quasi-legal functions, equivalent to those of a court of justice.[68]

Once an occasion is recognized as absolutely privileged, no cause of action can be maintained for defamation. Malice does not affect the defence of absolute privilege. Although this rule might prevent actions in cases where the conduct of the protected speaker was otherwise actionable, it is preferable to having numerous actions brought against persons honestly acting in the discharge of their duties, which would impair the judicial process.

However, to be protected, the utterance must be relevant to the issue and reasonably related to the subject of the judicial inquiry.[69] Entirely extraneous matters will not be protected.

(ii) Parliamentary Proceedings

With regard to parliamentary proceedings, the public has a right to expect a frank and vigorous debate in its democratic institutions, which might be destroyed by the fear of liability, involving caution. Therefore freedom of political debate receives its acknowledgement through absolute privilege. This privilege extends to any communication made by a Member of Parliament in the exercise of his duties during the course of Parliamentary proceedings as long as made on the floor of the House of Commons.[70] Not protected are communications made outside the proceedings of that body[71] so if a member repeats his statement (previously made inside) outside Parliament it generally will not be covered by the privilege.

(iii) High Executive Communications

The reason, why high executive communications are specially protected is, once more, to secure

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[68] To qualify as a quasi-judicial proceeding the tribunal must possess certain characteristics such as for example the power to adjudicate upon and determine legal rights between parties or to require their attendance, or the power to hear evidence under oaths, impose punishments, administer fines and enforce orders. Brown, supra n.51, at p.420

[69] Allan M. Linden, *Canadian Tort Law*, (6th ed., Butterworth, Toronto, 1997), at p.700.

[70] This common law rule found its reinforcement in sec.51(2) of the Constitution Act, R.S.B.C. 1996, c.66.

the free and fearless discharge of high public duty - here for the executive department of government. Therefore a defamatory statement made by a high executive officer is absolutely privileged if he is acting in the performance of his official duties relating to the affairs of state. The extent of this part of privilege is somewhat uncertain. While communications between Ministers of the Crown[72] are certainly protected as long as they are made in the course of public duties and as long as the subject matter relates to state affairs, not all public servants are so privileged. The privilege only attaches to "high officers of State".[73]

(iv) Marital Communications

Finally, communications between husband and wife enjoy absolute privilege to protect and respect the confidentiality of the matrimonial relationship.[74] Apart from this there is the fiction of the spouses being regarded as forming an integrated whole with the result that publication is missing. However, defamatory remarks one spouse makes about the other are of course not protected.

b) Qualified Privilege

On certain occasions and for specific public policy reasons the law affords protection for untrue and defamatory statements by qualified privilege, permitting a person to say something which otherwise might be actionable. Cases of qualified privilege are based on the principle that the publisher of a defamatory matter should not be entirely free from responsibility but he should be protected in so far as he has acted in good faith.[75] Therefore this defence only confers conditional immunity; the defendant loses his privilege if it is shown that he published the

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[71] *Stopforth v. Goyer* (1978), 20 O.R. (2nd) 262; Winfield & Jolowicz, supra n.34, at p.429.
[72] *Chatterton v. Secretary of State of India*, [1895] 2 Q.B. 189 (C.A.).
[73] Fleming, supra n.22, at p.620.
[74] Linden, supra n.69, at p. 703; Fleming, supra n.22, at p.621.
[75] John King, *The Law of Defamation in Canada*, (Carswell, Toronto, 1907), at p.493.

statement with malice.[76] Moreover, the publication has to be made to serve the legitimate purpose of the privileged occasion.[77] Only those statements which are relevant to the interest that justifies the privilege are protected.

In *Adam v. Ward*[78] Lord Atkinson describes such a privileged situation as one "where the person who makes the communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it." So a legitimate duty and interest relationship is necessary, which is conceivable in three constellations. Either one person has a legal, social or moral duty to speak to another with a legitimate interest to receive the information or he has a legitimate interest in giving the information to someone with a duty to receive it, or, finally, both sides have corresponding interests in providing and receiving the information (common interest).

The first constellation focuses on the duty-aspect and concerns statements made pursuant to a duty (either legal, social or moral) to a person who has a corresponding duty or interest in receiving it. The interest in the information has to be reciprocal.[79] Otherwise the defence of qualified privilege fails - even if the defendant honestly believed that the recipient possessed the required interest. For the existence of the duty it is not relevant whether the publisher believed it was there. The actual facts are decisive.[80]

While a legal duty can easily be determined, the more difficult question is what is understood by

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[76] *Hill v. Church of Scientology of Toronto*, (1995) 126 D.L.R. (4th) 129 at p.171.
[77] Fleming, supra n.22, at p.622.
[78] [1917] A.C. 309, at p.334.
[79] *Bureau v. Campell*, [1928] 3 D.L.R. 907 (Sask. C.A.); *Globe & Mail Ltd. v. Boland* (1960), 22 D.L.R. (2nd) 277.
[80] *Watt v. Longsdon*, [1930] 1 K.B. 130, where Watts believed himself obliged to disclose the immoral conduct of a man to his wife and therefore interfered as a stranger into the affairs of spouses.

a moral or social duty. According to Lord Lindley[81] this means "a duty recognized by people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings..." In view of this rather broad and indefinite definition it is understandable that courts seem to be more inclined to acknowledge such a duty if the statement is made in answer to an inquiry rather than volunteered, which also indicates that the information is of significance for the recipient.

Qualified privilege lies for example where a former employer gives character references of a dismissed employee in response to the request of a person who proposed to employ him, or where one businessman provides information after inquiry about the financial situation of a prospective customer.[82] Such an inquiry, however, is only one factor to be taken into account. Volunteered statements can also be regarded as uttered in discharge of a moral or social duty in certain relationships such as employer and employee, where the latter may tell work related things, or of course parent and child, where a father can warn his daughter against her suitor.[83]

The second constellation concerns statements where a person seeks to protect his own legitimate interests, or one he shares with someone else, or even the interest of another person. For instance, someone who has been subject to an attack on his reputation has a clear interest in responding to this attack to restore his damaged reputation and those who have heard the previous attack have a moral duty to receive the response. Therefore a statement in self-defence is protected by qualified privilege if it is made in reply to an attack upon one's own character or conduct, or to protect one's proprietary interests.[84] The defendant may even protect the interests

[81] In *Stuart v. Bell*, [1891] 2 Q.B. 341, at p.350.
[82] *Beevis v. Dawson*, [1956] 2 Q.B. 165; *Robshaw v. Smith* (1878), 38 L.T. 423.
[83] *Cooke v. Wildes* (1855), 119 E.R. 504; *Bordeaux v. Jobs* (1913), 6 Alta L.R. 440, at p.443.
[84] *Falk v. Smith*, [1941] O.R. 17 (C.A.); *Pleau v. Simpsons-Sears Ltd.* (1976), 75 D.L.R. (3rd) 747 (C.A.).

of his employer[85] since he has a personal interest in the business involved.

The defence is restricted to those statements which are necessary to meet the initial attack. [86] This means that only such information related to the attack is protected. The reply must not become a counterattack. As mentioned before, the communication is only protected so long as the recipient has a legitimate interest or duty to receive it but the requirement of reciprocity needs to be seen in context regarding the nature of the original attack. If an individual's reputation was attacked in public he is entitled to respond to the general public, so for instance if the press has been the means to publish the initial attack the defendant is free to respond by the same medium.[87]

In the case of a 'common interest' the publisher and the recipient share a legitimate common or mutual interest in communicating and receiving the information. It has to be more than just curiosity or news-gathering[88] and usually concerns pecuniary interests, arising from association between the parties for business purposes. Protected under qualified privilege are for example communications among shareholders, discussions between members of religious congregations, complaints by tenants to the landlord concerning the conduct of other tenants, the flow of information between members of trade and professional associations or unions, or between creditors for the same debtor.[89] Any legitimate interest worthy of protection by law will be sufficient. But the privilege only covers communications that relate to issues of common concern to the members of the group. If a statement goes beyond the group's interest or is

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[85] *Penton v. Calwell* (1945), 70 C.L.R. 219; similar *Gillett v. Nissen Volkswagen Ltd.*, [1975] 3 W.W.R. 520.
[86] *Whitaker v. Huntington* (1980), 15 C.C.L.T. 19 (B.C.S.C.).
[87] *Penton v. Calwell* (1945) 79 C.L.R. 219; *Adam v. Ward,* [1917] A.C. 309.
[88] *Howe v. Lees* (1910), 11 C.L.R. 361, at p. 398.
[89] *Telegraph Newspaper v. Bedford* (1934), 50 C.L.R. 632 at p.658; *Slocinsky v. Radwan* (1929), 144 Atl. 787 (N.H.); *Toogood v. Spyring* (1834) 149 E.R. 1044; *Thompson v. Amos* (1949), 23 A.L.J. 98; *Smith Bros. & Co. v. W.C. Agee & Co.* (1912), 50 So.647 (Ala).

communicated to someone who is not member of the group, i.e. who does not have the common interest, the qualified privilege is lost.[90] Apart from this, once more a corresponding interest is necessary so that it is not sufficient if only the recipient had an interest in hearing the information.

Noteworthy is that in the past courts generally have refused to recognise a common interest between newspapers and readers. Although all privilege can be traced back to some public interest in the publication, the mere fact that a matter is of public interest does not necessarily mean that the discussion of it is privileged. In that respect media have no greater protection from defamation action than any other member of the public.[91] Accordingly, the public has to have a legitimate interest in receiving the information while the publisher would require a corresponding duty to publish the report.

Because of this requirement of reciprocity there are rarely any cases in which a publication to the world at large will attract the protection of qualified privilege. A privilege has only been recognized under certain circumstances, for example in cases of public warnings against dangers such as contaminated food.[92] Apart from such exceptions the fact that a matter is of public interest has in general not been regarded as sufficient to constitute a privileged occasion at common law of defamation.[93] Generally, the press has to rely on the defence of fair comment, which only refers to comments based on true facts but not to mere statements of facts.[94]

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[90] *Guise v. Kouvelis* (1947) C.L.R. 102.
[91] King, supra n.75, at p.279.
[92] *Camporese v. Parton* (1983), 150 D.L.R. (3rd) 208 (B.C.S.C.); *Blackshaw v. Lord*, [1984] Q.B. 1.
[93] *Globe & Mail Ltd. v. Boland*, [1960] S.C.R. 203; Winfield & Jolowicz, supra n.33, at p.445.
[94] However, recently there has been a development towards acknowledging public interest further. Within the scope of the case of *Moises v. Canadian Newspaper Co.* [(1996) 24 B.C.L.R. (3rd) 211] the court deals at great length with the question whether qualified privilege should be extended for newspapers against the background that 'the difficulties involved in verifying the truth of allegations made by others have a chilling effect upon the willingness of newspapers to publish statements that are in fact true.' In *Parlett v. Robinson* [(1986) 30 D.L.R. (4th) 247] the court did not consider the publication of a statement of a Member of Parliament to the public at large through the

As already mentioned, there is some special reason of public policy in all cases of qualified privilege why the law accords immunity from a defamation suit. The defendant might have some public or private duty which justifies the communication of a statement, or some interest of his own which he is entitled to protect by doing so. However, it is not an absolute privilege, and if the defendant for some reason abuses the occasion which gives rise to the privilege, instead of legitimately using it, he loses the defence.[95] The occasion can be misused in different ways.

One way is the excess of privilege, where the words complained of are outside the scope of the privilege. The defendant might exceed his privilege by going beyond the limits of his duty or interest, for example by making statements that are completely unrelated to the privileged subject matter. There is no protection with regard to statements that are not relevant to the purpose for which the privilege is given, or that are known to be untrue.[96] Accordingly, unnecessarily attacking another's character to defend one's own character is not covered by the privilege.[97]

Or the defendant loses the privilege if he goes beyond the audience that can legitimately receive the information by publishing and communicating the information to those who have no legitimate interest or duty in receiving it.[98] Then the publication itself is unjustifiably wide. It is a different case if a person, who was the victim of an attack in public, has the right to defend himself before the same audience. Apart from this the circle of legitimate recipients in general is

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media as unduly wide. They held the member had a duty to express his concerns and they regarded the electorate in Canada as a group that had a *bona fide* interest in the published matter.

[95] *Watt v. Longsdon,* [1930] 1 K.B. 130, Scrutton L.J., at p.143.

[96] *Adam v. Ward,* [1917] A.C. 309, at pp.320-21, 'Anything that is not relevant and pertinent to the discharge of the duty or the exercise of the privilege or the right or the safeguarding of the interest which creates the privilege will not be protected'; Klar, supra n.33, at p.577.

[97] *Botiuk v. Toronto Free Press* (1995), 126 D.L.R. (4th) 609, at p.628.

[98] *Jones v. Bennett,* [1969] S.C.R. 277, where the defendant, a Premier, had spoken defamatory words during a meeting of party supporters in spite of his knowledge of the presence of reporters. Assuming his awareness and

more limited.

Excess of privilege is a matter for the determination of the trial judge while the jury has to decide whether the defendant acted with malice.[99]

Secondly, malice defeats the qualified privilege, i.e. the defence is lost if the communication is published maliciously. The term 'malice' in this context needs to be understood in a broad sense, i.e. it not only covers cases where the defamer is motivated by spite, ill will, hatred or the desire to inflict harm for its own sake. Above that it includes misuse of the privileged occasion for other improper purposes. Such a purpose can be any indirect motive - other than honest belief in the truth - that is not connected to the purpose for which the privilege was given.[100]

In *Royal Aquarium and Summer & Winter Garden Society Ltd. v. Parkinson*[101], acting *bona fide* (i.e. without malice) was understood in the sense that the defendant uses the privileged occasion for the proper purpose and does not abuse it. Therefore, according to Lord Esher, the question is whether the occasion is used honestly or is abused. Furthermore it was held that a privileged occasion might be abused if the communication is the result of some motive other than that of carrying out one's duty. The defendant there acted in 'gross and unreasoning prejudice' with regard to the subject matter and not simply from consideration of his duty. He had 'allowed his mind to get into such a reckless state of prejudice that he was regardless of the interests of the other person, and whether what he was saying was true or false.'

Clues to prove malice may be extrinsic or intrinsic. So for example the existence of personal

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even intention that the reporters would publish his statement he had exceeded his privilege by communicating 'to the world'.

[99] Linden, supra n.69, at p.712.

[100] *Jones v. Bennett,* [1969] S.C.R. 277; *Hill v. Church of Scientology*, (1995) 126 D.L.R. (4th) 129, at p.171.

[101] [1892] 1 Q.B. 431; see *Watt v. Longsdon*, [1930] 1 K.B. 130, at p.155; 'the defendant was in fact giving effect to his malicious or otherwise improper feelings towards the plaintiff and was not merely using the occasion for the protection....'.

animosity may be extrinsic evidence, but only if it allows the conclusion of improper motive on the part of the publisher.[102] The lack of honest belief or reckless disregard for the truth of the statement generally is conclusive evidence for malice.[103] Malice may also be inferred from the contents of the allegation itself, from the language in which the statement is expressed.[104]

At any rate, that one participant in the publication acted maliciously does not affect the privilege pleaded by another participant.[105] Each participant has an independent right to claim privilege and the misuse of one cannot be imputed to the other.

3. Fair Comment

Resulting from the nature of the subject matter, the public has a legitimate interest in government activity, public services and institutions, the conduct of public figures, political debate and public affairs in general. A free discussion of matters of public interest is essential in a democratic society, and honest criticism supports the proper discharge of public duties.[106] Therefore, fair comment on matters of public interest is protected from liability for defamation, as long as it is based on facts. The right of fair comment furthermore extends to matters of art such as music, paintings, literature or theatrical performances. In such cases, the character of a person, the artist, is not the object of criticism but his work, which he voluntarily displayed in public and submitted to public attention and criticism.

The defence of fair comment requires the defendant to establish that the statement itself consists of comment, that this comment is based on fact, that the subject matter is one of public interest and finally that the comment is fair. The defence fails, however, if the plaintiff is able to prove malice on the part of the defendant.

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[102] Fleming, supra n.22, at p.638.
[103] *McLoughlin v. Kutasy*, [1979] 2 S.C.R. 311, at p.321; Winfield & Jolowicz, supra n.33, at p.435.
[104] Fleming, supra n.22, at p.638.
[105] *Stephens v. WA Newspaper* (1994), 182 C.L.R. 211, at p.253; in spite of *Smith v. Streatfeild*, [1913] 3 K.B. 764.
[106] *Whitford v. Clarke*, [1939] S.A.S.R. 434, at p.439 (Napier J.).

The first requirement is that the statement has to be one of comment or opinion and not one of fact.[107] Since the law of defamation is not concerned with the intention of the publisher the statement's classification depends on how it would be interpreted by the ordinary unprejudiced reader or listener.[108] The conveyed imputation has to be understood as a subjective assessment or opinion of the defendant. The reason for this distinction is that it makes a difference whether the recipient can recognize that the remark expresses the personal view of the publisher with which he may or may not agree and whether he has the chance of forming his own judgement.

The statement is comment if an opinion is expressed on the basis of provided facts, but alleging something without referring to facts will in general be treated as a statement of fact. For example, to say that someone is an immoral person would not qualify as comment. On the other hand, to describe exactly someone's conduct and say this was immoral is opinion.

However, it is sufficient to indicate with reasonable clarity by the words themselves, seen in their context and surrounding circumstances, that the utterance has to be understood as comment.[109] Therefore it is possible to refer to facts, which are notorious, like for example the conduct of politicians,[110] without explicitly including them in the communication. Decisive is whether the imputation conveyed can be understood as comment. But if the expression is ambiguous and can be understood in either way the risk goes to the debit of the publisher.

However, the comment has not only to be based on facts but those facts have to be true and undistorted otherwise the comment itself cannot be fair.[111] It is not enough if the defendant simply believed his facts to be true.[112] Commenting on the basis of mistaken facts made at a privileged occasion, on the other hand, is treated differently. Their disclosure is in the public

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[107] If facts are published, the defendant can only plead the defence of justification.
[108] *Clarke v. Norton*, [1910] V.L.R. 494, at p.500.
[109] *Radio 2 UE Sydney v. Parker* (1992), 29 N.S.W.L.R. 448 (C.A.); *Kemsley v. Foot*, [1952] A.C. 345, at p. 357.
[110] *Bjelke-Petersen v. Burns*, [1988] 2 Qd. R. 129.
[111] Linden, supra n.69, at p.714.

interest.[113]

The subject matter of the comment must be a matter of public interest, i.e. one in which the public is legitimately interested or concerned. As already mentioned this can be governmental actions and the conduct of those involved in the political process, public affairs such as sports, arts, religious events, the conduct of all public figures etc. But the free expression is restricted to the public dimension of those activities and persons. Only the conduct or work of public officials and figures is of public interest and not their private life or morals. The publication of matters unrelated to this public dimension does not fall under the protection of fair comment. In this case the plaintiff's interest in privacy prevails.[114]

The comment must be a fair one. Fair in this context does not necessarily mean that the comment has to be reasonable or balanced. Instead fairness depends on the circumstance that the defendant honestly expresses his opinion.[115] Even strong language and harsh critique is covered by the defence, as well as exaggerated, obstinate or prejudiced remarks.[116] So long as the expressed opinion is honestly held by the publisher, it is protected - provided an honest-minded person might hold this view on the facts it is based on.[117]

Newspapers do not receive any special treatment in this respect, which is illustrated in the case *Chernesky v. Armadale Publishers Ltd.*[118] It dealt with a letter to the editor, published by the newspaper, that described the attitude of the plaintiff as racist. Whether this was the honest

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[112] *Douglas v. Stephenson* (1898), 29 O.R. 616; *Price v. Chicoutimi Pulp Co.* (1915), 51 S.C.R. 179.
[113] *Cook v. Alexander*, [1974] Q.B. 279, at p.288 (C.A.); *Mangena v. Wright*, [1909] 2 K.B. 958, at p. 977 (commenting on excerpt from Parliamentary paper); *Grech v. Odhams Press*, [1958] 2 Q.B. 275, at p.285.
[114] *Mutch v. Sleeman* (1928), 29 S.R. (N.S.W.) 125, at p.137 (MP called a wife beater).
[115] *Chernesky v. Armadale Publishers Ltd.* (1979), 90 D.L.R. (3rd) 321, at p.330.
[116] Ibid at p.325; Fleming, supra n.22, at p.653.
[117] *Merivale v. Carson* (1887), 20 Q.B.D. 275, at p.281 (Lord Esher).

belief of the two writers of the letter was not clear. The defendant publisher did not agree with the contents of the letter. According to the majority of the Supreme Court, the defence of fair comment failed due to the lack of honest belief in the allegation contained in the letter on the part of the newspaper.[119]

Finally, a comment distorted by malice cannot claim the protection of the defence of fair comment. It is the plaintiff's task to prove that the defendant acted maliciously, i.e. to show that the comment was not designed to serve the purpose of expressing one's honest and real opinion.[120] In this connection mere hostility or ill will alone is not enough to answer the question of malice in the affirmative.

4.) Consent, Apology and Retraction

The plaintiff's consent to the publication of defamation will protect the defendant from liability as a complete defence. It is possible that the plaintiff instigated or invited the defamatory statement himself, for example by starting rumours about himself or providing false information to a newspaper. Or he may try to provoke the defendant to defame him for the purpose of suing him afterwards. In cases like that the plaintiff will be deemed to have consented to the

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[118] (1979) 90 D.L.R. (3rd) 321.

[119] The minority criticised this decision for creating an unreasonable restriction of freedom of expression. They argued that, if newspapers are limited to publish opinions with which they agree, competing ideas will no longer gain access although the free and general discussion of public matters is fundamental to a democratic society. Therefore they emphasised the distinction between the question of fairness and the question of malice. In the first step it needs to be determined whether the statement can be regarded as one an honest person, although prejudiced, might make in the circumstances. In a second step the burden of proof shifts to the plaintiff to show that the publisher acted maliciously. They continued that, while it normally is the strongest possible evidence of malice if the plaintiff is able to show that the defendant does not hold the opinion expressed, cases where publisher and author are not identical have to be treated differently. The fact that the publisher did not agree with the contents of the comment does not give information about malice on his part. Here it should be sufficient if the comment was objectively fair and the individual publisher was not actuated by malice. It should not be necessary that the publisher himself had the same point of view as the writer. Winfield & Jolowicz, supra n.33, at p.427 is of the same opinion.

[120] Fleming, supra n.22, at p.654.

defamatory publication.[121]

Finally, there are the partial defences of apology and retraction. They are of particular interest to the media in view of the strict liability in cases of libel. They do not affect liability itself but they operate to mitigate damages. If the defendant apologized to the plaintiff for making the defamatory statement this fact will be reflected as mitigation in the award of damages. Accordingly, if the defendant refrains from apologizing, damages can end up being relatively high as for example in the *Hill*-case or in the *Cassidy*-case.[122] Retraction, a statutory concept[123], is of significance only for newspapers and broadcasters. On condition that there has been a complete and full retraction, fulfilling the requirements of the respective statute, liability is restricted to the plaintiff's actual damage.

[121] Fleming, supra n.22, at p.627; Brown, supra n.51, at p.389.
[122] *Hill v. Church of Scientology of Toronto* (1995), 126 D.L.R. (4th) 129, where the defendant did not attempt to apologize after being aware that his allegations were false and therefore ended up with a total of $ 1.6 millions in damages. In *Cassidy v. Daily Mirror Newspapers Ltd.*, [1929] 2 K.B. 331 the defendant persisted in doing right after he learned the truth in front of the trial instead of apologizing.
[123] See sec.7 of the *Libel and Slander Act, R.S.B.C.* 1996, c.263.

CHAPTER 3:

Freedom of Expression and the Charter

Having described the common law of defamation as the source of law that protects reputational interests, it is now time to have a look at the *Canadian Charter of Rights and Freedoms* which guarantees freedom of expression. I will briefly place the Charter in its historical context and explain under which circumstances it applies. Afterwards I will concentrate on freedom of expression, describing the scope of this fundamental right and how it is subject to limitations according to s.1 of the Charter.

A. Introduction of the Charter

I. Historical Context

Before the Charter, Canada's primary constitutional document was the *British North America Act, 1867* (renamed the *Constitution Act, 1867* in 1982) which contained two major features: a parliamentary system of government and federalism. The first, i.e. the supremacy of Parliament, refers to the unlimited power the elected representatives of the people, assembled in Parliament, have to make the law. The second element concerns the division of legislative powers between the Parliament of Canada and the provincial legislatures. The role of the courts was limited to deciding cases by interpreting the law, basically without the authority to invalidate duly enacted laws, except when they acted as referee in deciding whether legislative matters fell within federal or provincial jurisdiction. Then they could invalidate a provincial law that came within federal jurisdiction or vice versa.

Although the *Constitution Act, 1867* secured certain democratic and minority rights, it did not include a bill of rights. However, as a consequence of the increased interest in bills of rights following the Second World War, Parliament enacted the *Canadian Bill of Rights* in 1960 which, as an ordinary act of Parliament, was merely a statutory instrument. Since it did not apply to the provincial legislatures and moreover had been given little effect even in its application to the federal government, this bill proved inadequate in its protection of fundamental rights.

Finally, with the enactment of the *Constitution Act, 1982*, Canada received its *Canadian Charter of Rights and Freedoms*. As part of the Constitution the Charter can only be altered by constitutional amendment[1], it applies to both federal and provincial levels of government and it expressly overrides inconsistent statutes.[2] Various rights are identified and embodied in the Charter such as the fundamental freedoms of conscience, religion, thought, belief, opinion, expression, assembly and association as well as democratic rights, mobility rights, legal rights, the right to equality and language rights. However, the guarantees set out in the Charter are not absolute. The Charter itself expressly acknowledges that rights can be limited to protect other individual rights or broader community interests by including s.1 in its provisions.[3]

At any rate, the Charter has given the courts immense new power to protect the rights and freedoms of individuals and minorities, and at the same time limited the powers of the federal Parliament as well as the provincial legislatures by including an explicit supremacy clause[4] and

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[1] According to s.52(3) the constitutional amending procedure must be employed to alter the Constitution, of which the Charter is Part I.
[2] S.52(1) declares that any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.
[3] S.1 allows the state to limit the rights and freedoms provided that the limit is 'reasonable', 'prescribed by law' and 'can be demonstrably justified in a free and democratic society'.
[4] Supra n.2.

allowing extensive judicial review.

II. Application of the Charter

The question concerning the application of the Charter is addressed in s.32(1) of the Charter, which provides that the Charter applies to 'the Parliament and government of Canada in respect of all matters within the authority of Parliament...' and to the 'legislature and government of each province in respect of all matters within the authority of the legislature of each province...'

Foremost, the Supreme Court made it clear that the Charter is confined to governmental action, i.e. that it applies only where the government allegedly infringes a right or freedom guaranteed in the Charter.[5] This follows from the proposition that the Charter was set up to regulate the relationship between individuals and government, with the intention of restraining government action in order to protect the individual. Therefore, if the act under challenge comes from an entity that is part of the government, the Charter will apply whether or not the action is invoked in public or private litigation.

In *Dolphin Delivery*, the Court further determined that s.32(1) refers to the legislative, executive and administrative branches but not the judiciary branch.[6] This conclusion was supported by a textual analysis of s.32(1). Because that provision refers to the Parliament and legislatures separately from the 'government' it treats them as specific branches, separate from the executive branch of government. It does not expressly refer to the judiciary as a branch of government to which the Charter applies. Thus, a different treatment of the judicial versus the legislative,

[5] *R.W.S.D.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; reaffirmed in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; also *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p.156.

[6] *R.W.S.D.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, para.31. Subsequent cases such as *B.C.G.E.U. v. B.C.*, [1988] 2 S.C.R. 214 or *Rahey v. The Queen*, [1987] 1 S.C.R. 588 might appear inconsistent with this holding in

executive and administrative branches of government is justified. In the opinion of the Supreme Court, the term 'government' is not used in the generic sense to refer to the whole of the governmental apparatus of the state, but rather only in the sense in which one generally speaks of the Government of Canada or of a province, meaning the executive or administrative branches of government.[7] Accordingly, all statutory laws and regulations are subject to Charter scrutiny, as is every exercise of statutory authority.

The Charter also applies if the act complained of comes from an entity which is deemed to be part of government. With respect to such 'quasi-governmental' bodies, difficulties sometimes arise. For instance, the Charter does not apply to universities, even though they receive government funding and are created by statute[8], but community colleges have been regarded as part of government.[9] In general, the result depends on the degree to which the entity is controlled by government ministers or their officials in their day-to-day operations.[10] However, even a private entity can be subject to the Charter, namely in respect of certain inherently governmental actions, i.e. when its activity can be said to be 'governmental' in nature. This is in order to prevent governments from escaping Charter scrutiny by entering into private 'arrangements' and delegating the implementation of their policies to private entities.[11]

At any rate, the Charter will not be applicable to private litigation between private parties unless one party invokes or relies upon the exercise of governmental action to produce an infringement

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Dolphin since they also include the judicial branch, at least in so far as the criminal sphere is concerned. This issue will be raised in chapter six.

[7] *Dolphin Delivery*, ibid.

[8] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

[9] *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570.

[10] Robert Sharpe and Kathrine Swinton, *The Charter of Rights and Freedoms*, (Irwin Law, Toronto, 1998), at p.63. In *Douglas College*, for instance, the college was established by the government to implement government policy. Its board was appointed and removable at pleasure by the government which also could direct its operation by law. The college performed acts of government in carrying out its function.

[11] *Eldrige v. British Columbia*, [1997] 3 S.C.R. 624m at para.103.

of the Charter right of another.[12]

As already mentioned, court orders were not considered as governmental action. They were excluded from the scope of s.32(1) although the Supreme Court stressed in *Dolphin Delivery* that courts are bound by the Charter and by all law. Their exclusion was explained by referring to the function of courts as neutral arbiters when applying the law, i.e. they are not involved as contending parties in private litigation.[13] McIntyre J., who delivered the judgement, was concerned that the scope of Charter application would be widened to virtually all private litigation if court orders were regarded as an element of governmental intervention sufficient to invoke the Charter since all cases must end, if carried to completion, with an enforcement order.[14] To private litigation, however, the Charter was not supposed to apply. While governmental action could effectively be restricted only by constitutional limits, private conduct is regulated by the tort system and by other laws, which are better designed for this purpose and contain more details as to the appropriate scope of private rights and obligations.

With respect to the common law, the Court recognized, that the Charter must apply to it because of s.52(1) of the *Constitution Act, 1982*, which refers to 'any law' in declaring it of no force in case it is inconsistent with the provisions of the Constitution. The body of the common law, which in great part governs the rights and obligations of the individuals in society, definitely is 'any law'.[15] However, the Court then proceeded to restrict this ruling by concluding that the Charter will apply to the common law only in so far as a governmental actor is relying on it to abrogate Charter rights, i.e. only when the common law is the basis of some governmental

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[12] *R.W.S.D.U. v. Dolphin Delivery Ltd.*, supra n.5, at para.37. With respect to abuse of private power, the authority for legal control is said to be best left with the legislature. For courts it would be inappropriate to assume responsibility for all issues of social justice for all elements of society. Sharpe/Swinton, supra n.10, at p.62.
[13] *Dolphin Delivery*, ibid, para.34.
[14] Ibid, para.34.

action which (allegedly) infringes a guaranteed right or freedom.[16] The common law in and of itself does not demonstrate a sufficient connection to government to invoke the Charter's protection. Thus, between private parties the Charter will not apply to the common law because of the absolute requirement for governmental action.

In this respect, the decision in *Hill v. Church of Scientology of Toronto* determined that in the context of civil litigation involving exclusively private parties, the Charter will indirectly apply to the common law, namely to the extent that the common law is found to be inconsistent with Charter values.[17] The issue in such cases accordingly is whether the principles underlying the common law rule are consistent with the values enshrined in the Charter. This aspect is important for the question of the Charter's impact on the common law of defamation and will be discussed in greater detail in chapter six.

B. Structure of s.2(b) Analysis

I. The Scope of Freedom of Expression

1. Meaning of Expression

In contrast to the approach followed by the U.S. Supreme Court, the Supreme Court of Canada chose the broadest possible definition of expression: protected is freedom of *expression*, not freedom of *speech*.[18] "Expression", thereafter, has been held to include every activity that conveys or attempts to convey meaning.[19] Not only the freedom to speak, write or publish ideas

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[15] Ibid, para.23.
[16] Ibid, para.32.
[17] (1995) 126 D.L.R. (4th) 129, at p.157.
[18] *Ford v. Québec*, [1988] 2 S.C.R. 712, at p.766: Rights and freedoms should be given a large and liberal interpretation.
[19] *Irwin Toy v. Québec*, [1989] 1 S.C.R. 927, at p.968; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp.729, 826.

is protected, but arts and physical gestures or acts can also be covered.[20] If an activity has expressive content it *prima facie* falls within the scope of the guaranteed free expression. This definition excludes hardly anything and places all forms of expression on an equal footing.

An explanation for this broad approach can be found in the acceptance of three different rationales for freedom of expression which cover various facets of expression. The democracy rationale comprises political expression as being essential for the working of a parliamentary democracy since this form of government cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions.
By acknowledging the truth discovery rationale and the 'marketplace of ideas', the Court broadened the scope of protection to the expression of ideas concerning all branches of human knowledge. Finally, regarding expression as intrinsic worth for the individual, as an important element of personal self-fulfilment and autonomy, results in the broadest possible definition. This last rationale covers more than speech, namely expression through human activity such as, for instance, art, music or dance.[21]

Important is that the right of freedom of expression extends to the listener as well as to the speaker. It also protects the individual from being required to express a particular view, i.e. there is a right not to express.[22] Lamer J. said in *Slaight Communications Inc. v. Davidson*,[23] that

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[20] *Irwin Toy*, supra n.19, at p.970.
[21] Human activity most of the time combines physical and expressive elements. It is, however, possible that activity is purely physical without the intention to carry a message. Certain day-to-day tasks can generally not be regarded as attempts to convey meaning, such as parking a car, for instance. In such cases it is incumbent on the plaintiff to show that his act in fact was performed to convey a meaning (*Irwin Toy v. Québec*, supra n.19, at p.969). So in the example of parking a car, a plaintiff who parked without authority in a zone reserved for spouses of government employees might argue that he did this as part of a public protest, to express his anger at his exclusion from the allocation of a limited resource. In that context his activity has expressive content.
[22] *National Bank of Canada v. R.C.U.*, [1984] 1 S.C.R. 269, at p.295 (Beetz J.); *R. v. Big M Drug Mart*, [1985] 1 S.C.R.295, Dickson at p.336 about the meaning of freedom; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.
[23] [1989] 1 S.C.R. 1038, at p.1080.

'freedom of expression necessarily entails the right to say nothing, or the right not to say certain things'.

The following examples serve to get a general idea of the scope of freedom of expression according to the Supreme Court of Canada.

Commercial expression was held to be covered by the protection of s.2(b) in *Ford v. Quebec.*[24] The Court rejected the argument that the Charter was not intended to protect economic interests and instead emphasised the intrinsic value of advertising. The recipients of information provided by advertising are enabled to make informed economic decisions, which is important with regard to individual fulfilment and autonomy. Therefore, protection is not only afforded to commercial advertising and the advertisers but at the same time to the recipients of advertising. Later court decisions followed this view and also regarded commercial advertising as protected by freedom of expression.[25]

Freedom of expression is also involved in cases of picketing since any form of picketing contains at least some element of conveying meaning.[26] Certainly it intends to put the person picketed under pressure and cause him economic loss. But apart from that it conveys the message to the general public that the organisation picketing is 'involved in a dispute, that it is seeking to impose its will on the object of the picketing, and that it solicits the assistance of the

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[24] [1988] 2 S.C.R. 712, at p.766, where the issue was the constitutionality of a provincial law restricting the language of advertising.

[25] For example: *Irwin Toy*, supra n.19, where a legislative act prohibited commercial advertising directed at persons under thirteen years of age, or *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, where the constitutionality of a provision was challenged that explicitly restricted dentists' advertising. However, the fact that expression is commercial is not necessarily without constitutional significance, as can be seen later on, because the circumstance of how close expression is to the core values of freedom of expression (political or social participation, truth or self-fulfilment) may effect the sec.1 analysis.

[26] *R.W.D.S.U. v. Dolphin Delivery*, [1986] 2 S.C.R. 537, at p.587; see also *B.C.G.E.U. v British Columbia*, [1988] 2 S.C.R. 214.

public in honouring the picket line.'[27] The picketing tries to persuade customers to refrain from doing business with the person picketed. Therefore, picketing is an activity with expressive content and receives Charter protection, as long as it is peaceful.

Since postering and leafleting offer an effective and relatively inexpensive way of communicating political, cultural or social ideas which especially helps the less powerful members of society to give voice to their opinions and to support their concerns, this expressive activity also receives Charter protection. [28]

Communications which promote hatred against an identifiable group are covered by freedom of expression as well. They contribute to vigorous and open debate essential to democratic government and they foster a vibrant and creative society through the marketplace of ideas.[29] As stressed in *Irwin Toy,*[30] the type of meaning conveyed is irrelevant to the question of whether an expressive activity is protected by sec.2(b). Since communications promoting hatred convey a meaning and are intended to do so by those who make them, they cannot be deprived of the protection accorded by sec.2(b), no matter how offensive the content of a statement may be. The content of an expression cannot deprive it of its constitutional protection.

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[27] *Dolphin Delivery*, ibid, at p.588.

[28] *Ramsden v. Petersborough,* [1993] 2 S.C.R. 1084 (the decision furthermore dealt with the question whether postering on public property is protected as well and came to the conclusion that this is the case at least on some occasions); *Ford v. Québec,* [1988] 2 S.C.R. 712 (where the Supreme Court held that a law requiring public signs and posters to be printed only in French violated sec. 2 (b)); *United Food and Commercial Workers, Local 1518 (U.F.C.W.) v. Kmart Canada Ltd.*, [1999] S.C.J. No.44 (where members of the appellant union peacefully distributed leaflets at secondary sites during a labour dispute with two KMart stores. The Court cited the Labour Relations Board in para.27 and said it is 'permissible for employees to publish letters, issue press releases, take out newspaper advertisements or use billboards in order to publicize the labour dispute and attempt to gain public sympathy.' They stressed how important it is for workers to disseminate accurate information in a lawful manner with regard to a labour dispute).

[29] *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p.732; In this case a high school teacher was charged under the Criminal Code with unlawfully promoting hatred against Jews by making anti-Semitic statements to his students. The Court had to decide whether the particular section of the Criminal Code infringed freedom of expression.

On the same ground, the distribution of pornographic material was held to be within the scope of freedom of expression.[31] In creating a (pornographic) film for instance, the maker of the film is consciously choosing particular images, which together constitute the film, and thereby is attempting to convey some meaning. The content of the film and the reaction of the audience are of no relevance for the question of whether the activity is protected.[32]

Similarly, deliberate falsehoods have been regarded as protected, because the truth or falsity of such communications can only be determined by referring to its content.[33] Apart from the concept of content-neutrality it would be difficult to conclusively determine the falsity of a statement. And even if a statement is false it could still have a value since 'the challenge of this false idea to received understanding promotes a re-examination that vitalizes truth.'[34]
In view of this, defamatory expression that is untrue should deserve protection as well. However, I will come back to this issue in chapter six.

2. The Violence-Exception

There is one restriction placed on the protection of conduct of expressive nature: violence as a form of expression is excluded from sec.2(b) protection.[35] Although acts of violence, for example terrorist attacks, can obviously be intended to convey a meaning, the Supreme Court

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[30] [1989] 1 S.C.R. 927.
[31] *R. v. Butler*, [1992] 1 S.C.R. 452 dealt with the constitutionality of the obscenity provisions of the Criminal Code.
[32] Ibid, at pp.489-90.
[33] In *R. v. Zundel*, [1992] 2 S.C.R. 731 the section of the Criminal Code, which punished the act of wilfully publishing a statement, that the publisher knows is false and that causes or is likely to cause injury or mischief to a public interest, infringed sec. 2 (b) of the Charter. Publishing a pamphlet alleging that the killing of 6 million Jews during the Holocaust is a myth therefore fell within the guarantee of freedom of expression.
[34] Kent Greenawalt, "Free Speech Justifications' in: 'Constitutional Law in Canada" by Magnet, (4th ed., vol.2, Yvon Blais Inc., Montreal, 1989), at p.283.
[35] *Irwin Toy*, [1989] 1 S.C.R. 927, at p.970; *R. v. Keegstra*, [1990] 3 S.C.R. 967, at p.731.

decided that they would not receive constitutional protection.[36] The justification for this exception is that violence is inimical to the rule of law on which all rights and freedoms depend and to the values supporting freedom of expression.[37] While freedom of expression exists to ensure the enhancement of the freedom to choose between ideas or courses of conduct, violence is coercive and takes away free choice. It undermines the freedom of action.

Initially, threats of violence had also been unprotected.[38] In *R. v. Keegstra*[39], however, the Court refrained from excluding threats of violence. The starting point has to be that activities conveying or attempting to convey meaning are regarded as expression for the purpose of sec.2(b). Further, such expressive activities cannot be excluded from the scope of guaranteed free expression on the basis of the content or meaning conveyed.[40] Yet, a communication can only be classified as a threat of violence by reference to the content of its meaning (as opposed to its form). The decision stated clearly that the violence exception refers to expression communicated directly through physical harm. What may lead to violence is not itself violent so threats of violence are covered by freedom of expression. Accordingly, the determination of the scope of freedom of expression is governed by the principle of content-neutrality.

II. Limitation of Freedom of Expression

If the activity of the litigant who alleges an infringement of freedom of expression is covered by sec.2(b), the next step is to determine whether there has been a violation of the asserted right. In

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[36] Richard Moon criticizes this decision of the courts in his article "The Supreme Court of Canada on the structure of Freedom of Expression Adjudication", (1995) 45 University of Toronto Law Journal 419. He sees that the Court might have felt that inclusion of acts of violence in the Charter protection would give them a 'small but undeserved amount of legitimacy'. But he suggests proceeding according to the Court's general approach, i.e. to define expression broadly (which means to include violent acts) and use sec.1 to deal with difficulties.

[37] *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p.731 (Dickson) and p.830 (McLachlin).

[38] *R.W.S.D.E.U. v. Dolphin Delivery*, [1986] 2 S.C.R.537, at p.588.

[39] Supra n.35, at p.733 (Dickson C.J.); the activity of wilfully promoting hatred did not fall within the violence exception according to the majority of the Court.

[40] *Irwin Toy*, supra n.19, at p.969.

Irwin Toy the Supreme Court described how to proceed in this respect: the initial test of constitutional validity is to examine the purpose of legislation. If the government's purpose was to impose a limit on expression, there has been a violation of sec.2(b) and a sec.1 analysis is required to determine whether this limitation is consistent with the provisions of the Constitution. In case the governmental action fails this purpose test, i.e. the purpose is to limit expression, there is no need to consider its effects. At this point, legislation with an invalid purpose cannot be saved by relying on its effects. In case the conclusion of this test is that the legislation has a valid purpose the litigant can still argue that the effects of the legislation restrict his freedom of expression. Accordingly, there is a distinction between content-based restraints and those that merely have the effect of limiting expression.[41]

A governmental purpose to limit freedom of expression exists where the government intends to restrict the actual type of speech, i.e. the content of expression, by singling out particular meanings that are not to be conveyed. This is, for instance, the case with the criminal offence of defamatory libel, restrictions on advertising or the prohibition of pornography; likewise, if the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed, or to control the ability of the one conveying the meaning to do so. An example of a case of restricting a 'form' of expression would be a law that prohibits handing out pamphlets. Such a law is indifferent to the particular content of the pamphlets but bans whatever content they have and thus, restricts expression. *Hogg*[42] refers to those restrictions, which he labels 'prior restraint' on publication, as the most severe restrictions since 'expression that is never published cannot contribute in any way to the democratic process, to the marketplace of ideas or to personal fulfilment'.

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[41] [1989] 1 S.C.R. 927, at pp.972-976.
[42] Peter W. Hogg, *Constitutional Law of Canada*, (4th ed., Carswell, Toronto, 1996), at p.788.

Where the government aims only to control the physical consequences of particular human activity, regardless of the meaning being conveyed, its purpose is not to control expression. A rule against littering for example, as opposed to one that prohibits the handing out of pamphlets (i.e. a certain form of expression), only aims to control the physical consequences of certain conduct.[43] Therefore the question arises as to what the mischief of the impugned action is. If it consists only in the direct physical result of human conduct, the government's purpose is not to restrict freedom of expression. On the other hand, where thoughts, opinions, beliefs, particular meanings or the influence that a meaning has on the behaviour of others are the target of the regulation, the government's purpose is to restrict expression.

Limitations that aim at some other aspect of the activity, i.e. those where the government's purpose was not to control or restrict attempts to convey a meaning may nevertheless have impact on expression. Courts still have to decide whether the effect of the government action was to restrict the plaintiff's free expression. Here the plaintiff must be able to show that the activity in question advances at least one of the principles and values underlying freedom of expression, which have been identified before as participation in social and political decision-making, seeking and attaining the truth, and promoting individual self-fulfilment. The plaintiff has to identify the meaning he intended to convey and demonstrate how it relates to the pursuit of one of these values.

III. Justification of the Limit under s.1 of the Charter

Section 1 of the Charter prescribes the conditions under which a violation of freedom of expression can be justified. Necessary is a 'reasonable limit' 'prescribed by law' that can be

[43] Unfortunately, rules can be formulated to appear content-neutral while they actually aim to control attempts to convey meaning.

'demonstrably justified in a free and democratic society'.

This is the crucial stage in freedom of expression cases. Since almost everything qualifies as expression and since the establishment that expression has been limited by the state is rather a formal matter, the real issue is to determine whether the particular limit can be justified under sec.1. Here the collective interests, as well as the competing interests and rights of other individuals, have to be balanced against those of the claimant, and a reconciliation of these competing interests needs to be found.

In the case of *R. v. Oakes*[44], the Supreme Court laid down the criteria that must be satisfied to show that a limit is justified. It also expressed the idea that sec.1 of the Charter has a dual purpose. Not only does it serve as constitutional guarantee for the rights and freedoms set out in the provisions of the Charter but it also states explicitly the exclusive justificatory criteria. Therefore the standard should be high for the government to prove that a limitation is justified. According to the outline of the general principles applicable to a sec.1 inquiry given in *Oakes*, a law that qualifies as a reasonable limit first of all must pursue an objective that is sufficiently important to justify a limitation of a Charter right. Within the following proportionality stage, the law must be rationally connected to this objective, it must impair the right no more than is necessary to accomplish the objective and it must have a proportional effect on the person to whom it applies.[45]

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[44] [1986] 1 S.C.R. 103, at pp.135-142.

[45] See Peter W. Hogg, "Section 1 Revisited", National Journal of Constitutional Law 1, 1991/92 1, at pp. 3-4. In *Oakes* the Court suggested that the standard for justification is high. However, in subsequent cases, such as *Irwin Toy* the Court retreated from this position. In *RJR-MacDonald v. Canada* ([1995] 3 S.C.R. 199), for instance, LaForest suggested not to apply s.1 strictly in cases where the form of expression is placed far from the 'core' of values underlying freedom of expression. It should only be demonstrated that Parliament had a rational bases for introducing the measure. However, he was dissenting in this case and the majority of the Court decided for a stricter standard. I will refer to this aspect later on p.81. *Libman v. Québec* ([1997] 3 S.C.R. 569) is another example that shows how the Court seemed to allow legislature some leeway (see p.84).

The onus to defend a law as a reasonable limit rests upon the government. As the party who seeks to uphold the limitation, it has to prove on a balance of probability that a limit is reasonably and demonstrably justified in a free and democratic society. It bears the burden of proving that the impugned legislation is designed to address a pressing and substantial concern, and that the particular means employed by it are proportionate to this goal.[46]

Although all forms of expression qualify equally for constitutional protection, it will be easier to justify limits on some forms of expression than on others. Wilson J. said in *Edmonton Journal v. Alberta*[47] that not all expression is equally worthy of protection and that not all infringements of free expression are equally serious. When a form of expression lies near the 'core' meaning of freedom of expression, for instance political speech[48], there will be a strict application of sec.1 whereas a limitation by a legislature is more likely to survive when the expression at issue is peripheral to the core meaning. The motives for commercial expression, for example, are primarily economic. A limitation in this respect does not so much result in loss of the opportunity to participate in the political process or the marketplace of ideas, or the realization of one's self-fulfilment.[49]

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[46] *Irwin Toy*, [1989] 1 S.C.R. 927, at para.69 (p.986).
[47] [1989] 2 S.C.R. 1326.
[48] See *Libman v. Québec*, [1997] 3 S.C.R. 569, where the Court said in para.60 that political expression is at the very heart of freedom of expression and therefore should normally benefit from a high degree of constitutional protection, that is, that the courts should generally apply a high standard of justification to legislation that infringes the freedom of political expression.
[49] In *Rocket v. Royal College* ([1990] 2 S.C.R. 232, at p.247) the Court suggested that restrictions on expression of this kind might be easier to justify. A sensitive, case-orientated approach has been permitted if commercial expression in concerned. In *RJR-MacDonald v. Canada* ([1995] 3 S.C.R. 199, at para.75 and 77) La Forest said that commercial expression with regard to tobacco advertisement is entitled only to a very low degree of protection because this form of expression lies far from the 'core' of freedom of expression values. Its purpose is only to inform consumers about, and promote the use of, a product that is harmful to the consumers with the main motive of making profit. Therefore he found an attenuated level of sec. 1 justification appropriate in view of provisions limiting this form of expression. (La Forest was part of the minority in this judgement.)

1. 'Prescribed by Law'

The limitation in question has to be traced back to a law as opposed to an arbitrary restriction. This also applies to actions by public officials under the authority of a law which grants a general discretion. The exercise of discretionary power has to be based on a statutory regulation.[50]

One basic requirement for a law to constitute a limit prescribed by law is that it has to be drafted with precision and certainty and avoid vagueness or overbreadth. To survive a challenge, a law that imposes a limit on Charter rights should be 'expressed in terms sufficiently clear to permit a determination of where and what the limit is'.[51] A law that is unduly vague, ambiguous, uncertain or subject to too much discretionary determination is therefore an unreasonable limit. This is because the citizens have to be able to know their rights and the scope of these rights. They have to be informed of what conduct is permitted and prohibited so they can regulate their activities accordingly. Otherwise they might be deterred from conduct which in fact is lawful and not prohibited just because of the uncertainty concerning the extent to which the exercise of a guaranteed freedom may be restrained.

Such deterrence is particularly harmful where freedom of expression is concerned, a freedom which has been said to underlie the existence of virtually all other rights and liberties.[52] It has to be kept in mind that statutes restricting s.2(b) are enacted by a government whose legitimacy depends on the citizens' consent, which has a self-serving tendency and an interest in suppressing dissenting views. Broadly formulated statutes which leave the citizens in the dark

[50] In *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038 an arbitrator appointed by the Minister under the Canada Labour Code imposed a limit on the appellants right of freedom of expression. The Court moved on to sec.1 in that case. Likewise, in *Douglas/Kwantlen Association v. Douglas College*, [1990] 3 S.C.R. 570, where a college was regarded as government agent.

[51] *Re Luscher and Deputy Minister, Revenue Canada, Customs & Exercise* (1985), 17 D.L.R. (4th) 505, at p.506.

about their reach are in the government's interest. In view of the elementary importance of free expression, this has to be avoided.

As a result, a statute which describes in unduly vague terms what it regulates and that does not give clear information about what the limit is (for instance if it confers open-ended discretion to limit protected rights), does not meet the requirement of being prescribed by law.[53]

However, the 'vagueness-argument' needs to be seen against the background that there rarely is absolute precision in the law. Since laws define standards of general application they inherently posses an element of uncertainty. They always have a discretionary element because the standard of interpretation can never specify all the instances in which they apply. As long as the legislature does not give a plenary discretion to the courts to do whatever seems best in a wide set of circumstances, but provides an intelligible standard according to which the judiciary must decide, the 'vagueness-argument' fails.[54]

2. Pressing and Substantial Purpose

The next step is to have a look at the objective which the limitation is designed to serve. This objective must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom' and it must 'relate to concerns which are pressing and substantial'.[55] Most of the time courts are reluctant to reject the objectives pursued by the government at this stage of the scrutiny.

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[52] Cardozo J in *Palco v. Connecticut*, (1937) 302 U.S. 319.

[53] For example the Court found that the phrase 'likely to cause injury or mischief to a public interest' in a section of the Criminal Code was undefined and capable of almost infinite extension. The complain in this case (*R. v. Zundel*, [1992] 2 S.C.R. 731) concerned not only the breadth of the section's contextual reach but also that it was particularly invasive by choosing prosecution for an indictable offence as sanction. For fear of prosecution individuals might be restrained from saying what they would like to. Therefore the section in question was overbroad.

[54] See *Irwin Toy*, [1989] 1 S.C.R. 927, at para.63 (p.983).

[55] *R. v. Oakes*, [1986] 1 S.C.R. 103, at para.69.

It is difficult to define the purpose of a law. Different purposes can be found at different levels of generality. For example, there is the purpose of a statute as a whole and the purpose of a particular section of a statute. The higher the level of generality at which a legislative objective is expressed, the more obviously desirable the objective will appear.[56] But depending on how broadly a purpose is defined, the next stages of the sec.1 analysis will be influenced. A high level of generality will, for instance, be problematical for the government with regard to the 'least drastic means' requirement: there will be a greater possibility of finding a less drastic means that interferes less with the Charter right since a wide objective can be accomplished in many ways.

Initially, a high standard of justification with regard to the pressing and substantial purpose had been required by the Court to avoid the possibility that the rights and freedoms enshrined in the Charter would be stripped of most of their value.[57] In *Irwin Toy*, however, excuses have been made for not applying such a high standard. The Court retreated from the evidentiary requirements set out in *Oakes* and decided that the legislature had to 'draw upon the best evidence currently available'.[58] To justify their view that judges did not have to intervene in cases like the one at bar the Court referred, for instance, to *Ford v. Quebec*[59], where government was afforded a 'margin of appreciation' to form legitimate objectives based on somewhat inconclusive social science evidence. They also cited *R. v. Edwards Books and Art Ltd.*[60] where it was held that courts are not called upon to substitute judicial opinions for legislative ones as to the place at which a precise line has to be drawn, where one set of competing claims

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[56] Hogg, "Section 1 Revisited", supra n.45, at p.5.
[57] *R. v. Oakes*, [1986] 1 S.C.R. 103, at p.138.
[58] For example, legislative debates and statements of the Minister responsible for the legislature, commenting on the reasons for proceeding the way he did, have been accepted as evidence. There even have been competing credible scientific reports, which came to different conclusions.
[59] [1988] 2 S.C.R. 712, at p.777-79.
[60] [1986] 2 S.C.R.713, at p.781-82.

legitimately begins and another one ends. Therefore, courts have to accept reasonable estimations of the legislature as to where this line is most properly drawn.

Similarly, in his dissent in *RJR-MacDonald v. Canada* La Forest argued that a greater degree of deference should be accorded legislatures when courts are dealing with legislation that requires mediating between competing issues and protecting vulnerable groups, and when conflicting scientific evidence must be considered. Decisions in such cases are properly assigned to the elected representatives of the people of Canada, who have the necessary resources to make them and who are responsible and accountable to the electorate.[61]

Thus, a lower standard actually can apply with regard to the determination whether there is a pressing and substantial purpose.

3. Proportionality Stage

If an objective of sufficient significance is recognized, it still needs to be shown that the means chosen are demonstrably justified in a free and democratic society. The purpose for which the Charter originally was included in the Constitution is that Canadian society is to be free and democratic. Therefore courts have to keep in mind the values and principles which are essential to a free and democratic society.[62] Against this background it is necessary that the means chosen to achieve legislature's objective are appropriate.

At this stage courts are required to consider the effect of a particular governmental action on rights and to balance that against the purpose underlying the action. They have to determine

[61] [1995] 3 S.C.R. 199, at para.68; La Forest belonged to the minority here and McLachlin J. did not share such a generous view. She suggested a stricter standard. However,

[62] *R. v. Oakes*, [1986] 1 S.C.R.103, at para.64; Dickson J. named as such values respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect

whether the act goes too far in the impairment of rights, which involves a form of proportionality test. Three components constitute this test.

a) Rational Connection

The first component is that the measures adopted by legislature to limit a Charter right must be rationally connected to the objective of the limitation. They must be 'carefully designed to achieve the objective in question' and must not be 'arbitrary, unfair or based on irrational considerations'.[63] The infringement and the sought benefit must be connected, i.e. the government must show that the restriction on the right serves the intended purpose.[64] It rarely happens that courts decide that a law is not rationally connected to its objective.

The *Oakes* case itself, however, was decided on the basis that the impugned law lacked rationality. At issue was a provision of the federal *Narcotic Control Act*, which provided that if a court finds the accused in possession of a narcotic, he is presumed to be in possession for the purpose of trafficking. The rational connection between the basic fact of possessing a narcotic and the presumed fact of possessing for the purpose of trafficking was held to be missing. The Court found it irrational to infer that a person had intent to traffic on the basis of his possession (especially of a very small quantity) of narcotics.[65]

b) Minimum Impairment

After the rationality of the provision has been considered it is necessary that the adopted means should impair the right or freedom in question as little as possible. The law should pursue the

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for cultural and group identity and faith in social and political institutions, which enhance the participation of individuals and groups in society.

[63] *R. v. Oakes*, [1986] 1 S.C.R. 103, at para.70.

[64] *RJR-MacDonald v. Canada*, [1995] 3 S.C.R. 199, a para.153.

[65] *R. v. Oakes*, supra n.62, at para.77, 78.

desired objective by the least drastic means without affecting the right more than is necessary to accomplish the objective. The question becomes whether other means are available to the legislative body which would still accomplish the objective but which would impair the Charter right less. Usually the minimal impairment test is the centre of the inquiry into s.1 justification.

In *Ford v. Quebec*[66], for instance, the requirement that public signs be only in the French language has been regarded as too drastic a means of protecting the French language. To ensure that the "visage linguistique" reflected the demography of Quebec, i.e. that French is the predominant language, other less intrusive possibilities could have been chosen. For example, French could be required in addition to any other language or it could be required to have greater visibility than that accorded to other languages. Exclusivity for French could not be justified.[67]

Other cases adopted a more relaxed minimum impairment test. In *Edwards Books and Art Ltd. v. R.*[68], for instance, Dickson J. reformulated the requirement into whether the right was impaired as little as reasonably possible, and suggested that the limitation only needs to be the least intrusive given the objective and other competing interests. Instead of insisting that only the least possible infringement could survive, a reasonable legislative effort to minimize the infringement was sufficient. Likewise, La Forest who stressed that the minimal impairment requirement does not impose an obligation on the government to employ the least intrusive measure available, but rather the least intrusive in the light both of the legislative objective and the infringed right;[69] moreover, the less restrictive measure has to be equally effective.

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[66] [1988] 2 S.C.R. 712.
[67] Ibid, at para.72 (p.780).
[68] [1986] 2 S.C.R. 713.
[69] *RJR-MacDonald v. Canada*, [1995] 3 S.C.R. 199, at para.96 (La Forest was part of the minority in that case).

Furthermore, in *Irwin Toy Ltd. v. Quebec*[70] Dickson J. said that the 'Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups'. Finally, in *Libman v. Quebec*[71] the Court explained once more that great deference has to be accorded to the legislature's choice where legislature must reconcile competing interests in choosing one policy among several that might be acceptable, because it is in the best position to make such a choice.

There are differing views with regard to the question of how strict the minimal impairment test should be applied. On the one hand it has been said that the degree of constitutional protection may vary depending on the nature of the expression at issue and that even if a basic form of expression is restricted, the legislature must be accorded a certain deference to enable it to mediate between competing values.[72] Accordingly, La Forest J. contrasts in *RJR-MacDonald Inc. v. Canada*[73] the importance of Parliament's objective with the low value of the expression at issue, namely commercial expression, and argues the importance of the objective justifies more deference to the government at the stage of evaluating minimal impairment.

On the other hand, McLachlin J. emphasises that even on difficult social issues, Parliament does not have the right to determine unilaterally the limits of its intrusion on the rights and freedoms guaranteed by the Charter. She points out that the Constitution determines those limits. Furthermore, care has to be taken not to overvalue the legislature's objective and not to undervalue the expression at issue. Although commercial speech arguably is less important than

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[70] [1989] 1 S.C.R. 927, at para.88 (p.999).
[71] [1997] 3 S.C.R. 569, at para.59.
[72] *Libman v. Québec*, [1997] 3 S.C.R. 569, at para.60 and 61; At issue in this case were provisions that restricted spending on referendum campaigns with the primary purpose to promote political expression by ensuring an equal dissemination of points of views. Legislature had to balance the values of freedom of expression and referendum fairness. The Court decided that the particular provisions failed the minimum impairment test.
[73] [1995] 3 S.C.R. 199.

some other forms of speech it should not be lightly dismissed.[74]

c) Proportionate Effect

Finally there must be proportionality between the effects of the measure in question, and its objective. This test only applies when all the other aspects of proportionality have been satisfied, i.e. after the means have been judged to be rationally connected to the objective and to be the least intrusive available. The more severe the deleterious effects of a measure are the more important must be the objective. So even if all elements of the sec.1 analysis are satisfied it is still possible that a limit will not be justified by the purposes it intends to serve because its deleterious effects are too severe.

In *Dagenais v. Canadian Broadcasting Corp.*[75] the Court rephrased the third step of the above-described "Oakes-test". Instead of only requiring proportionality between the objective of the impugned governmental measure and its deleterious effects, the Court recognized the necessity to measure the actual salutary effects of the impugned legislation against its deleterious effects.[76] The question becomes that of how effectively the applied measure achieves its purpose. Often the adopted means will result in the (nearly) full realization of the legislative objective. There the balance between the objective in question and the deleterious effect has to be examined. But if the measure will result in only the partial achievement of its objective it is necessary to ask whether both the underlying objective and the salutary effects are proportional

[74] For the majority in *RJR-MacDonald*, at para.168, 169. The majority decided in this case that the challenged provisions are of no force and effect under sec. 52 of the Charter because they could not satisfy the requirement of minimum impairment. Instead of fully prohibiting any advertising of tobacco products government could have chosen for instance a partial ban which would allow information and brand preferences advertising, or a ban on lifestyle advertising only. These alternatives would have been a reasonable impairment given the objective and legislative context. And with regard to the requirement of placing health warnings on tobacco packaging government failed to show that the warning had to be unattributed to achieve the objective of reducing tobacco consumption.

[75] [1994] 3 S.C.R. 835.

[76] Ibid, at para.93.

to the deleterious effects the measure has on fundamental rights and freedoms.[77]

Chief Justice Dickson, who authored the majority judgement in *Oakes*,[78] later on expressed concern about the judiciary potentially intruding into the legislative sphere, and argued for a less strict application of the criteria set out in *Oakes* in certain cases. Similarly La Forest J., emphasised in *RJR-MacDonald v. Canada*[79] that the Court only established guidelines in *Oakes* to provide a framework for the determination of whether an infringement can be justified. He further said that the balance which the courts have to strike between individual rights and community needs could not be achieved in the abstract. Therefore courts should not stick strictly to a formalistic test but rather should take into account the nature of the infringed right and the specific values and principles upon which the state seeks to justify the infringement. This means that the requirements described in *Oakes* must be applied flexibly, with regard to the specific factual and social context of each case. La Forest supported this view by referring to the word 'reasonable' in sec.1, which, he argued, implies flexibility.

In this respect, the question arises whether such eroding of the initial test is reconcilable with the rationales underlying freedom of expression as described in Chapter 1. These rationales made a strong plea for an extensive protection of freedom of expression. If the courts continue to undermine the strictness of the test which justifies limitations on s.2(b), they surely undercut the purposes underlying this right.

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[77] See *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at pp.887-8. At issue in the case was an injunction prohibiting the CBC from broadcasting a series entitled 'The Boys of St. Vincent', a fictional account of sexual and physical abuse of children in a Catholic institution. The appellants, members of a Catholic religious order, were charged with abuse of children in their care at training schools and therefore applied for the injunction. The Court concluded that a publication ban has a serious deleterious effect on freedom of expression and has few salutary effects on the fairness of trial. Therefore they did not authorize the ban.

[78] *R. v. Oakes*, [1986] 1 S.C.R. 103.

In most of the cases courts do not spend very much time with this concluding stage of the sec.1 analysis. In *Irwin Toy*[80] the Court simply held that 'there is no suggestion that the effects of the ban are so severe as to outweigh the government's pressing and substantial objective'. It offered as supporting reason the fact that advertisers were free to direct their messages at parents and other adults, or to participate in educational advertising; they were just not allowed to aim advertisements at children.

In *Rocket v. Royal College of Dental Surgeons*[81], however, the provision restricting dentists' advertising did not pass this proportionality test. Its effect was clearly to prohibit expression, and it did not further its objectives of promoting professionalism, and of preventing irresponsible and misleading advertising. The exclusion of much of the prohibited speech was not necessary. For example, information about dentists' office hours, the languages they speak or other objective facts relating to their practise is very useful and the public has an interest in obtaining this kind of information. Such useful information was restricted without justification. Therefore the provision's effects were held to be disproportionate to its objective.

Hogg has expressed doubts about the use and significance of this last step within the proportionality stage. If a law is sufficiently important to justify overriding a Charter right (first step), if this law is rationally connected to the objective (second step), and if it also impairs the right at issue no more than is necessary to accomplish the objective (third step), the question is how the law's effects could then be judged to be too severe (fourth step). He concluded that an affirmative answer of the first three steps has to result in the affirmation of the fourth step and that therefore this last step has no work to do and can be ignored.[82]

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[79] [1995] 3 S.C.R. 199, at para.62 (dissenting opinion).
[80] [1989] 1 S.C.R. 927, at para.89.

However, in my opinion, there could also be a different interpretation of the proportionality test outlined in *Oakes*. The questions whether the limitation pursues a sufficiently important objective, whether it is rationally connected to this objective, and whether it is the least drastic means have to be answered on an abstract level, i.e. the challenged law has to meet these requirements in general. The last issue, whether the law has disproportionate effects, then refers to the particular situation that leads to the challenge. Accordingly, it could happen that a law, which is generally valuable, cannot be applied to one particular person because it has a disproportionately severe effect on this very person.

The proportionality analysis in Germany, for instance, proceeds this way, first scrutinizing the constitutionality of the limitation in general, then testing whether the application of the limiting statute is justified in the specific case at bar.[83]

IV. 'Indirect' Application of the Charter

A different question is, what kind and how much of an impact the Charter is to have if it does not directly apply, for example in the context of civil litigation involving private parties only that rely on a common law rule. In *Dolphin Delivery*[84] the Court held that in such a case the common law has to be developed in accordance with Charter values, i.e. that the Charter applied 'indirectly' in so far as the common law can be found to be inconsistent with Charter *values*. However, the Court did not elaborate on the differences between the direct and 'indirect' application of the Charter and how exactly the common law is to be developed in a manner consistent with Charter principles. *Hill v. Church of Scientology*[85] gave us a sense of how the Supreme Court deals with 'indirect' Charter application.

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[81] [1990] 2 S.C.R. 232.
[82] Hogg, "Section 1 Revisited", supra n.47, at p.24.
[83] See Chapter 4 on pp.103-105.
[84] R.W.D.S.U. v. Dolphin Delivery (1986), 33 D.L.R. (4th) 174.
[85] (1995), 126 D.L.R. (4th) 129.

Logically, the test to be applied if the court is dealing only with Charter values should be less strict than under a direct application of the Charter. Otherwise, the distinction between Charter rights and values does not make sense. Accordingly, the Court in *Hill* departed from the rigorous standard of *Oakes*. It decided not to utilize the traditional s.1 analysis but to apply a more flexible standard: the principles of the common law (in that case the law of defamation) should be weighed against the values underlying the Charter, which will provide guidelines for the modification of the common law rule - if such a modification proves necessary.[86] However, a test comparable to that set out in *Oakes*, providing some degree of certainty, cannot be detected in *Hill*. The Supreme Court only stated that courts should be cautious when amending the common law and should not go further than necessary, leaving far-reaching changes to the legislatures.

A major difference between the direct and 'indirect' application of the Charter established in *Hill* is the onus shift: according to the Supreme Court, the party challenging the common law bears the onus of proving both that the common law fails to comply with Charter values and that, when these values are balanced, the common law should be modified. The reason for this decision was that a private party should be able to rely upon the common law, which may have a long history of acceptance in the community, and should not be placed in the position of having to defend it.

In my opinion it is neither reasonable to apply a different test of justification if the common law is concerned, in contrast to statutory law, nor can I actually detect any test at all in *Hill*. However, this issue will be discussed further in chapter six.

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[86] Ibid, at p.157.

CHAPTER 4:

The two Competing Values in the German Jurisdiction

This chapter describes some crucial aspects of how the German legal system deals with the collision of the right to freedom of expression and the protection of an individual's reputation. I will shows the concept of constitutional scrutiny and defamation in Germany as representative of a civil law jurisdiction in the hope that the ideas underlying this different approach might provide some inspiration. The discussion of this country's approach is not so much intended as a comparative approach, but rather to point out that freedom of expression receives much stronger protection outside of Canada in order to support my conclusions in Chapter 6.

The legal system in Germany is in principle based on codified law with a traditional distinction between public and private law. The most important feature concerning constitutional cases is the balancing, or rather weighing, of competing values by deciding conflicts in the light of the individuality of the case and its special circumstances. This strong orientation of judgements by the concrete case has parallels with the common law system.

Both freedom of expression and the individual's reputation, are constitutionally protected in Germany. Thus, it is not a conflict between constitutional freedom of communication and values which are enshrined in ordinary statutory texts (such as provisions of the Civil Code) that needs to be resolved but the collision of two constitutional values.[1]

A. The Values at Issue

I. Freedom of Expression

Freedom of expression of opinion is guaranteed in article 5 of the Constitution.[2] In the *Lüth* case[3] the Federal Constitutional Court held that the basic right to freedom of expression, the most immediate aspect of the human personality in society, is one of the most precious rights of man. It is absolutely essential to a free and democratic state, for it alone permits 'constant spiritual interaction', the 'conflict of opinion', which is its vital element. This freedom advances and guarantees the possibility of forming a free individual and public opinion with a wide range of disparate views and in a certain sense is the basis of freedom itself.

Article 5 protects statements of opinion, distinguishing opinions in the sense of 'value judgements' (Werturteile) from 'factual assertions' (Tatsachenbehauptungen).[4] The term 'value judgement' covers the expression of thoughts, convictions, evaluations, rejections, comments, assessments, i.e. generally all kinds of expressions where the subjective element prevails. The protection of such opinions does not depend on their reasonableness or the value of their content.[5] While value judgements enjoy presumptive protection, factual assertions, statements that can be proved as correct or false, are not protected as generously. However, since they are

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[1] Michael Sachs, *Grundgesetz Kommentar*, (C.H. Beck Verlag, München, 1999), Art.5 Rn.162, Berthge.

[2] Art.5 I 'Everyone shall have the right to freely express and disseminate his opinion by speech, writing, and pictures and to inform himself without hindrance through generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.'
Art.5 II 'These rights shall find their limit in the provisions of general laws, in provisions for the protection of youth, and in the right to personal honour.'

[3] BVerfGE 7, 198 (Lüth, 1958) [BVerfGE = Bundesverfassungsgerichtsentscheidung = decision of the Federal Constitutional Court; the Bundesverfassungsgericht is the highest German Court and a guardian of the Basic Law.

[4] Statements are not only protected in the dimension of their dissemination but also in the dimension of their effect. Freedom of expression accordingly includes the right to choose those forms and circumstances which ensure the greatest possible effect for the statement. BVerfGE 25, 256, 265 (Blinkfüer, 1969).

[5] BVerfGE 33, 1, 14 (Strafgefangene, 1972); 90, 241, 247 (Ausschwitzlüge, 1994). 'Every person may assert and disseminate his opinion irrespective of whether it is valuable, valueless, true or false, well grounded or not, emotional or irrational. Sharp and exaggerated opinions are also protected. Especially in public debate, criticism,

often closely connected to the forming of an opinion, factual assertions will be protected if they are a prerequisite or foundation for the formation of opinions.[6] Yet, statements about facts are not covered by the protection of article 5 if they are obviously false at the time of their utterance since false facts do not contribute to the formation of real public opinion and therefore do not deserve any constitutional protection.[7] Thus, intentional lies and the dissemination of facts that are 'consciously false', or 'false as has been proved' fall outside the scope of protection.

In contrast to this, the Supreme Court of Canada held that even deliberate falsehoods are protected by s.2(b) in the case of *R. v. Zundel*[8]. However, Canadian constitutional law also has one exception concerning the scope of guaranteed free expression: expressive acts of violence will not receive constitutional protection.[9]

The right to freedom of the press, which is also mentioned in Art.5 I GG, is not regarded as a special basic right (no *lex specialis* in relation to freedom of expression). Indeed, the expression of opinion contained in a press report is protected by the general right to freedom of expression. The right to a free press refers to institutional prerequisites and general conditions such as the procurement of information, its technical transformation and the dissemination of the final news. Furthermore, the media are granted certain privileges. For instance, the right of editorial confidentiality is seen as a prerequisite of a free press since it secures its independence.[10] On the other hand, heightened duties correspond with this constitutional right, as there is a journalistic duty of care, which demands their journalists to carefully examine their news stories for truth,

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even in exaggerated and polemical form must be accepted if one is to avoid limiting the process by which public opinion is formed.'

[6] BVerfGE 61, 1, 8 (NPD Europas, 1982).

[7] BVerfGE 54, 208, 219 (Böll/Walden, 1980); 61, 1, 8 (NPD Europas, 1982).

[8] [1992] 2 S.C.R. 731.

[9] *Irwin Toy v. Québec*, [1989] 1 S.C.R. 927, at p.970.

[10] Martin Kriele, "Ehrschutz und Meinungsfreiheit", NJW 1994, 1897, 1902; Fritz Ossenbühl, "Medien zwischen Macht und Recht", JZ 1995, 633, 635.

contents and origin. The demands of this duty increase if personality rights are concerned.[11] Finally, constitutional protection might not even be removed from the publication of illegally obtained pieces of information if the publication serves a socially useful function, for instance if it reveals some illegality.

II. The Individual's Reputation

The reputation of an individual is protected as part of the right to 'personal honour'.[12] The right to personal honour can be found in Art.5 II GG[13] as one of the limits of freedom of expression. It receives its constitutional protection as the most important component of the 'general personality right', which is not explicitly mentioned in the basic rights of the German Constitution. Indeed, this personality right is a conceptual creation of the civil administration of justice; the German Federal Court of Justice derived it from Art.1 I in combination with Art.2 I of the Constitution[14] where human dignity and personal freedom are granted.[15]

In *Schacht*, a landmark decision in 1954[16], the German Federal Court established that a human individual is not only protected in his human dignity and the free development of his personality but also that a general right of personality exists which must be regarded as constitutionally guaranteed and should therefore be recognized within the Civil Code. Thus, the new institution 'general personality right' was construed in the civil law by reading it into the general delict

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[11] Ossenbühl, supra n.10, at p.636; Schmidt-Bleibtreu, *Kommentar zum Grundgesetz*, (9th ed., Luchterhand, Neuwied, 1999), Art.5, Rn.226

[12] With respect to honour there is a dual understanding. On the one hand, there is the 'inner honour' as aspect of human dignity. The 'outer honour', on the other hand, refers to a claim to social recognition, to a good reputation within society. Peter Tettinger, "Das Recht der persönlichen Ehre in der Weltordnung des Gesetzes", JuS 1997, 769, 770.

[13] 'GG' is the abbreviation for 'Grundgesetz', i.e. the German Constitution and Art.5 II GG stands for article 5 section two of the Constitution.

[14] Art.1 I GG 'Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority'. Art.2 I GG 'Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law'.

[15] The Supreme Court of Canada linked personal reputation to human dignity as well. In *Hill v. Church of Scientology*, (1995) 126 D.L.R. (4th) 129 it is said on p.163 that 'the good reputation of the individual represents and reflects the innate dignity of the individual...'

[16] BGHZ 13, 334 (Schacht, 1954) [BGH = Bundesgerichtshof = highest court for civil matters].

provision of the German Civil Code, § 823 BGB[17], under the designation of 'other right'.

This development is to be seen against the background of the idea that basic rights have two different functions. On the one hand they are '*subjective* rights', relating to the freedom of the individual. The main purpose of the Bill of Rights in this respect is to constrain public power and to protect the individual against state intervention. But beyond this, the basic rights are regarded as establishing an '*objective* order of values' that centres on the freedom of the human being to develop in society and which must, as a constitutional axiom, apply throughout the entire legal system.[18]

An individual's dignity and personality lie at the core of this value order reflected in the fundamental rights that are protected by the Constitution. They must be respected and protected by all organs of the state. Thus, the concept of human personality is one of the supra-legal basic values of the law and a basis for free and responsible self-determination of the personality. To respect the inner realm of the personality and to refrain from invading it without authorisation is a legal command issuing from the Basic Law itself. Therefore, general personality rights are incorporated in the basic rights.[19]

From the standpoint of the Civil Code the protection of property interests always stood in the foreground, whereas the personal worth of individuals only received fragmentary protection. But in recognizing a general personality right and granting it the protection of § 823 BGB the court drew for civil law purposes the consequences resulting from the rank the Constitution assigned to the worth of human personality.

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[17] § 823 I 'A person who, wilfully or negligently, unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damage arising therefrom'.
§ 823 II 'The same obligation is placed upon a person who infringes a statute intended for the protection of others. If, according to the provision of the statute, an infringement of this is possible even without fault, the duty to make compensation arises only in the event of fault'.

[18] BVerfGE 7, 198 (Lüth, 1958).

[19] BGHZ 26, 349 (Herrenreiter, 1958).

The decision in *Schacht* was confirmed in *Herrenreiter* (show-jumper)[20] and was finally approved by the Constitutional Court in *Soraya*[21] with the result that a 'right to be let alone' has emerged in German civil law. Thus, the constitutional values of liberty and dignity provided the foundations on which civil privacy rights could be developed judicially. With the recognition of a constitutional right of privacy, the individual's reputation as part of this right was granted constitutional status.[22]

Guaranteed by this personality right is a 'personal sphere of living', an 'area of free self development of the personality', i.e. a sphere where the individual remains unobserved and on his own.[23] Part of this is the representation of a person in public; everybody can decide for himself how he wants to represent himself towards others, what should define his claim to social recognition, and if and to what extent others are allowed to disclose parts of his life.[24] This does not mean that a person has a claim only to be represented to the public in a manner which corresponds to his self-image or which is pleasant for him. It does, however, protect him against representations which distort or falsify or which can substantially interfere with the development of his personality.[25]

There are various possibilities of how an individual whose personality rights are violated can proceed against such an infringement.

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[20] Ibid.

[21] In BVerfGE 34, 269 (Soraya, 1973).

[22] The development of the personality is according to article 2 confined within the boundaries of the constitutional order. This is to be understood as including all legal norms that are formally and materially in harmony with the basic law. Therefore, the basic right is subject to statutory limits. A certain part of the personality right, however, which refers to the human dignity in Art.1 I GG, is inviolably corresponding to the constitutional mandate of the inviolability of human dignity, which underlies all basic rights.

[23] Martin Kriele, "Ehrschutz und Meinungsfreiheit", NJW 1994, 1897, 1898.

[24] BVerfG 35, 202 (Lebach, 1973); Hans Jarass, "Das allgemeine Persönlichkeitsrecht im Grundgesetz", NJW 1989, 957, 858.

[25] Accordingly, an individual has the right not to be misquoted and is protected against having statements attributed to him which he did not make and which impair his self-defined claim to social recognition. Furthermore, the bearer of the right is protected against commercial appropriation, for instance through unauthorized advertising, i.e. he has the right to his own words and picture. Hans Jarass, supra n.24, at p.858; BVerfGE 63, 131, 142 (1984); 35, 202, 220 (Lebach, 1973); BGHZ 30, 7 (1959) and 36, 346 (1961).

In civil law, especially § 823[26] and § 1004[27] of the Civil Code give expression to the right to personality, providing a cause of action before a civil court. Furthermore there are § 12 BGB[28], referring to the right to one's name, as well as §§ 22, 23 and 33 KUG[29] for the violation to a person's right to his own picture, a barrier in cases of press reporting. Possible remedies in civil law are a prohibitory injunction[30], a right to retraction[31] or to reply[32] as well as monetary compensation.[33] In addition to the causes of actions before a civil court, the individual can also

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[26] Supra n.17.

[27] § 1004 BGB grants the proprietor a claim to eliminate any impairment or disturbance of property. In so far as there is a danger of further disturbances the proprietor has an action for injunction.

[28] An action for injunction also is possible in cases of violation of the right to one's name, according to § 12 BGB. This provision deals with cases where one person denies another person's right to use a specific name, or where another person injures the interest of a person who is entitled to a certain name through the unauthorized use of this name.

[29] § 22 KUG [KUG = Kunsturhebergesetz = law on copyright in works of art] determines that pictures of people can only be disseminated or displayed publicly with the consent of the person portrayed while § 23 KUG states certain exceptions of this rule, for instance in cases where a person of contemporary history is concerned. If there is a violation of these provisions, § 33 KUG allows imposing a fine or imprisonment up to one year.

[30] For the assertion of an injunction it is sufficient to set forth the objective unlawfulness of the offending statement. It is not necessary to prove fault on the part of the person making the utterance. A further condition is that the alleged violation of rights is imminent or that there is the danger of a repeated violation, which the courts usually assume when there was a prior violation of rights.

[31] The right to retraction also does not require fault. The plaintiff claiming this right to correction or revocation has to prove that the disputed factual statement is in fact false and that the impairment of it still lasts. Moreover the retraction has to be necessary with regard to the concrete circumstances of the case and, finally, unlawful.

[32] The right to reply is a special right concerning media publication. It confers the right to supplement a published text through one's own reply in the same section as the text complained of appeared in and in the same type and manner as to attract the same measure of attention among the readers. This right immediately derives from the general personality right. However, in so far as the personality right is allegedly violated by another person's utterance, the right to a reply or a retraction are only available if the complaint is about statements of facts. *Bonner Grundgesetz*, (C.F. Müller, Heidelberg, Stand Nov.2000), Art.5 Rn.185 ff; Degenhart.

[33]Monetary compensation can be achieved through either § 823 I of the Civil Code or § 823 II BGB in combination with for instance the defamation regulations of the criminal code. In order to succeed the plaintiff has to show that the defendant unlawfully disparaged his personality right, that he attacked the protected sphere of this right 'blameworthy' and that he was 'responsible' for the infringement. Finally, the plaintiff has to prove that the damage occurred as a causal consequence of the disparagement.
Difficulties arise if there is no pecuniary loss involved because § 253 of the Civil Code determines that for an injury which is not a pecuniary loss compensation may only be awarded in the cases specified by law. Accordingly, mere immaterial damage, expressed for example in a degradation of the personality, cannot give rise to a money claim in the absence of an express legal provision. Such a legal provision does not exist with respect to the infringement of personality rights. (The latter are themselves not even explicitly mentioned in the enumeration of § 823 I BGB.)
Nevertheless, it is now established that the articles 1 and 2 of the Constitution shall be used to enforce immaterial damage which a person has suffered as a result of the invasion of his personality.
The reasoning is as follows. The law of delict deals with the disturbance of essential values and makes the doers of injury owe satisfaction to the victim for the wrong done to him. It has to pay attention to the value-decision of the Constitution, where the protection of human dignity and of the right to free development is at the head of the fundamental rights. If a violation of the constitutionally guaranteed personality right did not give rise to an adequate sanction, the protection of this right would be incomplete. The elimination of damages for immaterial loss from the protection of personality would mean that injury to the dignity and honour of a human being remains without any sanction of the civil law.

have a criminal cause of action based on defamation, slander or calumny which is regulated in §§ 185 - 194 of the German Penal Code.[34]

B. Constitutional Review with respect to the Violation of Basic Rights

Before having a look of how freedom of expression and reputation are balanced in Germany, some basic features of the country's constitutional law have to be explained.

I. The Constitutional Complaint

The constitutional complaint is a procedural means provided by the Constitution to give effect to the commitment laid down in Art.1 III GG that 'the basic rights shall bind the legislature, the executive and the judiciary as directly as applicable law'. Accordingly, the issue of such a complaint is an 'act of public authority'.[35]

A court decision is seen as such an act of state because the rules which the court applied had been fashioned by the state. In a case where a private entity had violated another person's basic rights the lower courts perpetuate the constitutional violation by not acknowledging it. Therefore, the crucial element is not the fact that the dispute is between private individuals but the public character of the court decision in combination with the provenance of the applied rule, which was formulated by the state.

This view is contrary to the one expressed in *Dolphin Delivery*, where the Supreme Court of Canada expressly excluded the judicial branch from the scope of s.32(1) and, thus, from Charter

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Therefore, in cases of substantial violations of the personality right damages for pain and suffering will be awarded although there was no pecuniary loss. They are treated as punitive damages, awarded to punish the wrongdoer and to deter others from behaving similarly. (BVerfGE 34, 269, 293).

[34] § 185 punishes insult, § 186 malicious gossip and § 187 defamation. Both, malicious gossip and defamation, deal with the dissemination of facts which disparage another in the public opinion but in the latter case those facts have to be untrue. As far as disparaging opinions are concerned only insult is possible.

[35] Art.93 I No.4a GG determines that 'The Federal Constitutional Court shall rule on constitutional complaints, which may be filed by any person alleging that on of his basic rights ... has been infringed by public authority.'

application.[36]

However, the constitutional complaint empowers the court to review judicial decisions only within narrow limits. It is not for the Constitutional Court to check judgements of civil courts for errors of law in general, i.e. it cannot review the facts as found and evaluated by the lower court, the assessment of evidence, or the application of the civil law provisions in the individual case. These are matters for the regular courts and the Constitutional Court is not, like a court of appeal, empowered to substitute its own opinion of the case for that of the proper judge.[37] The Constitutional Court can only scrutinize whether there is a violation of 'specific constitutional law'.[38] This means that the court must determine whether the regular courts have correctly ascertained the reach and effect of the basic rights in private law.[39]

II. Horizontal Effect of the Basic Rights

Since the Constitutional Court scrutinizes whether the judgement of the civil court sufficiently took the influence of basic rights into account, these rights must have some horizontal effect, i.e. they must also regulate the relationships between private individuals to some degree.[40]

As already mentioned, the primary function of the basic rights does not exhaust itself with the protecting of the individual's sphere of freedom against encroachment by public power, i.e. as the citizen's bulwark against the state (Abwehrrechte, which means defensive rights).[41] They also incorporate an objective set of values, against which subsequent statutes must be tested.

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[36] *R.W.S.D.U. v. Dolphin Delivery Ltd*, [1986] 2 S.C.R. 573.

[37] Christian Zacker, "Die Meinungsfreiheit zwischen den Mühlsteinen der Ehrabschneider und der Menschenwürde", DÖV 1997, 238, 239; BVerfGE 30, 173 (Mephisto, 1971).

[38] Fritz Ossenbühl, "Medien zwischen Macht und Recht", JZ 1995, 633, 640.

[39] BVerfGE 7, 198, 204-207 (Lüth, 1958).

[40] At any rate, the belief that in the contemporary world individuals and private entities can interfere with human rights as extensively and more frequently than the state supports the concept that basic rights should have some influence even within private disputes.

This objective order of values pervades the entire legal system and thus expresses and reinforces the validity of the basic rights. It affects especially strongly those areas in which the law prescribes binding rules (*ius congens*) that displace the will of the parties. Naturally, it influences private law as well in so far as no rule of private law may conflict with it and all such rules must be construed in accordance with its spirit.[42]

Although constitutional rights are not directly applicable in private disputes and cannot override rules of civil law they nevertheless influence these rules. In view of this, the Constitutional Court adopted the principle of indirect effect[43] which means that a certain intellectual content of the constitutional principles flows and radiates into the civil norms and informs their interpretation and application.

This effect is most relevant to certain general clauses of the Civil Code, which are described as so-called 'points of entry' for basic rights into private law. One example for such a general clause is the term *'bonos mores'* in § 826 BGB, a regulation, which provides a remedy against a person who wilfully causes damages to another in a manner contra *bonos mores*. General clauses allow the courts to respond to the influence of the value-system of the constitutional rights since in deciding what is required in a particular case by such social commands, they must start from this system. If the judge disregards the influence of basic rights his judgement, as an act of public authority, infringes the constitutional right or rights of one of the parties. This party can then enforce his claim to consideration of his rights with a constitutional complaint. As a result, decisions of the regular courts are subject to constitutional review.

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[41] BVerfGE 7, 198, 204 (Lüth, 1958).

[42] In this respect, the Supreme Court of Canada proceeded similarly by deciding that the common law must be interpreted in a manner which is consistent with Charter principles and by allowing a private party in private litigation to argue that the common law he complains about is inconsistent with Charter values. (*Hill v. Church of Scientology* (1995), 126 D.L.R. (4th) 129, at pp.156-7)

[43] This indirect effect approach had already been adopted by the German Federal Court in Schacht, BGHZ 13, 334 in 1954 before the German Constitutional Court confirmed it in Lüth, BVerfGE 7, 198 (1958).

There, the Federal Constitutional Court must determine whether in applying the rules of private law the judicial decision under attack misconceived the meaning of the basic rights of whose infringement the complainant complains. To what extent this review will take place depends on the seriousness of the invasion by the ordinary courts. The more seriously a decision influences the sphere of a basic right, the more thorough will be the review and when the intensity of the invasion by the lower court's decision is at its greatest the Constitutional Court is empowered to replace the evaluation undertaken by the civil court with its own evaluation.[44]

In view of this, the Constitutional court can hold that the basic right of the losing party has been infringed if the judge has failed to recognize that it is a case of balancing conflicting constitutional rights, or if he has based his judgement on a fundamentally false view of the importance, and especially scope, of either of those rights. Thus, the Constitution exerts an influence on private relationships. Nevertheless, the resolution in such cases of conflict ultimately depends on the application of private law.

III. Article 5 Analysis

The constitutional complaint is justified if the complainant's basic right in question is indeed violated by an act of public authority. The test in this connection consists of three steps. First it has to be determined whether the impugned behaviour falls within the protected scope of the basic right which the individual complains has been infringed.[45] Secondly, some 'state-interference' in this basic right has to be shown, i.e. a limitation by public authority is necessary.[46] The third and most important step is the 'constitutional justification' of this interference, similar to the Canadian concept, where the issue of justification under s.1 of the

[44] BVerfGE 42, 143, 149 (Deutschland Magazin, 1976).

[45] The allegedly infringed activity of the complainant actually has to be covered by article 5 of the Basic Law. The scope of this basic right has already been defined above within the paragraph 'The values at issue'

Charter is crucial and at the centre of freedom of expression cases.

Within the test of 'constitutional justification' the court has to find out whether the state intervention complained of is covered by a 'constitutional limitation' provided by the basic right itself or otherwise by the Basic Law. Almost every basic right in the German Constitution is subject to certain limitations, for instance to statutory limits. While the Canadian Charter has s.1 as a general limitation clause, preceding the enumeration of rights and freedoms, the basic rights in the German Constitution often contain specific restrictions, as does article 5 in his subsection 2.[47] Thus, the question is whether the basic right itself provides a possibility to restrict its application, if so, whether the state action, referring to this limitation, fulfils its requirements and, finally, whether the limitation is proportionate.

1. General Laws

Freedom of opinion is only guaranteed within the framework of the general laws, the statutory provisions for the protection of the young and the right to personal honour, i.e. freedom of opinion is, according to Art.5 II GG, subject to these limitations.[48] Thus, Art.5 II allows the civil and criminal legislators the freedom to place some limits on the basic right to free expression.
Most of the time, freedom of expression will be restricted by a 'general law', which is the first possibility enumerated in Art.5 II GG. Law can be classified as general law if it does not prohibit a certain opinion itself and is not directed against the expression of a certain opinion, i.e. the law has to be neutral. In addition, it has to protect or serve a protected interest that deserves this protection, regardless of a particular opinion, and which takes priority over the

[46] This is the case, for instance, when the basic right has been impaired by an act of public authority, for instance the prohibition, impediment or order of the expression or dissemination of an opinion. It is sufficient if the state action only has limiting effects on free expression, similar to the Canadian purpose or effect approach.
[47] See note 2 above.
[48] See Art.5 II GG in note 2.

freedom of expression.[49]

§ 185 of the Penal Code, for instance, punishes 'insult'. It is a statutory provision that in effect prohibits expression, namely expression that constituted the criminal offence of insult. However, this provision is not specifically directed against a particular opinion but applies to everybody. It serves the protection of another very important interest, that of personal reputation, which deserves protection. Therefore, § 185 StGB[50] qualifies as 'general law' in the sense of Art.5 II.

This example also explains why the limitation of 'general law' is the most frequent one in article 5 analysis: the provisions that deal with the protection of young persons or with the right to personal honour mostly are general laws just as § 185 StBG is a general law and, at the same time, one of the rules concerning the right to personal honour.[51] Therefore, the first question in the stage of constitutional justification of a limit is whether the limiting legal provision qualifies as general law.

Most of the time the provision in question fulfils the requirement of being a general law. Having a general law as such, however, is not sufficient to limit freedom of expression. If it were, since almost all statutory restrictions classify as general law, the result would be that freedom of expression could be very easily restricted.

2. Theory of Reciprocal Effect

Of great importance with regard to the limitation of article 5 by general laws is the theory of reciprocal effect which is based on the idea that there is a certain relationship, a reciprocal effect, between the restricting law and the restricted basic right. The judge has to determine to

[49] Jarass/Pieroth, *Grundgesetz für die Bundesrepublik Deutschland*, (3rd ed., C.H. Beck, München, 1995), Art.5, Rn.45, Jarass.
[50] StGB = Strafgesetzbuch, i.e. Penal Code.

what extent the general laws limit the constitutional right. Here, the theory demands of the judge to keep in mind that these general laws themselves should be seen against the background of the entire legal system and of the importance this system attaches to free speech. Just as the general laws can affect the constitution because of Art.5 II GG so does the constitution, in its turn, affect them. The limitation has to be seen 'in the light of the importance of article 5'.[52] As a result it is necessary to search for equilibrium between the competing values, i.e. the courts have to strive for a balancing of the freedom of expression and the colliding value protected by the general law. This theory amounts to the invocation of the principle of proportionality.

3. Proportionality Analysis

The German concept starts from the assumption that only by weighing all the circumstances of the given case it can be decided whether the limitation of the basic right is constitutional. In order to be justified the general law restricting expression has to be 'proportional' which means that it is valid only if it survives the proportionality analysis consisting of three requirements. The law at issue has to be suitable for the achievement of a legitimate purpose, necessary to that end[53] and the burden it imposes must not be excessive in the light of the achieved benefits, i.e. its deleterious effects have to be proportionate to the salutary ones.[54] (In cases concerning freedom of expression and the protection of the reputation this means that the damage to personality resulting from a public representation must not be out of proportion to the importance of the publication upholding the freedom of communication.)[55]

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[51] Bonner Grundgesetz, supra n.32, Art.5 Rn.176, Degenhart.

[52] BVerfGE 7, 198, 208-210 (Lüth, 1958).

[53] A limitation is necessary if there is no other means that can achieve the legitimate purpose equally effective but in a less intrusive way.

[54] The disadvantages for the person concerned by the limitation have to be in an adequate proportion to the advantages this limitation aims to accomplish. Pieroth/Schlink, *Grundrechte, Staatsrecht II*, (11th ed., C.F. Müller Verlag, Heidelberg, 1995), Rn.300-324.

[55] Here is yet another similarity to Canadian Charter scrutiny. The three step test there requires that the limiting law, which has to pursue a pressing and substantial purpose, is rationally connected to its objective, that it impairs the

In applying the last part of the proportionality analysis for the determination of the reasonableness of a public exposure, i.e. when answering the question whether the effects of the limitation are indeed proportional, various factors have to be considered and each exposure must be assessed on its own in light of the following 'weighing factors'.[56]

One important aspect is the subject matter of the utterance. In case the subject deals with an affair of public importance there is a presumption of free speech.[57] This does not mean that freedom of expression has absolute priority in such cases. The presumption rather is a guideline within the balancing process and gives expression to the circumstance that courts favour political speech.[58]

The publisher's motives also have to be taken into consideration, i.e. what he hoped to accomplish by exposing someone in the public spotlight. It depends on whether the communication advances knowledge and public debate or merely benefits the speaker. For example, to publish private information for a purely commercial goal, seeking to capitalize upon the marketing value of somebody's personal characteristics at his expense, constitutes an invasion of privacy. The balance will then be in favour of the personality right.

Furthermore, the weighing of interests must take into account the intensity of the infringement of the personal sphere.[59] The more severe the private intrusion the more likely freedom of speech has to step back.

The occasion of an utterance can play an important role. One who suffered a severe attack on his honour in public is justified to an otherwise excessive counter-attack (Gegenschlag). He has the

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right no more than is necessary to accomplish the objective, and that it has a proportionate effect on the person to whom it applies

[56] The factors described refer to the weighing process applied to cases involving freedom of expression and reputation.

[57] BVerfGE 7, 198, 212 (Lüth, 1958); BGHZ 139, 95, 102 (1998).

[58] Georg Seyfarth, "Der Einfluß des Verfassungsrechts auf zivilrechtliche Ehrschutzklagen", NJW 1999, 1287, 1289.

[59] BVerfGE 35, 202 (Lebach, 1973); Seyfarth, ibid, at p.1290.

right to an appropriate reaction.[60]

The status of a person, whether or not he is a public figure, will also be relevant. One becomes a public personage who, by his accomplishments, fame or mode of living, or by adopting a profession or calling gives the public a legitimate interest in his doings. Such a person tends to benefit from publicity and his reasonable expectation of privacy is significantly lower. Someone who deliberately seeks publicity has to endure more.[61]

Other aspects influencing the balancing might be the way in which the information was obtained (for instance by illegal means), the extent of the dissemination of the publication, the accuracy of the statement, or whether the publication could reasonably have been made with a less far-reaching interference, or even without any interference with the protection of personality. Every other social objective, which might be involved in the dispute, has to be included in the balancing process.

However, if a limitation survived the proportionality analysis in general it is still possible that the application of this limitation in the particular case excessively burdens the person concerned. For this reason it can be necessary for restricting laws to provide for exceptions in order to avoid 'excessively burdening' a single person.

C. Freedom of Expression and the Personality Right

Constellations of dispute with regard to freedom of expression and defamation arise from civil actions where a decision is made against one party, or from criminal litigation where one party is sentenced because of defamation. This party will then call on the Federal Constitutional

[60] BVerfGE 12, 113, 131 (Schmid/Spiegel, 1961).
[61] BVerfGE 12, 113, 126 ff. In this context the institution of 'person of contemporary history' is important which will be explained later on.

Court, and file a 'constitutional complaint' (Verfassungsbeschwerde) arguing that his basic right to freedom of expression has not been sufficiently appreciated in rendering the previous judgement. Within this complaint the question is whether the regular court's decision under challenge is reconcilable with the complainant's right to freedom of expression, in so far as his communication is protected by article 5 of the Constitution at all.

The court's assessment in the individual case especially depends on whether the communication in question is classified as an opinion (in the sense of value-judgement) or as factual assertion. With opinions the subjective elements prevail and the listener can keep a certain distance more easily. If the recipient recognizes that a remark expresses the personal view of another person with which he may or may not agree he realizes that he has the chance of forming his own judgement whereas statements of facts rather claim to be objectively true. There is a situation of acceptance towards factual statements with the consequence that such statements potentially threaten the reputation of another more than the expression of an opinion. This is the reason for the distinction between the two kinds of utterances.[62]

I. Statements of Opinion

As already mentioned, statements of opinion enjoy presumptive protection. An extensive case-related balancing has to take place between the limited basic right (freedom of expression) and the legal value which the law limiting this right serves (the protection of the individual's honour) in accordance with the various factors described above. Here, usually freedom of expression will be favoured over the protection of the individual's honour and reputation.

The constitutional complaint will be unsuccessful, however, in cases of so-called 'defamatory

[62] Dieter Grimm, "Die Meinungsfreiheit in der Rechtsprechung des BVerfG", NJW 1995, 1697, 1702. On the same ground, the common law defence of fair comment provides special protection to the utterance of opinions based on facts. This defence in defamation law also differentiates between comments and statements of facts.

criticism' (Schmähkritik) or 'formal insult' (Formalbeleidigung). The term formal insult refers to § 192 of the Penal Code and covers statements where the existence of an insult results from the form of the assertion or dissemination, or from the circumstances under which it occurred. Defamatory criticism, on the other hand, occurs when the criticism is not only relentless and insulting but leads to an intentional dishonour of one's dignity. It is only accepted within very narrow limits, where the speaker gives special emphasis to the disparagement of a person instead of focusing on the technical argument, thus, where considerations concerning the subject matter itself (as opposed to personal issues) take absolutely no effect.[63]

II. Factual Assertions

First of all, the constitutional protection is restricted as far as factual statements are concerned since they are only covered if they are prerequisites or the foundation of the formation of opinions. If this is the case it is decisive whether they are true or false. The substance of truth in such statements influences the constitutional protection awarded to them.

For true statements of facts, the case-related balancing has to take place as well, according to the weighing factors described above - similarly to cases where statements of opinions are concerned. All the circumstances of the particular case have to be taken into consideration and the court has to find an appropriate proportion between the severity of the impairment of freedom of expression and the severity of the impairment of the colliding right to personal honour.[64]

The Court has to keep in mind that the general personality right protects against indiscretions, against the disclosure of private facts. The goal of the protection of personal development given by articles 1 and 2 of the Constitution is the maintenance of the basic conditions of social

[63] BVerfGE 61, 1, 12 (NPD Europas, 1982); 82, 272, 283 (Zwangsdemokrat, 1990); Kriele, supra n.23, at p.1899.

relationships between the person entitled to this basic right and his environment. Accordingly, this protection has to apply even if statements are true, for instance if they become a cause of social exclusion and isolation.[65] The right to an undisturbed private life secure from publicity might have priority over the public interest in knowing the truth.

In this respect, the German concept of the general personality right is broader than that of mere personal reputation under the common law of defamation, where the defence of justification ensures that the plaintiff cannot recover damages if true material is published. Thus, German and Canadian law treat truth slightly differently. While in Canada, the plaintiff has to put up with the publication of true defamatory information (in that case the defendant benefits from the defence of justification), he may not necessarily have to do so in Germany. Even if defamatory statements are in fact true the right to undisturbed privacy may prevail, thereby restricting free expression.

With respect to true factual statements the courts have defined different spheres with a gradation of protection accorded to the respective spheres. The classification into intimate, private and social spheres in fact amounts to a graded test of proportionality.[66]

The 'intimate sphere' is one of the closest areas of personality of a human being. Examples are occurrences of the sexual life, diaries, personal notes, or details of medical examinations. It is the sphere of inner feelings and thoughts where unauthorized coverage generally is not

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[64] Grimm, supra n.62, at p. 1703.

[65] In the Lebach case (BVerfGE 35, 202) the Court granted personality interests priority over broadcasting freedom because the transmission of a docudrama about a sensational crime was at a point close in time to the release of one of the perpetrators from imprisonment and would have made the reintegration of the person affected more difficult, if it did not entirely prevent it. (Impact of discriminatory consequences.)

[66] Bonner Grundgesetz, supra n.32, Art.5 Rn.178, Degenhart.

allowed[67] and a balancing or 'weighing' of the competing values can only take place by way of exception. Here, even the dissemination of a true statement can be a violation.[68]

The 'private sphere' covers the rest of the private life, i.e. the closer family relations, descriptions of the domestic life, religious convictions, pecuniary circumstances, letters which are not meant to be published, or the contents of private communications. This sphere is not confined to the area inside one's own house. It can also apply if somebody has confined himself to solitude and obviously wants to stay on his own, or if he behaves in a special situation in a way in which he would never behave in public because he trusts in being secluded. Unless there is a prevailing public interest in the information its publication is not allowed without permission of the person concerned. This means that if the public interest in the information outweighs the personal rights (for instance if the press acts with the legitimate interest of disclosing abuses) a right to publish can be granted.

Finally, the 'social sphere' concerns the area of public display, where personal development from the very beginning takes place 'in the contact with the world around', i.e. where the person concerned acted in public. Covered are the professional area and public activity in general, i.e. every relation to the outside world. Here, communications in principle are allowed.[69]

To sum up, it can be said that at least in cases of heavy and unjustified intrusion into the individual's private life the protection of personal honour regularly claims precedence over the

[67] BVerfG 35, 202 (Lebach, 1973); there is no legitimate interest on such communications.
[68] The reason for the strong protection in this area is that there has to be a sphere in which the individual remains unobserved and on his own, in which he can interact with people of his particular trust without consideration of social behavioural expectations, i.e. a sphere in which no libel is possible. Such a possibility to retreat is important for the development of the personality because there, the aspect of the articulation of a statement stands less in the foreground than the aspect of self-development. On these occasions it may come to statements of such content or form which would be avoided in regular situations. Compare: BVerfGE 90, 255 (Ausschwitzlüge, 1994).
[69] BVerfGE 10, 354, 371 (1960).

freedom of expression although this is only a balancing rule, or 'guideline' which does not hold without exception. Apart from this, the protection accorded to the individual, as well as the division into spheres, depends on the individual's own behaviour. If their private information is already in the public domain, the courts will be reluctant to accord privacy protection, i.e. someone who submits information about his intimate sphere to the public loses the protection in this connection.[70] Those who participate in the public debate have to accept that the public will critically deal with them in turn and if someone expresses criticism in public he has to reckon with counter-attacks.[71]

Generally, if a legitimate public interest exists with regard to an individual, he has to put up with the dissemination of facts concerning his private life to a greater extent.[72] In this connection, 'persons of contemporary history' form an important category of reduced constitutional protection. First, there are 'absolute persons of contemporary history', referring to persons who have a special place in society because of their position in society or because of their extraordinary achievement. Among these persons are important politicians, athletes, musicians or leading figures in the economic sphere. A second group are 'relative persons of contemporary history', covering people who have become prominent because of their connection to a current event of contemporary history. The latter can only be portrayed in context with the contemporary event.[73]

False factual assertions that injure someone's reputation generally do not have to be accepted. In

[70] Friedrich Kübler, "Ehrschutz, Selbstbestimmung und Demokratie", JZ 1984, 541, 545; Bonner Grundgesetz, supra n.32, Art.5 Rn.181, Degenhart; Yet, the court will investigate in such cases whether a full identification of the person concerned is necessary or in effect is part of a gold-digging operation on the part of the publisher who obviously was driven by commercial motives. This shows again that German courts distinguish between speech which informs and speech which is mere gossip and is motivated by greed.
[71] Fundamentally: BVerfGE 35, 202 (Lebach, 1973).
[72] BVerfGE 12, 113, 126 (Schmid/Spiegel, 1961).
[73] Bonner Grundgesetz, supra n.32, Art.5, Rn.181, Degenhart.

cases where the falsity of the statement was evident and certain beyond doubt at the time of the utterance this statement will not be constitutionally protected at all, i.e. freedom of expression cannot be invoked in the first place. If it is not clear whether the statement was in fact false, if the person who made the statement was not aware of its falsity the onus of proof with respect to the truth is on him with the result that falsity is presumed in case he is not able to meet his burden. Therefore, the speaker bears the risk of not being able to prove the truth of his allegation.[74] However, the courts have stressed that the demands made with respect to the burden of proof as well as the duty of care on the part of the speaker should not be too high in order to prevent a chilling effect on free speech since people might be deterred from giving voice to their opinion in case of a very high standard of proof.[75] (For instance, courts have to take into account that the possibilities of making investigations differ depending on whether the media or a single person is concerned.)

III. Conclusion

In summary, the protection of honour usually claims precedence over freedom of expression in cases where statements of opinion impair the content of human dignity contained in the personality rights because of article 1, or where such statements amount to 'defamatory criticism' or 'formal insult'. Furthermore, the right to personal honour will likely take priority over free speech if the speaker did not meet the requirements of his duty of care when communicating factual assertions that were false. As for the rest, there has to be a case-related weighing between the colliding values including all the circumstances of the particular case. If the publication touches upon a question of public concern this does not automatically mean that freedom of expression has priority but it gives rise to a presumption of free speech. In such cases the requirements for an explanation are heightened should the court decide in favour of the

[74] BGHZ 139, 95, 104 (1998).

right to personal honour.[76]

In a way it is ironic that freedom of expression receives a much stronger protection in Germany than it does in Canada. The German Constitution confers at the interest in the individual's reputation a higher value than the Canadian Charter does. Nevertheless, freedom of expression more often prevails in litigation whereas Canadian courts favour the protection of reputation.

[75] BVerfGE 54, 208, 220 (Böll/Walden, 1980); 42, 163; BGHZ 139, 95, 106 (1998).

[76] To complete the description of the situation in Germany it should be added that opposition exists with regard to the decisions of the Constitutional Court. Voices in literature disagree with the court, complaining about the 'elimination of the protection of honour' against disparaging communications and about the discrimination of persons of contemporary history. They claim that the Federal Constitutional Court misjudges the significance of honour, allows 'character assassination' (for instance: Christian Stark, "Verfassungsgerichtsbarkeit und Fachgerichte", JZ 1996, 1032) and moreover accuse the court of exceeding its authority. (See: Kriele, supra n.23, at p.1897; Walter Schmitt Glaeser, "Meinungsfreiheit, Ehrschutz und Toleranzgebot", NJW 1996, 873). There certainly is a trend to (over) emphasize speech values and a greater willingness to review the constitutionality of the decisions of ordinary courts.

CHAPTER 5:

How do other Common Law Jurisdictions balance the two Competing Values?

The Canadian concept of balancing freedom of expression and reputation basically is determined by the case *Hill v. Church of Scientology of Toronto*. Before dealing with the Canadian solution, however, it is necessary to have a look at two other cases which had been decided by common law countries prior to *Hill* and to which the Supreme Court of Canada referred: *New York Times Co. v. Sullivan*, decided by the U.S. Supreme Court, and the decision of the Australian High Court in *Theophanous v. Herald Weekly Times*.

A. United States: New York Times Co. v. Sullivan

American defamation law derived, like Canadian defamation law, from the English common law tradition. Consequently, Canadian and U.S. libel laws used to be very similar. In 1964 the case of *New York Times v. Sullivan*[1] brought a change to this close resemblance by revolutionizing the American law. There, the Court was required to decide the extent to which the constitutional protection for speech and press limited a state's power to award damages in libel actions. It held that the traditional tort rules were subject to the overriding constraints of the First Amendment.

In this case, the local city commissioner, Mr. Sullivan, sought compensation for injury to his reputation caused by some factual misstatements in a paid political advertisement run in the New York Times newspaper by a group of nationally prominent civil rights advocates. The editorial criticized the handling of civil rights demonstrations in Montgomery and made

reference to the volatile situation in Alabama. It included statements about police action directed against black students who participated in a civil rights demonstration and recounted, at times inaccurately, several instances of misconduct by "Southern violators", who by clear implication at least partly had to be public officials.

Neither of the statements mentioned the plaintiff by name. But Mr. Sullivan argued that, as he was generally responsible for the police in Montgomery the imputations against the police referred to him as Commissioner, as supervisor of the police department.

An Alabama jury had returned a verdict awarding the plaintiff half a million dollars in damages according to the Alabama common law of defamation and the award was affirmed on appeal to the State Supreme Court. The U.S. Supreme Court, however, reversed the lower court's holding and decided that the traditional law of defamation infringed upon the constitutional rights of free speech and free press.

Foremost, the Court stressed the tremendous importance of the citizen's right to criticize government officials in a democratic society.[2] It pointed out that 'debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'[3] The circumstance that criticism of official conduct is effective and diminishes the reputation of the officials involved was held to not deprive this criticism of its constitutional protection.[4]

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[1] (1964), 376 U.S. 254; the opinion of the majority was written by Brennan J.

[2] At p.269 the Court referred to the 'marketplace of ideas' theory and emphasized the significance of unfettered interchange of ideas. Then it continued: 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.' (*Stromberg v. California*, 283 U.S. 359, at p.369).

[3] Ibid, at p.270 (Brennan J.).

Then it was recognized that the common law of defamation had a 'chilling effect' on political speech which may lead to suppression of matters of public interest and of other issues that ought to receive public scrutiny and debate. In this respect, Brennan J. pointed out that, since it is often difficult to produce legal proofs that the alleged libel was true in its factual particulars, the necessity of proving truth as a defence does not deter false speech only. He stated that a rule 'compelling the critic of official conduct to guarantee the truth of all his factual assertions will be intolerable self-censorship' and that under such a rule 'would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expenses of having to do so'.[5] Thus, the Court ruled that the existing common law of defamation violated the guarantee of free speech under the First Amendment of the Constitution.

The solution adopted was to do away with the common law presumptions of falsity and malice and introduce the requirement of 'actual malice'.[6] It was held that in cases where defamatory statements are made in respect of public officials the plaintiff can only recover damages for defamation relating to his official conduct if he proves through clear and convincing evidence that the defendant acted with knowledge of the falsity of his statement or with reckless disregard as to whether it was false or not.[7] Consequently, the public official plaintiff has not only to prove that the statement is false and defamatory but also that the defendant either knew that he was not publishing the truth or consciously held serious doubts as to the truth of his statement. (Indifference to truth or falsity is not enough to satisfy the concept of 'reckless disregard'.) Thereby, a qualified privilege for criticism of official conduct was created.

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[4] Ibid, at p.273.
[5] Ibid, at p.279.
[6] Ibid, at p.279: 'The constitutional guarantees require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'.

It is important to note that 'actual malice' in this respect in a narrower concept than that of common law malice, which will defeat a claim to the common law defence of qualified privilege. The constitutional standard of malice adopted in *New York Times* has nothing to do with ill will, hostility, or bad or improper motive but refers only to the defendant's subjective awareness of the probable falsity of his allegations. His motives are irrelevant to liability since the essence is the relationship between falsity of the statement and knowledge on the part of the defendant. Also, negligence is not sufficient, i.e. a lack of reasonable care prior to publication does not satisfy the actual malice requirement.

The Supreme Court's decision modified the common law of defamation in various ways. On the one hand, instead of requiring the defendant to justify his allegations, the burden of proof with respect to falsity of the imputations is on the public official plaintiff now; falsity of the defamatory statement is no longer presumed.

Moreover, the Court held that a public official plaintiff must prove with convincing clarity that the statements relating to his official conduct were false to the knowledge of the defendant or that he acted with reckless disregard in that respect, i.e. the onus of proof is raised from a preponderance of probabilities to proof with convincing clarity, a standard more rigorous than the one normally applied to civil actions.[8]

Finally, an element of fault is added to the tort of defamation. The defendant is not liable irrespective of fault anymore.

It is to add, that three concurring justices, Black, Douglas and Goldberg, even suggested there should be an absolute bar of libel actions by public officials. In their separate reasons they held

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[7] Ibid, at pp.279-280.
[8] Ibid, at pp.285-286.

that the Times had an unconditional right to publish their criticisms about public affairs.

B. Australia: Theophanous v. Harold & Weekly Times

Australian defamation law traces back to the English common law tradition as well since Australian colonies early accepted that the general principles of the common law did apply in the Australian States. Except so far as it has been altered since then by the Australian Parliaments it is still the law.[9] Therefore, Australian and Canadian law of defamation is similar.

The Australian constitution, however, does not contain a Bill of Rights explicitly conferring freedom of expression constitutional protection. Instead the Australian High Court has distilled an implication of freedom of communication from the provisions and structure of the Constitution, particularly from the concept of representative government which is enshrined in the Constitution.[10] The relationship between this implied freedom and the common law of defamation, especially the question whether the implied constitutional guarantee is apt to protect the publication of material discussing the performance of duties of members of Parliament, was treated in *Theophanous v. Harold Weekly Times.*[11]

This case arose out of the initiation of defamation proceedings against a newspaper by a member of the Commonwealth Parliament who was also chairperson of a committee on migration regulations. The newspaper had published a letter to the editor critical of Mr.

[9] Blackshield/Williams/Fitzgerald, *Australian Constitutional Law Theory*, (The Federation Press, Riverwood, NSW, 1996), at pp.132.

[10] In the cases of *Australian Capital Television Pty Ltd v. Commonwealth* (1992), 108 A.L.R.577 and *Nationwide News Pty Ltd v. Wills* (1992), 108 A.L.R.681 the implied freedom of communication was acknowledged with respect to discussion of government and political matters, i.e. 'political discussion'. It includes discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those

Theophanous' views on Australia's immigration policies, which accused him of bias arising from his own ethnic background and questioned his fitness to hold office as a Member of Parliament. The matter was removed to the High Court because the defence pleaded that the publication was pursuant to a freedom guaranteed by the Australian Constitution to publish certain political material.

First of all, the court recognized that the implied constitutional freedom, which was held to apply in the case, not only is a restriction on legislative and executive power but also shapes and controls the common law. Correspondingly, the development of the common law must accord with the content of the implication of freedom.[12]

Relying on *New York Times v. Sullivan* the court then noted that the common law of defamation had a 'chilling effect' on political speech. The balance reflected in the common law defences was regarded to tilt too far in favour of the protection of the individual's reputation at the expense of freedom of communication with the consequence that the current law of defamation was unconstitutional.[13] However, the Australian High Court rejected the unconditional adoption of the 'actual malice rule' established in the United States without changes. It modified the common law rule in a different way.

Instead of requiring the public official plaintiff to prove actual malice on the part of the defendant with convincing clarity, the Court decided it was for the defendant to establish that he did not know the defamatory statement was false and was not reckless as to whether it was false or true. Concerning the substance of the constitutional defence, the defendant additionally had to

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seeking public office as well as the discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate.

[11] (1994) 124 A.L.R.1; the majority judgement was delivered by Mason CJ., Toohey and Gaudron JJ.

[12] Ibid, at p.15.

[13] Ibid, at pp.19 and 20.

prove that the publication was reasonable in the circumstances, i.e. he had to show that he either had taken steps to check the accuracy of the impugned material or that he was otherwise justified in publishing without taking such steps or steps which were adequate.[14] If these requirements are met the publication is a publication on an occasion of qualified privilege and not actionable.[15]

One significant difference to the U.S. Supreme Court's decision is that the burden of proving the (three parts of the) defence, i.e. no knowledge of falsehood, absence of recklessness and reasonableness of the publication, rests on the defendant. Apart from that, it is irrelevant whether the defamatory imputation is in fact true or false since the test focuses on the defendant's belief in truth.[16] Most important to note is that the defence articulated in *Theophanous* operates only in respect of political discussion, the only expression protected by the implied freedom of communication.

The High Court's decision also had consequences for the common law defence of qualified privilege. It was noted that this defence would have little applicability where a publication occurs in the course of the discussion of political matters (which will be protected by the constitutional freedom) and that it would need to be reconsidered in the light of the implied constitutional guarantee.[17]

With regard to the notion of reciprocal interest and duty contained in the common law privilege the Court held that the public at large has an interest in the discussion of political matters such that every person has an interest in communicating his views on those matters and every person

[14] Ibid, at p.23; In order to establish that he acted reasonable, the defendant basically had to show that he had taken reasonable steps to verify the truth of the published statement.
[15] Ibid, at p.26.
[16] Ibid, at p.24.
[17] Ibid, at p.25.

has an interest in receiving information on those matters.[18]

Thus, the Australian High Court, without having a general constitutional provision explicitly protecting freedom of expression, accorded a considerably stronger protection to this fundamental right than the Canadian Supreme Court did in *Hill v. Church of Scientology*, as I will show in the following chapter.

Finally, one judge, Justice Dean, took the view that absolute constitutional immunity should be granted where statements about the official conduct or the suitability of a Member of Parliament for his office are published, i.e. in such cases the application of defamation laws should be precluded completely.

[18] Ibid, at p.26.

CHAPTER 6:

Re-Thinking the Canadian Law of Defamation

This chapter deals with the questions whether defamation law in Canada has achieved the correct balance between freedom of expression and the protection of personal reputation, or whether it needs to be modified in order to comply with the Charter and what such a modification might look like in case it found to be necessary.

The attitude of the Supreme Court of Canadian in this respect was presented in *Hill v. Church of Scientology*. Therefore, I will first of all, review this decisions. My critical look at the *Hill* case and more generally at the common law of defamation itself will reveal that the common law of defamation, in my opinion, does not take freedom of expression sufficiently into consideration. I will also discuss the issue of Charter application to the common law of defamation and argue that the common law should be subject to s.1 of the Charter just as statutory law. Finally, proposals for changing defamation law in order to constitutionalize it will be introduced.

A. Hill v. Church of Scientology

The starting point for the question of the Charter's impact on Canadian defamation law is *Hill v. Church of Scientology*[1] where the Supreme Court of Canada finally was asked to reconsider the common law of defamation in the light of the Charter protection of freedom of expression.

The Court, however, neither adopted the actual malice rule introduced in *New York Times v. Sullivan*, nor the defence of qualified privilege found in *Theophanous v. Herald Weekly Times*, Further, it did not follow the radical approach of an absolute bar on defamation actions suggested by minorities in both of these cases. Instead, the Supreme Court refused to alter the

common law of defamation and opted to retain the strict liability standard as the appropriate balance between reputation and freedom of expression.

I. The Court's Decision in Hill

The plaintiff in this case, Mr. Hill, was a lawyer employed with the Ministry of the Attorney General in Ontario. He had acted for the Crown on legal matters arising from the seizure of documents belonging to the Church of Scientology and was accused by the latter of having violated court orders sealing these documents. At a press conference counsel for the Church of Scientology announced that contempt proceedings were being instituted against Hill and read the contempt motion alleging that Hill had breached the order of the court and had misled the judge. Both allegations were factually untrue and the application for contempt was ultimately dismissed. After Hill was exonerated he sued the Church of Scientology and its lawyer for defamation. During the trial the defendants continued to attack the plaintiff, repeating the libel despite prior knowledge that the allegations were false, and maintained their plea of justification. The jury awarded Hill a total of $ 1.6 million in damages ($ 300,000 general damages against both defendants and $ 500,000 aggravated damages as well as $ 800,000 punitive damages against the Church of Scientology). On appeal the jury assessment was affirmed. Before the Supreme Court of Canada the defendants challenged the constitutionality of the common law of defamation.

The first question was, whether the common law could be subject to Charter scrutiny at all. The Court affirmed *Dolphin Delivery* in holding that s.32(1) restricts the Charter's application to the actions of legislative, executive and administrative branches of government and that the constitutionality of common law rules and principles can only be examined in so far as the

[1] (1995), 126 D.L.R. (4th) 129.

common law is the basis of some governmental action which allegedly infringed a Charter right.[2]

With respect to this, the Court held that neither Hill's employment as a public official itself, nor the fact that the defamatory statements were made in relation to acts undertaken in his official capacity, automatically engaged the Charter. Furthermore, there was not to be a division between his personal reputation and his reputation as a public official. Instead, the Court focused on Hill's initiating the libel suit in response to the allegations impugning his own character, competence and integrity. Since he brought the action in his personal capacity, not instructed or obliged to do so by the government, he was acting outside the scope of his statutory duties and independently of, as well as distinct from, his status as agent for the government. Accordingly, the criteria for government action were not met.

However, in *Dolphin Delivery* it was also held that the common law could be subjected to some sort of constitutional scrutiny in the absence of government action because of s.52(1) of the *Constitution Act, 1982*. In this respect, the Court in *Hill* reconfirmed the rule laid down in *Dolphin Delivery*, that the common law should be applied and developed in a manner consistent with the values enshrined in the Constitution and, thus, agreed to measure the common law of defamation against the Charter's underlying values.[3]

It stressed the distinction between Charter rights and Charter values, explaining that the first could not be asserted by private litigants in the absence of government action[4], and elucidated

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[2] *R.W.S.D.U. v. Dolphin Delivery Ltd.*, [1986] 33 D.L.R. (4th) 174, at p.195. For the application of the Charter also see chapter three above.

[3] Ibid, at p.198. I have already referred to this issue in chapter three.

[4] In *Hill v. Church of Scientology of Toronto* (supra n.1, at p.157) it was held that while the cause of action is founded upon a Charter right when government action is challenged (the claimant alleges that the state has breached its constitutional duty, and the state, in turn, must justify this breach), private parties owe each other no constitutional duties and therefore cannot found their cause of action upon a Charter right. The party challenging the common law cannot allege that the common law violates a Charter right because Charter rights do not exist in

the consequences of this distinction. One consequence was, that in a conflict between principles and values the traditional s.1 analysis was not appropriate. Instead, a more flexible balancing, i.e. weighing, of the values at issue was necessary.[5] The values of the Charter were said to provide the guidelines for any modification to the common law.

Furthermore, the court fashioned an onus shift. It held that the party alleging that the common law is inconsistent with the Charter should bear the onus of proving both that the common law threatens Charter values and that, when these values are balanced against other competing interests, the common law should be modified.[6]

Thirdly, the Supreme Court, referring to *R. v. Salituro*[7], had recognized that courts in general have the responsibility of scrutinizing the common law in light of the Charter and of making incremental changes when appropriate in order to have the common law comply with Charter values.[8] Nevertheless, it emphasized that far-reaching changes to the common law have to be left to the legislatures.

Having determined that the common law should be developed in accordance with the Charter's underlying values, the Court went on to consider whether the common law of defamation struck an appropriate balance between freedom of expression and the value of personal reputation.

After briefly recognizing the importance of freedom of expression the Court stressed that this right had never been regarded as absolute and has on occasion given way to other competing values. It was clarified, that freedom of expression should not predominate simply because it is protected by the Charter, especially in the case of defamatory expression. Because of its

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the absence of state action. The most the private litigant can do is argue that the common law is inconsistent with Charter values.

[5] Ibid, at p.157.

[6] Ibid, at p.157. Usually one party must prove a *prima facie* violation while the other bears the onus of defending it.

[7] [1991] 3 S.C.R. 654, at p.670: 'The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the ... fabric of our society.'

[8] *Hill v. Church of Scientology of Toronto* (1995), 126 D.L.R. (4th) 129, at p.156. In this respect s.52(1) needs to be kept in mind, which renders inoperative any law that is inconsistent with provisions of the Constitution.

considerable distance from the core principles underlying free expression, defamatory speech was regarded as particularly vulnerable. It was held that defamatory statements are tenuously related to the core values which underlie s.2(b). The Court was of the opinion that false and injurious statements are inimical to the search for truth and cannot enhance self-development. They discourage participation in public affairs of the community, are detrimental to the advancement of these values, and harmful to the interests of a free and democratic society.[9]

In the course of the assessment of the values to be balanced the Court further reaffirmed the importance of personal reputation to a person's self-worth and dignity. Noting the consistent sanction of defamation across communities and throughout history, personal reputation was declared to be the fundamental foundation on which people are able to interact with each other in social environments.[10] The judges tied the individual's reputation, although not explicitly protected by the Charter, to the innate dignity of the individual and associated it with the right to privacy, which has been accorded constitutional protection in s.8. Thus, reputation was given a quasi-constitutional stature.[11]

The Court proceeded to review the decision in *New York Times*. Here, it gave an extensive account of American scholarly opinion criticizing the actual malice rule, and added that this standard had been rejected in the United Kingdom as well as by the Australian High Court in *Theophanous v. Herald Weekly Times*. In view of this, it refused the adoption of the remedy proposed by the U.S. Supreme Court.

[9] Ibid, at pp.159-160.
[10] Ibid, at pp.161-162.
[11] Ibid, at p.163.

The judges pointed out that it was not unduly onerous for people to have to ascertain the truth of statements before their publication, and that the public is not well served by permitting the circulation of defamatory facts on matters of public interest. Apart from that, the available defences provided by the law of defamation were regarded as sufficient to protect the public's interest in free speech.[12]

For these reasons, the Court did not agree that the law failed to balance appropriately the interests of free speech and the reputation of individuals. It concluded that the common law of defamation was consistent with Charter values and did not need to be modified.

However, the Court was careful to absolve the law of defamation only in its application to the parties in the action at bar. The conclusion was rather cautiously formulated, saying that the common law of defamation, 'in its application to the parties in that action, complied with the underlying values of the Charter.'[13] It can be inferred that judicial reconsideration of the common law as it might apply in a different context is possible, which indicates that issues still remain for other cases with different circumstances.

II. Critical Review of the Decision in Hill

This decision is vulnerable to attack. The Court did not give convincing reasons for its conclusion of rejecting any modification to the common law. Admittedly, the facts of the case were compelling with the defendants' knowledge of the falsity of their allegations. This probably explains the absence of a careful and thorough analysis of the existing common law and its alternatives. The debate in the case was limited to a discussion between the current regulation of defamation and the actual malice standard. The Court did not consider at all

[12] Ibid, at p.169: 'Surely it is not required too much of individuals that they ascertain the truth of the allegations they publish. The law of defamation provides for the defences of fair comment and qualified privilege. Those who publish statements should assume a reasonable level of responsibility.'

whether a 'no-fault law' was appropriate, and failed to give consideration to other approaches such as, for instance, a plain negligence standard. In order to distance itself from the American solution, the Supreme Court of Canada was simply driven into the opposite extreme. However, the reasons offered to justify the precedence of reputation over free expression are not persuasive and their weakness will be described in the following.

1. Defamatory Speech's Weak Claim to Constitutional Protection

The Court started by disparaging the value of defamatory statements as a type of expression saying they were detrimental to the enhancement of the values underlying s.2(b) and therefore do not deserve much protection. This conclusion contrasts with earlier findings.

In *Irwin Toy* the Court defined 'expression' very broadly, stating that s.2(b) extended constitutional protection to all activity conveying, or trying to convey a message, regardless of its content and no matter how offensive the message may be to the majority.[14] This holding was reaffirmed in *R. v. Zundel*[15], a case concerning hate speech. There, the accused was convicted of the criminal offence of spreading false news which he knew to be injurious to the public interest, contrary to section 181 of the Criminal Code and the judges agreed that the particular section violated s.2(b) of the Charter although it covered only deliberate falsehoods. They rejected the argument that the prohibited material did not further the purposes of freedom of expression, but instead, regarded deliberate falsehoods as deserving constitutional protection.

Crucial for this decision was the difficulty of assessing whether a statement is true or false for the purpose of determining constitutional protection. The conclusion concerning falsity can only

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[13] Ibid, at p.170.

[14] *Irwin Toy Ltd. v. Québec*, [1989] 1 S.C.R. 927, at p.969, 'We cannot ... exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee.'

[15] [1992] 2 S.C.R. 731.

be drawn by referring to the contents of the statement which would contravene the concept of content neutrality.[16] In the Court's view, the distinction between truth and falsity as the decisive criterion for the determination of whether a message is protected or not was not advisable in a constitutional context.

The same basic idea should apply to defamatory statements where the question whether a statement is defamatory or not also can only be answered by referring to its contents. The defamatory nature of an expression, however, does not change the fact that it conveys, or tries to convey a meaning, thus, that it has expressive content. As held by the Court, the content of a statement should not determine whether it falls within s.2(b).

Moreover, the defamatory nature of an allegation will only be assessed at trial, usually quite some time after the publication. Saying that a defamatory statement has a weak claim to constitutional protection thus means that the scope of expression in s.2(b) will be determined by an *ex post* judicial characterization. Yet, the fundamental right of freedom of expression certainly comprises more than statements which are either proven factually accurate at trial, or do not injure someone's reputation[17] - especially considering the holding in *Irwin Toy* that all messages are covered by s.2(b), as long as they (try to) convey a meaning.

The fundamental right to freedom of expression is so important that even those statements at the

[16] McLachlin declared in the majority judgement in *R. v. Zundel*, [1992] 2 S.C.R. 731, at p.758 that the court should be entirely certain that there can be no justification for offering protection and that the 'criterion of falsity falls short of the certainty, given that false statements can sometimes have value and given the difficulty of conclusively determining total falsity.' Apart from that, false messages were held to also serve the values which freedom of expression seeks to promote, for instance the search for truth, since wrong information might lead to right conclusions.

[17] Denis Boivin, "Accommodating Freedom of Expression and Reputation in the Common Law of Defamation", (1997) 22 Queens Law Journal 229, at p.270.

far periphery of its reach are entitled to constitutional protection.[18] The broad purposive interpretation given to s.2(b), which is supported by the language of the Charter, supports the conclusion that defamatory speech must be constitutionally protected.

Such expression may arguably serve useful social purposes. Protection under s.2(b) is especially important where political expression is concerned, for instance, in the case of injurious statements about public officials. According to the democracy rationale of freedom of expression the legitimacy of government requires the consent of the citizens. Stories about political happenings are an essential ingredient of such consent and should therefore be treated in a more tolerant fashion in order to give the voting member the fullest possible participation in a democratic society. He must be free to discuss and debate issues even if such discussion results in defamatory speech. Therefore, the scope of acceptable criticism should be defined more broadly when politicians are concerned. In order to ensure that democracy can exist, political opposition must be allowed and in the course of opposition defamatory speech is inevitable. In a vigorous debate on contentious issues, for example, participants often use harsh words and try to undermine the credibility of their opponents' ideas. Yet, such debate is essential to the maintenance and functioning of democratic institutions.

Moreover, the checking function of free expression supports defamatory speech. If an official's abuse is indeed addressed and criticized this will necessarily happen in a defamatory form. To accuse someone of misconduct in his office will inevitably lower his prestige in the esteem of others and cause him to lose respect. However, public scrutiny in this respect is important in order to deter authorities from abusing their power, and defamatory accusations are justified anyway if they are true.

Even outside the political arena the protection of defamatory expression is justified. After all, it

[18] David Lepofsky, "Making Sense of the Libel Chill Debate: Do Libel Laws 'Chill' the Exercise of Freedom of

is possible that published imputations are true, in which case they generally contribute to the discovery of truth with respect to their subject matter. In view of the difficulty of determining whether a communication is true or false it is not advisable to simply exclude a whole type of expression from constitutional protection. As Mill stated, the decision to suppress expression on the grounds of its falsity requires infallibility on the part of the decision maker. Apart from that, certain opinions are incapable of being proved either true or false but can still be valuable.

Furthermore it is important with regard to individual self-fulfilment to acknowledge that the individual must be free to communicate his own judgements on circumstances and persons, even if the courts will regard them as defamatory. Communication is fundamental to human existence. It is important for the welfare of the individual to relate to others and to exchange ideas. Such an exchange contributes to the forming of one's opinions and thus to achieving greater autonomy. In *Irwin Toy* it had been recognized that freedom of expression was entrenched in the Constitution to ensure that 'everyone can manifest their thoughts, opinions, beliefs, indeed all expression of the heart and mind, however unpopular, distasteful or contrary to the mainstream.'[19]

Thus, defamatory statements do play a justifiable role in a democratic society. They are supported by the rationales of freedom of expression and cannot carelessly be excluded from the scope of this fundamental right.

Apart from that, the main issue is not whether defamatory expression has any inherent value but how much room is to be left to citizens and the media to make errors, which may result in false and defamatory statements, in commenting about matters of important public interest or

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Expression?", (1994) 4 N.J.C.L. 169, at p.190.

[19] *Irwin Toy Ltd. v. Québec*, [1989] 1 S.C.R. 927, at p.968.

concern.[20] Certainly, injurious criticism may contain factual errors and cause harm to people's reputations. However, a critical statement might only accidentally be based on errors. The speaker might have stated an honest belief in a mistaken state of facts, or might have published minor inaccuracies. This circumstance alone should not be sufficient to consider a whole type of expression generally to be deserving less protection. While the harm caused creates a counterbalancing interest it does not justify complete deprivation of protection.[21]

At any rate, the judges in *Zundel* had concluded that the assessment of harmful consequences is more properly done under the Charter s.1's reasonable limit clause.[22] The same approach is followed by the German courts, where only those factual assertions which are evidently false (to the knowledge of the speaker) at the time of their utterance, are excluded from the start. Otherwise, the extent of constitutional protection of defamatory statements will be determined within the proportionality stage of the article 5 analysis. In view of the above, defamatory statements should not be excluded from the scope of freedom of expression *per se* in order to let the protection of reputation prevail.

2. Duty to ascertain the Truth of Allegations

The Court in *Hill* proceeded to say that it was not requiring too much of individuals that they ascertain the truth of the allegations they publish.[23] This suggests that verification of statements prior to their publication in fact can determine their truth or falsity. Yet, it is only an assumption that investigations will avoid the representation of false facts.[24] To check communications for

[20] Raymond Brown, *The Law of Defamation in Canada*, (2nd ed., vol.4, Carswell, Toronto, 1999), at p.27-8 (in note 11e). This problem will be further discussed later on.
[21] June Ross, "The Common Law of Defamation Fails to Enter the Age of the Charter", (1996) 35 Alta.L.Rev. 117, at p.133.
[22] [1992] 2 S.C.R. 731, at p.759.
[23] *Hill v. Church of Scientology*, supra n.1, at p.169.
[24] Boivin, supra n.17, at p.241.

their truth will help in several ways. In case the investigation reveals their falsity, allegations can be modified in order to represent reality. If they are found to be essentially true, they can be published regardless of their defamatory nature without fear. However, it is also possible that extensive inquiries do not uncover the falsity of what afterwards was published. Then the efforts undertaken to ascertain the truth of allegations would not prevent the publication of defamatory statements, and, under *Hill*, liability will be imposed on the publisher.

The Court demanded on the one hand that 'those who publish statements should assume a reasonable level of responsibility'[25] indicating some kind of negligence standard. On the other hand, it ignored the possibility that a person may have acted reasonably and did not depart from the standard of strict liability.

3. Sufficiency of the Common Law Defences

Another justification in *Hill* for rejecting any modification of the common law of defamation was that it provides for defences in appropriate cases and thereby restores an adequate balance between the competing values of reputation and freedom of expression. The common law defences have indeed been developed with a view to resolving tensions between the recognition of freedom of expression and the necessity of protecting the individual's reputation from injury. Yet, the court did not take into consideration the limited scope of the defences. A communication has to meet a number of conditions in order to enjoy the protection offered by the defences and partly these conditions are connected with a great degree of uncertainty.

According to the defence of justification a person is permitted to speak the truth about another regardless how damaging it may be. This appears to be a strong affirmation of the value of

freedom of expression. The reason for this defence is that a plaintiff's reputation which is damaged by the truth is not worthy of protection by the law. However, some aspects reduce its significance.

Foremost, falsity is presumed and truth must be proved by the defendant on the balance of probabilities. This is problematic in so far as truth often is difficult to establish in view of the rigorous evidentiary rules and standards of proof that apply in court proceedings.[26] Practical problems may arise. For instance, a witness may refuse to testify for fear of negative consequences, or might lack credibility in the eyes of the jury. Apart from this, no consideration is paid to the honesty or good intentions of the person who communicated the statement. Finally, pleading truth is treated as a republication of the defamation in case the defendant fails to substantiate his claim of justification. Then he may face increased damages. Therefore, it does carry some risks to plead this defence.[27]

Qualified Privilege also places some obstacles in the way of the defendant since a number of requirements have to be fulfilled. While the general principles of this defence may appear to be broad it has been applied rather inflexibly in the past.

The speaker has to discharge some legal, moral, or social duty, or pursue some private interest to communicate information to persons with a reciprocal duty or interest to hear that information. Necessary is a legitimate interest in giving information and a mutual interest in receiving it. The privilege is not extended easily but requires a compelling public policy reason to be permitted. However, there is no list of discrete occasions to which the privilege attaches.

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[25] *Hill v. Church of Scientology*, supra n.1, at p.169.

[26] Charles Tingley, "Reputation, Freedom of Expression and the Tort of Defamation in the United States and Canada: a Deceptive Polarity", (1999) 37 Alta.L.Rev. (3-4) 620, at p.625; Lewis Klar, "If you don't have anything good to say about someone...", published in David Schneiderman, *Freedom of Expression and the Charter*, (Carswell, Calgary, 1991), at p.266.

In the cases, a multitude of diverse situations can be found which do not offer clear and predictable rules as to when an occasion is regarded as privileged. A defendant can never be certain where the court will choose to draw the line between relationships that enjoy qualified privilege and those that do not.[28] Accordingly, a defendant often cannot know beforehand whether a qualified privilege applies in his case or not, much less, what the scope of his potential defence will be.

The latter is important since it is considered to be an excess of privilege to publish information to an audience, a portion of which has no legitimate interest in it. In that case, the privilege will be lost even if the original communication was privileged with regard to a smaller group. The privilege will also be lost if information unrelated to the privileged occasion is related, or it can be defeated by malice. In this respect it is problematical that malice includes every improper purpose that is not connected to the purpose for which the privilege was given. This means that malice is tested by the publisher's attitude toward the person defamed. The emphasis is not on the question whether the publisher believed in the truth or falsity of his material but whether he was motivated by any ill purpose which makes the availability of the defence even more difficult for the defendant.

At any rate, the defence of qualified privilege is not available for the media when an issue of public interest is represented, i.e. the law refuses to acknowledge that the media have any special duty or interest in communicating information to the world at large. The mere fact that the subject matter is of general concern is not sufficient to ground a defence of qualified privilege. Thus, the most important relationship in the context of defamation, the one between media and public with regard to matters of public interest, is excluded from the defence.

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[27] Philip Osborne, *The Law of Torts*, (Irwin Law, Toronto, 2000), at p.362.

Especially with respect to political debate it is hard to understand why the electorate should not have a legitimate interest in the affairs of government presented to them by the media who are in the position to provide such information. This contravenes the conception that democracy rests finally on the citizens and their consent and that the citizens must be free to discuss issues of public importance in order to be able to make intelligent decisions.[29]

Fair comment also makes high demands of the defendant. This defence is said to reflect the law's recognition of honest criticism as an aspect of free speech and applies to matters of public interest. In order to succeed, the defendant first must prove that the statement published was truly a comment or opinion and not one of fact. Then, the statement must be based on a substratum of facts, namely true facts, which were in existence at the time the statement was made, and it must concern a matter of public interest. Finally, it must be seen as fair, which in this context means honest. So long as the representation is an honest assessment by the reviewer, it is protected, even if it contains strong language and harsh criticism. If, however, the defendant acted with malice, for instance out of personal vindictiveness or without honest belief in the truth of the comment, the defence will fail. Thus, one cannot necessarily express one's own genuine opinion. This conception is very much unlike the German idea that statements of opinion deserve presumptive protection and will seldom be held to be of secondary importance in comparison with reputation.

The absence of just one of the elements of fair comment has the consequence that the defence will be rejected. In view of this, pleading fair comment involves a considerable uncertainty as to the likelihood of being successful. To begin with, the distinction between a statement of fact and a statement of *comment* on fact is not an easy one to make. The uncertainty contained in the

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[28] Tingley, supra n.26, at p.625; Osborne, supra n.27, at p.364.

[29] I will come back to this problem later on when discussing the proposal that the media should be conferred qualified privilege under the heading of 'Proposals for Change'.

defence itself, as well as the conservative attitude of courts towards its use, provides a disincentive to publishing material.[30] Courts have even gone so far as holding a newspaper liable for a comment published in a letter to the editor due do the lack of honest belief in the allegations on the part of the newspaper, i.e. because the newspaper did not share the opinion of the letter writer.[31]

4. Rejection of the Actual Malice Rule

In a next step the Court in *Hill* referred to American academic and judicial criticism of the actual malice rule in order to reject this standard and to justify its decision to maintain the existing regime. Arguments against *New York Times* were described extensively, without noting that the cited critics did not contemplate a return to the state of the common law that existed prior to *New York Times*. Instead, they acknowledged that the 'old' common law did not give adequate scope for freedom of expression.[32]

In order to warrant upholding strict liability, the Supreme Court also cited the House of Lords decision in *Derbyshire County Council v. Times Newspapers Ltd.*[33] as well as the Australian High Court in *Theophanous v. Herald Weekly Times Ltd.*[34] Both cases were intended to serve as examples of important courts in the common law world refusing to adopt the actual malice approach. However, the Court chose to ignore the fact that the courts in these cases did recognize the public interest in uninhibited public criticism of governmental bodies on the one hand, and the chilling effect defamation law has on free speech on the other hand. The

[30] Klar, supra n.26, at p.267.
[31] *Chernesky v. Armadale Publishers Ltd.* (1979), 90 D.L.R. (3rd) 321; see chapter two.
[32] Tingley, supra n.26, at pp.629 and 647; Boivin, supra n.17, at p.257; Ross, supra n.21, at p.134. Indeed, the U.S. Supreme Court does under no circumstances impose liability without fault despite the controversy about the actual malice standard. The principle that some kind of fault is necessary was established in *Gertz v. Robert Welsh Inc.* (1974), 418 U.S. 323.
[33] [1993] 1 All. E.R. 1011.
[34] (1994), 124 A.L.R. 1.

Australian High Court even moved in the direction of the *New York Times* rule by adopting a standard similar to the actual malice rule but with some modifications - despite the absence of an express constitutional protection of freedom of expression in Australia.

Apart from that, it is not sufficient to simply reject the solution adopted by another country and use this rejection itself as an argument for one's own position.

5. Conclusion

Thus, the reasons given in the *Hill* judgement remain unidimensional, focussing exclusively on the accommodation found in *New York Times* as if there was no other possible response to the tension between freedom of expression and personal reputation than the actual malice rule. The Court simply chose between this rule and the existing common law, without taking into consideration the consequences of strict liability in a 'worst case' scenario where the defendant exercised reasonable care prior to publishing material which he believed to be true but which was later found to be false and defamatory.[35] As a result, s.2(b) was denied the significance it should have at least with respect to expression central to its core purposes. The protection of reputation was over-emphasized.

That the judges formulated their conclusion rather carefully, referring to the 'application to the parties in this action' indicates that they themselves may not have felt quite comfortable with their decision and wanted to leave room for further reconsideration of the common law of defamation. This way they acknowledged that issues still remain open. The current accommodation of the interests in reputation and free speech therefore is subject to adjustment if a compelling case for change can be made. At the same time, however, the decision in *Hill* minimized the impact of the Charter on the judicial development of defamation law and posed

barriers for future cases with respect to the common law's reconciliation with freedom of expression.

B. The Application of the Charter to Court Orders and the Common Law

One crucial issue remains with regard to the decision in *Hill*: the fact that the Charter did not apply to the common law of defamation. The question of the Charter's application is not specifically related to the tension between freedom of expression and personal reputation but rather is a general problem concerning the Charter's impact. Nevertheless, this aspect is of importance because the Court's refusal as to the Charter's application also supports my conclusion that freedom of expression is not valued enough by Canadian courts in libel actions. The problem with respect to Charter application comprises on the one hand the question why court orders and procedures are not regarded as of 'governmental nature' in the context of s.32(1) of the Charter, and, on the other hand, why the common law is not subject to Charter scrutiny in the same way statutes are.

On the basis of s.32(1) of the Charter it has been argued that the Charter is intended to apply only to disputes in which government somehow is involved. In *Dolphin Delivery* McIntyre J. actually determined to whom in particular s.32(1) extends the reach of the Charter. In his opinion, this section addressed the legislative, executive and administrative branches of government, regardless of whether or not their action is invoked in public or private litigation.[36]

He inferred this conclusion from a textual analysis of the section in question which seems to be

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[35] Boivin, supra n.17, at p.232.

[36] [1986] 2 S.C.R. 573, at p.598. In this case the issue was whether an injunction granted under common law authority prohibiting secondary picketing infringed s.2(b).

rather artificial. Allegedly, s.32(1) treats Parliament and the Legislatures as separate or specific branches of government, distinct from the executive branch of government because it explicitly mentions the Parliament and government of Canada and the legislatures and governments of the Provinces. He held that the word 'government' in this context does not refer to the government in its generic sense - as in the whole of the governmental apparatus of the state - but to a branch of the government. Since the word 'government' followed the words 'Parliament' and 'Legislature' it was seen as referring to the executive or administrative branch, the sense in which one generally speaks of the government.[37]

It is, however, also possible to apply a different interpretation to s.32(1) by reading it in the light of s.52(1), which provides for the primacy of the Constitution over any Canadian law. First of all, the wording in s.32(1) does not restrict the Charter's application to the legislatures and Parliament 'only'. In contrast to s.1, according to which the guarantees set out in the Charter are subject 'only' to such reasonable limits etc., s.32(1) does not use this confining term. The absence of the word 'only' therefore is significant and can be linked to the historical context of the change in the constitutional system of government brought about by the Charter. Before the enactment of the *Constitution Act, 1982* one of the prevailing features of Canada's Constitution was parliamentary supremacy. But the Charter, contained in the new Constitution, was intended to constrain the supremacy of Parliament. Therefore, it was necessary to make clear that in certain cases this supremacy no longer existed. S.32(1) and s.52(1) were included in order to make the Charter's application to government unequivocal.[38] Seen in this light, s.32(1) does not

[37] Ibid, at p.598.

[38] Michael Doody, "Freedom of the Press, the Canadian Charter of Rights and Freedoms and a New Category of Qualified Privilege", (1983) Can. Bar Review 124, at p.137. Doody went even further and created an argument for the Charter's application to private litigation in general proceeding from this interpretation. He argues that private parties were and still are (during the post-Charter era) all subject to the general law. There was no need to specifically insert a section in the Constitution asserting that the benefits and obligations of the Charter apply to them because they simply need invoke some section of the general law and then invoke the enforcement section

support the textual justification for limiting the scope of the Charter's application found in *Dolphin*.

At any rate, it is a common perception that courts and their processes form an integral part of the government apparatus, and that court orders, as well as state processes to enforce such orders, are forms of government action.[39] As described in chapter four, court decisions are regarded as state action in German constitutional law, as acts of public authority, fit to allow a constitutional complaint. The three branches of government, namely the legislature, the executive and the judiciary, are explicitly mentioned in article 1 of the German Basic Law as being bound by the basic rights. The United States also regard actions of the judicial branch of government as 'government' or 'state action'.[40] The Supreme Court of Canada itself has acknowledged that the judiciary is part of government.[41] Yet, according to *Dolphin Delivery* government seems to be reduced to two branches, the legislative and executive. For the purpose of Charter application actions of the courts are not regarded as 'governmental action'. Courts seem to be something apart from government, although clearly not private actors.

In fact, this result is discordant with the Charter's own content. The Charter contains several rights which the courts alone can implement (or deny) and which would not make sense if they did not apply to the courts. The provisions in the category 'legal rights' particularly address the courts, such as s.7 and s.11(d) which protect the right of a criminal accused to a fair trial or s.11(e) that protects the right to reasonable bail.[42] These rights are ultimately in the competence of and can only be provided (or denied) by the courts. To say that the actions of the courts

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(s.24(1)) in an attempt to obtain a remedy. See also Darlene Madott, "Libel Law, Fiction, and the Charter", (1983) 21 Osgoode Hall L.J. 741, at pp.758-761.

[39] Brian Etherington, "Notes of Cases", (1987) Canadian Bar Review 818, at p.834.

[40] *New York Times v. Sullivan*, 376 U.S. 254, at p.264.

[41] *Fraser v. Public Service Commission*, [1985] 2 S.C.R. 455.

cannot be subject to Charter scrutiny contradicts the text and content of these provisions. Indeed, McIntyre himself stated in *Dolphin Delivery* that 'courts are, of course, bound by the Charter as they are bound by all law' and that it was their 'duty to apply the law'.[43] Despite this realization, he rejected the idea that court orders are an element of governmental intervention necessary to invoke the Charter. Thus, courts are obviously not bound in their role as adjudicators at common law.

However, subsequent cases partly undermined this holding by characterizing the exercise of common law authority by courts as public in nature if that exercise concerned criminal prosecution or took place in an effort to protect the court's process.[44] When judges decide issues relating to the common law in the context of a criminal trial or on bail eligibility it is clear now that the Charter does apply.[45] There the exercise of common law authority by courts has been recognized as public in nature. Still, the holding in *Dolphin Delivery* has not been abandoned and was reconfirmed in *Hill*.

One explanation given in *Dolphin Delivery* for excluding actions of the courts from Charter application was that courts act as neutral arbiters in applying the law.[46] This reflects a long outdated premise of legal formalism that judges are merely finders and declarers of pre-existing common law principles and rules.[47] However, it does not take into consideration that courts are policy makers, particularly with respect to the common law.

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[42] Lepofsky, supra n.18, at p.184.
[43] *Dolphin Delivery*, supra n.36, at p.600.
[44] In *R. v. Swain*, [1991] 1 S.C.R. 933 the Charter was applicable to the common law in criminal proceedings. Further examples for challenges to the common law in a criminal law context are *R. v. Bernard*, [1988] 2 S.C.R. 833 and *Rahey v. The Queen*, [1987] 1 S.C.R. 588. *B.C.G.E.U. v. British Columbia*, [1988] 2 S.C.R. 214 dealt with a judge's effort to protect the court's process. He issued an injunction on his own motion to prohibit picketing which might impede access to the courthouse. This injunction was subject to Charter scrutiny.
[45] For instance in *R. v. Swain*, ibid (right to be tried within reasonable time); *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Thomson Newspapers Ltd. v. Canada*, [1990] 1 S.C.R. 425.
[46] *Dolphin Delivery*, supra n.36, at p.600.

The approach taken in *Dolphin Delivery* suggests that courts actually are placed above the Charter in their role as judicial lawmakers under the common law. Courts with non-elected and non-accountable judges can examine decisions of Parliament and legislatures for infringements of Charter rights. Restrictions on such rights which have been imposed by democratically elected legislatures are subject to legal scrutiny while violations caused by the courts through court orders and through the implementation of common law rules cannot be challenged. This opens the possibility for a person to use the power and processes of the state to help him deny another person's Charter rights through court enforcement of common law rules.[48]

This leads directly to the question why the judge-made common law is immune from Charter attack in the absence of additional governmental action.

The supremacy clause in s.52(1) explicitly refers to 'any law' that is inconsistent with the provisions of the Constitution and stipulates that such law is of no force and effect. While the Court in *Dolphin Delivery* initially acknowledged that the common law is 'any law' in this sense, declaring it 'wholly unrealistic and contrary to the clear language employed in s.52(1)' to exclude the body of common law, it completely undermined this ruling by going on to hold that the Charter will only apply to the common law where a governmental actor is relying on it to infringe guaranteed rights.[49] The common law itself, or a court order based on the common law, is not a sufficient connection to government for Charter purposes. In effect, an important source of law, the great body of common law, will be immune from review for inconsistency with the Charter.[50] It can develop inconsistently to the Charter with the result of incompatibility with s.52(1).

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[47] Brian Etherington, "Notes on Cases", Canadian Bar Review 1987, 818, at p.835.
[48] Lepofsky, supra n.18, at p.185; Etherington, ibid, at p.835.
[49] *Dolphin Delivery*, supra n.36, at pp.593 and 599.

The Court in *Hill* based its conclusions with regard to the Charter's application to the law of defamation on this holding. It only tested whether the principles of the common law, in the particular case of the law of defamation, were inconsistent with Charter *values*. Thus, ordinary Charter scrutiny as it applies to statutes or other governmental action which allegedly infringe Charter *rights*, was not applicable.

The differential treatment of common law and statute law, however, is not reasonable. Many statutes codify common law causes of action or rules, and once they take statutory form they are subject to Charter scrutiny. In *Coates v. The Citizen*[51], for instance, the connection to government was made through the *Defamation Act* of Nova Scotia which allowed and regulated actions for defamation and contained provisions dealing with the issues of damages, malice and falsity. Through these provisions the Legislature authorized action which consequently had to comply with the Charter. The court held that although the Charter does not apply to private litigation, the fact that the Act is a provincial statute provides the necessary connection to allow the application of the Charter. Thus, the same defamation law can be examined under the Charter if it is enshrined in legislation, but it will be immunized from proper Charter review if it is left to the common law. In order to avoid Charter attacks, the legislature simply has to leave the matter to the common law.[52]

The courts (or others who exercise legislatively granted discretion) create rules for the resolution of competing private claims just as the legislature does and therefore should be treated alike. Private relations are as likely to be governed by statute as by common law and the desire for restricting Charter application to governmental rather than private action does not

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[50] Etherington, supra n.47, at p.832.
[51] (1988), 85 N.S.R. (2nd) 146.
[52] Lepofsky, supra n.18, at pp.184, 185.

justify the distinction between statute and common law. This point was well understood in *New York Times*. Justice Brennan held that 'it matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied, but, whatever the form, whether such power has in fact been exercised.'[53] As already argued above, courts do exercise state power, no matter whether they apply statutes or common law rules.

The Supreme Court's concern with respect to widening the scope of Charter application to virtually all private litigation since all cases must end with an enforcement order is understandable, especially against the background that the extension of the Charter's reach brings with it an expansion of the power and influence of courts. However, the question of what constitutes governmental action is separate from the question of whether and how the Charter should apply to private litigation where a court enforces a common law rule. Certainly, the Charter should not apply in the sense that it provides a new cause of action to resolve the private dispute since it exists to regulate the relations between government and private persons and not those between exclusively private persons.

As the German approach shows, it is possible to review court decisions without using the Basic Law as the foundation for resolving actual private disputes. The Constitutional Court in Germany is restricted to examining whether there is a violation of 'specific constitutional law' while the resolution of the actual dispute still ultimately depends on the application of the respective (private) law. The test is, whether the lower court sufficiently took into consideration the basic rights in question in applying the rules of private law. If the ordinary court failed in the task of contemplating possible infringements, the Constitutional Court states that the decision

[53] *New York Times v. Sullivan*, (1964), 376 U.S. 254, at p.265.

under challenge violates the Basic Law and sends the case back to the ordinary court for a new decision.

Likewise, the Charter should apply to court orders in Canada, even in purely private litigation, to preclude judicial enforcement of Charter right violations, i.e. to prevent the possibility that a court order perpetuates the infringement of fundamental rights caused by a private entity through not acknowledging it. The starting point still is, that the injured party may have a remedy under statutory or common law regulating private relations in case some action of a private entity resulted in a restraint on one of the injured party's civil liberties. There will not be a remedy under the Charter to resolve this problem.[54] The Supreme Court then can scrutinize the statute or common law in question in order to test its consistency with the Charter. The application of s.1 will not create complications with respect to the common law since limitations imposed by common law are prescribed by law as well.

For *Hill* this would have meant that the court had to go through the usual s.2(b) analysis in determining whether the common law of defamation violated the defendant's right to freedom of expression, i.e. it had to see whether the expression at issue was covered by the constitutional guarantee, whether there was a limitation of freedom of expression and whether this limitation was a reasonable limit, prescribed by law, that can be demonstrably justified in a free and democratic society under s.1 of the Charter.

In accordance with *Irwin Toy* and *Zundel* the Court would have had to acknowledge that injurious (and possibly defamatory) statements do benefit from the protection provided by s.2(b). That the law of defamation restricts free speech by imposing liability on certain communications and thereby is a violation of this right cannot be doubted. Finally, the court

would have had to justify this limitation under s.1.

Instead of applying a very flexible, rather arbitrary and superficial test to determine whether defamation law is consistent with Charter *values*, as done in *Hill*, the Court would have been forced to define the common law's objective, and to see whether it pursued a pressing and substantial purpose, and whether it met the requirements of the proportionality test. At this last stage the effects of the law of defamation on freedom of expression would have had to be considered and balanced against the law's underlying purpose. If the purpose of defamation law is defined as protecting personal reputation against injury, the measure adopted, namely the punishment and thus deterrence of defamatory speech, arguably is rationally connected to the law's objective. But it is doubtful whether the tort of defamation could have been regarded as impairing freedom of expression no more than is necessary to accomplish its objective. In my opinion, the law of defamation would not have survived the minimum impairment test. However, I will expand upon this aspect in the remaining part in this chapter.

Had the Supreme Court of Canada decided the case on the basis of the *Oakes* test that applies to statutory law,[55] it might well have come to a different conclusion in *Hill* as to whether the common law of defamation needs some adjustment in order to comply with the Charter. At least the decision's focus would not have been exclusively on the wisdom of the actual malice standard.

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[54] See Etherington, supra n.47, at p.832.

C. Critical Look at the Law of Defamation

So far, the Supreme Court's decision in *Hill*, the decisive decision with respect to the relationship between defamation and the Charter, has been criticized. Now it is time to cast some light on the common law of defamation itself, and to review it more generally in terms of its consistency with s.2(b) of the Charter.

Traditionally, defamation law has tended to favour the protection of reputation, and as shown above the impact of the Charter on this common law has been minimized by the Supreme Court in *Hill*. However, the current law of defamation as described in chapter two contains several aspects which give rise to the conviction that it has not achieved an appropriate balance between the opposing interests of free speech and reputation. In my opinion it exhibits no concern at all for balancing these values.

It has been mentioned before that the plaintiff has to establish three things in order to have a *prima facie* cause of action. He has to show that the material he complains of is defamatory, that it refers to the plaintiff and that it has been published to a third person. If the plaintiff succeeds in demonstrating these elements, the falsity of the defamatory statement will be presumed as well as damages and malice on the part of the defendant. The defendant has the possibility of pleading certain defences provided by the common law, such as justification, privilege or fair comment. In this connection he bears the burden of proving the respective requirements. The following examination of the ingredients making out a defamation action will confirm the conclusion that the existing regime does not sufficiently take s.2(b) of the Charter into

[55] The elements of the *Oakes* test have been indicated in the paragraph above. For a more detailed description see chapter three.

consideration.

I. Defamatory Nature of the Material

First of all, the plaintiff must prove that the words he complains of defame his reputation. Material is not only then regarded as defamatory when it causes serious harm to a person's reputation but also when it would cause the plaintiff to lose any respect or esteem in the eyes of others. The threshold to begin an action is relatively low, especially considering the circumstance that the court is not really concerned with whether the material actually did lower the plaintiff's reputation amongst those who were aware of it. Instead, a hypothetical test of whether the words are reasonably capable of a defamatory meaning is applied. Thus, the plaintiff does not have to prove that the words complained of are in fact defamatory but only that a reasonable and right-thinking person would understand them as defamatory.

Generally, courts will consider almost all critical material as defamatory.[56] In *Hanly v. Pisces Productions*[57], for instance, an honest letter responding to a request for reasons explaining why the defendant did not hire the plaintiff was considered to be defamatory with regard to its contents saying that the person in question lacked self-confidence, failed to provide positive work references and that there had been unsatisfactory work experiences.

As a result of this broad approach the field of application for the law of defamation is immensely extended. This approach harbours the potential of punishing a great number of communications which indeed deserve protection by awarding damages and thereby restricting free speech too extensively.

In view of the defence of justification it has been explained that defamation law protects the plaintiff's legitimate reputation and if this reputation can be damaged by the truth it is to that

extent unworthy of protection by the law. In *Watkin v. Hall*[58] the principle was established that 'the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, possess.' Yet, it does not even matter whether the plaintiff's reputation was in fact affected by the publication. An action for defamation may even be successful if the persons made aware of the allegations did not understand them in a defamatory sense, did not believe the imputations, or already had a low estimation of the plaintiff. How can a reputation be damaged if the audience of the publication did not sense any defamation? Clearly, the fact that material nevertheless may be considered defamatory cannot be reconciled with the principle that the law of defamation protects the 'deserved' reputation of the individual from 'injury'.

Another problem is that the defendant not only has to take responsibility for the natural and ordinary meaning of his words (as opposed to the meaning he intended to convey and was aware of conveying) but also for defamatory inferences reasonably drawn from those words even if he was ignorant of the extrinsic facts which made his apparently innocent communication defamatory. It is almost impossible for the defendant to estimate and to assess what the jury at trial will consider as defamatory since he cannot take into account each and every eventuality.

II. Presumption of Falsity

With regard to making out a *prima facie* cause of action the truth or falsity of the communication is of no relevance. If the material is found to be defamatory, its falsity will be presumed. Therefore, the plaintiff does not have to prove that the defamatory words were false. He is *prima facie* entitled to a good reputation even if he does not deserve it. This again

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[56] Klar, supra n.26, at p.263.
[57] [1981] 1 W.W.R. 369 (B.C.S.C.).
[58] (1868), L.R. 3 Q.B. 396, at p.400.

contradicts the principle that the law only protects a reputation which the plaintiff indeed enjoys. The common law requires the defendant to warrant the accuracy of his material and makes him bear the risk of not being able to conclusively prove the truth of his allegations in court with the result that the plaintiff may be protected undeservedly. Considering that the law's objective is to secure an individual's good reputation, which requires that such a reputation and integrity in fact exists, falsity of the material should have to be proved as a precondition for recovering damages.

The presumption of falsity shows that the law of defamation ignores that a defamatory opinion might be valuable. As Mill argued, the suppressed idea may possibly be true or may contain a portion of truth and truth is more likely to be found if people are exposed to various assertions. To presume that an opinion is false just because it is defamatory counteracts the purpose of free expression to discover truth and also ignores the checking function of free speech with regard to abuse of authority.

III. Presumption of Damage

In the same way as it is presumed that the plaintiff enjoys a good reputation, it is presumed that damage to this reputation has occurred without taking the actual effect into account. There is no need to show that the plaintiff has in fact suffered actual monetary or other loss because the existence of injury is presumed from the mere fact of publication.

Admittedly, it is impractical and difficult to measure the actual injurious effects of a communication on a person's reputation. However, this does not justify simply proceeding on the assumption that there must be some damage in the ordinary course of things. First of all, before assessing damages the courts should be strongly assured that the statement is indeed false. Falsity is the precondition that injury to the reputation can have occurred at all. In spite of

this, falsity will not be explicitly affirmed since it also is presumed.

The presumption of injury is particularly hard on the defendant since it cannot be rebutted. As said before it does not affect the finding of a statement being defamatory if no one believed the communication. Consequently, it does not help the defendant to establish that the publication was indeed not believed. Even if he could show that no damage whatsoever arose from his publication this will not defeat the action.[59] The plaintiff can nevertheless recover large damages.

Yet, the common law of defamation does not in all cases presume damages. It distinguishes between libel and slander, the latter being even subdivided into slander and slander *per se*. Only in the categories of libel and slander *per se* defamation is actionable without special proof of damages. In order to recover for slander itself damage will not be presumed but has to be pleaded and demonstrated.

Nowadays, cases of slander where proof of damages is required are relatively rare. In the early days of the common law, however, slander constituted the most important part of defamation actions since writing was not widespread in view of the general illiteracy of the population. Accordingly, at that time it usually was necessary to prove specific loss as a consequence of the communication. Today, the focus is on libel actions with the result that in the majority of cases no actual loss has to be shown. Thus, with the development from predominantly oral to mainly written communications the basic principle shifted from the requirement to prove damages to the presumption of damages.

IV. Presumption of Malice

It has already been indicated that fault is generally immaterial to liability in defamation law, with the exception of the publication issue: words can be found defamatory regardless of the defendant's intention to make a statement at all, much less a defamatory one. He will be liable even if he was not aware of the defamatory meaning his statement conveyed or if he took reasonable care to ensure it was not defamatory. In fact, the defendant has to take the consequences of all the inferences that can be reasonably drawn from his communication. Likewise, his intentions with regard to identification are of no relevance, i.e. the fact that he meant to refer to someone else or was not aware of the plaintiff's existence will not help him.

Liability depends solely on the act of publishing. The defendant has to be somehow responsible for the publication of the defamatory material. However, it is not even necessary that the defendant intended to publish the defamatory material since his intention with respect to publication will be inferred from the fact that the material actually was published. As soon as defamatory material is published the defendant is deemed to have intended the consequences of his voluntary action. If he in fact was not responsible for the publication, for instance in a case of accidental publication, it is up to him to prove this.

Cory J. held in *Hill* that defamation is the 'intentional publication of an injurious false statement.'[60] He continued to say that while an actual intention to defame is not necessary to impose liability on a defendant, the intention to do so is nevertheless inferred from the publication of the defamatory statement. Then, he concluded that this gives rise to the presumption of malice which may be displaced by the existence of a qualified privilege.

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[59] Robert Post, "The Social Foundations of Defamation Law: Reputation and the Constitution", (1986) 74 Cal.L.Rev.691, at p.699.

[60] *Hill v. Church of Scientology of Toronto* (1995), 126 D.L.R. (4th) 129, at p.178.

This view obscures the fact that the aspect of publication and that of the defamatory nature of the material are two distinct issues. Fault should be required for both issues independently without confusing them. Apart from that, to say that the intention to defame is inferred from the publication implies that fault in this sense can only be understood in terms of intention and not in terms of lack of reasonable care.[61]

For instance, the general delict provision of the German Civil Code, § 823 BGB, requires fault (or *animus*) concerning every aspect of the *actus reus*, namely with regard to the activity which violated one of the enumerated rights and to causing damage through that activity. Fault in this connection comprises intent and negligence, i.e. it leaves room for the concept of reasonable care taken prior to the activity. This example suggests that the law of defamation, especially as interpreted by Cory J., should be revisited with regard to its strict liability.

A further problem is that the presumption of non-accidental publication and of malice, i.e. the inference drawn from publication, is not a mere evidentiary presumption the defendant can rebut (unless it can be shown that there was a privileged occasion) but has the strength of a 'finding'.[62] Once more, the common law of defamation favours the plaintiff and the protection of his reputation at the expense of the defendant's right to free speech.

V. Common Law Defences

The value of the defences of justification, privilege and fair comment provided by the common law of defamation has, in view of the numerous limitations and uncertainty of their applicability, already been discussed above with the conclusion that they do not supply

[61] Richard Dearden, "Constitutional Protection for Defamatory Words Published about the Conduct of Public Officials", in David Schneiderman, *Freedom of Expression and the Charter*, (Thomson Professional Publishing Company, Calgary, 1991), at p.258.

sufficient means to protect freedom of expression.

Despite their function of restoring an appropriate balance between the tort law's interest in the protection of the reputation and the conflicting constitutional commitment to free speech, they fail to do so.

VI. Chilling Effect of the Common Law of Defamation

The law of defamation places a heavy burden on the defendant. He must anticipate the meanings that the jury might attribute to his statement, including inferences and innuendo, and make sure that their truth can be proved in order to escape liability, or he has to meet the numerous requirements of one of the defences.

In effect, the current libel law operates so as to create a reverse onus on a libel defendant.[63] While s.1 of the Charter places the burden of proof on the party who claims that a limit upon a fundamental right is justified, the law of defamation, which itself limits freedom of expression, requires the defendant, whose right to free speech has been restricted, to show that the limitation was not justified.

Boivin summarized the *status quo* of defamation law by saying that 'someone who voluntarily expresses himself must accept the risk of all reasonable defamatory inferences, whether the risk is excessive or not in the circumstances. The risk must be supported whether or not the cost of preventing the injurious falsehood outweighs the probability and gravity of the potential injury to reputation.' He concluded that the defendant may be liable even if complete silence is the only way harm could have been avoided.[64]

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[62] Dearden, supra n.61, at p.293.

[63] Thomas Gibbons, "Defamation Reconsidered", (1996) 16 Oxford J. Leg. Studies 587, at p.609; Dearden, supra n.6, at p.293.

In view of this, it is claimed that writers will rather censor themselves than risk the consequences of litigation. This is particularly so where the media are concerned. They may refuse to publish defamatory material referring to public figures on a matter of public interest since they cannot anticipate the outcome of such a publication. Stories may not be published because they are regarded as not being worth the risk of defending a libel action with the possibility of large damage awards and high legal costs. Under the current law, it seems, the media can only publish and broadcast news it can prove to be true, which may lead to suppression of coverage of important public issues. The sphere of protected discussion will be reduced to that which is comfortable and compatible with current conceptions and which is not critical of sensitive issues. This is commonly referred to as the 'chilling effect' of libel laws.

That such a libel chill exists was recognized in *New York Times* where Brennan J. explained that under the existing rule 'would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.'[65] As a result, the law limits the variety of public debate.

Similarly, the House of Lords acknowledged the chilling effect of defamation law in *Derbyshire CC v. Times Newspapers*. Lord Keith observed that 'the threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.'[66] Finally, the Australian High Court followed this view in *Theophanous v. Herald Weekly Times Ltd.* and found that the 'decisions which establish the common law principles have not been concerned to assess the inhibiting impact of the law of defamation and threats of action for defamation on the exercise

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[64] Boivin, supra n.17, at p.264.
[65] *New York Times v. Sullivan* (1964), 376 U.S. 254, at p.279.
[66] [1993] 1 All.E.R. 101.

of the implied freedom of communication.'[67]

The common law itself refers to the chilling effect with respect to the defence of absolute privilege. This defence exists in order to prevent Parliamentarians (among others) from being inhibited from expressing their views on matters of common interest by granting them absolute immunity from liability. This is said to support a frank and vigorous debate in the democratic institutions of government and, consequently, to secure the efficient functioning of those institutions. On the same grounds, members of the public or the press should have the right to fearlessly speak about the conduct of the very same public officials.

Certainly, this 'libel chill' has the most severe effect where political expression, which lies at the core of freedom of expression, is concerned. I have already referred to the value even defamatory speech has with respect to the checking function of expression for holding officials accountable by publicly scrutinizing their conduct, or with respect to political opposition. The threat of libel actions with their consequences can restrict the expression of critical and dissenting views much to the delight of politicians who have a strong interest in suppressing criticism of them in order to stay in power. Apart from this, the individual's capacity to form his own views and opinions, and to discuss these with others without censorship is essential for self-fulfilment. The right to freely express one's opinion also must comprise the right to state this opinion if it is defamatory. For the sake of promoting the process of intellectual self-development, society, to a certain degree, has to put up with communications of thoughts and beliefs which may be too harsh. It is dehumanizing to tell a person that he cannot communicate his beliefs, the expression of which is closely tied to his personality.

Of course, this right to free expression cannot be absolute but must in certain circumstances

[67] (1994), 124 A.L.R. 1, at p.19.

give way to countervailing considerations. Personal reputation is a value that deserves protection as well. However, equilibrium between the competing interests has to be found which did not happen in the case of the law of defamation.

VII. Conclusion

Casting a critical light on the current law of defamation revealed that this body of common law principles does not reflect a true compromise between the competing interests of reputation and freedom of expression but protects the first in a disproportional way at the expense of the latter. The low threshold requirement to open a libel action and the presumptions of falsity, damages and malice work against the libel defendant, placing obstacles in his way and making it difficult for him to defeat an action. Canadian courts obviously value reputation over free speech by supporting strict liability without attaching importance to the Charter's impact.

That the common law of defamation does not achieve a correct balance between the competing interests is not surprising considering its historical context and development. It has not been designed to fulfil the demands of contemporary society. The law's development was only urged on by the invention of the printing press, which was perceived as a serious threat to the public order and the Crown. Church and State were motivated by their desire to suppress and control political and religious discussion. The jurisdiction over defamation was assumed by the Star Chamber, an institution which exercised unlimited authority, in order to eradicate duelling and preserve peace.

Against this background, it is clear why the law of defamation is not concerned with balancing reputation and free speech: its initial purpose in fact was to suppress speech and it was administered by a very powerful institution which wanted to maintain its authority by assuming control over the press. The libel concept was used by tyrants to silence potentially influential

critics.

Cory J. referred to defamation law's history, concluding that the character of this law is 'essentially the product of its historical development up to the 17th century, subject to a few refinements such as the introduction and recognition of the defences of privilege and fair comment.' He further noted that although 'the law of defamation no longer serves as a bulwark against the duel and blood feud, the protection of reputation remains of vital importance.'[68] Surprisingly, this history was not taken as evidence that the law may be old-fashioned and requires some re-assessment and modification in order to comply with today's needs. On the contrary, the Court took this history as proof of the fundamental importance of the interest in reputation.[69]

In sum, had the Supreme Court in *Hill* applied the Charter to the common law of defamation as suggested above (instead of considering Charter values only), and had it, as a consequence, dealt with the regular s.2(b) analysis, it is doubtful whether the current law of defamation would have survived the justification test under s.1 of the Charter.

D. Proposals for Change

The importance of freedom of expression, as demonstrated in chapter one, in combination with the described failure of the common law of defamation to give adequate weight to this fundamental right (as shown earlier in this chapter) provide compelling reasons for modifying

[68] *Hill v. Church of Scientology of Toronto* (1995), 126 D.L.R. 129, at p.162.
[69] Noteworthy is that the majority of the Supreme Court came to a different conclusion in *R. v. Zundel*, [1992] 2 S.C.R. 731, after tracing back the provision of the Criminal Code. The goal of the law at the time was found out to be the prevention of statements about powerful landowners which might provoke them to use the force of arms.

defamation law. It needs to be adjusted to the changes and new constitutional demands brought with the enactment of the Charter. Even if the principles of the common law of defamation were only to be measured against the *values* underlying the Charter, as it has been decided in *Hill*, those values are still sufficient reasons to reform the common law rule that governs defamation despite the finding in *Hill* that this rule complies with them.

Unquestionably, the individual's good reputation has to be treated as a serious and significant value but not as a value that so pervasively dominates others, as it presently does. At the same time, freedom of expression is not an absolute right and should not prevail in all circumstances. However, one of the values necessarily will be favoured over the other to some degree.

How the common law of defamation should be formulated, and which precise balance it should establish depends on the relative importance a society wishes to attach to the respective competing values. Canadian courts show a preference for the interest in personal reputation. An explanation for this might be that the absence of an entrenched Bill of Rights in the Canadian Constitution for much of its history had a formative influence on judicial attitudes in this area. Canada also has never been confronted with a war and extensive speech suppression such as, for instance, Germany under the Nazi regime. It has lacked the pressing social context which might have prompted a greater regard for free expression.

Coming from another background, from a tradition where free speech is in effect valued more highly than individual reputation interests, I have a different perspective with regard to the tension between the competing values at stake. In my opinion, free expression should receive much stronger protection than it does under the current common law of defamation.

Because of these origins the Court rejected any substantial governmental objective of the current law. (Ross, supra

I demonstrated in chapter one that freedom of expression in general is extremely important and therefore should not be restricted carelessly. It has repeatedly been affirmed that the content of a statement cannot deprive it of the protection of s.2(b). Additionally, one has to keep in mind that it is difficult to determine when speech has redeeming value. These aspects already indicate that defamatory expression deserves constitutional protection.

Admittedly, the rationales explained in that chapter are not all unrestrictedly applicable to defamatory speech. However, the premise that defamatory speech cannot have value or is unrelated to the values underlying s.2(b) is not justified. The free speech rationales do support this type of expression as it has been pointed out occasionally within this thesis.[70]

The limitation of free speech through libel laws touches, for instance, on the value of the vigorous and open debate that is essential to democratic government and inevitable with respect to political opposition. If citizens truly are to be allowed to discuss and debate issues with regard to political activities and the conduct of public officials in order to ensure that their consent to government is as informed as possible (as the democracy rationale suggests), this must mean that they can state their actual opinion even if this will result in defamatory allegations. Apart from this, the restriction of defamatory speech undermines the function of free expression as a check on abuse of authority. The accusation of misconduct will almost necessarily be accompanied by defamatory imputations. In order to guarantee public scrutiny of official conduct, defamatory speech in this connection must be accepted. The exclusion of such speech invalidates the argument that freedom of expression has a checking function.

Another aspect is that of social stability enhanced by free expression. Giving a person who disagrees with political decisions or activities the possibility to vent his dissatisfaction through

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n.21, at p.133).

speech (which may include the communication of injurious statements), as opposed to suppressing his criticism, can help to achieve social stability.

The restriction of defamatory speech may also impair the search for truth since defamation law does not confine itself to false and defamatory communications but also covers injurious expression that may be true, namely, when the defendant was not able to prove the truth of his allegations in view of the strict evidentiary rules and standards of proof that apply in court proceedings.

Finally, it can have negative effects with regard to individual self-fulfilment to restrict social interaction that is important in order to allow the individual to see himself as sovereign in making decisions and forming opinions. All people must be given the possibility to openly communicate their beliefs and display their opinions even if they are injurious to others. There is something dehumanizing about telling a person that he cannot communicate his beliefs and to exclude him from the possibility of speaking. It denies the respect for inherent dignity of a human person. Only free expression can promote the accommodation of a wide variety of beliefs.

McLachlin stated in *R. v. Keegstra*[71] that 'if the guarantee of free expression is to be meaningful, it must protect expression which challenges even the very basic conceptions about our society.' Nevertheless, the common law of defamation imposes extensive limitations on freedom of expression and the Charter's impact has even been minimized by the Supreme Court in *Hill*. It almost seems as if defamation law is accepted as a valid restriction of free speech since it preceded the Charter.

I have argued that the Charter should apply directly to the common law in general and the common law of defamation in particular, and in the course of this discussion, I have indicated

[70] Particularly on pp.129-130 and 156 of this chapter.

that defamation law might in all probability not have survived the minimum impairment stage set out in *Oakes* as part of the s.1 analysis. This test requires that the adopted restricting means should impair the right or freedom in question no more than necessary to accomplish its objective. In other words, the common law of defamation has to be formulated in a way that its objective of protecting personal reputation is pursued by the least drastic means with regard to freedom of expression.[72]

However, a critical look at the common law of defamation earlier in this chapter revealed its one-sidedness, particularly in view of its presumptions. I have shown that the common law of defamation does not take freedom of expression sufficiently into account, that it over-emphasizes the significance of personal reputation, and that it needs reassessment. In my opinion, the existing defamation law restricts freedom of expression to an intolerable degree and does certainly not represent the least drastic means available in the sense of the minimum impairment test, no matter how strictly or relaxed such a test may be framed.

The only possibility to achieve an appropriate equilibrium between the protection of reputation and freedom of expression, in my view, seems to be to fundamentally change the common law of defamation in order to bring it into accord with the Charter. The elements of the traditional libel action, the common law presumptions, and the distribution of burdens all need to be adjusted in order to comply with the constitutional guarantee of free speech.

Defamation law has been the object of several inquiries in the past and various suggestions already have been made in order to improve its consistency with the constitutional value of free

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[71] [1990] 3 S.C.R. 697.

[72] In chapter three it has been mentioned that subsequent cases adopted a more relaxed standard than *Oakes* did, rephrasing the minimum impairment test, for instance, into 'impaired as little as reasonably possible' or 'least intrusive in the light both of the legislative objective and the infringed right'. At any rate, caution is necessary in order not to overvaluate legislature's objective and not to undervaluate the expression at issue.

speech. In the following I will first introduce and criticize the two proposals of granting absolute immunity to political speech and of according a qualified privilege to the media. Further proposals, such as the actual malice rule or the defence of due diligence, will be discussed in connection with my own idea of how the common law of defamation should be modified. This method allows me to draw comparisons and demonstrate differences between the varying approaches more easily.

I. Absolute Immunity for all Political Discussion

First of all, there was the rather radical minority position in terms of protecting freedom of expression of Douglas J. and Black J. in *New York Times*, which was also favoured by Dean J. in *Theophanous*. These judges argued that defamation actions should be precluded completely in cases of publications that deal with official conduct or the suitability of a Member of Parliament. They wanted to go considerably further in the application of the free speech guarantee by conferring on the media an unconditional right to say what they please about public officials. According to them it cannot be justified in the public interest to render citizens liable in damages for making statements about public officials and their conduct. The mere possibility of defamation actions has an unacceptable chilling effect upon political criticism.

This approach indeed goes very far in protecting freedom of expression; it also ignores the individual's right to be protected from injury to his reputation. It does not take into account that the media not only provide important political information but also are engaged in the entertainment business, where the publication of sensational scandals often proves to be decidedly economically valuable. An untrue publication may ruin a person's career and life. Therefore, it is not advisable to choose such an extreme method, withdrawing all protection from one of the competing values at stake.

In addition, it is well established in Canada that no right or freedom is absolute. The way in which s.1 of the Charter is framed arguably does not allow an interpretation departing from this rule. Therefore, the solution of granting freedom of expression absolute priority and of placing it above all other interests is inconsistent with the Canadian Charter.

II. Qualified Privilege for the Communication Media

Another proposal is the recognition of a new qualified privilege for the media based on the Charter itself in cases where the conduct of public officials is involved.[73]

So far the courts have not acknowledged that the media have a duty to provide information even where the public has a legitimate interest in receiving such information, i.e. no privileged occasion has been accorded to media publications. Even if a privileged occasion had (or would have) been found, it was exceeded since such a broad publication was regarded as one 'to the world at large', made to an audience which partly had no legitimate interest.

It is well established that the courts have not considered the categories of qualified privilege to be closed. The circumstances which give rise to a privileged occasion 'can never be catalogued and rendered exact'.[74] Indeed, the defence has to be reviewed from time to time since the continually changing conditions in society may render it necessary to create new privileged occasions.

The adoption of a new Constitution in Canada, including the *Charter of Rights and Freedoms*, represents a radical change in public policy that should have some impact on the existing common law. Therefore, it is appropriate to re-assess existing defences of qualified privilege. The Supreme Court itself has held that the law of defamation must be developed and applied in

a way consistent with Charter dictates, which might make modifications to the common law necessary.

Advocates of this proposal stress the vital role the press plays in a democratic society concerning the discussion of public affairs. In a system of representative democracy legislatures derive their political legitimacy from their representative character. In order to ensure that the Members of Parliament indeed represent the wishes of the electorate it is vital that the voters have the opportunity to receive and analyse political information. For this reason, it is argued, the dissemination of political information has to be afforded extensive protection.

The courts have been aware of the fact that there is reliance by the public on the news media as their agent and representative in public matters. The press performs the important function of gathering information for, and disseminating it to, the public. It has once been explained that 'no individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities... The press acts as an agent of the public at large. It is the means by which the public will see that free flow of information and ideas is essential to intelligent self-government.'[75] Moreover, the press serves as a very important check on governmental misconduct.

Against this background, the role of the press has been given constitutional status in s.2(b) of the Charter. In view of the significance of the media the courts should reconsider their position with regard to a qualified privilege; especially since the common law is based upon principles that can be considered discordant with the values enshrined in s.2(b) of the Charter.

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[73] This view is advocated by Dearden, supra n.61, at pp.308-316. See also Doody, supra n.38, at p.149.
[74] *London Association for Protection of Trade v. Greenlands*, [1916] 2 A.C. 15, at p.22 (H.L.).
[75] *Saxbe v. Washington Post Co.* (1974), 417 U.S. 843, at p.863. (Powell J.).

The suggestion is to acknowledge that the media have a common or mutual interest in disseminating information in which the public has a legitimate and mutual interest, such as political speech and the proper organisation and functioning of government. It is argued that s.2(b) of the Charter can and should be used to create a new category of qualified privilege with respect to defamatory allegations published about public officials or their conduct. Thus, the media should be granted qualified privilege in publishing political information to the public.

The creation of such a qualified privilege certainly acknowledges the important role of the press and takes a step in the right direction (i.e. constitutionalization of the common law of defamation). However, it does not eliminate the partiality and one-sidedness expressed by the law of defamation in favour of reputation that I have demonstrated earlier in this chapter. It only represents a partial possibility of improvement with respect to a better recognition of the right to freedom of expression in one particular context but is, in my opinion, not sufficient. The issues which have been examined above[76] do not only arise in connection with media defendants although this indeed is one of the most significant fields affected by the restrictions of defamation law. Therefore, changes should not stop at this point. I suggest going further in protecting free speech.

III. Extension of the Element of Fault

First of all, the law of defamation should be governed by the fault principle.

Boivin has made a convincing argument for the necessity of giving fault a more significant role in order to support his proposal of a defence of due diligence which I will introduce in a moment.

[76] Here I refer to the one-sidedness of the common law of defamation and its preference of the protection of reputation, created by its presumptions of falsity, malice and damages, as well as to the insufficiency of the defences provided by the defamation law, all of which I have demonstrated earlier in this chapter.

He pointed out that other areas of tort law which are governed by strict liability (for instance, the law pertaining to dangerous animals or the law of nuisance) usually have an economic justification based on the fair distribution of risk. Strict liability in these cases can be traced back to policy reasons such as, for example, the need for providing accident victims with reliable sources of compensation. However, while it might be appropriate to impose liability irrespective of fault in settings where dangerous activities are involved, the same standard is not suited in the libel context since the competing interests in that field are not purely economic. On the contrary, it is the constitutional interest of freedom of expression that is on the other side of the scale.[77]

Hill was a rare case in so far as it dealt with a malicious lie, where the defendant had knowledge of the falsity of his allegations and nevertheless repeated them during the trial. More often, however, the falsity of a defamatory statement will only be determined in court, following detailed discovery during trial. The really problematic cases are those where the defendant had published his allegations, which have been found to be false and defamatory, after a *bona fide* investigation that somehow failed to uncover their falsity. Then the defendant was not aware of the falsity of his material and took reasonable care to prevent his statements being false. In such cases the defence of justification is not applicable. Despite his best efforts, the defendant will be liable according to the present regime of defamation law unless he published the material on a privileged occasion. Attempting to ascertain the truth of his communication prior to publication did not help him.

In this scenario, the common law's unwillingness to tolerate the risk of error is an extreme position. In order to avoid deterrence of truthful expression some constitutional breathing room

[77] Boivin, supra n.17, at pp.265-269.

has to be given. It is hardly compatible with Charter values to penalize forms of expression regardless of fault. Therefore, a defendant should not be liable if he can show that he exercised reasonable care in verifying the accuracy of his allegations.[78]

It has been shown earlier in this chapter that the presumption of fault or malice, which infers the defendant's intention to defame another person from the sole act of publication even if the defendant lacked actual intention to publish the material at all, is harmful to free expression and cannot be maintained. The greatest part of Canadian tort law is governed by the fault principle (with rare exceptions that I have already referred to), as is the German 'law of delict'.[79] For the above reasons, I consider it necessary that the defendant be liable only if he acted with fault.

1. Defence of Due Diligence

Boivin suggests that a defence of due diligence be recognized.[80]

His proposal is to allow that the presumption of fault can be rebutted by proving that due diligence was exercised prior to the publication to ascertain the truth or falsity of the material. According to this solution the plaintiff would still be entitled to a *prima facie* finding of liability if he can prove the elements of an action for defamation: the defamatory nature of the allegations, identification and publication. Then it is up to the defendant to demonstrate that reasonable care was taken to prevent the disclosure of defamatory and false material. No evidentiary burden would be added to the plaintiff.

The defence of due diligence also is preferable to creating a new category of qualified privilege that requires the plaintiff to prove malice on the part of the defendant in order to recover damages. In a privileged occasion, the defendant can escape liability for publishing false

[78] See also: Boivin, ibid. at pp.242-244, 270-271.
[79] See p.152cin this chapter.

statements without efforts of ascertaining their truth, or if the plaintiff is unable to prove malice. Another advantage is the broad applicability of the defence of due diligence. It applies whether the plaintiff is a public or private figure, whether the defendant is a member of the media or does not benefit from the guaranteed freedom of the press, and independently of the publication's subject matter (in contrast to the actual malice rule adopted by the U.S. Supreme Court.)

Boivin's approach is similar to the one adopted in *Theophanous* where the Court also, in effect, granted a defence of due diligence to the publisher of statements critical of public officials by allowing the defendant to prove that he did not know the defamatory statement was false and was not reckless as to whether it was false or true. In addition he had to show that the publication was reasonable in the circumstances in order to escape liability.

Since the right to free communication in Australia covers only political expression in the first place, Boivin's defence of due diligence, which is applicable in every libel action, is broader. It also does not contain the aspect of recklessness on the part of the defendant and that of a reasonable publication. However, both conceptions have in common that they demand that the defendant show he had taken reasonable care in checking the accuracy of the impugned material in order to escape liability.

Nevertheless, neither the defence of due diligence nor the defence granted by the Australian High Court eliminates the injustices to the libel defendant contained in the current law of defamation. For instance, the significant issue of the presumption of fault, which has been criticized above, continues to exist. In view of the emphasis given to the principle of fault, it is, in my opinion, not sufficient to fashion it in the form of a defence, where the defendant bears

[80] Boivin made a case for adopting the defence of due diligence in his article "Accommodating Freedom of

the burden of proving his lack of fault, contrary to the basic rules laid down in s.1 of the Charter.

2. Actual Malice Rule

The decision in *New York Times* adopted a different approach in order to give fault a more significant role in the common law of defamation. The majority of the Court not only established a qualified privilege for the media, affording protection to criticism of official conduct, but also adopted a rule which prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice.

The proof of actual malice demands significantly more than traditional common law understanding of malice. It has to be shown that the defendant acted with knowledge that his allegation was false or with reckless disregard as to whether it was false or not.[81] This standard is not satisfied by providing evidence that the defendant was motivated by personal spite, ill will or intention to injure, but it requires the plaintiff to show that the defendant in fact entertained serious doubts as to the accuracy of his publication. As a result, the plaintiff has to prove the falsity of the published material in addition to its defamatory nature - the presumption of falsity is abolished - and he has to show actual malice on the part of the defendant.

It was accepted that this test would result in the publication of some false political information. However, this consequence was regarded as a lesser constitutional evil than press censorship would be, caused by the fear of libel actions and damages.

The actual malice rule has been much criticized. The Court in *Hill* extensively surveyed the criticism of it, mostly made by American commentators, and reviewed the impact of the

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Expression and Reputation in the Common Law of Defamation", supra n.17 (particularly pp.280-286).

standard developed by the U.S. Supreme Court. Especially reproved was the circumstance that the decision was very much influenced by the dramatic and compelling facts underlying the *Sullivan* case. The communication complained of was highly political since it criticized the conduct of government officials in southern states for allowing segregation to continue. The Court's decision was concerned with the ability of the press to effectively cover the development of the desegregationist civil rights movement in these states and with the prevention of a chilling effect on the conduct of the media's responsibility to watch the government. It has been argued that in order to remedy an extraordinary, isolated case a rule was introduced which created unintended and distressing effects.[82]

Furthermore, the Court in *Hill* referred to the opinion that the new standard has put great pressure on the fact-finding process and significantly complicated it since courts were now required to make subjective determinations as to who is a public figure and what is a matter of public concern.[83] (Indeed, the experience in the U.S. concerning the public figure concept is noteworthy. Initially, the rule applied to public officials only. Then it was expanded to public figures, a broad category including famous non-official plaintiffs.[84] The court even went so far as to extend the category to all private plaintiffs as long as they were involved in events of public or general concern or interest.[85] The question whether the plaintiff is a public figure increasingly divided the court and left confusion in its wake.[86])

Another point of criticism was that *New York Times* allegedly shifted the focus of defamation suits away from their original purpose of ascertaining the truth of the impugned statement to the

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[81] *New York Times v. Sullivan* 376 U.S. 254, at para.51.
[82] Tingley, supra n.26, at pp.640, 641.
[83] *Hill v. Church of Scientology* (1995), 126 D.L.R. (4th) 129, at p.166.
[84] *Curtis Publishing Company v. Butts* (1967), 388 U.S. 130.
[85] *Rosenbloom v. Metromedia* (1971), 403 U.S. 29.
[86] In order to complete the development it should be added that in *Philadelphia Newspapers Inc v. Hepps* (1986) 475 U.S. 767 it was held that a private plaintiff not only must prove fault and actual damage (which had been established in *Gertz* before) but also falsity.

determination whether the defendant acted with fault. Although it is not necessarily true that defamation law primarily is concerned with ascertaining the truth, the emphasis in cases under the U.S. rule admittedly is on the proof of actual malice and thereby fault.

This shift allegedly brings about several detrimental effects. For instance, the proof of malice on the part of a media defendant involves often extensive inquiry into media procedures. The plaintiff will have to explore the editorial process, investigate the notes and sources of the journalist and find out by which manner the latter prepares his story in order to prove that the defendant had knowledge. Since the defendant's state of mind has to be examined, there simply is more to litigate which, in turn, increases the length of the trial and the cost of litigation. Contrary to the purpose of the actual malice test, the rising costs of litigation and the frequency of actions in the post-*Sullivan* era were said to contribute to media self-censorship, with the result that the very evil the actual malice standard was supposed to eliminate has been aggravated.[87]

In sum, it has been said that the actual malice rule gives insufficient weight to reputation and affords inadequate protection to it because it places a heavy onus of proof on the public official who is basically left without a remedy.[88] While it is acknowledged that robust and unfair criticism is part of the price of going into public life, the person concerned should not be deprived of his right to reputation.

However, the decision in *New York Times* was a judicial endorsement of the views of Alexander

[87] Tingley, supra n.26, at pp.636-638.

[88] In Theophanous v. Herald Weekly Times Ltd. (1994) 124 A.L.R. 1, at p.21 the Court held that the test tilts the balance unduly in favour of free speech against the protection of individual reputation. See also Boivin, supra n.17, at p.240.

Meiklejohn, an American political philosopher,[89] whose argument was that because the citizens in a representative democracy have to be able to exercise informed consent, political communication must be treated in a much more protective way. That is what the U.S. did in *New York Times*: they gave more weight to freedom of political speech.

Apart from that, the criticism brought forward against *New York Times* is at least in part unconvincing. The decision admittedly was based on compelling facts. Nevertheless, it cannot be said that the previous common law rule was satisfying and was carelessly discharged in order to resolve a single case. Even the critics of this decision do not advocate a return to the old regime of defamation law.

The argument that the U.S. decision shifted the focus of defamation suits away from ascertaining the truth of the allegations to the determination whether the defendant acted with fault also does not support the maintenance of the existing defamation law. The issue of truth technically only arises in defamation litigation where the defendant pleads the defence of justification. Otherwise a statement, once regarded defamatory, is legally assumed to be false as the case proceeds. Thus, the law of defamation has never been primarily concerned with revealing the truth of the published material. I cannot see that it is wrong to focus on the defendant's fault. Indeed, to raise the issue of fault is exactly what I suggest. No person should be liable for any damage caused by him unless he acted with some kind of fault and, thus, actually is responsible in a legal sense for what he did.

Nevertheless, the U.S. actual malice rule has its disadvantages, such as the limited applicability and the complications with regard to determining who is a public figure and what is a matter of

[89] Ian Loveland, "Reforming Libel Law: The Public Law Dimension", International and Comparative Law

public importance. To require the plaintiff to prove actual malice also goes quite far at the expense of the protection of his personal reputation. However, my proposal will avoid these issues.

3. Negligence Standard

Combining ideas from both of these latter two proposals (defence of due diligence and actual malice rule), I suggest that strict liability be discarded by a negligence standard in all cases of defamation, independent of the status of the plaintiff or the defendant, and irrespective of the publication's subject matter, where the plaintiff has to prove fault, i.e. intention or negligence, on the part of the defendant.

A distinction between public official plaintiffs and private plaintiffs, or between media and non-media defendants, would only lead to additional complications. The guarantee of free expression in s.2(b) is accorded to the public generally, and the status of the persons concerned should in principle not make a difference for the purpose of balancing freedom of expression and personal reputation. It can, however, be taken into account in the course of the determination whether the defendant acted negligently, i.e. when measuring the defendant's conduct against what a reasonable person would have done under comparable circumstances. In cases concerning the criticism of a public official more leeway should be given to the publisher if the information deals with a matter of public interest. Apart from this, the basic rule needs to be the same for every plaintiff and defendant.

Finally, it has been demonstrated that all expressive content is worthy of protection, not only such content that deals with matters of public importance. Therefore, the scope of s.2(b) with regard to defamation actions should not be reduced to the protection of publications concerning

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Quarterly, ser.4, vol.4, 1997, 561, at p.572. See also chapter one for Meiklejohn.

public affairs.

With the defence of due diligence this proposal has in common universal applicability. However, while Boivin offers a defence that can rebut the presumption of fault, I argue that this presumption has to be abolished all together.

Compared to *New York Times* my solution is broader in so far as it applies to all cases of defamation without differentiating between public official plaintiffs and private persons. Thus, the reproach of putting pressure on the fact-finding process, which has been raised against the decision in *New York Times*, is eliminated. At the same time, the negligence standard requires less of the plaintiff with regard to proving fault on the part of the defendant. The actual malice rule made it necessary to prove the defendant's knowledge of the falsity of his allegations, or that he acted with reckless disregard as to whether they were true or not (with recklessness being a very high degree of negligence). Negligence, on the other hand, focuses on the question whether the publisher knew or should have known that his defamatory statement was false, whether he acted without reasonable care in ascertaining the truth of his imputations, or whether he failed to use ordinary care to determine the truth or falsity of his allegation. The defendant's conduct will be measured against what a reasonable person would have done under the same or similar circumstances. Such a standard, which lightens the burden of the plaintiff from having to prove recklessness to having to prove negligence, gives more weight to personal reputation than the actual malice rule does.

With respect to the onus of proof, s.1 of the Charter requires that the party who wants to maintain a limitation of a guaranteed right or freedom justify this restriction. In libel actions the plaintiff relies on the common law of defamation which restricts the defendant's right to free expression. Therefore, according to the way s.1 places the onus of proof, the plaintiff has to

prove that the defendant acted intentionally or negligently. The defendant will be liable only if the plaintiff can show that the defendant acted unreasonably in publishing the defamatory statement, i.e. that he failed to exercise that degree of care that a reasonable, prudent person would have exercised under comparable circumstances to protect persons from a defamatory falsehood.

IV. Presumption of Falsity

Closely linked to the problem of presumed fault is the presumption of falsity. It has been explained before that only a good reputation which is in fact enjoyed by the plaintiff will be protected by the common law of defamation. Another premise is that such a personal reputation, which the plaintiff does deserve, can only be injured by false defamatory statements. For this reason, the defence of justification was introduced, giving the defendant the possibility of showing the truth of his allegations. The basic principle is that a reputation which can be damaged by the truth does not deserve protection by the law. Now, if truth is valued too much to attach a penalty to its publication, falsity of the complained-of material must be a precondition for the success of a libel action. Apart from that, it is, in my opinion, generally a greater evil to penalize true expression, whose protection is in the interest of the public, than to refuse a plaintiff the right to recover damages for injury to his reputation due to the failure of proving falsity.

Being such an essential element, falsity cannot simply be presumed; it needs to be proven. The onus of doing so should be on the plaintiff as the one who wants to justify a limitation of free expression, again following the basic rule in s.1 of the Charter. And of course, fault on the part of the defendant has to cover the element of falsity, i.e. it is necessary that the defendant acted at least negligently with regard to the falsity of his allegations.

V. Presumption of Damage

On the same grounds, the presumption of damage needs to be abolished. If the objective of defamation law is to compensate a person for the damage his good reputation suffered from the publication of injurious allegations, it is elementary that some kind of damage must actually have resulted from the defamation.

In Germany § 253 of the Civil Code, which determines that in the absence of pecuniary loss compensation for an injury may only be awarded in the cases specified by law, reminds the court to be very careful in awarding damages.[90] In the field of defamation it is particularly complicated to assess damages because of the difficulty of assessing monetary compensation for injuries such as personal humiliation, insult or indignity, to name a few. In effect, the concept of presumed damage invites courts (especially juries) to punish unpopular opinion rather than to compensate individuals for injury suffered by the publication of defamatory statements. This danger has to be redressed. After all, in the early years of defamation law, when slander constituted the predominant part of defamation actions, it was necessary to prove actual loss in order to recover damages. The same basic rule should still apply today where, as a result of social development and change, libel actions prevail over slander actions.

Therefore, the plaintiff should only be able to recover damages if he can prove that he indeed sustained damage.

VI. Conclusion

In effect, my proposal resembles the approach adopted in parts of the United States following *New York Times*. The U.S. Supreme Court had held in *Gertz v. Robert Welch Inc.* that the states were free to define for themselves the appropriate standard of liability for the publication of

defamatory falsehoods, so long as they do not impose liability without fault.[91] Many states made use of this permission by introducing a negligence standard, where damage was no longer presumed, eventually abolishing the common law presumptions. However, for the most part the distinction between public figures and private plaintiffs has been retained.

As I have explained before, I reject such a differentiation and instead argue for equal treatment of all defamation actions. According to my proposal, the plaintiff not only has to establish that the words complained of are defamatory, identified the plaintiff and were published to a third person. He also has to prove the falsity of the allegations at issue and that he in fact sustained injury. Finally, the plaintiff has to prove fault on the part of the defendant with regard to the publication of false and defamatory material.

After what has been demonstrated and explained in the course of this chapter, fault on the part of the defendant has to comprise every single element of the cause of action, not only the act of publication. Thus, the defendant had to be aware of the fact that he communicated a false, defamatory statement identifying the plaintiff and he had to act at least without reasonable care as to whether his allegations were true or false. These aspects have to be proven by the plaintiff.

After adopting these modifications, the common law of defamation certainly will do justice to the importance of free expression as guaranteed in s.2(b) of the Charter to a greater degree, while still affording protection to the individual's reputation, and it will, I content, be apt to meet the requirements of the minimum impairment test under s.1 of the Charter.

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[90] See chapter four, note 33.
[91] (1974), 418 U.S. 323, at p.347.

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