REPUTATION, FREEDOM OF EXPRESSION AND THE TORT OF DEFAMATION IN THE UNITED STATES AND CANADA: A DECEPTIVE POLARITY

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This article explores the common law of defamation in Canada and whether it should be "constitutionalized" to comply with freedom of expression imperatives. Using a comparative law approach, the issue's development in Canada and the United States is explored.

The author asserts that the short Canadian history of Charter *challenges to the tort of defamation shows a misunderstanding of the considerable American experience in this area. By going beyond the limited sphere of jurisprudence to touch upon issues of political culture, constitutional interpretation and social history, the article deciphers the underlying reasons for the differences of judicial opinion in the U.S. and Canada. In so doing, the author dissolves the neat stereotypes derived from a superficial reliance on leading cases in each jurisdiction. The result has been the creation of a false polarity between the two countries on the subject of free speech and defamation which eclipses viable compromise approaches to resolving the debate.*

L'auteur examine le droit canadien de la diffamation et s'il conviendrait de le « constitutionnaliser » pour l'adapter aux impératifs de la liberté d'expression. À l'aide d'une approche de droit comparé, il étudie l'évolution de la question au Canada et aux États-Unis.

Il affirme qu'un survol de la courte histoire de contestations fondées sur la Charte *au Canada met en évidence une incompréhension de l'immense expérience américaine à cet égard. En dépassant le champ limité de la jurisprudence pour aborder des questions de culture politique, d'interprétation constitutionnelle et d'histoire sociale, l'auteur dégage les raisons sous-jacentes des divergences d'opinion juridique entre les É.-U. et le Canada. Il déconstruit ainsi les stéréotypes issus d'une interprétation hâtive des grands arrêts de chaque pays — laquelle crée de part et d'autre une polarisation artificielle au sujet de la liberté d'expression et de la diffamation, éclipsant des stratégies de compromis qui permettraient de régler les différends.*

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I. INTRODUCTION

Libel law involves the balancing of two competing principles: the protection of one's good reputation on the one hand and freedom of expression, particularly freedom of the press, on the other. In recent years, more and more media outlets, literary groups, and

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civil rights lobbies in Canada have been arguing that the balancing of these principles in the current common law of defamation is no longer reflective of contemporary views as to the importance of freedom of expression. As it stands, defamation is a strict liability tort in which a plaintiff who wishes to proceed in a libel action need only show that a statement adversely affects his or her reputation and that that statement was published to a third person. Beyond this point, it is up to the defendant to choose from a limited list of defences, while the falsity of the statement and the damages to the plaintiff are presumed.[1] Surely, critics have argued, this strict liability formulation in libel law does not comport with today's prevailing values.

Indeed, proponents of strong protection for freedom of expression refer to the *Canadian Charter of Rights and Freedoms*[2] as evidence of Canada's evolving commitment to one's right to speak freely. In particular, section 2(b) of the *Charter* counts "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication" as fundamental freedoms possessed by all. It is increasingly argued that strict liability defamation law unfairly infringes these rights by offering wealthy and influential plaintiffs a potent legal arsenal with which to muzzle press attempts at reporting on matters of public interest.[3]

As for the competing value of reputation, some have gone so far as to disparage it as an ephemeral idea no longer deserving of legal protection. Concerned with providing greater "breathing room" for publications involving issues of public concern, Professor Raymond Brown has asserted that "'reputation' is a flawed value. It does not represent what a plaintiff is but what he or she appears to be."[4] Hence, not only is current libel law under-representing Canadians' concern for freedom of expression, say some commentators, it is over-representing the outmoded value of reputation.

Defenders of strict liability defamation law, however, fault critics for not recognizing the context within which the law has evolved. Robert Martin has said that

> [w]hen Canadians profess to be concerned with the "chilling effect" of libel law they are simply falling victim to a disturbing, but perhaps inevitable feature of Canadian life. This is the habit of imagining that we live in the United States.[5]

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1 M.J. Bryant, "Section 2(b) and Libel Law: Defamatory Statements About Public Officials" (1991-92) 2 Media & Communic. L. Rev. 335 at 339.

2 Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

3 M.G. Crawford, "The Big Chill" (1992) 16:3 Can. Law. 14 [hereinafter "Big Chill"].

4 R.E. Brown, "Suggested Reform of the Law of Defamation" in Institute of Continuing Legal Education, ed., *Constitutional Freedom of Expression and the Media: Testing the Limits* (Toronto: Canadian Bar Association, 1994) at 5 [hereinafter "Suggested Reform"].

5 R. Martin, "Does Libel Law Have a 'Chilling Effect' in Canada?" in R. Martin & G. S. Adam, eds., *A Sourcebook of Canadian Media Law* (Ottawa: Carleton University Press, 1989) 757 at 757 [hereinafter "Chilling Effect"].

To be sure, many who are opposed to the Canadian law regularly refer with favour to the landmark case of *New York Times* v. *Sullivan*[6] in which the U.S. Supreme Court decided that First Amendment freedoms of speech and press demanded constitutional limits on liability for defamation. In order to ensure "a profound national commitment to the principle that debate on public issues be uninhibited, robust, and wide-open,"[7] the Court rejected strict liability in the case of public officials seeking to recover damages for defamatory falsehoods relating to their official conduct. Instead, public official plaintiffs could only recover if they proved that the defamatory statement "was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[8] The constitutionalization of defamation in the United States and the resultant "actual malice" standard have afforded media defendants much greater protection, at least theoretically, against libel actions than existed under the strict liability regime. With the advent of the *Charter* in Canada, commentators have argued that a similar constitutional protection for defamatory material is conceivable north of the border.[9]

But Martin's remark about the Canadian habit of "imagining that we live in the United States" suggests that arguments for adopting *New York Times*-like reforms in Canada are sustained by a fundamental failure to appreciate the different sets of circumstances which have and continue to govern the evolution of law in the United States and Canada. Indeed, the Supreme Court of Canada has explicitly refused to follow the American lead in the libel context. In *Hill* v. *Church of Scientology*,[10] strict liability defamation law was unanimously found to "compl[y] with the underlying values of the *Charter*[,]" and the Court saw "no need to amend or alter it."[11] In arriving at this conclusion, the Court rejected the actual malice standard developed in the United States and demanded that reputation — not just freedom of expression — be taken seriously as fundamental to democracy.[12] To that extent, Martin appears justified in distinguishing between Canadian and American judicial approaches to defamation and free speech.

The following discussion endeavours to probe these contrasting approaches with a view to determining their origins and potential for guidance in any effort to reform the common law of defamation in Canada. In this fashion, the paper's rather broad scope seeks to accommodate the perennial concern of comparative legal scholars that observation should go beyond the superficial, avoid false parallels or dichotomies, and

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6 *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) [hereinafter *New York Times*].

7 *Ibid.* at 270.

8 *Ibid.* at 279-80.

9 See *e.g.* M. Doody, "Freedom of the Press, the Canadian Charter of Rights and Freedoms, and a New Category of Qualified Privilege" (1983) 61 Can. Bar Rev. 124, M.G. Crawford, *The Journalist's Legal Guide*, 2d ed. (Toronto: Carswell, 1990) [hereinafter *Legal Guide*], R. Deardon & R. Hofley, "Should *New York Times* v. *Sullivan* Be Applied in Canada?" in Institute of Continuing Legal Education, ed., *supra* note 4. But see M.D. Lepofsky, "Making Sense of the Libel Chill Debate: Do Libel Laws "Chill" the Exercise of Freedom of Expression?" (1994) 4 N.J.C.L. 169.

10 [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129 [hereinafter *Hill* cited to D.L.R.].

11 *Ibid.* at 170.

12 *Ibid.* at 160.

plumb the contextual depths behind formal legal rules.[13] One must not accept positive law (foreign or domestic) on faith but rather proceed backwards to its founding principles and forwards to its practical effect and application in order to better assess the wisdom of departing from the domestic *status quo* to embark upon a foreign alternative. What, then, have been the different political, constitutional, and cultural circumstances informing the nexus between freedom of expression and libel law in the United States and Canada? Do these circumstances help explain the different paths followed in Canada and the U.S.? Are *New York Times* and *Hill* faithful reflections of each country's scholarly and popular feelings on the subject? Do they constitute the best alternatives to consider?

The ensuing inquiry will reveal that the diverging doctrinal paths taken by Canadian and American libel laws can best be accounted for by differences in the countries' political institutions, their formative national crises, and their methods of constitutional judicial review. Specifically, the *New York Times* rule has not been, and is unlikely to be, adopted in Canada because the Canadian press do not enjoy the same institutional status as government "watchdog" that the U.S. media possess, nor has Canada undergone a civil rights crisis similar to the American race-based civil rights movement in the 1960s. Canadian courts recognize a more limited conception of state action (and hence *Charter* reach) than their American counterparts, and the balancing function of the *Charter*'s section 1 saving provision vis-à-vis state action and the "underlying *Charter* values" analysis vis-à-vis the common law preclude an absolutist conception of rights that is more easily achieved in American constitutional interpretation.

In arriving at these conclusions, discussion will proceed with: (1) an overview of Canadian and American libel law with particular reference to *New York Times* and *Hill*; (2) an evaluation of the institutional positions of the press in Canada and the United States; (3) an assessment of the *New York Times* decision in practice and how it may reflect on the soundness of the actual malice standard; (4) and an in-depth examination of how the U.S. Supreme Court's preoccupation with the civil rights movement in the *New York Times* decision may have led it to constitutionalize libel law, including a comment as to the different methods of judicial review in North America and how they might help explain the adoption of the actual malice standard in the U.S. but not in Canada; and finally, (5) the decision in *Hill* will be revisited with a view to measuring its contribution to the law reform debate.

It is submitted that a strictly positivist analysis of defamation law and freedom of expression in Canada and the United States is misleading to the law reformer. Indeed, neither *New York Times* nor *Hill* seem to be entirely honest renderings of the issues at stake in constitutionalizing the common law of defamation. Rather, both decisions suffer from contextual and interpretive impairments which exaggerate the differences of opinion between the two jurisdictions while under-emphasizing any intermediate alternative to strict liability or actual malice. While it does appear unwise to adopt the

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[13] See M. Bogdan, *Comparative Law* (Lano, Norway: Kluwer, 1994), E. Stein, "Uses, Misuses — and Nonuses of Comparative Law" (1977) 72 Nw. U. L. Rev. 198, A. Watson, *Legal Transplants: An Approach to Comparative Law* (Atlanta: University of Georgia Press, 1993).

American malice standard in Canada, the U.S. experience may reveal that the right to free expression at minimum requires a showing of negligence or a defence of due diligence in Canadian defamation law. Ironically, such a position would reflect the bulk of doctrinal opinion on both sides of the border.

II. THE LAW

A. CANADIAN DEFAMATION LAW

Defamation laws are not strictly uniform across Canada. However, any differences between provinces are peripheral to the substance of defamation law which resides in the common law and governs libel actions throughout the country. Provincial acts serve only to buttress this body of common law by variously providing for certain pleading and procedural requirements in an action for defamation or by codifying existing common law defences such as qualified privilege and fair comment.[14] The one exceptional case is that of Quebec where defamation law is part of the general regime governing delictual liability in article 1457 of the *Civil Code of Quebec*. With some important exceptions, these laws generally resemble the common law rules applicable elsewhere in Canada.[15]

Defamation is a strict liability tort; liability does not depend upon the fault of the publisher but on the fact of the defamation.[16] A defamatory statement is one which "has the tendency to injure, disgrace, prejudice, or adversely affect the reputation or character of the plaintiff."[17] Such statement must specifically identify the plaintiff; group defamation is generally not recognized at common law.[18] If a plaintiff proves that a statement is defamatory, refers to him or herself, and has been communicated to a third person, falsity and damages are presumed, and the onus shifts to the defendant who must choose and argue a defence from several offered under the common law or by statute. The rationale for the presumptions of falsity and damages rests upon three principal notions: (1) it is generally very difficult for a plaintiff to prove damages because the effects of defamatory statements are frequently inestimable, (2) it is similarly difficult for the plaintiff to prove the falsity of a false allegation, which involves the logically impossible task of proving a negative,[19] and (3) the requirement that the defendant prove the truth of the statement is consistent with the project of competent journalism.[20]

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14 D.A. Alderson, "The Constitutionalization of Defamation: American and Canadian Approaches to the Constitutional Regulation of Speech" (1993) 15 Advocates' Q. 385 at 402.

15 One such exception is the insufficiency of truth as a complete defence where there is no element of public interest. The present discussion is concerned primarily with the common law of defamation; however, for a synopsis of the Quebec law, please see *Legal Guide*, *supra* note 9 at 38-41.

16 "Suggested Reform," *supra* note 4 at 4.

17 R.E. Brown cited in Bryant, *supra* note 1 at 339.

18 R. Martin, *Essentials in Canadian Law — Media Law* (Concord, Ont.: Irwin Law, 1997) at 126, 129 [hereinafter *Media Law*].

19 J.D. Richard & S.M. Robertson, *The Charter and the Media* (Ottawa: Canadian Bar Foundation, 1985) at 52.

20 *Media Law*, *supra* note 18 at 133.

A defendant may have recourse to several defences if a *prima facie* case of defamation is established. Truth is an absolute defence, but it is often difficult to establish that a statement is true because of the more rigorous evidentiary rules and standards of proof that are at play in court proceedings. Plaintiff's consent to a statement's publication is another complete defence. Fair comment can be claimed when a defamation consists of an expression of opinion (not an assertion of fact) made in good faith, based on true facts, and concerning a matter of public interest. Although this defence involves the slippery task of discerning between facts and opinion, it is generally considered to offer relatively wide protection for media statements.[21]

The defence of privilege may be invoked in instances where the public interest in free speech overrides private reputational interests. A claim of privilege does not seek to deny the libelous nature of a statement — as do the truth and fair comment defences. Rather, it seeks to deny any remedy because of the special circumstances under which the statement was made.[22] Absolute privilege is accorded statements made by participants in Parliament, provincial legislatures, and judicial proceedings in order that they may freely debate and discuss important issues of public concern. The media only benefit from an absolute privilege when reporting on court proceedings, the only *caveat* being that such reporting be fair, accurate, and timely.[23]

Less exclusive but more prevalent is a qualified privilege. Unlike the absolute variety, qualified privilege can be defeated by showing malice.[24] By statute, qualified privilege extends to a wide range of fair and accurate reports, including reports of the proceedings of law-making authorities, administrative bodies, lawful public meetings, and "any association or body in Canada which is dedicated to any art, science, religion, or learning, or any trade, business, industry, or profession, or any game, sport, or pastime."[25] Attempting to rely on a qualified privilege offered at common law, however, involves a certain measure of risk.[26] Common law qualified privilege can be claimed for communications arising from a relationship in which one party is under some obligation to relay the information and the other party is under a corresponding duty to receive it. One can never be certain where the court will choose to draw the line between relationships that enjoy a qualified privilege and those that do not.[27] The most salient relationship in the defamation context, that between the mass media and the public regarding matters of general concern, has not been held to contain reciprocal obligations sufficient to ground an automatic qualified privilege. Indeed, no special status appears to separate the journalist from the regular citizen in Canadian common

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21 Bryant, *supra* note 1 at 341.

22 *Media Law*, *supra* note 18 at 149.

23 *Ibid.* at 151.

24 *Legal Guide*, *supra* note 9 at 24, 28. Malice will be found if the defendant's dominant motive was to injure the plaintiff. Knowledge that the statement is likely to injure is not enough. *Media Law*, *supra* note 18 at 157.

25 *Media Law*, *supra* note 18 at 152-54.

26 Bryant, *supra* note 1 at 341-42.

27 *Media Law*, *supra* note 18 at 154-56. Common law privilege has recently been extended to documents prepared for litigation even before they are filed with the court.

law jurisprudence.[28] Nor has the Canadian Supreme Court wavered from this position to fashion a *Charter*-inspired privilege based on the relationship between media and public.

While the onus that strict liability puts on the libel defendant to justify his or her defamatory statements might be perceived as having an overly constraining effect on freedom of expression, other factors related to libel law work to mitigate such an effect. In all defamation legislation enacted in common law provinces, potential plaintiffs are given a short and strictly enforced period of time within which to issue a libel notice to a newspaper, radio, or television station after an objectionable statement has been published or broadcast. Potential defendants are in turn generally given a few days to review the statement by which time they must decide on an appropriate response. If a mistake is conceded, an apology may be published or broadcast during the response period which will lower recoverable damages in a subsequent libel action to "actual damages" rather than damages for a bruised reputation or hurt feelings. This usually amounts to no damages at all.[29] Essentially, these kinds of provisions offer potential media defendants a second chance. Moreover, the "loser pays" rule in Canada most probably reduces a large number of bogus claims from reaching court. These provisions contrast with the situation in the United States where the statute of limitations for libel suits against publishers and broadcasters usually ranges from between one and three years while the prevalence of contingency fee lawsuits encourages more dubious libel claims to reach the trial stage.[30]

B. AMERICAN DEFAMATION LAW

Like the Canadian law, American defamation law derived from the English common law tradition. Consequently, prior to the *New York Times* decision in 1964 libel laws in the United States closely resembled those in Canada.[31] This changed with the U.S. Supreme Court's decision to bring a large body of defamatory expression under First Amendment protection.

New York Times v. *Sullivan* was an Alabama case in which a Montgomery city commissioner, Mr. Sullivan, sought compensation for injury to his reputation caused by factual errors in an advertisement printed in the *New York Times*. On March 29, 1960, the *Times* published an endorsement of the civil rights movement prepared by The Committee to Defend Martin Luther King and the Struggle for Freedom in the South.[32] In the process of appealing for funds to pay for the legal fees of Dr. Martin Luther King, Jr., who was facing perjury charges at the time, the advertisement made reference to the volatile situation in Alabama.

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28 *Ibid.* at 154-56.

29 "Chilling Effect," *supra* note 5 at 764.

30 B. Sanford & J. Houpt, "The Libel Curtain: A Comparison of Canadian and American Libel Law" in *Testing the Limits*, *supra* note 4 at 20.

31 Alderson, *supra* note 14 at 403.

32 J. Lewis & B. Ottley, "*New York Times* v. *Sullivan*: Its Continuing Impact on Libel Law" (1985) 21:10 Trial 59 at 59-60.

Under the heading "Heed Their Rising Voices," the advertisement stated that "Southern violators" had harassed Dr. King, arrested him on seven different occasions, and applied repressive measures against black students protesting on the Capitol steps in Montgomery. Mr. Sullivan pointed out that the advertisement contained several misstatements of fact; for example, Dr. King had only been arrested four times and the students on the Capitol steps had not sung "My Country, 'Tis of Thee," as the advertisement claimed, but rather the national anthem. As Sullivan was generally responsible for the police in Montgomery, he argued that the errors contained in the endorsement reflected poorly on his capacity to carry out his duties as a city commissioner. Despite the fact he was never mentioned in the advertisement, an Alabama jury awarded him the $500,000 he was seeking. The award was affirmed on appeal to the State Supreme Court. [33]

On appeal to the United States Supreme Court in 1964, the lower courts' holdings were reversed and the common law rules of libel changed to accommodate First Amendment guarantees of freedom of speech and press. A unanimous Court held that "the Constitution delimits a State's power to award damages for libel actions brought by public officials against critics of their official conduct."[34] Without a great deal of comment, the Court determined that the Alabama court's enforcement of the common law amounted to the exercise of state power and therefore attracted constitutional scrutiny.[35] Since the responsibilities of public officials are intimately tied to the democratic process of government, went the Court's argument, criticism of the manner in which these duties are carried out must be accorded special protection.[36] It therefore stipulated that public officials could only recover damages for defamation relating to their official conduct if they proved through clear and convincing evidence that the defamatory statement was made with actual malice. Actual malice would be present in the event that a defendant had knowledge of a statement's falsity prior to its publication or if he or she acted with reckless disregard of its truth or falsity.[37] This new hurdle for public official plaintiffs, in that it involved determining the defendant's state of mind rather than determining more obvious facts such as publication and defamation, was vastly more demanding than the exigencies of the old strict liability rules for libel.[38]

Since its landmark decision in *New York Times*, the Court has been erratic in developing the category of plaintiffs to which the actual malice standard should apply. It initially worked to expand this category. First, the actual malice rule was extended beyond public officials to apply to "public figures," a very broad category

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33 A. Lewis, "*New York Times v. Sullivan* Reconsidered: Time to Return to the Central Meaning of the First Amendment" (1983) 83 Colum. L. Rev. 603 at 604.

34 *New York Times*, *supra* note 6 at 283.

35 *Ibid.* at 265.

36 J. Schaffner, "Protection of Reputation Versus Freedom of Expression: Striking a Manageable Compromise in the Tort of Defamation" (1990) 63 S. Cal. L. Rev. 433 at 436.

37 *New York Times*, *supra* note 6 at 280.

38 In *St. Amant* v. *Thompson*, 390 U.S. 727 (1968), the Supreme Court admitted that the actual malice test was a subjective one rather than a more objective test based, for example, on determining a defendant's adherence to a "reasonable journalist" standard.

encompassing movie stars, professional athletes, and other non-official plaintiffs.[39] The Court substantiated this ruling by referring to the increasingly blurred distinction between the government and private sector which had resulted in a blending of positions of influence and power.[40] *New York Times* doctrine reached its zenith, however, in 1971 when the Court held that the actual malice rule should be invoked in all cases relating to any "discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[41] These developments combined to make the class of defamatory expression protected by the First Amendment extremely broad indeed.

Subsequently, however, the Court back-pedalled from this position. In 1974, the Court attempted to clarify the public figure category. Its decision in *Gertz* v. *Robert Welch, Inc.* distinguished between two kinds of public figures: general-purpose public figures, whose fame or notoriety exists independently of the controversy involved in the case at hand, and limited-purpose public figures, who are only considered public persons in terms of the dispute at issue. A plaintiff will be deemed a limited-purpose public figure if the court determines that the issue involved in the defamation suit is adequately in the public interest and if the plaintiff is sufficiently involved in shaping that issue.[42] In ruling on public figure status, then, the Court focused more on the context of the case and whether or not the plaintiff had assumed the risk of achieving notoriety in specific instances.[43]

In addition to this retrenchment of the public figure category, however, the Court in *Gertz* stipulated that private figure plaintiffs would have to at least prove negligence on the part of the defendant rather than mere publication and defamation as per strict liability.[44] In 1979, the Court continued to soften its previous hard-line stance against public figure recovery in libel suits by providing for unusually broad discovery by plaintiffs in obtaining proof of a defendant's actually malicious state of mind.[45]

As a result of the confusing jurisprudential fallout of the *New York Times* decision, recent libel cases involving so-called public figure plaintiffs have increasingly divided the Court. Concurring in a 1985 decision, Justice White, writing also for Chief Justice Burger, lamented the disarray of defamation law, saying that he had

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39 *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 at 155 (1967) cited in K. Conkey, "Ninth Circuit Reveals Shocking Truth! No Protection for Public Figures Against Deliberate Fabrications by Media!: A Comment on *Masson* v. *New Yorker Magazine, Inc.*" (1990) 42 Rutgers L. Rev. 1133 at 1138.

40 *Curtis Publishing, Co.* v. *Butts* 388 U.S. 130 at 163-64 (1967) cited in D. Elder, "Freedom of Expression and the Law of Defamation: The American Approach to the Problems Raised by the *Lingens* Case" (1986) 35 Int'l & Comp. L.Q. 35 (October 1986) 891 at 899.

41 *Rosenbloom* v. *Metromedia*, 403 U.S. 29 at 44 (1971) cited in Conkey, *supra* note 39 at 1138.

42 Schaffner, *supra* note 36 at 447.

43 Elder, *supra* note 40 at 901.

44 Lewis, *supra* note 33 at 622.

45 *Herbert* v. *Lando*, 441 U.S. 153 at 157-58 (1979) cited in Conkey, *supra* note 39 at 1139.

become convinced that the Supreme Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation.[46]

The majority in this case ruled that private figure plaintiffs involved in a matter outside of the public interest could recover presumed and punitive damages without proving actual malice on the defendant's part.[47] Despite this questioning of the actual malice standard, it is understood that liability for defamation will never be imposed, whatever the context, without a finding of some fault.[48]

Despite this discernable trend toward a more conservative interpretation of the public figure category, the Court has steadfastly held to the core of the *New York Times* decision.[49] Any statement about a public official can be published in the U.S. so long as there is an absence of actual malice. Further, the American plaintiff must plead and prove the falsity of a defamatory communication, the defendant's fault, and the existence of damages.[50] Falsity, fault, and damages are all presumed under Canadian common law.

C. CANADA REVISITED: *HILL* V. *CHURCH OF SCIENTOLOGY*

In 1995, the Supreme Court of Canada rejected the actual malice rule adopted in the United States and opted to retain the strict liability standard for defamation as the proper balance between reputation and freedom of expression. While *Hill* v. *Church of Scientology*[51] was not a mirror image of New York Times, its only salient factual difference was the absence of a media defendant.

Mr. Hill was a lawyer with the Ministry of the Attorney General for the Province of Ontario. He acted for the Crown on legal matters arising from a police search and seizure of documents belonging to the Church of Scientology. While the documents were sealed pending a ruling on the search warrant, another unrelated government official sought to review the seized documents to decide whether the Church of Scientology should be authorized to solemnize marriages. Hill warned of the pending motion to quash the warrant and mentioned that notice to the Church would be advisable before proceeding. No such notice was given, and the application to review the documents was initiated and eventually granted. However, Hill played no part in the application, and the sealed documents were never ultimately inspected. Upon hearing of the successful application to inspect the sealed documents, the Church and

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46 *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.* 472 U.S. 749 at 767 (1985), White J. cited in Lewis & Ottley, *supra* note 32 at 63.

47 *Dun & Bradstreet,* 472 U.S. 749 cited in Elder, *supra* note 40 at 910.

48 D. Boivin, "Accommodating Freedom of Expression in the Common Law of Defamation" (1997) 22:2 Queen's L.J. 230 at 255-56.

49 See *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767 (1986); *Harte-Hanks Communications* v. *Connaughton*, 491 U.S. 657 (1989); *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1 (1990); *Masson* v. *New Yorker Magazine, Inc.*, 111 S.Ct. 2419 (1991).

50 Sanford & Houpt, *supra* note 30 at 6.

51 *Supra* note 10.

its lawyer accused Hill of being in contempt of court. The Church held a press conference on the steps of Osgoode Hall where its counsel answered questions and read the contempt motion alleging that Hill misled the court and helped to open and inspect sealed documents. The Church continued with the contempt prosecution despite prior knowledge that the documents had not been opened; in fact, its own agent had monitored the sealed documents and found no evidence of tampering. The Church also sought to disqualify Hill from the search and seizure proceedings, suggesting Hill would abuse his position to advance his personal interests.

Hill sued the Church and its counsel for damages from the libel communicated at the press conference. At trial, counsel for the Church repeated the libel despite knowing the allegations to be false. Even after the jury found in Hill's favour, the Church maintained its plea of justification until the first day of the appeal, some nine years after the initial libel. The jury awarded $300,000 in general damages against the Church and its counsel and $500,000 and $800,000 against the Church alone for aggravated and punitive damages. On appeal, the jury assessment was affirmed. In addition, the Court of Appeal rejected the appellants' constitutional claims that the common law of defamation was an unjustified violation of section 2(b) of the *Charter* or that *Charter* values required the adoption of the actual malice standard in Canada.

The Supreme Court agreed. Writing for the Court, Cory J. refused to submit the common law of defamation to direct *Charter* scrutiny on the basis of the appellants' submission that Hill's libel action constituted an attempt by a government department to unjustly restrict freedom of expression.[52] The fact of Hill's employment as a Crown attorney did not automatically veil his actions in the cloak of the state. Nor did it imply a neat division between his personal reputation and his reputation as a public official, whereby only the latter was affected by the libel (and affected without remedy). Rather, Cory J. maintained that reputation should be understood as an "integral and fundamentally important aspect of every individual [that] exists for everyone quite apart from employment."[53] The Court refused to engage in the uncertain task of distinguishing between mere employees and actual agents of the state, pointing to the Byzantine jurisprudence bred by the need to define "public official" after the *New York Times* decision in the United States.[54] Instead, the Court focused on the circumstances of Hill's initiating the libel suit. In bringing the suit against the defendants, Hill was not acting within his statutory powers; he brought the action in his personal capacity and was in no way instructed or obliged to do so by the Crown. Even if the focus were to be on the circumstances of the defamation, the Court found that the libel attacked Hill's own character, not that of the government.[55] Accordingly, Hill's libel suit was not

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52 This was precisely the basis for constitutional intervention in *New York Times*. See *supra* notes 34, 35 and accompanying text.

53 *Supra* note 10 at 149-50.

54 *Ibid.* at 150.

55 *Ibid.* Raymond Brown criticizes this approach, arguing that the taking of a private action by a public official in no way lessens the extent to which Hill's actions as a government lawyer are matters of public, not private, concern. See R. Brown, "Case Comment on *Hill* v. *Church of Scientology*" (1997) 8:2 Supreme Court L. Rev. 553 at 574-75 [hereinafter *Case Comment*].

considered to have met the criteria for government action under section 32 of the *Charter*.

While no direct *Charter* application would be entertained, the Court agreed to measure the common law of defamation against the *Charter*'s underlying values. Cory J. acknowledged that section 52(1) of the *Charter* required that the common law be interpreted in light of *Charter* values but was careful to distinguish between *Charter* "rights" and *Charter* "values." In the absence of government action, private litigants cannot assert a *Charter* right; therefore, the common law cannot be said to infringe such a right but only to be inconsistent with the values underlying the right. Moreover, the common law has particular characteristics which militate against blunt constitutional intrusion. The common law is the product of incremental, time-tested decisions. Preserving its integrity requires that a protective approach be taken in the face of a *Charter* challenge and that any extensive changes be left to the legislature.[56] Consequently, the Court argued for a flexible balancing mechanism whereby "*Charter* values, framed in general terms, should be weighed against the principles which underlie the common law. The *Charter* values will then provide the guidelines for any modification to the common law which the court feels is necessary."[57] In undertaking this balancing of principles, the onus lies upon the party impugning the common law to prove that it is inconsistent with *Charter* values and that, upon a balancing of the competing values in issue, the common law should be changed. This onus, the Court maintained, is consistent with the proper deference to be accorded the common law and the principle that the other party to the action should be able to rely upon the certainty of the common law to support his or her claim.[58]

The Court proceeded to weigh the values of reputation and freedom of expression to determine whether the common law of defamation struck an appropriate balance between the two. The bulk of Cory J.'s discussion relating to freedom of expression was dedicated to showing that such a right has never been understood in the Canadian context to be absolute. Whether before or after the *Charter*, freedom of expression has on occasion given way to other competing values believed to be deserving of protection in a free and democratic society.[59] Moreover, the case of defamatory expression is particularly vulnerable in the face of competing interests because of its considerable distance from the core principles underlying free speech. Indeed, defamation retards and derails the search for truth while discouraging participation in public affairs. Such effects are inimical to the interests of a free and democratic society.[60]

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56 June Ross argues that, taken literally, this approach "stipulates that the court has authority to cure minor transgressions, but not egregious violations." See J. Ross, "The Common Law of Defamation Fails to Enter the Age of the *Charter*" (1996) 35:1 Alta. L. Rev. 117 at 128.

57 *Supra* note 10 at 157.

58 *Ibid.* at 157-58.

59 *Ibid.* at 159.

60 *Ibid.* at 160. This uncharacteristically short shrift given to freedom of expression has been commented upon widely. Ross highlights the aberrant language of *Hill* by referring to *R* v. *Zundel* where McLachlin J. maintained that even deliberate falsehoods could play a justifiable role in public debate. Ross, *supra* note 56 at 132.

The Court's discussion of reputation adopted a sociological tone, arguing that the dearth of legal writing on reputation belied its real-life importance to human beings. Cory J. began by tying reputation to the inherent dignity of the individual which any democratic society should seek to preserve and enhance. Noting the consistent sanction of defamation across communities and throughout history, Cory J. cited various examples, from the Star Chamber to the *Old Testament*. In the context of a lawyer, Cory J. found that a good reputation was crucial to the practice of law which involves special relationships with clients, others members of the profession, and the court.[61] Finally, reputation was determined to be bound up with one's right to privacy such that defamatory comments amount to "an invasion of the individual's personal privacy and is an affront to that person's dignity."[62]

Having defined the values at stake, the Court assessed the proposed remedy of adopting the actual malice rule developed in *New York Times*. Cory J. relied heavily on American scholarly opinion to reject the adoption of the actual malice standard in Canada. A survey of such opinion revealed the adverse effects of *New York Times*, including a focus improperly shifted from the truth of the statement to the identity of the plaintiff, an unnecessarily harsh spotlight upon media procedures in order to prove malice, increased litigation costs and the increased social costs of undermining the truth in public discourse.[63] Referring to the fact that the actual malice standard had not been followed in the U.K. or Australia and had attracted widespread criticism in the U.S., the Court refused to adopt the actual malice standard. Given the competing concern for reputation and the defenses of privilege and fair comment, the common law of defamation was consistent with the values underlying the *Charter*. Indeed, the Court concluded; "surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish."[64]

It should be noted that the Court in *Hill* was careful to absolve the common law of defamation only "in its application to the parties in this action."[65] It can be inferred that the judicial door has been left ajar for possible reconsideration of the common law of defamation as it might apply in a different context — the case of a media defendant in a situation of unmistakable government action springs to mind. The fact that *Hill* fails to foreclose the debate requires that a deeper investigation be made into the legal and non-legal factors underlying as well as challenging the positive law in both countries so as to ascertain whether a fault standard has a chance of making its way into Canadian defamation law. Such an undertaking reveals the mutual shortcomings of *New York Times* and *Hill* as justifications for the positions taken in the United States and Canada. More importantly, it should caution law reformers and potential litigants to break free from the limited options (strict liability and actual malice) canvassed in the leading case law.

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61 *Supra* note 10 at 160-64. One might wonder whether lawyers are at all unique in their dependence upon reputation.

62 *Ibid.* at 164.

63 *Ibid.* at 166.

64 *Ibid.* at 169.

65 *Ibid.* at 170.

III. INSTITUTIONAL POSITION OF THE PRESS

In determining whether the Canadian Supreme Court should constitutionalize Canadian libel law by adopting a *New York Times*-like doctrine, it is important to take into account the institutional differences between the United States and Canada which may or may not make *New York Times* a product of uniquely American circumstances absent in Canada. An examination of the institutional role of the press in each country's political process should shed light on this inquiry, as argument for embracing the actual malice standard in Canada stems primarily from a concern about the "chilling" effect that strict liability libel laws have on the media's willingness to print stories in the public interest which it feels certain are true but which it doubts can be proven true in a court of law.

The prominent position of the press in the American political process was the crucial premise in the United States Supreme Court's argument for First Amendment protection of defamatory speech against public officials in *New York Times*. Indeed, the Court found the "central meaning" of the First Amendment in the all but forgotten controversy over the Sedition Act of 1798. With the decision in *New York Times*, Harry Kalven, Jr. concluded that "the Touchstone of the First Amendment has become the abolition of seditious libel and what that implies about the function of free speech on public issues in American democracy." [66] The Court essentially equated the facts of the *New York Times* case with seditious libel, a concept that, considering American history and its roots in a treasonous conflict with England, was entirely suspect under the First Amendment.[67]

Drawing on Madison, the Court in *New York Times* pointed out that the U.S. Constitution provides for a kind of government in which absolute sovereignty lies with the people rather than with the government. Madison emphasized that such a form of government was entirely different from that espoused by the British, in which absolute sovereignty resided in the Crown. He asked in this connection; "is it not natural and necessary, under such circumstances ... that a different degree of freedom in the use of the press should be contemplated?" [68] The Court answered Madison's call by recognizing that it was not only the citizen's privilege to criticize government, it was also his or her duty to do so.[69]

On a more functional level, the republican form of government in the United States requires an energetic and unfettered press. The separation of powers that exists in American government is such that the President is never obliged to field questions from the Congress. Instead, the President's line of communication to the public and Congress alike is forged through the media. Press conferences are staged, and carefully tailored

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66 H. Kalven, Jr., "The New York Times Case: A Note on the Central Meaning of the First Amendment" (1964) 64 Supreme Court Rev. 191 at 209.

67 Lewis, *supra* note 33 at 606.

68 Madison cited in *New York Times*, *supra* note 6 at 274-75.

69 Kalven, *supra* note 66 at 209.

information is released to different press sources.[70] Therefore, journalists carry out an important function in the American political process, and they require, as Madison pointed out, a great degree of freedom in order to adequately carry out their crucial role as a check on government.

In contrast, the press in Canada have not been elevated to the status of "Fourth Estate." The first key judicial opinion relating to the position of the media in Canada was delivered in *Reference Re Alberta Legislation*[71] in which the Supreme Court of Canada was asked to consider a provincial legislative package seeking to regulate the accuracy of newspaper reports. The legislation was a rather blunt response to highly critical media coverage of the Alberta Social Credit regime at the time. Responding creatively in the absence of a rights charter, the Court found the law to be *ultra vires* the provincial legislature because the restriction of public debate on matters of public concern could only be contemplated at the federal level under the "peace, order, and good government" power.[72] Duff C.J.C. was of the view that freedom of public discussion was "the breath of life for parliamentary institutions,"[73] while Cannon J. touched more directly upon the role of the press and the citizen in the democratic process,[74] stating that

> [f]reedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest.[75]

Despite this heady language, the reasoning of the Court still assumed that freedom of political expression could indeed be curtailed, if only by Parliament. Indeed, the Constitution provided no explicit protection for freedom of expression prior to the passage of the *Charter* in 1982.[76]

The courts have not recognized a special duty on the part of the Canadian media to report on matters of public interest. This fact was clearly set out by Cartwright J. in 1961 when he explained that one must not

> confuse ... the right which the publisher of a newspaper has, in common with all Her Majesty's subjects, to report truthfully and comment fairly upon matters of a public interest, with a duty of this sort which gives rise to an occasion of privilege.[77]

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70 Bryant, *supra* note 1 at 362.

71 [1938] S.C.R. 100, 2 D.L.R. 81 [hereinafter *Alberta Legislation* cited to S.C.R.].

72 *Media Law*, *supra* note 18 at 16.

73 *Supra* note 71 at 133 cited in B.M. Rogers, "Freedom of the Press Under the Charter" in *Testing the Limits*, *supra* note 4 at 176.

74 Doody, *supra* note 9 at 143.

75 *Supra* note 71 at 145-6.

76 Bryant, *supra* note 1 at 343.

77 *Banks* v. *Globe & Mail Ltd.*, [1961] S.C.R. 474, 28 D. L. R. (2d) 343 at 349 cited in Doody, *supra* note 9 at 127.

Hence, outside of its qualified privilege in reporting on official public proceedings, the Canadian press has little in terms of judicial recognition to distinguish its rights of freedom of expression from those enjoyed by individual Canadians. This stance was made abundantly clear in the much quoted decision in *Arnold* v. *R.*:

> The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute law, his privilege is no other and no higher.[78]

In fact, the press does not even have recourse to some of the privileges which have been accorded to private citizens in making defamatory remarks to advance their own personal interests, the interests of others, or those of the public in general.[79] Brown has illustrated this point in remarking that a private citizen can warn someone that he or she is being robbed, for example, but a newspaper has no privilege to warn the general public that their government officers are siphoning funds from the public coffers.[80] In this respect, the Canadian press is in some ways caught in limbo between public officials and private citizens.

The position of the courts on the institutional role of the press in the Canadian political process reflects the fact that the evolution of free speech rights in Britain, and by extension Canada, has been grounded in Parliamentary supremacy. James Paterson's notion of liberty of the press in 1880 as "the sum of the varied restrictions on the actions of each individual which the supreme power of the state enforces in order that all its members may follow their occupations with greater security"[81] has been cited as the one which probably guided the traditional conception of press freedom in the minds of the first Canadian citizens. However, since the passage of the *Charter*, there is no question that Parliament no longer stands as supreme as it once was. In fact, the *Charter* largely reflects the absorption of American as well as British traditions. Nonetheless, if one were to talk of first premises in freedom of expression debates, the starting assumption in Canada would be that restrictions on the press are acceptable as long as debate in Parliament is wide open.[82]

Indeed, the nature of Canada's parliamentary system exercises particular influence upon the role of the press in Canada. Unlike the American president, Canadian ministers are directly accountable to the legislature. Specifically, forty-five minutes are reserved out of each day that Parliament is in session for Question Period during which Members of Parliament may ask any question of any Member of the House.[83] Opposition members use this opportunity to launch scathing and biased attacks on the government of the day. In doing so, they enjoy absolute immunity from civil liability

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78 [1914] A.C. 644, 83 L.J.P.C. 299 at 300 (P.C.), cited in *Media Law*, *supra* note 18 at 156.

79 See R.E. Brown, *The Law of Defamation in Canada*, 2d ed. (Toronto: Carswell, 1994) c. 13 for a discussion of privileges extended to private citizens acting in their own interests or in the interests of others or the public.

80 "Suggested Reform," *supra* note 4 at 11-12.

81 Cited in Bryant, *supra* note 1 at 359.

82 *Ibid.* at 360.

83 *Ibid.* at 362.

and their often defamatory attacks may be printed by the press under a qualified privilege. Whereas the American press must initiate reporting about public officers, the Canadian press may look directly to Parliament for its material and may in turn carry out its reporting function by ensuring that its coverage is even-handed.[84]

In Canada, over all, courts have been more concerned with the effect of defamation on the fitness of public officials than with the effect of libel on the citizen-critic. This position was firmly stated by Wood J.A. of the British Columbia Court of Appeal in 1992:

> The rule in the *New York Times* case leaves vulnerable the reputation of all who are or would be in public life, by depriving such people of any legal recourse from defamatory falsehoods directed against them, except in those rare cases where "actual malice" can be established. Such a rule would be likely to discourage honest and decent people from standing for public office. Thus the rule destroys, rather than preserves, the delicate balance between freedom of expression and protection of reputation....[85]

This stress on the importance of attracting high calibre people to public office was relied upon by the Supreme Court in *Hill* to show the positive role defamation law played in the preservation of healthy and competent democratic representation.[86]

The decision in *Hill* gave surprisingly scant support for the value of freedom of expression in its analysis of the common law of defamation, leading to an arguably skewed presentation of the values at stake in strict liability libel law. However, the foregoing discussion would appear to flesh out the notable gaps in the judgment and provide a basis for future courts to reject an American formulation of freedom of expression, particularly in the media context which is likely to be the next battleground between free expression and reputation.

While a cross-border comparison of the press is helpful in explaining the differences between Canadian and American libel laws, an examination of the application as well as the effects of the *New York Times* doctrine in the United States suggests that the actual malice standard, while perhaps borne of a pro-free speech tradition which finds no match in Canada, has not fulfilled its goal of freeing the media from threats of suit. Nor did the United States Supreme Court's decision to constitutionalize defamation law appear to have adequately reflected the attitudes of regular Americans towards the importance of protecting reputation. The following section will explore this apparent incongruence and its implications for explaining the emergence of the *New York Times* rule.

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84 *Ibid.* at 363.

85 *Derrickson* v. *Tomat* (1992), 88 D. L. R. (4th) 401 at 408 (B.C.C.A.) cited in Alderson, *supra* note 14 at 418.

86 *Supra* note 10 at 158.

IV. *NEW YORK TIMES* IN PRACTICE

With reference to the post-1964 era of constitutionalized libel law, one commentator has reported that "neither plaintiffs, press defendants, nor the societal interests each seeks to vindicate, could claim to have obtained satisfaction through the judicial process."[87] Such a disappointing outcome for a decision which had been dubbed "an occasion for dancing in the streets"[88] has its roots in several unintended by-products of *New York Times* doctrine. In particular, these have been jury ignorance of the actual malice standard, rising litigation costs, increased infringement of press freedoms and decreased security for reputation.

An indication that Americans generally do not agree with the down-playing of reputational interests in *New York Times* can be found in widespread jury non-compliance with judicial instructions to apply the actual malice standard in cases involving public figure plaintiffs. In particular, jury non-enforcement of the condition that plaintiffs prove falsity of the defamation contributed to appellate court reversal of three out of four plaintiffs' verdicts in the late 1980s.[89] An exclusive interview with jury members after a high-profile libel trial in which they awarded over $2 million in damages to the president of Mobil Corporation reveals the rift between the actual malice rule and jury perceptions of justice in defamation trials. Explaining the generous award, one jury member said, "[n]one of us thought big Tavoulareas [plaintiff and president of Mobil Corp.] had not set up his son [in business]. It's just we couldn't prove it."[90] It appears quite clearly that the jury overlooked altogether the question of actual malice and replaced that standard with a burden on the part of the defendant to prove the truthfulness of the defamatory publication.

It has been argued that this failure on the part of jurors to absorb the values of the *New York Times* decision is the result of a greater allegiance to, or identification with, the traditional common law rules of strict liability. Rodney Smolla views the increasingly blurred line between the media's entertainment and informing functions as contributing to a widely shared social sentiment which perceives media information as a product like any other which has the same capacity to injure as, say, defective car brakes. In cases where media stories are "defective" and injurious, "the influence of strict liability makes perfect sense."[91] This observation, combined with the generally accepted fact that most juries have an anti-media bias, suggests that the decision to change the common law rules of defamation in favour of media defendants did not coincide with a similar pro-media sentiment in the rest of the country. Nor did the decision, at least according to scholars like Smolla, recognize the media's evolution as a big business which made it increasingly suited to strict product liability rules.

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87 L. Levine, "Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart" (1985) 35 Am. U.L. Rev. 3 at 31.

88 Professor Alexander Meiklejohn quoted in Kalven, *supra* note 66 at n. 125.

89 Libel Defense Resource Center Litigation Study #9 (1988) cited in Sanford & Houpt, *supra* note 30 at 11.

90 Cited in Lewis, *supra* note 33 at 613.

91 R. Smolla, "Let the Author Beware: The Rejuvenation of the American Law of Libel" (1983) 132:1 U. Penn. L. Rev. 1 at 36.

New York Times has occasioned a significant increase in the costs of litigating libel suits. With the actual malice standard at play to determine liability in public figure libel suits, there is simply much more to litigate. Before actual malice, only publication and defamation needed to be proven to show liability. These facts could be determined quickly and easily because they were based on objective and externally visible evidence. Proving actual malice involves determining a defendant's state of mind, a far messier affair which demands widespread discovery in order to build a picture out of invisible thought processes.[92] Such an onerous discovery process is exceedingly expensive. For example, the American Broadcasting Company was reported to have spent about $7 million in defending itself against a libel suit brought by a public figure which ultimately ended in an out-of-court settlement.[93] In another case, the producer of a documentary was deposed on twenty-eight different occasions, generating nearly three thousand pages worth of transcripts and two hundred and forty exhibits in an attempt by a plaintiff's lawyers to determine actual malice.[94] In many cases, this furious discovery process is undertaken in the hopes of securing the generous prize of combined compensatory and punitive damages which are recoverable once the actual malice hurdle has been negotiated. Juries have certainly not hesitated in delivering these prizes.[95] Epstein has argued that this high-stakes game has contributed to a mushrooming in libel litigation and, consequently, a vast increase in overall pay-outs for litigation costs.[96]

The rising costs and frequency of libel actions have contributed to media self-censorship, the very evil which the actual malice rule was designed to eradicate.[97] Indeed, the rigorous discovery process required in order to determine a defendant's state of mind when he or she published the defamation, besides costing media defendants dearly in dollar terms, has opened the editorial process to close outside scrutiny. Where the media had previously been successful in arguing that sensitive materials like reporters' notes were privileged and not vulnerable to discovery, *New York Times* doctrine removed this privilege, compromising journalistic independence in the process.[98] Ironically, a good editorial process of fact-checking may be a liability, as healthy internal criticisms of print or broadcast reports may ultimately be used as

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92 R. Epstein, "Was *New York Times* v. *Sullivan* Wrong?" (1986) 53 U. Chi. L. Rev. 782 at 808 [hereinafter "Was *Sullivan* Wrong?"].

93 Levine, *supra* note 87 at 27.

94 Lewis, *supra* note 33 at 611.

95 In the period 1982-1984, compensatory damages averaged over $2 million and punitive damages more than $2.9 million. See N. Strossen, "A Defence of the Aspirations — But not the Achievements — of the Rules Limiting Defamation Actions by Public Officials or Public Figures" (1986) 15 Melbourne U. L. Rev. 419 at 426-27.

96 "Was *Sullivan* Wrong?," *supra* note 92 at 806-7. See J.R.S. Prichard, "A Systematic Approach to Comparative Law: The Effect of Cost, Fee, and Financing Rules on the Development of the Substantive Law" (1988) 17 J. Legal Stud. 451 at 465 for a detailed account of how the cost rule, the availability of contingency fees, and the existence of public interest firms have led to frequent litigation of low-probability claims like public-figure plaintiff libel actions.

97 *New York Times*, *supra* note 6 at 279: "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions ... leads to ... 'self censorship.'"

98 Strossen, *supra* note 95 at 430.

evidence of fault in publishing.[99] Media independence has been further curbed by the fact that litigation costs in libel actions are essentially determined by the plaintiff, "the one participant in the litigation with an obvious ax to grind."[100] The emergence of libel insurance as well as groups of well-financed professional defamation plaintiffs has signalled a winter of discontent for the press.[101] In this threatening atmosphere, refusing to pursue stories for fear of facing a lawsuit is not surprising, especially for smaller media outfits.

Finally, *New York Times* has done little to satisfy the libel plaintiff's desire to vindicate his or her reputation. Under the actual malice standard, the truth or falsity of a publication is at most a peripheral point.[102] But it is precisely with the truth or falsity of a defamatory statement that the honest libel plaintiff is principally concerned. This reality is corroborated by the fact that most targets of defamatory publications go immediately to the sources and demand retractions, corrections, or apologies; it is only after these demands are refused that recourse is had to legal action.[103] Beyond the fact that *New York Times* entirely side-steps the very issue of truth central to reputational interests, it also demands that the libel plaintiff spend considerable sums of money to simply make an attempt at clearing his or her good name. Furthermore, the plaintiff under *New York Times* is exposed to punishing cross-examination in which every trivial and long forgotten detail of some business deal or activity relating to his or her official conduct is rehashed and used as a weapon to discredit.[104] This is hardly the best way to restore one's reputation.

The media's reputation suffers in equal measure. Epstein asserts that the common law rules of strict liability play a crucial role in binding manufacturers to consumers in contract. Where actions brought under strict liability clarify the truth or falsity of a libel while offering some financial recovery as well, the public, says Epstein, is also reassured that the information issued to it through the media is true and reliable. Such a reassurance in turn boosts the value of that information, and publishers gain accordingly. Moreover, strict liability works to the advantage of superior producers while imposing costs on inferior ones, thus refining the market.[105] Conversely, the actual malice rule essentially forfeits the advantages of strict liability by looking equally upon producers of good information and producers of bad information as long as the bad information is only produced with gross negligence.[106] So, in terms of reputation, superior publishers pay the price in public distrust for the wrongs of inferior publishers.

Even this cursory rendering is sufficient to show that *New York Times* in practice fails to satisfy any of the interests at stake in defamation law. The balance of American scholarly opinion confirms this point of view. In particular, it seems evident that the

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99 Lewis, *supra* note 33 at 614.

100 Levine, *supra* note 87 at 30.

101 See *ibid.* at n. 125 for testimonials of media self-censorship flowing from the threat of litigation.

102 Iowa Research Project cited in Strossen, *supra* note 95 at 431.

103 *Ibid.* at 435.

104 Lewis, *supra* note 33 at 614.

105 "Was *Sullivan* Wrong?," *supra* note 92 at 812.

106 *Ibid.* at 812.

Court's decision to constitutionalize libel law did not take adequate account of the delicate rationale behind the long-standing common law rules of strict liability as related to defamation. The "stunning, if well intentioned, failure"[107] of *New York Times* doctrine to properly balance interests of free speech and press with those of reputation lends support to the position of conservative jurists who oppose judicial activism in areas where legislative or other action is better suited and more properly responsible for crafting a solution. The Canadian Supreme Court's cautious "*Charter* values" approach to reviewing the constitutionality of the common law would no doubt find favour with such critics of zealous judicial intervention.

V. *NEW YORK TIMES*: CIVIL RIGHTS, JUDICIAL ACTIVISM AND BALANCING

Why, in hindsight, does the Court's decision in *New York Times* appear so ill-considered? Perhaps an answer to this question can be found in the constitutional approach propounded by the author of *New York Times* himself, Mr. Justice William Brennan. Brennan J.'s perception of the Constitution was of a document which is constantly evolving because of "the adaptability of its great principles to cope with current problems and current needs."[108] Armed with Brennan J.'s theory of constitutional interpretation, one is urged to return to the circumstances of the *New York Times* decision in order to see what problems and needs of the time were so deserving of such a formidable example of judicial activism. The results of such an investigation are especially enlightening as to the reasons for the current predicament in American defamation law.

The historical context of the *New York Times* decision is often forgotten in contemporary debate on press freedoms. Rather, proponents of free speech have preferred to hail the decision for its great symbolic value as a victory for First Amendment rights. But why was such a rights coup necessary when there existed a "general satisfaction with the law of libel before *New York Times*... and [an] extensive protection generally afforded criticism of public works and public figures"?[109] A second look at the circumstances leading to the constitutionalization of libel law reveals an answer to this question. From a historical perspective, it becomes abundantly clear that the Court's decision in *New York Times* was largely concerned with the de-segregationist civil rights movement in the American South and the ability of the press to effectively cover its developments.

This observation has important implications for the study of judicial policy-making. Specifically, it highlights the dangers posed by enthusiastically employing imperfect judicial measures to correct political problems. There is considerable evidence to suggest that such a phenomenon was at play in the *New York Times* decision. The very facts of the case, as earlier outlined, were intimately tied to the turbulent civil rights

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[107] Kaufman quoted in Levine, *supra* note 87 at 31.

[108] Brennan J. quoted in D. F. B. Tucker, *The Rehnquist Court and Civil Rights* (Brookfield, Vt: Dartmouth, 1995) at 57.

[109] "Was *Sullivan* Wrong?," *supra* note 92 at 791.

movement. Beyond the case facts, though, the facts of the litigation experience were also tinged with racial tensions and judicial carps against desegregation. In the Alabama courtroom where the libel action was initiated, Judge Jones was good enough to share his vision of justice with those there assembled:

> There will be no integrated seating in this courtroom. Spectators will be seated ... according to their race, and this is for the orderly administration of justice and the good of all people coming here lawfully.... We shall now continue with the trial of this case under the laws of Alabama, and not the under the XIV Amendment, and in the belief and knowledge that the white man's justice ... will give the parties at the Bar of this Court, regardless of race or color, equal justice under law.[110]

This kind of sideshow, at a time when all branches of government had finally rallied in favour of civil rights,[111] would no doubt have been repugnant to the Supreme Court. Indeed, writing in the immediate aftermath of the Supreme Court's ruling, Harry Kalven, Jr. distilled the significance *New York Times* when he remarked that, "... although Alabama law had not been distorted to achieve the result, Alabama somehow pounced on this opportunity to punish the *Times* for its role in supporting the civil rights movement in the South."[112] Consequently, the Court was faced with a hard case of constitutional law: a common law rule that arguably functioned properly in its normal context allowed in one isolated instance for an unintended and distressing outcome. The difficulty in these situations arises from the fact that in order to remedy the rare case, a generally sound rule must be abandoned or amended with the potential danger of ending up with a new rule which is worse than the original in dealing with more frequent and mundane cases.

However, the Supreme Court in *New York Times* had a number of options in remedying the problem before it. Creating the actual malice rule was only one of these. With the recognition that the situation at hand was a common law aberration (if not a misapplication of defamation law), it should have been incumbent upon the Court to tamper as little as possible with the common law rules of defamation. Epstein has pointed out several ways in which the Court could have proceeded in a more cautious manner. First, it could have held that defamation of large groups does not have the force to injure particular unnamed individuals.[113] To be sure, this was the situation in *New York Times*. Sullivan was never mentioned in the advertisement; instead, "Southern violators" were blamed for the injustices in Montgomery. Alternatively, the Court could have taken aim at the hefty $500,000 jury award for general and punitive damages which was assessed without the slightest showing of any actual damages to Sullivan. Beyond these courses, the Court could have chosen to amend the common law rules of defamation less radically by introducing a due diligence defence or shifting the burden of proving falsity to the plaintiff.[114] But none of these avenues were pursued

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110 Jones J. quoted in Lewis & Ottley, *supra* note 32 at 60-61.

111 S. Wasby, "A Transformed Triangle: Court, Congress, and Presidency in Civil Rights" (1993) 21:3 Pol'y. Stud. J. 565.

112 Kalven, *supra* note 66 at 200.

113 It is trite law in Canada that the plaintiff must show the defamatory statement refers specifically to him or herself. See *supra* note 18 and accompanying text.

114 "Was *Sullivan* Wrong?," *supra* note 92 at 792-95.

by the Supreme Court. Rather, the Court occupied a significant chunk of the common law of defamation by introducing the actual malice standard for libel actions brought by public officials.

This rather heavy-handed treatment of the common law is curious at the very least, considering, again, the relative contentment with the strict liability standard. It has been established that *New York Times* was primarily concerned with correcting a situation whereby libel law was being abused to stifle criticism against segregation. As has been shown, the Court did not appear to pursue the possibility that the common law was disfigured by the Alabama courts. Consequently, to remedy the injustice, some kind of constitutional review was necessary. But why not take a narrower path in constitutionalizing libel law?

Bradley Canon's theory of "Judicial Cheerleading" may offer some explanation. In Canon's unusually titled theory, "cheerleading" essentially consists of forceful and passionate judicial argument on values that the Supreme Court holds especially dear. Rather than merely stating the law and the Court's decision, judges who engage in cheerleading become "educators" and actively try to win others over to their cause.[115] Canon argues that the Supreme Court is particularly prone to assuming a cheerleading role when the cases before it involve "politico-moral disputes." Politico-moral disputes

> can have economic or civil libertarian components, but their essence is that the disputants approach policy questions not in terms of political wisdom or experience, but in non-political terms of absolute right or wrong.[116]

In these disputes, a zero-sum game emerges where a gain for one side is perceived as a loss for the other. According to Canon's framework, cheerleading provides the Court with greater potential influence in the development of public policy than can be achieved through its direct decision-making. This is so because loud "cheers" from the Court can attract media attention, affect popular understanding of an issue, motivate and fortify public sentiment, activate interest groups, and ultimately spur political institutions to make particular policies that the Court itself cannot make.[117]

Canon's notions of politico-moral disputes and judicial cheerleading appear to complement the approach already adopted here in explaining the decision in *New York Times* and why that decision has not thus far been followed in Canada. Where the first perilous step of constitutionalizing libel law can largely be accounted for by the fact that generally sound defamation law was viewed through the skewed lens of extremely compelling circumstances, Canon's theory may explain the Court's second and perhaps more perilous step of going as far as it did in colonising the common law.

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[115] B.C. Canon, "The Supreme Court as a Cheerleader in Politico-Moral Disputes" (1992) 54:3 J. Politics 641.

[116] *Ibid.* at 638.

[117] *Ibid.* at 639, 641. While such widespread ability to mobilize opinion may not truly exist in any or all cases, it is conceivable that Supreme Court judges believe it does exist and are often motivated by such belief.

The *New York Times* case seems to satisfy Canon's criteria for judicial cheerleading. Canon explicitly cites segregation as a politico-moral dispute, flowing from the original and more absolutist dispute concerning slavery. Moreover, *New York Times* falls within the same time period designated by Canon as the era in which the Court engaged in cheerleading against segregation.[118] Unanimity, a particular manifestation of cheerleading according to Canon, also characterized *New York Times*. Certainly the tenor of the Court's judgment was one of great passion and rhetoric, prompting an admiring Daniel Farber to note that Brennan "was not simply a judge enforcing a legal provision because that was his duty. Instead, he seemed genuinely to value the rude vitality of a free society."[119] As for the characteristics of a zero-sum game, the Court's decision frequently dealt with freedom of speech in absolutist terms. Indeed, Justices Douglas and Black argued in a concurring opinion for complete immunity in defaming public officials.[120] In short, *New York Times* represents a near ideal example of a judicial cheerleading.

It can be argued that judicial cheerleading may encourage decisions which do not adequately balance the interests at stake in a case. In the fervour of a judge's "cheers," proper perspective on the issue at hand may be lost. Indeed, a measured balancing of free speech against the social interests in regulating defamation was conspicuously absent from the *New York Times* decision. On this topic, Kalven has remarked, "if ever a case was appropriate for the application of the balancing test, the *Times* case was. But, from the Court, only silence."[121] Such an absence of balancing, combined with the enthusiasm of the Court, may have contributed to the over-zealous attack on the common law rules governing defamation, with the extreme result of replacing strict liability with the actual malice standard in libel actions brought by public officials.

Donald Horowitz has gone to great lengths in order to demonstrate how judicial politics are usually poorly suited to creating public policy. He points out that forging national policy from the concerns addressed in one specific case, as the legal process necessitates, is unsatisfactory. There is no guarantee that a case before the Court is representative of the average case upon which any good policy should be based. Also, the adversarial nature of litigation means that complex policy debates are simplified into two opposing positions, neither of which may be the best one to adopt.[122] In *New York Times*, these constraints came fully into play. The Court was confronted with a case whose issues were far removed from the normal application of common law libel rules. However, as the issues involved compelling civil rights concerns, the Court saw fit to re-formulate a libel policy which had undergone careful judicial refinement over hundreds of years. Smolla notes that constitutionalizing libel law has ironically threatened to reduce freedom of expression to levels far lower than those provided by

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118 *Ibid.* at 638, 646. This period spanned approximately two decades after *Brown* v. *Board of Education* in 1954.

119 D.A. Farber, "Brennan's Finest Hour" (1990) 26:11 Trial 18 at 19.

120 *New York Times*, *supra* note 6 at 293: "I vote to reverse exclusively on the ground that the *Times* and the individual defendants had an absolute, unconditional constitutional right to publish in the *Times* advertisement their criticisms...," Black J. (Douglas J. concurring).

121 Kalven, *supra* note 66 at 215-16.

122 Tucker, *supra* note 108 at 32.

the original common law. Since its decision in *Gertz*, the Court's shrinking of the public figure category has reached a point where, today, a naturally-evolving common law of defamation uninterrupted by *New York Times* doctrine would probably offer more occasions of privilege.[123] This, along with numerous other criticisms already penned, illustrates the dubious wisdom of destroying part of the common law without stopping to understand its delicate formula for balancing interests.

In light of the specific dangers encountered in the American case study, the *Charter*'s section 1 balancing requirement deserves some mention. Section 1 guarantees the rights and freedoms provided by the *Charter* "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Hence, the freedom of expression provided by the *Charter* is explicitly subject to limitation. If the Canadian Court found itself in a position where its judicial cheerleading was tempting it to constitutionalize the common law of libel, it seems conceivable that the multi-step balancing requirement of the *Oakes* test[124] would at least dampen the Court's verve in dismissing the common law out of hand, especially since the test would compel the Court to understand, if not appreciate, how the common law of defamation functions. The *Oakes* test would do this by forcing the Court to address libel law's "pressing and substantial" objective of protecting reputation, the rationality of how the law is linked to this objective, and the difference between the collective benefits and individual limitations provided by the law.

Of course, an *Oakes* inquiry might lay bare defamation law's strict liability regime and its uncompromising no fault rationale, which could lead to a change in the law. In this regard, it is worthwhile to ask whether the "*Charter* values" test vis-à-vis the common law would adopt a means analysis. The Court in *Hill* did not deal at any length with the reasonableness of strict liability as a means of protecting reputation. If the "*Charter* values" test fails to follow the spirit of section 1, the common law/state action distinction will have even more significance on the outcome of litigation than it already has.[125]

This perfunctory investigation into the chances of a *New York Times* decision in Canada reinforces the notion that the circumstances leading to the adoption of the actual malice rule in the United States were products of a uniquely American social, political, and constitutional landscape. The institutional importance of the press in the American political process, the absolutist formulation of the First Amendment as well as the absence of an explicit balancing mechanism similar to the *Charter*'s section 1 test, and the uniquely American civil rights movement in the 1960s were the factors at work in the *New York Times* decision. These factors find no match in Canada.

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123 Smolla, *supra* note 91 at 51.

124 *R.* v. *Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 and subsequent jurisprudence.

125 For a critique of the *Charter* values test and its apparent lack of means test, see *infra* note 132 and accompanying text.

VI. CONCLUSION: *HILL* AND THE LAW REFORM DEBATE

The preceding discussion has sought to fill in some of the gaps left by the Court in *Hill* regarding its argument not to follow *New York Times*. The analysis emphasizes the importance of going beyond the positive law in order to evaluate how foreign legal rules are formulated and applied before transplanting them in the domestic context. While this is a good lesson for comparative legal scholars and those eager to reform the law of defamation in Canada, it would be wrong to use the American experience as an unassailable argument for the *status quo* in Canada. To dismiss the ideas underlying *New York Times* jurisprudence because of their ultimate articulation in the actual malice standard is to short-change the comparative endeavour. Unfortunately, the decision in *Hill* does precisely that; its reasons amount to a superficial and unimaginative consideration of the alternatives to strict liability defamation law in part by supposing that the actual malice standard is the only way to constitutionalize the common law of defamation.

The Supreme Court has been criticized for limiting the debate over defamation to a decision between the actual malice rule and the existing regime. Denis Boivin laments the fact that *Hill* failed to adequately consider the wisdom of Canada's "no fault" defamation law and the potential for adopting a plain negligence standard. Instead, "the Supreme Court chose to ignore the scenario where a defendant acts reasonably prior to publishing material later found to be false and defamatory."[126] Indeed, the Court's conclusion that defamation is not expression worthy of protection because it works against the interests of truth has been seen as largely off point. Brown finds the fact that defamation is inconsistent with *Charter* values to be wholly uncontentious. The problem is that this assertion of fact passes over what Brown feels to be the real issue at play, namely

> the latitude to be allowed by the Court in permitting the press or private citizens to make mistakes which may result in false and defamatory statements in commenting about matters of important public interest and concern.[127]

In other words, should people be made to warrant the truth of what they say? Interestingly enough, Cory J. appears to unwittingly answer this question in the negative despite ruling that the common law of defamation should remain unchanged. At the end of his analysis, Cory J. concluded that "[t]hose who publish statements should assume a reasonable level of responsibility."[128] Unless a "reasonable level of responsibility" is meant as total responsibility, Cory J. seems to be describing some kind of negligence standard. At the very least, when the Court opines that it is not too much to ask that people ascertain the truth of what they say, it is simply begging the question of what level of diligence will be demanded in the fact-checking process.

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126 Boivin, *supra* note 48 at 243.

127 *Case Comment*, *supra* note 55 at 573.

128 *Supra* note 10 at 169.

Boivin makes the most thorough case for adopting a due diligence standard in the common law of defamation. He argues that strict liability's usual economic justification based on the fair distribution of risk is not suited to the libel context where there are competing interests at stake that are not economic in nature. Moreover, *Hill* is the rare case of a malicious lie; more often, the false and defamatory nature of a statement is only determined *ex post facto* in court after lengthy discovery. In this context, failing to tolerate any risk of error from the outset is an extreme stance.[129] Rather, Boivin argues that the presumption of fault in defamation law should be rebuttable by a showing of due diligence. This solution would add no evidentiary burden to the plaintiff, and it is preferable to creating a new category of privilege which would require plaintiffs to prove malice in order to recover damages. Finally, a due diligence standard avoids the public/private plaintiff categorization which has led to such confusion in the United States.[130]

While it may be that defamation law should not be amended in Canada,[131] the Court's failure to canvass the options and review the workings of existing defamation law detracts from the cogency of its argument in favour of the *status quo*. Boivin sees the absence of any discussion as to the reasonableness of the means by which defamation law protects reputation as a serious flaw or an outright misapplication of the "*Charter* values" test. While there can be no direct recourse to the *Oakes* test, Boivin maintains that to ignore a means analysis is to de-contextualize the issue and reduce the debate to an abstract competition between *Charter* values and the purposes of the common law.[132] It is unlikely that a common law purpose will be offensive in itself.

Consequently, the Supreme Court's decision in *Hill* does not amount to an earnest engagement of the issues surrounding the common law of defamation and proposals for its reform. To this extent, it suffers from the same shortcomings as the decision in *New York Times*. Both cases were characterized by extremely compelling facts which militated against a careful and thorough appraisal of existing libel law and its alternatives. In this way, Canada and the United States have been pushed to opposite extremes of the debate. Indeed, it was partly the perception of the actual malice standard as rash and extreme that led the Canadian Court to an equally rash conclusion that strict liability is the proper standard in defamation law.

It has been the aim of this discussion to compensate in some measure for these incomplete judgments by seeking additional reasons that might better explain or justify the differences in defamation law between Canada and the United States. The result,

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129 Boivin, *supra* note 48 at 268-71.

130 *Ibid.* at 286-88.

131 Martin and Lepofsky are the leading defenders of the *status quo*. They emphasize that "libel chill" (the usual complaint of law reformers) is vastly exaggerated. Martin cites a Canadian Daily Newspaper Publishers Association study which found that in 1988, 71 percent of newspapers did not have a libel suit taken against them and 73 percent spent less than $5,000 defending such suits (*Media Law*, *supra* note 18 at 173). Both writers stress that litigation usually arises from the extreme reticence of newspapers to retract or correct statements regardless of their veracity.

132 Boivin, *supra* note 48 at 271-72.

it is hoped, has been to demonstrate that differences in perceptions of the press, state action doctrines, methods of judicial review and contextual decision-making are the best explanations for the actual malice and strict liability approaches in each country. However, most of these explanations relate to factors peripheral to the common law of defamation itself.

An exhaustive appraisal of the strict liability standard for defamation is wanting in North American jurisprudence. It is particularly unfortunate that the Canadian Supreme Court failed to probe fully into the American experience. If it had, it would have become apparent that despite the controversy over the actual malice standard in the U.S., a return to strict liability has never been contemplated. Rather, courts will only impose liability based on some kind of fault standard. Rather than recognize the issue as whether a fault standard should be adopted in defamation suits, the Canadian Court preferred to polarize argument between the actual malice standard and the *status quo*. Considering this exceedingly narrow approach, potential defendants should be careful to frame their next constitutional challenge to the common law of defamation in the broader language of fault. Add a media defendant and a patently public figure, and there may be a chance the Court will move away from strict liability.