



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

Defamation Law in the Internet Age

Consultation Paper

November 2017



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ABOUT THE LAW COMMISSION OF ONTARIO

The Law Commission of Ontario (LCO) was created by an Agreement among the Law Foundation of Ontario, the Ontario Ministry of the Attorney General, Osgoode Hall Law School and the Law Society of Upper Canada, all of whom provide funding for the LCO, and the Law Deans of Ontario's law schools. York University also provides funding and in-kind support. The LCO is situated in the Ignat Kaneff Building, the home of Osgoode Hall Law School at York University.

The mandate of the LCO is to recommend law reform measures to enhance the legal system's relevance, effectiveness and accessibility; improve the administration of justice through the clarification and simplification of the law; consider the use of technology to enhance access to justice; stimulate critical legal debate; and support scholarly research. The LCO is independent of government and selects projects that are of interest to and reflective of the diverse communities in Ontario. It has committed to engage in multi-disciplinary research and analysis and make holistic recommendations as well as to collaborate with other bodies and consult with affected groups and the public more generally.

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Disclaimer

The opinions or points of view expressed in our research, findings and recommendations do not necessarily represent the views of our funders, the Law Foundation of Ontario, the Ministry of the Attorney General, Osgoode Hall Law School, and the Law Society of Upper Canada, or of our supporters, the Law Deans of Ontario, or of York University.

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List of Acronyms

ADR	Alternative dispute resolution
ALRC	Australia Law Reform Commission
BCLI	British Columbia Law Institute
CFA	Conditional fee agreements
CJEU	Court of Justice of the European Union
CMLA	Canadian Media Lawyers Association
CPR	Civil Procedure Rules
CRT	Civil Resolution Tribunal
CSA	Cyber-safety Act (NS)
DMCA	Digital Millennium Copyright Act (US)
DPA	Data Protection Act, 1998 (UK)
ECHR	European Convention on Human Rights
GDPR	General Data Protection Regulation
ICCPR	International Covenant on Civil and Political Rights
IIG	Internet information gatekeepers
IP	Internet protocol
ISP	Internet service provider
LCO	Law Commission of Ontario
LRCBC	Law Reform Commission of British Columbia
LSA	Libel and Slander Act
MAG	Ministry of the Attorney General
NILC	Northern Ireland Law Commission
ODR	Online Dispute Resolution
PIPEDA	Personal Information Protection and Electronic Documents Act (Can)
PPPA	Protection of Public Participation Act, 2015
RTBF	Right to be forgotten
SCC	Supreme Court of Canada
SLAPP	Strategic litigation against public participation
SPEECH	Securing the Protection of Our Enduring and Established Constitutional Heritage Act (US)
ULCC	Uniform Law Conference of Canada

EXECUTIVE SUMMARY

A. The Law Commission of Ontario

The Law Commission of Ontario (LCO) is Ontario's leading law reform agency. Our role is to conduct research, undertake public consultations, and develop reports and recommendations to improve the effectiveness, relevance and accessibility of the law. Our work promotes access to justice and contributes to public debate. Over the last 10 years, LCO projects have studied and recommended law reform in areas as diverse as disability rights, consumer protection, and vulnerable workers. More information about the LCO can be found at www.lco-cdo.org.

B. Introduction to the LCO's *Defamation in the Internet Age Project*

The LCO's Defamation in the Internet Age project considers whether or how defamation law should be reformed in light of fast-moving and far-reaching developments in law, technology and social values. This Executive Summary accompanies the LCO's formal Consultation Paper on this project. The Consultation Paper sets out the LCO's preliminary analysis and questions in this important area of law.

Defamation law protects reputation from harm caused by false words. The law tries to balance two fundamental yet potentially conflicting values: protection of reputation and freedom of expression. Both values are important to individuals and the functioning of a modern democracy. Both values are informed by community norms and influenced by the society in which they operate.

Defamation law has deep roots. Defamation law originated in the 17th century and the values and norms from that period continue to influence the law today. Ontario's current defamation law developed primarily through common law supplemented by the *Libel and Slander Act* (LSA).¹

Matthew Collins has argued that "[a]lmost every concept and rule in the field of defamation law ... has to be reconsidered in the light of the Internet."² On one level, the internet has revolutionized how we communicate. It instantly puts us in touch with a potentially global audience and we can, if we choose, speak to that audience anonymously. Publications are also increasingly electronic, whether they are in the form of a traditional media news story, digital media news story, blog or social media post. These developments have understandably had a huge impact on a law designed to regulate expression. Finally, the power of the internet to connect individuals and groups has transformed us into a networked society where communities of shared interests exist regardless of geography.

Defamation law in Ontario has not remained static in face of these developments. In recent years, both courts and legislatures have responded to important issues and concerns in order to bring defamation law into the internet age. This approach, while obviously an effective means of addressing specific defamation issues, is not a comprehensive response to the far-reaching challenges posed by "internet speech."

This project is designed to meet that challenge. The LCO's project is the most comprehensive analysis of Ontario's defamation law framework to date. It is designed to analyze the underlying purpose and function of defamation law and to update the law to reflect the social and technological developments that will continue well into the future. The issues addressed in the project and the Consultation Paper include:

- The law of defamation in Ontario today and its limitations;
- How the legal, technological, and social landscape of the early 21st century influences and challenges "traditional" defamation law;
- A consideration of the legal elements of defamation in light of "internet speech";
- Access to justice in defamation matters;

- Privacy and its relationship to defamation;
- Internet intermediary liability; and,
- Alternative dispute resolution.

The answers to these issues are neither obvious nor easy. Nor is there a consensus among lawyers, governments, the media, civil society organizations, or others about how they should be addressed.

The LCO's Consultation Paper asks important questions about these issues and seeks comments and advice from a broad range of individuals and organizations, including complainants and defendants in defamation actions, traditional and new media organizations, defamation lawyers and academics, government, members of the judiciary, advocacy organizations, internet intermediaries, online review businesses and other web platforms and others.

The Consultation Paper is part of a comprehensive research and consultation process that involves public consultations, qualitative studies, commissioned research papers, forums, an international conference and other events. More information about the project can be found at the end of the Executive Summary, in the Consultation Paper, and on our project webpage at <http://www.lco-cdo.org/en/defamation-law>.

C. How to Get Involved

The LCO wants to hear from all Ontarians interested in the issues in this project. Some of the questions raised in this Consultation Paper involve technical legal rules and will be of most interest to lawyers and academics. However, this project is also about some important issues that affect any Ontarian living in the internet age. There is no need for legal training to respond to the Consultation Paper.

The LCO encourages all Ontarians to consider these issues and provide us with your input. The Questions for Consideration listed in this paper are a guide to the issues identified by the LCO at this point in the project. We welcome everyone's input on these or any other issue Ontarians believe is important. **Please send us your input by March 30, 2018.**

There are many ways to contribute. Please contact the LCO through any of the following methods:

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The release of this Consultation Paper launches an intensive five-month period of public consultations, during which we encourage input from all members of the public interested in these issues. During this period, we expect to hold several focus groups in concert with our community partners. We will also conduct interviews and meetings with a broad group of individuals and organizations. The LCO will host a defamation conference in 2018, culminating the consultation process.

The consultation deadline is March 30, 2018.

D. Consultation Issues and Questions

The Consultation Paper synthesizes the LCO's considerable research and background consultations to date. The issues and questions identified in the Paper are neither final nor exhaustive. Ontarians are welcome to make submissions on any additional topic they believe is important to this project.

Chapter Two – Defamation Law Today

Chapter Two of the Consultation Paper briefly reviews the existing state of defamation law in Ontario and Canada. This review reveals notable limitations and complexities in Canadian law that suggest the need for law reform. The chapter also summarizes developments in other jurisdictions and identifies at least four general policy options for modern defamation law.

Questions for Consideration

1. What lessons are to be learned from the law and law reform efforts of other jurisdictions on the issues in this project? How applicable are these lessons to the Ontario context?

Chapter Three – Defamation Law in Context

The LCO's goal is to recommend defamation law reforms that reflect contemporary values and legal principles in their social context. Chapter Three of the Consultation Paper considers how the legal, technological, and social landscape of 21st century society differs from the conditions at the time defamation law was developed. This chapter begins with an examination of three important legal principles and social values: free expression, reputation and privacy.

Chapter Three also considers how defamation law has evolved over the centuries to adapt to new communications technologies. This Chapter considers several features of internet speech that, taken together, are unique and have a significant impact on how defamation law principles are applied. The Chapter further considers how the technological change represented by the internet has affected how Ontarians participate in democratic communities and how Ontarians currently understand and define media.

Questions for Consideration

2. Can or should defamation law reform in Ontario differentiate between the following and, if so, how:
 - a. Traditional communications and internet communications,
 - b. Reputational harm on the internet and reputational harm offline,
 - c. Different forms of internet communications,
 - d. Traditional media publishers, bloggers/citizen journalists and other internet publishers
3. Are there new or emerging technologies or issues that the LCO should consider when analyzing the impact of the internet on defamation? What considerations should the LCO take into account to ensure that our recommendations are likely to remain relevant as technology changes?

Technological innovation in communications necessarily influences freedom of expression. This influence has never been more apparent than in the emergence of the internet era. Chapter Three, therefore, considers the nature of online expression and its implications for the kinds of claims that engage defamation law principles today.

Questions for Consideration

4. How is our understanding of freedom of expression interests, issues or expectations different in the internet era? What, if any, significance does this have for defamation law reform in Ontario?
5. Has our understanding of truth and falsity changed in the internet era and how should this affect defamation law reform in Ontario?

The internet has caused a shift in how society understands reputation. Social norms about privacy have also fundamentally shifted with the rise of social media sites such as Facebook and Twitter as well as ever-present smartphone cameras. In this section, the LCO considers the overlap between reputation and privacy interests in the internet age.

Questions for Consideration

6. Are reputational or privacy interests, issues or expectations different in the internet age? If so, what significance does this have for defamation law reform in Ontario?

Chapter Four – The Legal Elements of the Test for Defamation

The elements of the legal test for defamation were, for the most part, established long ago. They are subject to an extensive body of case law interpreting and applying them to countless cases over a period of centuries. The LCO does not delve into the nuances of specific elements of the tort. Rather, for the purpose of this project, we have two main concerns: the overall balance struck by these elements between protection of reputation and freedom of expression, and how successfully these elements operate in the context of internet communications.

The LCO's other focus in this chapter is on the operation of the elements of the tort as applied to the new forms of defamatory communications made possible by the internet. In this chapter, the LCO reviews the various elements that make up the legal test for defamation and considers how the development of the *Charter* and the internet should affect any potential reforms to the law.

Defamatory Meaning

In this section we consider if the legal test for defamatory meaning should be reformed in light of the distinctions between traditional communications and internet communications. The LCO also considers whether this may be an area for legislative reform or whether the common law should continue to evolve incrementally.

Questions for Consideration

7. Would legislative reform of the test for defamatory meaning be appropriate or should this area of defamation law continue to evolve incrementally through case law? If a new test were adopted, what elements should be part of this test?



Publication

In this section, we review the traditional law of publication as it relates to both primary and secondary publishers, and then examine the application of these principles to internet publications by *primary* publishers. In chapter VII below, we look at *secondary* liability for online publications as part of a broader discussion of internet intermediaries and content regulation on the internet.

Questions for Consideration

8. Should Ontario adopt a statutory definition of “publisher” that would require an intentional act of communicating specific words? (Also see chapter VII below.)
9. Should the statutory presumption of publication in newspapers and broadcasts be extended to some forms of internet publication?
10. Should the multiple publication rule be replaced with a statutory single publication rule, as in the UK? If so, what limitation period should be applicable to defamation claims?



Strict Liability

In the next few sections, the LCO considers whether the legal elements of the tort of defamation combine to strike an appropriate balance between protection of reputation and freedom of expression. In this section, we begin by asking stakeholders to consider whether strict liability for defamation remains appropriate in the *Charter* era. This discussion must be considered in conjunction with the following sections and, particularly, the section on defamation defences.

Questions for Consideration

11. Should a fault requirement be introduced into the tort of defamation in Ontario? If so, at what stage of the analysis should fault be considered?



Presumption of Falsity

The presumption of falsity is a signal that defamation law strikes the balance between protection of reputation and free expression closer to the protection of reputation end of the spectrum. The question is whether the presumption of falsity is outdated in the *Charter* era and the internet era.

Questions for Consideration

12. Is the presumption of falsity in defamation law still appropriate? Should the law require plaintiffs to prove falsity?
13. Is defamation law's emphasis on the distinction between true and false communications still appropriate in the internet age?

***Presumption of Harm***

The presumption of harm also provides very strong legal protection for reputational interests. The UK *Defamation Act, 2013* has introduced a serious harm threshold which has the effect of raising the bar for a plaintiff to bring a defamation lawsuit. The LCO is considering whether Ontario should reconsider the presumption of harm and/or introduce a serious harm threshold in order to raise the bar for bringing defamation actions in this province.

Questions for Consideration

14. Is the presumption of harm in defamation law still appropriate?
15. Should Ontario adopt a serious harm threshold similar to that adopted in the UK *Defamation Act, 2013*?

***Defences to Defamation***

In this section, we briefly review defamation defences as elements in the broader balancing act between protection of reputation and free expression. We ask stakeholders to consider whether the defences require further reform or codification.

Questions for Consideration

16. Should the common law defences for defamation be reformed or codified as has occurred in the UK *Defamation Act, 2013*?



Court Remedies for Defamation

The goal of a defamation lawsuit is to vindicate the plaintiff's reputation. Traditionally, this has been achieved with a damages award. However, defamation claims are often not about money, and remedies such as a retraction or a correction and apology may be more suitable in the context of internet defamation. In this section, the LCO considers traditional and emerging remedies that may be awarded in a lawsuit between a complainant and the publisher of the defamation.

Questions for Consideration

17. What principles should be applied in adapting damages awards and injunctions to internet defamation?
18. Should Ontario adopt legislation creating new remedies for defamation that more directly vindicate the reputation of a successful plaintiff and are responsive to the nature of internet defamation?

***Distinction between Libel and Slander***

Most provinces and territories in Canada have abolished the distinction between libel and slander. The LCO is asking for input on whether the distinction should be similarly abolished in Ontario.

Questions for Consideration

19. Should Ontario continue to maintain the distinction between libel and slander? If so, should internet communications be considered to be libel or slander?

**Chapter Five – Access to Justice and the Court Process**

As a law reform agency with a mandate to promote access to justice, the LCO is particularly concerned about the access to justice concerns underlying many of the issues in this project. The LCO's goal is to re-examine key procedural issues from first principles, that is, by considering how the nature of defamation claims have changed in the internet age and identifying procedures that best achieve access to justice in this new environment. As part of this exercise, we reconsider the provisions of the LSA and recommend reforms, either to specific provisions or more far-reaching reform to the legislation as a whole.

Standing of Corporations to Bring a Defamation Action

Although the entitlement of corporations to sue in defamation is longstanding, there is a significant body of opinion arguing that protecting corporate reputation unduly impinges freedom of expression. In this section, we review the arguments for and against corporate standing to sue and ask stakeholders to consider whether there should be a change to the law in this area.

Questions for Consideration

20. Should corporations retain standing to sue for defamation in the internet age? Should they continue to be entitled to rely on the presumption of harm and presumption of falsity?



Jurisdiction and Choice of Law Over Internet Defamation Claims

In this section, the LCO considers the current test applied when courts assume jurisdiction over internet defamation actions and we review the approach taken by other jurisdictions. We also consider whether it would be appropriate for Ontario to reform the LSA to provide statutory guidance on defamation jurisdictional issues.

Questions for Consideration

21. What evidence is there of libel tourism or inappropriate forum-shopping occurring in Ontario?
22. Does the current common law test for assuming jurisdiction strike an appropriate balance between protection of reputation and freedom of expression? Should Ontario adopt a statutory provision similar to s.9 of the (UK) *Defamation Act, 2013* for multi-jurisdictional defamation actions?



Notice and Limitation Periods

In this section the LCO reconsiders the six week notice period and the three month limitation period in the LSA, applicable to claims involving libels in newspapers and broadcasts.

Questions for Consideration

23. Should the notice period in ss. 5(1) of the LSA be eliminated from Ontario law? If not, how long should the notice period be and how long should the publisher have to respond to the notice? Should notice/retraction be made available in relation to a broader range of publications?
24. Should the special limitation period in s. 6 of the LSA be eliminated so that all defamation claims are subject to the two year general limitation period in Ontario's *Limitations Act*?



Potential Procedural Reforms

The LCO invites proposals from stakeholders on potential procedural reforms for containing the costs and reducing the complexity of defamation proceedings while maintaining fairness and just outcomes.

Questions for Consideration

25. What are the best options for reducing cost and complexity and promoting access to justice in defamation proceedings?

Preliminary Motions and Hearings in Defamation Actions

In this section, the LCO considers preliminary hearings available in English defamation actions. We ask whether Ontario's existing summary judgment mechanism is sufficient for the fair and just resolution of issues in defamation claims or whether the LCO should consider recommending preliminary hearing powers as exist in England.

Questions for Consideration

26. Is Rule 20 of the *Rules of Civil Procedure* an appropriate and sufficient mechanism for the preliminary hearing of issues in defamation proceedings? Should Ontario adopt UK-style preliminary issues hearings or summary disposal measures?

Strategic Litigation and the PPPA

In 2015, the Ontario government enacted the *Protection of Public Participation Act, 2015* (PPPA) which put into place a fast-track motion procedure to identify and dismiss "strategic lawsuits against public participation", otherwise known as SLAPP lawsuits. The PPPA is an important development in defamation law in Ontario. In this section, we review the fledgling case law interpreting the new procedure and ask stakeholders to consider whether the procedure strikes an appropriate balance between freedom of expression and protection of reputation.

Questions for Consideration

27. What impact has the PPPA had on the process and outcome of defamation lawsuits in Ontario? Does the PPPA achieve an appropriate balance between the interests of parties to defamation proceedings?

Role of the Jury

In this section, we ask stakeholders to reconsider the role of juries in Ontario defamation proceedings.

Questions for Consideration

28. What is current practice on the use of juries on Ontario defamation trials?
Should the right to a jury trial for defamation actions be limited in Ontario?

***Identifying Anonymous Defendants***

Currently, a plaintiff seeking to identify an anonymous defamer may bring a *Norwich* motion. In this section, we review the benefits and limitations of *Norwich* motions. We seek input on how to balance the value of anonymous speech with the need to prevent defamers from hiding behind the “electronic curtain” to avoid being legally held to account for their actions.

Questions for Consideration

29. Does the current test for obtaining a *Norwich* order appropriately balance anonymous free speech, privacy interests, the value of a broad discovery process and the administration of justice? Would legislation addressing the identification of anonymous defendants be appropriate?

***Anonymizing Plaintiffs***

In this section, we discuss the tension that exists between the open court principle and the role of anonymization orders where complainants may be dissuaded from defamation litigation for fear of suffering additional reputational harm.

Questions for Consideration

30. What principles should be applied in deciding whether to grant anonymization orders to plaintiffs in defamation proceedings in the internet age?

**Chapter VI: Privacy and its Relationship to Defamation**

This chapter discusses the relationship between defamation and privacy and asks questions about how the law in Ontario can or should address the overlapping and evolving issues of reputational harm, free speech, privacy and technological change.

Questions for Consideration

31. What impact does the evolution of privacy law have on defamation?
Should the LCO consider statutory reform similar to New Zealand's *Harmful Digital Communications Act*?



Chapter VII: Internet Intermediary Liability for Defamatory Content

This chapter considers to what extent intermediaries should be legally responsible for content that they did not author. For the purpose of applying our existing body of defamation law to intermediaries, the crucial question is whether or not the intermediary should be considered to be a “publisher” of the defamatory content.

The questions in this section ask stakeholders to consider possible substantive reforms to the common law of intermediary liability.

Questions for Consideration

32. What principles or factors should guide the analysis of intermediary liability and how should intermediaries be categorized for this purpose?
33. In what circumstances, if any, should internet intermediaries bear legal responsibility for defamatory content created by someone else?
34. Do recommendations 1 to 3 in the Laidlaw & Young commissioned paper represent desirable reform in this area? Why or why not?



The LCO also asks whether the principles of intermediary liability in Ontario should be left to incremental development in common law or whether the law should be codified through statutory reform. We examine several statutory regimes in other jurisdictions and ask stakeholders to comment on whether some form of analogous statutory regime might be appropriate in the Ontario context.

Questions for Consideration

35. Should Ontario adopt legislative provisions regulating the role of internet intermediaries in relation to third party content?
36. If so, what kind of regulatory regime is recommended:
 - a. Liability-based regulation such as
 - i. broad immunity from liability (as in s.230 of the US *Communications Decency Act*) or
 - ii. a notice and takedown regime (as in the UK *Defamation Act, 2013* or the EU *Directive*);
 - b. Regulation based on statutory penalty such as
 - i. a notice and notice regime (as in Canada's *Copyright Act*) or
 - ii. a notice and notice plus regime (as in the Laidlaw & Young proposal).



Chapter VIII: Alternative Dispute Resolution in the Internet Era

The goal in this chapter is to look beyond the court system and consider whether there might be an alternative resolution mechanism that better promotes access to justice as well as fair outcomes for online defamation. We ask stakeholders to consider what relationship, if any, should exist between defamation law and online complaints processes. We also examine the possibility that some online defamation claims may be diverted to a statutory alternative dispute resolution mechanism.

Questions for Consideration

37. In your experience how successful are online complaint processes at resolving disputes over offensive online content? What role, if any, should online complaint processes play as an extra-judicial tool for resolving online defamation disputes?
38. Should a statutory dispute resolution mechanism be made available for some defamation claims as an alternative to the court process? If so, what considerations are important to its design? Should specialized rules or procedures be developed for offensive content involving children?



A. The Limits and Scope of the LCO's Project

This project was inspired by two law reform proposals received by the LCO. The first suggested a review of defamation law principles generally. The second suggested a project focused on internet defamation. The project, as approved by the LCO Board of Governors, blends the two proposals.

The LCO has necessarily drawn some limits on the scope of the project. Importantly, the LCO will not be addressing issues of criminal defamation. The LCO is a provincial organization and criminal defamation is a matter of federal jurisdiction and therefore outside the scope of this project.

Nor will the LCO address in detail claims other than defamation that might apply in the case of harm caused by internet speech. Such related claims include injurious falsehood, misappropriation of personality, cyberbullying, online harassment, hate speech, the new European right to be forgotten and a quickly developing assortment of breach of privacy claims such as intrusion upon seclusion and public disclosure of private facts. These are each worthy of a law reform project all to itself and we cannot hope to do justice to them in this project without losing sight of our main goal to bring defamation law into the 21st century. Generally speaking, the LCO will limit its recommendations to the reform of defamation law as currently defined.

B. The LCO's Project So Far and Next Steps

The LCO began preliminary work on this project in 2015 and 2016. During this period, the LCO undertook research and conducted roughly 35 preliminary interviews of people from a broad range of stakeholder groups, including complainants in defamation actions, traditional and new media organizations, defamation lawyers and academics, government representatives, members of the judiciary, advocacy organizations, internet intermediaries and online review businesses.

In 2016, the LCO organized an expert Advisory Group representative of key stakeholder groups to provide ongoing input and support for the project. Advisory Group members include:

Ian Binnie, C.C., Q.C., Lenczner Slaght Royce Smith Griffin

Dan Burnett, Owen Bird Law Corporation

Jamie Cameron, Osgoode Hall Law School

Peter Downard, Fasken Martineau DuMoulin

Kathy English, The Toronto Star

David Fewer, Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic

John D. Gregory, Retired General Counsel, Ministry of the Attorney General

Emily Laidlaw, University of Calgary, Faculty of Law

Brian MacLeod Rogers

The Honourable Wendy Matheson, Superior Court of Justice of Ontario

Roger McConchie

Tom McKinlay, General Counsel, Crown Law Office – Civil, Ministry of the Attorney General

Julian Porter, Q.C., Professional Corporation

David Potts

Paul Schabas, Blake, Cassels & Graydon LLP

Andrew Scott, London School of Economics

Joanne St. Lewis, University of Ottawa, Faculty of Law

Hilary Young, University of New Brunswick, Faculty of Law

The LCO issued a Call for Research Papers in August 2016 and subsequently commissioned five research papers addressing specific issues and bringing important insights to the project. These papers are:

- Dr. Emily B. Laidlaw, *Are We Asking Too Much From Defamation Law? Reputation Systems, ADR, Industry Regulation and other Extra-Judicial Possibilities for Protecting Reputation in the Internet Age*.
- Dr. David Mangan, *The Relationship between Defamation, Breach of Privacy and Other Legal Claims Involving Offensive Internet Content*.
- Professor Karen Eltis of the Faculty of Law, University of Ottawa, *Is "Truth-telling" Decontextualized Online Still Reasonable? Restoring Context to Defamation Analysis in the Digital Age*.
- Dr. Emily B. Laidlaw and Dr. Hilary Young, *Internet Intermediary Liability in Defamation: Proposals for Statutory Reform*.
- Jane Bailey and Valerie Steeves, Co-Leaders of the eQuality Project, University of Ottawa, *Defamation Law in the Age of the Internet: Young People's Perspectives*.

The commissioned papers are available at the LCO's website: www.lco-cdo.org/en/defamation-law

The LCO has also engaged law students at the University of New Brunswick, Faculty of Law and the University of Calgary, Faculty of Law to conduct a series of interviews of youth on the issues in this project.

The release of this Consultation Paper launches an intensive five-month period of public consultations, during which we encourage input from all members of the public interested in these issues. During this period, we expect to hold several focus groups in concert with our community partners. We will also conduct interviews and meetings with a broad group of individuals and organizations. The LCO will host a defamation conference in 2018, culminating the consultation process.

We expect to receive formal submissions from organizations and individuals but we also encourage informal input from the public by any form of communication: email or phone, blog, Facebook post, Twitter post and so on. **The deadline for submissions is March 30, 2018.**

Any questions or comments can be directed to Sue Gratton, Project Head, at sgratton@lco-cdo.org or to:

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¹ LSA.

² Matthew Collins, *The Law of Defamation and the Internet*, 3d ed (Oxford: OUP, 2010), 35 [Collins, *Defamation & Internet*].

I. INTRODUCTION

A. Introduction to the LCO's Project

This is the Law Commission of Ontario's (LCO) consultation paper on its Defamation in the Age of the Internet project. This paper sets out the LCO's preliminary analysis and questions in this far-reaching and important area of law.

Defamation law is designed to protect reputation from harm caused by false words. The law tries to balance two conflicting values. On the one hand, protection of reputation has been recognized as a quasi-constitutional value by the Supreme Court of Canada.¹ On the other hand, there is express constitutional protection for freedom of expression under the *Canadian Charter of Rights and Freedoms*.²

Both values, reputation and freedom of expression, are informed by community norms and context for their content, so that defamation law is particularly sensitive to and influenced by the society in which it operates. The problem is that our current body of defamation law was largely developed by the 17th century and, therefore, influenced by the community norms and context of that time. In the 17th century, reputation was valued as property to be protected through litigation as with any other property right, and the same set of social values were shared among a wider segment of society.

In contrast, today's society is relatively pluralistic and diverse, grounded in principles of equality and individual freedoms. Our ideas about reputation and freedom of expression have evolved accordingly in response to social and legal forces such as the constitutional entrenchment of freedom of expression, human rights, globalization and the development of mass communications. Defamation law has evolved in response to these developments on a case by case basis, supplemented periodically with legislation.

Even prior to the internet, many commentators believed that defamation law was complex, inconsistent and confusing. It has been likened to "Frankenstein's monster"; a body of law that, even a century ago, was already considered unstable and in need of reform.³

The emergence of the internet in the early 1990s has had a profound impact on defamation law. On one level, the internet has revolutionized how we communicate. It instantly puts us in touch with a potentially global audience and we can, if we choose, speak to that audience anonymously. Publications are also increasingly electronic, whether they are in the form of a traditional media news story, digital media news story, blog or social media post. These developments in the nature of expression have understandably had a huge impact on a law designed to regulate expression. And the power of the internet to connect individuals and groups has transformed us into a networked society where communities of shared interests exist regardless of geography. This has influenced our understanding and expectations of reputation and privacy and called into question some of the underlying premises of defamation law.

The LCO's project is the most comprehensive analysis of Ontario's defamation law framework to date. The last major law reform initiative in this area was carried out by an Ontario Ministry of the Attorney General Advisory Committee in 1990. The Committee undertook a broad review of the law but made only modest recommendations and these were not implemented.⁴

The LCO's project is designed to analyze both the underlying purpose and function of defamation law and how that law can be updated to reflect the social and technological developments that will continue well into the future. This Consultation Paper asks key questions about these issues and seeks comments and advice from broad range of individuals and organizations interested in these issues, including but not limited to complainants and defendants in defamation actions, traditional and new media organizations, defamation lawyers and academics, government, members of the judiciary, advocacy organizations, internet intermediaries, online review businesses and other web platforms and others. This paper is part of a comprehensive research and consultation process that involves public consultations, qualitative studies, commissioned research papers, forums, an international conference and other events. More information about the project can be found at our webpage: <http://www.lco-cdo.org/en/defamation-law>.

B. About the LCO

The Law Commission of Ontario (LCO) is a unique, innovative and productive partnership between the provincial government, the Law Foundation of Ontario, the Law Society of Upper Canada, Osgoode Hall Law School and the Law Deans of Ontario. The LCO was established in 2007. The five-year agreement that created the LCO has been renewed twice.

The LCO provides independent, balanced and authoritative advice on some of Ontario's most complex and far-reaching legal policy issues. The LCO evaluates laws impartially, transparently and broadly. The LCO's work is informed by legal analysis; multidisciplinary research; public consultations; social, demographic and economic conditions; and the impact of technology.

LCO reports include principled, practical, "problem-solving" recommendations that are informed by broad consultations and tested through a transparent, comprehensive review process that engages a broad range of individuals, experts and institutions. The LCO gives a voice to marginalized communities and others who should have an important role in law reform debates and discussions. Over the last five years, the LCO has engaged with thousands of Ontarians on law reform projects.

LCO reports have led to legislative amendments and policy changes, promoted access to justice and contributed significantly to public debates surrounding important law reform issues.

C. How to Get Involved

The LCO wants to hear from everyone interested in the issues in this project. Some of the questions raised in this Consultation Paper involve technical legal rules and will be of most interest to lawyers and academics. However, this project is also about some important issues that affect all of us living in the internet age. There is no need for legal training to answer these questions. There is no need to even be an internet user. These questions involve the importance you place on reputation and privacy in the internet era, how the law should protect these, what freedom of expression means to you and the degree to which limits should be placed on freedom of expression in order to protect reputation. We encourage all Ontarians to think about these issues and provide us with your input. The Questions for Consideration listed in this paper are a guide to the issues we are addressing but you do not have to answer these specific questions. We welcome your input on any of the issues in the project that you think important.

There are many ways to reach us. You can send in a submission by mail but you can also send us an email or give us a call. Also consider blogging or tweeting about the issues on social media in order to expand the conversation. **Please send us your input by March 30, 2018.**

Contact Us

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Web page: <http://www.lco-cdo.org/en/defamation-law>.

Follow us on Twitter @LCO_CDO

D. Scope of the LCO's Project

This project was inspired by two law reform proposals received by the LCO. One suggested a review of defamation law principles generally. The other suggested a project focused on internet defamation. The project, as approved by the LCO Board of Governors, is a blend of these proposals. The internet is the unavoidable backdrop for any meaningful law reform exercise. Accordingly, the LCO will examine defamation law taking into account, first, that the internet is now the arena in which much, if not most, defamation occurs and, second, that the internet has had an unprecedented impact on the two core values underlying defamation law: freedom of expression and protection of reputation.

Here are some of the issues the LCO will consider in this project:

- The LCO will examine some core elements of the common law defamation tort, such as its imposition of strict liability and its presumptions of falsity and harm. Some of these elements have been modified in some jurisdictions by statutory reform. They have also been affected by common law efforts to bolster the defences available in defamation actions in order to provide added protection for freedom of expression in the *Charter* age. The LCO will consider whether the time has come to reform the traditional foundations of defamation law in order to adjust the balance between freedom of expression and protection of reputation.
- The LCO will consider whether the law on defamatory meaning requires reform in light of the differences between traditional forms of communication and a myriad of new methods of and venues for communicating over the internet.
- The LCO will consider how best to adapt defamation law to specific procedural issues that have arisen both before and during the internet era. These include, among other things, notice periods and the single publication rule, identification of anonymous posters for the purpose of bringing an action and the counter-productive effect of bringing an action only to further publicize the defamation and exacerbate reputational harm. More specifically, we will consider reforms to Ontario's *Libel and Slander Act* (LSA).⁵
- The LCO will consider how the traditional legal rules around what is a publication in defamation law should be adapted to address internet publications, and in what circumstances online actors, including bloggers, web moderators, internet service providers and others, should be legally responsible as publishers for third party content.
- The LCO will consider if or how current law on the jurisdiction of Ontario courts to hear multistate defamation actions should be coordinated with the law of other jurisdictions, particularly in response to a perceived concern about libel tourism.
- The LCO will consider whether a broader range of defamation remedies is warranted in the age of the internet to overcome limitations in the traditional remedy of damages and to decrease the cost of legal proceedings and promote access to justice.
- The LCO will also consider whether we should look beyond the courtroom to remedy some forms of internet defamation. We will explore possible forms of alternative dispute resolution (ADR), online complaints processes and government regulation among other things.

Many issues raised in this project are concurrently being examined by jurisdictions around the world. The very nature of the internet is to transcend geographic boundaries and the LCO will need to consider how possible directions of law reform in Ontario will affect and be affected by developments internationally. For example, a number of countries are currently grappling with the role of internet intermediaries, like Facebook and Google, for example, in facilitating internet communications and the degree of legal responsibility they should have for offensive internet content.⁶ Defamatory communications are only one subset of this broader issue and we consider defamation law reform in the context of this quickly developing, international debate.

The LCO has necessarily drawn some limits on the scope of the project. Importantly, the LCO will not be addressing issues of criminal defamation. Section 300 of the *Criminal Code* prohibits the publishing of defamatory material that the person knows is false.⁷ Many questions arise about the scope of this offence and its relationship to common law defamation.⁸ However, the LCO is a provincial organization and criminal defamation is a matter of federal jurisdiction and therefore outside the scope of this project.

Another important limit on the scope of the project is more difficult to articulate. Defamation is one of several legal claims that might apply in the case of harm caused by internet speech. Other possibilities include injurious falsehood, misappropriation of personality, cyberbullying, online harassment, hate speech, the new European right to be forgotten and a quickly developing assortment of breach of privacy claims such as intrusion upon seclusion and public disclosure of private facts.⁹ Some of these claims have resulted from or been heavily influenced by the rapid advance of the internet age and are currently the subject of intense public and political interest. They are each worthy of a law reform project all to itself and we cannot hope to do justice to them in this project without losing sight of our main goal to bring defamation law into the 21st century. Generally speaking, the LCO will limit its recommendations to the reform of defamation law as currently defined. This approach is consistent with the LCO's mandate to develop practical recommendations that can be implemented in order to improve the law as it is currently functioning. However, the LCO will be cognizant of the values underlying these related claims and the mechanisms used to remedy them may be relevant in searching for analogous solutions in defamation law.

It is particularly difficult to draw a neat doctrinal boundary between defamation law and privacy law. Some breach of privacy claims are so closely intertwined with defamation claims that examining them in isolation does not make sense. Therefore, although the project focuses on false speech – the traditional realm of defamation law – we have expanded our analysis to examine related privacy claims (which may involve true speech) as we have considered necessary. More specifically, we examine breaches of informational privacy that involve some form of disclosure or publication and that, most closely, resemble the kinds of values and interests engaged in defamation law.

E. Overview of the LCO's Process

The LCO Board of Governors approved this project in late 2014. The LCO developed the project and conducted preliminary research during the summer and fall of 2015.

Between November 2015 and October 2016, the LCO conducted roughly 35 preliminary interviews of people from a broad range of stakeholder groups, including complainants in defamation actions, traditional and new media organizations, defamation lawyers and academics, government representatives, members of the judiciary, advocacy organizations, internet intermediaries and online review businesses.

In March 2016, the LCO organized an expert Advisory Group representative of key stakeholder groups to provide ongoing input and support for the project. Advisory Group meetings were held in April and December 2016 and January, July and October 2017.

The LCO issued a Call for Research Papers in August 2016 and subsequently commissioned five research papers addressing specific issues and bringing important insights to the project. These papers are:

- Dr. Emily B. Laidlaw, *Are We Asking Too Much From Defamation Law? Reputation Systems, ADR, Industry Regulation and other Extra-Judicial Possibilities for Protecting Reputation in the Internet Age.*
- Dr. David Mangan, *The Relationship between Defamation, Breach of Privacy and Other Legal Claims Involving Offensive Internet Content.*
- Professor Karen Eltis of the Faculty of Law, University of Ottawa, *Is "Truth-telling" Decontextualized Online Still Reasonable? Restoring Context to Defamation Analysis in the Digital Age.*

- Dr. Emily B. Laidlaw and Dr. Hilary Young, *Internet Intermediary Liability in Defamation: Proposals for Statutory Reform*.
- Jane Bailey and Valerie Steeves, Co-Leaders of the eQuality Project, University of Ottawa, *Defamation Law in the Age of the Internet: Young People's Perspectives*.

The commissioned papers are available at the LCO's website: www.lco-cdo.org/en/defamation-law

In addition to the commissioned study conducted by Jane Bailey and Valerie Steeves on youth and the digital age, the LCO has also engaged law students at the University of New Brunswick, Faculty of Law and the University of Calgary, Faculty of Law to conduct a series of interviews of youth on the issues in this project.

The release of this Consultation Paper launches an intensive five-month period of public consultations, during which we encourage input from all members of the public interested in these issues. During this period, we expect to hold several focus groups in concert with our community partners. We will also conduct individual interviews as necessary. In spring 2018, we will host an international conference on some key issues in the project, culminating the consultations process. We expect to receive formal submissions from organizations and individuals but we also encourage informal input from the public by any form of communication: email or phone, blog, Facebook post, Twitter post and so on. **The deadline for submissions is March 30, 2018.**

F. The LCO's Perspectives in Approaching the Project

The LCO has not reached any conclusions about its potential findings or recommendations in this area. Nevertheless, readers should be aware of important assumptions or perspectives that will guide the LCO's work on this project.

1. Independence and Impartiality

Stakeholders often bring certain perspectives, experiences or interests to debates about complex law reform issues. By way of contrast, the LCO provides independent and balanced analysis to complex and important legal policy issues. The LCO evaluates laws impartially, transparently and broadly.

Defamation law tends to engender polarized views between those primarily concerned with freedom of expression (defendants in a defamation action seeking to protect *their* right of free speech) and those primarily concerned with protection of reputation (plaintiffs in a defamation action seeking to protect *their* reputation).

Traditionally, many, if not most defendants of defamation claims have been media organizations. The media have numerous organizations representing their interests. And legal practitioners who represent media defendants are often specialists in advocating the pro-freedom of expression point of view. Experience demonstrates, however, that it is more difficult to connect with individuals primarily concerned with protecting reputation. Prospective plaintiffs in a defamation action come from all walks of life and there are few organized groups representing their interests. The resulting evidentiary disparity is to some extent unavoidable and has been recognized in earlier reform efforts.¹⁰ As one law reform commission stated rather bluntly,

One difficulty about consulting people about the law of defamation is that prospective defamers are better organized and more articulate than prospective plaintiffs. A newspaper company knows where the shoe pinches and has the experience and resources to put its views persuasively. No one has put anything to us which is intentionally unfair to plaintiffs, but it is natural that the plight of a defendant should be seen in strong colours by people who have many times been defendants.¹¹

The LCO will strive to hear from all stakeholders and take into account all points of view in formulating our recommendations in this project.

2. Contextual and Multidisciplinary Approach

The LCO's work is informed by legal analysis; multi-disciplinary research; contemporary social, demographic and economic conditions; and the impact of rapid technological change. The LCO gives a voice to marginalized communities and others who are often left out of important law reform debates and discussions.

Past defamation law reform has tended to start from a foundation of existing legal principles with reform largely confined to this doctrinal framework. The LCO has determined that a broader perspective is necessary in this project, particularly in light of the overlapping legal claims that may be applied to harmful internet content. Individuals suffering reputational harm as a result of online speech will not typically care what legal label is attached to their claim. A broader perspective is warranted in order to consider other legal mechanisms for regulating internet content and what role defamation law should play in this larger context. Although the LCO will apply this contextual approach, our recommendations will be directed specifically at defamation law.

3. Access to Justice

The LCO has a mandate to promote access to justice. Accordingly, the LCO will consider access to justice issues in this project. Surprisingly, there is very little literature on the principle of access to justice as applied to defamation actions, except in the context of strategic litigation against public participation (SLAPP suits) which we will discuss in chapter V. However, access to justice issues abound in the law, particularly given the high cost of civil actions and the relatively limited efficacy of traditional remedial options.

4. Comparative Law Approach

This project involves a number of novel legal issues that have arisen as a result of the internet's profound impact on human communications. These issues are currently being explored in countries around the world. From a comparative law perspective, there is a great deal to be learned from other jurisdictions, common law and civil law alike. But, we have an even more direct interest in the international legal landscape in this project. The very function of the internet in interconnecting individuals and communities across geographic boundaries means that Ontario defamation law will be increasingly influenced by law elsewhere. Other countries are also currently contemplating reform.¹² Therefore, a multi-jurisdictional approach to this project is imperative.

5. Principled and Problem-Solving Approach

LCO reports include principled, practical, problem-solving recommendations that are informed by broad consultations and tested through a transparent, comprehensive review process that engages a wide range of individuals, experts and institutions. For example, in spite of some inherent limitations of court actions as a model for remedying defamation claims, defamation reform efforts in the past have tended to focus on court actions only. The LCO adopts a broader perspective in this project to consider whether there may be practical ways to deal with some defamation claims outside the court system.

6. Technological Neutrality

It is important in adapting defamation law to the internet age to avoid social or moral judgments about the technological impact of the internet on society. Early case law, such as *Barrick Gold*, arguably adopted a pessimistic view of the internet age, emphasizing the new potential for reputational harm.¹³ Some commentators have criticized this and have suggested that a balanced view of the internet and its impact on defamation law is one that recognizes the value of internet to free speech as well as its dangers.¹⁴ The LCO seeks to develop recommendations that are neutral as to the technology used to publish communications and that recognize, for better or worse, that the internet is an important part of our future.

G. The Variety of Defamation Law Claims

It is trite to say that the purpose of defamation law is to protect against reputational harm arising from false publications. However, reputational harm may mean something very different in different fact scenarios. One of the challenges in understanding defamation law is that it seeks to apply a uniform set of legal principles to regulate reputational harm in very diverse circumstances. Putting aside legal principles for the moment, it is worthwhile to consider in what circumstances people bring defamation claims in the 21st century?

A review of the facts behind numerous Canadian defamation cases suggests that they can often be roughly divided into three types:

Actions Between Individuals – These claims are relatively frequent notwithstanding the legal costs of bringing and defending them that might be expected to exceed the resources of many individuals.¹⁵ They tend to involve underlying disputes that escalate, become personal and sometimes nasty. Driven by emotion, these claims bear some resemblance to family law disputes or estate litigation. Some defamation actions involving businesses may actually be motivated by personal interests rather than commercial interests.

Actions Motivated by Commercial Interests – In these cases, the alleged harm is to business reputation and the plaintiff will typically do a cost-benefit analysis before proceeding with a claim. Several authors have questioned the appropriateness of allowing corporations to use defamation law to protect economic interests, pointing to the inconsistency in the underlying rationales of these two causes of action.¹⁶

Actions Brought Against Media or Other Public Interest Publishers – These cases involve any claims brought against media, academic or other public interest publishers. There are societal interests at play in these cases that are distinct from other types of cases. They engage distinct legal principles designed to protect the important role of media in reporting in the public interest.

Of course, these three scenarios cannot possibly capture the full range of fact situations and circumstances that must be addressed in reforming defamation law and any reforms must be general and flexible enough to address all of these. However, in thinking about the ideas discussed in this paper, it is helpful to test them against these highly distinct factual scenarios as a sort of litmus test to ensure that the diverse interests underlying defamation law are being adequately considered.

The LCO's intent is that by keeping sight of the variety of defamation law claims that arise in today's society, we may develop pragmatic as well as principled reforms to Ontario defamation law that allow it to meet the purposes for which it is currently being applied.

II. DEFAMATION TODAY: THE EXISTING LEGAL LANDSCAPE

In this chapter, we briefly review the existing state of defamation law in Ontario and elsewhere as well as the main reform efforts to date. This review reveals notable limitations and complexities in the law that suggest the need for law reform.

A. Ontario (and Common Law Canada)

Ontario defamation law has developed primarily through common law supplemented by the *Libel and Slander Act* (LSA).¹⁷ The elements of the tort are substantially similar in most common law jurisdictions with the exception of the United States. In order to make out a claim of defamation, a plaintiff must establish three things:

- that the words in issue refer to the plaintiff;
- that they were published to a third party; and
- that they are defamatory in the sense that they tend to lower the plaintiff's reputation among reasonable persons in the community.

Where these elements are made out, the law presumes that the words are false and that they caused the plaintiff harm. A finding of fault is not necessary in order to establish defamation.

This threshold for establishing defamation is low. A lot of the “work” of the tort takes place in determining whether one of a list of defences may apply. Possible defences include justification (the words were substantially true), absolute or qualified privilege, fair comment and responsible communication, among others. For some of these, the plaintiff may rebut the defence by proving that the defendant acted maliciously.

The LSA originally dates from 1877 but in its modern form is largely based on the English *Defamation Act, 1952*.¹⁸ The LSA is an assortment of specific provisions designed to supplement the common law. The language of the Act is antiquated in places and it does not address key technological innovations such as the internet. Practically speaking, the most important provisions of the Act are its notice requirements and limitation periods in respect of defamation in a newspaper or broadcast.¹⁹ The intent is to give newspapers and broadcast stations an opportunity to correct, retract or apologize for false statements in order to contain their exposure to damages.

To date, defamation law reform in Ontario and, indeed, in Canada has been limited. In the early 1980s, the Uniform Law Conference of Canada (ULCC) decided to reform the existing Uniform Defamation Act dating from 1944.²⁰ The Conference interpreted its task narrowly, as “clarifying and balancing the concepts of defamation law which currently exist”.²¹ Nevertheless, it made a number of substantive recommendations in response to evolving case law and technology. For example, it recommended that a definition of “defamatory matter” be included in the legislation (but without reference to the element of falsity).²² And it recommended procedural changes such as clarification on who can bring claims (groups, relatives of deceased individuals and so on) and a limitation period of six months. This report eventually led to the updated 1994 *Uniform Defamation Act*.²³

A 1985 Report of the British Columbia Law Institute (BCLI) relied on the ULCC Report in recommending a new draft Defamation Act for that province.²⁴ However, no legislative reform followed.²⁵

Ontario's last reform project on defamation law took place 25 years ago. An Advisory Committee appointed by the Ministry of the Attorney General (MAG) described the law as a combination of “ancient rules and procedures with nineteenth century precepts and twentieth century remedial patchwork”.²⁶ It reconsidered defamation law principles in light of the *Charter's* guarantee of free expression. The Committee focused particularly on traditional media organizations and whether the law should provide them with increased protection from defamation suits so that they could practice responsible journalism. Although no legislative reform followed the Committee's Report, the Supreme Court of Canada (SCC) eventually heard this

call, developing the responsible communication defence and enhancing the fair comment defence in order to better protect responsible journalism and other forms of public interest communication.²⁷

The MAG Committee also raised more fundamental issues of defamation law reform, including its strict liability nature, the presumption of harm and presumption of falsity. However, the Committee did not reach consensus on these issues and did not develop recommendations.²⁸ In this project the LCO is re-examining some of these fundamental principles.

At the time of the MAG Committee's Report, the internet had not yet emerged as the predominant forum for communication and its recommendations must be seen through this lens. For example, the MAG Committee Report focused primarily on defamation law as it applies to traditional media publications. However, the internet now allows anyone and everyone to be a publisher, thereby blurring the line between media and non-media publications. This gives rise to new questions such as whether LSA notice and limitation period protections should be extended to publishers other than traditional media.

In 2010, another panel was struck in Ontario, this time to consider the possibility of legislating protection against strategic lawsuits (known as SLAPP lawsuits) that place undue limits on freedom of expression in relation to matters of public interest. The Panel specifically addressed how the proposed legislation would operate in the context of defamation. It suggested ways to balance the aims of the legislation with the case law on defamation defences, and it explicitly recommended that corporations' and politicians' right to sue for defamation not be restricted.²⁹ The panel's recommendations led to the 2015 enactment of the *Protection of Public Participation Act* (PPPA).³⁰ The PPPA creates a pre-trial process for identifying and dismissing SLAPP lawsuits that place undue limits on freedom of expression by individuals or organizations on matters of public interest.³¹ Importantly, the scope of the new Act is confined to SLAPP lawsuits and it does not purport to reform defamation law generally.

Also, in recent years Canadian courts have been interpreting defamation law to better protect the *Charter* right to freedom of speech and to address internet communications. In *WIC Radio v. Simpson* [2008], the SCC reformulated the fair comment defence to protect a radio broadcast comparing an anti-gay activist to Hitler.³² In *Grant v. Torstar* [2009], the Court created a new defence of responsible communication to protect defamatory communications made responsibly in the public interest.³³ The Court noted the changing context brought about by the internet, suggesting that the law must adapt accordingly:

*...many actions now concern blog postings and other online media which are potentially both more ephemeral and more ubiquitous than traditional print media. While established journalistic standards provide a useful guide by which to evaluate the conduct of journalists and non-journalists alike, the applicable standards will necessarily evolve to keep pace with the norms of new communications media.*³⁴

In 2012, the SCC issued a trilogy of decisions addressing jurisdictional issues in multi-state tort claims. Two of the decisions involved defamation claims commenced in Ontario. In both cases, the SCC held that the plaintiff was entitled to bring the claim in Ontario where the alleged defamatory material was made available in Ontario even though originally published elsewhere.³⁵ However, in both cases the Court acknowledged that one element of the *forum non conveniens* analysis, the law applicable to the tort, remains unsettled in defamation law.³⁶ Although a concern for "libel tourism" (complainants strategically suing in jurisdictions perceived to have plaintiff-friendly defamation laws) also arose in both cases, the Court did not address this issue at any length.³⁷

In *Crookes v. Newton* [2011], the Court considered the nature of hyperlinks, holding that they do not amount to a publication of the information to which they link, for the purpose of attracting liability.³⁸ The Court signaled in this decision the importance of adapting traditional defamation law principles in a way that does not stifle the development of the internet:

*Given the core significance of the role of hyperlinking to the Internet, we risk impairing its whole functioning. Strict application of the publication rule in these circumstances would be like trying to fit a square archaic peg into the hexagonal hole of modernity.*³⁹

Notwithstanding these decisions, the SCC has not yet had the opportunity to deliberate on many of the issues specific to internet communications. The Court has acknowledged that there is much work still to be done in adapting defamation law to internet technologies as they continue to evolve.⁴⁰

Ontario courts are also regularly grappling with internet defamation cases.⁴¹ For example, in *Goldhar v. Haaretz.com* [2016], the Court of Appeal divided on the appropriate test for assuming jurisdiction in a multi-state internet defamation case.⁴² In *Shtatf v. Toronto Life* [2013], the Court of Appeal indicated its view that legislative reform, particularly of the LSA, is warranted.⁴³

An important question for the LCO project is whether common law or legislative reforms are the best approach to address the complexity of defamation law in the age of the internet.

B. Other Jurisdictions

As noted earlier, the LCO project is the first to comprehensively consider defamation law in Canada in the last 25 years. Defamation law reform is an international issue spanning many jurisdictions and legal traditions. These developments provide the LCO will both an opportunity and a challenge. On the one hand, many of these jurisdictions hold lessons for defamation law reform in Ontario. On the other hand, defamation law is inherently grounded in local norms and values. Therefore, the LCO must analyze foreign developments against the need for a made-in-Ontario response to these issues.

1. United Kingdom and Ireland

English defamation law has traditionally been the model for defamation law in Ontario and other common law Canadian provinces and legal doctrine in both countries has largely overlapped. A series of reform efforts in the United Kingdom has been reflected to varying degrees in Ontario law.

For example, in 1948, the Porter Committee considered complaints that defamation actions were too costly, complex and unpredictable, and that the existing law favoured “gold-digging” plaintiffs at the expense of innocent defamers. Even then there was a concern that the law was too restrictive of free speech.⁴⁴ The Committee considered but rejected the idea of codifying defamation law.⁴⁵ It did recommend extending the current law to broadcasting (in addition to newspapers). Otherwise, the Committee concluded that “drastic changes in the substantive law” were unnecessary and, instead, some “pruning” and simplifying were appropriate.⁴⁶ The Committee’s recommendations were largely incorporated into the U.K. *Defamation Act, 1952*. Many also found their way into Ontario’s LSA in a 1958 amendment.⁴⁷

In 1975, another report on the state of UK defamation law was undertaken by the Faulks Committee.⁴⁸ Two of the Committee’s key recommendations were to abolish the distinction between libel and slander and establish a statutory definition of defamation. Otherwise, the Committee mainly tinkered with the existing law. The report did not result in immediate legislative changes although it has been referenced in the common law development of UK defamation law.⁴⁹

An extensive reform process in the UK preceded the enactment of the *Defamation Act, 2013*.⁵⁰ This was motivated, in large part, by a concern that the existing law did not adequately protect freedom of expression, particularly in the context of public interest reporting by the media. A draft defamation bill was proposed by the government, subjected to a public consultation process and reviewed by the Joint Committee on the Draft Defamation Bill.⁵¹ This reform process resulted in recommendations for significant substantive and procedural reforms to the law, although there was little discussion of the social context and no attempt to reexamine the foundations of the tort. The Committee adopted four goals driving its review of the draft bill: adjust the balance between protection of reputation and freedom of expression; reduce the costs of defamation proceedings; improve accessibility to the law; and adapt to modern communications culture. But both the government and Joint Committee approached the issues as a basket of distinct, doctrinal reforms.

Many of the proposed reforms are reflected in the *Defamation Act, 2013*. Some of these, such as the introduction of a single publication rule and notice and takedown regulations for website operators, respond specifically to problems created by

the emergence of the internet. The Act also tightens up the test for asserting jurisdiction over multi-state defamation claims in order to prevent England from being a libel tourism destination. Other reforms are more fundamental, including a provision reversing the traditional presumption of harm by introducing a serious harm requirement. And the defamation defences have been modified and codified.

The *Defamation Act, 2013* takes a targeted approach to reform of defamation law. It addresses particular identified problem areas in the law and develops legislative fixes.⁵² UK legislators did not step back to consider how the rise of the internet is affecting the foundations of defamation law. David Mangan has politely commented, “[a]s legislation passed in the midst of remarkable technological advances in communication, the Act underwhelms.”⁵³ One example is the Act’s emphasis on monetary remedies more suitable for traditional media defendants over discursive remedies more suitable to defamation on social media platforms.⁵⁴

What did not find its way into the *Defamation Act, 2013* were the recommendations by the Joint Committee for a procedural overhaul designed to promote early settlement and remove many defamation proceedings from the court system.

The impact of the *Defamation Act, 2013* is not yet clear. Case law interpreting the new provisions is only now beginning to accumulate. But the Act provides the best example so far of how a jurisdiction may adapt its body of defamation law to the internet age.

Most of the *Defamation Act, 2013* provisions apply only to England and Wales. Therefore, in 2014, the Northern Ireland Law Reform Commission undertook to determine whether Northern Ireland should adopt the Act in whole or in part. In its Consultation Paper, the Commission suggested that the tension in many modern defamation proceedings is not so much between reputation and free speech, as between litigants who can afford to defend themselves and those who are unable to do so.⁵⁵ The Commission was disbanded before it could issue its report and the Ministry of Finance retained Dr. Andrew Scott to make recommendations on the matter. His report recommended that the majority of the provisions in the *Defamation Act, 2013* be adopted.⁵⁶ However, the report also went further and suggested procedural reforms to enhance access to justice.

The Scottish Law Reform Commission followed suit with a discussion paper released in 2016.⁵⁷ Again, the focus was relatively narrow, using the *Defamation Act, 2013* as a model for possible reform. The Commission recognized that the Act would not fit easily in all respects with Scots law and suggested that codification of the entire Scot law on defamation would not be “practical.”⁵⁸ However, the Commission also noted the benefits of consistency in the law and committed to assessing the issues “with a view to avoiding being left behind by developments in England and Wales.”⁵⁹

Most recently, in October, 2016, the government of Ireland announced its intention to review defamation law and has requested submissions from the public.⁶⁰ The aim of its review is to assess the changes made by the *Defamation Act, 2013*, review recent reforms from other jurisdictions and determine if Irish law (particularly the *Defamation Act 2009*) is appropriate and effective at fulfilling its objectives.⁶¹

2. Australia and Other Commonwealth Jurisdictions

Australian law is also largely based on the English common law. The main legislative development has been the adoption of uniform defamation legislation by all states and territories in 2006.⁶²

It is worth noting the Australia Law Reform Commission’s (ALRC) 1979 Report, *Unfair Publication: Defamation and Privacy*.⁶³ Although this report did not result in legislative change, it is a good example of an earlier attempt to do broad-based law reform from first principles. The ALRC undertook to clarify Australia’s complex defamation law within the context of a changing society and changing media.⁶⁴ The report identified three main defects in the existing law: inefficiency in protecting reputation, creation of obstacles to the free flow of information on public affairs and inadequate protection of personal privacy.⁶⁵ In responding to these concerns, the Commission adopted a broader conceptual view of what it termed “the law of unfair publication”; encompassing defamation as well as publication privacy. It recommended the

legislation of an *Unfair Publication Act* which would substantially codify defamation law and create a new right of action for publication of private facts.

In the end, the ALRC Report was overly ambitious. The federal Australian government did not have jurisdiction to follow through with its recommendations and there was insufficient cooperation among the states and territories to agree on uniform legislation.⁶⁶ Australia was eventually successful in adopting uniform defamation in 2006 but without reference to ALRC's unfair publication framework.⁶⁷

However, the Australian courts have been the source of some key decisions considering the extent to which traditional defamation law principles should be reinvented in the wake of the internet. For example, in *Gutnick v. Dow Jones [2002]*, the Australian High Court considered the legal test to be applied in assuming jurisdiction over a multi-state internet defamation proceeding.⁶⁸ More recently, in *Google Inc. v. Duffy [2017]*, the Supreme Court of South Australia upheld a finding that Google was liable for failing to remove defamatory material from its search results, including its Autocomplete and Related Searches features, after having been made aware of the material.⁶⁹

Other common law jurisdictions that may be of interest in this project include New Zealand, South Africa, Hong Kong, Malaysia and Singapore.⁷⁰

3. United States

The approach to defamation law in the United States is distinct from that in Ontario and other commonwealth jurisdictions. In the US, defamation law is heavily influenced by the strong protection of free speech contained in the First Amendment of the US constitution. It is generally difficult to win a defamation lawsuit in the US without some clear and egregious conduct on the part of the defendant. Suits by public figures are especially challenging. Moreover, internet service providers have legislative immunity from defamation claims in their role as intermediaries.⁷¹

In spite of these distinctions, American law potentially has important implications for Ontario and other common law jurisdictions. For example, some argue that the American defence-friendly approach may encourage libel tourists to bring defamation claims in jurisdictions considered to be more plaintiff-friendly, including Ontario.⁷² Others dispute that libel tourism is happening in practice.

4. Quebec

Quebec does not have a law of defamation *per se*. Defamation is addressed like all torts as a fault under the Quebec *Civil Code*.⁷³ The plaintiff must establish that a fault has occurred, that harm has resulted and that there is a causal connection between the two. This is a more contextual approach than in common law. There is no strict liability, no presumption of harm and no presumption of falsity. The arcane and categorical features of common law defamation law have led some to argue that a civil law approach would be preferable in addressing internet defamation claims.⁷⁴

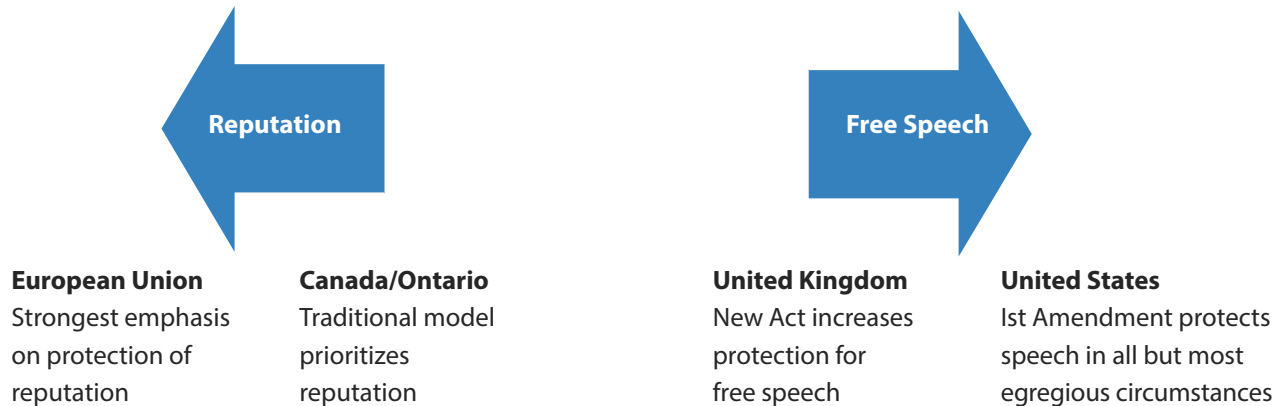
5. European Union

In the European Union, defamation law has developed against the backdrop of two competing rights in the *European Convention on Human Rights* (ECHR): article 8 privacy rights (including a substantive right to honour and reputation) and article 10 on freedom of expression.⁷⁵ This recognition of reputation as a human right reflects a more general tendency in the European Union to balance reputation and free expression somewhat closer to the reputation end of the spectrum than other jurisdictions. One example of this is the "right to be forgotten" created by the Court of Justice to recognize a plaintiff's right to have personal data removed from a search engine where the data is no longer relevant to the purpose for which it was collected.⁷⁶ On the other hand, the European Court of Human Rights has emphasized the importance of protecting the role of the media as "public watchdog" and the need to avoid a chilling effect on political debate and satirical expression.⁷⁷

The European perspective provides a useful counterpoint to the US heavy emphasis on freedom of expression.⁷⁸

C. Spectrum of Policy Approaches to Defamation Law

The range of approaches to defamation law in the jurisdictions identified above is summarized in the following chart. The chart identifies at least four general policy models of defamation law. The chart demonstrates how different jurisdictions currently balance protection of reputation and freedom of expression.



The LCO stresses that none of these approaches predetermines the LCO’s eventual findings or recommendations. As noted above, the LCO is committed to developing a made-in-Ontario response to defamation law issues.

D. Inherent Challenges in Defamation Law Reform

The tort of defamation has been persistently and widely criticized for most of its existence.⁷⁹ As early as 1812, Mansfield C.J. criticized the structure of the tort but felt that it was too late to make significant changes.⁸⁰

Another critic, Van Vechten Veeder, wrote at the turn of the twentieth century that if defamation law were actually achieving its purpose to balance our personal rights and public interest in protection of reputation and freedom of expression, it would be “an admirable measure of the culture, liberality, and practical ability of each age”. However, in his view, the law was not principled but, rather, “a mass which has grown by aggregation, with very little intervention from legislation” producing “meaningless and grotesque anomalies”. He concluded that the law was “...as a whole, absurd in theory, and very often mischievous in its practical operation.”⁸¹

Defamation law has been described as the “Galapagos Islands Division of the law of torts” since it has developed on its own without cross-fertilization with other tort law principles.⁸² From a law and economics perspective, defamation law has been termed “completely irrational.”⁸³

The difficulties with defamation law are deeply rooted. Commentators have pointed to a combination of challenges, some of which are inherent in the tort. These include:

- The subjective nature of speech - Defamation law seeks to regulate a highly subjective and nuanced element of social relationships. Identifying and categorizing the kind of speech that should or should not be determined to be defamatory is complex and contextual.
- The subjective nature of reputation - The concept of reputation is also highly subjective and contextual. Reputational harm can be a form of moral damage and is often not translatable into measurable economic loss. Crafting a remedy that responds to and compensates reputational harm caused by the defamatory speech is of necessity a rough and ready exercise.

Both these subjective aspects of defamation law combine to undermine the predictive nature of the law and both will be discussed further below. For the present, the point is to emphasize that the tort being considered in this project has developed awkwardly from its earliest incarnations. Up until now, the law has evolved piecemeal in order to deal with difficulties as they arise. In this project, the LCO will seek to develop from first principles a coherent set of legal principles to govern defamation law into the 21st century.

Questions for Consideration

1. What lessons are to be learned from the law and law reform efforts of other jurisdictions on the issues in this project? How applicable are these lessons to the Ontario context?



III. DEFAMATION LAW IN CONTEXT

The LCO's goal in this project is to recommend defamation law reforms that reflect contemporary values and legal principles in social context. Therefore, in this chapter, the LCO considers how the legal, technological, and social landscape of 21st century society differs from the conditions at the time defamation law was developed.

Defamation law is necessarily a product of the era and community in which it is applied. Defamation law may also reflect different social and moral norms within the same time and place where different micro-communities exist. These norms vary with factors including gender, race and ethnic background, age and geography.⁸⁴

The fundamental concepts underlying defamation law, reputation and free expression, are also, to some extent, generated by the norms and legal values of a particular time and place. For example, as society's understanding of reputation changes, so too must defamation law if it is to continue to fulfil its protective purpose.⁸⁵ In an influential 1986 article, Robert Post wrote that "defamation law presupposes an image of how people are tied together, or should be tied together, in a social setting. As this image varies, so will the nature of the reputation that the law of defamation seeks to protect."⁸⁶ So too, the constitutional entrenchment of freedom of expression has necessitated a rebalancing of the values underlying defamation law. And, as new forms of technology and expression develop, the means by which the law protects freedom of expression must evolve accordingly. The dynamic nature of defamation law is an important challenge to any law reform exercise.

A. Evolving Legal Principles and Values

Defamation law attempts to balance at least three important legal principles and social values: free expression, reputation and privacy. These principles are neither absolute nor mutually exclusive. For example, reputational harm can also impede free speech. An individual whose reputation is under attack and speaks out may be less likely to be heard or believed. At the other end of the spectrum, censorship inhibits the free exchange of opinions that is necessary for the development of reputation.

The LCO believes it is important to understand each of these principles or values on its own terms before discussing how they should be balanced.⁸⁷

1. Freedom of Expression

A key catalyst for defamation law reform has been the enshrinement of freedom of expression in section 2(b) of the *Canadian Charter of Rights and Freedoms*:

2. Everyone has the following fundamental freedoms:...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication...⁸⁸

Freedom of expression has been labelled as "the matrix, the indispensable condition, of nearly every other form of freedom."⁸⁹ The right encompasses the ability to express oneself in the manner of one's choosing, as well as the ability to access expressive content produced by others.⁹⁰

The Supreme Court of Canada has identified three values underpinning the right to freedom of expression under section 2(b) of the *Charter*: individual self-fulfillment, the search for truth and promotion of democratic discourse.⁹¹

i. Individual Self-Fulfillment

Freedom of expression has traditionally been considered vital to individual self-development and self-fulfillment.⁹² Within Western cultures, the dominant view of the self is the independent self – a set of "internal attributes—thoughts, preferences, motives, goals, attitudes, beliefs, and abilities—that uniquely define the individual and enable, guide and constrain

behavior.”⁹³ Expression is the means through which those attributes are revealed and one’s individuality is affirmed.⁹⁴ Expression also has important implications for self-perception and identity development.⁹⁵

ii. Facilitating the Search for the Truth

Freedom of expression can also be justified as an essential component of the “marketplace of ideas” – the notion that unfettered competition between ideas promotes the broader societal goal of understanding truth.⁹⁶ The search for truth is understood to be a process rather than an outcome and the value of freedom of expression is not dependent on the truth of the expression. Even wrong opinions result in “the clearer perception and livelier impression of truth, produced by its collision with error.”⁹⁷ The marketplace of ideas rationale has been widely adopted in modern legal systems, including the Supreme Court of Canada, and remains a central justification for protecting expressive activities from state interference.⁹⁸

iii. Promoting Democratic Discourse

Freedom of expression is also viewed as valuable because it promotes the “free flow of ideas essential to political democracy and the functioning of political institutions.”⁹⁹ This rationale manifests itself in two ways. First, freedom of expression allows government policy and action to be vigorously discussed and debated, thereby enhancing accountability.¹⁰⁰ Second – and linked to the “marketplace of ideas” theory – freedom of expression fosters open competition between different political visions of the state, furthering the goal of having only the best “rise to the top”.

Two of these freedom of expression values, the search for truth and democratic discourse, have been front and center in the Supreme Court of Canada’s defamation jurisprudence. However, the value of individual self-fulfillment has been less emphasized in the defamation context because, “the plaintiff’s interest in reputation may be just as worthy of protection as the defendant’s interest in self-realization through unfettered expression.”¹⁰¹

iv. Constitutional Values and Constitutional Rights

The values underlying freedom of expression have inspired significant common law reforms to defamation law over the past decade. The Supreme Court has adopted an objective test for the defence of fair comment, developed an entirely new responsible communication defence, and restrictively applied the publication rule to hyperlinks.¹⁰² These developments have come about in the context of private law defamation disputes where the *Charter* is not directly applicable.¹⁰³ However, it is important to emphasize that any recommendations for legislative reform to defamation law will directly engage the *Charter* and must be compliant with the right to freedom of expression guaranteed in ss. 2(b).

2. Reputation

Accepting that our societal understanding of reputation has evolved since the early days of defamation law, the question becomes: what has it evolved into? What is the concept of reputation that defamation law is intended to protect in 2017? And how should the law reflect these contemporary values?

As noted above, the legal test for establishing defamation is whether the impugned statement would tend to lower the plaintiff’s reputation in the eyes of reasonable community members. In other words, there is typically no objective determinant of reputational harm. Reputational harm only occurs if reasonable members of society would tend to believe it has. Nor is there an authoritative legal definition of reputation that emerges from case law or scholarly literature. What one does find is a general consensus that reputation is too nuanced a concept to admit of a neat definition that covers all cases. Moreover, views may differ about who “reasonable members of society” are and how one determines what they would believe, once one identifies them.

Many scholars have adopted the following three concepts of reputation developed by Robert Post that defamation law is designed to protect.¹⁰⁴

i. Reputation as Property

Historically, reputation was primarily considered to be an intangible property interest, somewhat analogous to goodwill.

As a property interest, reputation has value and the tort of defamation is intended to provide a pecuniary remedy for the loss of that value. This concept of reputation as property is still reflected in modern defamation law, most particularly in claims by businesses to protect loss of commercial reputation or by individuals to protect their employability or other economic relations.¹⁰⁵

ii. Reputation as Honour

According to Post, the concept of reputation as honour was developed in pre-industrial England when society was stratified into a well-defined class system and defamation was perceived as a means of vindicating one's honour. This notion of reputation has fallen out of favour in modern society.

iii. Reputation as Dignity

Post argues that the concept of reputation that resonates most clearly in modern day is reputation as dignity. Defamation law has a dual role here. It is intended to protect the individual's full membership in society (or "his interest in being included within the forms of social respect") as well as society's interest in its rules of civility.¹⁰⁶ The point of defamation law is not so much vindication but, rather, "rehabilitation of individual dignity and maintenance of communal identity".¹⁰⁷

Post points out the sharp conceptual distinction between the two notions of reputation most influential to modern defamation law doctrine: reputation as property and reputation as dignity. He argues that this explains much of the persisting incoherence of the tort since each concept reflects "a very different image of social life" and "the intellectual consistency of defamation law is strained by the pull of divergent underlying assumptions about the nature of social reality".¹⁰⁸

More recent literature takes Post's analysis further. David Rolph emphasizes the media's role in the creation and destruction of reputation. He would add to Post's three categories a fourth, that is, reputation as celebrity.¹⁰⁹ Lawrence McNamara examines reputation in relation to community, arguing that reputational harm occurs when one's moral status is diminished in the eyes of the community.¹¹⁰ David Ardia reflects on Post's theory that reputation is a societal interest and argues that the tort of defamation, and particularly the assessment of reputational harm, requires reform in order to reflect this reality. In the internet age, harm created by online defamation that is societal in nature should be addressed with a remedy directed at the social component of reputational harm.¹¹¹

David Howarth sees reputation as a personal interest bound up with notions of sociality:

*The individual pain caused by a threat to sociality might be a private matter, but the functioning of human groups and networks is important to the welfare of all of their members, not just to those threatened with exclusion.*¹¹²

A theme running through these theoretical studies of reputation is that, no matter how the values underpinning reputation are exactly delineated, protection of reputation is seen to have significant social value in addition to personal value. This theme has also been expressed in the case law. For example, in *Times Newspapers v. Reynolds* [2001], the House of Lords recognized the importance of reputation to the public good in forming the basis of important decisions in a democratic society such as hiring, firing, promoting, forming business partnerships and voting.¹¹³

The Supreme Court of Canada has linked reputation to "the innate worthiness and dignity of the individual" and indicated that its protection is just as important as the protection of freedom of expression.¹¹⁴

In the European Union, reputational interests are recognized as one element of the right to private life protected by article 8 of the *European Convention of Human Rights*.¹¹⁵ The exact relationship between reputation and private life and the extent of the overlap is less clear and is a developing area of ECHR jurisprudence and commentary.¹¹⁶

These alternative conceptions of reputation may impact defamation law in several ways; most particularly in the legal test that is to be applied in assessing reputational harm and the choice of appropriate remedies for responding to reputational harm. They also underlie questions about who should have standing to seek a remedy for reputational harm. More broadly, our conception of reputation has a direct impact on how defamation law balances protection of reputation and freedom of expression. Each of these issues is addressed below.

3. Privacy

A third important legal principle affecting defamation law is privacy. Privacy is no longer merely the right to be left alone. It is a constitutionally-protected value considered to be integral to our democracy. According to the Supreme Court of Canada:

*...[S]ociety has come to realize that privacy is at the heart of liberty in a modern state. . . . Grounded in a man's physical and moral autonomy, privacy is essential for the well-being of the individual. . . . The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.*¹¹⁷

The Court has recognized three types of privacy interests: personal, territorial and informational. All types of privacy engage core values of dignity and integrity of the person.¹¹⁸ Informational privacy recognizes that “all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit.”¹¹⁹ For the purposes of this project, breach of privacy claims involving disclosure of private information are conceptually closest to defamation claims.

Privacy interests have taken on new dimensions in the internet age. In *R. v. Spencer* [2014], the Supreme Court considered the right to privacy in the context of anonymous internet communications.¹²⁰ The Court examined three ways of understanding informational privacy (privacy as secrecy, privacy as control and privacy as anonymity) but focused on privacy as anonymity. In anonymous communications, the communication itself is not private. But the communication takes place on the understanding that the identity of the speaker will not be revealed. Therefore, the privacy interest extends not only to this identifying information, but also to the link between the identifying information and the anonymous communication.

The recognition of anonymity as an element of privacy illustrates that there may be privacy interests in public spaces. In certain circumstances, there will be a reasonable expectation that one may engage in public activity and be “casually observed” but “justifiably...outraged by intensive scrutiny” or, in other words, that one may “merge into the ‘situational landscape’.”¹²¹ This may be relevant to evaluating the balance of interests in anonymous communications alleged to be defamatory.

Privacy issues are increasingly engaged in defamation law, particularly given the recognition of privacy as a human right in the European Union.¹²² However, privacy interests remain conceptually distinct from reputation. Whereas defamation protects one's public face, claims for breach of privacy seek to protect one's private face.¹²³

In practice, privacy and reputation are often intimately connected. Both may involve a similar balancing exercise with freedom of expression.¹²⁴ Both may be pleaded in relation to the same facts.¹²⁵

Privacy interests are relevant at different points in the legal analysis for establishing and defending against a defamation claim. For example, a reasonable expectation of privacy is relevant to the public interest test and the assessment of factors required in applying the responsible communication defence.¹²⁶

The legal principles and values discussed in this section, free expression, reputation and privacy, must underlie any defamation law reform. In the next section, we consider the impact of technology on defamation law.

B. Evolving Technology and Social Context

1. Technology and Defamation Law – Past, Present, and Future

Defamation law doctrine has evolved over the centuries to adapt to new communications technologies as they have emerged; from the printing press in the 15th century to broadcasting and telecommunications at the turn of the 20th century. For example, a statutory amendment in 1888 England extended the protection of qualified privilege to newspapers reporting matters of public interest, published before their accuracy could be confirmed.¹²⁷ In the 1940s, the Porter Committee recommended widening the definition of newspaper to provide protection to a wider range of publications in response to “changes in social, economic and political conditions” over the past 60 years.¹²⁸ When broadcasting technology was invented, statutory amendments established that broadcasts would be dealt with as libel rather than slander.¹²⁹ Similar adjustments were recommended with the advent of cable TV.¹³⁰

How does the invention of the internet in the 1980s relate to this long line of technological advancements and how should defamation law respond? Some see the internet as just one more step in this long history of the evolution of human communications.¹³¹ Implicit in this view is a conservative approach to law reform. If the internet is a communications technology that differs from earlier technologies only in degree rather than in kind, then perhaps law reform should be similarly constrained. Others argue that the internet has taken human communications to another realm entirely. Its constellation of technological features has resulted in a new form of speech with vast social consequences. The logical corollary is that reform of defamation law should proceed from first principles and be open to novel legal solutions.

The possibility is that the internet has changed the nature of speech and/or the nature of reputation so dramatically that the traditional framework for understanding defamation law, as well as the court-based mechanism for remedying defamation, are no longer adequate for their purposes. According to Matthew Collins, “[a]lmost every concept and rule in the field of defamation law ... has to be reconsidered in the light of the Internet.”¹³²

2. Sources of Internet Speech

Of course, the internet is not a unified concept. It is a set of protocols by which computers may communicate with each other. These capacities let users develop a vast variety of platforms, techniques and interactions, and new protocols are devised from time to time that expand these capacities. The internet includes not only the World Wide Web and email but also bulletin boards, social networking sites and peer-to-peer networks for file sharing (such as Google Groups). Certain platforms will have overlapping functions. For example, Reddit is both a social networking and news website.

Platforms for online expression can be roughly divided into four categories:

- Email and analogous communication such as instant messaging
- Websites, bulletin board posts, blogs and social networking sites
- Hyperlinking: both “linking” and “framing”¹³³
- Indexing web content in a particular form such as search engine results.¹³⁴

Defamation claims may involve online expression from any of these platforms.

Social networking sites operate using an array of different forms of communication with different implications for defamation law. Reputational harm caused by a defamatory message on Facebook may look quite different from reputational harm caused by the same message on Twitter or Snapchat. In principle, Facebook operates on a real names basis so a plaintiff will typically be able to identify the alleged defamer and will be able to pursue a civil action if he or she chooses to do so. In contrast, Twitter and Snapchat posts are often anonymous, significantly complicating a potential civil action. The potential scope of reputational harm will also differ. Defamatory posts on Facebook will be published more or less widely depending on whether they are public or restricted to the account holder’s “friends”, and depending on the number of friends, the

number of the friends' friends and so on.¹³⁵ In contrast, Twitter posts are published to the general public. There are no privacy settings to contain who may read the post (though it is possible to send targeted messages by Twitter as well). Snapchat is different again with photos fading from the screen after a few seconds. This may limit potential reputational harm (although the reality is these images do not necessarily disappear).¹³⁶

Thus far, Canadian case law on online defamation has tended to speak of the internet as a uniform phenomenon with unprecedented power to harm reputation. The argument has been made that, until relatively recently, courts have been unduly protective of reputational interests at the expense of freedom of expression simply as a result of their unfamiliarity with the technology and their unease with its potential power.¹³⁷ However, these are early days yet in the internet era and courts are already developing a more sophisticated understanding of internet technology.

3. Attributes of Internet Speech

There are several features of internet speech that are unique in combination and have a significant impact on how defamation law principles are applied.¹³⁸ Internet speech is:

- Geographically indeterminate
- Easily and instantly republished
- Transmitted by intermediaries
- Connected by hyperlink
- Transmitted in different forms
- Accessible indefinitely.¹³⁹

We discuss some of these briefly.

i. Geographic Scope

The internet affords consumers "the ability to communicate instantaneously with a potentially vast global audience".¹⁴⁰ Unlike their real-world counterparts, online speakers are far less constrained in their ability to reach their audience. Physical proximity is not a pre-requisite for online expression and dialogue. Access to information does not depend on access to physical repositories (such as public libraries). The geographic scope of the internet creates the potential for far more speech to reach a far larger audience than was traditionally possible and do so across jurisdictional boundaries.

ii. Speed and Reach

Internet speech may be communicated instantaneously to a large audience. It may be easily forwarded and hyperlinked, extending its reach beyond its immediate context. Some internet speech is prone to "go viral", spreading quickly and widely throughout the internet. Other modes of communication, such as cell phones and live television, allow for instantaneous communication but on a smaller scale and without the potential for two-way communication.

iii. Intermediaries

Internet communications are necessarily intermediated communications. Internet intermediaries are gatekeepers that control the flow of information as it travels from the original communicator to the end receiver.¹⁴¹ These intermediaries include, but are not limited to the following:

- Internet service providers (ISPs), such as Rogers Communications and Bell Internet, provide the physical infrastructure through which internet communications must pass *en route* from one computer to another.¹⁴² ISPs will also often "cache"¹⁴³ certain types of Internet content to allow them to be more easily transmitted to subscribers.¹⁴⁴ These intermediaries are to be distinguished from the core cables, satellites and nodes that underlie the transmission of signals around the world. They are also distinct from the registrars and domain administrators that make the addressing system work.

- Search engines, such as Google and Yahoo, index online content in response to search queries and present them in a set of ranked hyperlinks. Some have compared the Internet to a library.¹⁴⁵ If this analogy is apt, search engine results are the card catalogue that allows users to locate specific content.
- Content hosts who operate message boards, blogs and so on, that allow members to express views and exchange ideas.

Intermediaries are not a unique feature of internet architecture. In the physical world, individuals may express and receive ideas through traditional intermediaries such as television operators and newspapers. However, internet intermediaries typically exercise a weaker form of editorial discretion, if any, over the content they display.¹⁴⁶ This is both a function of capacity (given the sheer volume of content on the Internet) and choice.

iv. Anonymity

It is far easier for speakers to remain anonymous online than in the physical world.¹⁴⁷ Anonymous comments are frequently posted on blogs, message boards and other websites. Some websites operate on a presumption of anonymity. Anonymous comments posted from a public computer (such as in an Internet cafe or library) may be almost impossible to trace back to their author.¹⁴⁸ Web hosting services exist which allow internet users to establish and maintain websites without disclosing any identifying information.¹⁴⁹

Anonymous publication is more difficult to achieve in the physical world. In-person communication often requires disclosure of some identifying information that is unnecessary online simply by virtue of the Internet's architecture.¹⁵⁰

v. Permanence

Once posted, online expression typically stays permanently on the internet and remains readily accessible to others. Permanence of information is not unique to the internet – libraries, for example, will sometimes store extensive archives of books, newspapers and magazines. However, access to these archives is typically limited.¹⁵¹ The internet's unique combination of permanence *and* accessibility gives internet speech a lasting character that it does not possess through other mediums of communication.

Further on in this Consultation Paper, we ask questions about how the law should govern specific aspects of internet communications.

C. The Networked Society

The technological change represented by the internet has also impacted how we understand and participate in community. Manuel Castells argues that we have evolved into a networked society characterized by individuation. Whereas our community was once defined by our physical location, community may now be individually generated online, on the basis of common interests, values and projects.¹⁵²

This has important implications for defamation law reform. In spite of the ubiquity of the internet, the tort of defamation remains grounded in the social norms of specific communities. The internet has blurred the boundaries between communities, making it difficult for a court to identify a consistent set of social rules for the purpose of assessing whether or not they have been violated by an alleged defamatory statement. In this sense, modern defamation law has become uncomfortably bifurcated, attempting to accommodate this new global technology while remaining faithful to local norms and values.

The networked society has not only affected our understanding and experience of community, it has also affected the way we communicate. According to Castells, the communications process has shifted from being "a message sent from one to many with little interactivity" to "messages from many to many, multimodal, in chosen time, and with interactivity, so that senders are receivers and receivers are senders."¹⁵³ As discussed below, there is an argument that this potential interactivity between speaker and receiver creates a degree of internal accountability that may lessen the need for legal regulation.

It may be that the networked society also affects our individual experience of communicating. For example, some point to a positive correlation between use of the internet and psychological indicators of personal happiness.¹⁵⁴ Others point out a tendency for some internet users to develop more insular views due to their limited intake of information based on their personal interests.¹⁵⁵

Where new forms of harmful speech have occurred online, there has been some pressure on defamation law to provide a remedy.¹⁵⁶ However, the broader point is that these changes in the way we communicate may have implications for the kind of content published on the internet and the scope and efficacy of defamation law in regulating it.

Finally, the networked society is a global society. As Kirby J. in the High Court of Australia has observed, “interrelationships created by the internet exist outside conventional geographic boundaries and comprise a single interconnected body of data”.¹⁵⁷ One consequence of this phenomenon is that there are increasingly common legal issues among different jurisdictions. Another consequence is that conflict of laws issues are increasingly occupying the courts. For example, the recent defamation law reform in the UK was partly motivated by a concern that the UK was becoming a libel tourism destination.¹⁵⁸ British Columbia practitioners have expressed the same concern.¹⁵⁹ The issue here is how we might achieve a degree of harmonization in the law among these different jurisdictions.

1. Media in the Internet Age

Defamation law has traditionally provided media (and other public interest speakers) with certain protections to ensure that it is able to fulfill its function of reporting in the public interest. However, the internet challenges the traditional distinction between media and other defendants by making it possible for anyone to engage in public interest reporting and commentary.¹⁶⁰ The internet facilitates rapid dissemination of articles, pictures and videos covering social and political developments of every kind, from celebrity scandals to police abuse. Most of this content comes from regular citizens, not professional journalists.¹⁶¹ As of October 2011, there were 173 million blogs on the internet.¹⁶² Not all of these are likely to chronicle matters of public interest, but those that do are increasingly blurring the boundaries of professional journalism.

In Hilary Young’s empirical examination of Canadian defamation actions, she found that the percentage of defamation actions involving traditional media publications (as compared to non-journalistic publications) was significantly lower in the first decade of this century than in the 1970s.¹⁶³ Today, the defendant in a defamation action is just as likely to be an individual blogger, tweeter or troll, as an established media outlet.

And yet there are a number of potentially relevant distinctions between traditional media and public interest bloggers. First and foremost, traditional media are subject to accountability mechanisms, such as codes of ethics and press councils, lacking in citizen journalism.¹⁶⁴ These promote an expectation that traditional news stories will be accurate. Online journalism is valued, in part, for other attributes. One blogger described the distinction as follows:

*The culture of traditional journalism, with its values of accuracy, pre-publication verification, balance, impartiality, and gate-keeping, rubs up against the culture of online journalism which emphasizes immediacy, transparency, partiality, non-professional journalists and post-publication correction.*¹⁶⁵

One issue for defamation law reform is whether it is appropriate to extend the procedural advantages afforded newspapers and broadcasters in the LSA to online bloggers/citizen journalists given this new culture of digital media ethics.

2. Difficulty of Predicting Technology

Although the unique attributes of internet speech must be taken into account in designing effective defamation law reform, the LCO is also conscious that technology is evolving too quickly to predict what online communications will look like in the future. Robert Danay argues against the longtime tendency to develop defamation law principles in relation to the medium through which defamatory communications pass.¹⁶⁶ He wonders how a tort that was already out of date over a

century ago can possibly assimilate the rapid fire technological developments over the past 40 years and into the future. This is a fair point and the LCO seeks to develop recommendations that are technology neutral; recognizing that, although transmitted through technological means, online communications are still at their core about people: their relationships, rights and reputations.

Questions for Consideration

2. Can or should defamation law reform in Ontario differentiate between the following and, if so, how:
 - a. Traditional communications and internet communications,
 - b. Reputational harm on the internet and reputational harm offline,
 - c. Different forms of internet communications,
 - d. Traditional media publishers, bloggers/citizen journalists and other internet publishers
3. Are there new or emerging technologies or issues that the LCO should consider when analyzing the impact of the internet on defamation? What considerations should the LCO take into account to ensure that our recommendations are likely to remain relevant as technology changes?

D. Defamation in the Age of the Internet

In this section the LCO returns to the principles and values underlying defamation law and considers how the evolving technology and social conditions have affected them and, therefore, affected defamation law reform.

1. Freedom of Expression in the Internet Age

Technological innovation in communications necessarily influences freedom of expression, and this has never been more apparent than in the emergence of the internet era. Jack Balkin has written:

*...[T]he most important decisions affecting the future of freedom of speech will not occur in constitutional law; they will be decisions about technological design, legislation and administrative regulations, the formation of new business models, and the collective activities of end-users.*¹⁶⁷

In this section, we consider how the attributes of online expression affect how we now understand the value of freedom of expression.

i. Online Expression is Relatively Accessible

Online expression is generally less constrained by financial or physical barriers than traditional expression is. Expression can be expensive in the physical world. Low-cost methods of expression exist, but these typically have limited dissemination.¹⁶⁸ Further, the publication standards adopted by traditional media outlets restrict broad expressive opportunities for less advantaged members of society.¹⁶⁹ These individuals also face greater difficulties in accessing information from physical locations such as libraries.¹⁷⁰ Relative to traditional forms of expression, the Internet provides a low-cost method for large segments of society to express their views, engage in dialogue and access information.¹⁷¹

This has important implications for the kinds of claims that engage defamation law principles today. Traditionally, defamation law was invoked most often by plaintiffs in response to media speech or speech by others with the resources to publish by

traditional means. These cases were more likely to be “worth” the cost of a legal action. Now, in addition to traditional claims involving, for example, a public figure alleging that a news article oversteps the bounds of responsible journalism, we see more claims arising from personal disputes played out over social media. With online expression now available to a much broader range of individuals in relation to a broader range of speech, defamation law must be flexible enough to adapt to these differing circumstances.

ii. Online Expression May Be Subject to Different Social Norms

In certain situations, social norms constraining online expression may be different from those governing physical expression. Influenced in part by the ease of anonymity on the internet, online speech can be more pointed, confrontational and hyperbolic than its physical counterpart.¹⁷² Shared norms regarding acceptable expression may develop in online forums and speakers who violate these norms may face a variety of sanctions such as criticism, message blocking and account deletion.¹⁷³ However, online norms differ from location to location and can also rapidly change over time. This makes it more difficult to identify the social norms relevant to assessing reputational harm and, in turn, to apply the current legal test for defamatory meaning. Defamation law reform must allow for these changing norms and expectations.

iii. Online Expression Promotes the Search for Truth and Democratic Discourse

The Internet makes possible a “marketplace of ideas” of unprecedented size and variety which arguably enhances the search for the truth by fostering competition between a broad and diverse set of ideas and opinions.¹⁷⁴ Anonymity has the potential to strengthen these trends by encouraging individuals to express unpopular viewpoints. Online databases like Wikipedia, search engines like Google and hyperlinks all allow individuals to tap into a vast swath of information in an organised manner.¹⁷⁵ These services and activities allow individuals to better understand *existing* knowledge, a crucial component of the “search for the truth”. By facilitating access to information about government activities and laws, the Internet strengthens accountability and provides a basis for informed electoral decision-making, thereby enhancing democratic discourse.¹⁷⁶

On the other hand, the nature of online communications may also hamper the “search for truth” in a variety of ways. The speed of online communications discourages fact-checking in some circumstances.¹⁷⁷ Also, our understanding of truth and falsity is, perhaps, more complicated online. We find value in databases like peer-edited Wikipedia without any reliance of their truth. It is important in reforming defamation law, which is defined by the distinction between true and false, to consider our evolving relationship with these concepts. It is also important to recognize that there are both benefits and costs of protecting anonymous speech.

The role of online expression in promoting the values underlying freedom of expression depends on access to intermediaries such as ISPs, content hosts and search engines and, as a result, the issue of intermediary liability is a crucial one for defamation law reform. For example, risk-adverse intermediaries may be motivated to remove internet content without waiting for a ruling on its legality, thereby preemptively chilling free speech.¹⁷⁸ Therefore, the values inherent in freedom of expression are engaged in every aspect of the reform process.

iv. How Should the Law Respond to Online Expression (or Can It)?

Courts are already struggling to reinterpret free speech in the context of the internet era and, in fact, free speech has been the *cri de coeur* of many internet advocates. Some have even suggested that it is no longer possible to effectively regulate freedom of speech in the internet age.¹⁷⁹ For those who believe otherwise, that some regulation of online expression is possible and, indeed, essential, disagreement persists about whether distinct legal rules are warranted.¹⁸⁰ One school of thought holds that online expression constitutes a “brave new world of free speech”, and as such, often requires different legal analysis than does traditional expression.¹⁸¹ For instance, the Ontario Court of Appeal has held that the factors to consider in determining damages for online defamation must be examined in light of the “ubiquity, universality and utility” of the Internet.¹⁸² Similarly, the Supreme Court of Canada has warned against a “formalistic application of the traditional publication rule” to hyperlinking on the Internet, in light of the importance of the activity to the free flow of online information.¹⁸³

A second school of thought argues that online expression should not receive special legal treatment. U.S. appeals court Judge Frank Easterbrook once stated that “there was no more a “law of cyberspace” than there was a “Law of the Horse” in the days of horse-based transportation and agriculture.¹⁸⁴ While his view has not found favour in modern legal scholarship, some academics have attempted to re-focus online expression jurisprudence away from the *medium* of conveyance and towards the *content* of the expression in question.¹⁸⁵ On this view, broad generalizations about the Internet adversely impact the delicate balancing required in most legal claims involving online expression.¹⁸⁶ This issue as to the approach to be taken in reforming defamation law in the internet age is one of the questions underlying our consultations process.

Questions for Consideration

4. How is our understanding of freedom of expression interests, issues or expectations different in the internet era? What, if any, significance does this have for defamation law reform in Ontario?
5. Has our understanding of truth and falsity changed in the internet era and how should this affect defamation law reform in Ontario?

2. Reputation in the Internet Age

The internet has caused a shift in how society understands reputation.¹⁸⁷ One of the key reasons that social media sites exist and are so popular is their capacity to influence reputation; either by enhancing reputation (such as where Facebook users post information carefully designed to allow others to see them in a positive light) or harming it (such as in the case of whistle-blowers). In this sense, reputation is a core currency in which social media sites deal. Reputation is even more explicitly at stake in online review sites, such as TripAdvisor and HomeStars. The exchange of reputational information is the very purpose of these websites.

The democratizing effect of the internet also means that reputation no longer necessarily follows the social hierarchies of offline society. And internet communications may have the effect of destabilizing reputation. As it becomes possible for a much wider group to publish information about an individual, correspondingly less control may be exerted by the individual in question.

Similarly, internet communications may have the effect of decontextualizing reputation. An individual's reputation is understood within the context of the social and cultural norms of her community as well as the context of the publisher. Information about an individual that is published online and then republished may be distorted where it is stripped of this contextual information.¹⁸⁸ Also, many people have more than one identity on the internet and, therefore, more than one reputation.

The commercial value of reputation is also of increased concern in the internet age. A 2012 World Economics survey found that, on average, more than 25% of a company's market value is directly attributable to its reputation.¹⁸⁹ Corporations view reputational risk as a strategic business issue; many of them consider it the most important strategic risk that they face:

*“...[A] company's reputation should be managed like a priceless asset and protected as if it's a matter of life and death, because from a business and career perspective, that's exactly what it is.”*¹⁹⁰

And it is not just corporations whose reputation has a commercial or economic value. Anyone starting a career or even looking for a job must be concerned for building their “brand”.

Once reputational harm has occurred on the internet, there are several options for controlling or minimizing that harm short of bringing a legal action. The first step is often asking the website owner to remove the defamatory content according to its posting guidelines. This is the preferred option for many youth.¹⁹¹ Individuals may also proactively manage their online reputation on social media sites by controlling their privacy settings or using a fake identity, for example.¹⁹² An online reputation management industry has developed to offer expert service in proactively managing one's online reputation as well as in managing reputational harm once it occurs.

Many businesses also proactively manage their online reputation by monitoring social media (known as "social listening") and by using technology such as analytical and brand monitoring tools.¹⁹³ Businesses also increasingly rely on online reputation management services as a means of combating defamatory or other harmful statements online. The strategy is often to create positive and linkable counter-stories so that harmful links are buried far down the list of search results and, thus, are unlikely to be viewed by users.

The prediction is that, as more of the population becomes internet-savvy and the next generation of internet users grows up, we, as a society, will become more sophisticated in understanding the reputational risks posed by social media and will develop more effective ways of managing our reputations on an ongoing basis.¹⁹⁴ To the extent that this prediction is realized, legal tools like defamation will be relatively less in demand.

3. Privacy in the Internet Age

Social norms about privacy have fundamentally shifted with the rise of social media sites such as Facebook and Twitter as well as ever-present smartphone cameras.¹⁹⁵ The online publication of behaviour once considered to be private also has a consequential impact on reputation. The problem is described by Daniel Solove in his book *The Future of Reputation*:

*We're heading toward a world where an extensive trail of information fragments about us will be forever preserved on the Internet, displayed instantly in a Google search. We will be forced to live with a detailed record beginning with childhood that will stay with us for life wherever we go, searchable and accessible from anywhere in the world. This data can often be of dubious reliability; it can be false and defamatory; or it can be true but deeply humiliating and discrediting... This record will affect our ability to define our identities, to obtain jobs, to participate in public life, and more.*¹⁹⁶

Furthermore, the distinction between the concepts of privacy and reputation has become blurred in the online world. Reputational harm may equally occur as a result of the publication of true statements (violating privacy interests) and the publication of false (defamatory) statements. For the individual harmed, as well as the end user reading the statements online, the truth or falsity of the statements may be somewhat beside the point. The statement may take on a life of its own:

*On the internet, we constantly live in a twilight between fact and fiction. We're often exposed to information that we can't entirely trust. In a world where it is difficult to separate the true from the false, rumor and defamation can readily spread, and the Internet can be used as a powerful tool to launch malicious attacks on people and ideas.*¹⁹⁷

There are several legal categories that have developed to address forms of online harm involving a blend of reputation and privacy interests. Cyberbullying, hate speech, breach of privacy, online harassment and the right to be forgotten among others, may engage similar interests to those protected by defamation law. Plaintiffs who have suffered reputational harm as a result of online speech are unlikely to understand or care about the particular legal label lawyers use in describing their case. The role of privacy in defamation law must be understood in this broader context.

Questions for Consideration

6. Are reputational or privacy interests, issues or expectations different in the internet age? If so, what significance does this have for defamation law reform in Ontario?



IV. THE LEGAL TEST FOR DEFAMATION

The legal test for establishing defamation at common law requires that the plaintiff prove that the impugned statement:

1. has defamatory meaning,
2. refers to the plaintiff and
3. was published to a third party.

It is also required that the statement be false but this is presumed at first instance. The defendant may make out the defence of justification by establishing the statement's truth. It is also presumed that the statement caused the plaintiff to suffer reputational harm unless the defendant shows otherwise.

The defendant has an array of possible defences. Where the statement was made in the public interest, the defences of qualified privilege, fair comment or responsible communication may apply.

These elements of the legal test for defamation were, for the most part, established long ago. They are subject to an extensive body of case law interpreting and applying them to countless cases over a period of centuries. The Law Commission of Ontario (LCO) does not propose to delve into the nuances of specific elements of the tort. Rather, for the purpose of this project, we have two main concerns: the overall balance struck by these elements between protection of reputation and freedom of expression, and how successfully these elements operate in the context of internet communications

The legal elements of defamation all contribute to a balance between plaintiffs' interests in protection of reputation and defendants' interests in freedom of expression. Like a game of pick-up-sticks, it is difficult to isolate one element of the test for the purpose of legal reform without throwing off that balance. For example, the strict liability nature of defamation and the presumptions of harm and falsity lower the threshold for establishing the tort. They allow plaintiffs to make out their case without the need to prove that the defendant acted negligently or that harm actually occurred as a result of the defamatory words or that the defamatory words were false. Conversely, defences such as qualified privilege and fair comment were developed to counterbalance this low threshold. They protect defendants in circumstances where the societal interest in free expression outweighs protection of reputation and liability is deemed inappropriate.

The constitutional entrenchment of the right to free expression in ss. 2(b) of the *Charter* has led the Supreme Court of Canada to reassess the balance struck by these elements of the tort.¹⁹⁸ In the last decade, the Court has strengthened the defence of fair comment and created a new defence of responsible communication for the express purpose of shifting the balance to provide additional protection to freedom of expression.

In this project, the LCO is examining the balance between reputation and free expression once again. In considering whether any particular element of the tort of defamation should be reformed, the impact of any such reform on the balance struck by the elements of the tort as a whole must be considered.

The LCO's other focus in this chapter is on the operation of the elements of the tort as applied to the new forms of defamatory communications made possible by the internet. Defamation law was already viewed as irrational long before the introduction of the *Charter* and the advent of the internet.¹⁹⁹ Over the past forty years, the social and technological changes that have taken place have further destabilized this already unstable body of law. This might be thought to be ideal conditions for reforming the legal test for defamation. On the other hand, the substantive elements of the legal test are long-settled. It may not be practical or advisable to change them or for Ontario's defamation law to deviate substantially from the law in other common law provinces and countries. In this chapter, the LCO reviews the various elements that make up the legal test for defamation and considers how the development of the *Charter* and the internet should affect any potential reforms to the law.

A. Defamatory Meaning

There has been debate about the definition of defamation and the determination of defamatory meaning almost as long as the tort has been in existence. In this section we consider if the legal test for defamatory meaning should be reformed in light of the distinctions between traditional communications and internet communications. The internet has been called “...a rough and tumble medium, where language is rude, strong, confrontational and hyperbolic.”²⁰⁰ If our social expectations about the nature of online speech have changed, the issue is whether the legal determination of what amounts to defamation should change accordingly. Thus far, this position is not reflected in Ontario case law.²⁰¹ The LCO also considers whether this may be an area for legislative reform or whether the common law should continue to evolve incrementally. In an area of law that turns so closely on the nuances of language and the context in which that language is received, incremental reform through case law may be best suited to addressing these issues.²⁰²

1. A Contextual Test

Traditionally, a statement is defamatory where it “...tends to lower a person in the estimation of right-thinking members of society, or to expose a person to hatred, contempt or ridicule.”²⁰³ This test for defamatory meaning is expressed in the language of an era long past.²⁰⁴ More recently, in *Grant v. Torstar [2009]*, McLachlin C.J., rephrased the test by replacing the phrase “right-thinking” with “reasonable”.²⁰⁵ This test is more appropriate in a modern pluralistic society, but still involves some degree of social prejudice in assessing what segment of the community is to be considered reasonable.²⁰⁶

Applying the test for defamatory meaning is complicated. Courts are to discern defamatory meaning from “all the circumstances of the case, including any reasonable implications the words may bear, the context in which the words are used, the audience to whom they were published and the manner in which they were presented.”²⁰⁷ Contextual factors that the court may take into account include the audience’s pre-publication knowledge and opinion of the plaintiff and of the defendant, the subject matter to which the words relate, relevant circumstances of the audience, the form of publication and whether the words are opinion or fact.²⁰⁸

In practice, contextual factors tend to be underused in the case law. Courts often infer defamatory meaning in the case of a disparaging statement.²⁰⁹ Hilary Young argues that courts should be looking beyond the bare disparaging meaning of the statement and considering factors indicating the actual presence or absence of reputational harm. This would allow courts to adjust the balance between protection of reputation and freedom of expression on a case by case basis without requiring any change to the law.²¹⁰

2. The Online Context

Some commentators have suggested that the fact that a disparaging statement was published online may be the most important contextual factor of all.²¹¹ This view is premised on a belief that internet communications are qualitatively or inherently different than print communications. The question for stakeholders in this project, therefore, is whether online communications appropriately fit within the traditional doctrinal framework or whether a new framework is necessary. There is no doubt that internet communications are often experienced differently than print communications, but are these differences compatible with the existing common law rules or do they warrant reform?

This question was raised by the Ontario Court of Appeal in *Baglow v. Smith [2012]* when it ordered that a defamation claim arising from an incendiary political blog proceed to trial.²¹² The resulting trial decision, *Baglow v. Smith [2015]*, is the leading Ontario case on defamatory meaning in the context of internet communications.²¹³ The case involved a dispute between two well-known political bloggers. The defendant posted a blog stating that the plaintiff was “one of the Taliban’s most vocal supporters”. The question for the court was whether, in the context of the case, the post would tend to cause reasonable people to think less of the plaintiff.

The trial judge appointed an expert on social media, culture and communications, Dr. Greg Elmer, to assist the court. In his testimony, Dr. Elmer highlighted significant differences in how political communications are understood online and offline:

- a. Blogs are archived. Unlike traditional media in which new articles are self-standing, new blog posts build on earlier posts. This accumulation provides context for readers.
- b. Bloggers have different expectations of social media and blog platforms than of mainstream media. Blogging is possible 24/7 and posts and comments appear in near-real time. The relative speed of these communications promotes personal and “life-like” interactions.
- c. Mainstream media are regulated by professional practices, ethics and guidelines which provide a degree of accountability to which bloggers are not subject. Many blogs are moderated but moderators tend to limit their interventions.
- d. Bloggers often hyperlink to documents, pictures and comments that provide context for their posts. This enables bloggers to focus their posts more on opinion, argument or sarcasm.
- e. Bloggers are well aware of and expect the confrontational nature of online political communications. They expect humour, sarcasm, irony and sharper language. This expectation is less entrenched among mainstream media commentators. (More personal attacks, known as “flame wars”, are not necessarily expected in the blogosphere.)
- f. Bloggers are able to measure their popularity and influence in the comments posted in response to their blogs.
- g. Readers interpret blogs based on factors such as the structure of the blogs and boards, their ownership, moderation, mission and history, reputation of the bloggers in question and the broader partisan environment (elections etc.).
- h. The anonymity of a blogger may be relevant to readers in assessing his or her credibility; however, pseudonymous bloggers develop credibility online over time just as named bloggers do.
- i. Blogs tend to be short to reduce the amount of “scrolling down” that readers must do and because of the fast pace of exchanges between the blogger and readers.
- j. Readers expect that bloggers will respond when their opinion is challenged in a comment.

Notwithstanding this evidence, in the end the trial judge held that the words on the blog were defamatory. She expressed concern for the consequences if internet speech were to be exempted from defamation law:

[I]t seems to me that taking the submissions of the CCLA and the defendants to their logical conclusion, little, if anything, could be found to be defamatory on partisan weblogs and message boards.²¹⁴

It is arguable that the decision in *Baglow v. Smith* gave insufficient consideration to the unique nature of internet communications and, in particular, the “rough and tumble” nature of the blogosphere. Although this case was decided after Young’s call for a more contextual application of the defamatory meaning test, it might be speculated that this was exactly the kind of case she had in mind. As she notes, “[t]he right-thinking person is...known to possess common sense, to be informed and not to be naïve.”²¹⁵

On the other hand, the decision in *Baglow v. Smith* is consistent with the Supreme Court’s decision in *WIC Radio v. Simpson* [2008] where a statement by a radio host comparing an anti-gay activist to Hitler was held to be defamatory.²¹⁶ It is easy to understand why the trial judge felt obliged to follow the result in *WIC Radio*. Although there may be obvious differences between political blogs and mainstream media, the differences between political blogs and shock radio shows are not as easily apparent.²¹⁷

In an article responding to the *Baglow v. Smith* decision, Spencer Keys suggests that the internet is more than a new medium for the publication of familiar messages to familiar audiences.²¹⁸ He argues that the internet allows for a more democratic form of dialogue in which each blog, video, message board response and social media post is subject to the perspectives of and modification by others. This provides a form of internal accountability for internet communications that is not available in traditional communications. According to Keys, the judge's concern in *Baglow v. Smith* for the experience of blog readers does not take into account the "moral community" of the blog where readers may respond with their own posts, or may search the internet for additional material to put the blog in context. Nor does it account for the fact that these readers only come into contact with the blog because they actively choose to participate in the discussion board.²¹⁹

There are also other distinctions between traditional media communications and internet communications that may be relevant in assessing defamatory meaning. For example, the context surrounding an online statement may not be apparent to the reader where the statement has been transmitted far from the community in which it was originally uploaded. Internet communications are easier to misunderstand because they may be forwarded or retweeted out of context. A comment intended as a friendly joke may be misunderstood to be an attack. Abbreviations such as "LOL" and emoticons were created for just this purpose.

To date, Canadian courts have not accepted the argument that blogs are inherently different than traditional communications for defamation law purposes. If Dr. Elmer's list of differences were to be accepted as being materially significant for determining defamatory meaning, the existing contextual test may need to be adapted to defamatory comments in the blogosphere. This gives rise to at least two issues. One issue is how effective are accountability mechanisms inherent in internet communications in preventing irresponsible and harmful communication. Assuming that some form of legal regulation over defamatory blogs remains desirable, another issue is what considerations should be taken into account in developing a new test that respects the unique characteristics of the blogosphere but continues to provide an appropriate deterrent to online reputational harm? What seems clear is that internet communications are increasingly the new terrain of defamation battles and that the Canadian courts – and potentially legislatures – are very likely to be confronted with these issues more frequently in the future.

Questions for Consideration

7. Would legislative reform of the test for defamatory meaning be appropriate or should this area of defamation law continue to evolve incrementally through case law? If a new test were adopted, what elements should be part of this test?



B. The Common Law of Publication

A pivotal element in establishing defamation is that the defamatory content has been published to a third party. Although there is an extensive body of case law on publication dating from the 16th century, the legal principles remain confused. One reason for this has been the need for the law to keep pace with evolving technologies involved in the publication process, from the printing press to the internet. The degree of human involvement in the transmission of defamatory material has ebbed and flowed over this time and the concept of involvement has become key to establishing someone as a publisher.

In this project, we are focusing on how the traditional law of publication has adapted to the internet era. So far, the courts have sought to apply existing principles to online defamation cases by relating internet publications back to traditional

forms of publication. One question in this project is whether this approach is sufficient or appropriate. Are online publications a new variant of offline publications to which the traditional test should be adapted? Or are online publications distinct enough that the traditional test should be reevaluated?

The law distinguishes between primary and secondary publishers. Primary publishers “have or can readily acquire full knowledge of the publication’s content before its release and are able to control and, if necessary, prevent dissemination of such content.”²²⁰ Secondary publishers, in contrast, have a relative lack of knowledge or control over the content. In this chapter, we review the traditional law of publication as it relates to both primary and secondary publishers, and then examine the application of these principles to internet publications by *primary* publishers. In chapter VII below, we will look at *secondary* liability for online publications as part of a broader discussion of internet intermediaries and content regulation on the internet.

1. Existing Categories of Publication

i. Primary Publication and Publication by Omission

In Canadian law, defamatory words are published where they are conveyed (brought to someone’s attention) to at least one third party and are heard and understood by the third party.²²¹ The onus is on the plaintiff to prove that publication has taken place but, traditionally, this has been a relatively low threshold.²²² Although the plaintiff need not prove (at first instance) that the defendant intended to cause her harm, she must establish that the defendant intended to or negligently published the words in issue (although not necessarily knowing that they were defamatory).²²³

Liability in defamation may also extend to those who are found to have published defamatory words by omission.²²⁴ For example, a property owner may be liable for failing to remove a defamatory poster from its property where it not only has knowledge of the defamatory statement but, by its inaction, can be said to have adopted or endorsed it so as to become a publisher.²²⁵

ii. Secondary Publishers and the Defence of Innocent Dissemination

The law becomes more confusing when applied to secondary publishers who play a “peripheral role” in conveying defamatory words authored by someone else.²²⁶ There is a myriad of cases where secondary publishers such as book stores, printing press operators, distributors and others have been held to be publishers of material passing through their hands even where they did not know of its content.²²⁷ According to the Supreme Court in *Crookes v. Newton* [2011], “the breadth of activity captured by the traditional publication rule is vast.”²²⁸ In fact, the very concept of a secondary publisher is legally problematic. Imposing liability on secondary publishers can be said to undermine the protection of freedom of expression since these publishers will often have “little stake in the content of what has been published” and, therefore, little incentive to protect it in the face of litigation.²²⁹

There have long been efforts to rationalize the law as applied to secondary publishers. The defence of innocent dissemination was created in common law to ease the burden of liability from secondary publishers who did not know of the defamatory content passing through their hands and were not negligent in their lack of knowledge.²³⁰ In England, this defence was incorporated into the 1996 *Defamation Act* and transformed into a regulatory regime for website operators in the 2013 *Defamation Act*.²³¹ However, Canadian law continues to rely on the defence as it exists in common law.

Although termed a “defence”, there is uncertainty as to whether innocent dissemination limits a secondary publisher’s liability for defamation or whether it negates the defendant’s status as a publisher in the first place. If the former, it is a defence and the onus lies on the defendant. Otherwise, the onus is on the plaintiff to establish that the defendant is a publisher.²³² This ongoing confusion in the case law illustrates the instability in these legal doctrines and suggests that they may not offer a solid foundation for legal principles addressing modern secondary publishers like internet intermediaries.

To add to the confusion, the concepts of publication by omission and secondary publication overlap to some extent. In their LCO commissioned paper, Emily Laidlaw and Hilary Young untangle these by drawing 3 distinctions. First, the onus is on the

plaintiff to establish that one is a publisher by omission where it has adopted a defamatory statement already published. In contrast, secondary publishers are already publishers and the onus is on the defendant to establish the innocent dissemination defence. Second, knowledge of specific defamatory words is necessary to be a publisher by omission whereas it is sufficient to establish general knowledge of the existence of a libel in order to disprove an innocent dissemination defence. Third, publishers by omission are publishers after the fact whereas secondary publishers are involved in the primary publication.²³³ Again, the conceptual overlap here combined with fine distinctions and inconsistent case law raise the issue whether reform is necessary to build coherent principles around liability for publication generally and internet publication in particular.

In their paper, Laidlaw & Young argue that the publication element of defamation should be redefined for all communications (online and offline).²³⁴ They would dispense with the distinction between primary and secondary publishers and import a requirement that specific words be deliberately communicated. Only so-called primary publishers would be legally responsible for defamation under this model and the category of publication by omission would be eliminated. We discuss this possibility further in the chapter on Internet Intermediaries.

2. Evidence Needed to Establish Primary Publication

To establish that defamatory material was published, it is necessary to prove that the material was received and understood by a third party. In the case of newspapers and broadcasts, the plaintiff is assisted by a statutory presumption of publication in the Ontario *Libel & Slander Act* (LSA).²³⁵ No such presumption exists for online material. In Ontario, one court reasoned that the very nature of the “worldwide web” gave rise to a presumption of publication for materials posted online.²³⁶ However, such a presumption was firmly rejected by the Supreme Court in *Crookes v. Newton* absent statutory reform.²³⁷

Instead, courts have attempted to adapt traditional principles on what is necessary to establish publication. In her concurring decision in *Crookes v. Newton*, Deschamps J. listed the following factors as relevant in determining whether an inference of online publication should be made:

- whether the link was user-activated or automatic
- whether it was a deep or a shallow link
- whether the page contained more than one hyperlink and, if so, where the impugned link was located in relation to others
- the context in which the link was presented to users
- the number of hits on the page containing the hyperlink
- the number of hits on the page containing the linked information (both before and after the page containing the link was posted)
- whether access to the Web sites in question was general or restricted
- whether changes were made to the linked information and, if so, how they correlate with the number of hits on the page containing that information
- evidence concerning the behaviour of Internet users.²³⁸

While internet analytics involving subscriber numbers, hit counts and IP address identification will be useful in establishing online publication, the fact remains that these numbers do not establish how many (if any) users actually read the material.²³⁹ Courts have inferred publication in the case of bulletin boards or online forums but only where people have registered as members or in analogous circumstances.²⁴⁰

In England, courts have determined that internet publication must be to a substantial number of people in the jurisdiction, rather than just one individual as in pre-internet law. This was deemed important to adequately preserve freedom of expression as protected in the *Human Rights Act, 1998*.²⁴¹

The upshot is that the case law does not currently provide clear guidance on what evidence will be necessary to establish online publication. The question is whether the case law should be permitted to develop incrementally or whether a statutory presumption of online publication in certain circumstances is advisable.

3. Where Does One Publication End and the Next Begin?

In Ontario, each communication of defamatory content is a separate publication giving rise to a separate cause of action. However, it is not entirely clear in the internet context what amounts to a single publication under existing law. In one Australia decision, traditional principles were applied to hold that separate letters and materials on the same website constituted separate publications where the parts of the site had different substantive identities, forms and purposes.²⁴² However, more recent decisions have called into question this approach and suggested that hyperlinked articles may form part of the same publication in certain circumstances.²⁴³

The difficulty here in applying traditional legal analysis to the online context may be attributed to a broader trend in internet technology. Kevin Kelly, in his book, *The Inevitable*, applies the term “flowing” to describe the phenomenon in which tangible units of information pre-internet (for example, encyclopedias) are transformed online into a fluid collection of content connected by hyperlink and subject to constant change (for example, Wikipedia).²⁴⁴ To the extent this is the case, there may continue to be problems applying pre-internet concepts like publication to the new internet reality.

4. Liability for Republication

The concept of republication can also be challenging in the internet context. Traditionally, an original publisher is not responsible for republication of a defamatory statement unless the republication was authorized or intended, or was in some other way the natural and probable result of the original publication.²⁴⁵ Instead, responsibility lies with the republisher. For example, an author who quotes a defamatory statement from an earlier book is responsible for the defamation as a republisher.

In the internet context where material may be copied, shared, linked or forwarded exponentially, this traditional approach to republication raises the spectre of perpetual or unbounded liability.²⁴⁶ A controversial decision in this respect is *Pritchard v. Van Nes* [2016].²⁴⁷ A British Columbia court held that the comments, shares and reacts resulting from defamatory Facebook posts were themselves separate instances of defamation. Then the court went further and held the original author liable for these third party comments on the basis that “the nature of the medium, and the content of [the] initial posts, created a reasonable expectation of further defamatory statements being made”.²⁴⁸

The facts of the case are not unusual. The defendant posted several comments to her Facebook page implying that her neighbour might be a pedophile. These comments were automatically transmitted to the Facebook pages of her 2059 Facebook “friends”. Thirty-six of the defendant’s friends commented on her posts with their own critical statements. One of her friends copied her posts and forwarded them to the school where the plaintiff was employed as a teacher. Although the defendant deleted her own posts less than 30 hours later, the second generation posts were still visible on her friends’ timelines. The Court described this ripple effect as the posts having “gone viral”.²⁴⁹

*In my view the nature of Facebook as a social media platform and its structure mean that anyone posting remarks to a page must appreciate that some degree of dissemination at least, and possibly widespread dissemination, may follow.*²⁵⁰

This reasoning arguably deviates from established principles of third party liability in tort law generally and, to this extent, illustrates a poor fit between traditional defamation principles and internet communications.²⁵¹ In a blog review of the case, Emily Laidlaw discusses the need to clarify the law of publication and the differences between intermediaries and content providers. She also points out an important distinction between traditional communications and social media communications that is not accounted for in our current body of defamation law:

*We do have a real problem with mobs online and this stretches beyond defamation law to privacy, harassment, revenge pornography, and other abuse and bullying. In my work I have sought to interrogate the nature of this mob to address the kind of law reform needed to tackle the serious harm suffered by the victims. However, this requires a larger wholesale reform of the law.*²⁵²

The analytical confusion illustrated by the *Pritchard v. Van Nes* decision again suggests that the traditional principles of republication may require reconsideration in the internet defamation context.

5. The Single Publication Rule

The phenomenon of ubiquitous internet republication also has procedural implications. Traditionally in defamation law, every communication of a defamatory statement founds a separate cause of action.²⁵³ This means that a new limitation period begins to run in relation to each publication or republication of the statement. It ensures that a plaintiff is able to sue in relation to all reputational harm arising from republication as well as the original publication. This “multiple publication rule” continues to be the law in Ontario.²⁵⁴

The multiple publication rule made sense in pre-Internet days where it was more difficult to republish a defamatory statement (publishing another newspaper article for example). It was still possible for the parties to have a relatively clear idea of when the limitation period began to run and when it would expire. However, the rule is increasingly nonsensical in the internet context where republication of defamatory statements can be virtually endless and impossible to control or even to track, and the first publication is permanently available. In these circumstances, pinning the limitation period to each republication of the statement renders the limitation period virtually meaningless.

The US was the first jurisdiction to address this problem by adopting a single publication rule.²⁵⁵ This rule provides that a plaintiff has a single cause of action in defamation which arises at the first publication of an alleged defamatory statement, regardless of how many copies of the publication or republication occur. The result is that a single limitation period applies and a defendant’s scope of liability is contained to any republications occurring within that single limitation period. (Republication occurring beyond the limitation period may still be relevant for the purpose of assessing damages.)

More recently, the UK has followed suit by adopting a statutory single publication rule in section 8 of the *Defamation Act, 2013*.²⁵⁶ A key question for stakeholders in this project is whether Ontario should also adopt a single publication rule as a means of containing the potential scope of liability for defamation arising from multiple and continuous publications of the same statement.

There are strong policy reasons in favour of a single publication rule. The rationale for the rule was articulated by a US court and quoted by the Ontario Court of Appeal as follows:

*The single publication rule prevents the constant tolling of the statute of limitations, effectuating express legislative policy in favour of a short statute of limitations period for defamation. It also allows ease of management whereby all the damages suffered by a plaintiff are consolidated in a single case, thereby preventing potential harassment of defendants through a multiplicity of suits. ... Finally the single publication rule is more consistent with modern practices of mass production and widespread distribution of printed information than the multiple publication rule.*²⁵⁷

Perhaps the most important argument in favour of a single publication rule is that it reduces the chill on freedom of expression. Under the current multiple publication rule, online publishers are exposed to the risk of a claim indefinitely so that they are motivated to pull controversial material from the internet regardless of whether or not it may be said to be defamatory.

There was significant support for the UK single publication rule leading up to the introduction of the UK Act and this continues to be expressed elsewhere. In the Northern Ireland consultation process, the uniform view was that the single publication rule was “significant and highly desirable”.²⁵⁸ In the recommendations resulting from that process, Andrew Scott noted that the “serious harm” threshold (discussed below) may render the single publication rule in the *Defamation Act, 2013* of symbolic importance only but that it should be adopted in Northern Ireland nonetheless.²⁵⁹

However, the countervailing concern with a single publication rule is that it may unduly limit the plaintiff's recovery for reputational harm occurring as a result of republication. In Ontario, the rule would preclude a plaintiff from bringing an action more than three months (the current limitation period for libels in newspapers and broadcasts) from the date of an original defamatory publication regardless of how many times it has been republished subsequently.²⁶⁰ This could act as a significant constraint on plaintiffs who may only appreciate the reputational harm occurring as a result of the defamation over time.

This concern has led several commonwealth courts to reject the single publication rule.²⁶¹ In *Shtatf v. Toronto Life* [2013], the Ontario Court of Appeal reasoned that it would be unfair to plaintiffs to apply a single publication rule across different media of communication. For example, a defamatory print publication may not attract enough attention to merit the plaintiff bringing a lawsuit. However, later republication of the statement on the internet may be much more widely circulated. If the plaintiff were to be bound by the limitation period in relation to the original statement, he or she may well be barred from bringing an action at this later date. Therefore, any proposal to move to a single publication rule must address this problem of determining if and when the rule should be applied across different mediums of communication.

Different jurisdictions have dealt with this problem in different ways. The UK *Defamation Act, 2013* provides that the single publication rule will not apply in respect of subsequent publications that are materially different from the original publication.²⁶² Material difference is defined in part in relation to the level of prominence the subsequent publication is given and the extent of the subsequent publication.

The Canadian Media Lawyers Association (CMLA) addressed this issue of material difference in their submissions to the Joint Committee on the Draft Defamation Bill.²⁶³ They recommended that the proposed provision clarify that material difference does not include archives or databases, hyperlinks or access through new technologies.

It is important to note here that what lies in the balance is the *time period* during which an action may be brought in relation to a defamatory statement. Therefore, a possible compromise would be to adopt a single publication rule but to increase the length of the limitation period during which the plaintiff may sue. Ontario's three month period for claims involving newspaper and broadcast defamation seems particularly restrictive compared to the standard limitation period for claims against other publishers (two years).²⁶⁴ Some other provinces have also adopted a two year limitation period, although others have shorter periods. See the chart of limitation periods across Canada in chapter V below. In the UK, the *Limitation Act* provides for a one year limitation period.²⁶⁵ And, to the extent that an extended limitation period might offer a solution to the republication dilemma, it is also important to consider the current discord between the three month limitation period in the LSA applicable to libels in newspapers and broadcasts and the two year limitation period that applies to all other defamation actions.

Questions for Consideration

8. Should Ontario adopt a statutory definition of "publisher" that would require an intentional act of communicating specific words? (Also see chapter VII below.)
9. Should the statutory presumption of publication in newspapers and broadcasts be extended to some forms of internet publication?
10. Should the multiple publication rule be replaced with a statutory single publication rule, as in the UK? If so, what limitation period should be applicable to defamation claims?



C. Strict Liability

Strict liability is a hallmark of defamation law in Canada. Once a plaintiff proves the three elements of the tort – that the words were defamatory, they were about the plaintiff and they were published – the defendant is liable unless he or she can raise a defence. A lack of intent on the part of the defendant to injure the plaintiff is not a defence.²⁶⁶ Strict liability contrasts with the classic model in tort law which requires a finding of negligence before liability will be imposed.

Historically, defamation developed as a strict liability tort because of the difficulty that plaintiffs had in proving defamatory meaning and measuring reputational harm. The presumptions of falsity and harm (discussed in the following sections) were also developed to assist the plaintiff in meeting these hurdles. The result is that the legal threshold to establish defamation is quite low. The burden of proof rests largely with the defendant to rebut the presumptions of falsity and harm. These elements of the tort intentionally emphasize protection of the plaintiff's reputation over the defendant's right to free expression. An important question is whether this is consistent with the constitutional protection of freedom of expression and freedom of the press in ss. 2(b) of the *Charter*.

In the *Charter* era, Canadian courts have reassessed the elements of the tort and shifted the balance to provide further protection for free expression. However, they have achieved this through the "back door". Instead of raising the threshold for establishing defamation by imposing a fault requirement or reversing the presumptions of falsity or harm, courts have promoted free expression by strengthening defences that are available to rebut legal responsibility for defamation once established.²⁶⁷ The burden of proof remains largely with the defendant.

In the next few sections, the LCO considers whether these legal elements of the tort of defamation combine to strike an appropriate balance between protection of reputation and freedom of expression. In this section, we begin by asking stakeholders to consider whether strict liability for defamation remains appropriate in the *Charter* era. This discussion must be considered in conjunction with the following sections and, particularly, the section on defamation defences.

1. Rationales for Strict Liability

The most common rationale for strict liability in defamation law is the need to establish strong legal protections for reputation. This rationale makes most sense in the context of a broad societal interest in protecting reputation. Where only private interests are at stake, it is arguable that liability should not be imposed in the absence of harmful intent or negligence.²⁶⁸

From a law and economics perspective, there are important differences between a strict liability and fault-based regime:

- A strict liability regime may incentivize publishers to unduly restrict their speech in order to avoid the risk of lawsuits and damage awards. This effect is sometimes called "libel chill".
- A fault-based regime may encourage potential victims of defamation to take precautions against harm by restricting their public activities.
- The social welfare function of a fault-based law requires the courts to assess the standard of care to reflect social benefits arising from defamatory speech in addition to social losses. Under a strict liability standard, courts need to assess social losses only.
- Court and litigation costs may be lower in a strict liability regime than a fault regime because legal proceedings may be shorter and less complex.²⁶⁹

This analysis helps to uncover some of the implicit policies underlying the law. However, it does not necessarily suggest that strict liability is preferable to fault or *vice versa*. Strict liability risks a chilling effect on publishers and fault risks a reverse chilling effect on citizens wishing to participate in the public sphere. Both may impinge on society's interest in public life.

2. The Fault-Based Alternative: Quebec and United States

In contrast to Ontario, both Quebec and the United States have adopted a fault-based approach to defamation, but for different reasons. In Quebec, the fault-based standard for defamation is consistent with its civil law tradition where all torts are classified as “civil wrongs”. In the United States, however, the strict liability standard was overruled by the United States Supreme Court as inconsistent with the protection of free speech enshrined in the First Amendment of the US constitution.²⁷⁰

i. Quebec – The Civil Law Model

Quebec civil law does not have a specific action for defamation. Instead article 1457 of the Quebec *Civil Code* governs general civil liability.²⁷¹ To establish a civil wrong, the plaintiff must prove, on a balance of probabilities, the existence of an injury, a wrongful act and a causal connection between the two.²⁷² In the context of defamation, the plaintiff must first establish that the impugned statement is defamatory. This analysis proceeds much as it does in common law. However, the second requirement, the commission of a wrongful act, deviates from common law. The plaintiff must establish that the publisher acted either maliciously (the material was published with intent to ridicule or humiliate the victim), or negligently (the material was published without intent to harm but through negligence or carelessness). In assessing negligence, courts look to the objective standard of the reasonable person assessed contextually.²⁷³ This is a highly adaptable mechanism. For example, a court may consider whether the publisher checked the facts before publishing, the nature of the forum in which the statement was published and the time and opportunity the publisher had to tell the full story.²⁷⁴

There is no presumption of falsity in civil law and proving the truth of a published statement is not always an automatic defence. For example, a journalist can be sued for damage to reputation even if what they published was truthful, if they failed to adhere to professional standards and harm to reputation results.²⁷⁵

The negligence standard in Quebec is sufficiently contextual and flexible that it has overridden many of the defences typically available in common law jurisdictions.²⁷⁶ For example, the decision of the Supreme Court of Canada in *Prud'homme v. Prud'homme [2002]* resulted in the practical disappearance of the fair comment and qualified privilege defences.²⁷⁷ According to Joseph Kary, if all defamatory comments are evaluated according to a standard of reasonableness, special defences are “unnecessary and redundant” because “the leeway they allow in special cases is already built into the general liability standard”.²⁷⁸

ii. United States – The First Amendment Model

In the US, strict liability in defamation law was eliminated in 1974 with the United States Supreme Court decision in *Gertz v Robert Welch Inc.*²⁷⁹ The court expressed concern that a rule of strict liability requiring the media to guarantee the accuracy of factual assertions may lead to “intolerable self-censorship”. It held that the First Amendment requires protection of “some falsehood in order to protect speech that matters”.²⁸⁰

Another unique feature of US defamation law is that public officials must meet an even higher legal standard in order to be successful in a defamation case. The US Supreme Court decision of *New York Times Co v Sullivan [1964]* established that public officials must prove actual malice in order to be successful in a libel claim against the media.²⁸¹

Both *Gertz* and *Sullivan* turned on the First Amendment right to free speech. The First Amendment has resulted in US defamation law evolving very differently than in Canada and it is difficult to assess the US fault standard on its own without taking into account the distinct history and wording of the US First Amendment. Canadian defamation law reform must be based on Canadian legal traditions and constitutional principles.

3. Recent Developments Towards a Fault Analysis in Defamation Law

The possibility of importing a fault standard into Ontario defamation law may not be as radical as one might think. The reality is that Ontario and other common law jurisdictions have already introduced elements of a fault-based system into the law. For example, the SCC’s responsible communications defence, adopted in *Grant v. Torstar [2009]*, has arguably

transformed defamation from a strict liability tort to a fault-based tort in respect of public interest communications, broadly defined.²⁸²

In *Grant v. Torstar*, the Court concluded that a lack of responsibility (fault) requirement is necessary to balance society's interest in public interest reporting against a measure of accountability imposed on the media and others reporting in the public interest.²⁸³ A defendant may establish responsible communication in reference to a series of factors: the seriousness of the allegation; the public importance of the matter; the urgency of the matter; the status and reliability of the source; whether the plaintiff's side of the story was sought and accurately reported; whether inclusion of the defamatory statement was justifiable; whether the statement was legitimate reportage; and other relevant considerations.²⁸⁴

Hilary Young has noted that the Court's responsibility analysis in *Grant v. Torstar* is not significantly different from a reasonableness analysis.²⁸⁵ She suggests that a focus on the reasonableness of public interest communications would be appropriate in the context of non-media communications and she proposes a more general application of fault principles in order to accommodate a broader scope of communications.

Eric Descheemaeker also argues for a negligence standard in defamation law on the basis that there is no longer any reason (if there ever was) to distinguish between the protection of reputation and interests at stake in negligence-based torts:

*[R]eputation is... no different in nature from such other rights as bodily integrity or property: these are all valuable interests, which deserve protection if they are injured. By and large, the law has settled for centuries on culpa (fault, negligence) as the standard of liability required for legal redress to be triggered when rights are violated; and there does not seem to be any good reason why reputation should be treated either more or less favourably.*²⁸⁶

In her paper commissioned by the LCO, Karen Eltis argues that the civil law fault-based test for defamation is particularly suited to the internet age.²⁸⁷ Civil law's focus on the contextual reasonableness of the impugned expression would bring some much needed contextual analysis to internet speech. She suggests the adoption of responsible communication "as a standard of conduct rather than as a mere defence".²⁸⁸

Therefore, a question for this project is whether there may be reason for expanding the analysis in *Grant v. Torstar* beyond public interest communications by importing a responsibility (or reasonableness) analysis into all defamation cases.²⁸⁹

A separate question is whether a fault standard, if imported into Ontario law, should continue to be assessed as part of the defence, with the burden of proof on the defendant. The alternative would be to shift the burden to the plaintiff to prove fault as an element of establishing defamation at first instance, as is the law in Quebec and the United States. There is some interest in this possibility. Eltis suggests that a reverse onus requiring the defendant to assert reasonableness in her defence is an "undue burden" on *Charter* rights.²⁹⁰ Descheemaeker suggests that the concept of "reasonable truthfulness", whether or not limited to matters of public interest, might be the basis of a new negligence-based tort of defamation.²⁹¹

It is possible that the strict liability nature of our existing body of defamation law has caused it to be unduly weighed down by categories.²⁹² As our society becomes more diverse and new forms of internet communications continue to evolve, a more contextual approach may be desirable. The LCO seeks input on the possibility that redefining the tort as a fault-based tort would allow for a more contextual approach able to accommodate continued social and technological change into the future.

Questions for Consideration

11. Should a fault requirement be introduced into the tort of defamation in Ontario? If so, at what stage of the analysis should fault be considered?



D. Presumption of Falsity

Underlying the common law tort of defamation is a concern for the truth or falsity of the impugned statement. Only false statements can be defamatory in law on the rationale that a reputation will be protected by law only where it is deserved.²⁹³ The traditional rule was articulated in *Reynolds v Times Newspapers Ltd.* [2001]:

*'[T]he law will not permit a man to recover damages in respect of an injury to a character which he does not, or ought not, to possess. Truth, is a complete defence. If the defendant proves the substantial truth of the words complained of, he thereby establishes the defence of justification.'*²⁹⁴

Distinct from the requirement of falsity as an element of the tort of defamation is the issue of who should bear the onus of establishing truth or falsity. Currently, falsity is presumed unless the defendant raises a defence of justification. This reverse burden of proof is well entrenched, dating from the 16th century.²⁹⁵ The presumption protects plaintiffs against the burden of having to prove falsity. It can be difficult to “prove a negative” and, in cases of egregious reputational harm, requiring claimants to prove the falsity of the allegation may be practically impossible, therefore precluding them from receiving any remedy.²⁹⁶ The presumption was also thought to “inculcate a spirit of caution in publishers” against publishing statements that they could not prove to be true.²⁹⁷

The presumption of falsity is one of several signals that defamation law strikes the balance between protection of reputation and free expression closer to the protection of reputation end of the spectrum. The question is whether the presumption of falsity is outdated in the *Charter* era and the internet era.

The presumption of falsity is unique to the common law tradition.²⁹⁸ In contrast, in civil law, a finding of defamation is not precluded simply because the impugned statement may be true.²⁹⁹ According to Karen Eltis, in civil law countries, “the question is not whether the defamatory statements are true or false but rather whether expressing them under the circumstances was reasonable according to an objective standard”.³⁰⁰ Therefore, “a lie reasonably told in the circumstances does not meet the defamation threshold, whereas truth, *unreasonably* disclosed publically, thereby causing harm to reputation does.”³⁰¹

More recently, the common law requirement of falsity has come under pressure as the law has begun to recognize and protect privacy interests. The importance here is that privacy “rights” may apply irrespective of whether a statement is true or false. A published statement about someone may cause them significant reputational harm regardless of whether the statement is true or false. If the information is false, the action properly lies in defamation. If the information is true, an action may lie under one of a handful of privacy torts that have been recognized in various jurisdictions. In either case, the court must undertake the task of striking an appropriate balance between protection of reputation, privacy interests and the *Charter* value of freedom of expression.³⁰² See chapter VI for further discussion of the overlap between defamation and privacy.

Eltis argues that defamation law’s categorical focus on truth or falsity cannot be sustained in the internet age. This is because even truthful information on the internet can present, “a distorted view of an individual resulting from the decontextualization of tidbits of information [that] is more readily feared than the perpetuation of lies”.³⁰³ She further argues that defamation law’s onus on the defendant to prove truth is “disproportionate” and “unduly frustrates” freedom of

expression.³⁰⁴ Instead, Eltis recommends a civil law contextual analysis of the circumstances in which the statement was made as the standard for assigning liability.

Questions for Consideration

12. Is the presumption of falsity in defamation law still appropriate? Should the law require plaintiffs to prove falsity?
13. Is defamation law's emphasis on the distinction between true and false communications still appropriate in the internet age?



E. Presumption of Harm

In addition to the presumption of falsity, traditional defamation doctrine also presumes that harm occurs from a defamatory publication. Like the presumption of falsity, the presumption of harm is a reverse onus so that it requires the defendant to prove the absence of harm. The presumption of harm is said to be justified by the practical difficulty of proving reputational harm. Taken together, the presumptions of falsity and harm provide very strong legal protections for reputational interests.

The presumption of harm, like the presumption of falsity, is controversial. The presumption is unique in tort law and was questioned as long ago as 1812 in a leading English decision.³⁰⁵ It has also come under significant attack in the modern context.³⁰⁶

One problem with the presumption of harm is that it shifts the law's focus from establishing the *actual* harm of a defamatory statement to a consideration of *potential* or *theoretical* harm. In so doing, the presumption of harm appears to be inconsistent with the traditional objective of tort law to limit a person's damages to the harm they actually suffered. If the plaintiff were required to establish *actual* harm, this artificial exercise of generalizing how a group thinks about the impugned statement would be avoided.³⁰⁷ As David Rolph has stated:

*By focusing on the objective tendency to damage a reputation, rather than the actual damage, a defendant may avoid liability for actual damage to reputation, or a plaintiff might be compensated in respect of damage not actually done. The disparity between the way defamation law protects reputations and the way reputations are actually experienced heightens the artificiality of defamation and undermines its legitimacy.*³⁰⁸

It was thought for a time that the presumption of harm in the UK had been reversed by the serious harm threshold introduced in the UK's *Defamation Act, 2013*.³⁰⁹ The serious harm threshold attempts to discourage trivial claims by providing that a statement is not defamatory unless its publication "has caused or is likely to cause serious harm to the reputation of the claimant." Where the claimant is "a body that trades for profit", harm is not "serious" for the purpose of the threshold unless it "has caused or is likely to cause the body serious financial loss".³¹⁰ The new threshold was intended to assess the seriousness of reputational harm taking into account the seriousness of the defamatory meaning conveyed by the words used and the context in which they were used.³¹¹

The serious harm threshold has shifted the balance between reputation and free speech towards protection of free speech.³¹² Certainly, the introduction of the threshold raised the bar for claimants considering bringing a defamation action.³¹³ However, the England Court of Appeal recently held that the serious harm threshold has not reversed the traditional presumption of

harm.³¹⁴ The court reasoned that the presumption of harm persists but that “there is no presumption, at law, of *serious* damage in a libel case.”³¹⁵

The LCO is considering whether Ontario should reconsider the presumption of harm and/or introduce a serious harm requirement in order to raise the bar for bringing defamation actions in this province. This issue requires a careful consideration of the balance between protection of reputation and freedom of expression in light of all the issues raised in this chapter.

Like the presumption of falsity, a contemporary analysis of the presumption of harm requires the LCO to consider if, or how, the issue is affected by the nature of internet communications. The original rationale for the presumption of harm was the practical difficulty of proving harm to something as ephemeral as reputation. However, there is some suggestion that this may be less of a problem in cases of internet defamation. Internet analytics may make it possible to assemble empirical evidence of harm or the absence thereof in a way that is not possible in the offline world.³¹⁶ Although an intriguing idea, there seems to be little discussion of this at present.

Questions for Consideration

14. Is the presumption of harm in defamation law still appropriate?

15. Should Ontario adopt a serious harm threshold similar to that adopted in the UK *Defamation Act, 2013*?

F. Defences to Defamation

Defamation defences is an area where the courts have been active in law reform and specific LCO recommendations may be unnecessary. On the other hand, Ontario defamation defences are largely common law and there is some question as to whether they should be codified as has partly occurred in the UK *Defamation Act, 2013*. In this section, we briefly review the defences as elements in the broader balancing act between protection of reputation and free expression. We ask stakeholders to consider whether the defences require further reform or codification.

1. Justification

Under the common law defence of justification, the defendant has the burden of rebutting the presumption of falsity and proving the substantial truth of the “sting” of the impugned statement as a matter of fact.³¹⁷ Section 22 of the LSA supplements the defence, providing that justification may succeed against one defamatory allegation even if it does not succeed against other distinct defamatory allegations, where these remaining allegations do not, on their own, materially injure the plaintiff’s reputation.³¹⁸

In the UK, the *Defamation Act, 2013* abolished the common law defence of justification and replaced it with a statutory variant known as the defence of truth. Section 2 of the Act provides that “[i]t is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.”³¹⁹ This section essentially codifies the common law.³²⁰

One of the drawbacks to the defence of justification is the difficulty that media defendants may have in proving the truth of their story by the time a defamation claim goes to trial. In *Grant v. Torstar*, the court noted that “[t]he practical result of the gap between responsible verification and the ability to prove truth in a court of law on some date far in the future, is that the defence of justification is often of little utility to journalists and those who publish their stories.”³²¹

2. Qualified/Absolute Privilege

The common law defence of privilege protects certain occasions of privilege during which the defendant has a legal, social or moral interest or duty to communicate information to a recipient and the recipient has a corresponding interest or duty to receive it.³²² The rationale behind the defence is that “false and defamatory expression may sometimes contribute to desirable social ends.”³²³ The various categories of absolute and qualified privilege that have developed in common law are intended to capture those circumstances where it is socially desirable to protect communications without regard to potential reputational harm.

Occasions of qualified privilege have the effect of creating a presumption that the defendant communicated in good faith with an honest belief in the truth of the communication. No liability for defamation will lie unless the plaintiff is able to establish malice or the defendant exceeded the scope of the privilege.³²⁴ Malice means that the defendant has taken improper advantage of the qualified privilege attaching to the statement. The defendant may not have believed the statement to be true when she made it or may have acted through spite, vengeance or some other improper motive.³²⁵

Section 3 of the LSA creates a statutory qualified privilege in relation to fair and accurate reports in newspapers or broadcasts of certain public proceedings, meetings and decisions of various public interest associations.³²⁶ This privilege does not apply where: (a) it is proved that the report was made maliciously; (b) the report is “blasphemous, seditious or indecent”; (c) the report is “not of public concern” or its publication is “not for the public benefit”.

The common law defence of absolute privilege recognizes that there are certain narrow circumstances in which communications should be entirely immune from liability. Section 4 of the LSA supplements the defence of absolute privilege in relation to fair and accurate reports of court proceedings where published contemporaneously with such proceedings.³²⁷

The application of the qualified privilege defence to cases of internet defamation has proved problematic, with some courts presuming that publication on the internet amounts to publication to the world, thereby disentitling defendants from relying on qualified privilege.³²⁸ One question for stakeholders is whether this defence needs to be re-examined in the context of internet communications.

3. Fair Comment

The defence of fair comment protects statements of opinion (in contrast to statements of fact) from liability for defamation. The rationale for this longstanding defence was recently explained by Andrew Scott:

*Hence, the underlying principle would appear to be that the airing of one's view is not the same as asserting a fact, and – importantly – it is not treated as such by those to whom it is communicated. Where facts only are stated, truth is asserted; readers are not invited to demur. Where defamatory opinion is concerned, provided the inferential nature of the assertion is clear and the facts on which the opinion is based made available, the possibility of reasonable readers being misled by the expressed viewpoint does not arise in the same way.*³²⁹

Expressions of opinion may include any “deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof.”³³⁰ A defendant claiming fair comment must establish that the comment is: (a) on a matter of public interest; (b) based on fact; (c) recognizable as comment; (d) capable of being honestly held on the proven facts; and (e) not actuated by express malice.³³¹ The common law is supplemented by sections 23 and 24 of the LSA.³³²

The defence of fair comment was adapted for the *Charter* era by the Supreme Court of Canada in *WIC Radio v. Simpson [2008]*.³³³ The Court expanded the defence by changing the traditional requirement that the opinion be one that a “fair-minded” person could honestly hold, to one that “anyone could honestly have expressed” on the proven facts.³³⁴ As Binnie J. put it, “[w]e live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones.”³³⁵

In the UK, s. 3 of the *Defamation Act, 2013* has abolished the common law defence of fair comment and replaced it with a new defence of honest opinion. The statute eliminates the public interest requirement, broadening the potential application of the defence, and it omits any reference to malice as limiting the availability of the defence.³³⁶ It also loosens the requirement that there be a factual basis for the comment.³³⁷

The UK *Defamation Act, 2013* defence is significantly broader than the fair comment defence adopted by the SCC in *WIC Radio*. The question is whether Ontario should similarly revisit this defence, particularly in respect of how the defence operates in the context of internet communications. For example, in *Spiller v. Joseph [2010]*, the UK Supreme Court noted the problem of online comments that may be taken out of context so that the underlying facts are no longer apparent:

*Today the internet has made it possible for the man in the street to make public comment about others in a manner that did not exist when the principles of the law of fair comment were developed, and millions take advantage of that opportunity. Where the comments that they make are derogatory it will often be impossible for other readers to evaluate them without detailed information about the facts that have given rise to the comments.*³³⁸

4. Responsible Communication

The new defence of responsible communication, adopted by the Supreme Court of Canada in *Grant v. Torstar [2009]*, had been quietly under construction in other jurisdictions for some time.³³⁹ The problem was widely recognized – the comparative lack of legal protections for “responsible” media stories published in the public interest.

In *Grant v. Torstar*, the Supreme Court of Canada concluded that a defence was required “that would allow publishers to escape liability if they can establish that they acted responsibly in attempting to verify the information on a matter of public interest.”³⁴⁰ The Court held that this was necessary to respect freedom of expression and support “the public exchange of information that is vital to modern Canadian society”, while maintaining protection for reputation.³⁴¹ In a departure from UK case law, the Court created a defence that is not limited to media but is generally available to “anyone who publishes material of public interest in any medium.”³⁴² The defence requires the defendant to prove that the publication was on a matter of public interest and that the defendant acted responsibly in trying to verify the accuracy of the statement as determined by reference to a list of factors.³⁴³

In her study of cases applying the new defence, Hilary Young argues that the factors for establishing responsible communication set out in *Grant v. Torstar* make most sense in the context of journalism and that they may need to be modified in relation to different forms of internet communications.³⁴⁴ A responsible “tweet” may look different from a responsible “blog”, which, in turn, may look different from a responsible news article. Young suggests that a preferable test for the non-media context would be to replace the concept of responsibility with reasonableness. A court might ask, was it reasonable to publish the defamatory words given the risk that they are false, the degree of harm that would result if they are and the benefits of publishing the words notwithstanding the risk? In Young’s view, a reasonableness standard would be more flexible and better suited to the complexity and range of communications in the internet age.

Questions for Consideration

16. Should the common law defences for defamation be reformed or codified as has occurred in the UK *Defamation Act, 2013*?



G. Court Remedies for Defamation

The goal of a defamation lawsuit is to vindicate the plaintiff's reputation. Traditionally, this has been achieved with a damages award. Alternative remedies such as injunctions, retractions and apologies are available only in limited circumstances. Recently courts appear to be stretching traditional remedial doctrines to provide effective relief for internet defamation. To date, however, the use of alternative remedies has been "haphazard" and their availability beyond the context of traditional media unclear.³⁴⁵

Some commentators suggest that alternative remedies should be more widely available.³⁴⁶ Defamation claims are often not about money and remedies such as a retraction or a correction and apology may be more suitable in the context of internet defamation.

In this section, the LCO considers traditional and emerging remedies that may be awarded in a lawsuit between a complainant and the publisher of the defamation. In the online context, a complainant's most effective remedy may be an order against a third party intermediary hosting the defamatory content. We discuss remedies against intermediaries briefly here. However, the responsibility of these intermediaries in relation to defamatory content on their platforms is discussed in greater detail in chapter VII below.

1. Traditional and Emerging Defamation Remedies

i. Damages

Damages are traditionally the primary remedy for defamation. General damages are intended to compensate for reputational and social damage; vindicate the plaintiff's good name; and account for the distress, hurt and humiliation caused by the defamatory comments.³⁴⁷ Aggravated damages may be awarded where the defendant's conduct has been particularly malicious or highhanded.³⁴⁸

Reputational harm is not easily translated into monetary terms. Therefore, the quantum of a general damages award is measured in relation to a number of factors, including "the plaintiff's position and standing, the nature and seriousness of the defamatory statements, the mode and extent of publication, the absence or refusal of any retraction or apology, the whole conduct and motive of the defendant from publication through judgment, and any evidence of aggravating or mitigating circumstances".³⁴⁹

The trend for defamation to occur online gives rise to at least two sets of questions about the ability or appropriateness of damages to vindicate a plaintiff's reputation.

First, the internet has added layers of complexity to the measure of damages for defamation. A defamatory blog may travel far and fast through the internet. It may be repeated out of context, thereby lending it more (or less) credibility than it deserves. Even if the author removes a defamatory blog, its "digital echoes" may be publicly accessible indefinitely.³⁵⁰ On the one hand, these digital echoes may make it more difficult to mitigate reputational harm. On the other hand, they may make it easier to assess reputational harm with the use of tools such as sentiment analysis algorithms.³⁵¹

In an early internet defamation decision, the Ontario Court of Appeal held that damages awards in internet defamation cases must be sensitive to the medium's "ubiquity, universality and utility".³⁵² This statement has been used by subsequent courts to justify higher damage awards for online defamation on the basis that the plaintiff's reputation has suffered relatively greater damage.³⁵³ The concern here is whether this reasoning could lead to damage awards high enough to chill free expression.³⁵⁴

A second issue with damage awards in the internet context is their effectiveness to achieve vindication of the plaintiff's reputation. The adequacy of damages as a remedy for defamation has long been debated but the nature of internet defamation has provided fresh fuel to this debate.³⁵⁵ A key concern is that the message conveyed by a damages award (that the defamatory statement was groundless) may not attach to the defamatory statement remaining in public view. For

example, it may be possible for defamatory posts to continue to appear high up in a list of search results while corrections, apologies or reports of trial judgments are buried several pages in. As David Potts puts it, there may be an “indelible reputational stain in cyberspace even when the individuals [a]re completely exonerated”³⁵⁶ Potts refers to this phenomenon as “temporal indeterminacy” and it is yet another factor suggesting that the remedies available in defamation actions in the 21st century may need reconsideration.

ii. Injunctions

*[I]t might fairly be said that many prospective libel plaintiffs would be content to simply silence their defamer, even if it meant foregoing damages. And almost all would, if it were possible, turn back the clock so that the offending words were never published. In short, most plaintiffs would, if possible, choose an injunction over an action.*³⁵⁷

In spite of the limitations of damages as an award for defamation, and the relative benefits of early injunctive relief, interlocutory injunctions are exceptional in defamation cases. In order for an interlocutory injunction to be granted, it must be clear that the impugned comments are defamatory and no defence of justification will succeed, so that a jury with a contrary verdict would be considered perverse.³⁵⁸ Limiting injunctive relief to “the rarest and clearest cases” prevents “prior restraint” and is consistent with the right of freedom of expression.³⁵⁹

The same stringent test for injunctive relief has been found to be applicable in the context of internet defamation by anonymous bloggers.³⁶⁰ However, there is some suggestion that courts will apply the test liberally where necessary to prevent anonymous posters from circumventing the court process.³⁶¹ For example, in *Canadian National Railway Co. v. Google Inc. [2010]*, the Court held that the test was met where anonymous bloggers had posted clearly defamatory material on a blog hosted by Google and did not file a defence in the proceeding. The Court directed the interim injunction at Google, as well as the bloggers, and ordered that the weblog be taken down.³⁶²

In contrast to interlocutory injunctions, permanent injunctions may be granted after a finding of liability where (1) there is a likelihood that the defendant will continue to publish the defamatory statements despite the finding of liability or (2) an award of damages is unlikely to be enforceable due to the defendant’s impecuniosity.³⁶³ For example, in *Warman v. Fournier [2015]*, a jury held two operators of a political message board liable for forty-one defamatory statements made about the plaintiff. The defendants were found to have acted with malice and they had refused to apologize or issue a retraction. In these circumstances, the court awarded a permanent injunction restraining the defendants from publishing any statement against the plaintiff held in the action to be defamatory.³⁶⁴

A further consideration is that injunctive relief in defamation actions may be ineffective because the order may not be enforceable. In contrast to defamation in the physical world, a defendant posting defamation online is less likely to be within the court’s territorial jurisdiction. Traditionally, courts have been reluctant to grant injunctions in these circumstances. However, again, there is some indication in the case law that courts will interpret traditional principles liberally in order to craft effective remedies in internet defamation cases. For example, in *Barrick Gold v. Lopehandia [2004]*, the Ontario Court of Appeal upheld an injunction even though the defendant was resident in another province. It held that the “highly transmissible nature” of the defendant’s defamatory internet posts should be relevant in deciding to grant a permanent injunction. The court reasoned:

*The courts are faced with a dilemma. On the one hand, they can throw up their collective hands in despair, taking the view that enforcement against such ephemeral transmissions around the world is ineffective, and concluding therefore that only the jurisdiction where the originator of the communication may happen to be found can enjoin the offending conduct. On the other hand, they can at least protect against the impugned conduct re-occurring in their own jurisdiction.*³⁶⁵

More recently, in *Google Inc. v. Equustek Solutions Inc. [2017]*, the Supreme Court of Canada upheld an injunction against Google requiring it to de-index certain webpages from all of its domains worldwide.³⁶⁶ The order was made in the context

of an intellectual property dispute where the defendant was hiding in cyberspace while using the internet to sell the plaintiff's product as its own. Frustrated from obtaining a direct legal remedy against the defendant, the plaintiff instead sought injunctive relief against Google Inc., requiring it to remove the defendant's website from all Google search results worldwide.³⁶⁷ In deciding to uphold the injunction, Abella J. reasoned:

*The problem in this case is occurring online and globally. The Internet has no borders — its natural habitat is global. The only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google operates — globally.*³⁶⁸

The decision in *Equustek* is not directly applicable to the internet defamation context since the Supreme Court was applying the lower threshold for injunctive relief applicable to tortious conduct that does not engage freedom of expression considerations.³⁶⁹

Where a similar issue arose in an internet defamation case, a British Columbia court refused to grant an injunction for the de-listing of Google search results. In *Nielema v. Malamas* [2015], the plaintiff lawyer was the subject of a sustained defamation campaign by a former client. Google had voluntarily de-listed 146 webpages from Google.ca but the lawyer sought an order extending the de-listing beyond the territorial jurisdiction.³⁷⁰ The Court rejected the request on jurisdictional grounds, holding that it was "reluctant to make an order that cannot be complied with".³⁷¹ The Court was referring to the US statutory immunity for intermediaries under s.230 of the *Communications Decency Act* and the *SPEECH Act* that prohibits US courts from enforcing foreign judgments that would violate the First Amendment.³⁷² The Court declined to make a de-listing order that would not be enforceable in the United States.

Therefore, in spite of the decision in *Equustek*, the practical value of de-listing as a remedy for online defamation is limited by geographical considerations.³⁷³ Nevertheless, *Equustek* and *Barrick* are both signals that courts are straining to adapt traditional principles to offer effective injunctive relief in the internet era.

iii. Retractions, Apologies and Other Novel Remedies

The LCO's research and preliminary consultations suggest that many defamation plaintiffs are not looking for a monetary award so much as they hope to set the record straight. As a result, there is increasing pressure on the law and courts to recognize a broader range of remedies better suited to vindicating reputation and to the unique attributes of internet defamation.

One remedy directed at vindicating reputation is a court-ordered retraction.³⁷⁴ In *Warman v Fournier* [2014], the plaintiff requested that the defendants be ordered to publish a retraction on the homepage where the defamatory comments were posted.³⁷⁵ The judge held that there is jurisdiction to make such an order since it is akin to a mandatory injunction. However, the judge declined to grant the remedy where damages were sufficient to vindicate the plaintiff's reputation and the defendant's failure to apologize or retract was built into the damages award.

Retractions are arguably well-suited to defamation actions because they are directed at vindicating a plaintiff's reputation in the very forum where the reputational harm occurred. However, court-ordered retractions do have limitations as a remedy. They are not considered appropriate in the context of opinions where "public interest is better served by continuing debate through rebuttal rather than by compulsorily bringing it to an end" and it may be seen as "invidious to be forced to recant opinions still honestly held".³⁷⁶ For this reason, commentators have typically recommended against court-ordered retractions.³⁷⁷

Two new remedies for defamation were introduced into the UK *Defamation Act, 2013*. Section 12 provides that courts may order an unsuccessful defendant to publish a summary of the judgment.³⁷⁸ This is similar to a retraction and can be a valuable remedy where the parties are unable to agree on the wording of an apology or correction. Section 13 provides express authority for the court to order that internet intermediaries remove content found by the court to be defamatory.³⁷⁹

UK's *Defamation Act*, 1996 also provides for some novel remedies where a plaintiff is successful in a summary disposal motion.³⁸⁰ These include a declaration, correction and apology. This last remedy is noteworthy. Courts do not generally have jurisdiction to order an apology as a remedy for defamation.³⁸¹ The rationale is, first, that it violates freedom of expression and, second, that it is impossible to ensure that a mandated apology is genuine and sincere. However, some argue that an apology can be a simple and effective remedy for online defamation, offering a means of exerting "a practical degree of civilization and responsibility" over social media networks without discouraging their use.³⁸²

A unique internet remedy proposed but rejected in the UK reform process was a flag to be attached to online content where its truth is being contested in court.³⁸³

Alastair Mullis and Andrew Scott have suggested that the UK remedial reforms did not go far enough and that a wider range of "discursive" remedies would better serve to vindicate reputation, promote freedom of expression and further the public's access to information on matters of "collective importance".³⁸⁴ They argue:

*What most libel claimants want is a swift correction or a right of reply. They do not want to become embroiled in expensive and lengthy litigation. The most effective way of vindicating a person's reputation is to ensure that the truth is aired, and misrepresentations corrected. Most responsible defendants should be content to publish a swift correction when the truth is pointed out to them... Where the truth is contested, a right of reply can assuage both parties' sense of righteousness.*³⁸⁵

The issue for the LCO is whether, or how, traditional defamation remedies should be adapted to defamatory internet communications.

2. Limitations of Court Remedies for Internet Defamation

The discussion above raises further questions about the suitability of these or any court-based remedy to redress internet defamation. There are at least four points here.

First, the publicity or notoriety surrounding a defamation action may actually worsen a plaintiff's reputation, even if the plaintiff is successful in court. This is because public knowledge of the court action may disseminate the defamatory remarks to an even wider audience (through social media for example). As one commentator queried:

*How long is it going to take before lawyers realize that the simple act of trying to repress something they don't like online is likely to make it so that something that most people would never ever see... is now seen by many many more people?*³⁸⁶

On the other hand, court judgments may not be public enough to effectively counteract the reputational harm caused by online defamation. The publicity (if any) surrounding a successful defamation lawsuit will not always have the same reach as a social media post for example.³⁸⁷ There is no direct mechanism within the court system to publicize the result, although some of the novel remedies discussed above would have this effect. At the very least, plaintiffs are put in the position of having to publicize successful judgments themselves or hope that the judgment attracts media interest.

Third, the court process is arguably too slow to effectively remedy online defamation. This is not a problem specific to internet defamation, although it may be exacerbated in the context of internet defamation. In 1979, the Australia Law Reform Commission found that the court system was not achieving the aim of defamation law to repair and remedy reputational harm:

*The effective restoration of reputation depends on speed. The true position must be established before the lie hardens into fact in the public mind, while the context is fresh. Yet speed is singularly lacking.*³⁸⁸

The ALRC provided examples of defamation actions lasting up to five years before final judgment. Similar examples exist in the Ontario context.³⁸⁹

Fourth, a court action may be a too formal, punitive process for some forms of internet communication or defamation. On the one hand, the accessibility and durability of expression on the internet can “allow the law to regulate the types of comments and conversations to which it previously had only limited application.”³⁹⁰ A foolish comment made to one’s friends or family members would historically not have attracted significant attention, let alone legal liability. Today, the same comment posted online can rapidly gain notoriety and give rise to a defamation suit. Are legal remedies and court processes the appropriate response to these communications? Or would “legalizing” these communications detract from the “freedom to converse, to take risks and make mistakes in everyday life.”³⁹¹

In these circumstances, the LCO is considering whether alternatives to court actions may be more effective remedies for internet defamation. For example, the internet allows the opportunity for contemporaneous and accessible rebuttals. This is an internet-specific factor that arguably should be taken into account in assessing damages.³⁹² The plaintiff may post a rebuttal to the accusations or may perhaps refrain from taking action in order to contain reputational damage.³⁹³

In chapter VIII below, we discuss possible alternatives to court actions for resolving online defamation. For immediate purposes, we ask stakeholders to consider what reforms might be made to the available remedies in a court action for defamation in order to ameliorate some of the limitations we have discussed here.

Questions for Consideration

17. What principles should be applied in adapting damages awards and injunctions to internet defamation?
18. Should Ontario adopt legislation creating new remedies for defamation that more directly vindicate the reputation of a successful plaintiff and are responsive to the nature of internet defamation?

H. Distinction between Libel and Slander

Defamation is a generic term encompassing two historical torts – libel and slander. Libel provides a cause of action in relation to false statements that are published in a manner of some degree of permanence such as writing or print. Broadcasts are also statutorily deemed to be covered by libel. Slander relates to false statements that are spoken or otherwise impermanent and a cause of action generally arises only where the plaintiff can prove special (actual measurable) damages.

The distinction between libel and slander did not develop until the late 17th century and came under criticism as early as 1812.³⁹⁴ It has been regularly denounced by law reformers and commentators ever since.³⁹⁵ Even back in 1975, the Faulks Committee argued that the distinction no longer made sense in a technological era of sophisticated forms of communications.³⁹⁶

Most provinces and territories in Canada have, indeed, abolished the distinction.³⁹⁷ The Uniform Law Conference of Canada has also eliminated the distinction in its Uniform Defamation Act.³⁹⁸ Only Ontario, British Columbia and Saskatchewan have maintained the distinction in their legislation.³⁹⁹

Overseas, the distinction has been abolished in Australia.⁴⁰⁰ However, it was not addressed in the UK *Defamation Act, 2013* and, therefore, remains the law in England and Wales.⁴⁰¹ The *Defamation Act's* maintaining of the distinction between libel and slander has been criticized given other provisions in the Act.⁴⁰²

Ontario's LSA modifies the common law distinction between libel and slander to some extent. The Act eliminates the traditional requirement to prove special damages for slander actions where the alleged slander concerns:

- words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by the plaintiff;⁴⁰³ or
- slander of title, slander of goods or other malicious falsehood.⁴⁰⁴

Subject to these statutory refinements, courts continue to observe the distinction in Ontario.⁴⁰⁵

The policy argument for maintaining the distinction between libel and slander seems to be a concern that the courts may be flooded by “petty ‘garden wall’ slander actions” absent a special damages requirement.⁴⁰⁶ The contrary view is that the high cost of litigation likely precludes this possibility. There are also concerns about the ability to prove the ephemeral content of a slander. The more certainly one can prove what was published - by producing the written record, for example - the more safely the law may estimate or presume the reputational harm that has resulted.

A more forward-looking question is whether internet communications have created a new rationale for maintaining the distinction. Some commentators argue that social media speech, although permanent in many senses, has a degree of informality that is evocative of slander. Accordingly, it has been argued that defamation actions involving social media statements should be limited to cases where the plaintiff can prove special damages.⁴⁰⁷ This idea was implicitly rejected by the New Zealand High Court in *Karam v. Parker [2014]*.⁴⁰⁸ The court acknowledged the informality and immediacy of blog communications but reasoned that their permanence still exposes the plaintiff to the same risk of harm and should therefore be subject to the same legal test as traditional print communications. Also, unlike gossip in the physical world, electronic communications are easier to prove from an evidentiary perspective since they tend to leave hard-to-erase traces.

Question for Consideration

19. Should Ontario continue to maintain the distinction between libel and slander?
If so, should internet communications be considered to be libel or slander?



V. ACCESS TO JUSTICE AND THE COURT PROCESS

A. Introduction

As a law reform agency with a mandate to promote access to justice, the LCO is particularly concerned about the access to justice concerns underlying many of the issues in this project. Access to justice is a complex issue that is raised both in the traditional court-based setting and non-traditional dispute resolution settings operating beyond the court system. The consultation paper looks at access to justice from both these perspectives. This chapter is focused on court procedures and rules that govern defamation dispute resolution. Chapter VIII will examine alternative mechanisms for remedying defamation disputes.

The rules that govern court-based litigation are largely, but not exclusively, set out in the *Libel and Slander Act (LSA)* and various court rules.⁴⁰⁹ In theory at least, this means that the rules governing access to court-based dispute resolution are equally applicable to everyone and that dispute resolution is in the public realm. However, current statutory and court-based systems were largely designed to resolve disputes between traditional defamation plaintiffs (public figures) and traditional defamation defendants (media companies, newspapers and broadcasters). Today, with the democratization of information brought about by the internet, we see a much broader range of individuals as well as companies seeking resolution of defamation disputes.

Even in the absence of internet-related issues, our traditional court system is under considerable strain in Ontario and elsewhere due to high litigation costs and lack of timely resolution of disputes resulting in challenges to access to justice.⁴¹⁰ These concerns may be exacerbated in defamation litigation which is often very expensive due to both its substantial legal complexity and the complex factual evidential record needed to either establish or defend a defamation claim. And the parties may have distinct goals and interests in defamation proceedings. For example, in addition to the goals of all litigants (and the public at large) in ensuring procedural fairness, just outcomes, timely resolution of matters, and cost-effective dispute resolution, plaintiffs in defamation proceedings may want procedures that promote the restoration of their defamed reputation.

In addition to these concerns, internet-based defamation disputes often raise unique legal and access to justice issues that challenge the traditional paradigm and current statutory and court rules for resolving defamation claims. For example, internet-related defamation claims often raise complex jurisdictional issues or questions about whether (or how) to unmask anonymous defendants, if not both.

The result is that there are several procedural aspects of defamation actions that may create significant barriers to access to justice for both plaintiffs and defendants. Notwithstanding the range and complexity of substantive problems with the tort of defamation, many stakeholders in our preliminary interviews felt that the most pressing need for reform was with the process through which defamation claims are currently resolved.⁴¹¹ In fact, it has been suggested that “the key imbalance” in defamation law is “not that in favour of reputation over free speech or vice versa...[but rather] that between litigants who can afford to defend their publications or to vindicate their reputations, and those who cannot.”⁴¹² In Ontario, these issues are exacerbated by the current LSA which is widely recognized to be out of date and inadequate to regulate online defamation claims.

In this project, the LCO’s goal is to reexamine several of these key procedural issues from first principles, that is, by considering how the nature of defamation claims have changed in the internet age and identifying procedures that best achieve access to justice in this new environment. As part of this exercise, we will reconsider the provisions of the LSA and recommend reforms, either to specific provisions or more far-reaching reform to the legislation as a whole.

In this chapter, we focus on defamation proceedings in the courts. However, as will be seen below, there are inherent limitations to the court process as a means of achieving justice in certain cases and no amount of reform is likely to remediate these in practice. At the same time, the internet has made possible other more informal dispute resolution techniques that

are already in operation and that must be taken into account as alternatives to the traditional court-centric paradigm of justice. In chapter VIII we expand our perspective and consider possible extra-judicial approaches to regulating defamation in the internet age.

B. Cost and Complexity of Defamation Proceedings

Before turning to some of the unique procedural elements of defamation litigation in Ontario, it is important to look at the process as a whole and consider the extent to which the cost and complexity of defamation actions may be compromising access to justice.

1. Backdrop: Civil Justice Reform in Ontario

Defamation proceedings are just one example of a civil justice system that is widely considered to be failing Canadians. In 2013, the National Action Committee on Access to Justice in Civil and Family Matters acknowledged the obvious; that the civil justice system is “too complex, too slow and too expensive”.⁴¹³ According to the Action Committee’s Roadmap for Reform of Civil Justice, only 6.5% of legal problems ever reach the formal justice system.⁴¹⁴ In the 2016 World Justice Project Rule of Law Index, Canada ranked 12th out of 36 high income countries, with accessibility and affordability of civil justice being a particular weakness relative to other measures.⁴¹⁵

Whereas justice reform was once primarily focused on the formal justice system, the Action Committee recommended a more holistic, user-focused system:

*Our current formal procedures seem to grow ever more complicated and disproportionate to the needs of the litigants and the matters involved. Everyday legal problems need everyday solutions that are timely, fair and cost-effective. Procedures must be simple and proportional for the entire system to be sustainable. To improve the system, we need a new way of thinking that concentrates on simplicity, coherence, proportionality and sustainability at every stage of the process.*⁴¹⁶

The LCO suggests that this is helpful advice even in the context of defamation actions that typically lie on the technical end of the spectrum of civil proceedings. In this project, we invite stakeholders to question traditional assumptions about defamation proceedings and consider possible ways to simplify procedure and reduce costs while maintaining a fair process overall.

2. Cost and Complexity of Defamation Proceedings

Among civil actions generally, stakeholders have advised us that defamation proceedings are considered to be particularly costly and complex for the parties and the justice system generally

Reasons for this are complicated. The substantive complexities of defamation law and the procedural complexities of pleading a defamation action contribute to high costs and create barriers to access to justice. And where the impugned statement is online, costs may be even higher. For example, the ease with which online statements may be replicated means that one original defamatory statement may spread into a unwieldy mass of communications that a plaintiff must attempt to identify in a pleading.⁴¹⁷ Any procedural innovations to improve access to justice in defamation proceedings must take into account the unique nature of the cause of action.

A further reason for the complexity of defamation claims is that these tend to be more about vindicating reputation than remedying a monetary loss. Therefore, plaintiffs may be motivated to pursue litigation where it does not make financial sense to do so, and the costs of bringing the action can very quickly eclipse the amount of money claimed.⁴¹⁸ Also, personal animosity between the litigants may lead to a particularly contentious discovery and pre-trial process and longer trials.⁴¹⁹ In addition, there are examples of recalcitrant defamers maintaining a stubborn online campaign against a plaintiff regardless of court proceedings, injunctions, bankruptcy or even contempt proceedings.⁴²⁰

3. The Goal of Proportionality

The principle of proportionality has developed as a touchstone to reigning in excessive procedural steps and attendant costs in civil litigation. An aspirational principle, proportionality is reflected in the Ontario *Rules of Civil Procedure* and was endorsed by the Supreme Court of Canada in *Hryniak v Maudlin* (2014).⁴²¹ The Court held that summary judgment rules must be interpreted “broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims”.⁴²² Although the goal is to ensure a fair and just process, the court noted that “much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim”.⁴²³

The goal of proportionality has also been imported into defamation proceedings. In *Jameel v. Dow Jones* (2005), Lord Justice Phillips MR wrote:

*It is no longer the role of the court simply to provide a level playing-field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.*⁴²⁴

A particularly egregious example of the need for proportionality in Ontario defamation proceedings is the odyssey of *Warman v. National Post* (2015) in which skirmishes over document production in a defamation trial persisted over a period of 6 years in spite of a comprehensive decision by the Master on the importance of proportionality in the process.⁴²⁵

The aspiration of proportionality is relatively easy to articulate but more difficult to achieve where it may compromise a plaintiff’s right to be fully heard or the defendant’s full right of reply. Also in the defamation context, it must be kept in mind that “it may be appropriate to consider the principle of proportionality by reference to different metrics than in other civil litigation”.⁴²⁶ In this project, the question is what kind of procedural reforms would achieve proportionality in defamation disputes while preserving the underlying goal of a fair and just process.⁴²⁷ These themes underlie the discussion of more specific court processes that follows.

C. Standing of Corporations to Bring a Defamation Action

As any business owner knows who has been the subject of a defamatory online review, harm to corporate reputation can be devastating. In Canada and the United Kingdom, corporations have standing to sue in defamation just like individual plaintiffs do.⁴²⁸ A distinction is recognized only when it comes to damages. Corporations can only suffer damage in respect of their commercial interests.⁴²⁹ As the House of Lords held in *Lewis v. Daily Telegraph Ltd.*:

*A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel, but that injury must sound in money.*⁴³⁰

Therefore, corporations may be awarded general damages, but not aggravated damages which are intended to remedy harm to feelings.⁴³¹

Although the entitlement of corporations to sue in defamation is longstanding, there is a significant body of opinion arguing that protecting corporate reputation unduly impinges freedom of expression. In Australia, legislators have eliminated the right of most corporations to sue in defamation, maintaining standing only for non-profit corporations and corporations with less than 10 employees.⁴³² In this section, we review the arguments for and against corporate standing to sue and ask stakeholders to consider whether there should be a change to the law in this area.

1. Arguments for Removing Corporate Standing to Sue

In her comprehensive article on this topic, Hilary Young raises a number of arguments in favour of reform.⁴³³ We emphasize three of these.

i. Corporate Reputation is Relatively Less Worthy of Protection

Corporate reputation engages a narrower range of values than individual reputation. In chapter III, we discussed the concept of reputation as property, honour and dignity. In modern times, defamation is primarily understood as protecting self-worth and dignity interests. However, corporate reputation exclusively engages proprietary interests. The economic losses suffered by defamed businesses relate less to social relationships and more to “advertising, public relations and image”.⁴³⁴ Consequently, some scholars have argued that corporate reputation should weigh less heavily in the balance between freedom of expression and reputation.⁴³⁵

ii. Criticism of Corporations is Valuable Expression

Allowing corporations to sue for defamation can chill valuable speech.⁴³⁶ Criticism of corporations and their activities helps facilitate informed consumer-decision making, provides a check on abusive corporate behaviour, and improves transparency. Defamation suits can deter such criticism. This risk is particularly acute with respect to expression about corporations for two reasons. First, corporations are often – though not always – well-resourced and willing to sue to protect their reputation.⁴³⁷ Second, and relatedly, corporations may be more prone to launch strategic litigation against public participation (SLAPP suits) to stifle critics, even over statements that are not defamatory.⁴³⁸ The problems around SLAPP suits and Ontario’s legislative response are discussed in this chapter below.

iii. Corporations Have Other Options for Protecting Reputation

Corporations have other options for protecting their reputation. Howarth suggests that corporate reputation is more appropriately protected by existing economic torts such as malicious falsehood, conspiracy to injure, procuring a breach of contract and interference with trade by unlawful means.⁴³⁹ Of course, claims such as malicious falsehood are not as advantageous to plaintiffs since there is no presumption of harm and falsity as there is in defamation.⁴⁴⁰ Corporations can also sue under negligence if they can establish that the alleged defamer owed them a duty of care.⁴⁴¹ Section 7(a) of the *Trademarks Act* provides further recourse to corporations by restricting the types of things business competitors may legitimately say about each other.⁴⁴² Directors of corporations can sue for defamation in their personal capacity if statements about the corporations also defame them.⁴⁴³ Finally, corporations may have access to non-legal routes to vindicate their reputation. They can launch advertising campaigns, engage reputation consultants, and influence public opinion to a far greater extent than traditional defamation plaintiffs.⁴⁴⁴

2. Arguments for Retaining Corporate Standing to Sue in Defamation

Against these arguments is a concern for the reputational harm that corporations may incur, particularly from online defamation given the proliferation of online review sites such as TripAdvisor, Homestars and others. A defamatory review, transmitted instantly throughout cyberspace, may cause irreparable harm to a business. Furthermore, corporations are not a homogenous class of plaintiffs but rather represent a wide spectrum of entities from local sole proprietorships to multinational corporations. McDonalds may have much greater capacity to protect its corporate reputation through litigation or business practices than does a family-run B&B. Different considerations may also apply to non-profit and for-profit corporations.⁴⁴⁵

3. Three Options for Reform

Young concludes in her analysis of the issue that corporate standing to sue in defamation should be eliminated. However, there are two other reform options short of removing standing to sue altogether, also canvassed by Young. We consider Young’s three options below.

i. Removing Corporations’ Standing to Sue For Defamation

This proposal most effectively counters the chilling effect of defamation law. Young suggests that this is the most appropriate option, at least for medium to large for-profit corporations.⁴⁴⁶ Australia implemented this approach for all for-profit corporations with over 10 employees.⁴⁴⁷ However, the ‘10 employee’ threshold has been criticized as arbitrary.⁴⁴⁸

ii. Removing the Presumption of Harm

Young's second option is to remove defamation law's traditional presumption of harm. A rationale for the presumption of harm in defamation law is that reputational damage often involves intangible impacts on dignity that are not easily demonstrated in court. However, this is arguably not an issue in the case of corporate reputational losses that must "sound in money".⁴⁴⁹ Therefore, it may be appropriate to require corporations to prove actual damage in defamation suits.

The United Kingdom addressed this issue in the *Defamation Act, 2013* by requiring corporate plaintiffs to establish "serious financial loss" on a balance of probabilities.⁴⁵⁰ This accords with evidentiary standards employed in other torts involving damage to corporate reputation, such as injurious falsehood.⁴⁵¹

iii. Removing the Presumption of Falsity

Young's third option is to remove defamation law's traditional presumption of falsity. Dario Milo argues that the presumption of falsity reflects the "primacy of reputation over free speech at common law".⁴⁵² To the extent this is so, the question is whether this primacy is appropriate in the context of corporate defamation given that the reputational interests at play are exclusively proprietary. In other torts involving corporate reputation, such as injurious falsehood, plaintiffs bear the burden of demonstrating falsity. Therefore, one option would be to bring defamation in line with other corporate torts by eliminating the presumption of falsity for corporate plaintiffs.

Questions for Consideration

20. Should corporations retain standing to sue for defamation in the internet age? Should they continue to be entitled to rely on the presumption of harm and presumption of falsity?

D. Jurisdiction and Choice of Law Over Internet Defamation Claims

The internet connects individuals and communities across geographic boundaries. Therefore, internet defamation claims often have connections to more than one jurisdiction. In these cases, a key issue is whether or not an Ontario court should assert jurisdiction over the action.

The complexity of jurisdictional issues in internet defamation cases is illustrated by the facts in a case currently before the Supreme Court of Canada, *Haaretz.com v. Goldhar*.⁴⁵³ Mr. Goldhar is a prominent Canadian businessman who purchased and managed an Israeli soccer team. Haaretz is an Israeli newspaper who published an article in print and online in which it criticized Goldhar's management of the team. The online version of the article was published in English and was read by 200-300 people in Canada. In a global, internet economy where Ontario businessmen operate businesses in Israel and Israeli newspapers are read as easily in Ontario as in Israel, how is an Ontario court to determine the issue of jurisdiction?

In 2012, the Supreme Court of Canada released a trilogy of decisions that addressed the jurisdiction test for multi-jurisdictional defamation claims. However, there remain questions about whether this test, as currently applied, is appropriate for internet defamation cases. The LCO has heard the concern that the test may unduly favour plaintiffs and thereby create a libel chill. Some defendant stakeholders have argued that the current test allows for inappropriate forum-shopping or "libel tourism", with complainants strategically choosing to sue in jurisdictions perceived to have plaintiff-friendly defamation laws.

The test for assuming jurisdiction in Ontario defamation actions remains one of common law. In contrast, other jurisdictions such as the US, UK and Australia have adopted statutory jurisdictional tests for the express purpose of preventing libel

tourism. In this section, the LCO considers the state of the law in Ontario and the possibility that the Supreme Court of Canada may reform the law as a result of the *Goldhar* case. We review the approach taken by other jurisdictions in the ongoing effort to find an appropriate balance between protection of reputation and freedom of expression. We also consider whether it would be appropriate for Ontario to reform the *Libel and Slander Act* to provide statutory guidance on defamation jurisdictional issues.

1. Ontario's Current Test for Jurisdiction

Ontario's current common law test for jurisdiction was set out by the Supreme Court of Canada in one of the trilogy decisions, *Club Resorts Ltd v. Van Breda*.⁴⁵⁴ The Court held that a court can assume jurisdiction over a claim when:

- the plaintiffs can prove a real and substantial connection between the claim and the jurisdiction, and
- the defendant cannot demonstrate that there is a clearly more appropriate forum elsewhere.⁴⁵⁵

The first branch of this test, known as the real and substantial connection test, is met in a tort claim where the court finds that at least one of four non-exhaustive presumptive connecting factors exists:

- the defendant is domiciled or resident in the province
- the defendant carries on business in the province⁴⁵⁶
- the tort was committed in the province; or
- a contract connected with the dispute was made in the province.⁴⁵⁷

Underlying the jurisdiction test are the general principles of fairness, efficiency and comity. These values may influence the selection of new presumptive factors or the method of resolving conflicts.⁴⁵⁸

In the two defamation cases that were part of the SCC's trilogy, the third presumptive factor, that the tort was committed in the province, was easily met.⁴⁵⁹ In the case of defamation claims, the tort is committed where the defamatory statement is published to a third party. We have seen in chapter IV above, that publication occurs anytime an online statement is read, downloaded or republished by a third party. Therefore, so long as a defamatory statement is read by a third party in Ontario, the tort is committed in Ontario and the real and substantial connection test is met.

Once jurisdiction is established under the real and substantial connection test, the court may still stay the proceedings if the defendant can show why another forum is clearly more appropriate to hear the claim.⁴⁶⁰ This *forum non conveniens* analysis is a discretionary decision determined by reference to a non-exhaustive list of factors designed to ensure that both parties are treated fairly and that the process for resolving their litigation is efficient.⁴⁶¹ For example, factors may include:

- the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
- the law to be applied to issues in the proceeding;
- the desirability of avoiding a multiplicity of legal proceedings;
- the desirability of avoiding conflicting decisions in different courts;
- the enforcement of an eventual judgment; and
- the fair and efficient working of the Canadian legal system as a whole.⁴⁶²

In exercising its discretion, the court must engage in a contextual analysis while respecting the principle of comity and refraining from leaning too instinctively in favour of its own jurisdiction.⁴⁶³

2. Three Areas of Uncertainty in the Jurisdiction Test for Online Defamation

Recent case law and commentary calls into question at least three aspects of the current test for multi-jurisdictional internet defamation cases.⁴⁶⁴ These three issues are the subject of the upcoming appeal to the Supreme Court of Canada in the *Goldhar* case and they indicate that the law in this area remains uncertain.⁴⁶⁵ Each of these issues is briefly discussed in turn.

i. Applying the Real and Substantial Connection Test to Internet Defamation Cases

In an internet defamation case, there is a very low threshold to establishing the presumptive connecting factor that a tort has been committed in Ontario. Since online publications are accessible worldwide, establishing that defamatory material was communicated to at least one person in Ontario (other than the plaintiff) will be “virtually automatic.”⁴⁶⁶ The concern is that the role of the presumptive factors as checks on the automatic assumption of jurisdiction becomes “illusory.”⁴⁶⁷

For example, in *Goldhar*, the majority of the Ontario Court of Appeal held that jurisdiction was established where an article posted to an Israeli newspaper website was accessed by 200-300 people in Canada.⁴⁶⁸ (In contrast, the article was read by tens of thousands of people in Israel.) One of the issues on appeal to the Supreme Court of Canada is whether minimal online publication in Ontario should amount to a real and substantial connection resulting in a presumption of jurisdiction or, alternatively, whether minimal online publication should serve to rebut any presumption of jurisdiction that does arise.⁴⁶⁹ The concern is that the current rule unduly impinges on freedom of expression and creates a libel chill by subjecting defendants to a law suit in a jurisdiction to which they have little or no connection.

ii. Applying the Forum Non Conveniens Test to Internet Defamation Cases

There is also uncertainty as to the proper application of the discretionary factors of the *forum non conveniens* test and their relationship to the real and substantial connection test. In each of the SCC’s trilogy decisions, the application of the legal doctrine of *forum non conveniens* factors resulted in a finding that the local jurisdiction was the most appropriate forum to hear the claim. This was also the result in the majority decision of the Ontario court of Appeal in *Goldhar*. However, the dissenting judge in *Goldhar*, Pepall J.A., reasoned that a “robust and carefully scrutinized review of the issue of *forum non conveniens*” was necessary, particularly given the low threshold of the real and substantial connection test.⁴⁷⁰ Pepall J.A. would have chosen Israel as the most appropriate forum in the circumstances of that case.

One issue is in weighing the relative convenience and expense of witnesses appearing at the trial. In *Goldhar*, the plaintiff undertook to fund the travel and accommodation costs of Israeli witnesses testifying at an Ontario trial. On appeal, the question is whether this is impermissible as an attempt to use one’s “financial heft” to “buy passage to a forum.”⁴⁷¹

iii. The Test for Choice of Law in Internet Defamation Cases

A third area of uncertainty is in the test for choice of law, one of the factors to be considered in the *forum non conveniens* analysis. The law to be applied to the issues in the proceeding is traditionally determined by reference to the *lex loci delicti*, that is, the place where the tort occurs.

The rationale behind this general rule is that, in the case of most torts, “the occurrence of the wrong constituting the tort is its most substantial or characteristic element.”⁴⁷² However, the Supreme Court of Canada has recognized that this test may pose difficulties where the consequences of the tort are felt elsewhere, as may be the case in online defamation.⁴⁷³ Therefore, an alternative test has been proposed for defamation, that is, the place of most substantial harm to reputation.⁴⁷⁴

The most substantial harm test recognizes the importance of allowing claimants to sue for defamation in the place where they enjoy their reputation.⁴⁷⁵ It is also seen as a means of curbing libel tourism and promoting freedom of expression.⁴⁷⁶

Canadian courts considering the substantial harm test as an alternative to the *lex loci delicti* have had regard to a similar statutory test adopted in Australia which is applied by reference to four factors:

- The place at the time of publication where the plaintiff was ordinarily resident or, in the case of a corporation, the place where the corporation had its principal place of business at that time;
- The extent of publication in each relevant jurisdiction;
- The extent of harm sustained by the plaintiff in each relevant jurisdiction; and
- Any other matter that the court considers relevant.⁴⁷⁷

However, there has been some uncertainty in Canadian courts as to the weight to be accorded to the second factor, the relative extent of publication, in determining the appropriate choice of law. The concern is that relying on extent of

publication as a decisive factor in establishing substantial harm is inconsistent with the traditional evidentiary rule that a single instance of publication is sufficient for the tort of defamation to arise.⁴⁷⁸ Moreover, the impact on reputation is not simply a matter of numbers of publications but may depend on how influential are particular readers.

3. International Reform Efforts to Curb Libel Tourism

The United States, England and Wales and Australia have each undertaken statutory reforms to their tests for assuming jurisdiction over internet defamation actions. These reforms were largely instigated by a concern for the phenomenon of libel tourism.⁴⁷⁹ However, the extent to which libel tourism is actually practiced in these jurisdictions is a matter of ongoing debate.⁴⁸⁰

In the United States, state courts can only assume jurisdiction over online defamation claims involving out-of-state defendants where the online publication expressly targets readers in the local state.⁴⁸¹ In 2010, the United States also addressed the spectre of libel tourism by enacting the *Securing the Protection of our Enduring and Established Constitutional Heritage Act* (the SPEECH Act).⁴⁸² The SPEECH Act renders foreign libel judgments unenforceable unless the underlying legislation conforms to the *First Amendment*. This has the impact of shielding American journalists, bloggers, authors, academics and publishers from foreign defamation judgments, so long as they do not hold assets in the foreign jurisdiction.

England and Wales has enacted section 9 of the *Defamation Act of 2013* in an effort to counter libel tourism.⁴⁸³ Under this provision, the complainant must demonstrate that England and Wales is the most appropriate forum for hearing the action. The onus is the reverse of the current Ontario test. Instead of requiring the defendant to establish that a clearly more appropriate forum exists elsewhere, the onus is on the complainant to establish the local forum as the most appropriate. Relevant factors include whether the defamatory words targeted the jurisdiction, whether the extent of the harm was greater in one jurisdiction over another, the extent of the dissemination of the defamatory words in both jurisdictions and any evidence that the complainant may not receive a fair hearing elsewhere.⁴⁸⁴ In applying the test, the court must consider every jurisdiction where the defamatory statement was published.⁴⁸⁵ Consequently, the complainant must bring evidence as to the extent of publication in all jurisdictions where she could suffer harm.

In its 2005 defamation reform, Australia sought to reduce libel tourism between Australian states by unifying the law across its states and by adopting the most substantial harm test for determining choice of law issues within the federation.⁴⁸⁶

These developments reveal a strong international trend to tighten up jurisdictional rules in order to constrain libel tourism. Ontario's law is currently relatively plaintiff-friendly. This gives rise to the question whether, or the extent to which, inappropriate forum-shopping is a concern in Ontario. This concern also operates at the interprovincial level. For example, since Ontario notice requirements and limitation periods are stricter than those in British Columbia, it is possible that defamation actions otherwise connected to Ontario may migrate to B.C. instead. So harmonization of Ontario law with the law in other provinces and countries may be an issue here. The LCO invites input on the extent to which the concern over inappropriate forum-shopping is borne out in Ontario both internationally and interprovincially.

4. Possibilities for Reforming the Test for Jurisdiction

The three areas of uncertainty in Ontario's test for assuming jurisdiction result in a lack of predictability in the law that arguably undermines access to justice. At the time of deciding to publish an online statement, the publisher should ideally have a reasonable idea in which jurisdictions it might be required to defend against a lawsuit. And a potential claimant should be able to anticipate the most appropriate jurisdiction for commencing a claim.

The areas of uncertainty also have important implications for the balance between protection of reputation and freedom of expression and the prevention of inappropriate forum-shopping. First, the current formulation of the real and substantial connection test arguably permits Ontario courts to assume jurisdiction over foreign publishers where there is relatively little evidence of publication in Ontario.⁴⁸⁷ According to the principles of comity and reciprocity, Ontario publishers may be

required to submit to foreign courts in analogous circumstances with the consequent chilling effect on their freedom of expression.⁴⁸⁸ Second, the current *forum non conveniens* test arguably permits claimants to influence libel proceedings by strategically shopping for a forum with plaintiff-friendly libel laws. Third, the traditional choice of law test, *lex loci delicti*, also arguably permits forum shopping whereas the alternative most substantial harm test would lead to greater certainty in the law. The LCO invites comment on each of these issues and, in particular, whether s.9 of the (UK) *Defamation Act, 2013* offers a useful model for reform. The LCO also seeks comment on what form any reform to the test for jurisdiction should take. Should Ontario retain a common law approach to this issue or should a statutory provision be adopted?

Questions for Consideration

21. What evidence is there of libel tourism or inappropriate forum-shopping occurring in Ontario?
22. Does the current common law test for assuming jurisdiction strike an appropriate balance between protection of reputation and freedom of expression? Should Ontario adopt a statutory provision similar to s.9 of the (UK) *Defamation Act, 2013* for multi-jurisdictional defamation actions?

E. Notice and Limitation Periods

1. Current Notice and Limitation Periods in Ontario

At several points in this paper, the LCO has discussed the “plaintiff-friendly” nature of traditional defamation law in Ontario. It is easy to overstate this orientation, however, as the LSA includes several important provisions designed to protect newspapers and broadcasters from liability for defamation. Chief among these are a notice requirement and a limitation period for commencing actions in relation to libels in newspapers and broadcasts.

Subsection 5(1) of LSA requires that plaintiffs provide defendants with six weeks written notice before commencing an action in relation to libel in a newspaper or broadcast.⁴⁸⁹ Where a notice is not given in time, the plaintiff has no claim and the action will be struck out.⁴⁹⁰

The purpose of the notice period is to provide media defendants with a timely opportunity to investigate the claim and retract or correct defamatory publications, thereby limiting the plaintiff’s reputational harm and reducing its exposure to damages. Where the defendant publishes a “full and fair retraction” within three days of receiving the notice, ss. 5(2) of the Act is triggered. This subsection provides that so long as the defendant was acting in good faith and in “mistake or misapprehension of the facts”, the plaintiff’s claim will be limited to actual damages.⁴⁹¹ Since, it is often difficult for plaintiffs to prove actual damages in defamation claims, a retraction may amount to “the practical equivalent of barring the right of action”.⁴⁹² On the other hand, it may be difficult for defendants to meet the three day time limit for publishing a retraction.

In addition to the notice period, Section 6 of the LSA imposes a special three month limitation period for defamation actions in relation to libels in a newspaper or broadcast.⁴⁹³ In contrast, defamation actions against other defendants are subject to the two year limitation period in the *Limitations Act*.⁴⁹⁴

The following chart illustrates the current lack of uniformity in this area of law. There is further complexity in the various ways in which notice periods and limitation periods are calculated.

Notice and Limitation Periods for Defamation Actions Across Canada

Province/Territory	Notice Period	Limitation Period
Ontario ⁴⁹⁵	Newspaper/Broadcast ⁴⁹⁶ : 6 weeks	Newspaper/Broadcaster: 3 months General: 2 years
Alberta ⁴⁹⁷	General: 3 months Daily Newspaper: 7 days Other Newspaper/Broadcast: 14 days	General: 2 years
Manitoba ⁴⁹⁸	General: 3 months Daily Newspaper: 7 days Other Newspaper/Broadcast: 14 days	General: 2 years
Newfoundland ⁴⁹⁹	General: 3 months Daily Newspaper: 7 days Other Newspaper/Broadcast: 14 days	Newspaper/Broadcaster: 4 months General: 2 years
Nova Scotia ⁵⁰⁰	General: 3 months Daily Newspaper: 7 days Other Newspaper/Broadcast: 14 days	Newspaper/Broadcaster: 6 months General: 2 years
Northwest Territories, Nunavut, Yukon ⁵⁰¹	General: 14 days	Newspaper/Broadcaster: 6 months General: 2 years
Prince Edward Island ⁵⁰²	Daily Newspaper: 5 days Other Newspaper/Broadcast: 14 days	Newspaper/Broadcaster: 6 months General: 2 years
Quebec ⁵⁰³	Newspaper: 3 days	Newspaper: 3 months General: 1 year
Saskatchewan ⁵⁰⁴	Daily Newspaper: 5 days Weekly Newspaper: 14 days	General: 2 years
British Columbia ⁵⁰⁵	No notice required	General: 2 years
New Brunswick ⁵⁰⁶	No notice required	General: 2 years

2. The Function and Length of the Notice Period

The defamation legislation in most provinces have some variation of Ontario's notice period.⁵⁰⁷ However, British Columbia has no notice period and the Law Reform Commission of British Columbia expressly rejected the idea of adopting a notice period in its 1985 *Report on Defamation*.⁵⁰⁸ The Commission pointed out that the notice period operated for the benefit of defendants rather than plaintiffs. Plaintiffs could seek a retraction or apology without any need for a statutory time limit. A notice period would serve "no useful purpose" and would merely impose a new limitation period and "increase the difficulties and expense of litigation, and the law's technical complexity".⁵⁰⁹ The *Uniform Defamation Act* published by the Uniform Law Conference of Canada historically contained a notice period but this was deleted after a review of the LRCBC Report.⁵¹⁰ Although the MAG Advisory Committee briefly discussed the Ontario notice period in its 1990 Report, it did not consider the option of eliminating it.⁵¹¹ One issue for stakeholders to consider is whether the notice period continues to serve a useful purpose in the internet age.

Of those provinces that retain a notice period, several have chosen a longer, three month period. If Ontario retains a notice period, another issue is whether a longer period would be appropriate. A related issue here is whether the three day deadline for media defendants to publish a retraction should be correspondingly lengthened.

3. Availability of Notice/Retraction in Relation to Broader Range of Publications

Ontario's notice/retraction option is currently only available in relation to libels published in newspapers and broadcasts as defined in the LSA. Therefore, for the most part, they operate for the benefit of traditional media defendants.⁵¹² The policy rationale was to give these defendants the opportunity to publish a correction or retraction of the allegedly defamatory statement in appropriate circumstances. However, the LSA did not anticipate the internet era and there has been litigation to determine in what circumstances notice/retraction applies in the online context. Recently, the Ontario Court of Appeal has confirmed that an online newspaper may take advantage of the notice period.⁵¹³ However, it remains unclear the extent to which other forms of internet publications are subject to the Act.⁵¹⁴

Today, there is a much broader range of publishers in a position to publish a correction or retraction where timely notice is received from a complainant. Pre-internet, one rationale for limiting the notice period to libel published in newspapers and broadcasts was that these had frequent publication schedules allowing for timely retraction.⁵¹⁵ But a distinction based on frequency of publication no longer makes sense. Online publication can occur almost instantaneously. Of course, there is always a question as to whether content can ever be effectively removed from the internet.⁵¹⁶ Nevertheless, notice/retraction is a practical, cost-effective remedy that may benefit both parties and should arguably be encouraged by law. It is questionable whether there remains any reason to distinguish between different categories of publications.

One issue in extending notice/retraction to online publications is that complainants must be able to locate the publisher in order to serve notice on them. This is currently achieved in the LSA by requiring that the names and addresses of media owners and publishers are accessible by complainants.⁵¹⁷ Currently, many online publishers do not advertise their contact information, particularly in the case of anonymous communications. However, the possibility of being able to rely on a notice period may encourage some online publishers to do so.

4. Consolidating and Simplifying the Limitation Periods

There is a strong argument to be made that it is time to consolidate the different Ontario limitation periods for defamation and to adopt a single period applicable to actions against all defendants, whether media or not and whether in respect of online or offline publications. Even back in 1989, the MAG Advisory Council wrote in its Issues Paper that "disparate" limitation periods in defamation law are "difficult to justify".⁵¹⁸

In several provinces including Alberta, British Columbia, Manitoba, Saskatchewan and New Brunswick, there is no special limitation period for defamation actions. Instead, they are subject to a general two year limitation period.⁵¹⁹ The suggestion

has been made that Ontario should also adopt a “medium-neutral” uniform limitation period for all defamation actions.⁵²⁰ A longer limitation period may also have the benefit of allowing for a “cooling-off” period during which a complainant may consider whether the reputational harm suffered really does merit the cost of pursuing a defamation action.

Currently, the limitation period in s.6 of the LSA begins to run when the libel has “come to the knowledge of the person defamed.”⁵²¹ Similarly, the general limitation period in the *Limitations Act* is based on the discoverability principle.⁵²² In 1990, the MAG Advisory Committee considered the possibility of an absolute limitation period running from the date of publication of the libel.⁵²³ However, the Committee was still operating in a mostly pre-internet world where “[t]he more remote the libel or slander in fact, the less likely is continued injury.”⁵²⁴ This is no longer necessarily the case with online defamation and the LCO suggests that the discoverability principle should be applicable whatever limitation period is chosen.

Any reform to the limitation period must be coordinated with the notice period, discussed immediately above. It must also take into account the possibility of adopting a single publication rule, discussed in chapter 3 in the section on publication.

Questions for Consideration

23. Should the notice period in ss. 5(1) of the LSA be eliminated from Ontario law? If not, how long should the notice period be and how long should the publisher have to respond to the notice? Should notice/retraction be made available in relation to a broader range of publications?
24. Should the special limitation period in s. 6 of the LSA be eliminated so that all defamation claims are subject to the two year general limitation period in Ontario's *Limitations Act*?



F. Potential Procedural Reforms

The LCO invites proposals from stakeholders on potential procedural reforms for containing the costs and reducing the complexity of defamation proceedings while maintaining fairness and just outcomes. Without limiting the scope of the consultations process, in this section, we discuss two particular possibilities. One option is to provide judges with broad case management powers over defamation actions.⁵²⁵ Another option is to provide for a preliminary hearing early on in defamation proceeding to resolve one or more issues in dispute. Currently, case management and preliminary hearings are more fully utilized in English defamation practice than in Ontario. In this section, we ask stakeholders to consider whether the English experience offers any lessons to be learned in the procedural reform of Ontario defamation actions.

1. Case Management of Defamation Actions

Currently in Ontario, defamation actions proceed as any civil action does. There is some provision for case management in Rule 77 but there are no dedicated procedural tools designed to manage the cost and complexity of defamation proceedings specifically.⁵²⁶ One of the issues in this project is whether some form of specialized case management for defamation law suits would be beneficial to reduce costs, promote proportionality and encourage early resolution of disputes.

Ontario may look to the UK where the Rules provide courts with extensive case management powers over civil actions generally and where case management of defamation proceedings has been a specific issue.⁵²⁷ Under Rule 3.1 of the *Civil Procedure Rules*, the court in any civil action may:

- extend or shorten the time for compliance with any rule
- adjourn or bring forward a hearing
- hold a hearing by telephone
- stay the whole or part of any proceedings
- direct a separate trial of any issue
- exclude an issue from consideration
- dismiss or give judgment on a claim after a decision on a preliminary issue
- order any party to file and exchange a costs budget
- take any other step for the purpose of managing the case, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case.⁵²⁸

In 2000, England put into place a dedicated Pre-Action Protocol for Defamation.⁵²⁹ The Protocol “is intended to encourage exchange of information between parties at an early stage and to provide a clear framework within which parties to a claim in defamation, acting in good faith, can explore the early and appropriate resolution of that claim”.⁵³⁰ The Protocol establishes a code of good practice which includes an early exchange of letters detailing the claim and the response to the claim, a commitment to act reasonably to “maintain costs proportionate to the nature and gravity of the case and the stage the complaint has reached”, and consideration of alternative dispute resolution measures rather than proceeding with litigation. Possible ADR options are listed: discussion and negotiation, early neutral evaluation by an independent third party, mediation and reference to the Press Complaints Commission. Although the Protocol recognizes that ADR cannot be mandated, Rule 3.1(4) and (5) of the *Civil Procedure Rules* requires that the court take into account compliance with the Protocol in giving directions and in making cost orders.⁵³¹

Notwithstanding the Pre-Action Protocol, the costs and complexity of UK defamation proceedings have continued to be of concern.⁵³² In the reform process leading up to the *Defamation Act, 2013*, the House of Lords/House of Commons Joint Committee called for better enforcement of the Pre-Action Protocol and more aggressive case management to help minimize costs.⁵³³ In the end, the government declined to include case management provisions as part of its legislative reforms.⁵³⁴

Meanwhile, in 2013, the English Civil Justice Council struck a Defamation Costs Working Group which issued a Final Report making several recommendations for instituting rigorous case management of defamation actions in order to control costs.⁵³⁵ The Group recommended that specialist judges be appointed to manage particular defamation claims through each stage of the process. These judges would have wide powers to set a time table for progression of the action, establish a costs budgeting regime, determine substantive issues such as “whether an action has fundamental merit” by paper proceedings and encourage early resolution. Case management conferences would take place by phone as soon as possible after proceedings are issued.⁵³⁶

To date, these UK proposals have not yet come to pass.⁵³⁷ In fact, some argue that the cost and complexity of defamation proceedings is a bigger problem than ever.⁵³⁸

There are at least two potential lessons for Ontario here. First, commentary in England suggests that the Pre-Action Protocol for Defamation is not all that effective in that jurisdiction. However, the problem is apparently one of enforcement and proposals for procedural reform tend to include the Pre-Action Protocol as the foundation for greater control and management of defamation proceedings. One suggestion for procedural reform in Ontario might be a similar but relatively robust case management tool.

Second, there is a strong argument among policymakers and commentators that the unique nature of defamation proceedings merits the appointment of specialized judges to oversee all aspects of defamation proceedings. This is a possibility that might be considered in Ontario within the broader context of Ontario's policy goals for the administration of justice.

As noted above, there has been some discussion regarding the need to appoint specialist judges for defamation matters. This suggestion raises the complementary issue of specialist training or accreditation for counsel in defamation matters. Professional regulation of lawyers in Ontario is the responsibility of the Law Society of Upper Canada. In addition, legal organizations such as the Ontario Bar Association provide continuing legal education for lawyers in Ontario. The LCO is seeking advice on whether there is a need for improved accreditation or education for defamation lawyers, and, if so, what form these initiatives might take.

Questions for Consideration

25. What are the best options for reducing cost and complexity and promoting access to justice in defamation proceedings?

2. Preliminary Motions and Hearings in Defamation Actions

i. Ontario

Preliminary hearings have the potential to resolve one or more issues in dispute in an action. The result may be to simplify the remaining issues for trial and, in some cases, encourage settlement of the entire action. Ontario does not currently have a pre-trial process specific to defamation actions. Instead, there are two types of pre-trial motions available to the parties of any civil action to determine issues early in a proceeding.

First, Rule 21.01 of Ontario's *Rules of Civil Procedure* provides for a motion to strike a pleading as disclosing no reasonable cause of action or defence. In a motion to strike the facts are accepted as true and the test is whether there is no reasonable chance of success in law.⁵³⁹ These motions are not common in defamation claims.⁵⁴⁰

Second, Rule 20 of Ontario's *Rules of Civil Procedure* provides for summary judgment motions, permitting the court to dispose of all or part of a claim in a summary manner where there is "no genuine issue requiring a trial."⁵⁴¹ The Rule was amended in 2010 to improve access to justice.⁵⁴² Under the amended Rule, the court may order that the parties present oral evidence and it has the power to weigh evidence, evaluate the credibility of deponents and draw reasonable inferences from the evidence (unless, exercising these powers at trial would better serve the interests of justice).⁵⁴³ Post *Hryniak*, summary judgment motions have been granted in several Ontario defamation cases for the purpose of determining meaning and the applicability of pleaded defences.⁵⁴⁴

ii. United Kingdom

Preliminary hearings are more common in English defamation practice than in Ontario practice. An array of options are available, both for civil actions generally and specific to defamation claims.

Preliminary Issues – Part 3 of the UK Civil Procedure Rules provides courts with a list of powers to be used in the management of civil cases generally, including the power to "direct a separate trial of any issue" and to "discuss or give judgment on a

claim after a decision on a preliminary issue.”⁵⁴⁵ These powers have no comparator in Ontario at present. They may be exercised on the court’s own initiative.⁵⁴⁶ In the UK, preliminary issues hearings are regularly used to determine key issues in defamation cases, including the viability of pleaded defences and whether or not the impugned statement has a defamatory meaning.⁵⁴⁷

Since the introduction of the “serious harm” threshold in the *Defamation Act, 2013*, preliminary hearings have also been held to determine whether serious harm resulted from the defamatory statement.⁵⁴⁸ These issues are considered to be suited for preliminary determination particularly since the Act has made jury trials “very much the exception” in defamation proceedings.⁵⁴⁹ Recent courts have encouraged parties to seek preliminary hearings to determine the serious harm issue at the same time as determining issues of meaning and allegations of abuse of process.⁵⁵⁰

Summary Disposal – England has a summary judgment regime under the *Civil Procedure Rules* Part 24 that is somewhat similar to Ontario’s Rule 20. However, there is also available a more specialized summary disposal procedure established in sections 8-10 of the *Defamation Act, 1996*.⁵⁵¹

Summary disposal allows a judge to weigh the merit of the claims and defences, and dispose of the claim in favour of either party where a claim appears to have no realistic prospect of success and there is no reason why it should be tried.⁵⁵² The first branch of this test, no realistic prospect of success, is the same test used in a summary judgment motion.⁵⁵³ The second branch of the test, no reason why it should be tried, is unique to summary disposal motions and takes into account factors such as the parties who are before the court, any conflicts of evidence and the seriousness of the alleged wrong.⁵⁵⁴ The summary disposal procedure provides a limited range of remedies including a declaration, corrections and apologies, an injunction and damages not exceeding £10,000.⁵⁵⁵

Summary disposal was intended to be a fast-track, low cost (and low award) remedy. The idea was to push both parties to put “all their cards on the table early” in order to encourage early settlement.⁵⁵⁶ They are not as flexible as summary judgment hearings since they cannot be used to resolve particular issues. Summary disposal motions have been used to try defences,⁵⁵⁷ establish meaning,⁵⁵⁸ and determine damages.⁵⁵⁹ Most recently, summary disposal motions have been brought to seek relief against anonymous internet defendants.⁵⁶⁰ This case law is discussed below in the section on anonymity.

iii. Preliminary Hearings Compared

Ontario and England have distinct procedural tools in their arsenal for the preliminary hearing of defamation claims. The power of English courts to hold preliminary hearings in defamation actions as part of case management allows for a broad range of issues to be determined before trial, including meaning, the serious harm threshold and the availability of particular defences. Ontario has no general power to hold preliminary hearings in defamation or other matters. Nor does Ontario have a streamlined summary disposal procedure. In both instances, Ontario relies on summary judgment to serve these purposes.

In sum, the question is whether Ontario’s existing summary judgment mechanism, as amended in 2010 and interpreted by the Supreme Court of Canada in 2014, is sufficient for the fair and just resolution of issues in defamation claims or whether the LCO should consider recommending specialized preliminary hearing powers as exist in English defamation practice.⁵⁶¹

Questions for Consideration

26. Is Rule 20 of the *Rules of Civil Procedure* an appropriate and sufficient mechanism for the preliminary hearing of issues in defamation proceedings? Should Ontario adopt UK-style preliminary issues hearings or summary disposal measures?



G. Strategic Litigation and the Protection of Public Participation Act, 2015

Strategic litigation against public participation (SLAPPs) refers to lawsuits “initiated against one or more individuals or groups that speak out or take a position in a public debate on an issue of public interest.”⁵⁶² These lawsuits are a form of abuse of process. They are used by plaintiffs “to limit the freedom of expression of the defendants and neutralize their actions by resorting to the courts to intimidate them, deplete their resources and reduce their means of action.”⁵⁶³ Many SLAPPs are framed as defamation actions. A typical example is a defamation lawsuit brought by a developer to discourage environmentalists from speaking out against a proposed development. SLAPPs have consequences beyond their impact on the parties involved. They represent a misuse of the court system and they may stifle public debate on matters of public interest.⁵⁶⁴

In 2015, the Ontario government enacted the *Protection of Public Participation Act, 2015* (PPPA) which put into place a fast-track motion procedure to identify and dismiss SLAPP lawsuits.⁵⁶⁵ This procedure is another recent tool (like the responsible communication defence) providing increased protection for freedom of expression on matters of public interest. Generally speaking, the new procedure has been widely supported by commentators and has begun to be interpreted by the courts. However, concerns have also been raised about the fairness of the legal test for assessing the merit of plaintiffs’ claims at a very early stage of the proceedings, as well as other aspects of the procedure. In this section we review the fledgling case law interpreting the new procedure and ask stakeholders to consider whether the procedure strikes an appropriate balance between freedom of expression and protection of reputation.

1. The PPPA

In 2010, an expert Advisory Panel was asked by the Ontario Attorney General to address the problem of SLAPPs in Ontario.⁵⁶⁶ The Panel found that existing legal remedies against abuses of process were not effective against SLAPPs and that a more focused remedy was necessary to protect public participation.

The panel developed a fast-track summary procedure to identify and dismiss strategic lawsuits and this procedure was enacted in 2015 in the PPPA. The PPPA amended the *Courts of Justice Act* to include a section entitled “Prevention of Proceedings that Limit Freedom of Expression on Matters of Public Interest (Gag Proceedings)”.⁵⁶⁷ The purpose of this section is listed in s.137.1:

- 137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,
- a. to encourage individuals to express themselves on matters of public interest;
 - b. to promote broad participation in debates on matters of public interest;
 - c. to discourage the use of litigation as a means of unduly limiting expression on matters of public interest;
 - and
 - d. to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.⁵⁶⁸

The section provides for motions to dismiss proceedings where they arise from “an expression made by the person that relates to a matter of public interest”.⁵⁶⁹ Importantly, the legal test focuses on the objective effect of the expression rather than the subjective intent of the speaker.⁵⁷⁰ However, the speaker’s motives will be relevant to balancing the value of the expression against the harm to the plaintiff.

Once the public interest effect is established, the judge is required to order dismissal unless the respondent is able to meet a two-part test. First, the respondent must establish “grounds to believe” that the proceeding has “substantial merit” and the applicant has “no valid defence”. Second, the respondent must establish that the harm resulting from the expression is “sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression”.⁵⁷¹ It is not necessary for the applicant to show that the respondent was acting with improper motives in order for the action to be dismissed. This is a unique feature of the Ontario legislation.

Applicants may bring a motion any time after a proceeding has been commenced and, therefore, need not wait to file a Statement of Defence.⁵⁷² The motion is then heard within 60 days.⁵⁷³ Meanwhile, no further steps may be taken in the proceeding until the motion, and any appeal, is disposed of.⁵⁷⁴

The legislation uses cost provisions to encourage applicants to make use of the new procedure.⁵⁷⁵ Where an applicant is successful in having a proceeding dismissed, there is a statutory presumption that it will be awarded its costs of the motion and the proceeding on a full indemnity basis.⁵⁷⁶ However, where a respondent is successful in defending their proceeding, the presumption is the opposite – they will not be awarded costs on the motion.⁵⁷⁷ Both presumptions are subject to the judge's discretion.

Subsection 137.1 (9) provides for damages in favour of an applicant where the court finds that the original proceeding was brought in bad faith or for an improper purpose.⁵⁷⁸

2. Case Law Interpreting the PPPA

Thus far, courts have not been timid about using the new procedure to dismiss defamation actions where they are satisfied that the statutory test has been met. Perhaps not surprisingly, courts have been willing to dismiss actions involving classic SLAPP scenarios where the parties clearly do not have equal resources to fund litigation. These involve large corporations targeting individuals who have spoken out about their business on public interest grounds.⁵⁷⁹ For example, in *United Soils Management Ltd. v. Mohammed*, a corporation operating a gravel pit sued a local teacher in relation to her Facebook posts about possible contamination from fill poisoning local water sources. There was clear evidence that the corporation was attempting to intimidate the defendant, including burying her in unnecessary procedural motions. The court dismissed the action and took the corporation's abusive behaviour into account in ordering \$7500 in damages to the defendant.

However, courts have also been willing to dismiss defamation actions where there is no apparent power imbalance between the parties.⁵⁸⁰ In *Able Translations Ltd. v. Express International Translations Inc.*, the court dismissed a defamation action brought by a translator in relation to comments made by a competitor.⁵⁸¹ In *Platnick v. Bent*, the court dismissed an action brought by a doctor against a personal injury lawyer who had sent a listserve email accusing the doctor of misconduct.⁵⁸²

There are also a minority of cases in which courts have refused to dismiss defamation actions. For example, in *Thompson v. Cohodes*, the court refused to dismiss a defamation claim against a former hedge fund manager who alleged that the plaintiff CEO of a public corporation had committed fraud.⁵⁸³ The court held that the allegation of fraud was unsubstantiated so that the defamation proceeding should be allowed to continue.

The legislation remains new and there are appellate level decisions pending that will assist in its interpretation and application. Nevertheless, it is clear that the Act is designed to provide additional protection for free expression.

3. Questions About the Balance Achieved By the PPPA

The PPPA is plainly weighted to favour individuals or parties who have spoken on matters of public interest over others who have allegedly suffered reputational harm as a result. As Mr. Justice Dunphy commented in one of the first decisions interpreting the new procedure:

*By intentionally creating a fast-track and relatively summary procedure, the Legislature has implicitly accepted that some potentially meritorious defamation claims may be nevertheless be dismissed without a full hearing on the merits. To this degree, it might be said that the PPPA combats "libel chill" with its own form of "litigation chill".*⁵⁸⁴

In *United Soils Management v. Mohammed*, Lederer J. went further in describing the shift effected by the new legislation:

*I am inclined to the view that the legislature did more than just “tilt the balance somewhat”. Rather the legislature created a steep hill for the plaintiff to climb before an action like this one is to be permitted to proceed. The legislation directs that we place substantial value on the freedom of expression over defamation in the public sphere.*⁵⁸⁵

A key example of the legislative shift in balance towards defamation defendants and free expression is in the relatively heavy burden and standard of proof imposed on the defamation plaintiff’s SLAPP proceeding. The plaintiff bears the burden to establish “grounds to believe” both that its defamation claim against the defendant has substantial merit and that there is no valid defence to the claim. This is a reversal of the onus of proof in a common law action for defamation.

The PPPA has created its own set of legal complexities. For example, the “grounds to believe” standard of proof has been interpreted as requiring something more than not being frivolous or vexatious, but something less than proof on a balance of probabilities. A middle ground standard of “credible and compelling evidence” has been adopted.⁵⁸⁶ Critics have argued that this is too high a standard for plaintiffs to meet at such an early stage of a proceeding.⁵⁸⁷

Concern has also been expressed about the requirement in s.137.1 (4) that the plaintiff show evidence of “sufficiently serious” harm. This is a higher standard than required in common law where harm is presumed once the plaintiff establishes the elements of the tort.⁵⁸⁸

The costs and damages provisions also plainly favour defendants.⁵⁸⁹

Some commentators predict that the legislation will cause a “chilling effect on valid lawsuits brought for good reason” and see a possibility that defamers will be given “undeserved credibility” on the basis that they are championing constitutional freedom of expression.⁵⁹⁰ The “public interest” threshold is seen as quite easy for some potential defendants to clear, which could lead PPPA to become a favoured strategy for those faced with defamation suits.⁵⁹¹

The defendant-friendly orientation of the new legislation has already been subject to a Charter challenge as a denial of procedural fairness amounting to a deprivation of fundamental justice. At first instance, the court dismissed this argument on the basis that the right to reputation was not a protected right under s.7.⁵⁹² This decision has recently been heard on appeal but the decision has not yet been released.

Some SLAPP suits represent a serious abuse of the court system with a substantial impact on freedom of expression. The facts and procedural history in the *United Soils Management v. Mohammed* case is an eloquent illustration of the problem that the PPPA was designed to address. However, the question underlying much of the commentary and case law, and posed for stakeholders in this project, is whether the legislation successfully targets “real” SLAPP suits without unduly compromising legitimate defamation actions? In other words, does the PPPA succeed in striking an appropriate balance between free expression and protection of reputation?

4. Three Unique Characteristics of the PPPA

The PPPA is based on the recommendations of the Anti-SLAPP Advisory Panel. In designing the PPPA, the Panel made a number of policy choices that distinguish the PPPA from anti-SLAPP legislation in other jurisdictions. A few of these are worth reviewing in considering how successfully the legislation is fulfilling its purpose to date.

First, the PPPA adopts a relatively broad definition of the activity that it purports to protect, that is, any expression that “relates to a matter of public interest”. The Panel also considered but rejected narrower options such as protecting communications intended to influence government action.⁵⁹³ It emphasized the value in targeting the “full scope of legitimate participation in public matters”.⁵⁹⁴

Second, the PPPA targets the abusive effect of strategic litigation against public participation. This is in contrast to legislation in several other jurisdictions that target the plaintiffs' improper motives in bringing such actions.⁵⁹⁵ The Panel reasoned that determining motive or bad faith would be difficult particularly in the context of an expedited proceeding.

Third, the Panel considered and rejected limiting the types of defendants entitled to benefit from protection under the legislation.⁵⁹⁶ Corporations, media and individuals are all eligible to bring a motion so long as their expression genuinely relates to the public interest.

The LCO invites submissions on these characteristics of the PPPA as well as its effect to date.

Questions for Consideration

27. What impact has the PPPA had on the process and outcome of defamation lawsuits in Ontario? Does the PPPA achieve an appropriate balance between the interests of parties to defamation proceedings?

H. Role of the Jury

There is a tradition of jury trials for defamation actions in common law jurisdictions. However, this tradition has gradually eroded. In the 2013 *Defamation Act*, England decisively reversed the presumption for jury trials in defamation actions. The draft *Defamation and Malicious Publications (Scotland) Bill*, would similarly remove the presumption of jury trials in Scotland.⁵⁹⁷ In this section, we consider this trend and ask stakeholders to consider the role of juries in Ontario defamation proceedings. The role of the jury in defamation actions is a classic procedural issue that is not influenced by the advent of the internet.

Currently in Ontario, defamation actions are generally treated like any civil action, with a presumption that a trial will be by judge alone unless a party requires otherwise.⁵⁹⁸ However, section 14 of the LSA contemplates juries and provides that they may give either a general or special verdict.⁵⁹⁹ In other Canadian provinces, the rules vary. Quebec has no provision for defamation trials to be before a jury.⁶⁰⁰ In Manitoba and Nova Scotia, jury trials are presumed unless the parties consent otherwise.⁶⁰¹ Other provinces allow jury trials to be held on the request of a party unless a judge orders otherwise.⁶⁰²

The LCO does not have statistics on what proportion of Ontario defamation actions are heard by jury. Nor is it clear to what extent stakeholders agree or disagree on the jury issue. The LCO welcomes input from practitioners and parties on these issues.

Traditionally, jury trials have been considered appropriate for defamation cases because of the engagement of community values.⁶⁰³ This is particularly so where defamatory meaning is in issue since the test for establishing defamatory meaning is based on community standards. Plaintiffs may favour a jury trial if they believe that a jury increases their chance of receiving a larger damages award. However, jury trials may involve a longer and more costly litigation process than do trials by judge alone. For example, in the United Kingdom, jury trials were found to increase costs by 20-30% and double the length of the proceedings.⁶⁰⁴

There is some reason to believe that juries increase the cost and complexity of defamation trials. Jury trials tend to be both complex and "back-loaded". For example, where an allegedly defamatory statement may have several possible meanings, a jury may select one meaning over others only at the end of the trial. This requires that counsel prepare alternative arguments to accommodate varying meanings.⁶⁰⁵ But where a defamation proceeding is heard by judge alone, meaning may be determined early on as part of a preliminary motion.⁶⁰⁶ According to Alastair Mullis and Andrew Scott, this may lead to "significantly reduced" costs and more early settlements.⁶⁰⁷

Defamation trials in the *Charter* age raise important issues of constitutional rights, particularly the right to freedom of expression, and some argue that these questions of law are not appropriate to be left to laypersons.⁶⁰⁸ Also, legal developments such as the creation of the responsible communication defence have resulted in a “confused division of functions of judge and jury” which further complicates the jury’s task.⁶⁰⁹

The issue is whether the procedural efficiencies gained by trial by judge alone outweighs the value to be placed on the opportunity of complainants to have defamatory meaning determined by a jury of their peers. Lord Denning observed in *Rothermere v. Times Newspaper*:

*It is true that a trial by judge alone would have many advantages. In particular, a judge could deal better with the mass of documents and he would give reasons which could be reviewed by a Court of Appeal. But the result is not always better justice... But a jury looks at a case more broadly. They give weight to factors which impress the lay mind more strongly than the legal.*⁶¹⁰

As Andrew Scott wrote in his recommendations to the Northern Ireland government, “[e]specially, where decisions to be taken by the court have a factual character, their legitimacy in the eyes of the wider public may be peculiarly dependent in some socio-political contexts on community involvement in the reaching of outcomes.”⁶¹¹

Questions for Consideration

28. What is current practice on the use of juries on Ontario defamation trials?
Should the right to a jury trial for defamation actions be limited in Ontario?



I. Identifying Anonymous Defendants

In chapter III, we discussed the important role that anonymous speech plays in furthering privacy interests and the right to freedom of expression. However, anonymity can be a double-edged sword. On one end of the spectrum is the vulnerable whistleblower engaging in socially beneficial criticism (of unfair workplace practices, for example) whose anonymity shields her from retribution. In this circumstance, anonymity may be essential to protect free expression. On the other end of the spectrum is the poster who hides behind anonymity while engaging in defamatory slurs. This was condemned by the Court in *Manson v. Doe* as “freedom of defamation” not entitled to legal protection.⁶¹² The tension between the value and risks of anonymous speech is particularly cogent in the context of internet speech where anonymity is more easily achieved than in the offline world. In some circumstances, anonymous speech may be less harmful to reputation where it is less credible exactly because it is anonymous.

Anonymous internet communications give rise to significant procedural hurdles in bringing a defamation action that can impede access to justice. Karen Eltis warns of “anonymity’s capacity for undermining even emasculating domestic (Canadian) courts, the remedies they mete out and indeed the justice system.”⁶¹³ The problem is that, no matter how egregious defamatory statements may be and no matter what substantive remedy our legal system may make available, access to justice may be denied if the defendant is unidentifiable.

The practical problem is in identifying anonymous speakers so that those who are responsible for defamation and other illegal expression may be named as defendants in a legal action. In this section, we seek input on how to balance the value of anonymous speech with the need to prevent defamers from hiding behind the “electronic curtain” to avoid being legally held to account for their actions.⁶¹⁴

This issue is raised in the context of a plaintiff seeking to bring a defamation action directly against the anonymous speaker. Often, when faced with an anonymous speaker, the plaintiff may instead bring an action against the website or other internet intermediary hosting the defamatory comments. In chapter VII, we discuss this scenario and consider the extent to which intermediaries should be liable for defamation authored by someone else.

Many times, the problem of anonymous defamatory speech does not end up in court at all. A plaintiff may be more inclined to access a complaint mechanism operated by the intermediary hosting the site. In chapter VIII we look more broadly at extra-judicial mechanisms for alternative dispute resolution.

1. Motions to Identify Anonymous Speakers (Norwich Orders)

The anonymity possible in internet communications may be illusory. Website hosts, including social media platforms, may have identifying information for users where this was provided as a requirement of registering for the service.⁶¹⁵ Even where this information is not directly available, website hosts are usually able to link particular content to the internet protocol (IP) address of the computer or other device used to post the content. Once the IP address is known, the internet service provider (ISP) will be able to link that address to the particular subscriber who registered that computer or device.⁶¹⁶

Therefore, website hosts and ISPs will often have access to identifying information about an anonymous poster. Experience demonstrates, however, that they are unlikely to release this information to a complainant without a court order for two reasons. First, they will generally owe a duty of confidentiality to their customers under their terms of service. Also, they are subject to the *Personal Information Protection and Electronic Documents Act* (PIPEDA).⁶¹⁷ Under PIPEDA, an ISP is not permitted to disclose a subscriber's personal information without the subscriber's knowledge or consent, except in certain specified circumstances, including where required by court order.⁶¹⁸

Therefore, a complainant faced with an allegedly defamatory anonymous comment must generally bring a motion for an order requiring the website host and ISP to release information identifying a subscriber.⁶¹⁹ Ontario's rule 31.10 provides for a court order for discovery of a non-party "who there is reason to believe has information relevant to a material issue in the action" so long as the information cannot otherwise be obtained and, on balance, fairness requires it.⁶²⁰

It is also possible even before commencing an action to bring a motion for an equitable bill of discovery known as a *Norwich* order. The rationale behind the *Norwich* order was explained in the decision which gave it its name:

*[I]f through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability, but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of wrongdoers...[J]ustice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.*⁶²¹

Ontario courts have used both the Rules approach and the *Norwich* approach to support an order requiring intermediaries to disclose the identity of anonymous posters in certain circumstances.⁶²² Indeed, it is not clear that these are separate procedures.⁶²³ Subsequent case law has treated these as a single approach and, for the purpose of this paper, we do likewise. In referring to the *Norwich* procedure, we refer to this amalgamated approach.

The leading case in Ontario is *Warman v. Fournier*.⁶²⁴ The court held that the *Rules of Civil Procedure* must be interpreted in a manner consistent with *Charter* rights and values, including the right of freedom of expression and privacy interests. It laid out a four part test for determining whether it could order a third party to disclose the identity of an anonymous online user. The Court must consider whether:

1. the unknown alleged wrongdoer had a reasonable expectation of anonymity;
2. the applicant had a *prima facie* case of defamation and was acting in good faith;
3. the applicant had taken reasonable steps to identify the anonymous party and had been unable to do so; and
4. whether the public interests favouring disclosure outweighed the freedom of expression and privacy interests of the unknown alleged wrongdoers.⁶²⁵

These identification motions seek to balance the long recognized value of a broad discovery process that is evident throughout our common law system of legal procedure with the important *Charter* values underlying anonymous speech.⁶²⁶ As Robert J. Currie notes, our civil procedure generally reflects the “right to face one’s accuser” and this is contrary to the idea that anonymous defamation may lie beyond the reach of the law.⁶²⁷ But Currie goes on to say that “the deeply complex and potentially explosive relationship between technology and privacy is touching and sometimes reshaping many of the moving parts in the administration of justice, including procedure.”⁶²⁸

2. Procedural Barriers in Obtaining Norwich Orders

Currently, courts deliberating whether to grant a *Norwich* order conduct a careful balance the freedom of expression and privacy interests of the anonymous speaker, the reputational interests of the complainant and the societal interest in a broad discovery process promoting the administration of justice. In practice, we have heard from stakeholders that Norwich hearings operate efficiently. However, there is a certain artificiality to Norwich proceedings. Although developed in the context of civil actions involving parties sufficiently well-funded to see them through, the question to be asked is how accessible this process is to the vast majority of complainants seeking legal relief.

For example, obtaining a court order disclosing the identity of an anonymous internet poster is often a two-step procedure. A motion must be brought against the website host for an order disclosing the relevant IP address. A separate motion will then be necessary against the ISP in order to link the IP address to subscriber information. For example, this was the case in *York University v. Bell Canada*.⁶²⁹ The University brought a motion against Google Inc. for disclosure of the IP address behind the pseudonymous email and this order was granted in May 2009. The second order against the ISPs granting disclosure of the subscriber information was granted in August 2009. The allegedly defamatory comments had been in circulation online for 6 months (since February 2009) and the action for defamation had not yet been commenced. Mark Donald sums up the problem in a thoughtful blog and suggests that the current rules are unbalanced so as to favour online trolls.⁶³⁰

A motion against an intermediary may also be complicated by jurisdictional issues where the intermediary is headquartered out of the jurisdiction.⁶³¹

3. Limitations of Norwich Orders Once Obtained

Even if a plaintiff is successful in obtaining a *Norwich* order, the plaintiff cannot be confident about successfully identifying the alleged defamer. Learning the identity of the ISP subscriber may be of no use to the plaintiff if the defamer created the post on a public computer. At internet cafes and other public networks, it may be impossible to track who was using the computer at a given time.

Even computers in more private environments may be used by people other than the subscriber. For example, in *Applause Store v. Raphael*, Facebook complied with a Norwich order to reveal the IP address that had set up a false account containing defamatory content.⁶³² The IP address was linked to two computers in the defendant’s flat. However, the defendant denied being the author of the false account, alleging instead that it was friends who had stayed with him during the relevant period. The court held that the Defendant’s evidence was implausible and that he was, indeed, responsible for the defamatory account.⁶³³ However, this conclusion was drawn only after a four day trial and a detailed written judgment handed down over a year after the defamatory Facebook page was posted. This scenario shows how difficult it may be in certain circumstances to reveal anonymous posters even after having spent the time and money to obtain an order identifying the IP address involved.

There are also cases where a *Norwich* order is unsuccessful in identifying ISP subscribers who use false names. There are new technologies such as Tor which make it difficult and in certain circumstances impossible to trace transmissions through an ISP back to the Tor user.⁶³⁴ An example was considered by the court in *Brett Wilson LLP v. Persons Unknown*.⁶³⁵ The owners of the website in issue had registered with a proxy service listing them as “Anonymous Speech”. The service was set up

specifically to hide the identity of users and apparently would regularly move its servers from country to country in order to avoid detection.⁶³⁶ In that case, the plaintiffs obtained a *Norwich* order against “Anonymous Speech” but the order was simply ignored.

Even if the *Norwich* order is enforceable and the alleged defamer is unmasked, the plaintiff still has the challenge of bringing action against them. For all these reasons, no matter how meritorious a claim may be, pursuing a *Norwich* motion may be akin to rolling very expensive dice.⁶³⁷ Therefore, regardless of how carefully the *Norwich* test is devised or the various factors are balanced, the more basic issue is whether this court-based mechanism, with its attendant costs, creates a barrier to effective access to justice for a defamed plaintiff.

On the other hand, the anonymous author’s access to justice is also engaged. First, there is the concern for libel chill. Online users may choose not to post legitimate forms of anonymous speech for fear of being subjected to an expensive and uncertain court process. Second, *Norwich* orders are *ex parte* orders and there is a concern about interfering with a defendant’s privacy rights where that individual is not before the court.⁶³⁸ Of course, this latter argument is somewhat circular where the only reason that the defendant is not in court is that she has made the choice to hide behind anonymity. It might be questioned whether the plaintiff should be required to meet a higher threshold to obtain a disclosure order simply *because* the defendant has chosen not to disclose.

4. Reform Options for Identifying Anonymous Defendants

Canada, the United Kingdom, the United States and Australia have all adopted a system of “traceable anonymity”. This means that online users are anonymous until they pass a threshold of behavior, which varies from jurisdiction to jurisdiction, which can then be used as a basis for identifying them.⁶³⁹ The LCO believes this is an appropriate model generally since it allows for a balancing of the various interests engaged. However, the issue is how that threshold should be determined. One question for stakeholders is whether the *Norwich* test as it has developed in Ontario is an appropriate test for determining when the veil of anonymity should be pierced. Or are there other factors to be considered or balanced? An additional concern is whether the cost and complexity of the process for seeking a *Norwich* order is, for practical purposes, an inappropriate burden on plaintiffs’ access to justice.

There are several possible approaches to these issues.

i. Notice Requirement and Serving Anonymous Defendants

Mark Donald suggests that procedures for commencing actions should be reformed to rebalance the interests of plaintiffs and anonymous posters.⁶⁴⁰ First, according to Donald, there should be clarification that the notice requirements applicable to newspapers and broadcasters under the LSA do not apply in respect of anonymous defendants. The notice requirement in the LSA is discussed in more detail above.

Second, Donald recommends making service by email more broadly acceptable in these cases. As to this latter suggestion, it is noted that service by social media is increasingly being ordered by Ontario courts and commentators have suggested that this should be the rule rather than the exception.⁶⁴¹

ii. Linking Intermediary Liability to Anonymity

In England, the *Defamation Act, 2013* deflects the problem of identifying anonymous online speakers by shifting responsibility to the intermediary to respond to complaints as required by the Website Operators Regulation.⁶⁴² A proper response requires both obtaining the speaker’s contact information and providing it to the victim, or removing the defamatory content. Instead of bringing an expensive pre-trial motion, the complainant need only give notice to the intermediary and they may be able to access the wrongdoer’s identity, or at the least have the post taken down.

Although Ontario does not currently have a regulatory system as in England, intermediaries are still potentially liable as secondary publishers in common law and this provides them with some incentive to assist complainants in the identification

of alleged defamers. In contrast, USA intermediaries are virtually immune from defamation lawsuits and privacy and free speech are more entrenched, giving them less incentive to cooperate with complainants.

We discuss the issue of intermediary liability in further depth in chapter VII below.⁶⁴³

iii. Summary Disposal Motions Against Anonymous Defendants

A motion to obtain a *Norwich* order to identify anonymous defendants is usually a means to an end. The ultimate goal is to bring a defamation proceeding against the defendant in order to obtain a remedy in respect of the alleged defamation.⁶⁴⁴ But we have seen that there are numerous circumstances in which the test for a *Norwich* order may not be met or, even if a *Norwich* order is granted, it is not enforceable or, even if enforced, it is not effective to reveal the identifying information sought.

In England, this is not necessarily the end of the road for the plaintiff's claim. England's summary disposal process, discussed above in the section on Preliminary Hearings, has been successfully used in a couple of cases against anonymous defendants who "hide" from the proceedings.⁶⁴⁵ In both cases, the motion judges were careful to conclude that service of the motion for summary disposal had been effected but that the defendants had chosen not to engage with the court process. In both cases, the court ordered the maximum damages allowable under the summary disposal procedure (£10,000) and an injunction for the removal of the impugned webpages.

Of course, the obvious limitation to the use of this procedure, or a summary judgment motion in Ontario, against anonymous defendants is that it is unlikely to be enforceable against them. However, a default judgment should be effective in convincing an intermediary to remove the defamatory content.⁶⁴⁶ This would be the court order that intermediaries require. It also serves as a public vindication for the plaintiff that may be just as valuable to them as a monetary award. The summary disposal procedure has been called "relatively straightforward" and "the most suitable mechanisms for cases... where a final injunction (and an award of vindication) is needed as promptly and cost-effectively as possible."⁶⁴⁷

iv. Separating Identification Motions from Defamation Claims

Professor James Grimmelmänn argues that identification motions to unmask anonymous defendants should be considered as a potential remedy for defamed plaintiffs separate and apart from the possibility of a defamation claim.⁶⁴⁸ In certain cases, the threat of being unmasked (and the public shame involved) is a persuasive incentive to refrain from the kind of mob attack that is so prevalent on social media. Of course, there may be equally persuasive privacy and/or freedom of expression considerations militating against unmasking but Grimmelmänn's point is that this balancing exercise should be conducted directly without regard to the strength of the plaintiff's claim for defamation. Instead, he suggests that the balancing exercise take into account the likelihood of the plaintiff retaliating against the defendant if unmasked. The LCO is seeking advice on this proposal.

v. Education of Users

A common suggestion in a variety of contexts is that there is a need for users to be educated about the online world. Many do not realize there are technologies for unmasking anonymous users. If users are aware that anonymous content may be traced back to them, they may be less likely to make irresponsible or harmful statements. A focus on educating users in classrooms, workplaces and various online communities would hopefully work proactively to reduce the frequency of anonymous defamation.

Questions for Consideration

29. Does the current test for obtaining a *Norwich* order appropriately balance anonymous free speech, privacy interests, the value of a broad discovery process and the administration of justice? Would legislation addressing the identification of anonymous defendants be appropriate?

J. Anonymizing Plaintiffs

There is a strong presumption in Ontario, as elsewhere in the common law world, that court proceedings will be open and accessible to the public and the media.⁶⁴⁹ Public access extends not only to court hearings themselves but also to the names of the parties and the content of court documents. This open court principle is deeply entrenched in our democracy and our *Charter*, including our right to freedom of expression.⁶⁵⁰ In most cases, it is recognized to be a legitimate limit on privacy interests.⁶⁵¹ And, since most people learn about court proceedings through the media, freedom of the press has become closely linked to open justice.⁶⁵²

Defamation proceedings are usually public by virtue of the open court principle. This makes particular sense for defamation proceedings because these claims involve reputation which can only be measured by reference to public opinion. However, in some cases, defamation proceedings pose a dilemma for open justice. The reputational harm caused by defamation may be exacerbated by the public process brought to remedy it. Therefore, some plaintiffs seek orders to restrict publicity. One possibility is an order for “anonymization” which disguises the plaintiff’s identity through the use of initials.⁶⁵³ In this section, we discuss the tension that exists between the open court principle and the role of anonymization orders where complainants may be dissuaded from defamation litigation for fear of suffering additional reputational harm.

In Ontario, limits to the open court principle are recognized only in exceptional cases. Under the *Dagenais/Mentuck* test, publication bans or analogous limitations on publicity (including anonymization) will be ordered (a) where necessary to prevent a serious risk to the proper administration of justice and (b) where the benefits of a ban outweigh adverse effects, including effects on the right of free expression.⁶⁵⁴ Some general exceptions have developed under this test. For example, the court will protect the privacy of confidential information raised in a lawsuit where to do otherwise would destroy the very subject-matter of the litigation.⁶⁵⁵ There are also statutory exceptions to the general rule of openness designed to protect the special privacy interests of children.⁶⁵⁶

The competing interests at play in an anonymization request are well illustrated by the facts in *AB v. Bragg*.⁶⁵⁷ This case involved a 15 year old girl who had been the victim of cyberbullying and defamation. She sought anonymity in her motion to unmask the identity of her defamer. She argued that, unless her privacy was protected, other young victims of cyberbullying would be unwilling to come forward and would, therefore, be denied access to justice.⁶⁵⁸

The Nova Scotia Court of Appeal would have denied the request for anonymization. It reasoned that reputational harm can only be measured in the eyes of the public so that proceeding “under a cloak of secrecy” is “contrary to the quintessential features of defamation law”.⁶⁵⁹ The Court also noted the potential benefits of publicity in warning social media users about the dangers of sharing personal information as well as deterring would-be cyberbullies.⁶⁶⁰

The Supreme Court of Canada allowed the appeal. It affirmed the “critical importance” of the open court principle but recognized that there are some interests “sufficiently compelling to warrant restrictions on freedom of the press and open courts”.⁶⁶¹ The applicant’s privacy interests were found to be heightened due to her age and the type of victimization (sexualized online bullying). In the circumstances, the need to protect her privacy interests outweighed the open court principle. The Court reasoned in part:

*In addition to the psychological harm of cyberbullying, we must consider the resulting inevitable harm to children – and the administration of justice – if they decline to take steps to protect themselves because of the risk of further harm from public disclosure.*⁶⁶²

The Court was concerned to encroach on the open court principle and freedom of the press as little as possible. Anonymization was found to be minimally harmful because it would not prevent the media from being present at the hearing and reporting on it.⁶⁶³ The Court refused to order a more intrusive publication ban.

The result in *AB v Bragg* turned on the fact that the applicant was a child victim of cyberbullying and the precedential effect

of the decision on future anonymization cases is not yet clear. However, the decision does illustrate the balance that must be drawn between the importance of open justice and the benefits of anonymization in defamation cases where a lawsuit may have the antithetical effect of increasing reputational harm.

There are starkly opposing viewpoints on the desirability of allowing for anonymized plaintiffs in defamation claims. Many argue that anonymization should be resisted in order to protect the open court principle in our legal system. It is through public scrutiny that the independence and impartiality of our courts are ensured. An open process also inspires public understanding and confidence in the administration of justice.⁶⁶⁴ This ultimately lends legitimacy to the justice system. There are other benefits to open justice as well. Naming litigants encourages the public to care about the issues.⁶⁶⁵ Names become engrained in people's minds and help to personalize stories and invoke empathy. Naming litigants may also encourage more individuals to come forward on similar issues.⁶⁶⁶

In addition to a general concern for the open court principle, David Rolph argues that the very nature of defamation proceedings suggests that plaintiffs should usually be named. The goal of a defamation claim is to vindicate harm to reputation which is public by definition. Rolph questions how the plaintiff's reputation can be vindicated if her identity is unknown.⁶⁶⁷

Media resisting anonymization orders argue that pseudonyms are not appropriate once an individual has already been named in the public sphere. In other words, it is impossible to "unring" the bell once it has sounded.⁶⁶⁸ Similarly, it is said that the widespread availability of information online makes it practically impossible to maintain anonymity in the internet age and courts should not be engaging in what is essentially a moot exercise.⁶⁶⁹

On the other hand, others argue that the balance between open justice and privacy must be recalibrated in the internet age. Websites like canlii.org, and other electronic case databases, make case information, including the names of litigants, much more accessible than ever before.⁶⁷⁰ And this information may spread much further, thereby causing new reputational harm over and above the harm that motivated the claim in the first place.

Furthermore, internet culture has changed how personal information is accessed. According to Jane Bailey and Jacquelyn Burkell, online personal information is just as likely to be sought out for financial gain or voyeuristic entertainment as for insight into the functioning of the legal system.⁶⁷¹ Therefore, in these circumstances, the protection of privacy interests may not be inconsistent with the policy underlying the open court principle. And it has been argued that anonymization may be an effective tool for protecting personal privacy with minimal harm to open justice.⁶⁷² According to Karen Eltis, safeguarding privacy through anonymization of plaintiffs may actually encourage participation in the justice system.⁶⁷³

Finally, there is another consideration which suggests that anonymization orders may become more common in defamation proceedings in the future. David Rolph has observed that in the UK reputation has been recognized as a component of the right to a private life in Article 8 of the European Convention of Human Rights.⁶⁷⁴ He suggests that courts may be more willing to grant anonymization orders accordingly. It is arguable that a similar overlap between reputation and privacy is being recognized in Canada.⁶⁷⁵ To the extent that this is so, it may be that privacy interests should receive more weight in the *Dagenais/Mentuck* test.

Questions for Consideration

30. What principles should be applied in deciding whether to grant anonymization orders to plaintiffs in defamation proceedings in the internet age?



VI. PRIVACY AND ITS RELATIONSHIP TO DEFAMATION

There is reason to believe that, in the future, defamation law may no longer be the primary means of addressing reputational harm. Other legal tools, developed to address the increasing importance of protecting personal privacy, may overtake defamation law in this respect and these offer a further challenge to the relevance of defamation law in the internet age.

This trend is due in part to the technological revolution that has caused new challenges to privacy and to reputation.⁶⁷⁶ The phenomenon has reached new levels with the advent of the internet. According to the India Supreme Court:

*Ours is an age of information. Information is knowledge. The old adage that “knowledge is power” has stark implications for the position of the individual where data is ubiquitous, an all-encompassing presence. Technology has made life fundamentally interconnected... [E]very transaction of an individual user and every site that she visits, leaves electronic tracks generally without her knowledge. These electronic tracks contain powerful means of information which provide knowledge of the sort of person that the user is and her interests. Individually, these information silos may seem inconsequential. In aggregation, they disclose the nature of the personality: food habits, language, health, hobbies, sexual preferences, friendships, ways of dress and political affiliation. In aggregation, information provides a picture of the being: of things which matter and those that don’t, of things to be disclosed and those best hidden.*⁶⁷⁷

The internet has also brought with it uniquely modern social problems, such as cyberbullying, revenge porn and cybersecurity breaches that give rise to both privacy and reputation interests. Thus far, privacy rights, statutes and common law tools have arguably been more successful than defamation in responding to these challenges. The downside is perhaps a lessening of the importance of free speech.

This chapter will discuss the relationship between defamation and privacy and ask questions about how the law in Ontario can or should address the overlapping and evolving issues of reputational harm, free speech, privacy and technological change. We will review the complex and evolving array of statutory and common law tools designed to protect privacy, data protection and related issues. An important part of this analysis is a discussion of how defamation law and privacy issues have been “gradually moving towards each other in the early 21st century” in both Ontario and other jurisdictions.⁶⁷⁸ These issues are explored in further detail in the paper by David Mangan commissioned by the LCO for this project.⁶⁷⁹

A. Privacy and Reputational Interests

There is no doubt that the interests underlying privacy and defamation are deeply entwined. In certain circumstances, protecting one’s privacy can be the most effective means of protecting reputation, particularly in the digital age where records last forever and there is an enormous amount of personal data available for review. Privacy is about more than just having “private” conversations on social media. Consider criminal convictions, personal bankruptcy and other digitized personal records which may directly affect one’s reputation. In the past, these records, though technically public, were effectively private because they were obscure or hard to find. Now, these matters may be easily accessible through key word searches.

A glimpse into the online world of today’s youth also reveals an overlap between privacy and reputation. Youth play an increasingly proactive role in creating their online reputation by controlling personal information and the audience to whom it is revealed. Privacy protection is crucial in maintaining that control over information and audience.⁶⁸⁰

This connection between privacy and reputation is increasingly reflected in our legal principles. The Supreme Court of Canada has acknowledged privacy to be “intimately related” to reputation and has recognized it as a *Charter* value engaged in the tort of defamation.⁶⁸¹ In the European Union, reputational interests are recognized as one element of the right to private life protected by article 8 of the *European Convention of Human Rights (ECHR)*.⁶⁸² The nature and extent of these overlapping interests is a developing area of ECHR jurisprudence and commentary.⁶⁸³

However, not all privacy interests are related to reputation. In chapter III, we introduced the three zones of privacy (territorial privacy, personal privacy and informational privacy). Of these, it is informational privacy that is primarily engaged in conjunction with defamation law issues. Informational privacy interests may be violated both by *discovery* of private information (that is, learning about something previously unknown) and *disclosure* of private information (that is, making something known to a third party).⁶⁸⁴ But only *disclosure* of private information, particularly through publication to a third party, may impact reputation and may resemble or give rise to a claim in defamation. So too, only *disclosure* of private information gives rise to countervailing considerations of freedom of expression. In this chapter, we focus on privacy in this context, that is, the disclosure of private information insofar as it engages reputational interests and free expression.

B. Protecting Privacy and Reputation in Law

Historically, reputation was exclusively protected by the law of defamation and the law did not recognize a right to privacy. One of the reasons for refusing to remedy breaches of privacy was a concern for unduly impinging freedom of expression which often counterbalances privacy interests just as it does reputational interests.⁶⁸⁵ Over time, however, common law and statutory instruments have developed for the protection of personal privacy and personal data and these new legal tools, in many cases, also provide some protection to reputation. The question being grappled with in many jurisdictions is: where does this leave the law of defamation?

This section summarizes some of the complex array of legal “tools”, common law and statutory, that have been developed to protect privacy interests and that, in some circumstances, may also operate as an alternative to a defamation claim. The final section of this chapter explores the relationship between these overlapping legal instruments and defamation law and asks stakeholders to consider what implications there may be for defamation law reform. The LCO is seeking advice on how defamation law “fits” within this increasingly complex legal landscape.

1. Common Law Protection of Privacy

The recognition of a legal claim for breach of privacy is still in its infancy. In this section, we review a selection of privacy-related claims that have either been newly created or are arguably under development.⁶⁸⁶ Each is an attempt to respond to the new challenges to personal privacy brought about by the internet. In each, it is apparent that reputational interests are tied up with the privacy interests being protected.

i. Invasion of Privacy

Ontario is the only province in Canada that has recognized a tort for invasion of privacy. In *Jones v. Tsige*, a bank employee used her computer to access the personal bank records of another employee 174 times over a period of four years. In these circumstances, the Ontario Court of Appeal took the novel step of recognizing a direct cause of action for invasion of privacy based on the American tort of intrusion upon seclusion.⁶⁸⁷ The case involved discovery rather than disclosure of private information and reputational interests were not engaged. However, the court’s reasons arguably set the stage for the recognition of the related tort of public disclosure of embarrassing private facts which does involve disclosure of information and reputational interests.⁶⁸⁸

Elsewhere, four provinces (BC, Saskatchewan, Manitoba, Newfoundland) have created statutory torts for breach of privacy.⁶⁸⁹ Privacy rights are also protected under Quebec law in the *Civil Code* and the *Quebec Charter of Human Rights and Freedoms*.⁶⁹⁰ These provisions all apply to the disclosure of private information and, therefore, may engage reputational interests.

ii. Disclosure of Intimate Images (Revenge Porn)

A contemporary social phenomenon that cries out for a legal remedy is the online disclosure of intimate images, otherwise known as revenge porn. Although the phenomenon has recently been criminalized in Canada, a civil remedy is widely believed to be necessary.⁶⁹¹ In Manitoba and Alberta, a statutory tort has been created that allows victims to sue for damages where a person distributes an intimate image of them recklessly or without consent.⁶⁹² In Ontario, a new tort of “public

disclosure of private facts” temporarily addressed the problem.⁶⁹³ However, the court created this tort in the course of a motion for default judgment and the decision has since been set aside.⁶⁹⁴ Therefore, in this jurisdiction, as in most, it is not yet clear to what extent the law provides victims with a civil remedy.

Revenge porn involves the publication of personal material that may certainly result in reputational harm. For example, the LCO’s commissioned study by Bailey & Steeves found that, among the youth they studied, incidents of revenge porn “almost automatically” resulted in the victims gaining “a reputation for being a slut”.⁶⁹⁵

iii. Cyberbullying

Cyberbullying is another recent social phenomenon which raises both privacy and reputational interests.⁶⁹⁶ This involves online behaviour causing “fear, intimidation, humiliation, distress or other forms of harm to another person’s body, feelings, self-esteem, reputation or property.”⁶⁹⁷ Currently in Canada there is no cause of action, either in common law or legislation, specifically directed to combating cyberbullying. The Nova Scotia *Cybersafety Act* was introduced for this purpose in 2013 but was struck down by the Nova Scotia Superior Court in 2015 as being constitutionally overbroad.⁶⁹⁸

iv. Online Harassment

Harassment involves “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.”⁶⁹⁹ The distinction between cyberbullying and online harassment is a subtle one (cyberbullying is used particularly in the context of youth). Both commonly involve publishing negative information online and, therefore, can result in reputational harm. There is no direct cause of action of online harassment in Canadian law. However, various torts, such as defamation and assault, have served this purpose.⁷⁰⁰

England and Wales has introduced the *Protection from Harassment Act, 1997* which prohibits people from pursuing a course of conduct (including speech) that amounts to harassment of an individual.⁷⁰¹ The Act provides for a civil action by a victim of harassment for damages or injunctive relief.

v. England’s Misuse of Private Information

In the United Kingdom, privacy is expressly protected by art. 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*: “Everyone has the right to respect for his private and family life, his home and his correspondence.”⁷⁰² The English courts have chosen to protect this right by expanding the tort of breach of confidence into a general tort protecting against privacy breaches, known as misuse of private information.⁷⁰³ The legal test has been devised to balance the Article 8 right to privacy and the Article 10 right to freedom of expression.⁷⁰⁴ Reputational interests, or “the right to the esteem and respect of other people” are directly engaged in this test as part of the right to informational privacy.⁷⁰⁵

2. Statutory Protection of Privacy

i. Canada’s PIPEDA

Unlike some provinces, Ontario does not statutorily regulate the disclosure of personal information in the private sector.⁷⁰⁶ Instead, Ontario commercial entities are subject to the federal regulatory regime in the *Personal Information Protection and Electronic Documents Act* (PIPEDA).⁷⁰⁷ PIPEDA limits the collection, use or disclosure of personal information “in the course of commercial activities” without consent unless one of the exemptions applies. The exemptions are lengthy and include “personal or domestic use, and artistic, literary, or journalistic reasons”.⁷⁰⁸

The Office of the Privacy Commissioner of Canada (OPC) is charged with overseeing compliance with PIPEDA and hears complaints where personal information has been improperly disclosed online. A complaint may be followed up with a hearing before the Federal Court and the Court may award damages for a violation of PIPEDA in “egregious” cases.⁷⁰⁹ In deciding to make an award of damages, the court will consider, among other things, “the impact of the breach on the... social, business or financial position of the applicant” (that is, reputational harm).⁷¹⁰

PIPEDA's overlapping protection of privacy and reputational interests is illustrated in some of the case law. For example, in *Nammo v. Transunion of Canada Inc.*, the respondent credit agency had reported inaccurate credit information about the applicant to a bank.⁷¹¹ The bank declined the applicant's loan application on the basis that he had "bad credit". The Court made an unprecedented damages award of \$5000 for violation of the provisions of PIPEDA. The Court reasoned that the applicant had suffered humiliation in front of his business partner and the bank and that he "wanted to clear his name".⁷¹² The breach was "serious", involving "financial information of high personal and professional importance".⁷¹³

PIPEDA is a limited mechanism for remedying privacy and related reputational breaches for a number of reasons.⁷¹⁴ In particular, the "journalistic, artistic or literary purposes" exemption would presumably preclude most claims against media organizations.⁷¹⁵ However, the fact remains that this is another format through which reputation may be protected along with privacy interests.

ii. United Kingdom's Data Protection Act, 1998

The UK's *Data Protection Act, 1998* regulates the "processing" of personal data.⁷¹⁶ It was introduced to implement the European Union *Directive*, discussed below, and the right to private life in Article 8 of the *European Convention on Human Rights (ECHR)*.⁷¹⁷ Like PIPEDA, it exempts from its provisions the processing of personal data with a view to the publication of "journalistic, literary, or artistic material". It also exempts processing where there is a reasonable belief that publication would be in the public interest.⁷¹⁸ These exemptions are intended to protect the right to freedom of expression in Article 10 of the ECHR.⁷¹⁹ Like PIPEDA, the DPA can be, and increasingly is being, used to protect reputation along with privacy.⁷²⁰

The DPA is, by definition, tied to the law of defamation. "Data controllers" (persons determining the purposes for which and the manner in which personal data is processed) are required to comply with a series of data protection principles.⁷²¹ The first such principle is that personal data shall be processed "fairly and lawfully".⁷²² The term "lawfully" has been interpreted to refer to the general law of confidentiality, including the law of libel.⁷²³ In other words, the defamatory processing of personal data will amount to a violation of the DPA.

The overlapping scope of the DPA was established in *Law Society v. Kordowski*. This case involved the www.solicitorsfromhell.co.uk website which published defamatory reviews of law firms.⁷²⁴ The Court upheld a claim for violation of the DPA, a claim for harassment under the *Protection from Harassment Act* and a libel claim. It reasoned that each cause of action represented a different aspect of the right to private life in Article 8.⁷²⁵ Libel was designed to protect reputation. Harassment was designed to protect against "unjustifiable alarm and distress". And the DPA was broader but similarly protected against "being subjected unfairly and unlawfully to distress".⁷²⁶

This reasoning was approved by the Court of Appeal in *Prince Hicham v. Elaph Publishing Ltd.*⁷²⁷ *Hicham* was a classic defamation case involving a news article critical of the Prince that was published on the publisher's UK website. The Court confirmed that a DPA claim could be pursued alongside the defamation claim.

iii. The European Union's Right to be Forgotten

The European Union is a world leader in the regulation of personal privacy. Currently, the EU's Data Protection Directive ("the Directive") sets out guidelines which have been incorporated into privacy legislation in each Member State, including the DPA in the United Kingdom.⁷²⁸

An important aspect of the EU's data protection regime is "the right to be forgotten" (RTBF). In *Google Spain (2014)*, the Court of Justice of the European Union (CJEU) recognized the existence of a right to be forgotten where personal data located online is "inadequate, irrelevant or no longer relevant, or excessive in relation to" the "purposes for which [it was] collected or processed".⁷²⁹ The CJEU found that the data subject may make a complaint requesting that the relevant search engine remove links from its results to a search for the data subject's name.⁷³⁰ However, the Court recognized that this request must be balanced against other fundamental rights including freedom of expression.⁷³¹ A request may be denied, if, for example, the information is in the public interest.⁷³²

The *Google Spain* decision caused a maelstrom of criticism and commentary globally.⁷³³ However, a form of RTBF (a right of erasure) is also included in the *General Data Protection Regulation* (GDPR) which will replace the Directive in 2018.⁷³⁴

For practical purposes, the RTBF has fallen to search engines, most prominently Google, to administer. Since the 2014 *Google Spain* decision, Google has received 509,125 requests to remove 1,621,955 URLs on RTBF grounds. These numbers demonstrate the extent to which individuals today are concerned about online threats to their personal privacy and reputation. Of these requests, Google has removed 57 percent pursuant to its own internal policies and practices.⁷³⁵

The recognition of a RTBF in Europe has potentially world-wide implications. It reflects a concern by lawmakers everywhere about the ubiquity of personal data online and the resulting risk to privacy and reputational interests. On the other hand, it allows intermediaries, who are commercial actors, to play an unprecedented role in controlling online speech. The RTBF is a legal reform driven by the same technological issues influencing defamation law and, for this reason, is of great interest to the LCO.

The possibility of a RTBF being recognized in Ontario has been raised as an issue by numerous stakeholders in connection with the LCO's project. The issue is also currently under consideration by the Office of the Privacy Commissioner of Canada in its *Online Reputation* project.⁷³⁶ Of particular concern to some stakeholders is the possibility that freedom of expression will be preemptively violated by search engines who will prefer to delist information on request rather than possibly incur the cost of legal proceedings. Some commentators argue that a RTBF would be unconstitutional in Canada for this reason.⁷³⁷ Commentators have also argued that a right to be forgotten ignores the social importance of an open internet as a disseminator of information in the public interest.⁷³⁸

How does this RTBF debate impact the issues in this project? It may be that the extent of any conceptual resemblance between RTBF and defamation is not the relevant question here. RTBF is not so much of a right as a remedy.⁷³⁹ It allows a data subject the right to seek to have personal information delisted from a search engine.⁷⁴⁰ The right engaged in RTBF claims is the right to informational privacy. The remedy is delisting, except that this remedy is administered, at first instance at least, outside the court system. Delisting is discussed further in chapter VIII.

C. Relating Defamation and Privacy Law: Where Does Defamation Fit?

So far, this review has summarized how new offshoots of privacy law, developed to respond to the unprecedented privacy challenges of the internet age, are increasingly addressing the reputational interests traditionally protected by defamation law. These developments have led some commentators to conclude that defamation law is increasingly irrelevant or in need of serious reform. For example, Ursula Cheer has suggested that the tort of privacy has the capacity to “swallow up” significant parts of defamation.⁷⁴¹ The LCO recognizes the importance of these developments and suggests that it may be helpful to summarize and analyze some of the key differences between these legal concepts, tests and procedures in order to assess how defamation law should “fit in” to this new social and legal environment.

1. Defamation Law is Limited to False Claims; Privacy is Not

The most obvious traditional distinction between defamation law and privacy claims is that defamation law concerns itself exclusively with false publications whereas breach of privacy, cyberbullying and harassment may involve true information. Upon reflection, however, this apparently clear distinction between defamation and privacy law breaks down.

First, David Mangan points out that the falsity requirement has historically not been core to the definition of defamation but has been more of an “add on” element realized through the defence of justification.⁷⁴² In modern times, according to Mangan, defamation law has moved away from a bright line distinction between truth and falsity to address the rise of opinion which is neither true nor false.⁷⁴³

Second, although privacy violations may involve true information, this is not necessarily so. For example, the Office of the Privacy Commissioner has acted under PIPEDA to investigate a company selling false personal information.⁷⁴⁴ Also, the UK courts, arguably ahead of Canada in the development of privacy law, have held that the truth or falsity of information is irrelevant to the determination whether it is private and entitled to protection in law.⁷⁴⁵

Third, it is often difficult if not impossible to discern truth in the online environment.⁷⁴⁶ Information may be a combination of truth, falsity and opinion, or even “throwing shade.”⁷⁴⁷ Or, truth may simply be less valued in some contexts than it was in the past. There is anecdotal evidence that some people prefer informal online “news” sources even though they know that what they read is not necessarily true.⁷⁴⁸ Bailey and Steeves comment in their commissioned paper that “defamation law’s focus on *falsity* and *individual reputation*, and its distinction between opinion and fact may weaken its contribution to reputational protection.”⁷⁴⁹

Fourth, it has been asserted that reputational interests should encompass harm from true information as from false information. In *Pattaswamy v. Union of India*, Sanjay Kishan Kaul J. of the India Supreme Court issued a concurring judgment recognizing a constitutional right to privacy and reasoning:

*An individual has a right to protect his reputation from being unfairly harmed and such protection of reputation needs to exist not only against falsehood but also certain truths. It cannot be said that a more accurate judgment about people can be facilitated by knowing private details about their lives – people judge us badly, they judge us in haste, they judge out of context, they judge without hearing the whole story and they judge with hypocrisy. Privacy lets people protect themselves from these troublesome judgments.*⁷⁵⁰

Therefore, there is some suggestion that the truth/falsity dichotomy between privacy and defamation law may need re-examining in the modern context.⁷⁵¹

2. Defamation and Privacy Remedies are Different

Another traditional distinction between privacy and defamation is their remedial features.⁷⁵² Traditionally, breach of privacy is said to be irremediable. Once private information is made public, there is no way to put that information back into the private sphere. Therefore, damages are not available for a breach of privacy. A defamed reputation, on the other hand, may be vindicated through a court action and an award of damages is the demonstration of that vindication.⁷⁵³ And this is linked to another traditional distinction between the claims. The threshold for interlocutory relief is very high in defamation actions in order to protect against prior restraint of speech. Privacy actions, on the other hand, are subject to the standard test for injunctions, suggesting a lower level of protection for freedom of expression.⁷⁵⁴

David Rolph argues that these distinctions are not as solid as they may appear.⁷⁵⁵ Defamation actions are not all that successful at vindicating reputation and, in any event, the goal of vindicating one’s interests is a feature of many torts and could conceivably be extended to privacy claims.⁷⁵⁶ And it is not clear that there is a principled basis for applying different tests for injunctive relief to defamation and privacy claims.⁷⁵⁷

Furthermore, the remedial distinctions between the two actions become moot where claims do not reach the courts. We discuss in chapters VII and VIII the more likely scenario in the internet era in which complaints are made to internet intermediaries about offensive online content and intermediaries make the determination whether or not to remove the content. In these cases, claims may not be labelled privacy and/or defamation at all. In these cases, the additional concern arises that intermediaries will pre-emptively remove content in violation of freedom of expression rather than risk involvement in legal proceedings.

3. Defamation More Explicitly Balances Free Speech with Reputation and Privacy Interests

In Canada, privacy has not yet developed the same robust tradition of balancing reputation and privacy interests with the constitutional right to freedom of expression.⁷⁵⁸ For example, the Ontario courts have refused to recognize a tort of public

disclosure of private facts in the context of a defamation claim since it would risk undermining the law of defamation's careful balance between free expression and protection of reputation.⁷⁵⁹ Less regard for freedom of expression is also evident in the lower threshold for injunctive relief developed for privacy claims as discussed above.

4. Defamation and Privacy Claims Have Different Legal Tests and Defences

Although defamation and privacy claims are doctrinally distinct, the overlapping privacy and reputational interests at stake are increasingly resulting in these claims being combined in legal proceedings.⁷⁶⁰ Courts are faced with attempting to harmonize different legal tests and defences. In some cases, the claims may be conflated. For example, in England, since the serious harm threshold was introduced in the *Defamation Act, 2013*, making defamation a less attractive option for claimants, privacy claims are beginning to play a larger role in remedying reputational harm.⁷⁶¹

Statutory initiatives are also invading the traditional reach of defamation. For example, the Nova Scotia *Cyber-safety Act* was expressly designed as a substitute for defamation claims.⁷⁶² According to the Nova Scotia Attorney General:

*The legislation was created to ... provide alternatives to a civil suit for defamation. Timeliness was seen to be an important characteristic because of the speed with which messages can spread on the Internet. A low-cost alternative to a civil suit for defamation was also seen to be important, enabling greater access to justice to victims of cyberbullying who otherwise may not have been able to afford to bring a defamation suit.*⁷⁶³

During its short life, the Nova Scotia legislation appears to have lived up to its intent. In *Nova Scotia (Director of Public Safety) v Lee*, the court granted a prevention order under the Act on facts that might have grounded a claim in defamation.⁷⁶⁴ And, just as defamation cases may be characterized as cyberbullying, so too has cyberbullying been characterized as defamation.⁷⁶⁵

As we noted in the section on remedies above, the legal distinctions between privacy and defamation may not be observed at all where claims involving online content are determined by intermediaries rather than by the courts. The question to be asked here is what is the practical effect of this growing tendency to combine claims in privacy and defamation in spite of the doctrinal differences between them?

5. Where Do We Go From Here? Reconsidering the Relationship Between Privacy and Defamation Law

The time-honored position is that privacy torts and defamation fulfill different functions. Defamation law is "principally concerned with the protection of the plaintiff's public face" whereas privacy is "inherently private."⁷⁶⁶ Therefore, as of 2016, most law reform projects continue to look at defamation and privacy in isolation from one another.⁷⁶⁷

However, we have seen above that privacy claims are increasingly addressing reputational harm and, therefore, overlapping with the traditional sphere of defamation law.⁷⁶⁸ The issue for this project is whether, in light of these developments, the relationship between the privacy torts and defamation law should be re-examined.

A number of commentators have argued that a re-examination is necessary.⁷⁶⁹ Ursula Cheer notes that the increase in cases of "complex damaging speech" (in which reputational and privacy interests are entwined) is threatening the coherence of the law.⁷⁷⁰ David Mangan suggests that "a focus on clarifying the purposes of these actions is necessary."⁷⁷¹ He offers "intrusion" as a possible unifying element between privacy and defamation, particularly in the context of social media, to prevent the law from veering into "divergent terrain."⁷⁷²

Some degree of overlap between privacy and defamation is accepted.⁷⁷³ But it may be that the overlap is growing. There are some long-established distinctions between privacy and defamation that are being questioned. For example, the truth/falsity distinction, discussed above, is increasingly unstable in the internet age.

Cheer examines overlapping features between privacy and defamation and notes that both claims “look outwards at how others perceive us, which can impact on both public and personal lives”.⁷⁷⁴ Both may involve loss of public and personal dignity and lost dignity is remedied in both torts in damages for distress, hurt feeling and humiliation. Also, loss of autonomy is a key feature in both claims.⁷⁷⁵

Cheer argues that the two torts might be merged in a broader claim for harm caused by published speech. She suggests that New Zealand's *Harmful Digital Communications Act* (2015) might be expanded to serve this purpose by addressing all communications (rather than just digital).⁷⁷⁶ Two principles covered by the Act currently would operate in respect of defamation and privacy claims. Principle 1 requires that digital communications not reveal sensitive personal facts about an individual. Principle 6 requires that digital communications not make a false allegation. The statute creates an agency charged with administering a complaints process and offers a range of practical discursive remedies.⁷⁷⁷

Cheer is not the first to suggest a statutory combination of the torts. In 1979, the Australia Law Reform Commission was given a mandate extending to both defamation and privacy law. It took the opportunity to consider the conceptual interrelationship between defamation and privacy and concluded that the essence of defamation and privacy (insofar as the latter relates to publication) is the “provision of redress against unfair publication”.⁷⁷⁸ Although the torts must remain distinct, the Commission recommended that they be addressed as part of this single concept with substantive rules and procedures correlating as much as possible.⁷⁷⁹ It proposed a draft statute, the *Unfair Publication Act*, containing separate sections on defamation and privacy but some common remedies and procedures.⁷⁸⁰ The Commission's recommendations were not adopted but they illustrate that the tension between privacy and defamation is a longstanding one and one that perhaps should not be ignored in conducting defamation law reform.

Questions for Consideration

**31. What impact does the evolution of privacy law have on defamation?
Should the LCO consider statutory reform similar to New Zealand's
Harmful Digital Communications Act?**



VII. INTERNET INTERMEDIARY LIABILITY FOR DEFAMATORY CONTENT

A. The Role of Internet Intermediaries in Transmitting Defamatory Internet Communications

Internet intermediaries control the flow of internet speech from its author to the audience. This control may or may not be conscious or intentional on the part of intermediaries and it may be directed at the flow of communications rather than its content. But intermediaries are a crucial element of internet communications that must be accommodated in any law purporting to regulate internet speech.

In particular, internet intermediaries are important to addressing online defamation on three different levels.⁷⁸¹ First, a person complaining of defamatory content may look to an internet intermediary to disclose the name of the anonymous poster in order to bring a lawsuit against them. We discussed this issue in chapter V above. Second, some laws make intermediaries responsible for protecting complainants by requiring the intermediary to take down or block defamatory content, or to prevent access to the content. Third, in some cases, intermediaries have been held directly liable for defamatory content appearing on their platform. It is these latter two issues that are discussed in this chapter.

Currently, the law governing intermediaries is a strange mix of statutory instruments, judicial decisions and corporate social responsibility measures. These have developed quickly as the importance of intermediaries in controlling internet communications has become apparent. The resulting patchwork of laws has been called “haphazard” and “increasingly unprincipled.”⁷⁸² As for corporate social responsibility measures, there has been concern raised about the legitimacy of the internet industry (largely private, for-profit actors) making rights determinations as to what material is and is not available online.⁷⁸³

However, underlying the mix of common law and statutory approaches to intermediary liability discussed in this chapter is a single key issue. To what extent should intermediaries be legally responsible for content that they did not author? On the one hand, laws directed at intermediaries may be the only way to get defamatory content off the internet, particularly where the author of the content is anonymous. On the other hand, the concern is that making intermediaries responsible for third party content violates legal and constitutional principles, most particularly freedom of expression. At a policy level, the concern is that intermediaries responsible for policing online content will be overly quick to remove content so as to minimize their risk of liability. These themes underlie the discussion that follows.

Before discussing the legal principles, it is important to understand the nature of internet intermediaries as well as the social, economic and technological importance of intermediary involvement in internet communications.

1. The Diverse Functions of Internet Intermediaries

Intermediaries may be described as services that “bring together or facilitate transactions between third parties on the Internet.”⁷⁸⁴ However, this simple definition, in fact, covers a broad range of actors and varying degrees of involvement in content being transmitted from author to audience. Differentiation between these actors becomes essential in assessing when and why intermediaries should be liable for hosting defamatory content.

Riordan offers a taxonomy of internet intermediaries designed to identify how particular technology has been involved in wrongdoing and how that technology relates to internet architecture as a whole.⁷⁸⁵ Riordan distinguishes between network layer services and application layer services. Network layer services, such as ISPs and hosts, route data packets between IP addresses. Examples include Rogers and Teksavvy. They have varying degrees of control over transmitted data, although relatively less than do application layer services.⁷⁸⁶ Application layer services, on the other hand, engage in content transactions with end-users and exercise relatively more control over content.⁷⁸⁷ There is a wide range of such services, including platforms and gateways:

- Platforms display user-created content. Platforms include social networks (Facebook and Twitter), cloud storage services (Dropbox), media-sharing platforms (YouTube), publishing services (Blogger.com), location services (TripAdvisor) and gaming platforms (World of Warcraft). Many platform operators have implemented some form of moderation control to detect and remove undesirable materials.⁷⁸⁸
- Gateways “collate, index, and distribute hyperlinks to third parties’ internet content.”⁷⁸⁹ Gateways include search engines (Google), portals, directories, and RSS. Gateways use “automated tools and algorithms” to manage a very high volume of third party content.

Even these categories are not sufficiently nuanced to capture the precise degree of involvement an intermediary may or may not have in the transmission of internet speech. Information control by intermediaries can be relatively subtle but none the less significant.⁷⁹⁰ For example, search engines like Google do not host material as such but they do direct users towards certain material and away from other material. According to statistics, the traffic control role played by Google is strikingly effective. Content appearing on page 4 or 5 of a list of Google search results is relatively unlikely to ever see the light of day.⁷⁹¹ Google also manipulates the ranking of search results for commercial purposes. For a fee, a poster may have its content appear at the top of the ranking list as an “Ad”.

Other automated functions associated with search engines also may impact access to particular content. The autocomplete function will suggest certain search terms as the user is typing. These terms may be harmful to reputation as was the case in *Duffy v. Google* [2017].⁷⁹² A related problem may arise from the blurb of content (called “snippets”) that automatically accompanies each search result. The question is whether these varying degrees of involvement in the transmission of content are such that search engines should be held legally responsible for the content. Current statutory and judicial approaches to these issues are discussed below.

2. Social and Economic Contributions of Internet Intermediaries

Any legal regulation of intermediary liability must also take into account the important social and economic benefits brought about by the growing intermediary industry.⁷⁹³

i. Freedom of Expression

As discussed in chapter III above, a key benefit of online intermediaries is their role in promoting online expression. Participative networking platforms provide users with new avenues of communication with their friends, colleagues, and perhaps most importantly, those with whom they disagree. Online knowledge repositories and search engines facilitate the “search for the truth” by fostering the exchange of new ideas and criticism. By widely disseminating information on developments in all facets of society, intermediaries can improve government and corporate accountability and promote informed citizen choice in their economic, social and political decisions.⁷⁹⁴

ii. The Economy

Internet intermediaries also have an important role in facilitating economic growth.

First, they improve economic efficiency. Search engines and E-commerce platforms link consumers to products far more effectively than traditional advertising.⁷⁹⁵ Consumers enjoy reduced transactions costs and businesses reap increased sales.⁷⁹⁶ Participative networking sites that review consumer services make it easier for consumers to research businesses and make informed economic choices.⁷⁹⁷

Second, internet intermediaries spur innovation. Data processing services allow firms to efficiently store institutional memory and make easier the process of improving upon past initiatives and projects.⁷⁹⁸ Online knowledge platforms and search engines promote widespread diffusion of knowledge.⁷⁹⁹ And intermediaries are often themselves the source of creative new ideas.⁸⁰⁰ Intermediaries also invest in broader Internet infrastructure.⁸⁰¹

Third, online intermediaries promote competition. Search engines, e-commerce platforms and participative networking sites allow smaller businesses to reach out to prospective consumers and reduce their advertising overhead, thereby levelling the playing field with larger, more established competitors.⁸⁰² Intermediaries also weaken geographical restrictions traditionally associated with consumer purchasing, forcing businesses to engage with a broader pool of competitors.⁸⁰³

It is important that the LCO's recommendations for law reform take into account and encourage this myriad of social and economic benefits and continued innovation spurred by the intermediary industry.⁸⁰⁴

3. A Broader Look at Legal Challenges Posed by Internet Intermediaries

The social and economic advantages of the intermediary industry have been accompanied by a number of legal challenges, the transmission of defamatory content being one instance of these.

Online intermediaries have raised new, serious challenges for law enforcement by facilitating online file transmission and storage.⁸⁰⁵ Some of those files either contain illegal content (such as child pornography), or are transferred/shared for illegal purposes (such as copyright infringement).⁸⁰⁶ The pace, pervasiveness and anonymity of online activity can frustrate efforts to police these illicit transactions.⁸⁰⁷

E-commerce platforms present further challenges for law enforcement by facilitating the sale and purchase of counterfeit goods.⁸⁰⁸ Their efficiency in linking seller to buyer, a critical benefit in the context of legal transactions, creates significant problems when harnessed for illegal purposes.

And the growth of online intermediaries poses challenges for online reputation and privacy. For example, certain intermediaries such as search engines may profit from selling private user information to third party businesses.⁸⁰⁹

For better or worse, intermediaries are the linchpin that makes possible the free flow of communications through the internet. They have the potential to exert enormous control over the content they transmit and this is particularly significant since most intermediaries are private for-profit corporations. According to Frank La Rue, former Special Rapporteur to the United Nations, "[g]iven that internet services are run and maintained by private companies, the private sector has gained unprecedented influence over individuals' right to freedom of expression and access to information".⁸¹⁰

In the next two sections, we consider how this reality meshes with the existing law on intermediary liability for defamatory content. Section B reviews the existing common law principles in Canada and elsewhere and section C considers some regulatory approaches to intermediary liability that have developed in other jurisdictions. In each section we put forward some possible directions for law reform that we ask stakeholders to consider in their submissions..

B. The Common Law of Publication as it Applies to Internet Intermediaries

For the purpose of applying our existing body of defamation law to intermediaries, the crucial question is whether or not, in the circumstances, the intermediary should be considered to be a "publisher" of the defamatory content. We discussed above in chapter IV the inconsistencies and ambiguities in the concept of publication in defamation law. There are two elements that may be relevant (although not always necessary) to holding an intermediary responsible as a publisher: some involvement or control in the publication and some degree of notice or knowledge of the publication. These same elements are relevant in the internet context. However, the law is not yet clear on how they should be applied. For one thing, courts have had difficulty relating internet intermediaries to traditional intermediaries like libraries, book stores or newsstands for which traditional publication principles were developed. In *Davison v. Habeeb & Ors* [2011], an English judge explained:

*It is necessary to see how relatively novel internet-bred concepts can be made to fit into the traditional legal framework. One tool is analogy. But it can be difficult to draw effective analogies between long established modes of publication like the newspaper and the television, and radically novel platforms like the enormous burgeoning Babel which [Google] hosts through Blogger.com.*⁸¹¹

In general, Canadian, British and some other Commonwealth courts have been resistant to imposing liability for defamation on internet intermediaries, reasoning that they bear insufficient editorial control over content. In so finding, courts have arguably strayed significantly from the common law of publication. To date, Australia has been more willing to find intermediaries to be publishers in certain circumstances. US common law has largely been subsumed by the statutory immunity protecting intermediaries in s.230 of the *Communications Decency Act* and will only be touched on briefly in this section.⁸¹²

1. Canada

One relatively consistent principle in the Canadian law of intermediary liability is that ISPs are not typically publishers of illegal content so as to attract civil liability. This was established in the copyright context in *SOCAN v. Canadian Association of Internet Providers* [2004] where the Supreme Court of Canada found that ISPs did not have sufficient control or input over the content posted by the content producers to treat them as communicators for this purpose.⁸¹³

More recently, this reasoning was extended to the defamation context in *Crookes v. Newton* [2011], involving the issue of liability for hyperlinks linking to defamatory material.⁸¹⁴ While hyperlinks are not intermediaries as such, they also raise the issue of secondary liability for defamation and the reasoning in *Crookes v. Newton* is significant in addressing intermediary liability in Canada.⁸¹⁵

Justice Abella for the majority in *Crookes v. Newton* held that the hyperlinks in issue were better viewed as references beyond the linker's control. They should not attract liability since they merely communicate the fact of the message rather than communicating the message itself.⁸¹⁶ She raised the concern that, otherwise, an innocent link could turn defamatory if the author were to change the content without the linker's knowledge.⁸¹⁷ She acknowledged that the traditional publication rule would likely impose liability for hyperlinking in some circumstances but found that "a formalistic application of the traditional publication rule" was inappropriate in this context.⁸¹⁸

Justice Deschamps, in her concurring opinion, supported this conclusion on policy grounds. She stated that a more modern view of defamation that accords with *Charter* values should be adopted with respect to the Internet. Particularly she noted:

*The Internet cannot, in short, provide access to information without hyperlinks. Limiting their usefulness by subjecting them to the traditional publication rule would have the effect of seriously restricting the flow of information and, as a result, freedom of expression. The potential "chill" in how the Internet functions could be devastating, since primary article authors would unlikely want to risk liability for linking to another article over whose changeable content they have no control. Given the core significance of the role of hyperlinking to the Internet, we risk impairing its whole functioning. Strict application of the publication rule in these circumstances would be like trying to fit a square archaic peg into the hexagonal hole of modernity.*⁸¹⁹

Some commentators suggest that *Crookes v. Newton* establishes a mental element to internet defamation law, which goes beyond hyperlinking.⁸²⁰ If so, this would arguably reverse the traditional presumption of involvement in publication and intermediaries should no longer need to rely on an affirmative defence such as innocent dissemination. However, even this conclusion that the publication rule has been narrowed in the internet intermediary context is unclear in the existing state of the law.⁸²¹

Subsequent to *Crookes v. Newton*, Canadian courts have considered carefully the technology used by internet intermediaries before determining whether they are publishers of defamatory content. For example, in *Baglow v. Smith* [2015], web forum operators were found to be publishers of defamatory statements on their conservative message board where they were not passive bystanders but could control content and participate in threads. In other words, they played an editorial role over third party content on the forum generally.⁸²² However, in *Weaver v. Corcoran* [2015], the *National Post* was held not responsible for defamatory statements posted to the newspaper's website where it had no knowledge of the statements and the sheer number of reader posts prevented the newspaper from playing an active editorial role. The newspaper had removed the statements within one to two days of learning about them.⁸²³ Thus far, therefore, the law of internet intermediary liability in Canada remains unclear.

2. United Kingdom

United Kingdom courts have also been hesitant to find internet intermediaries to be publishers for the purpose of assigning liability in defamation. The common law has to a large extent been displaced by ss. 5 and 10 of the *Defamation Act, 2013*. We discuss the possibility of statutory reform below. However, the UK common law remains relevant in Ontario where there is currently no such legislative regime.

The decision of Eady J. in *Bunt v. Tilley* [2006] introduced a new basis for ISPs to avoid defamation liability.⁸²⁴ Whereas the Court in *Crookes v. Newton* focused on the degree of control exercised by the hyperlinkers over the defamatory content, the judge in *Bunt v. Tilley* focused on the element of knowledge of the defamatory content. The judge held that the defendant ISPs were not secondary publishers but mere “passive conduits” who did not have “knowing involvement” of the defamatory words in issue.

The test in *Bunt v. Tilley* has also been applied beyond the ISP context. In *MIS v. DesignTechnica* [2009], Eady J. rejected the allegation that Google had become a publisher of search snippets due to the lack of “human inputs”.⁸²⁵

In *Tamiz v. Google Inc.* [2012], Eady J. again applied his passivity concept in finding that Google was not a publisher of defamatory content merely by hosting a Blogger.com weblog on which the defamatory content appeared.⁸²⁶ This time, however, the finding was modified on appeal.⁸²⁷ The appellate judge agreed that Google was a passive instrument up until the point that it received notice of complaint about the defamatory posts. At that point, however, it arguably became a publisher by omission and therefore responsible for the content.⁸²⁸ Therefore, UK common law suggests that knowledge/notice may rebut any inference of passivity on the part of an intermediary.

3. Australia

Australia has deviated from other common law jurisdictions in its adherence to more traditional legal principles of publication. In two recent decisions, Australian courts have rejected the English “passive instrument” test and held Google liable for its search result snippets. In *Trkulja v. Google Inc.* [2012], the court reasoned that a search results page “was a page of Google Inc.’s creation – put together as a result of the Google Inc. search engine working as it was intended to work by those who wrote the relevant computer programs.”⁸²⁹ In *Duffy v. Google* [2017], the court held Google liable for search result snippets and autocompletes where it had received notice of the defamatory content and had not removed it within a reasonable time.⁸³⁰ Emily Laidlaw and Hilary Young prefer the reasoning of the English courts. In their LCO commissioned paper, they respond to *Trkulja*, arguing that “where there is a lack of knowledge of specific contents, it is not possible to view inaction as constituting adoption of the contents.”⁸³¹

Australian case law has also addressed the issue of hyperlinks with divided results. In *Visscher v. Maritime Union* [2014], an Australian court distinguished *Crookes v. Newton* and imposed liability on a hyperlinker for the defamatory content of the hyperlinked article.⁸³² However, another Australian court that same year, *Cripps v. Vakras* [2014], held that a hyperlinker was not liable for hyperlinked article on the basis that the two articles were insufficiently related to one another.⁸³³

In Australia, as in other jurisdictions, the internet defamation case law has not yet worn a consistent path through the thicket of traditional legal principles of publication.

4. Hong Kong

A Hong Kong decision is noteworthy for addressing the limitations of applying pre-internet common law principles to internet publications. In *Oriental Press Group Ltd. v. Fevaworks Solutions Ltd.* [2013], the Hong Kong Court of Appeal held that Fevaworks, the host of an internet discussion forum, was a secondary publisher where it took an active role in facilitating postings by third parties. However, it was not liable on the facts of the case since it had acted reasonably by removing the defamatory statements after becoming aware of them.⁸³⁴

The Court described pre-internet cases as involving “one-to-many” communications, such as newspapers, books, radio and so on, and explained that secondary publishers in these cases have more control over the material being published. In

contrast, internet publications involve “many-to-many” communications in which the secondary publisher may have no knowledge of third party content and reduced ability or opportunity to prevent its dissemination. The Court held that a reasonable care standard should be applied to internet publications. Before notice of the defamation, an intermediary’s duty is to exercise reasonable care over the content being published generally. After acquiring notice of the defamatory material, the duty is to exercise reasonable care in removing it.

This “reasonable care” analysis may be added to the “passivity” and “knowing involvement” tests among the array of common law approaches to internet intermediary liability that have developed to date.

C. Proposals for Reform of the Common Law of Publication

Although the law of publication has been pinched and pulled in order to accommodate the phenomenon of internet intermediaries, it has had limited success to date. Riordan notes that the distinction between passive and participatory hosts is “mired in confusion and metaphor”.⁸³⁵ A New Zealand court, noting the decision in *Crookes v. Newton*, has commented, “until the highest Courts in each jurisdiction comprehensively review this area of the law, there must remain substantial uncertainties as to how the law will develop in each jurisdiction.”⁸³⁶

On their review of the case law, Laidlaw & Young find three particular areas of uncertainty:

- a. whether intermediaries are passive instruments or secondary publishers;
- b. if they are passive instruments, whether knowledge/notice (necessarily) makes them publishers by omission; and
- c. what “knowing involvement” in the publication means.⁸³⁷

There are a couple of different approaches to reforming the common law of publication that might resolve these areas of uncertainty. The *Oriental Press* decision discussed above, with its development of a reasonable care standard for internet intermediaries in respect of third party content, is an example of one common law approach to reform. Reasonable care may be a sufficiently flexible and yet familiar legal concept to lead to fair, consistent and predictable case law over the long term.⁸³⁸

However, a reasonable care standard defines liability in relation to the degree of editorial control an intermediary may have over the publication at issue. And we have seen that there are serious policy concerns with the adoption of editorial control as an instrumental concept in determining when intermediary involvement in the transmission of defamation becomes actionable. As Riordan explains, “[p]aradoxically, to infer publication so readily from the capacity or historical tendency to moderate material that is not the material complained of discourages website operators from developing and using the systems best capable of removing harmful content”.⁸³⁹ Intermediaries are motivated to limit their editorial involvement in order to avoid liability with the result that there is no internal means of preventing defamatory words from being published in the first place.⁸⁴⁰ Such intermediaries are equally unlikely to defend the content in issue, a by-product of the law that Andrew Scott has labelled a form of “collateral censorship”.⁸⁴¹

Laidlaw & Young propose a different approach to reform. In recommendation 1 of their commissioned paper, Laidlaw & Young recommend that the law of publication be significantly simplified in order to relieve intermediaries from liability on the basis that “their role in causing reputational injury is insufficient to justify their liability in defamation”.⁸⁴² They reference a similar argument by Andrew Scott in his recommendations to the Northern Ireland government on reforming defamation law.⁸⁴³

In recommendation 3, Laidlaw & Young propose a much simpler test for publication:

*In essence, “publication” would mean conveying specific words with intent that those words be conveyed. Put differently, publishers would have to have knowledge of specific words and control over whether they are conveyed. Thus, defamation would be an intentional tort, with intent relating to... conveying particular words.*⁸⁴⁴

The effect of this reformed concept of publication would be to eliminate the legal categories of secondary publisher (recommendation 1) and publication by omission (recommendation 2). In particular, the elimination of the category of publication by omission would be necessary to prevent intermediaries from having control over the determination of what is defamatory (with the accompanying incentive to remove it “just in case”).

Negligence or carelessness would not be sufficient to make one a publisher. However, principles of accessory liability would be applicable to cover someone sufficiently involved in a publication so as to be blameworthy on tort principles.⁸⁴⁵

Not everyone agrees that this narrow scope of liability for intermediaries is appropriate. Matthew Collins suggests that there is a continued role for intermediary liability based on publication by omission:

Where, for whatever reason, a claimant would be otherwise unable to obtain a remedy, it would not seem to be unreasonable for a moderator who has responsibility for and the ability to control what appears on the bulletin board or forum to become responsible for its publication on Byrne v. Deane grounds; that is, where the moderator has knowledge of the defamatory statement and the opportunity to remove it, but instead has consented to, or approved of, or promoted, or in some way ratified, its continued accessibility.⁸⁴⁶

Or perhaps a more far-reaching understanding of internet Intermediaries is necessary. It could be the case that traditional publisher analogies are no longer quite right. Intermediaries play a new and unprecedented role in the transmission of internet speech. It may be time to jettison traditional analogies, understand intermediaries on their own terms and develop appropriate legal principles accordingly.

The LCO encourages submissions on the pros and cons of Laidlaw & Young’s recommendations as well as other suggestions for reforming the common law of publication, or moving beyond the concept of publication altogether, to better address the role of internet intermediaries.

Questions for Consideration

The questions in this section ask stakeholders to consider possible substantive reforms to the common law of intermediary liability. The separate question, whether reform should involve the introduction of a new statutory regime for internet intermediaries, is addressed in section D below.

32. What principles or factors should guide the analysis of intermediary liability and how should intermediaries be categorized for this purpose?
33. In what circumstances, if any, should internet intermediaries bear legal responsibility for defamatory content created by someone else?
34. Do recommendations 1 to 3 in the Laidlaw & Young commissioned paper represent desirable reform in this area? Why or why not?



D. Lessons from Statutory Approaches to Intermediary Liability

In the above section, we discussed possible reforms to the common law of publication as it applies to internet intermediaries. In this section we pose the question how reform is best effected. Should the principles of intermediary liability in Ontario be left to incremental development in common law or should the law be codified through statutory reform as has occurred in many other jurisdictions?

The divergent case law in this area and the attendant policy concerns are both signals that some type of statutory reform is appropriate. Laidlaw & Young are unequivocal in their recommendation that the principles of intermediary liability be subject to statutory reform in Ontario.⁸⁴⁷ This is a crucially important issue for this project.

England, the U.S., the European Union and other jurisdictions have largely replaced the common law of intermediary liability with statutory regimes that impose duties on intermediaries receiving notice of defamatory or other illegal content on their servers. In this section, we examine several of these regimes and ask stakeholders to comment on whether some form of analogous statutory regime might be appropriate in the Ontario context.

1. The Rationale for Statutory Reform to Address Intermediary Liability

Intermediaries are quickly becoming as essential to modern life as are water and electricity. Their involvement in controlling information arguably transcends their role as private corporations.⁸⁴⁸ Emily Laidlaw distinguishes between internet gatekeepers that control the flow of information over the internet generally and “internet information gatekeepers” (IIG) which are gatekeepers that, through their control, “impact participation and deliberation in a democratic culture.”⁸⁴⁹ Laidlaw argues that this latter category (IIGs) attract human rights responsibilities specifically in relation to freedom of expression, privacy and association.⁸⁵⁰ This responsibility has been legally recognized in a range of statutory instruments from various jurisdictions which regulate intermediaries for different purposes.⁸⁵¹

As with any regulated endeavour, a careful balance must be struck between achieving the goals of regulation and maintaining, without hampering, the social benefits accruing from that endeavour. The benefits of internet intermediaries’ role in facilitating free expression can scarcely be overstated. However, at the same time, it is equally important that there be adequate safeguards in place to protect reputation where appropriate.

In the next section, we look at defamation-specific legislation limiting intermediary liability in the UK and consider what lessons may be drawn for the regulation of intermediaries in Ontario.⁸⁵² In the following section we look at other statutory regimes regulating intermediary liability for internet content more generally.

2. Defamation-Specific Legislation Limiting Intermediary Liability

The UK case law on intermediary liability for online defamation is subject to the *Defamation Act, 1996* and the *Defamation Act, 2013*.⁸⁵³ Part of the rationale for each of these statutory regimes was to provide internet intermediaries with increased protection from liability, although the extent to which this goal has been achieved is a matter of debate.⁸⁵⁴

Subsection 1(1) of the *Defamation Act 1996* codifies the English innocent dissemination defence.⁸⁵⁵ It is applicable where a defendant establishes that it was not the “author, editor or publisher” of the impugned content and that it acted without negligence, actual knowledge or willful blindness that it was contributing to the publication of defamation. Subsequent subsections attempt to define these concepts.⁸⁵⁶ However, courts have interpreted this provision consistently with the common law, thereby largely negating the effect of this statutory reform.⁸⁵⁷

A more sophisticated scheme for limiting intermediary liability was introduced into the *Defamation Act, 2013* as part of its overall goal to better defend free speech online.⁸⁵⁸ Section 10 of the Act protects online intermediaries from liability unless it is not “reasonably practicable” for the claimant to proceed against primary publishers.⁸⁵⁹ The onus is on the claimant to establish this threshold. The impact of this provision is not yet clear. For example, the immunity granted under s.10 of the Act does not extend to “authors, editors or publishers” as defined in the 1996 *Defamation Act*. This is likely to perpetuate the confusion over the legal definition of an internet intermediary.⁸⁶⁰

Section 5 of the Act links the protection from liability in section 10 to a complex notice and takedown regime contained in Website Operator Regulations.⁸⁶¹ So long as the website operator complies with the regulations, section 10 provides the operator with broad immunity.⁸⁶²

The Regulations provide that where the poster of defamatory material is not identifiable, the claimant may give the website operator notice of a complaint. The notice must include the complainant's name, the statement concerned and an explanation why it is defamatory of the complainant, the location of the statement on the website, and "such other information as may be specified in regulation".⁸⁶³

On receiving a notice of complaint, the website operator must determine if it has an email address for the poster. If it does not have this contact information, then its sole duty is to remove the offending material within 48 hours and advise the complainant of such.⁸⁶⁴

Assuming the operator does have an email address for the poster, it must respond to the complaint according to a complex flowchart of notices and timeframes.⁸⁶⁵ Most paths along the flowchart will end in the statement being removed from the website.⁸⁶⁶ However, there is no obligation on the operator to remove the statement where the poster complies with the timelines and provides its name and address to the operator but refuses to consent to removal of the statement and refuses to allow its identity to be disclosed to the complainant.⁸⁶⁷ In this eventuality, the complainant must go to court for relief.

Sections 5 and 10 of the Act and the Website Operator Regulations do go some way to protect freedom of expression while preserving a complainant's right to a remedy. However, commentators have noted limitations to this scheme. Alastair Mullis and Andrew Scott point out that the substantive issue of defamatory meaning is not really addressed in the notice of complaint and the operator is asked to respond having only "half the story".⁸⁶⁸ Scott further comments in his recommendations to the Northern Ireland government that the scheme perpetuates an insupportable burden on parties who are not actively involved in the allegedly illegal conduct.⁸⁶⁹ Functionally, the scheme creates an incentive for complainants to file notices, even where the material is not defamatory, in order to obtain the identity of the poster. Riordan cautions that the scheme risks being used as a "vehicle for reputation management".⁸⁷⁰ Laidlaw & Young question whether it is appropriate for intermediary liability to depend on whether or not the author of the post can be identified.⁸⁷¹ They also recommend a focus on reforming the elements of defamation rather than creating more defences.⁸⁷²

3. Other Statutory Limits on Intermediary Liability

Defamatory speech is only one of many forms of illegal online content and different approaches have been taken to different categories of content in determining when intermediaries should be legally responsible. Also recall that most forms of illegal speech existed long before the internet was invented. Just as is the case with defamation, each of these forms of speech has been governed by a pre-existing set of legal rules that has now been adapted in one way or another to this new means of transmission. This section explores some of these analogous regulatory regimes.

*i. U.S. Communications Decency Act, s.230*⁸⁷³

Introduced in 1996, section 230 offers broad immunity to "interactive computer services", including ISPs, hosts and search providers, by providing that they are not publishers or authors of information provided by another information content provider. Section 230 is effective to summarily dispose of two-thirds of lawsuits involving allegedly defamatory content.⁸⁷⁴ Immunity operates even in cases where the intermediary is well aware of the illegal content on its site.⁸⁷⁵

We have discussed above the important benefits of limiting intermediary liability in protecting freedom of expression and encouraging continued social and economic growth and technological innovation. However, there is also a cost to the kind of blanket protection of intermediaries available in the U.S. An example of the extreme effect of s.230 is *Jones v. Dirty World Entertainment Recordings LLC* [2014].⁸⁷⁶ The Dirty is a website dedicated to posting negative and offensive comments about people. People send in submissions and the Dirty chooses selections to edit and post. In this case, the Dirty posted photographs about the plaintiff that were found to have hurt her reputation in the community. The Court of Appeal held that, notwithstanding that the Dirty had encouraged and facilitated the defamatory posts, s.230 applied to protect the Dirty from liability.

Although there are those who argue that s.230 remains necessary to protect the internet industry, a number of problems with absolute immunity have been identified, not the least of which is that it is ineffective to deter or remedy unlawful behavior.⁸⁷⁷ Laidlaw & Young also note that s.230 was enacted before the dangers of unregulated internet speech were fully appreciated.⁸⁷⁸

Some commentators believe that the blanket protection in s.230 in the U.S. has allowed the internet industry to flourish to the benefit of all. The LCO is not in a position to assess these arguments. It is important to keep in mind, however, that s.230 has important consequences for individuals who have had reputations harmed over the internet.⁸⁷⁹

ii. European Union E-Commerce Directive⁸⁸⁰

The E-Commerce Directive (Directive) was designed to protect intermediaries from liability in order to promote the “free flow of information” and “continued development of electronic networks.”⁸⁸¹ The Directive provides “safe harbour” to different categories of intermediaries. Article 12 protects “mere conduits” from liability where they are not authors of the transmission, they do not initiate it and they do not interfere with it.⁸⁸² This provision is directed at passive intermediaries such as ISPs. Article 13 protects “caching” from liability where it is automatic, intermediate and temporary, it does not modify the information cached, it complies with industry rules and steps are taken to remove caches corresponding to original material that has been determined to be illegal.⁸⁸³ Article 14 protects “hosting” from liability for stored information where there is no actual or constructive knowledge that the information is illegal and, upon receiving such knowledge, the host acts “expeditiously” to remove the information.⁸⁸⁴

It is Article 14 that is most often engaged in relation to application layer services such as website hosts. However, the Article 14 safe harbor is applicable only in respect of the storage of information. It does not capture intermediaries who actively manipulate information or website hosts who voluntarily moderate content. For this reason, it has been criticized as creating the perverse incentive, discussed above, for intermediaries to refrain from beneficial voluntary moderation in case it might lead to liability.⁸⁸⁵ It is not clear whether this safe harbor is available to the automated indexing function of search engines such as Google.⁸⁸⁶

Laidlaw & Young review a list of criticisms that have been leveled at the Directive regime including uncertainty over the types of intermediary activities captured by Article 14 on “hosting”, uncertainty on the meaning of “knowledge” and “notice” and uncertainty as to the notice and takedown procedures.⁸⁸⁷ It would appear that the Directive does not offer a significant advantage over the common law of publication in this regard.

One ambiguity that is particularly relevant for our purposes is the issue of what amounts to “knowledge” or “notice” in the context of allegedly defamatory material. Defamatory meaning is notoriously difficult to identify even with the benefit of a full trial. Something more than a complaint is necessary here, which leaves the intermediary in the unenviable position of attempting to assess the legal validity of the complaint.⁸⁸⁸

Another limitation of the Directive is that the effectiveness of notice and takedown will be undermined where defamatory content may be repeatedly reposted as fast as it is taken down.⁸⁸⁹ There is no general obligation on intermediaries under the Directive to actively monitor for illegal content although there is provision in the Directive allowing States to require monitoring in specific cases.⁸⁹⁰

iii. Copyright Legislation in US and Canada

Both the U.S. and Canada have legislation immunizing internet intermediaries from liability for copyright infringing content where the intermediaries meet detailed requirements for responding to notices of infringing content.

The U.S. *Digital Millennium Copyright Act* (DMCA), section 512, imposes a notice and takedown regime that bears some similarity to the EU e-Commerce Directive but is much more detailed in the policies and procedures that intermediaries must administer in order to maintain immunity.⁸⁹¹ Section 512 has been in operation since 1998. A key criticism of the regime is that intermediaries have little incentive to deny takedown requests. It is cheaper and safer to err on the side of caution, notwithstanding the associated chill on freedom of expression.⁸⁹²

Canada's notice and notice regime in the *Copyright Act*, effective as of 2015, was developed partly to overcome the problem of excessive takedowns under the US regime.⁸⁹³ In the Canadian regime, immunity for internet intermediaries is not tied to notice and takedown but, instead, to notice and notice. In other words, the intermediary's responsibility on receiving notice of infringing content is only to pass notice on to the infringer. The purpose of the regime is educational and to discourage infringement.⁸⁹⁴ From the perspective of the copyright owner, it remains necessary to bring a court application in order to seek a remedy against the infringer.

An important aspect of the Canadian regime is that failure to comply with the notice and notice requirements does not expose an intermediary to liability for copyright infringement. Instead, the penalty is an order of statutory damages from \$5000 to \$10 000.⁸⁹⁵ This is intended to eliminate intermediaries' perverse incentive to takedown content voluntarily and, instead, to encourage corporate social responsibility in developing internal mechanisms for identifying and removing illegal content. The scheme has been considered by some to be a successful deterrent that rarely requires actual litigation.⁸⁹⁶ On the other hand, the new regime has been criticized for lacking teeth, removing liability, and requiring little of ISPs.⁸⁹⁷

The Canadian regime also avoids the problem of prescribing what amounts to effective notice so as to trigger the intermediary's obligation to pass notice on. The regime leaves the content of the notice up to the rights owner and the intermediary's role is a relatively passive one; simply to pass the notice on to the alleged infringer. This avoids uncertainty about whether or not the notice is effective and, as a result, intermediaries have been able to develop automated software to process these notices. However, this automated approach has its downside. Certain copyright owners have abused the regime by flooding potential infringers with threatening or misleading notices.⁸⁹⁸ One suggestion for curtailing these fishing expeditions would be to impose a modest administrative fee on copyright owners for filing a notice under the regime.

4. International Human Rights Principles for Regulating Intermediary Liability

Any regulatory scheme adopted in Ontario must be compliant with *Charter* values, particularly as expressed in *Crookes v. Newton*.⁸⁹⁹ However, beyond the *Charter* there is also the international human rights framework to consider. Several international organizations have applied a human rights analysis and proposed principles to be applied in regulating intermediary liability. The rights engaged include

- user rights to seek and receive information and communicate online,
- user rights to reputation as a legitimate limit on the right to free expression and
- intermediary rights to freedom of expression.⁹⁰⁰

For example, the United Nations Human Rights Council has stated that any restriction of access to internet-based content must comply with Article 19(3) of the *International Covenant on Civil and Political Rights*.⁹⁰¹ Under this Article, any restriction on freedom of expression must be

- provided by law "which is clear and accessible to everyone"
- necessary "for respect of the rights or reputations of others" (among other justifiable public purposes) and
- the least restrictive means required to achieve the public purpose.⁹⁰²

The Human Rights Council makes particular mention of defamation law, warning that it should be "crafted with care" so as to comply with Article 19(3).⁹⁰³

In 2011, the United Nation's then special rapporteur on promotion and protection of the right to freedom of opinion and expression, Frank La Rue, interpreted Article 19 to require that

*...any legislation restricting the right to freedom of expression must be applied by a body which is independent of any political, commercial, or other unwarranted influences in a manner that is neither arbitrary nor discriminatory, and with adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application.*⁹⁰⁴

La Rue noted that, while defamation was a legitimate type of information to be restricted, regulations controlling defamation in traditional media may not be “legitimate and proportionate” in the internet context. For example, he noted that the right of reply possible in internet communications may reduce the need for sanctions in certain cases.⁹⁰⁵

La Rue further cautioned against states delegating a censorship role onto private entities and proposed a very limited role for intermediaries in notice and takedown regimes. He recommended that intermediaries:

- only implement restrictions after judicial intervention
- be transparent to the user and wider public about measures taken
- forewarn users before the implementation of restrictive measures,
- minimize the impact of restrictions strictly to the content involved, and
- adopt effective remedies for affected users including possible judicial appeal.⁹⁰⁶

La Rue also signed a Joint Declaration on Freedom of Expression and the Internet jointly with other international organizations.⁹⁰⁷ This recommends that ISPs and other intermediaries providing “technical Internet services” should be insulated from liability for third party content where they do not “specifically intervene” in that content.⁹⁰⁸ It is also suggested that this principle be extended to other types of intermediaries. On the other hand, the Joint Declaration does impose a duty on intermediaries to refrain from discrimination in “the treatment of Internet data and traffic” and to be “transparent about any traffic or information management practices they employ”.⁹⁰⁹

More recently, the current special rapporteur, David Kaye, released a report in 2016 in which he emphasized the important role private industry plays in the exercise of free expression in the digital age.⁹¹⁰ The Report reiterates the weaknesses of notice and take down regimes and highlights the difficulty intermediaries may have in assessing the legality of online content.⁹¹¹

Laidlaw & Young recommend that international human rights principles be observed in the LCO’s recommendations.⁹¹² They suggest the six Manila Principles, created by a group of civil society organizations world-wide, as a compelling international human rights compliant framework for regulating intermediary liability:

- Intermediaries should be shielded from liability for third-party content
- Content must not be required to be restricted without an order by a judicial authority
- Requests for restrictions of content must be clear, be unambiguous and follow due process
- Laws and content restriction orders and practices must comply with the tests of necessity and proportionality
- Laws and content restriction policies and practices must respect due process
- Transparency and accountability must be built into laws and content restriction policies and practices.⁹¹³

5. Options for Regulation of Intermediaries in Ontario

In chapter IV above and section B of this chapter, we discussed the confusing state of the common law of publication, particularly in relation to secondary publishers such as internet intermediaries. We noted Laidlaw & Young’s proposals for reforming and simplifying the law of publication by redefining publication to mean a deliberate act to convey particular information. In this section we must consider those and other proposals alongside the possibility of introducing supplementary legislation to delineate some other sphere of responsibility on intermediaries who receive notice that they are hosting defamatory content.

In considering the possibility, scope and elements of a regulatory regime for intermediaries in Ontario, it is worth keeping in mind the list of conflicting principles proposed by John Gregory as relevant to intermediary liability issues. These are: effectiveness, cost, impact on competing values (freedom of expression, reputation and privacy), proportionality, media

neutrality and legitimacy.⁹¹⁴ It is also important for readers to remember that law reform proposals for internet intermediaries are intertwined with more general reforms to the law of defamation. Internet intermediary reforms, coupled with other reforms, must be considered in total to assess the impact of the entire legislative/reform scheme on reputation and free expression.

i. Setting the Scope of a Regulatory Scheme

There are a number of significant policy questions that must be considered before considering the potential details of legislative reform. These questions include:

- Is any kind of legislation appropriate?
- What would be the constitutional and practical limits of provincial legislation?⁹¹⁵
- Would a statutory code be best directed at intermediary liability in respect of defamatory content or would a more general regime regulating intermediary liability be preferred?

Once these threshold issues are addressed, the next issue is whether a regulatory regime should operate to provide some form of safe harbour to intermediaries from the prospect of liability for illegal content or whether it should exempt intermediaries from liability altogether and, instead, impose a statutory penalty for failure to meet regulatory requirements.

ii. Should Regulation Be Liability-Based or Limited to Statutory Penalty?

An important policy choice in considering options for regulating internet intermediary liability for defamatory content is whether regulation should be liability-based (where intermediaries failing to adhere to regulatory requirements risk being found liable for defamation) or based on statutory penalty (where intermediaries' exposure is limited to whatever fine or other penalty is set out in the legislation). This policy choice has important practical consequences for both plaintiffs and internet intermediaries and both reputation and freedom of expression.

Notice and takedown procedures such as the Directive and the DMCA are liability-based in that the intermediary risks liability for the illegal content if it does not comply with the regulatory requirements. Notice and takedown procedures are also called safe harbor provisions because they provide intermediaries with conditional immunity (safe harbor) from liability so long as they remove or disable access to content that is considered unlawful or defamatory. Notice and takedown regimes encourage intermediaries to remove unlawful content and this incentive is one of the reasons liability-based regimes have been found attractive.

On the other hand, liability-based regimes have been criticized on several fronts. Laidlaw & Young note that one of the significant drawbacks of these regimes is that they effectively leave the initial decision about the legality of *all* content on their platforms up to the intermediary. As a result, intermediaries are "forced into a pseudo-judicial role" where they have to decide whether content on their site is defamatory or legal. As noted elsewhere in this report, these are exceedingly complex questions.⁹¹⁶ The SCC has also recognized that these schemes put ISPs in a difficult position of deciding if an objection is well-founded and then choosing to contest the action or possibly breach its contract with a content provider.⁹¹⁷

Another significant problem with liability-based regulation is that intermediaries have a strong economic incentive to simply take down any content that is subject to a complaint without regard to its legality. Internet intermediaries are commercial entities. Most of the content on their sites is generated by others. Intermediaries, therefore, "have little stake in the content of what has been generated."⁹¹⁸ In these circumstances, intermediaries have an incentive to avoid potential lawsuits and resulting litigation costs and damage awards by simply taking down any content subject to a complaint.⁹¹⁹ This is undesirable for a number of reasons:

First and foremost, liability-based regimes arguably lead to an unacceptable chill on freedom of expression. In these circumstances, an allegation of defamation can practically be transformed into a restraint on speech very quickly if the intermediary pre-emptively chooses to take down the allegedly illegal material.⁹²⁰ As Andrew Scott has pointed out: "[t]here is no 'balancing of rights' provided for under such a scheme; only a privileging of reputation over free speech."⁹²¹

Second, taking content down before a judicial finding of defamation is at odds with the common law's resistance to injunctive relief except as an "exceptional remedy".⁹²² Prior restraint of words to be published is considered to be an undue incursion on free speech that courts will very rarely permit.

Third, liability-based regimes arguably create perverse incentives for intermediaries to *not* monitor the content posted on their sites. If intermediaries have legal responsibility for illegal content once they become aware of it, they are simply encouraged not to become aware of it. In other words, they are discouraged from exercising corporate social responsibility and developing robust internal procedures for controlling content.⁹²³

Fourth, absent more specific legislative provisions, the success of liability-based regimes often depends on the codes of conduct and practices adopted by intermediaries to manage complaints about content posted on their sites. From a legal perspective, the difficulty with these private codes and practices is they may lack transparency or accountability or be applied inconsistently. A further difficulty is that there is no assurance that a corporate code, assuming there even is one, will be consistent with the legal norms in a jurisdiction regarding defamation, free expression or human rights. UN Special Rapporteur, Frank LaRue has noted that a "[l]ack of transparency in the intermediaries' decisionmaking process also often obscures discriminatory practices or political pressure affecting the companies' decisions."⁹²⁴

Fifth, in addition to the substantive reasons for limiting intermediary liability as secondary publishers, there is the practical limit on the effectiveness of take-down orders in an environment where the same content may pop up on another server as quickly as it is taken down.⁹²⁵

An alternative to liability-based regulation is a regime based on statutory penalty, as has been adopted in Canada's *Copyright Act*. This regime leaves the substantive issues to the courts and simply imposes notice requirements on intermediaries where there are complaints. Intermediaries may be subject to a fine where they do not comply with the regulations but they do not get involved in takedowns and do not risk liability for failure to take down illegal content. The main limitation of this option is that it provides no remedy to those complaining of defamation. The court system, with its attendant delays and expense, remains the only avenue for real relief. The result is that defamatory material may continue to circulate online, causing ongoing harm to reputation. The LCO invites stakeholders to comment on this and other aspects of the Canadian copyright regime as a potential model for regulating intermediaries with respect to defamatory content.

iii. Laidlaw & Young's "Notice and Notice Plus" Option

Laidlaw & Young have proposed what they term a "notice and notice plus" regime.⁹²⁶ This option steers a middle path through the existing regimes discussed above. On the one hand, intermediaries would not be exposed to liability for defamatory content. Nor would the intermediary be required to make a determination whether or not content is illegal. However, unlike the Canadian *Copyright Act* "notice-notice" regime, the intermediary would have responsibility to take down content in certain circumstances, thus providing those complainants with an inexpensive, effective remedy.

The Laidlaw & Young proposal is directed primarily at platforms for user-generated content. ISPs or "mere conduits" would not be subject to the regime. Since search engines do not directly provide platforms for user-generated content, they would be subject to a less onerous notice and notice based regime.⁹²⁷

In this proposal, intermediaries subject to the regime would receive complaints based on prescribed forms and subject to a small administrative fee. The notices would be required to include the legal basis for the claim. This would include at minimum a statement that the information is not true. On receiving a complaint, the platform would be required to forward it to the poster responsible for the content at issue. The poster would have one or two days to respond to a complaint, failing which the intermediary would remove the content. Alternatively, the poster might file a notice of dispute stating that the content was lawful and providing a reason. In these circumstances, the intermediary would not remove the content and

the dispute would move to the courts if the complainant wished to pursue it. Other than in these narrow circumstances, intermediaries would not remove content without a court order. Nor would intermediaries have any responsibility to monitor for defamatory content. Laidlaw & Young set out many more details of their proposal in their paper.⁹²⁸

Laidlaw & Young argue that their proposal addresses several of the major difficulties attendant with both liability-based regimes and notice-based regimes. For example, unlike a liability-based regime, Laidlaw & Young state that their proposal:

- does not chill free expression or promote prior restraint because the proposal removes (or at least mitigates) an intermediary's economic incentive to simply take down offending material,
- promotes clarity and certainty in the application of the rules because intermediaries would not be forced to informally adjudicate disputes,
- promotes transparency, accountability and consistency due to clear, public rules, and
- promotes quicker resolution of defamation complaints because intermediaries would have incentives to develop internal, more streamlined methods for dealing with complaints.

Similarly, Laidlaw and Young believe that their proposal would address a significant shortcoming of the Canadian copyright regime by providing complainants, in certain circumstances, with an inexpensive, quick remedy as an alternative to a court action.

On the other hand, one must consider whether this proposal would lead to a system of takedowns without assessment of their legality or, alternatively, a tendency for these disputes to end up in the courts to be determined in cost-inefficient circumstances.⁹²⁹

iv. Anonymous Content

One of the vexing challenges of defamation law, irrespective of the regulatory model chosen, is the issue of intermediaries and anonymous content. The availability and ease of online anonymity may tend to encourage speakers to post unfiltered and, in some cases, defamatory, material. It is not uncommon to see content posted to social media platforms that is clearly defamatory in nature but cannot be attributed to any particular publisher. It is not only unfair to leave victims without remedy in these circumstances, but the lingering presence of this material also may tend to encourage additional anonymous, defamatory content. On the other hand, anonymous speech is an important element of freedom of expression and it is not an answer to say that allegedly defamatory anonymous content should be taken down simply by virtue of the publisher's anonymity.

The problem of anonymous content and potential mechanisms for dealing with it is addressed in chapter V of this consultation paper. For the purpose of the present discussion, it is important to point out that, in the case of anonymous content, intermediaries are often in the pivotal position of controlling information identifying the primary publisher. Practically speaking, intermediaries are often added to defamation lawsuits not only because of their relatively deep pockets but because plaintiffs do not have sufficient information about the alleged defamer/primary publisher to sue directly.

Therefore, an additional issue in contemplating the regulation of intermediaries is whether or not there should be some regulation of the collection and release of subscriber information by intermediaries in order to facilitate actions against primary publishers. One option for dealing with this issue would be for certain intermediaries to be given the responsibility to maintain a registry of information about the identity of people communicating over their platforms and to disclose that information in certain circumstances. Such a regime would presumably remove some of the pressure to hold intermediaries liable for user content since, once identified, primary publishers would be able to take their place as defendants directly responsible for allegedly defamatory content. On the other hand, any regime for disclosure of information identifying

anonymous publishers must take into account the important role of anonymity as a component of freedom of expression. Currently, courts regulate the release of subscriber information through Norwich orders or other interlocutory motions. The possibility of introducing statutory regulation to replace this judicial function is further discussed in chapter V.

v. Intermediary Regulation into the Future

Looking forward, technological advances may make it increasingly feasible for intermediaries to play a meaningful role in monitoring online content and resolving complaints. On the other hand, if, as seems inevitable, human communications continue to shift over to the internet, it may become increasingly inappropriate for intermediaries to play this fundamental role in regulating speech. Recommendations for the reform of intermediary liability for defamation in Ontario should be directed not at stop-gap regulation that will serve for the time being but at reform that will be relevant well into the future.

Questions for Consideration

35. Should Ontario adopt legislative provisions regulating the role of internet intermediaries in relation to third party content?

36. If so, what kind of regulatory regime is recommended:

a. Liability-based regulation such as

- i. broad immunity from liability as in s.230 of the US *Communications Decency Act*,
- ii. notice and takedown regime (as in the UK *Defamation Act*, 2013 or the EU *Directive*);

b. Regulation based on statutory penalty such as

- i. a notice-notice regime similar to that in Canada's *Copyright Act* or
- ii. a notice-notice plus regime (as in the Laidlaw & Young proposal).



VIII. ALTERNATIVE DISPUTE RESOLUTION IN THE INTERNET ERA

“At its best, the law can achieve control without having to be invoked.”⁹³⁰

In chapter V above, we discussed a number of procedural issues involved in promoting access to justice in defamation actions. We asked stakeholders to consider what kind of procedural reforms to the court process would achieve proportionality in defamation disputes while preserving the underlying goal of a fair and just process. We also recognized a number of technical features of online defamation (such as anonymity and extra-jurisdictional reach) which make litigation problematic for some online defamation claims.

The goal in this chapter is to look beyond the court system and consider whether there might be an alternative resolution mechanism that better promotes access to justice as well as fair outcomes for online defamation. We ask stakeholders to be both pragmatic and creative here. For example, most online defamation is resolved informally either through direct contact between the parties or by making an online complaint to the social media host of the defamatory content. Many social media hosts are actively involved in evaluating controversial content and taking down content that violates their terms of service. Although not a legal process, online complaint processes do provide a rough and ready solution to high volume, low value claims and are “one of the only effective ways to resolve defamation disputes for some people.”⁹³¹ We ask stakeholders to consider what relationship, if any, should exist between defamation law and these online complaints processes. Also relevant to this issue are the notice and takedown regimes adopted in some jurisdictions as an alternative to imposing direct liability on social media hosts and other intermediaries for illegal content. These are discussed in chapter VII above.

We also examine the possibility of a statutory alternative dispute resolution mechanism with the suggestion that some online defamation claims may be diverted to such a process. Here, the internet, which creates so many challenges in resolving online defamation claims, also creates opportunities in the form of online dispute resolution (ODR). We explore three alternative dispute resolution options, including ODR as recommended by Emily Laidlaw in her paper commissioned for this project.⁹³² We conclude by asking stakeholders to propose their own suggestions for dispute resolution mechanisms that are tailored to the challenges of defamation in the internet era.

A. Why Look Beyond the Courtroom?

1. Limitations of the Court Process

There are at least two reasons to look beyond the courtroom for an alternative dispute resolution mechanism that is effective in resolving online defamation claims. First, are the procedural barriers to accessing justice in defamation actions as discussed in chapter V above. In some cases, the length, complexity and cost of defamation actions are disproportionate to the interests at stake. And there is a tendency for plaintiffs to start down the litigation process in order to vindicate reputation even where the costs of doing so far outstrip any damages awarded.

Second, we have seen throughout this paper that there are a number of features of defamation transmitted online that make court resolution more problematic than it is for offline defamation. These are summarized by Emily Laidlaw in her commissioned paper as:

- *the defendant problem* – defendants may be anonymous or out of jurisdiction
- *the jurisdiction and conflicts of law problem* – limited ability to enforce transnational disputes
- *the permanence problem* – complete removal online is unlikely to be possible

- the “network information economy” problem – online reputation is disaggregated
- the community problem – online defamation spreads beyond communities
- the high-volume, low-value problem – most claims are not worth litigating.⁹³³

The remedial limitations of the tort are particularly apparent in the online context. In chapter V, we discussed the problem of enforcing a de-listing remedy beyond the immediate geographical jurisdiction, a serious problem where defamatory content may spread globally with the press of a computer key. As a result of these technical features of online defamation, most online defamation claims never reach the courts.

In response to these limitations with the court process, there is a call for more informal methods of protecting online reputation. According to Solove:

*“People resort to lawsuits because of a lack of informal means to find resolutions, because there are no other good options. The goal of the law should be to encourage the development of norms and to spur people to work out their disputes informally.”*⁹³⁴

Solove’s views are reinforced by the Bailey & Steeves study of youth and defamation commissioned by the LCO. The 20 young people interviewed for the study favoured informal methods for resolving instances of online reputational harm over a legal response. Law was perceived to be costly and slow and less successful at resolving “the social and emotional aspect of the harm”.⁹³⁵

2. Protecting Charter Rights

There is no doubt that the court system remains an essential tool for redressing some defamation claims. This chapter and the recommendations in Laidlaw’s commissioned paper are premised on the continuation of the traditional defamation court action with its emphasis on procedural fairness and formal authority.⁹³⁶ We also recognize the crucial role of courts in protecting *Charter* rights, including freedom of expression.

However, the *Charter* is not the exclusive preserve of the courts, particularly in the internet age. Jack Balkin argues that constitutional rights will be increasingly protected as part of technological and administrative regulation and suggests that a broader group of actors, legislatures, administrative agencies and technologists, will play this role.⁹³⁷ The possibility is that the role of courts in balancing freedom of expression with protection against harmful online speech should be shared with other institutions more able to adapt to the digital age. Court actions may lie among an arsenal of tools for protecting online reputation and defamation law may now be understood in this broader remedial context.

Therefore, given the cost and other limitations of a defamation action as a means of vindicating online reputation, is there an extra-judicial mechanism that would be appropriate as an alternate route for resolving some of these disputes?

B. Online Complaint Processes

In considering whether there are extra-judicial tools that might be effective in resolving some online defamation disputes, it is first important to examine tools that already exist online. In this section, we consider online complaint processes as dispute resolution tools alternative to the court process. Although they may bear little resemblance to the legal adjudicative processes with which lawyers are familiar, it is fair to say that many more disputes involving online reputational harm are resolved using online complaint processes than are subject to legal claims.⁹³⁸

1. The Operation of Online Complaint Processes

What is most likely to happen when someone is defamed on social media? If the person knows who is responsible, their first response may be to complain to the person directly. If they are a young person, they may complain to their friends or

their school.⁹³⁹ However, many people will click the online button “report post” and submit an online complaint to the social media site hosting the defamatory content.⁹⁴⁰

Social media hosts regulate defamatory content to varying degrees through terms of service and codes of conduct. The broad spectrum of such policies reflects the commercial purpose of these services. Some social media hosts explicitly prohibit use that “defames” an individual or group of individuals.⁹⁴¹ Some even provide guidelines on how to avoid writing defamatory reviews.⁹⁴² Others, such as discussion boards, are less likely to incorporate legal language. Reddit discourages users from conducting “personal attacks.”⁹⁴³ Twitter’s policy simply prohibits “illegal activities.”⁹⁴⁴ 4Chan has no warnings at all against defamatory statements.⁹⁴⁵ These policies operate as social contracts, building trust among users. Requiring users to agree to a code of conduct promotes a safe environment which, in turn, attracts users and furthers the site’s commercial success.

Some degree of moderation is essential to protect the integrity of these services. Most social media hosts use a combination of user-based policies, in-house moderation and algorithmic mechanisms. Users are relied on to flag problematic content at first instance. In this sense, the process operates as a form of user self-regulation. Some social media hosts allow users to nominate volunteer moderators to oversee the speech-conditions of the community.⁹⁴⁶ Others, such as Reddit, primarily moderate content through an algorithm. What appears in the feed is what has been voted up or down by users.⁹⁴⁷ Thus, the community directly judges what should be seen or not seen on a discussion thread.⁹⁴⁸

Large social media hosts, such as Facebook and Twitter, have devoted extensive resources to in-house moderation. Facebook receives approximately 2 million requests to remove content weekly. Facebook’s 4500 moderators process these requests and remove approximately 39% of them.⁹⁴⁹

Some social media hosts use algorithms that automatically filter results out if they meet specified thresholds such as spam or hate speech.⁹⁵⁰ However, algorithms often misinterpret language, meaning and context and can inadvertently censor users.⁹⁵¹ Certainly, they are not currently capable of appreciating the nuances of defamatory language. Although there has been some rudimentary experimentation of anti-defamation algorithms, the definition of defamation adopted for this purpose has been wholly inadequate to capture its complexity.⁹⁵² It remains to be seen whether some form of automated moderation of defamatory communications may become possible in the future.

Where moderators detect offensive content, internal enforcement tools may be triggered. Social media hosts may remove content, suspend access, restrict privileges, and expel users. Some platforms have appeal processes.⁹⁵³

2. Limitations of Online Complaint Processes

Although online complaint processes are a fact of internet use in the 21st century, this is not to say that they are necessarily suitable as a legal process for resolving defamation claims. Online complaint processes have few of the hallmarks of procedural fairness and none of the authoritativeness of a judicial decision.⁹⁵⁴ As Emily Laidlaw observes:

*Principles of due process that we expect of a court system, such as notice, a right to be heard and to hear the case against you, transparency, a right to confront witnesses, and access to a neutral decision makers, aren’t even notionally replicated in most company dispute resolution systems, particularly in the social networking context.*⁹⁵⁵

In addition to this general concern for procedural fairness, there are at least three particular drawbacks to these complaint processes as a form of alternative dispute resolution for online defamation claims.

First, these complaint processes target offensive content generally and most often do not apply legal principles in distinguishing between different forms of harm. For example, when reporting a post on Facebook, the user is given the following options to describe the post: “It’s rude, vulgar or uses bad language, It’s sexually explicit, It’s harassment or hate speech, It’s threatening, violent or suicidal, Something else.”⁹⁵⁶ These categories are defined by the social media host’s terms

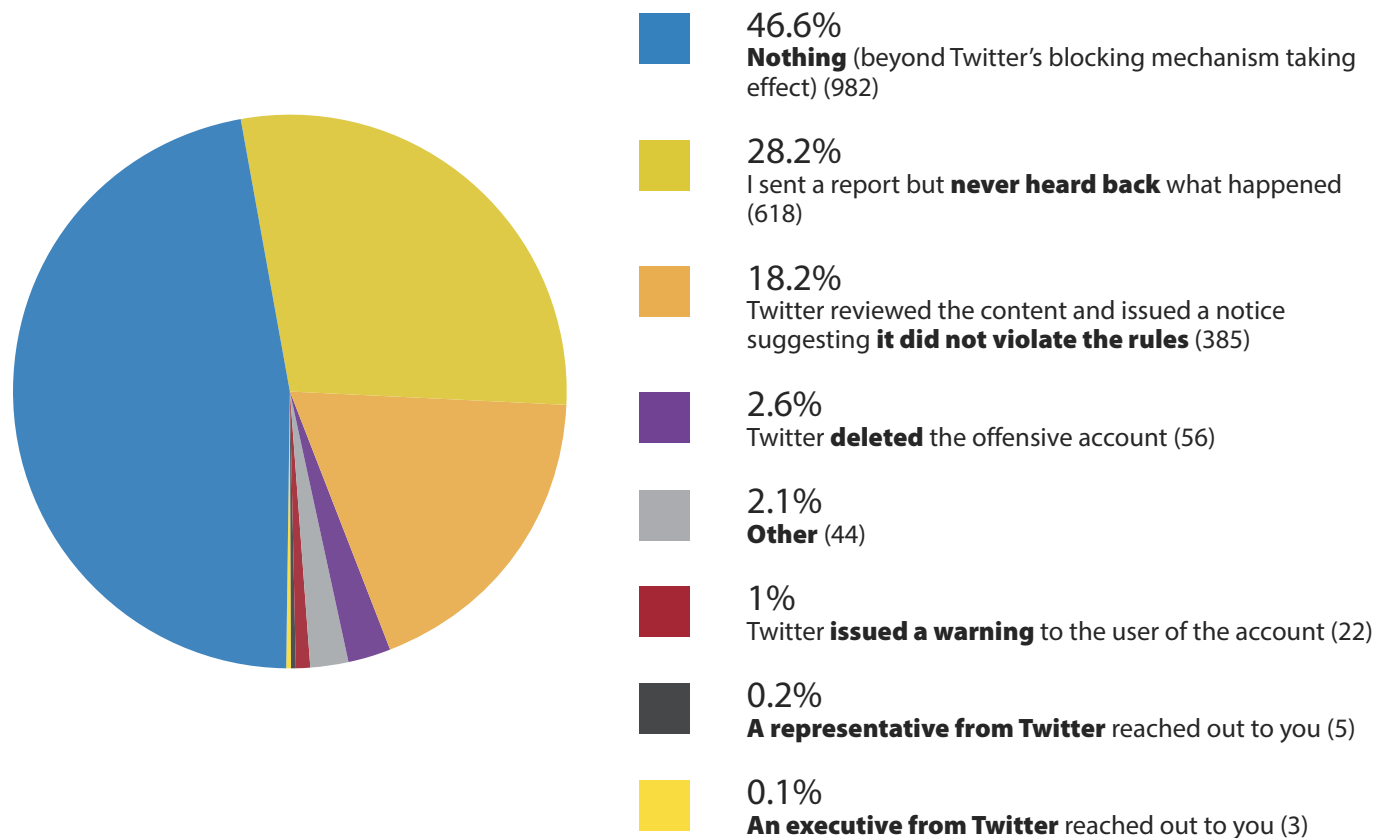
of service or other internal policies. There is no commitment on the part of social media hosts to apply the substantive law of defamation, for example, in enforcing their policies. And, in any event, defamation claims are particularly difficult to assess based only on a paper process.⁹⁵⁷

Second, many large social media hosts are global corporations with little connection to Canada or Canadian law. To the extent that they apply legal principles in enforcing their policies, these are most likely to be U.S. legal principles reflecting the *First Amendment* rather than Canadian law.⁹⁵⁸ In defamation law, this distinction may have a significant impact on outcome.

Third, online complaint processes are highly discretionary and there is at least some question as to how effective they are in addressing offensive communications. According to a BuzzFeed News survey of 2700 Twitter users, in more than 90% of complaints about offensive tweets, Twitter either did nothing or it determined that the tweets do not violate its policies.⁹⁵⁹ The report offers the following breakdown of Twitter's responses to user complaints:

What happened after you reported an abusive tweet?

(2,115 responses)



3. Social Media Hosts as Decision-Makers: The European Example

The institutional competence of intermediaries such as social media hosts to resolve disputes about some forms of online information has been considered in the context of the EU *Google Spain* decision, further discussed in chapter VI.⁹⁶⁰ The CJEU held that the search engine Google should be required to remove personal data located online where it is “inadequate, irrelevant or no longer relevant, or excessive in relation to” the “purposes for which [it was] collected or processed.”⁹⁶¹

This new legal obligation puts search engines in a decision-making role and gives rise to similar concerns for procedural fairness and evidentiary rules. One of the members of the Google Advisory Council raised this concern in the Advisory Council’s final report to Google in 2015:

*I completely oppose the legal situation in which a commercial company is forced to become of the judge of our most fundamental rights of expression and privacy, without allowing any appropriate procedure for appeal by publishers whose works are being suppressed. The European Parliament needs to immediately amend the law to provide for appropriate judicial oversight, and with strengthened protections for freedom of expression.*⁹⁶²

On the other hand, another member of the Advisory Council argued that the decision to de-list in response to a user complainant is a typical decision made by commercial search engines based on internal policies and the contractual relationship with their users and that this should remain within the private domain:

*The search engine is the responsible body to decide on the removal request. This is a typical relationship between a private user on the one hand, who requests the removal and a private company on the other hand, which is entitled to decide whether it grants or denies the request. This right to decide cannot be taken away from the company.*⁹⁶³

The Advisory Group to Google heard several suggestions for structuring a decision-making process in response to de-listing requests. These included a court-like model where the publisher of the information would be given notice of the complainant’s request to delist and Google would set up a fair process for balancing their respective interests.⁹⁶⁴ Another option was a public mediation process modeled on the process for resolving domain name disputes.⁹⁶⁵

In its Final Report, the Advisory Council to Google repeated these suggestions but did not adopt them. However, it did recommend that Google publish its decisions on de-listing requests in order to promote transparency. It also recommended that both data subjects and publishers should have the right to challenge Google’s decision to a public authority or the courts.⁹⁶⁶

4. Indirectly Regulating Online Complaint Processes

In chapter VII above, we discuss various regulatory models that impose a process on social media hosts and other intermediaries for notice and takedown of offensive online content. These operate as an alternative to holding intermediaries directly liable for the content. The premise behind these models is that intermediaries are not publishers and should not be responsible for adjudicating what is or is not acceptable online content. Therefore, these models do not purport to directly regulate online complaint processes, for example, imposing legal standards to be applied in evaluating content. Instead, they offer an indirect, procedural approach.

The key, according to Laidlaw, is to incentivize social media hosts and other intermediaries to impose resolution structures that “pass muster.”⁹⁶⁷ She and Hilary Young recommend a notice, notice plus framework under which intermediaries would be required to pass on notice of an allegation of defamatory content to the publisher and to remove allegedly defamatory content in narrow circumstances.⁹⁶⁸ Intermediaries would not be legally responsible for content that they do not create and non-compliance with the scheme would result in a fine rather than liability. One way of encouraging robust terms of service would be to assess the terms of service in setting the quantum of any fine.⁹⁶⁹ This recommendation is discussed further in chapter VII above.

C. Statutory Alternative Dispute Resolution

What other tools might be available to resolve online defamation claims outside the court process? In this section, we discuss the idea of developing a statutory dispute resolution mechanism that would operate as a legal alternative to a lawsuit and to any online complaint process that might exist.

The proposal for a dispute resolution process alternative to the courts does involve some challenges. These are similar to the challenges involved in simplifying the court process discussed in chapter V above. A key concern is the relative complexity of defamation law that, most often, does not revolve around the interpretation of a contract or the non-payment of money.⁹⁷⁰ How can an adjudicator accurately assess defamatory meaning or the public interest in a streamlined manner?

Another challenge is ensuring that a specialized dispute resolution body does not become just one more costly step in a process that ultimately leads to court proceedings anyway.

Laidlaw's commissioned paper considers what variables should be considered in seeking a dispute resolution framework for online defamation. These are:

- speed of resolution
- reach of resolution to the right communities
- using the discursive nature of internet communities in the resolution
- containment and erasure of defamatory information
- costs of resolution.⁹⁷¹

She further suggests that an acceptable dispute resolution framework would allow for: containment and erasure of information, identifying defamatory information as contested (through a flag or something similar), identifying the information as false (flag, notice or something similar), public apology, correction, right of reply, declaration of falsity.⁹⁷² Laidlaw surveys a number of possible models in her commissioned paper.⁹⁷³ We focus on the most likely here.

1. Mullis/Scott ADR Proposal

Various proposals were made during the UK defamation law reform exercise for a specialized body (court, tribunal or arbitrator) to determine defamation claims in a streamlined, low-cost process.⁹⁷⁴ One example is a proposal by Alastair Mullis and Andrew Scott for a two-track model of defamation dispute resolution.⁹⁷⁵ The purpose of this proposal would be to “emphasize the swift resolution of complaints and the provision of discursive remedies.”⁹⁷⁶ Claims would be triaged with the vast majority of claims being diverted to a track one streamlined process operated by the courts or an administrative body.

Mullis & Scott suggest that specialized adjudicators hear track one claims. For example, self or statutory media regulators might adjudicate cases involving a media publication and expert professional panels might be struck to hear cases involving academic or other specialized publications. For online defamation, Mullis & Scott suggest that the Internet Service Providers Association might create a dispute resolution body to adjudicate such cases.⁹⁷⁷ Each of these adjudicators would be subject to judicial review by the High Court on traditional grounds.⁹⁷⁸

Track one claims would proceed on the basis that the alleged defamatory statement means what the claimant alleges that it means, so long as that is reasonable. The primary defences would be truth and honest comment. The emphasis would be on discursive remedies such as a correction or retraction, public apologies or declarations of falsity.⁹⁷⁹ Flags would be used to identify contested online content. More serious or damaging cases would proceed to the High Court along with cases involving the public interest.

The authors conclude that nothing short of a “radical revision to the law and procedures of libel” will lead to an appropriate balance between free expression, reputation and access to justice.⁹⁸⁰

2. Laidlaw Online Dispute Resolution (ODR) Proposal

Laidlaw argues that the particular goals of an internet defamation resolution framework (dispute avoidance and containment, accessibility, speed, discursive remedies) are best achieved using a techno-legal response. She suggests that online dispute resolution (ODR) “provides a fundamental opportunity for reform.”⁹⁸¹ In contrast to ADR, ODR can be cheaper, faster, transparent and more flexible. It provides a route for low-value disputes that otherwise would not be resolved. On the other hand, it is not as suitable for legally complex claims and it does not allow for the emotional and psychological benefits of negotiating in person.⁹⁸² ODR comes with privacy risks that must be managed and it must gain the trust of users.⁹⁸³ In order to be successful, ODR must also allow for effective enforcement.

Government-created ODR is currently in operation in a number of jurisdictions, including British Columbia where the Civil Resolution Tribunal (CRT) was created to resolve small claims (under \$5000) and condominium disputes.⁹⁸⁴ The CRT operates in four phases: solution explorer, negotiation, facilitation and adjudication. The first phase is information-based and free, provided by way of an interactive online tool. The software helps categorize and narrow the complainant’s problem and sets out possible paths to resolution. The second phase requires that the complainant use drop-down menus and templates to set out the problem for resolution and encourage party to party negotiation. The third phase involves online mediation by a human mediator. The fourth phase involves online adjudication by a tribunal member leading to an enforceable decision.⁹⁸⁵

Laidlaw recommends the introduction of an ODR system based on the CRT as a means of resolving high volume, low value online defamation claims.⁹⁸⁶ This remedial option would exist alongside existing intermediary complaints mechanisms and the notice-notice-plus regime recommended in the commissioned paper by Laidlaw & Young.⁹⁸⁷

Laidlaw emphasizes the need for specialization of any dispute resolution mechanism adopted. Defamation law is technical and “simplification comes by way of experts facilitating negotiations and adjudicating disputes.”⁹⁸⁸ She suggests that lawyers with defamation expertise would be “ideal candidates” to play this role.⁹⁸⁹ Laidlaw further suggests that the ODR process be voluntary for the claimant as most complementary to the court process. Intermediaries would be required to provide a link to the ODR mechanism to Ontario users.⁹⁹⁰

The creation of an ODR mechanism for online defamation claims would also come with challenges. A problem with any direct method of dispute resolution is forcing defendants to the table. This is particularly so in the online defamation context where there is no contractual relationship between the parties. Many defamers post anonymously and there is no way to identify them without involving intermediaries. Furthermore, defamers may be outside the province and unwilling to submit to the jurisdiction. We discuss both these issues in chapter V above. Laidlaw notes that indirect enforcement would be possible either by using the decision to require an intermediary to take down the content or by simply publishing the result.⁹⁹¹

Another challenge would be to establish the scope of the new mechanism. The LCO’s mandate is to examine online defamation but we have seen that most people experiencing reputational harm online do not stop to consider whether that harm constitutes defamation, invasion of privacy, cyberbullying, revenge porn and/or online harassment. And the interests of plaintiffs may be very different in privacy cases than in defamation cases.⁹⁹² We discuss the overlap between these related claims in chapter VI above.

3. CyberSCAN: Investigation and Informal Complaints Resolution

This last example of an alternative dispute resolution process is a bit different than the models discussed above since it involved a proactive investigatory body that was mandated to go into the community, gather the facts and attempt to

resolve instances of cyberbullying. We discussed Nova Scotia's legislative regime for combatting cyberbullying in chapter VI above.⁹⁹³ Although the Nova Scotia legislation was struck down as unconstitutional, we may still learn from the administrative regime that the government set up for the purpose of dealing with cyberbullying complaints.⁹⁹⁴

The *Cyber-safety Act* created a civil tort of cyberbullying and gave judges the power to make protection orders.⁹⁹⁵ However, in addition to these remedies, the legislature amended the *Safer Communities and Neighbourhoods Act*, providing for CyberSCAN, a complaints resolution and investigative unit to handle prevention orders.⁹⁹⁶

Anyone with knowledge of cyberbullying was encouraged to file a complaint with CyberSCAN. Once the complaint was received, the Director had broad powers to investigate it, seek further information, send a warning letter to the source of the electronic communication, ask an internet service provider to halt service to that source, and try to resolve the complaint by agreement or informal action.⁹⁹⁷

Where necessary, the Director could also make a court application for a prevention order. A prevention order could include a number of provisions ranging from an order prohibiting the respondent from engaging in cyberbullying to an order confiscating any electronic device and discontinuing service from an internet service provider.⁹⁹⁸

According to the CyberSCAN brochure:

How can CyberSCAN help me?

CyberSCAN investigators will first try to stop the cyberbullying by talking to everyone involved, including schools and families. If that doesn't work, the investigators can apply for a prevention order to stop the bullying by:

- ordering the cyberbully to limit all contact with you;
- limiting the cyberbully's use of technology or taking away their computer, cell phone, other mobile devices, and/or internet service, so they cannot use it to bully.

Court orders are valid for one year.⁹⁹⁹

CyberSCAN handled over 820 cyberbullying complaints until the invalidation of the legislation.¹⁰⁰⁰ The invalidation of the CSA removed CyberSCAN's complaint resolution mechanisms and investigative powers.¹⁰⁰¹ Currently, it operates as an educative force against cyberbullying.¹⁰⁰² Nevertheless, the CSA offers a glimpse of an informal, community-based possibility for dealing with some forms of online defamation outside of the courts.

D. Future Regulation of Online Reputation

Defamation law and the alternative dispute resolution processes that we examine in this chapter operate as *ex post facto* tools to vindicate, contain or erase reputational harm once it has occurred. An alternative in the future may be to look to the internet itself as a form of preventative regulation. According to Roger Brownsword,

*...[C]onduct is sometimes most effectively channeled by relying, not on norms, pressure, or financial signals, but on 'code', on integrated technology or design – that is, as Lawrence Lessig puts it, on a West Coast rather than a (traditional) East Coast approach to regulation.*¹⁰⁰³

The problem of regulating or limiting defamation in the internet age must be viewed from a forward-looking perspective. What legal tool will be effective to control defamatory speech as technology develops over the next several decades? Although it seems that human communications have been revolutionized since the early 1980s, many argue that the internet is still in its infancy and that we will not be able to recognize the internet and internet communications of 2047.¹⁰⁰⁴ Proposed extra-judicial tools for remedying defamation should be examined with this in mind.

Questions for Consideration

37. In your experience how successful are online complaint processes at resolving disputes over offensive online content? What role, if any, should online complaint processes play as an extra-judicial tool for resolving online defamation disputes?
38. Should a statutory dispute resolution mechanism be made available for some defamation claims as an alternative to the court process? If so, what considerations are important to its design? Should specialized rules or procedures be developed for offensive content involving children?



APPENDIX A – ADVISORY GROUP MEMBERS

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APPENDIX B – QUESTIONS FOR CONSIDERATION

1. What lessons are to be learned from the law and law reform efforts of other jurisdictions on the issues in this project? How applicable are these lessons to the Ontario context?
2. Can or should defamation law reform in Ontario differentiate between the following and, if so, how:
 - a. Traditional communications and internet communications,
 - b. Reputational harm on the internet and reputational harm offline,
 - c. Different forms of internet communications,
 - d. Traditional media publishers, bloggers/citizen journalists and other internet publishers
3. Are there new or emerging technologies or issues that the LCO should consider when analyzing the impact of the internet on defamation? What considerations should the LCO take into account to ensure that our recommendations are likely to remain relevant as technology changes?
4. How is our understanding of freedom of expression interests, issues or expectations different in the internet era? What, if any, significance does this have for defamation law reform in Ontario?
5. Has our understanding of truth and falsity changed in the internet era and how should this affect defamation law reform in Ontario?
6. Are reputational or privacy interests, issues or expectations different in the internet age? If so, what significance does this have for defamation law reform in Ontario?
7. Would legislative reform of the test for defamatory meaning be appropriate or should this area of defamation law continue to evolve incrementally through case law? If a new test were adopted, what elements should be part of this test?
8. Should Ontario adopt a statutory definition of “publisher” that would require an intentional act of communicating specific words? (Also see chapter VII below.)
9. Should the statutory presumption of publication in newspapers and broadcasts be extended to some forms of internet publication?
10. Should the multiple publication rule be replaced with a statutory single publication rule, as in the UK? If so, what limitation period should be applicable to defamation claims?
11. Should a fault requirement be introduced into the tort of defamation in Ontario? If so, at what stage of the analysis should fault be considered?
12. Is the presumption of falsity in defamation law still appropriate? Should the law require plaintiffs to prove falsity?
13. Is defamation law’s emphasis on the distinction between true and false communications still appropriate in the internet age?
14. Is the presumption of harm in defamation law still appropriate?
15. Should Ontario adopt a serious harm threshold similar to that adopted in the UK Defamation Act, 2013?
16. Should the common law defences for defamation be reformed or codified as has occurred in the UK Defamation Act, 2013?
17. What principles should be applied in adapting damages awards and injunctions to internet defamation?
18. Should Ontario adopt legislation creating new remedies for defamation that more directly vindicate the reputation of a successful plaintiff and are responsive to the nature of internet defamation?

19. Should Ontario continue to maintain the distinction between libel and slander? If so, should internet communications be considered to be libel or slander?
20. Should corporations retain standing to sue for defamation in the internet age? Should they continue to be entitled to rely on the presumption of harm and presumption of falsity?
21. What evidence is there of libel tourism or inappropriate forum-shopping occurring in Ontario?
22. Does the current common law test for assuming jurisdiction strike an appropriate balance between protection of reputation and freedom of expression? Should Ontario adopt a statutory provision similar to s.9 of the (UK) Defamation Act, 2013 for multi-jurisdictional defamation actions?
23. Should the notice period in ss. 5(1) of the LSA be eliminated from Ontario law? If not, how long should the notice period be and how long should the publisher have to respond to the notice? Should notice/retraction be made available in relation to a broader range of publications?
24. Should the special limitation period in s. 6 of the LSA be eliminated so that all defamation claims are subject to the two year general limitation period in Ontario's Limitations Act?
25. What are the best options for reducing cost and complexity and promoting access to justice in defamation proceedings?
26. Is Rule 20 of the Rules of Civil Procedure an appropriate and sufficient mechanism for the preliminary hearing of issues in defamation proceedings? Should Ontario adopt UK-style preliminary issues hearings or summary disposal measures?
27. What impact has the PPPA had on the process and outcome of defamation lawsuits in Ontario? Does the PPPA achieve an appropriate balance between the interests of parties to defamation proceedings?
28. What is current practice on the use of juries on Ontario defamation trials? Should the right to a jury trial for defamation actions be limited in Ontario?
29. Does the current test for obtaining a Norwich order appropriately balance anonymous free speech, privacy interests, the value of a broad discovery process and the administration of justice? Would legislation addressing the identification of anonymous defendants be appropriate?
30. What principles should be applied in deciding whether to grant anonymization orders to plaintiffs in defamation proceedings in the internet age?
31. What impact does the evolution of privacy law have on defamation? Should the LCO consider statutory reform similar to New Zealand's Harmful Digital Communications Act?
32. What principles or factors should guide the analysis of intermediary liability and how should intermediaries be categorized for this purpose?
33. In what circumstances, if any, should internet intermediaries bear legal responsibility for defamatory content created by someone else?
34. Do recommendations 1 to 3 in the Laidlaw & Young commissioned paper represent desirable reform in this area? Why or why not?
35. Should Ontario adopt legislative provisions regulating the role of internet intermediaries in relation to third party content?

36. If so, what kind of regulatory regime is recommended:
- a. Liability-based regulation such as
 - i. broad immunity from liability (as in s.230 of the US Communications Decency Act) or
 - ii. a notice and takedown regime (as in the UK Defamation Act, 2013 or the EU Directive);
 - b. Regulation based on statutory penalty such as
 - i. a notice and notice regime (as in Canada's Copyright Act) or
 - ii. a notice and notice plus regime (as in the Laidlaw & Young proposal).
37. In your experience how successful are online complaint processes at resolving disputes over offensive online content? What role, if any, should online complaint processes play as an extra-judicial tool for resolving online defamation disputes?
38. Should a statutory dispute resolution mechanism be made available for some defamation claims as an alternative to the court process? If so, what considerations are important to its design? Should specialized rules or procedures be developed for offensive content involving children?

ENDNOTES

- 1 *Hill v Church of Scientology*, [1995] 2 SCR 1130, para 120, [Scientology].
- 2 *Canadian Charter of Rights and Freedoms*, part I, *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].
- 3 Matthew Collins, *Collins on Defamation* (Oxford: OUP, 2014). Also see Robert Danay, "The Medium is Not the Message: Reconciling Reputation and Free Expression in Cases of Internet Defamation" (2010) 56 McGill LJ 1, 24 ["The Medium is Not the Message"].
- 4 Ministry of the Attorney General Advisory Committee, *Report on the Law of Defamation* (November 1990) [1990 MAG Report].
- 5 *Libel and Slander Act*, RSO 1990, c L 12 [LSA].
- 6 See, for example, *Murray v Wishart*, [2014] NZCA 461; *Duffy v Google Inc*, [2015] SASC 170 [Duffy v Google Inc]; *Dr Yeung, Sau Shing Albert v Google Inc*, [2014] HKCFI 1404; *Richardson v Facebook*, [2015] EWHC 3154 (QB); *Tamiz v Google Inc*, [2013] EWCA Civ 6.
- 7 *Criminal Code*, RSC 1985, c C-46, s.300.
- 8 For example, in a recent talk, Ryerson Professor Lisa Taylor suggested that s.300 is being misused and should be abolished: Mitchell Thompson, "Canada's Criminal Libel Laws May Threaten Free Speech", November 14, 2016, online: <http://www.j-source.ca/article/canada%E2%80%99s-criminal-libel-laws-may-threaten-free-speech>.
- 9 For the new breach of privacy claims see *Jones v Tsige*, 2012 ONCA 3 and *Doe v D*, 2016 ONSC 541.
- 10 Porter Committee, *Report of the Committee on the Law of Defamation* (London: HMSO, 1948), 7, [Porter Committee].
- 11 New South Wales Law Reform Commission, *Report 11 – Defamation*, (1971), para. 12.
- 12 See the discussion in chapter II.
- 13 *Barrick Gold Corp v Lopehandia* (2004), 71 OR (3d) 416 (CA), [Barrick].
- 14 Danay, note 3, "The Medium is Not the Message".
- 15 On the motives of plaintiffs to bring defamation proceedings despite low success rates, see Lawrence M Friedman, *Guarding Life's Dark Secrets* (Stanford: Stanford University Press, 2007), 235 [Friedman, *Guarding*].
- 16 Hilary Young, "Rethinking Canadian Defamation Law as Applied to Corporate Plaintiffs" (2013) 46 UBC L Rev 529 [Young "Rethinking"]; David Howarth, "Libel: Its Purpose and Reform" (2011) 74 MLR 845, 873 [Howarth, "Libel"]. See chapter V for this discussion.
- 17 *Libel and Slander Act*, RSO 1990, c L 12 [LSA].
- 18 15 & 16 Geo 6 & 1 Eliz 2, c 66.
- 19 LSA, note 17, ss.5-8.
- 20 Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting, Held at Quebec, Quebec August, 1983* at 144–146, online: <http://www.qp.gov.sk.ca/documents/ULCC/1983ULCC0065.pdf>.
- 21 Defamation: Report of the Saskatchewan Commissioners, Appendix G, Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting*, 1983, 96 [1983 ULCC Report].
- 22 1983 ULCC Report, note 21, 98.
- 23 Uniform Defamation Act (1994), online: <http://www.ulcc.ca/en/uniform-acts-new-order/older-uniform-acts/200-josetta-1-en-gb/uniform-actsa/defamation-act/384-defamation-act>.
- 24 Law Reform Commission of British Columbia (LRCBC), *Report on Defamation*, LRC 83 (1985).
- 25 Substantive amendments were made to BC's *Libel and Slander Act* only in 2004 (s.6.1 on the defence of fair comment and s.6.2 on actions against educational libraries): *Libel and Slander Act*, RSBC 1996, c 263, as amended (21 Oct 2004).
- 26 Ministry of the Attorney General Advisory Committee, *Report on the Law of Defamation*, 1990 [1990 MAG Report].
- 27 *WIC Radio Ltd. v. Simpson*, [2008] 2 SCR 420 [WIC Radio]; *Grant v. Torstar Corp.*, [2009] 3 SCR 640 [Grant v. Torstar].

- 28 Professor Raymond Brown has also recommended substantial reform for Canadian defamation law. Three of his core recommendations are: 1. abolish strict liability and adopt a rule of fault consistent with the general law of torts; 2. alter the definition of malice on occasions of qualified privilege so that liability will be based on the defendant's attitude towards the truth of what is published rather than the defendant's attitude towards the plaintiff; 3. protect expressions of opinion from liability regardless of whether they involve matters of public interest, so long as they do not include false or defamatory factual assertions: Raymond E Brown, *Defamation Law: A Primer* (Toronto: Carswell, 2003) 309–315.
- 29 *Anti-SLAPP Advisory Panel Report to the Attorney General* (Toronto: Ministry of the Attorney General, 28 October 2010), 69–78 and 90–92 [Anti-SLAPP Report].
- 30 *Protection of Public Participation Act, 2015*, SO 2015, c 23 [PPPA].
- 31 SLAPP is an acronym for strategic lawsuits against public participation. See the Anti-SLAPP Report, note 29.
- 32 *WIC Radio*, note 27.
- 33 *Grant v Torstar*, note 27
- 34 *Grant v Torstar*, note 27, para 97.
- 35 *Breeden v Black*, 2012 SCC 19 [Black]; *Éditions Écosociété Inc v Banro Corp*, 2012 SCC 18 [Banro].
- 36 *Black*, note 35, para 32; *Banro*, note 35, para 56.
- 37 *Black*, note 35, para 15; *Banro*, note 35, para 3.
- 38 *Crookes v. Newton*, [2011] 3 SCR 269 [Crookes].
- 39 *Crookes*, note 38, para 36.
- 40 *Crookes*, note 38, para 43.
- 41 *Shtaiif v Toronto Life Publishing Co Ltd*, 2013 ONCA 405, [Shtaiif]; *Barrick Gold Corp v Lopehandia* (2004), 71 OR (3d) 416 (CA), [Barrick]; *Baglow v Smith*, 2015 ONSC 1175, [Baglow]; *Warman v Fournier*, 2015 ONCA 873, [Fournier].
- 42 *Goldhar v Haaretz.com*, 2016 ONCA 515, leave to appeal granted, 2017 CanLII 12231 (SCC).
- 43 *Shtaiif*, note 41, para 20.
- 44 Porter Committee, *Report of the Committee on the Law of Defamation* (London: HMSO, 1948), 7 [Porter Committee].
- 45 Porter Committee, note 44, 9.
- 46 Porter Committee, note 44, 48.
- 47 SO 1958, c 51.
- 48 *Report of the Committee on Defamation* (London: Her Majesty's Stationary Office, 1975) [Faulks Committee Report].
- 49 UK common law has, in turn, influenced Canadian legal developments. See, for example: *Hill v. Church of Scientology*, [1995] 2 SCR 1130, para 136.
- 50 *Defamation Act, 2013* (UK), c 26 [UKDA 2013].
- 51 Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill, Session 2010-12, Report*, together with formal minutes (London: House of Lords and House of Commons, 12 October 2011), online: <https://publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20302.htm>, [Joint Committee Report].
- 52 David Howarth has criticized UK reform efforts for refusing “to think about fundamentals” and, therefore, failing to take into account defamation's role in protecting “fundamental human interests in sociality”: David Howarth, “Libel: Its Purpose and Reform” (2011) 74 MLR 846 [Howarth, “Libel”].
- 53 David Mangan, “Regulating for Responsibility: Reputation and Social Media” (2015) 29 Int'l Rev. L. Computers & Tech. 16, 18 [Mangan, “Regulating”].
- 54 Mangan, “Regulating”, note 53, 16.
- 55 Northern Ireland Law Commission, *Defamation Law in Northern Ireland* (NILC 19, 2014).
- 56 Andrew Scott, *Reform of Defamation Law in Northern Ireland: Recommendations to the Department of Finance* (June 2016), online: <https://www.finance-ni.gov.uk/publications/review-law-defamation>.
- 57 Scottish Law Commission, *Discussion Paper on Defamation, Discussion Paper No 161* (Edinburgh, March 2016), online: <http://scotlawcom.gov.uk/files/5114/5820/>

- 6101/Discussion_Paper_on_Defamation_D
P_No_161.pdf, [Scottish Law Commission]. The
Scottish Law Reform Commission subsequently
released a draft bill for consultation: *Defamation
and Malicious Publications (Scotland) Bill*,
Consultation Draft.
- 58 Scottish Law Commission, note 57, 1.18.
- 59 Scottish Law Commission, note 57, 1.20.
- 60 Ireland, Minister for Justice and Equality, *Review of
the Defamation Act 2009 – Public Consultation,
Invitation for Submissions* (November 1, 2016),
online:
http://www.justice.ie/en/JELR/Pages/Review_of_the_Defamation_Act_2009_Public_Consultation.
- 61 Ireland, Minister for Justice and Equality, note 60.
- 62 Apparently, the uniform defamation legislation
in Australia may not be all that uniform: David
Rolph, “A Critique of the National, Uniform
Defamation Laws” (2008) 16 Torts L J 207.
[Rolph, “Critique”].
- 63 Australia Law Reform Commission (ALRC),
Unfair Publication: Defamation and Privacy,
Report No 11 (Canberra, 1979).
- 64 ALRC, note 63, 17-25.
- 65 ALRC, note 63, Summary, ix-xi.
- 66 State reports on the issue include: New South
Wales Law Commission, *Report 75 (1995) –
Defamation*, (Sydney: New South Wales Law
Reform Commission, 1995) and Law
Commission of Western Australia, *Project No 8
–Part II Defamation* (Perth: Law Commission of
Western Australia, 1979) at 3.3-
3.5.
- 67 New defamation laws came into effect on 1
January 2006 in New South Wales, Victoria,
South Australia, Western Australia, Queensland,
Tasmania, on 23 February 2006 in Australian
Capital Territory and on 26 April 2006 in
Northern Territory: *Defamation Act 2005* (NSW);
Defamation Act 2005 (Vic); *Defamation Act 2005*
(SA); *Defamation Act 2005* (WA); *Defamation Act*
2005 (Qld); *Defamation Act 2005* (Tas); *Civil Law*
(Wrongs) Act 2002 (ACT); *Defamation Act 2006*
(NT).
- 68 *Dow Jones & Co v Gutnick*, [2002] HCA 56 [Gutnick].
- 69 *Google Inc v Duffy*, [2017] SASFC 130.
- 70 See the discussion on other sources of law in
Matthew Collins, *Collins on Defamation* (Oxford:
OUP, 2014), 16-20, [Collins on Defamation].
- 71 *Communications Decency Act*, 47 US Code, art
230 [CDA (US)].
- 72 This was an allegation made in *Black*. United
States has enacted legislation that renders
foreign libel judgments unenforceable unless
the underlying legislation conforms to the First
Amendment: *Securing the Protection of our
Enduring and Established Constitutional Heritage*
Act § 4102 Public Law 111-223 – August 10,
2010 [the SPEECH Act].
- 73 *Code civil du Québec*, LQ 1991, ch. 64, art 1457.
- 74 See Robert Danay, “The Medium is Not the
Message: Reconciling Reputation and Free
Expression in Cases of Internet Defamation”
(2010) 56 McGill LJ 1, 24, [“The Medium is Not the
Message”].
- 75 Council of Europe, *European Convention for the
Protection of Human Rights and Fundamental
Freedoms*, 4 November 1950, ETS 5 [ECHR]. On
the right to privacy in the context of a
defamation claim, see *Pfeifer v. Austria*, (2007)
48 EHRR 175, 183, para 35.
- 76 *Google Spain SL, Google Inc. v. Agencia Española
de Protección de Datos, Mario Costeja González*,
(May 13, 2014), Doc. C-131/12, ECLI:EU:C
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- 77 *Najafli v. Azerbaijan*, No 2594/07, [2012] ECHR
1772; *Thorgeirson v. Iceland* (1992), No
13778/88; *Castells v. Spain* (1992), No 11798/85,
14 EHRR 445.
- 78 See, for example, *St Elizabeth Home Society v.
Hamilton (City)*, 2008 ONCA 182, para 29
(journalist subpoenaed to provide names of
sources for articles. European Court of Human
Rights case law cited on the chilling effect that
disclosing sources may have on journalism).
- 79 Raymond Brown, *The Law of Defamation in
Canada*, (Thompson Carswell, binder service)
vol 1, ch 2, “History of Defamation”.
- 80 *Thorley v Kerry* (1812), 128 ER 367.
- 81 Van Vechter Veeder, “The History and Theory of the
Law of Defamation”, (1903) 3 Columbia L Rev 546.

- 82 David Ipp, "Themes in the Law of Torts", (2007) 81 Australian Law Journal 609, 615, quoted in *Collins on Defamation*, note 70, 3.
- 83 Paul C Weiler, "Defamation, Enterprise Liability, and Freedom of Speech", (1967) 17 UTLJ 278, 306.
- 84 Lawrence M Friedman, *Guarding Life's Dark Secrets* (Stanford: Stanford University Press, 2007), 7 [Friedman, *Guarding*].
- 85 Mark AB Donald, "Roadkill or Sacred Cow? Defining 'Reputation' in 21st Century Defamation Law" OBA.org (April 29, 2014).
- 86 Robert C Post, "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74 Cal L Rev 693 [Post "Social Foundations"].
- 87 See the discussion of the values underlying reputation and freedom of expression in Peter A Downard, *Libel* (Markham: LexisNexis, 2014), ch 2.
- 88 *Canadian Charter of Rights and Freedoms*, part I, *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11 [Charter].
- 89 *Palko v Connecticut*, 302 US 316 (1937); *R v Sharpe*, 2001 SCC 2, para 23.
- 90 *Edmonton Journal v Alberta (AG)*, [1989] 2 SCR 1326 at 1339-1340. This is subject to certain limitations. For instance, violent expression falls outside the sphere of section 2(b) of the *Canadian Charter: Irwin Toy Ltd v Quebec*, [1989] 1 SCR 927, 970 [*Irwin Toy*].
- 91 *Irwin Toy*, note 90, 976-977; *R v Keegstra*, [1990] 3 SCR 627, 762-3 [*Keegstra*].
- 92 Victoria Nash, "Analyzing Freedom of Expression Online: Theoretical, Empirical and Normative Contributions" in William H Dutton, ed, *The Oxford Handbook of Internet Studies* (North Carolina: Carolina Academic Press, 2001), 4; *Keegstra*, note 91, 804-805; TI Emerson, "Towards A General Theory of the First Amendment" (1963) 72 Yale LJ 877, 879.
- 93 Heejung S Kim and David K Sherman, "Express Yourself: Culture and the Effect of Self-Expression on Choice" (2007) 92 Journal of Personality and Social Psychology 1, 2 [Kim & Sherman, "Express"].
- 94 Kim & Sherman, "Express", note 93, 2.
- 95 Kim & Sharman, "Express", note 93, 2.
- 96 *Keegstra*, note 91, 762-3; *Irwin Toy*, note 91, 976-7; Dawn C Nunziato, *Virtual Freedom: Net Neutrality and Free Speech in the Internet Age* (California: Stanford University Press, 2009), 25.
- 97 JS Mill, *On Liberty* (Kitchener: Batoche Books, 2001), 19.
- 98 *Abrams v United States*, 250 US 616, 630; *Keegstra*, note 91, 762-3; *Irwin Toy*, note 90, 976-7.
- 99 *Keegstra*, note 91, 802-803.
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- 101 *Grant v Torstar Corp.*, [2009] 3 SCR 640, para 51. [*Grant v Torstar*].
- 102 *WIC Radio Ltd v Simpson*, [2008] 2 SCR 420 [*WIC Radio*]; *Grant v Torstar*, note 101; *Crookes v Newton*, [2011] 3 SCR 269 [*Crookes*].
- 103 *Hill v Church of Scientology*, [1995] 2 SCR 1130, para 95, [*Scientology*].
- 104 Post, "Social Foundations", note 86.
- 105 Hilary Young, "Rethinking Canadian Defamation Law as Applied to Corporate Plaintiffs" (2013) 46 UBC L Rev 529, 543 [Young "Rethinking"].
- 106 Post, "Social Foundations", note 86, 711.
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- 108 Post, "Social Foundations", note 86, 721.
- 109 David Rolph, *Reputation, Celebrity and Defamation Law* (Ashgate, 2008).
- 110 Lawrence McNamara, *Reputation and Defamation* (Oxford: OUP, 2007).
- 111 David S Ardia, "Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law" (2010) 45 Harvard Civil Rights – Civil Liberties Law Review 261; Amy Kristin Sanders, "Defining Defamation: Evaluating Harm in the Age of the Internet" (2012) 3 UB Journal of Media Law & Ethics 112.
- 112 David Howarth, "Libel: Its Purpose and Reform" (2011) 74 MLR 859, [Howarth, "Libel"].
- 113 *Reynolds v Times Newspapers Ltd*, [2001] 2 AC 127, 201.

- 114 *Scientology*, note 103, para 107.
- 115 *Pfeifer v Austria*, (2009) 48 EHRR 8.
- 116 Alastair Mullis & Andrew Scott, "The Swing of the Pendulum: Reputation, Expression and the Re-Centring of English Libel Law (2012) 63 Northern Ireland Legal Quarterly 27. One recent suggestion has been that reputation is not part of private life after all but, rather, reputational harm can cause harm to private life: Tanya Aplin & Jason Bosland, "The Uncertain Landscape of Article 8 of the ECHR: the Protection of Reputation as a Fundamental Human Right?" in Andrew T Kenyon, ed, *Comparative Defamation and Privacy Law* (Cambridge: Cambridge University Press, 2016), 265.
- 117 *R v Dyment*, [1988] 2 SCR 417, para 17 [*Dyment*].
- 118 *Dyment*, note 117, para .19
- 119 *Dyment*, note 117, para 22, quoting from Canada, *Task Force on Privacy and Computers*. (Ottawa: Information Canada, 1972), 12-14.
- 120 *R v Spencer*, 2014 SCC 43.
- 121 *R v Wise*, [1992] SCR 558 per La Forest J, quoting M Gutterman, "A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance" (1988) 39 Syracuse L Rev 647, 706.
- 122 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, art. 8 [ECHR].
- 123 David Rolph, "Vindicating Reputation and Privacy", in Andrew T Kenyon, ed, *Comparative Defamation and Privacy Law* (Cambridge: Cambridge University Press, 2016) 291 [Rolph, "Vindicating"].
- 124 Both reputation (protected by defamation law) and privacy engage dignitary interests: Chris DL Hunt, "The Common Law's Hodgepodge Protection of Privacy" (2015) 66 UNBLJ 161, 172. A close connection between privacy and reputation is also illustrated in the European Court of Human Rights case law interpreting article 8 of the European Convention on Human Rights. Article 8 protects the right to respect for "private and family life" and this has been determined to include respect for reputation as one element of private life: Cameron Doley, Alastair Mullis & 5 others, eds, *Carter-Ruck on Libel and Privacy*, 6th ed (LexisNexis, 2009).
- 125 See the discussion of the relationship between the two causes of action in *Terry v Persons Unknown* (Rev 1), [2010] EWHC 119 (QB). Also see *Chandra v CBC*, 2015 ONSC 2980.
- 126 *Grant v Torstar*, note 101, paras 102, 111.
- 127 *Law of Libel Amendment Act 1888* (51 & 52 Vict c 64).
- 128 Porter Committee, *Report of the Committee on the Law of Defamation* (London: HMSO, 1948), 50, [Porter Committee].
- 129 Porter Committee, note 128, 49.
- 130 *An Act to Amend The Libel and Slander Act*, SO 1980, c 35; see the LRCBC report recommending that the BC *Libel & Slander Act* be updated to apply to cable television in addition to traditional broadcasters: Law Reform Commission of British Columbia, *Report on Cable Television and Defamation*, LRC 50 (March 1981), online: www.bcli.org/sites/default/files/LRC50-Cable_Television_and_Defamation.pdf.
- 131 Even renowned defamation jurist, Mr Justice Eady, has compared the internet to the printing press: "The recent communications revolution is comparable to the invention of printing, just on a vaster scale numerically and geographically." Inform, "News: Eady lecture launches Centre for Law, Justice and Journalism," (2010 Speech to City University London), *Inform's Blog*, online: <https://inform.wordpress.com/2010/03/10/eady-lecture-launches-centre-for-law-justice-and-journalism/>.
- 132 Matthew Collins, *The Law of Defamation and the Internet*, 3d ed (Oxford: OUP, 2010), 35 [Collins, *Defamation & Internet*].
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- 134 Collins, *Defamation & Internet*, note 132.
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- 137 Robert Danay, "The Medium is Not the Message: Reconciling Reputation and Free Expression in Cases of Internet Defamation" (2010) 56 *McGill LJ* 1, 24 ["The Medium is Not the Message"].
- 138 See the discussion on characteristics of the internet in David A Potts, *Cyberlibel: Information Warfare in the 21st Century* (Toronto: Irwin Law, 2010), ch 5.
- 139 Collins, *Defamation & Internet*, note 132, 36-42.
- 140 Collins, *Defamation & Internet*, note 132, 33.
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- 142 Collins, *Defamation & Internet*, note 132, 19.
- 143 "Caching" means to temporarily store in a bank of reserved section of computer memory for the purpose of enabling the material to be quickly retrieved at a later time: Collins, *Defamation & Internet*, note 132, 27.
- 144 Collins, *Defamation & Internet*, note 132, 27.
- 145 Crookes, note 102, para 34, quoting Collins, *Defamation & Internet*, note 132.
- 146 However, some of these intermediaries have censored unfavourable information in the past. See Dawn C. Nunziato, *Virtual Freedom: Net Neutrality and Free Speech in the Internet Age* (California: Stanford University Press, 2009, 5-10.
- 147 Collins, *Defamation & Internet*, note 132, 79.
- 148 Collins, *Defamation & Internet*, note 132, 79.
- 149 Collins, *Defamation & Internet* note 132.
- 150 See Lawrence Lessig's discussion of internet architecture as one modality regulating behavior in cyberspace: Lawrence Lessig, "The Law of the Horse: What Cyberlaw Might Teach" (1999) 113 *Harvard LR* 501, 507 [Lessig, "Law of the Horse"].
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- 152 Manuel Castells, *Change. The Impact of the Internet on Society: A Global Perspective*, online: <https://www.technologyreview.com./s/530566/the-impact-of-the-internet-on-society-a-global-perspective/>, [Castells, *Change*].
- 153 Castells, *Change*, note 152.
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- 155 Andrew Murray, *Information Technology Law: the Law and Society* (Oxford: OUP, 2010), 106.
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- 157 *Dow Jones & Co v Gutnick*, [2002] HCA 56, per Justice Kirby.
- 158 Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill, Session 2010-12, Report*, together with formal minutes (London: House of Lords and House of Commons, 12 October 2011), online: <publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/203.pdf> [Joint Committee Report].
- 159 For example, the Ontario LSA requires a plaintiff bringing a libel claim against a news or broadcast publisher to provide the publisher with 6 weeks' notice of the claim and, thereafter, to sue within 3 months: *Libel and Slander Act*, RSO 1990, c. L 12, [LSA] ss.5, 6. There is no similar provision in BC. Therefore, a plaintiff missing the Ontario limitation period will be motivated to establish a "real and substantial connection" with BC instead.
- 160 M Schacter, 3rd ed, *The Law of Internet Speech* (Durham, NC: Carolina Academic Press, 2008), 35, [Schacter, *Internet Speech*]; Jacob Rowbottom, "The Protection of Expression in the UK: Old Principles in a Digital World" in Oreste Pollicino and Graziella Romeo, eds, *The Internet and Constitutional Law* (Routledge, 2016), 199 [Rowbottom, "Protection"].
- 161 Rowbottom, "Protection", note 160.
- 162 Statista, *The Blogosphere Expands*, online: <https://www.statista.com/chart/161/number-of-blogs-worldwide/>.

- 163 Hilary Young, "The Canadian Defamation Action: An Empirical Study" (June 30, 2016), 15-16, available at SSRN: <https://ssrn.com/abstract=2802787>.
- 164 See, for example, the National NewsMedia Council, created in 2015 to replace provincial press councils (National NewsMedia Council, "About Us", online: <http://mediacouncil.ca/about-us/>).
- 165 Stephen JA Ward, "Digital Media Ethics" Centre for Journalism Ethics, University of Wisconsin-Madison, online: <https://ethics.journalism.wisc.edu/resources/digital-media-ethics/> [Ward, "Digital Media Ethics"].
- 166 Danay, "The Medium is Not the Message", note 137.
- 167 Jack M Balkin, "The Future of Free Expression in a Digital Age" (2009) 36 *Pepperdine LR* 427; also see Jack M Balkin "Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society", (2004) 79 *NYULR* 1, 2.
- 168 Dragos Cucereanu, *Aspects of Regulating Freedom of Expression on the Internet* (Intersentia, 2008), 139 [Cucereanu, *Aspects*].
- 169 See Glenn Reynolds, *An Army of Davids: How Markets and Technology Empower Ordinary People to Beat Big Media, Big Government and Other Goliaths* (Thomas Nelson, 2007).
- 170 This is not to say the internet is affordable for all – increasing access to the internet remains a key objective for domestic governments and international organizations: "Faster, More Reliable Internet Coming to Rural Communities Across Canada" Government of Canada News Release, (8 April 2016), online: <https://www.canada.ca/en/innovation-science-economic-development/news/2016/04/faster-more-reliable-internet-coming-to-rural-communities-across-canada.html>; James Vincent, "UN Condemns Internet Access Disruption as a Human Rights Violation", *The Verge*, (4 July 2016), online: <https://www.theverge.com/2016/7/4/12092740/un-resolution-condemns-disrupting-internet-access>.
- 171 Cucereanu, *Aspects*, note 168, 140.
- 172 *Baglow v Smith*, 2015 ONSC 1175, paras 202, 206 [Baglow]; *Smith v ADVFN plc*, [2008] EWHC 1797, para 14.
- 173 Lessig, "Law of the Horse", note 150, 508; Jeremy Keeshin, "Social Norms on Internet: How To Create Productive Digital Communities" (2010), 1-6, online: <http://thekeeshin.com/docs/norms.pdf>; Collins, *Defamation & Internet*, 81.
- 174 Schacter, *Internet Speech*, note 160, 13-14, citing *American Civil Liberties Union v. Reno*, 929 F Supp 824, 881 (ED Pa 1996), aff'd 521 US 844 (1997).
- 175 Crookes, note 102, para 34; Collins, *Defamation & Internet*, note 132, 75.
- 176 Cucereanu, *Aspects*, note 168, 140. This point is open to debate. See Matthew Hindman, *The Myth of Digital Democracy* (New Jersey: Princeton University Press, 2009) ch 6.
- 177 Ward, "Digital Media Ethics", note 165.
- 178 Daphne Keller, "Empirical Evidence of 'Over-Removal' by Internet Companies under Intermediary Liability Law", October 12, 2015, Stanford Center for Internet & Society, (12 October 2015), online: <http://cyberlaw.stanford.edu/blog/2015/10/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws>.
- 179 Lessig, "Law of the Horse", note 150, 505.
- 180 Schacter, *Internet Speech*, note 160, 110.
- 181 Schacter, *Internet Speech*, note 160, 110, citing *Blumenthal v Drudge*, 992 F Supp 44, 48 n7 (DDC 1998).
- 182 *Barrick Gold Corp v Lopehandia* (2004), 71 OR (3d) 416 (CA), para 30, [Barrick].
- 183 Crookes, note 102, para 25.
- 184 Lessig, "Law of the Horse", note 150, 501.
- 185 Danay, "The Medium is Not the Message", note 137.
- 186 Danay, "The Medium is Not the Message", note 137, 14.
- 187 The evolution in the nature of online reputation has emerged as an important policy issue in Canada as evidenced by a recent study by the Office of the Privacy Commissioner of Canada (OPC). In accordance with its mandate, the OPC is considering the issue of online reputation from the perspective of privacy interests: Office of the Privacy Commissioner of Canada (OPC), *Online Reputation: What are They*

- Saying About Me?* Discussion Paper, 2016, online: https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2016/or_201601/ [OPC, *Online Reputation*].
- 188 OPC, *Online Reputation*, note 187, 2.
- 189 Deloitte, *2014 Global Survey on Reputation Risk*, October 2014 [Deloitte, *2104 Global Survey*], citing Simon Cole, *The Impact of Reputation on Market Value* (2012) 13 *World Economics* 47, online: <https://www2.deloitte.com/global/en/pages/governance-risk-and-compliance/articles/reputation-at-risk.html>.
- 190 Deloitte, *2014 Global Survey*, note 189.
- 191 Jane Bailey & Valerie Steeves, Co-Leaders of the eQuality Project, "Defamation Law in the Age of the Internet: Young People's Perspectives", *LCO Commissioned Paper*, June 2017. Also see Lesley A. Jacobs with Nachshon Goltz and Matthew McManus, *Privacy Rights in the Global Digital Economy: Legal Problems and Canadian Paths to Justice* (Toronto: Irwin Law, 2014), 48.
- 192 Mary Madden & Aaron Smith, *Reputation Management and Social Media* (Pew Internet, 2010), online: <http://www.pewinternet.org/2010/05/26/reputation-management-and-social-media/>.
- 193 See, for example, Jessica Twentyman, "Reputation Management: Whatever Happens, Be Responsive and Remain Positive: Companies Should Listen to What People Say About Them", (November 5, 2013), *Financial Times*, online: <https://www.ft.com/content/787c5eca-2f3c-11e3-ae87-00144feab7de>.
- 194 OPC, *Online Reputation*, note 189, 11-12.
- 195 Daniel J. Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (New Haven: Yale University Press, 2007) [Solove, *Future of Reputation*].
- 196 Solove, *Future of Reputation*, note 195, 17.
- 197 Solove, *Future of Reputation*, note 195, 35.
- 198 *WIC Radio Ltd. v. Simpson*, [2008] 2 SCR 420 [WIC Radio]; *Grant v. Torstar Corp.*, [2009] 3 SCR 640 [Grant v. Torstar].
- 199 Robert Danay, "The Medium is Not the Message: Reconciling Reputation and Free Expression in Cases of Internet Defamation" (2010) 56 McGill LJ 1, 24 ["The Medium is Not the Message"].
- 200 *Baglow v. Smith*, 2015 ONSC 1175, para 55 [Baglow 2015].
- 201 *Baglow 2015*, note 200, para 207.
- 202 "[A] finding of defamatory meaning in a particular case is so context-dependent that it has no precedential value": Hilary Young, "But Names Won't Necessarily Hurt me: Considering the Effect of Disparaging Statements on Reputation" (2011) 37 Queen's LJ 1, 10 [Young, "But Names"].
- 203 *Botiuk v. Toronto Free Press Inc.*, [1995] 3 SCR 3, [Botiuk].
- 204 Eric Barendt, "What is the Point of Libel Law?" (1999) 52 *Current Legal Problems* 110, 120; Ursula Cheer "Divining the Dignity Torts: A Possible Future for Defamation and Privacy" in Andrew T. Kenyon, ed, *Comparative Defamation and Privacy Law* (Cambridge: Cambridge University Press, 2016) 309, 310.
- 205 *Grant v. Torstar*, note 198, para 28.
- 206 See, generally, Lyrrissa Barnett Lidsky, "Defamation, Reputation, and the Myth of Community" (1996) 71 *Wash L Rev* 1 and Amy Kristin Sanders, "Defining Defamation: Community in the Age of the Internet" (2010) 15 *Comm Law & Policy* 231, [Sanders, "Defining Defamation"].
- 207 *Crookes v. Newton*, [2011] 3 SCR 269, para 39, [Crookes], quoting from *Botiuk*.
- 208 There is also the third-party effect which is a form of social science bias that tends to favour the finding of reputational harm: Young, "But Names", note 202.
- 209 Young, "But Names", note 202, 9-15.
- 210 Young, "But Names", note 202, 33-34.
- 211 Spencer Keys, "Reconceptualizing Reputation and Defamation for Cyber Speech: An analysis of *Baglow v. Smith*", Ad IDEM 2016 Freedom of Expression Writing Prize (September 11, 2016), online: http://www.adidem.org/2016_Ad_IDEM_Freedom_of_Expression_Writing_Prize_Winning_Submission [Keys, "Reconceptualizing"]; Gary Chan Kok Yew, "Reputation and Defamatory Meaning on the Internet:

- Communications, Contexts and Communities" (2015) 27 SAclJ 694.
- 212 *Baglow v. Smith* 2012 ONCA 407, para 28 [Baglow 2012].
- 213 *Baglow* 2015, note 200.
- 214 *Baglow* 2015, note 200, para 207.
- 215 Young, "But Names", note 202, 13.
- 216 *WIC Radio*, note 198. However, LeBel J. wrote a minority opinion expressing his view that the impugned statement was not defamatory in the context in which it was expressed.
- 217 This point was also made by the New Zealand court in *Karam v Parker*, [2014] NZHC 737, para 29.
- 218 Keys, "Reconceptualizing", note 211.
- 219 Keys, "Reconceptualizing", note 211.
- 220 Emily Laidlaw & Hilary Young, "Internet Intermediary Liability in Defamation: Proposals for Statutory Reform, commissioned for the Law Commission of Ontario, 1, LCO Commissioned Paper, online: <http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Laidlaw-and-Young.pdf> ["Internet Intermediaries"]
- 221 Laidlaw & Young, "Internet Intermediaries", note 220, 5, quoting from *Oriental Press v Fevaworks Solutions Ltd*, [2013] HKCFA 47, para 57.
- 222 The LSA assists with the evidentiary burden of proving publication in newspapers and broadcasts (as defined in the Act) by deeming words contained therein to have been published: *Libel and Slander Act*, RSO 1990, c L12, s. 2. Also see ss. 8(2), [LSA].
- 223 Laidlaw & Young, "Internet Intermediaries", note 220, 4.
- 224 Laidlaw & Young, "Internet Intermediaries", note 220, 7-10.
- 225 *Byrne v. Deane*, [1937] 1 KB 818 (CA).
- 226 Laidlaw & Young, "Internet Intermediaries", note 220, 5.
- 227 See the discussion in Jaani Riordan, *The Liability of Internet Intermediaries* (Oxford: Oxford University Press, 2016) 8.08 – 8.28, [Riordan].
- 228 *Crookes v Newton*, 2011 SCC 47, note 207.
- 229 Andrew Scott, "Consultation Paper: Defamation Law in Northern Ireland," *Northern Ireland Law Commission*, 61, online: http://www.nilawcommission.gov.uk/final_version_-_defamation_law_in_northern_ireland_consultation_paper_-_nilc_19_2014_.pdf, [Consultation Paper].
- 230 *Emmens v Pottle* (1885) QBD 354; *Crookes v Newton*, note 207, para 20.
- 231 *Defamation Act*, 1996 (UK), c 31, s.1 [UKDA 1996]; *Defamation Act*, 2013 (UK), c 26, s.5, [UKDA 2013].
- 232 Laidlaw & Young, "Internet Intermediaries", note 220, 5-6.
- 233 Laidlaw & Young, "Internet Intermediaries", note 220, 9-10.
- 234 Laidlaw & Young, "Internet Intermediaries", note 220, 1-2, 82-83.
- 235 LSA, note 222, s.2, 8(2).
- 236 *Manson v Moffett*, 2008 ONSC, para 8.
- 237 *Crookes v Newton*, note 207, para 14, 108, 126.
- 238 *Crookes v Newton*, note 207, para 110.
- 239 See *Trumm v Norman*, [2008] EWHC 116 (QB), paras 33-37.
- 240 Matthew Collins, *Collins on Defamation* (Oxford: OUP, 2014), para 4.12, [Collins on Defamation].
- 241 Jaani Riordan, *The Liability of Internet Intermediaries* (Oxford: Oxford University Press, 2016) 8.08 – 8.28, para 8.42, [Riordan].
- 242 *Buddhist Society of Western Australia Inc v Bristile Ltd*, [2000] WASCA 210 (Australia).
- 243 See *Collins on Defamation*, note 240, para 4.31-4.33.
- 244 Kevin Kelly, *The Inevitable* (Viking: 2016), [The Inevitable].
- 245 *Collins on Defamation*, note 240, paras 4.96. Similar principles apply with respect to the repetition of defamatory statements by secondary publishers: Raymond A Brown, *Defamation Law: A Primer*, 2d ed (Carswell, 2013), 107.
- 246 *Collins on Defamation*, note 240, para 4.104-4.106. Also see, John Gregory, "Does Including a

- Forwarding Feature to Defamation Amount to Republication", *Slaw* (19 February 2015), online: <http://www.slaw.ca/2015/02/19/does-including-a-forwarding-feature-to-defamation-amount-to-republication/>.
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- 247 *Pritchard v Van Nes*, 2016 BCSC 68, [Van Nes].
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- 248 *Van Nes*, note 247, para 113.
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- 249 *Van Nes*, note 247, para 32.
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- 250 *Van Nes*, note 247, para 83.
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- 251 Laidlaw & Young, "Internet Intermediaries", note 222201, 32 and the discussion at footnote 139. Also see Daniel W Burnett, QC, "The New Face of Defamation" in Archibald & Echlin, eds, *Annual Review of Civil Litigation 2016* (Thomson Reuters, 2016) 409, 417.
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- 252 Emily Laidlaw, "Pritchard v. Van Nes: Imposing Liability on Perpetrator Zero of Defamatory Facebook Posts Gone Viral," *ABlawg.ca* (18 May 2016), online: <http://ablawg.ca/2016/05/18/pritchard-v-van-nes-imposing-liability-on-perpetrator-zero-of-defamatory-facebook-posts-gone-viral/>.
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- 253 *Dow Jones v Gutnick*, [2002] HCA 56, para. 27.
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- 254 In Ontario, there are two limitation periods applicable to defamation actions. Section 6 of the LSA imposes a three month limitation period in relation to a libelous newspaper article or broadcast as defined in the Act. The provision also allows for the recapture of other libels against the plaintiff occurring within the year prior to the date of the impugned statement. All other defamatory publications (including many internet publications) are subject to the two year general limitation period in the *Limitations Act, 2002*, SO 2002, c 24, Sch B.
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- 255 See, for example, *Churchill v. State of New Jersey* (2005), 876 A (2d) 311 (Sup Ct of NJ, App Div) and the discussion in *Shtaiif v Toronto Life Publishing*, 2013 ONCA 405, para 27-29.
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- 256 UKDA 2013, note 231, s.8.
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- 257 *Churchill v State of New Jersey* (2005), 876 A (2d) 311, 316 (Sup Ct of NJ App Div) as quoted in *Shtaiif v Toronto Life Publishing*, 2013 ONCA 405, para 27-29.
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- 258 Andrew Scott, *Reform of Defamation Law in Northern Ireland: Recommendations to the Department of Finance* (June 2016), online: <https://www.finance-ni.gov.uk/publications/review-law-defamation>, para 2.110.
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- 259 Scott, Recommendations, note 258, para 2.110, fn 131.
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- 260 LSA, note 222, s. 6.
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- 261 In England, see *Loutchansky v Times Newspapers Ltd.*, [2002] QB 783 (CA); in Australia, see *Dow Jones v Gutnick*, [2002] HCA 56; and in British Columbia, see *Carter v BC Federation of Foster Parents Assn*, 2005 BCCA 398.
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- 262 UKDA 2013, note 231, s 8.
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- 263 Canadian Media Lawyers Association, *Submission to the Joint Committee on the Draft Defamation Bill* (31 May 2011), 9.
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- 264 *Limitations Act, 2002*, SO 2002, c, 24, [Limitations Act].
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- 265 *Limitation Act, 1980* (UK), c 58, s. 4A.
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- 266 Alastair Mullis and Cameron Doley, *Carter-Ruck on Libel and Privacy*, 6th ed, (London, LexisNexis: 2010), 35.
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- 267 *WIC Radio*, note 198; *Grant v Torstar*, note 198.
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- 268 David Howarth, "Libel: Its Purpose and Reform" (2011) 74 MLR 859, [Howarth, "Libel"].
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- 269 Howarth, note 268, 870.
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- 270 Eugenie Brouillet, "Free Speech, Reputation, and the Canadian Balance" (2005-2006) 50 N Y L Sch L Rev 33, 53-54.
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- 271 *Prud'homme v. Prud'homme*, 2002 SCC 85, para 32 [Prud'homme].
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- 272 *Prud'homme*, note 271, para 32.
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- 273 Karen Eltis, "Is 'Truth-telling' Decontextualized Online Still Reasonable? Restoring Context to Defamation Analysis in the Digital Age", LCO Commissioned Paper, July 2017, 26.
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- 274 Joseph Kary, "The Constitutionalization of Quebec Libel Law, 1848 – 2004" (2004) 42 Osgoode Hall LJ 229, 267.
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- 275 *Neron Communication Marketing Inc. v. Chambre des Notaires du Quebec*, [2004] SCR 95; Brouillet, 48.
- 276 Eltis, note 273, 30.
- 277 Kary, note 274, 267.
- 278 Kary, note 274, 267.
- 279 *Gertz v Robert Welch Inc.*, 418 US 323 (1974) [Gertz].
- 280 *Gertz*, note 279, 340-341.
- 281 *New York Times Co v Sullivan*, 376 US 254, 289-90 (1964), discussed in Joshua Azriel and Charles Mayo, "Fifty Years after *New York Times Co v Sullivan* and Forty Years After *Gertz v Welch*: How these Twentieth Century Supreme Court Rulings Impact Twenty-First Century Online Social Media Libel Claims" (2014) 20 BU J Sci & Tech L 191, 191.
- 282 *Grant v Torstar*, note 198, para 95.
- 283 *Grant v Torstar*, note 198, para 62.
- 284 Descheemaeker observes an apparent incongruity in that truth is an absolute defence to the most base and useless of publications but a reasonable belief of truth is only a defence for public interest publications: Eric Descheemaeker, "Truth and Truthfulness in the Law of Defamation" (2014) University of Edinburgh School of Law Research Paper 2014/26, 12 [Descheemaeker, "Truth"].
- 285 Hilary Young, "'Anyone... in any medium'? The Scope of Canada's Responsible Communication Defence" in Andrew T. Kenyon, ed, *Comparative Defamation and Privacy Law* (Cambridge: Cambridge University Press, 2016) 17, 32 [Young, "Anyone"]; Eric Descheemaeker, "Protecting Reputation: Defamation and Negligence" (2009) 29 Oxford Journal of Legal Studies 603.
- 286 Descheemaeker, "Truth", note 284, 11.
- 287 Eltis, note 273.
- 288 Eltis, note 273, 34.
- 289 Early evidence suggests that the public interest threshold is being interpreted generously so it is not doing all that much "work" in limiting the responsible communications defence anyway: Young, "Anyone", 26.
- 290 Eltis, note 273, 34.
- 291 Descheemaeker, "Truth", note 284, 19.
- 292 Eltis, note 273; Danay, note 199. Dan Burnett has suggested that a "hard look" should be taken at the strict liability nature of defamation as well as the presumptions of falsity and harm: Daniel W Burnett, QC, "The New Face of Defamation" in Archibald & Echlin, eds, *Annual Review of Civil Litigation 2016* (Thomson Reuters, 2016) 409, 425.
- 293 *Collins on Defamation*, note 240, 170. There have been rare exceptions to this rule. Before uniform legislation was enacted in Australia in 2006, some Australian States extended defamation law protection to true private facts that were defamatory where there was no public benefit in publishing them: Andrew T Kenyon, "Defamation and Privacy in an Era of 'More Speech'", in Andrew T. Kenyon, ed, *Comparative Defamation and Privacy Law* (Cambridge: Cambridge University Press, 2016), 1.
- 294 *Reynolds v Times Newspapers Ltd*, [2001] 2 AC 127, 192 per Lord Nicholls.
- 295 Descheemaeker, "Truth", note 284, 6.
- 296 Howarth, note 268, 865.
- 297 *Report of the Committee on Defamation* (London: Her Majesty's Stationary Office, 1975), 36, [Faulks Committee Report].
- 298 In the United States, the presumption of falsity has been reversed in relation to claims against "public figures": *Collins on Defamation*, note 240, 654.
- 299 Descheemaeker, "Truth", note 284, 15.
- 300 Eltis, note 273, 27.
- 301 Eltis, note 273, 27 (*italics in the original*).
- 302 See *Grant v Torstar*, note 198, para 59. In England, see *Terry v Persons Unknown* (Rev 1), [2010] EWHC 119 (QB).
- 303 Eltis, note 273, 12.
- 304 Eltis, note 273, 13.
- 305 *Thorley v Lord Kerry* (1812) 4 Taunton 355; Eric Barendt, "What is the Point of Libel Law?" (1999) 52 Current Legal Problems 110, 121 [Barendt, "What is the Point"].

- 306 Barendt, "What is the Point", note 305, 120.
- 307 Barendt, "What is the Point", note 305, 122.
- 308 David Rolph, "Defamation law needs fundamental reform", *The Australian* (November 27, 2015), online: <http://www.theaustralian.com.au/business/legal-affairs/david-rolph-defamation-law-needs-fundamental-reform/news-story/bff7b6ee531c535c68f4c271f1ffdc14>.
- 309 Mathilde Groppo, "Serious Harm: A Case Law Retrospective and Early Assessment", (2016) 8 *Journal of Media Law* 1, 6.
- 310 UKDA 2013, note 231, s.1.
- 311 *Lachaux v Independent Print*, [2017] EWCA Civ 1334, para 73, [*Lachaux*].
- 312 Erik Descheemaeker, "Three Errors in the Defamation Act 2013" (2015) 6 *J European Tort Law* 24.
- 313 *Cooke v MGN*, [2014] EWHC 2831 (QB), para 36.
- 314 *Lachaux*, note 311.
- 315 *Lachaux*, note 311, para 72.
- 316 Interview with stakeholder, February 2, 2016.
- 317 Peter A Downard, *Libel* (Markham: LexisNexis, 2014), 106.
- 318 LSA, note 222, s. 22.
- 319 UKDA 2013, note 231, s. 2.
- 320 Alastair Mullis and Andrew Scott, "Tilting at Windmills: the Defamation Act 2013" (2014) 77 *Modern Law Rev* 87, 89.
- 321 *Grant v Torstar*, note 198, para. 33.
- 322 *Hill v Church of Scientology*, [1995] 2 SCR 1130, para 143, [*Scientology*].
- 323 *Grant v Torstar*, note 198, para 30.
- 324 Downard, *Libel*, note 317, 154.
- 325 Faulks Committee, note 297, 63.
- 326 LSA, note 222, s. 3.
- 327 LSA, note 222, s. 4.
- 328 See Robert Danay, "The Medium is Not the Message", note 199.
- 329 Andrew Scott, "Consultation Paper", note 229, para. 3.17.
- 330 *Ross v New Brunswick Teachers' Assn*, 2001 NBCA 62, para. 56, cited in *WIC Radio*, note 198, para 26,
- 331 *WIC Radio*, note 198.
- 332 Section 23 of the LSA provides that a statement of mixed fact and opinion may be fair comment even where not every fact is proved so long as the opinion is fair comment having regard to those facts as are proved. Section 24 of the LSA provides that a defendant may rely on a defence of fair comment in relation to an opinion held by another person even where neither of them held that opinion so long as a person could honestly hold the opinion (LSA, note 222.)
- 333 *WIC Radio*, note 198.
- 334 *WIC Radio*, note 198, paras 49-51.
- 335 *WIC Radio*, note 198, para 4.
- 336 Broadening the scope of the defence was not a new idea. In 1975, the Faulks Committee had emphasized the importance of this defence as a "bulwark of free speech". It recommended that the descriptor "fair" should be removed from the title of the defence and that malice no longer be an exception to the defence. Instead, the exception would apply where the impugned comment "did not represent the defendant's genuine opinion": Faulks Committee, note 297, 39, 41.
- 337 Timothy Pinto, "Defamation Act 2013: A boost for free speech – Part 1: Serious Harm, Truth and Honest opinion", *Inform's Blog*, online: <https://inform.wordpress.com/2013/05/21/defamation-act-2013-a-boost-for-free-speech-part-1-serious-harm-truth-and-honest-opinion-timothy-pinto/>.
- 338 *Spiller v Joseph*, [2010] UKSC 53, para 99.
- 339 *Grant v Torstar*, note 198. In England see *Reynolds v Times Newspapers Ltd*, [1999] 4 All ER 609 and *Jameel v Wall Street Journal Europe SPRL*, [2006] UKHL 44, [*Jameel*]. In Australia, see *Lange v Australian Broadcasting Corp.* (1997), 145 ALR 96. More recently, the analogous test in the UK has been abolished and restated in

- the new *Defamation Act, 2013*. Section 4 of that Act creates the defence of publication on a matter of public interest. Among other differences, the UK defence extends to statements of opinion as well as fact. See, generally, Paul Schabas & Adam Lazier, "Defamation Law in Canada and England: Emerging Differences", ch 6 in Weisenhaus & Young, eds, *Media Law and Policy in the Internet Age* (Hart, 2017).
- 340 *Grant v Torstar*, note 198, para 85.
- 341 *Grant v Torstar*, note 198, para. 86.
- 342 Chief Justice McLachlin agreed with the conclusion of Lord Hoffman in *Jameel*, note 339, para 54.
- 343 *Grant v Torstar*, note 198, paras 110-126: a) the seriousness of the allegation; b) the public importance of the matter; c) the urgency of the matter; d) the status and reliability of the source; e) whether the plaintiff's side of the story was sought and accurately reported; f) whether the inclusion of the defamatory statement was justifiable; g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ('reportage'); and h) any other relevant circumstances.
- 344 Young, "Anyone", note 285.
- 345 Andrew Scott, "*Ceci n'est pas une pipe*: the autopoietic inanity of the single meaning rule" in Andrew T Kenyon, ed, *Comparative Defamation and Privacy Law* (Cambridge: Cambridge University Press, 2016), 52.
- 346 Mullis & Scott, "Tilting at Windmills", note 320.
- 347 *Young v Toronto Star Newspapers Ltd* (2003) 66 OR (3d) 170, para 212, affirmed (2005) 77 OR (3d) 680 (CA).
- 348 Punitive damages are a distinct head of damages directed *not* at compensating the plaintiff's reputational harm but at punishing the defendant for reprehensible conduct: Raymond E Brown, *Defamation Law: A Primer*, 2d ed (Carswell, 2013), 328, 363.
- 349 *Awan v Levant*, 2014 ONSC 6890, para 192 *per* Matheson J, affirmed 2016 ONCA 970, leave to appeal dismissed, 2017 CanLII 35113 (SCC).
- 350 This phrase is adopted by David S Ardia, "Freedom of Speech, Defamation, and Injunctions" (2013) 55 William & Mary L Rev 1 [Ardia, "Freedom of Speech"].
- 351 Sydney Archibald, "Rethinking Reputation in an Automated Age" (22 April 2017), online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2255046.
- 352 *Barrick Gold Corp v Lopehandia* (2004), 71 OR (3d) 416 (CA), para 30, [Barrick]
- 353 See, for example, *Sagman v Politi*, 2014 ONSC 4183.
- 354 There is a concern in some jurisdictions that damages awards by juries are escalating beyond reason. In Ireland, the *Defamation Act 2009* was introduced to limit damages. It has not helped so far. In December 2014, \$1.25 million in damages was awarded in *Leech v Independent Newspapers (Ireland) Ltd*, [2014] IESC 79. This judgment has been criticized on the basis that out of control damage awards are an unjustifiable incursion on freedom of expression: Scott Griffen, "In Depth: Libel Damages Squeeze Ireland's Press: Outsize Jury Awards are Turning Irish Journalism Into a Risky Business (International Press Institute, Jan 4, 2017), online: <http://ipi.media/in-depth-libel-damages-squeeze-irelands-press/>.
- 355 Marko Vesely, "Injunctions in Defamation Law", *The Truth About Defamation: Current Issues and Recent Decisions*, LSUC CPD (18 January 2016) [Vesely, "Injunctions"].
- 356 David Potts, *Cyberlibel*, 2d ed., referring to Richard Peltz, "Fifteen Minutes of Infamy: Privileged Reporting and the Problem of Perpetual Reputational Harm" (2008) 34 Ohio Northern University Law Review 717 at 718-719.
- 357 Vesely, "Injunctions", note 355, 1.
- 358 *Rapp v McClelland & Stewart Ltd.* (1981), 34 OR (2d) 452 at 455-456 (HC), *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 SCR 626.
- 359 *Canadian National Railway Company v Google Inc.*, 2010 ONSC 3121, para 8 [CNR].
- 360 CNR, note 359, para 13.
- 361 See, for example, *Busseri v John Doe*, 2012 ONSC 5385.
- 362 CNR, note 359, para 33.
- 363 *Astley v Verdun*, 2011 ONSC 3651, para 21.

- 364 *Warman v Fournier*, 2015 ONCA 873, affirming 2014 ONSC 412. Also see *St. Lewis v Rancourt*, 2015 ONCA 513.
- 365 *Barrick*, note 352, para 75.
- 366 *Google Inc v Equustek Solutions Inc*, 2017 SCC 34, [Equustek].
- 367 *Equustek*, note 366, para 41.
- 368 *Equustek*, note 366, para 41.
- 369 *Equustek*, note 366, paras 25, 48.
- 370 *Niemela v Malamas*, 2015 BCSC 1024, [Niemela].
- 371 *Niemela*, note 370, paras 33, 34.
- 372 *Communications Decency Act*, 47 US Code, art 230 [CDA (US)].
- 373 Laidlaw, "Are We Asking Too Much From Defamation Law? Reputation Systems, ADR, Industry Regulation And Other Extra-Judicial Possibilities For Protecting Reputation In The Internet Age: Proposal for Reform", *LCO Commissioned Paper*, 11, online: <http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Laidlaw.pdf>, [Laidlaw, "Are We Asking"].
- 374 The LSA also encourages retractions through the operation of its notice provisions: LSA, note 222, s. 5. This notice regime is discussed in chapter V below. The 1990 MAG Advisory Committee recommended that these retraction provisions should be made more flexible. However, the Committee recommended against court-ordered retractions as being contrary to freedom of expression: 1990 MAG Advisory Committee, 6, 16.
- 375 *Warman v Fournier*, 2014 ONSC 412, para 37.
- 376 John G Fleming, "Retraction and Reply: Alternative Remedies for Defamation" (1978) 12 UBC L Rev 15, 25.
- 377 1990 MAG Advisory Committee, note 374, 16; Fleming, "Retraction and Reply", 30; Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting*, Appendix G: Report of the Saskatchewan Commissioners, Defamation (August 1983), 133-138.
- 378 UKDA 2013, note 231, s.12.
- 379 UKDA 2013, note 231, s.13.
- 380 See the discussion in chapter V below.
- 381 Although apologies may not be mandated by the court, the LSA encourages apologies and retractions by providing that they serve to mitigate a defendant's damages: LSA, note 222, ss. 9, 20. See the discussion in Downard, *Libel*, note 317, 294.
- 382 Dominic McGoldrick, "The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective" (2013) 13 Human Rights L Rev 125, 151.
- 383 Mullis & Scott, "Tilting at Windmills", note 320, 107.
- 384 Mullis & Scott, "Tilting at Windmills", note 320, 107.
- 385 Mullis & Scott, "Tilting at Windmills", note 320, 108.
- 386 Mike Masnick (2005) quoted in Dale A. Herbeck, "Swimming in Cyber-Cesspools" in Susan J. Drucker and Gary Gumpert, eds, *Regulating Social Media: Legal and Ethical Considerations*, 50.
- 387 David S Ardia, "Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law" (2010) 45 Harvard Civil Rights – Civil Liberties Law Review 26, 314-315.
- 388 Australia Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No. 11, 1979, 31.
- 389 See, for example, *St. Lewis v Rancourt*, 2015 ONCA 513, leave to appeal refused, 2016 CanLII 7600 (SCC), in which court proceedings lasted over a period of 5 years from the time of the first defamatory publication
- 390 Jacob Rowbottom, "The Protection of Expression in the UK: Old Principles in a Digital World" in Oreste Pollicino and Graziella Romeo, eds, *The Internet and Constitutional Law* (Routledge, 2016), 196-7 [Rowbottom, "Protection"].
- 391 Rowbottom, note 390, 197.
- 392 Amy Kristin Sanders, "Defining Defamation," note 206, 131.
- 393 Daniel J. Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (New Haven: Yale University Press, 2007), ch 5, 121, [Solove, *Future of Reputation*].

- 394 *Thorley v Kerry* (1812) 128 ER 367 per Lord Mansfield.
- 395 Faulks Committee Report, note 297, 18-19.
- 396 Faulks Committee Report note 297.
- 397 Alberta, Manitoba, New Brunswick, Nova Scotia, PEI, Newfoundland, Yukon, Northwest Territories: see the complete list in Downard, *Libel*, note 317, 311.
- 398 Uniform Defamation Act (1994), online: <http://www.ulcc.ca/en/uniform-acts-new-order/older-uniform-acts/200-josetta-1-en-gb/uniform-actsa/defamation-act/384-defamation-act>.
- 399 In BC, the Law Reform Commission of British Columbia recommended that the distinction be abolished in its 1985 report: LRCBC. However, this recommendation was not taken up and the distinction continues to be observed.
- 400 *Collins on Defamation*, note 240, 57.
- 401 The distinction does not apply in Scots law. It has been abolished in Ireland but continues to apply in England, Wales and Northern Ireland: *Collins on Defamation*, note 240, 57-58.
- 402 See, for example, *Collins on Defamation*, note 240, 58.
- 403 LSA, note 222,s.16.
- 404 LSA, note 222,s.17.
- 405 See, for example, *Romano v D'Onofrio* (2005), 77 OR (3d) 583 (CA).
- 406 Faulks Committee Report, note 297, 20.
- 407 Danay, note 199, referring to Glenn Harlan Reynolds, "Libel in the Blogosphere: Some Preliminary Thoughts" (2006) 84 Wash U L Rev 1157.
- 408 *Karam v. Parker*, [2014] NZHC 737, para 29 [*Karam*].
- 409 *Libel & Slander Act*, RSO 1990, c L12, [LSA].
- 410 National Action Committee on Access to Justice in Civil and Family Matters, *A Roadmap for Change*, Ottawa, Canada, October 2013, online: http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Rreport_English_Final.pdf [NAC].
- 411 This was also a common refrain during the consultations leading up to the enactment of the Defamation Act, 2013. See House of Commons, Joint Committee on the Draft Defamation Bill, "Summary" in *First Report*, London: the Stationary Office Limited, 19 October 2011, 3, online: <https://publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20303.htm> [*Joint Committee on the Draft Defamation Bill*]. Alastair Mullis and Andrew Scott, "Opinion: "Lord Lester's Defamation Bill 2010: a distorted views of the public interest, *Inform's Blog* (7 July 2010), online: <https://inform.wordpress.com/2010/07/07/opinion-lord-lester%E2%80%99s-defamation-bill-2010-a-distorted-view-of-the-public-interest-alastair-mullis-and-andrew-scott/>.
- 412 Andrew Scott, *Reform of Defamation Law in Northern Ireland: Recommendations to the Department of Finance, Department of Law*, LSE, June 2016 [*Reform*], para 1.05, quoting from Northern Ireland Law Commission (NILC) Discussion Paper, online: http://www.nilawcommission.gov.uk/final_version_-_defamation_law_in_northern_ireland_consultation_paper_-_nilc_19_2014_.pdf.
- 413 NAC, note 410.
- 414 NAC, note 410, 11.
- 415 Canadian Forum on Civil Justice, "Access to the Civil Justice System in Canada is a Concern According to Data from the 2016 World Justice Project Rule of Law Index," *Obiter Dicta* (6 February 2017). Online: <http://obiterdicta.ca/2017/02/06/access-to-the-civil-justice-system-in-canada-is-a-concern-according-to-data-from-the-2016-world-justice-project-rule-of-law-index/>.
- 416 NAC, note 410, 8.
- 417 Judith Gibson, "It Came From CyberSpace: Defamation Law and the Internet", NSW State Legal Conference: Session 16 (28 August 2014), 6, online: <https://inform.files.wordpress.com/2014/09/it-came-from-cyberspace-judith-gibson.pdf>.
- 418 *Bernstein v. Poon*, 2015 ONSC 2125, para 9. [*Bernstein*] For example, in *Awan v. Levant* [2014], the plaintiff sued over a series of blog posts on the defendant's blog labelling the plaintiff a liar.

- The Court held that the posts were defamatory and malicious. Although the plaintiff was awarded general damages of \$50,000 and aggravated damages of \$30,000, his costs were more in the range of \$120,000 (\$73,000 of which was granted as a costs award). *Awan v. Levant*, 2014 ONSC 6890, affirmed 2016 ONCA, leave to appeal refused (SCC). Costs award: *Awan v. Levant*, 2015 ONSC 2209. In *Bird v. Ontario* [2014], the plaintiff lawyer sued over a voice mail left sent by the defendant to her client in which the defendant alleged that she was professionally incompetent. A 3 day trial resulted in a damages award of \$10,000. The plaintiff's costs were \$64,000, of which she recovered only \$7,500. *Bird v. Ontario*, 2014 ONSC 6387.
- 419 See, for example, a blog describing a defamation action that took 22 days to try but resulted in a relatively modest \$200,000 judgment for the plaintiff: Advocate Daily.com staff, "Don't Expect a Windfall from a Defamation Action," *Advocate Daily* (24 March 2017). Online: <http://www.advocatedaily.com/brian-radnoff-dont-expect-a-windfall-from-a-defamation-action.html>.
- 420 *Manson v. Doe*, 2013 ONSC 628, [Manson]. Also see *Busseri v. Doe*, 2014 ONSC 819, [Busseri]. Also see *St. Lewis v. Rancourt*, 2014 ONSC 4840. In Australia, see *Tate v. Duncan-Strelec* [2014] NSWSC 1125. In England, see *The Law Society & Ors v. Kordowski* [2011] EWHC 3185.
- 421 *Rules of Civil Procedure*, RRO 1990, Reg 194, Rules 1.04(1), (1.1) [Rules of Civil Procedure]; *Hryniak v. Mauldin*, 2014 SCC 7 [Hryniak].
- 422 *Hryniak*, note 421, para 5.
- 423 *Hryniak*, note 421, para 29.
- 424 *Dow Jones v. Jameel*, [2005] EWCA Civ 75, para 54. In Australia, see *Bleyer v. Google Inc* [2014] NSWSC 897 in which the court permanently stayed a defamation claim against Google where, among other considerations, the plaintiff alleged publication only in respect of three individuals.
- 425 *Warman v. National Post*, 2015 ONSC 267, referencing *Warman v. National Post* 2010 ONSC 3670.
- 426 Mew J. in *Bernstein*, para 10. Mr. Justice Mew does not indicate what metrics he has in mind here but these are presumably to do the plaintiff's reputational interests and the value of free expression; intangibles that are not easily measured in terms of money.
- 427 Note that a concern for proportionality is different from a concern to prevent defamation proceedings from being used for improper purposes (Strategic Lawsuits Against Public Participation [SLAPP] proceedings). Proportionality presumes that the proceeding may be perfectly legitimate except that the costs to litigate it are disproportionate to the reputational harm in issue. SLAPP proceedings are discussed separately below.
- 428 Raymond E. Brown, *Defamation Law: A Primer* (Toronto: Thomson Carswell, 2003) at 80 ["Brown"]. See also *Barrick Gold Corp. v. Lopehandia*, 71 OR(3d) 416 (C.A.) ["Barrick Gold"].
- 429 Brown, note 428, 81.
- 430 *Lewis v. Daily Telegraph Ltd.* [1964] AC 234 (H.L.) at 262 ["Lewis"]. See also *Barrick Gold*, note 428, para 49.
- 431 As aggravated damages are typically intended to compensate for harms to feeling – see Hilary Young, "Rethinking Canadian Defamation Law as Applied to Corporate Plaintiffs" (2013) 46 UBC L Rev 534, [Young, "Rethinking"].
- 432 *Civil Law (Wrongs) Act 2002* (ACT), s.121; *Defamation Act 2006* (NT), s. 8; *Defamation Act 2005* (NSW), s. 9; *Defamation Act 2005* (Qld), s. 9; *Defamation Act 2005* (SA), s.9; *Defamation Act 2005* (Tas), s. 9; *Defamation Act 2005* (Vic), s 9; *Defamation Act 2005* (WA), s. 9.
- 433 These arguments are all raised in Young, "Rethinking", note 431. Most are also raised in David Howarth, "Libel: Its Purpose and Reform" (2011) 74 MLR 859, [Howarth, "Libel"]
- 434 Howarth, note 433, 874, referring to Lord Scott in *Jameel*.
- 435 Young, "Rethinking", note 431, 549-550; Howarth, note 433, 874-75.
- 436 Young, "Rethinking", note 431, 557-560.
- 437 Young, "Rethinking", note 431, 559.
- 438 Young, "Rethinking", note 431, 559; Howarth, note 433, 875.
- 439 Howarth, note 433, 875.

- 440 They can sue for injurious falsehood if a defendant's false statement(s) pertain to their business, property or title. To succeed in an action for injurious falsehood, a corporate plaintiff must establish falsity and damages on a balance of probabilities. *Lysko v. Braley*, 2006 CanLII 11846 (ON CA) para. 133-134 ["Lysko"].
- 441 The Supreme Court of Canada has ruled that "the possibility of suing in defamation does not negate the availability of a cause of action in negligence where the necessary elements are made out". *Young v. Bella*, 2006 SCC 3 at para. 56.
- 442 *Trademarks Act*, RSC 1985, c.T-13, s.7(a)
- 443 Young, "Rethinking", note 431, 575-6.
- 444 Young, "Rethinking", note 431, 563-5.
- 445 Non-profits in Australia retain the right to sue for defamation.
- 446 Young, "Rethinking", note 431, 539.
- 447 Young, "Rethinking", note 431, 531, fn 6.
- 448 David Rolph, "Corporations' Right to Sue For Defamation: An Australian Perspective", *Entertainment Law Review*, Vol. 22, pp. 195-200, 2011.
- 449 Lewis, note 430, 4.
- 450 *Defamation Act*, 2013 (UK), c 26, s.1(2), [UKDA 2013].
- 451 See *Lysko*, note 440, para 133.
- 452 David Milo, *Defamation and Freedom of Speech* (Oxford: Oxford University Press, 2008) at 168 (citing *Holomisa v. Argus Newspapers*, 1996 (2) SA 588 (W)).
- 453 *Haaretz.com v. Goldhar*, 2016 ONCA 515 [*Goldhar*].
- 454 *Club Resorts Ltd v. Van Breda*, [2012] 1 SCR 572 [*Van Breda*].
- 455 *Van Breda*, note 454.
- 456 A recent Supreme Court of Canada decision establishes that businesses such as Google providing e-services within a province may be said to be carrying on business within the jurisdiction for the purpose of the real and substantial connection test: *Google Inc v. Equustek Solutions Inc*, 2015 BCCA 265 at para 54; affirmed on other grounds, 2017 SCC 34, see para 37.
- 457 *Van Breda*, note 454, para 90.
- 458 *Van Breda*, note 454, para 84.
- 459 *Éditions Écosociété Inc. v. Banro Corp*, [2012] 1 SCR 636 [*Banro*]; *Breeden v. Black* [2012] 1 SCR 666 [*Black*].
- 460 *Van Breda*, note 454, para 103.
- 461 *Van Breda*, note 454, para 105.
- 462 Factors listed in s.11(1), *Uniform Court Jurisdiction Proceedings Transfer Act*: *Van Breda*, note 454, para 105.
- 463 *Van Breda*, note 454, para 112.
- 464 See the dissenting judgment in *Goldhar*, note 453, and the commentary listed at para 130.
- 465 *Haaretz.com v. Goldhar*, Supreme Court of Canada Case Information, File #37202, online: <http://www.scc-csc.ca/case-dossier/info/af-ma-eng.aspx?cas=37202> [*Haaretz.com SCC*].
- 466 *Goldhar*, note 453, Pepall JA, dissenting, para 127.
- 467 *Goldhar*, note 453, Pepall JA, dissenting, para 130.
- 468 *Goldhar*, note 453, para 43.
- 469 *Haaretz.com SCC*, note 465, (Factum of the Appellants paras 27-32).
- 470 *Goldhar*, note 453, para 132.
- 471 *Goldhar*, note 453, Pepall JA, dissenting, para 151.
- 472 *Banro*, note 459, para 50.
- 473 *Banro*, note 459, para 50.
- 474 *Banro*, note 459, para 56
- 475 *Banro*, note 459, para 58
- 476 *Goldhar*, note 453, dissent, para 169; Kate Sutherland, "Book Reviews, the Common Law Tort of Defamation, and the Suppression of Scholarly Debate" (2010) 11:6 German L.J. 656 at 667-69, quoted in *Goldhar*, note 453, para 174.

- 477 *Banro*, note 459, para 59; *Goldhar*, note 453, Pepall JA, dissenting, para 180; *Defamation Act 2005* (Cth), s 11(3).
- 478 *Goldhar*, note 453, para 86, referring to LeBel J. in *Banro*, note 459, para 55.
- 479 Andrew Scott, *Reform*, note 412, para 2.111; Dana Green, "The SPEECH Act Provides Protection Against Foreign Libel Judgments" *Litigation News*, ABA Section of Litigation. Online: <https://apps.americanbar.org/litigation/litigationnews/mobile/firstamendment-SPEECH.html>.
- 480 Andrew Scott, *Reform*, note 412, para 2.112; David Rolph, "Splendid Isolation? Australia as a Destination for 'Libel Tourism' (2012) *Australian International Law Journal* 79, 81.
- 481 *Young v. New Haven Advocate*, 315 F (3d) 256 at 262-64 (4th Cir 2002), leave to appeal to the Supreme Court ref'd, 538 US 1035 (2003).
- 482 *Securing the Protection of Our Enduring and Established Constitutional Heritage Act*, § 4102 Public Law 111-223—Aug. 10, 2010. [SPEECH Act]
- 483 UKDA 2013, note 450, s 9. This provision applies only to non-domiciled, non-EU and Lugano Convention members. It has been recommended that this provision also be introduced into law in Northern Ireland: Andrew Scott, *Reform*, note 412, para 2.115. The provision is also being considered by the Scottish Law Commission: Scottish Law Commission, *Discussion Paper on Defamation*, March 2016 no 161: para 11.4. [Scottish Law Commission].
- 484 UKDA 2013, note 450, Explanatory Notes, para 66.
- 485 *Ahuja v. Politika Novine | Magazini DOO & Ors*, [2015] EWHC 3380 (QB) para 31.
- 486 David Rolph, "A Critique of the National, Uniform Defamation Laws" (2008) 16 *Torts Law Journal* 207, 210. Australia did not alter its choice of law test for international claims. Standing Committee of the Attorney General (SCAG) Working Group of State and Territory Officers, Proposal for Uniform Defamation Laws (July 2004) at 31-32, online: http://www.justice.qld.gov.au/_data/assets/pdf_file/0018/21636/uniform-defamation.pdf. Consequently, for multi-jurisdictional cases the *lex loci delicti* test establishes jurisdiction and the defendant must demonstrate that Australia is clearly an inappropriate forum. *Regie National des Usines Renault SA v. Zhang*, 2002 HCA.
- 487 This is the Appellant's argument before the Supreme Court of Canada in *Haaretz.com SCC*, note 465 (Factum of the Appellants para 8).
- 488 Comity and reciprocity require that nations respect each other's legislation and government decisions and reciprocate when the actions do not violate the core values of another people.
- 489 LSA, note 409, ss. 5(1). Under s. 7, the notice period in ss. 5(1) applies only to newspapers printed and published in Ontario and to broadcasts from a station in Ontario. The notice period has also been held to apply to claims against non-media defendants where the claim relates to a libel in a newspaper or broadcast: Peter Downard, *Libel*, 3d ed. (Markham: LexisNexis, 2014), paras 13.18, 13.19, [Downard, *Libel*].
- 490 *John v. Ballingall*, 2017 ONCA 579, [Ballingall].
- 491 LSA, note 409, ss. 5(2). There are a few qualifications to this provision. Under ss. 5(3), the notice and retraction provisions do not apply in the case of alleged libel against a candidate for public office unless retraction is made at least 5 days before the election. Under ss. 8(1), the notice and retraction provisions apply to newspapers only where the names and addresses of the proprietor and publisher are prominently displayed in the newspaper. Under ss. 8(3), the notice and retraction provisions apply to broadcasters only where the broadcaster provides the relevant names and addresses where requested by the complainant.
- 492 Downard, *Libel*, note 489, 298.
- 493 LSA, note 409, s. 6. The provision does allow plaintiffs to include in their claim any other alleged libels against the same defendant dating back 1 year from the date of commencing the action. There are, however, a few qualifications to section 6. Under s. 7, the limitation period applies only to newspapers printed and published in Ontario and to broadcasts from a station in Ontario. Under ss. 8(1), the names and addresses of the proprietor and publisher of the newspaper must be prominently displayed. Under ss. 8(3),

- broadcasters must provide the names and addresses of the owner and operator of the station where requested by the complainant.
- 494 *Limitations Act*, 2002, SO 2002, c. 24.
- 495 Notice Periods: LSA, note 409, ss. 5 and 7; Limitations Periods: LSA, note 409, s. 6; General: *Limitation Act*, 2002, SO 2002, c 24, Sch B, s. 4.
- 496 Note that, under the LSA, (unlike every other jurisdiction except Saskatchewan, British Columbia, and Quebec), the notice period and limitation period depends on where the libel occurs rather than who may be named as a defendant in the action. Also, the LSA specifies that the newspaper must be published in Ontario and the broadcast must emanate from Ontario (LSA, note 409, s. 7)
- 497 Notice Periods: *Defamation Act*, RSA 2000, C D-7, s.13(1); Limitations Periods: *Limitations Act*, RSA 2000, c L-12, s. 3(1).
- 498 Notice Periods: *The Defamation Act*, CCSM, c D20, s 14(1); Limitations Periods: Manitoba delineates specific limitations for each kind of cause of action. Defamation actions have a 2-year limitation. *The Limitation of Actions Act*, CCSM c L150, s 2(1)(c).
- 499 Notice Periods: *Defamation Act*, RSNL 1990, c D-3 s.16(1), [*Defamation Act* (NL)]; Limitations Periods: *Defamation Act* (NL) s.17(1), General: *Limitations Act*, SNL 1995, c L-16.1, s. 5.
- 500 Notice Periods: *Defamation Act*, RSNS 1989, c 122, s.18(1), [*Defamation Act* (NS)]; Limitations Periods: *Defamation Act* (NS) s.19, General: *Limitation of Actions Act*, SNS 2014, c 35, s. 8.
- 501 Notice Periods: NWT and NU: *Defamation Act*, RSNWT (Nu) 1988, c D-1, s 15; YK: *Defamation Act*, RSY 2002, c 52, s.14; Limitation Periods: NWT and NU: *Defamation Act*, RSNWT (Nu) 1988, c D-1, s 16; YK: *Defamation Act*, RSY 2002, c 52, s.15; General: NWT and NU: *Limitation of Actions Act*, RSNWT (Nu) 1988, c L-8, s. 2(1)(c) for defamation: 2 years after the publication or speaking the slanderous words, or within two years of the special damage (if special damage is the gist of the action); YK: *Limitation of Actions Act*, RSY 2002, c 139, s. 2(1)(c), same as NWT and NU.
- 502 Notice Periods: *Defamation Act*, RSPEI 1988, c D-5, s. 14(1), [*Defamation Act* (PEI)]; Limitations Periods: *Defamation Act* (PEI) s. 15, General: *Statute of Limitations*, RSPEI 1988, c S-7, s. 2(1)(c)
- For defamation: 2 years after the publication or speaking the slanderous words, or within two years of the special damage (if special damage is the gist of the action.)
- 503 Notice: Unlike most jurisdictions there is no starting point for this notice period so that it does not serve to limit the bringing of an action; Limitation Periods: in Quebec, the 3-month limitation period runs from the date of publication or when the claimant had knowledge of it up to a maximum limitation period of one year from date of publication: *Civil Code of Québec*, CQLR c CCQ-1991, c. 64, a. 2889.
- 504 Unlike most jurisdictions there is no starting point for this notice period so that it does not serve to limit the bringing of an action. Similar to Ontario, the Saskatchewan depends on where the libel occurs rather than who may be named defendant. *The Libel and Slander Act*, RSS 1978, c L-14, s 15; Limitations Period: *The Limitations Act*, SS 2004, c L-16.1, s. 5.
- 505 *Limitation Act*, SBC 2012, c 13, S. 6(1)
- 506 *Limitation of Actions Act*, SNB 2009, c L-8.5, s.5(1)(a).
- 507 See the discussion in Downard, *Libel*, note 489, ch 13.
- 508 Law Reform Commission of British Columbia, *Report on Defamation*, 1985, [LRCBC, *Defamation*].
- 509 LRCBC, *Defamation*, note 508, chapter 10, section C.
- 510 Uniform Law Conference of Canada (ULCC), "Proceedings of the Sixty-Ninth Annual Meeting held at Victoria, British Columbia," August 1987, Appendix C, Defamation, Report of the Saskatchewan Commissioners, 143.
- 511 MAG Advisory Committee, The Law of Defamation: An Issues Paper, March 1989 [MAG *Issues*] 98-99; MAG Advisory Committee, Final Report, November 1990 [MAG *Final*] 22.
- 512 Non-media defendants named in a lawsuit involving libel in a newspaper or broadcast may also take advantage of the notice and limitation periods: case.
- 513 *Ballingall*, note 490; *Weiss v. Sawyer* (2002) 61 OR (3d) 526 (CA).

- 514 *Shtaif v. Toronto Life Publishing Co Ltd*, 2013 ONCA 405, paras 20-24; *Bahlhieda v. Santa* (2003), 68 OR (3d) 115 (CA).
- 515 *MAG Issues*, note 511, 98-99.
- 516 *Warman v. Fromm*, (2007) 62 CCLT (3d) 227, (ONSC)
- 517 *LSA*, note 409, s. 8.
- 518 *MAG Issues*, note 511, 99.
- 519 See the discussion in Downard, *Libel*, note 489, 266-271.
- 520 See written submission to the LCO from CBC, "Proposal to the Law Commission of Ontario for the Introduction of a Uniform Limitation Period in Defamation Actions," April 2017.
- 521 *LSA*, note 409, s. 6.
- 522 *Limitations Act*, 2002.
- 523 *MAG Final*, note 511, 22-23.
- 524 *MAG Issues*, note 511, 99.
- 525 See *NAC*, note 410.
- 526 *Rules of Civil Procedure*, note 421, Rule 77. This rule applies only in respect of certain geographic centers and certain types of claims: Rule 77.02. The Rule will generally apply to defamation claims so long as they do not appear on the Commercial List. A court decision or consent of the parties is necessary for a case to be assigned to case management: Rule 77.05.
- 527 *Civil Procedure Rules 1998* (UK), SI1998/3132, part 3. [CPR]
- 528 *CPR*, note 527, Rule 3.1.
- 529 Ministry of Justice, *Pre-Action Protocol for Defamation*. Online: https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_def. [Pre Action Protocol] Also see Matthew Collins, *Collins on Defamation*, (Oxford: Oxford University Press, 2014), para 2.93, [Collins on Defamation].
- 530 *Pre-Action Protocol*, note 529.
- 531 *CPR*, note 527, Rule 3.1.
- 532 Defamation law reform efforts in the United Kingdom have taken place within a broader civil justice reform process evolving out of the 2009 Jackson Report, *Review of Civil Litigation Costs: Final Report* (Jackson Report) (December 2009). The Jackson Report addressed various costs protection options that have continued to be debated in that jurisdiction culminating most recently in the April 2017 House of Lords decision, *Times Newspapers v. Flood*, [2017] UKSC 33. These options, including conditional fee agreements (CFAs), after-the-event insurance (ATE) and success fees are beyond the scope of the LCO's project.
- 533 *Joint Committee on the Draft Defamation Bill*, note 411, 44-51.
- 534 Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill*, (London: the Stationary Office Limited, February 2012) 18-21, online: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217300/government-response-draft-defamation-bill.pdf.
- 535 Civil Justice Council, *Defamation Costs Working Group Final Report*, 2013, online: https://www.judiciary.gov.uk/wp-content/uploads/2012/12/Defamation-costs-final-report_18-4-13-d.pdf.
- 536 Recently, Mathilde Groppo has argued in favour of using case management procedures already available in England to allow for more rigorous control of defamation proceedings in order to prevent costs from escalating. Groppo suggests that specialized judges could be trained to limit discovery where appropriate and streamline the trial process. Mathilde Groppo, "Libel Litigation: Jackson, Fixed Costs and Case Management", *Inform's Blog*, 28 March 2017, online: <https://inform.wordpress.com/2017/03/28/libel-litigation-jackson-fixed-costs-and-case-management-mathilde-groppo/>, [Groppo, *Libel Litigation*].
- 537 England does have a specialized Media and Communications List headed by Mr. Justice Warby which allows him to exercise some control over procedural issues: *Mr Justice Warby to Take Charge of Media-Related Case Listing* (27 February 2017). Online: <https://www.judiciary.gov.uk/announcements/the-media-and-communications-list/>.
- 538 Groppo, *Libel Litigation*, note 536.
- 539 *R v. Imperial Tobacco Canada Ltd*, 2011 SCC 42, para 17; *Mantini v. Smith Lyons LLP* (2003), 64

- OR (3d) 516,(CA). According to Rule 20.04 (2.1-2.2) judges also have the ability to consider evidence at motions and discretion to allow oral evidence (Rule of Civil Procedure, note 421).
- 540 *Daniels Midtown Corporation v. Mariai*, 2015 ONSC 6568, para 17.
- 541 *Rules of Civil Procedure*, note 421, Rule 20.
- 542 *Hryniak*, note 421, para 36.
- 543 *Rules of Civil Procedure*, note 421, Rule 20.04(2.1), 20.04(2.2). Summary judgment motions have been reinvigorated, once again, by the Supreme Court of Canada's decision in *Hryniak*, note 421, discussed above, and its emphasis on proportionality in the litigation process.
- 544 *Hazel v. Rainy River First Nations*, 2016 ONSC 5875 (summary judgment granted, action allowed and \$10,000 damages awarded); *Brent v. Nishikawa*, 2016 ONSC 4297 (summary judgment granted, action allowed and \$30,000 general damages awarded); *Pitney v. Toronto Police Services Board*, 2016 ONSC 1013 (summary judgment granted, defence of qualified privilege established and action dismissed); *Rolon v. Bell*, 2015 ONSC 6042 (summary judgment granted, defence of qualified privilege established and action dismissed).
- 545 *CPR*, note 527, 3.1(2)(i), (j).
- 546 *CPR*, note 527, 3.3.
- 547 See, for example, *GKR Karate (UK) Ltd v. Yorkshire Post Newspapers Ltd (No.1)*, [2000] EWCA Civ 420, para 28, [*GKR Karate*] where the Court of Appeal upheld a preliminary hearing on the issues of whether a defence of qualified privilege was made out and whether the publication was motivated by malice. The judge had reasoned that a preliminary hearing would take approximately 3 days in contrast to the 4 to 6 weeks that would be necessary for a full trial, *GKR Karate*, para 6. Preliminary hearings on meaning are further governed by specific rules in *CPR*, note 527, Practice Direction 53, s.4.
- 548 *Cooke v. MGN Limited*, [2014] EWHC 2831.
- 549 *Lachaux v. Independent Print Limited (no. 2)*, [2015] EWHC 2242 (QB), para 7, [*Lachaux (no.2)*].
- 550 *Ames v. The Spamhaus Project*, [2015] EWHC 127 (QB), para 101; *Lachaux (no.2)*, note 549, para 167. But see *Brown v. Bower*, [2017] EWHC 1388 (QB).
- 551 *Defamation Act 1996* (UK), c 31, ss. 8-10, [UKDA 1996].
- 552 UKDA 1996, note 551, ss. 8(1,2).
- 553 *James Gilbert v. MGN*, [2000] EMLR, 690-691. [*Gilbert*]
- 554 UKDA 1996, note 551, s. 8(4).
- 555 UKDA 1996, note 551, s. 9.
- 556 Helena Jeffs, "Defamation Bill [HL], Bill 127 of 1995-96: Law and Procedure Research Paper 96/60", House of Commons Library, 16 May 1996, 39-40, online: <http://researchbriefings.files.parliament.uk/documents/RP96-60/RP96-60.pdf>.
- 557 *Gilbert*, note 553; *Downtex plc v. Flatley*, [2003] EWCA Civ 1282.
- 558 *Gillick v. Brook Advisory Centres*, [2002] EWHC 829 QBD; *Milne v. Telegraph Group Ltd*, [2002] EWHC 2564 (QB); *Mosley v. Focus Magazine*, [2001] EWCA Civ 1030.
- 559 *Loutchansky v. Times Newspapers Ltd and others (Nos. 2-5)*, [2001] EWCA Civ 1805.
- 560 *Brett Wilson LLP v. Person(s) Unknown, Responsible for the Operation and Publication of the website www.solicitorsfromhelluk.com* [2015] EWHC 2628 (QB), [*Brett Wilson LLP*]; *Smith v. Unknown Defendants* [2016] EWHC 1775 (QB), [*Smith v. Unknown*].
- 561 In *Berstein*, Mr. Justice Mew decried the excessive costs spent by the parties in that litigation. He looked to "early resolution" procedures proposed in the UK and suggested that the enhanced summary judgment procedures in Ontario might be adapted to counteract the lack of proportionality evident in that case: Mew J. in *Bernstein*, note 418, para 10.
- 562 Uniform Law Conference of Canada, *Strategic Lawsuits Against Public Participation (SLAPPs) Report 2008* (August 2008). Online: <http://www.ulcc.ca/en/annual-meetings/235-2008-quebec-city-qc/civil-section-documents/448-strategic-lawsuits-against-public-participation-slapps-report-2008?showall=&limitstart=> para 4, [ULCC].
- 563 ULCC, note 562, para 4.
- 564 Peter Downard, *The Balance Shifts: The Ontario Protection of Public Participation act 2015*, Free

- Speech and Reputation Protection, LSUC (18 January 2016), 2 [Downard, *The Balance Shifts*].
- 565 Protection of Public Participation Act, 2015, SO 2015, c 23, [PPPA].
- 566 Ministry of the Attorney General, *Anti-SLAPP Advisory Panel Report to the Attorney General of Ontario* (28 Oct 2010). Online: https://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/anti_slapp_final_report_en.html at para 2, [MAG Advisory Panel Report].
- 567 Courts of Justice Act, RSO 1990, c C43, s 137.1 - 137.5 [CJA].
- 568 CJA, note 567, s. 137.1 (1).
- 569 CJA, note 567, s. 137.1 (3).
- 570 MAG Advisory Panel Report, note 566.
- 571 CJA, note 567, s 137.1 (4).
- 572 CJA, note 567, s 137.2 (1)
- 573 CJA, note 567, s 137.2 (2)
- 574 CJA, note 567, s 137.1 (5).
- 575 *Accruent LLC v. Mishimagi*, 2016 ONSC 6924, para 4.
- 576 CJA, note 567, s 137.1(7).
- 577 CJA, note 567, s 137.1(8).
- 578 CJA, note 567, s 137.1(9). This provision was applied by the court in *United Soils Management v. Mohammed*, 2017 ONSC 4450 in awarding the defendant \$7,500 where the plaintiff brought several interlocutory motions to “intimidate” the defendant, para 78. [*United Soils Management*]
- 579 *Fortress Real Developments Inc. v. Rabidoux*, 2017 ONSC 167; *United Soils Management*, note 578.
- 580 *Able Translations Ltd. v. Express International Translations Inc*, 2016 ONSC 6785, [*Able Translations*]; *Platnick v. Bent*, 2016 ONSC 7340 [*Platnick*]; an appeal from this decision is under reserve; *Rizvee v. Newman*, 2017 ONSC 4024, [*Rizvee*].
- 581 *Able Translations*, note 580.
- 582 *Platnick*, note 580; an appeal from this decision is under reserve.
- 583 *Thompson v. Cohodes*, 2017 ONSC 2590.
- 584 *Able Translations*, note 580, para 38.
- 585 *United Soils Management*, note 578, para 45.
- 586 *Able Translations*, note 580, para 48; *Platnick*, note 580, para 87.
- 587 Brian Radnoff, A “SLAPP” in the Face to Defamation Plaintiffs, in *The Lawyer’s Daily*, April 10, 2017. Online: <https://www.thelawyersdaily.ca/articles/2839/a-slapp-in-the-face-to-defamation-plaintiffs>.
- 588 The elements of the tort of defamation are: 1) the statement must refer to the plaintiff; 2) the statement must be published to at least one person other than the plaintiff; and 3) it must be defamatory in nature, i.e. it would tend to make a right-thinking person think less of the plaintiff (per *Grant v. Torstar Corp*, 2009 SCC 61 at para 28.
- 589 CJA, note 567, 137.1 (7), (8), (9).
- 590 Julius Melnitzer, “Corporate litigators get ready for Ontario’s new anti-SLAPP legislation,” *Financial Post* (2 Dec 2015). Online: <http://business.financialpost.com/legal-post/corporate-litigators-get-ready-for-ontarios-new-anti-slapp-legislation>.
- 591 Derek J. Bell, “Everything You Need to Know About Ontario’s New Anti-SLAPP Law” (29 Oct 2015), *Bennet Jones* (blog). Online: <https://www.lexology.com/library/detail.aspx?g=86bbad1b-c680-4f9f-b648-82baf59eee30>.
- 592 *Platnick*, note 580, para 150.
- 593 MAG Advisory Panel Report, note 566, para 28.
- 594 MAG Advisory Panel Report, note 566, para 31.
- 595 MAG Advisory Panel Report, note 566, para 33.
- 596 MAG Advisory Panel Report, note 566, para 62.
- 597 Scottish Law Commission, “Defamation and Malicious Publications (Scotland) Bill, Working Draft,” 2017, s. 19.
- 598 CJA, note 567, s 108.
- 599 LSA, note 409, s 14.
- 600 Canadian Medial Lawyers Association, *Submission to the Joint Committee on the Draft*

- Defamation Bill*, May 31, 2011, 10 [CMLA Submission].
- 601 CMLA Submission, note 600, 10.
- 602 CMLA Submission, note 600, 10.
- 603 Honourable Coulter A. Osborne, Q.C., *Civil Justice Reform Project*, November 2007. Online: https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/090_civil.php.
- 604 *Joint Committee on the Draft Defamation Bill*, note 411, 24, citing Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs, Final Report*, chapter 32, para 6.3.
- 605 Alastair Mullis and Andrew Scott, "Tilting at Windmills: the Defamation Act 2013" (2014) 77 *Modern Law Rev* 87; Scottish Law Commission, para 11.11.
- 606 Mullis & Scott, "Tilting at Windmills", note 605, 106; Scottish Law Commission, note 483, para 11.11.
- 607 Mullis & Scott, "Tilting at Windmills", note 605, 106.
- 608 CMLA Submission, note 600, 11.
- 609 *Gatley on Libel and Slander*, para 36.1; Hilary Young, "Anyone ... in Any Medium"? The Scope of Canada's Responsible Communication Defence", (3 April 2014), SSRN, 22, online: <https://ssrn.com/abstract=2420103>.
- 610 *Rothermere v. Times Newspaper Ltd*, [1973] 1 WLR 448, [*Rothermere v. Times*]. This reasoning by Lord Denning no longer has precedential value given the statutory reform that has taken place in England. In *Tim Yeo v. Times Newspaper Ltd*, [2014] EWHC 2853 (QB), Warby J. held that pre-amendment authorities such as *Rothermere v. Times* can no longer "hold sway" where they rest on the idea of a constitutional right to trial by jury. However, it does represent the traditional view which much be weighed in the balance in undertaking legislative reform.
- 611 Andrew Scott, *Reform*, note 412, para. 2.121.
- 612 *Manson*, note 420, para 20. Also see *Busseri*, note 420.
- 613 Karen Eltis, "Is 'Truth-telling' Decontextualized Online Still Reasonable? Restoring Context to Defamation Analysis in the Digital Age", *LCO Commissioned Paper*, 32, online: [http://www.lco-cdo.org/wp-](http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Eltis.pdf)
- content/uploads/2017/07/DIA-Commissioned-Paper-Eltis.pdf.
- 614 *Manson*, note 420, para 20.
- 615 Facebook, for example, used to require that users provide their real life name and other personal information in order to user their service. This policy has recently been changed: Thaddeus Houston, "Constitutional Drag Race: Anonymous Online Speech after Digital Music News v. Superior Court" (2015) 30 *Berkley Tech LJ*. 1243.
- 616 See, for example, *Voltage Pictures LLC v. John Doe and Jane Doe*, 2014 FC 161.
- 617 PIPEDA, SC 2000, c 5.
- 618 PIPEDA, note 617, ss. 7(3). There are several exemptions. For example, an organization may disclose without knowledge or consent to a government institution in response to the institution's request based on national security concerns or for the purpose of enforcing or administering law.
- 619 Seeking to identify anonymous speakers is one approach to the problem. Another approach is to hold internet intermediaries directly responsible for the defamatory content instead. In England, under ss. 5 and 10 of the *Defamation Act 2013* online intermediaries are treated as backup defendants in the event that a plaintiff cannot identify anonymous posters in order to bring an action against them. This regulatory response to the problem of anonymous speech online is discussed in chapter VII below.
- 620 *Rules of Civil Procedure*, note 421, Rule 31.10. Also see Rule 30.10.
- 621 *Norwich Pharmacal Co v. Customs and Excise Commissioners*, [1974] AC 133 (HL), 175.
- 622 For example, in *York University v. Bell Canada*, a group with the pseudonym, York Faculty Concerned about the Future of York University (YFCFYU) sent an anonymous email alleging that the President of the University was guilty of academic fraud. The University brought a motion for an *Norwich* order requiring Bell and Rogers to disclose the names registered to the Internet Protocol (IP) addresses from which the email was sent. The court found that the University had established a *prima facie* case that the comments were defamatory. It also applied several equitable factors in granting

the order. The ISPs terms of service recognized that the ISP may be required to disclose the identity of subscribers in certain cases so that subscribers did not necessarily have a reasonable expectation of privacy. There was no other potential source for obtaining the information. The cost of providing the information was minimal and the applicant had agreed to cover this: *York University v. Bell Canada Enterprises* (2009), 99 OR (3d) 695, para 39, [*York University v. Bell Canada*].

- 623 Robert J Currie, "Cross-Cutting Conflicts: Developments in the Use of *Norwich* Orders in Internet Defamation Cases", in T. L. Archibald & R.S. Echlin, eds., *Annual Review of Civil Litigation 2016* (Toronto: Carswell, 2016) 129 [Currie, "Cross-Cutting"].
- 624 *Warman v. Wilkins-Fournier et al*, 2010 ONSC 2126 [*Warman v. Wilkins-Fournier*]. However, a later Ontario Court of Appeal decision did find that step two of the *Norwich* test calls for a *bona fide* standard rather than the more stringent *prima facie* standard applied in *Warman: 1654776 Ontario Ltd v. Stewart*, 2013 ONCA 184. More recently, see *Olsen v. Facebook Inc*, 2016 NSSC 155. In order to establish *prima facie* defamation, the Court must determine that the comments are capable of being defamatory as a question of law: *Warman v. Fournier*, 2011 ONSC 3023, para 26
- 625 *Warman v. Wilkins-Fournier*, note 624, at para 34.
- 626 In *Warman v. Wilkins-Fournier*, note 624, the Ontario Divisional Court applied a *Charter* analysis in ordering disclosure of material identifying anonymous defendants: paras. 15-19.
- 627 Currie, "Cross-Cutting", note 623.
- 628 Currie, "Cross-Cutting", note 623
- 629 *York University v. Bell Canada*, note 622.
- 630 Mark Donald, "Speaker's Corner: Rebalancing Defamation Law in an Online Age" (12 December 2016) *Law Times*, online: <http://www.lawtimesnews.com/201612125831/commentary/speaker-s-corner-rebalancing-defamation-law-in-an-online-age>, [Donald, "Rebalancing Defamation."]
- 631 For example, owners of a Scotland bed and breakfast were allegedly defamed by anonymous users of TripAdvisor. A Scottish court held that it did not have jurisdiction to order the disclosure of the identities of the posters since

TripAdvisor is headquartered in Massachusetts and its terms of service with its users require that all claims against it must be heard in the US state: Gavin Madeley, "B&B Owners Crushed" (2014) *Daily Mail Online*. Online: <http://www.dailymail.co.uk/news/article-2553671/B-B-owners-took-TripAdvisor-facel-ess-reviewers-left-crushed-judge-says-no-power-make-web-giant-reveal-names-critic-s.html>.

- 632 *Applause Store v. Raphael*, [2008] EWHC 1781 (QB), para 10, [*Applause Store*].
- 633 *Applause Store*, note 632, para 62.
- 634 Kevin Poulsen, "The FBI Used the Web's Favorite Hacking Tool to Unmask Tor Users" (2014) *Wired*. Online: <http://www.wired.com/2014/12/fbi-metasploit-tor/>.
- 635 *Brett Wilson LLP*, note 560.
- 636 *Brett Wilson LLP*, note 560, para 6. Also see *Smith v. Persons Unknown*, note 560.
- 637 We might also consider the social costs of requiring ISPs to retain a log of all of its user's activities for a long enough period to allow these motions to be brought.
- 638 Currie, "Cross-Cutting" note 623.
- 639 Ronen Perry & Tal Z Zarsky, "Who Should be Liable for Online Anonymous Defamation?" (2015) *U. Chi. L. Rev. Dialogue* 82 (2015) 162.
- 640 Donald, "Rebalancing Defamation", note 630.
- 641 Patricia Barrett, "Facebook: a substitute for personal service," (10 April 2015), *Western University Report*. Online: <http://westernreport.fims.uwo.ca/index.php/facebook-a-substitute-for-personal-service/>; Darcy Merkur, "Personal Injury Law: Service via Facebook should become the norm." (20 January 2014), *Law Times*, Online: http://www.lawtimesnews.com/201401203716/commentary/personal-injury-law-service-via-facebook-should-become-the-norm?utm_source=responssys&utm_medium=email&utm_campaign=CLNewswire_20140120.
- 642 UKDA 2013, note 450.
- 643 Note Laidlaw and Young's position that it is not appropriate to shift liability to the intermediary

where it is not morally culpability for the impugned post: Emily Laidlaw & Hilary Young, "Internet Intermediary Liability in Defamation: Proposal for Statutory Reform," (July 2017) *LCO Commissioned Paper*, online: <http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Laidlaw-and-Young.pdf>, ["Internet Intermediaries"].

- 644 But see James Grimmelmann, "The Unmasking Option" (2010) 87 *Denver ULR Online* 23, [Grimmelmann, "Unmasking"], in which he argues that the act of unmasking an alleged defamer might achieve certain public interest goals separate and apart from any litigation that may or may not follow.
- 645 *Brett Wilson LLP*, note 560; *Smith v. Unknown*, note 560.
- 646 Andrew Scott suggests that a summary judgment motion might achieve the same purpose – a court ordered take-down – without the primary publisher ever being identified: Andrew Scott, *Reform*, note 412, para 2.68.
- 647 "Defamed by Persons Unknown – Interview with Iain Wilson", (30 July 2016) *Inform's Blog*, online: <https://inform.wordpress.com/2016/07/30/defamed-by-persons-unknown-interview-with-iain-wilson/>.
- 648 Grimmelmann, "Unmasking Option", note 644.
- 649 *AB v. Bragg Communications Inc*, 2012 SCC 46, para 11, [*Bragg SCC*].
- 650 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11. See also *Toronto Star Newspapers Ltd v Ontario*, 2005 SCC 41, paras 1-2, and *Vancouver Sun, Re*, 2004 SCC 43, para 23, [*Re Vancouver Sun*].
- 651 Canada's Judges Technology Advisory Committee, *Open Courts, Electronic Access to Court Records, and Privacy* (Ottawa: Canadian Judicial Council, 2003), 2, online: https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_tech_issues_OpenCourts_20030904_en.pdf.
- 652 *Re Vancouver Sun*, note 650, para 26.
- 653 In Ontario, Rule 14.06 of the *Rules of Civil Procedure*, note 421, requires that the title of proceedings

name both the plaintiff and the defendant. The court has a general discretion in Rule 2.03 to dispense with this rule where necessary in the interests of justice: rr 2.03, 14.06(1).

- 654 *Re Vancouver Sun*, note 650, para 29, referencing *Dagenais v. Canadian Broadcasting Corp*, [1994] 3 SCR 835 and *R v. Mentuck*, 2001 SCC 76.
- 655 David Rolph, "Anonymity and Defamation" (January 5, 2016) in *SECRECY, LAW AND SOCIETY*, G. Martin, R. Scott Bray, M. Kumar, eds, Routledge, UK, 2015; Sydney Law School Research Paper No. 16/04. Available at SSRN: <https://ssrn.com/abstract=2711549>. [Rolph, "Anonymity and Defamation."]
- 656 See, for example, *Youth Criminal Justice Act*, SC 2002, c 1, s. 110 and *Child and Family Services Act*, RSO 1990, c C.11, ss 45(8).
- 657 *Bragg SCC*, note 649.
- 658 *Bragg SCC*, note 649, para 10.
- 659 *AB v. Bragg Communications Inc*, 2011 NSCA 26, para 80 [*Bragg NSCA*].
- 660 *Bragg NSCA*, note 659, para 99.
- 661 *Bragg SCC*, note 649, para 13.
- 662 *Bragg SCC*, note 649, para 23.
- 663 *Bragg SCC*, note 649, para 28, 29.
- 664 *Re Vancouver Sun*, note 650, para 25.
- 665 Sujoy Chatterjee, "Balancing Privacy and the Open Court Principle in Family Law: Does De-Identifying Case Law Protect Anonymity?" (2014) 23 *Dal J. Leg Stud* 91, [Chaterjee, "Balancing Privacy"].
- 666 Jane Bailey and Jacquelyn Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2017) 48 *Ottawa Law Rev* 143, 154. [Bailey and Burkell]
- 667 Rolph, "Anonymity and Defamation", note 655.
- 668 *McKeogh v. John Doe 1* (User Name Daithii4u), [2012] IEHC 95. See Eva Nagle BL, Nagle, Eva, 'Unringing' the Bell that Has Sounded so Loudly: Maintaining Anonymity When Suing for

- Defamation and Breach of Privacy in the Internet Realm (22 January 2014). Available at SSRN: <https://ssrn.com/abstract=2383222>.
- 669 Chaterjee, "Balancing Privacy", note 665.
- 670 Although these sites do have their own procedures for preserving private information.
- 671 Bailey and Burkell, 180, note 666.
- 672 See, for example, Daniel J. Solove, *The Future of Reputation: Gossip, Rumor and Privacy on the Internet*, (New Haven and London: Yale University Press, 2007) ch 5, 121.
- 673 Karen Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship Between Privacy and Accessibility in the Cyber Context" (2011) 56 McGill L.J. 291.
- 674 Rolph, "Anonymity and Defamation", note 655.
- 675 See *Hill v Church of Scientology*, [1995] 2 SCR 1130. Also see, for example, Office of the Privacy Commission of Canada, *Online Reputation: What Are They Saying About Me?* Discussion Paper prepared by the Policy and Research Group of the Office of the Privacy Commissioner of Canada, January 2016, online: https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2016/or_201601/.
- 676 Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy" (1890) 4 Harv L Rev 193.
- 677 *Justice K.S. Puttaswamy v. Union of India*, Writ Petition (Civil) No. 494 of 2012 dated 24/08/2017, para 170 (SC India), [Puttaswamy].
- 678 David Mangan, "The Relationship Between Defamation, Breach Of Privacy And Other Legal Claims Involving Offensive Internet Content" (July 2017) *LCO Commissioned Paper*, 20, online: <http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Mangan.pdf>, [Mangan, "Defamation, Privacy"].
- 679 Mangan, "Defamation, Privacy", note 678.
- 680 Jane Bailey & Dr. Valerie Steeves, "Defamation Law in the Age of the Internet: Young People's Perspectives," (June 2017) *LCO Commissioned Paper*, 5, 78, 92, online: <http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-eQuality.pdf>, [Bailey & Steeves, "Young People"].
- 681 *Hill v. Church of Scientology*, [1995] 2 SCR 1130, para 121 [*Scientology*].
- 682 *Pfeifer v. Austria*, (2009) 48 EHRR 8.
- 683 Andrew Mullin & Andrew Scott, "The Swing of the Pendulum: Reputation, Expression and the Re-Entering of English Libel Law" (2012) 63 Northern Ireland Legal Quarterly 27 [Mullin & Scott, "Pendulum"]. One recent suggestion has been that reputation is not part of private life after all but, rather, reputational harm can cause harm to private life: Tanya Aplin & Jason Bosland, "The Uncertain Landscape of Article 8 of the ECHR: the Protection of Reputation as a Fundamental Human Right?" in Andrew T. Kenyon, ed., *Comparative Defamation and Privacy Law* (Cambridge: Cambridge University Press, 2016), 265.
- 684 Mangan, "Defamation, Privacy", note 678, 24.
- 685 Mangan, "Defamation, Privacy", note 678, 28.
- 686 Chris D.L. Hunt, "The Common Law's Hodgepodge Protection of Privacy" (2015) 66 UNBLJ 161, 172 [Hunt, "Hodgepodge"]. See, for example, *Tolley v. Fry*, [1931] AC 333 (HL).
- 687 *Jones v. Tsige*, 2012 ONCA 3 [Tsige].
- 688 The decision in *Jones v. Tsige*, note 687, was extended to a disclosure scenario in *Jane Doe 464533 v. ND*, a "revenge porn" case. However, this decision was reached in the context of a default judgment and has subsequently been set aside: *Jane Doe 464533 v. ND*, 2016 ONSC 541, [*Doe v. ND*].
- 689 *Privacy Act*, CCSM c P125; *Privacy Act*, RSBC 1996, c 373; *Privacy Act*, RSS 1978, c P-24; *Privacy Act*, RSNL 1990, c P-22. Quebec also recognizes a right of privacy flowing from its *Charter of Human Rights and Freedoms*, RSQ c C-12 [*Quebec Charter*].
- 690 *Civil Code of Québec*, SQ 1991, c 64, arts 3 and 35-37; *Quebec Charter*, s. 5.
- 691 *Protecting Canadians from Online Crime Act*, SC 2014, c 31.
- 692 *The Intimate Image Protection Act*, CCSM c 187, s. 11; *Protecting Victims of Non-Consensual Distribution of Intimate Images Act*, SA 2017, c P-26.9.

- 693 *Doe v. ND*, note 688.
- 694 *Jane Doe 464533 v. ND*, 2016 ONSC 4920.
- 695 Bailey & Steeves, "Young People", note 680, 32.
- 696 Bullying has been defined in part as "[b]ehaviour that is intended to cause, or should be known to cause, fear, intimidation, humiliation, distress or other forms of harm to another person's body, feelings, self-esteem, reputation or property.": *AB v. Bragg Communications Inc.*, [2012] 2 SCR 567, para 21, [AB v. Bragg].
- 697 *AB v. Bragg*, note 696.
- 698 *Cybersafety Act*, SNS 2013, C 2 s. 21; *Crouch v. Snell*, 2015 NSSC 340, [Crouch].
- 699 *Human Rights Code*, RSO 1990, c H 19, s. 10(1).
- 700 *Warman v. Grosvenor*, (2008) 92 OR (3d) 663 (SC).
- 701 *Protection from Harassment Act*, 1997, c 40, ss. 1(1) [PHA].
- 702 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221, 223 [ECHR], incorporated by the *Human Rights Act 1998* (UK), 1998 c 42.
- 703 *Campbell v. MGN Ltd.*, [2004] UKHL 22, para 51 [Campbell].
- 704 Mangan, "Defamation, Privacy," note 678, 37.
- 705 Mangan, "Defamation, Privacy," note 678, 37.
- 706 Ontario does regulate the disclosure of personal information by public institutions and health information custodians: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F 31; *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M 56; *Ontario Personal Health Information Protection Act*, SO 2004, c 3, Schedule A.
- 707 *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 (PIPEDA). PIPEDA was enacted in response to the 1998 European Union Directive that prohibits members of the EU from transporting personal data to third countries that do not have adequate levels of privacy protection for personal information: Mangan, "Defamation, Privacy," note 678, 41. Complying with the Directive was a practical pre-requisite to trade with EU member countries. The EU has now put into place a new harmonized *General Data Protection Regulation* (GDPR) which will come into force in 2018. There is debate about whether PIPEDA will be considered compliant with the GDPR: Susan Krashinsky Robertson, "Calls Grow for Canada to Modernize Privacy Laws Amid EU Changes", *The Globe and Mail*, 24 July 2017, online: <https://beta.theglobeandmail.com/report-on-business/industry-news/marketing/calls-grow-for-canada-to-modernize-privacy-laws-amid-eu-changes/article35778176/?ref=http://www.theglobeandmail.com&>.
- 708 Hunt, "Hodgepodge", note 686, 181.
- 709 See the discussion by Alex Cameron & Michelle Johnston, "Current Trends in Canadian Privacy Law of Interest to the Media Industry: Damage Awards, Tort Claims and Class Actions" at *Ad Idem 2012 Annual Conference, Canadian Media Lawyers Association* [Cameron & Johnston, "Current Trends"]; *Girao v. Zarek Taylor Grossman Hanrahan LLP*, 2011 FC 1070, para 42, [Girao].
- 710 *Girao*, note 709, para 47.
- 711 *Nammo v. Transunion Of Canada Inc.*, 2010 FC 1284, [Nammo].
- 712 *Nammo*, note 711, paras 67, 68.
- 713 *Nammo*, note 711, para 71.
- 714 First, it only applies in to information gathered in the context of commercial activities so does not apply to privacy breaches through social media for example. Second, the powers of the OPC are limited to making non-binding recommendations and the option of going to court is not all that attractive since (a) one must exhaust the OPC process first; (b) the court will award damages only in "egregious" cases, and (c) even where the court does award damages, awards have tended to be modest. (Cameron & Johnston, "Current Trends", 1). Third, online breach of privacy often involves foreign websites which raises jurisdictional issues about the extraterritorial applicability of PIPEDA. Office of the Privacy Commissioner of Canada (OPC), *Online Reputation: What are They Saying About Me?* Discussion Paper (2016) 6, online: https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2016/or_201601/.
- 715 For a discussion of the journalistic purposes exception, see *AT v. Globe24h.com*, 2017 FC 114, paras 65-.

- 716 *Data Protection Act 1998* (UK), chapter 29 [DPA].
- 717 ECHR, Article 8.
- 718 DPA, note 716, s. 32.
- 719 ECHR, note 717, Article 10.
- 720 Michael Patrick and Alicia Mendonca, Using data protection law to defend your reputation: what about the new Data Protection Bill?, online, <https://inform.org/2017/09/05/using-data-protection-law-to-defend-your-reputation-what-about-the-new-data-protection-bill-michael-patrick-and-alicia-mendonca/>.
- 721 DPA, note 716, ss. 4(4).
- 722 DPA, note 716, First Data Protection Principle.
- 723 *Law Society v. Kordowski*, [2011] EWHC 3182 (QB), para 78, 100, [Kordowski].
- 724 *Kordowski*, note 723.
- 725 *Protection from Harassment Act 1997* (UK), 1997 c.40.
- 726 *Kordowski*, note 723, para 74.
- 727 *Prince Hicham v. Elaph Publishing Ltd.*, [2017] EWCA Civ 29.
- 728 EC, *Directive 95/46/EC* of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1995] OJ, L281/31, [European Commission]. However, in 2016, the EU adopted the *General Data Protection Regulation* (GDPR) to replace the Directive. The GDPR will come into force in 2018 and will create a single unified privacy regulatory regime: *General Data Protection Regulation* (EU) 2016/679 to come into force on May 25, 2018.
- 729 *Google Spain, SL, Google Inc v. Agencia Española de Protección de Datos, Mario Costeja González*, C-131/12, [2012] ECJ EUR-Lex LEXIS 1014 [*Google Spain*]; Court of Justice of the European Union, Press Release, 70/14, “Judgment in Case C-131/12 *Google Spain SL, Google Inc v. Agencia Española de Protección de Datos, Mario Costeja González*” (13 May 2014), para 93. Online: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140070en.pdf>. The Court described Right to be Forgotten (RTBF) as follows: the “operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person’s name links to web pages, published by third parties and containing information related to that person, [...] and even, as the case may be, when its publication in itself on those pages is lawful (*Google Spain*, para 94).
- 730 *Google Spain*, note 729, para 94.
- 731 European Commission, note 728, 2.
- 732 European Commission, note 728, 5.
- 733 Ivor Shapiro & Brian MacLeod Rogers, “How the ‘Right to be Forgotten’ Challenges Journalistic Principles” (2017) 5 *Digital Journalism* 1101; Ellis Schindler, “Will the Right to be Forgotten be just a Memory?” *Inform’s Blog*, 8 July 2016, online: <https://inform.wordpress.com/2016/07/08/will-the-right-to-be-forgotten-be-just-a-memory-ellis-schindler/>; Eloïse Gratton & Jules Polonetsky, “Privacy Above All Other Fundamental Rights? Challenges with the Implementation of a Right to Be Forgotten in Canada” (28 April 2016) submitted to Office of the Privacy Commission of Canada, 10 to 18, online: www.eloisegratton.com/files/sites/4/2016/04/PolonetskyGratton_RTBFpaper_FINAL.pdf, [Gratton & Polonetsky, “Privacy”]; David T.S. Fraser, “You’d Better Forget the Right to Be Forgotten in Canada” (28 April 2016), *Canadian Privacy Law* (blog). Online: <http://blog.privacylawyer.ca/2016/04/you-d-better-forget-right-to-be.html>.
- 734 European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data*, COM (2012) 11 final, article 17, L 119/43 – 119/44 [General Data Protection Regulation or GDPR]. The GDPR was approved by the European Parliament on April 2016 and will come into force on May 2018 (EC, *Regulation (Eu) 2016/679 Of The European Parliament And Of The Council*, (2016) L119/1 – L 119/89, 132 online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2016:119:FULL&from=EN>)
- 735 Google, “Transparency Report,” online: <https://www.google.com/transparencyreport/removals/europeprivacy/> (Figures from August 4, 2016).

- 736 Office of Privacy Commissioner of Canada, *Online Reputation*, (January 2016) online: https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2016/or_201601/.
- 737 Gratton & Polonetsky, "Privacy", note 733, 10 to 18.
- 738 Gratton & Polonetsky, "Privacy", note 733, 47.
- 739 One stakeholder consulted by the Advisory Council to Google after the *Google Spain* decision, stated: "We are not talking about the right to be forgotten, but the right of an individual to appeal against the processing of his own individual data": Moritz Karg, Commissioner for Data Protection Hamburg Data Protection Authority, Advisory Council Meeting, Berlin, October 14, 2014, quoted in *Advisory Council to Google Report*, February 6, 2015, online: http://www.cil.cnrs.fr/CIL/IMG/pdf/droit_obli_google.pdf, 3 [*Advisory Council to Google Report*].
- 740 Delisting means that the information at issue will not be included in a list of results when the person's name is searched. However, it does not mean that the information is removed from the internet altogether. The Advisory Council to Google noted that different legal criteria might apply in determining whether removal of information is warranted: *Advisory Council to Google Report*, note 739, 4.
- 741 Ursula Cheer "Divining the Dignity Torts: A Possible Future for Defamation and Privacy" in Andrew T Kenyon, ed, *Comparative Defamation and Privacy Law* (Cambridge: Cambridge University Press, 2016) 309, 312, [Cheer].
- 742 Mangan, "Defamation, Privacy", note 678, 21.
- 743 Mangan, "Defamation, Privacy", note 678, 22.
- 744 *Lawson v. Accusearch Inc.*, [2007] 4 FCR 314.
- 745 *McKennitt v. Ash*, [2006] EWCA Civ 1714, paras 80, 86.
- 746 Katherine Schulten and Amanda Christy Brown, "Evaluating Sources in a 'Post-Truth' World: Ideas for Teaching and Learning about Fake News" *New York Times*, (Jan 19, 2017), online: <https://www.nytimes.com/2017/01/19/learning/lesson-plans/evaluating-sources-in-a-post-truth-world-ideas-for-teaching-and-learning-about-fake-news.html>.
- 747 Bailey & Steeves, "Young People", note 680, 36, 40, 71.
- 748 Bailey & Steeves, "Young People", note 680, 41.
- 749 Bailey & Steeves, "Young People", note 680, 6.
- 750 *Puttaswamy*, note 677, paras 55, 56, concurring minority judgment per Sanjay Kishan Kaul, citing Daniel Solove, '10 Reasons Why Privacy Matters' published on January 20, 2014. Online: <https://www.teachprivacy.com/10-reasons-privacy-matters/>.
- 751 However, the opposing view has also been asserted, that the truth/falsity dichotomy continues to be core to the tort of defamation. Eric Descheemaeker argues that truth is properly a complete defence to a claim in defamation since the nature of the tort is to protect not reputation as a whole but *deserved* reputation or *character*. The law of defamation has been stretched to protect dignitary interests such as privacy and self-esteem within the rubric of reputation but these are not properly within its boundaries: Eric Descheemaeker, "'Veritas non est defamatio?' Truth as a Defence in the Law of Defamation (2011) 31 Legal Studies 1.
- 752 David Rolph, "Vindicating Reputation and Privacy", in Andrew T. Kenyon, ed., *Comparative Defamation and Privacy Law* (Cambridge: Cambridge University Press, 2016), 291 [Rolph, "Vindicating Reputation and Privacy"].
- 753 Rolph, "Vindicating Reputation and Privacy", note 752, 293-294.
- 754 Rolph, "Vindicating Reputation and Privacy", note 752, 304.
- 755 Rolph, "Vindicating Reputation and Privacy", note 752.
- 756 Rolph, "Vindicating Reputation and Privacy", note 752, 307.
- 757 Rolph, "Vindicating Reputation and Privacy", note 752, 304.
- 758 This is in contrast to the European Union where courts must balance the Article 8 right to privacy with the Article 10 right to free expression.
- 759 *Chandra v. CBC*, 2015 ONSC 6519, para 49, [Chandra].

- 760 *Chandra*, note 759, para 49; *Griffin v. Sullivan*, 2008 BCSC 827. In England, see *Cooper v. Turrell*, [2011] EWHC 3269 (QB).
- 761 Between 2015 and 2016, defamation decisions in England and Wales decreased from 56 to 37. Michael Patrick and Alicia Mendonca, "Using data protection law to defend your reputation: what about the new Data Protection Bill?" *Inform's Blog*, 5 Sept 2017, 2017. Online: <https://inform.wordpress.com/2017/09/05/using-data-protection-law-to-defend-your-reputation-what-about-the-new-data-protection-bill-michael-patrick-and-alicia-mendonca/#more-38229>. Also see the table of cases (2010-2017) at "Table of media Law Cases," *Inform's Blog*, online: <https://inform.wordpress.com/table-of-cases-2/>.
- 762 *Crouch*, note 698, para 67 quoting the *Cybersafety Act*, SNS 2013 s 3.
- 763 *Crouch*, note 698, 141.
- 764 *Nova Scotia (Director of Public Safety) v. Lee*, 2015 NSSC 71 [Lee]
- 765 *AB v. Bragg*, note 696.
- 766 David Rolph, "Preparing for a Full-Scale Invasion? Truth, Privacy and Defamation," (2007) 25 Communications Law Bulletin 7.
- 767 David Rolph, "Vindicating Reputation and Privacy", note 752. In 1948, the Porter Committee decided against expanding defamation law to include invasion of privacy, finding that the latter was a problem "against good taste" and one of "internal discipline to be regulated by an understanding between the proprietorial and journalistic organizations": Porter Committee, 10. Similarly, the 1971 New South Wales Commission excluded from the scope of its reform project invasion of privacy and disclosure of confidences, declaring that the law of defamation is "not a fit instrument for that task". The 1975 Faulks Committee agreed with these earlier approaches. Faulks Committee Report quoting from 1972 Privacy Commission, 16. More recently, the English reform process leading to the 2013 *Defamation Act* dealt with defamation law exclusively. However, in an exception to this trend, the Australian Law Reform Commission studied both defamation and privacy in its 1979 report, *Unfair Publication: Defamation and Privacy*. Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, 1979.
- 768 Andrew T Kenyon, "Defamation and privacy in an era of 'more speech'", in Andrew T. Kenyon, ed., *Comparative Defamation and Privacy Law* (Cambridge: Cambridge University Press, 2016), 6.
- 769 Rolph, "Vindicating Reputation and Privacy" note 752; Cheer, "Divining the Dignity Torts", note 741; Mangan, "Defamation, Privacy", note 678.
- 770 Cheer, "Divining the Dignity Torts", note 741.
- 771 Mangan, "Defamation, Privacy", note 678, 56.
- 772 Mangan, "Defamation, Privacy", note 678, 51, 53.
- 773 Mangan, "Defamation, Privacy", note 678, 19.
- 774 Cheer, "Divining the Dignity Torts", note 741, 319-320.
- 775 Cheer, "Divining the Dignity Torts", note 741, 320.
- 776 *Harmful Digital Communications Act* (NZ) (2015), 2015 No 63. Cheer also describes a possible constitutional model which we do not discuss here (327).
- 777 Cheer, "Divining the Dignity Torts", note 741, 325-326.
- 778 Australia Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No. 11, 1979, 9, [ALRC].
- 779 ALRC, note 778, 9.
- 780 ALRC, note 778, 204.
- 781 John Gregory, "Intermediary Liability Revisited: Part 2 – Policy Questions", *Slaw* (18 September 2014), online: <http://www.slaw.ca/2014/09/18/intermediary-liability-part-2-policy-questions/> [Gregory, "Intermediary Liability Part 2"].
- 782 Jaani Riordan, *The Liability of Internet Intermediaries* (Oxford: Oxford University Press, 2016) 1, [Riordan]. The LCO has adopted the term "internet intermediaries" as a descriptor in this project for the same reasons described by Janni Riordan in the treatise, *The Liability of Internet Intermediaries* (2016), 28.
- 783 See Laidlaw's case study of Internet Watch Foundation in Emily Laidlaw, *Regulating Speech in Cyberspace: Gatekeepers, Human Rights and Corporate Responsibility* (Cambridge: Cambridge University Press,

- 2015), ch 4, [Laidlaw, *Regulating Speech in Cyberspace*]. Also see Robert Epstein, "The New Censorship: How did Google become the internet's censor and master manipulator, blocking access to millions of websites?" (June 22, 2016). Online: <https://www.usnews.com/opinion/articles/2016-06-22/google-is-the-worlds-biggest-censor-and-its-power-must-be-regulated>.
- 784 OECD, *The Role of Internet Intermediaries in Advancing Public Policy Objectives* (OECD Publishing, 2011) at 20 ["OECD"].
- 785 Riordan, note 782, para 2.40.
- 786 Riordan, note 782, para 2.46.
- 787 Riordan, note 782, para 2.57.
- 788 Riordan, note 782, para 2.58-2.59.
- 789 Riordan, note 782, para 2.73.
- 790 See generally Laidlaw, *Regulating Speech in Cyberspace*, note 783, ch 5.1.
- 791 According to one study, 91% of Google traffic comes from the first page of search results. Eric Sharp, "The First Page of Google by the Numbers" Protofuse (30 April 2014,) Online: <http://www.protofuse.com/blog/first-page-of-google-by-the-numbers/>.
- 792 *Duffy v. Google*, [2017] SASFC 130, affirming [2015] SASC 170.
- 793 OECD, note 784, 40-52, 189; L Edwards, *Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights* (presented at WIPO, June 22, 2011) 6-7; Riordan, 4.
- 794 Jerome Armstrong and Markos Moulitsas Zuniga, *Crashing the Gate: Netroots, Grassroots, and the Rise of People Powered Politics* (Chelsea Green Publishing, 2008).
- 795 OECD, note 784, 66.
- 796 OECD, note 784, 66.
- 797 OECD, note 784, 66-67.
- 798 William R. King, "Knowledge Management and Organizational Learning" (2009) *Annals of Informations Systems* 4, 4-5.
- 799 R Lambiotte & P. Panzarasa, "Communities, Knowledge Creation and Information Diffusion" (2009) *Journal of Infometrics* 3, 180-181.
- 800 OECD, note 784, 64-65.
- 801 OECD, *The Internet Economy on the Rise: Progress Since the Seoul Declaration* (2013), 107 [OECD 2]; OECD, 61.
- 802 European Digital Media Association, *Online Intermediaries: Impact on the EU Economy* (Copenhagen Economics, 2015) at 20-25 [Online Intermediaries]; OECD, 62-63.
- 803 *Online Intermediaries*, note 802, 20-21.
- 804 Emily Laidlaw & Hilary Young, "Internet Intermediary Liability in Defamation: Proposal for Statutory Reform," (July 2017) *LCO Commissioned Paper*, 95, online: <http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Laidlaw-and-Young.pdf>, ["Internet Intermediaries"].
- 805 Riordan, note 782, 9.
- 806 Statistics indicating significant increases in online piracy and other copyright infringement illustrate the difficulties with online law enforcement. See for example European Commission, "Online Copyright Enforcement, Consumer Behaviour, and Market Structure" (Institute for Prospective Technological Studies, 2015) at 2.
- 807 RJ Mann & SR Belzley, "Internet Ills: The Promise of Internet Liability" (2005) 47 *Williams & Mary LR* 1, 245-246.
- 808 Patricia L. Bellia et. al, *Cyberlaw: Problems of Policy and Jurisprudence in the Information Age*, 4th Ed. (Minnesota, Thomson Reuters, 2011) at 495-496.
- 809 OECD, note 784, 27, 30.
- 810 Report of the special rapporteur on the promotion and protection of the right to freedom of expression, Frank La Rue to the United Nations General Assembly, 16 May 2011, quoted in Laidlaw, *Regulating Speech*, note 783, 21.
- 811 *Davison v. Habeeb & Ors*, [2011] EWHC 3031 (QB), quoted in Laidlaw & Hilary, "Internet Intermediaries", note 804, 12.

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- 812 *Communications Decency Act*, 47 US Code, art 230 [CDA (US)].
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- 813 *Society of Composers, Authors, and Music Publishers v. Canadian Association of Internet Providers*, [2004] 2 SCR 427, para 46.
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- 814 *Crookes v Newton*, [2011] 3 SCR 269 [*Crookes v. Newton*]. The two hyperlinks in issue linked the reader to a website containing three allegedly defamatory articles. One link was regarded as “shallow” because it merely directed the user to the relevant website but not to the specific webpage. (Some commentators argue that shallow links are not really hyperlinks at all...) The second link was “deep” in that it took the user directly to the allegedly defamatory content. In neither case was the link accompanied by any opinion about or repetition of the defamatory content.
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- 815 Fischer, Iris and Lazier, Adam. “Crookes v. Newton: The Supreme Court of Canada Brings Libel Law into the Internet Age” (2012) 50 Alberta LR 205-217.
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- 816 *Crookes v. Newton*, note 814, para 26.
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- 817 *Crookes v. Newton*, note 814, para 27.
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- 818 *Crookes v. Newton*, note 814, para 25. So too in *Niemela v. Malamas*, 2015 BCSC 1024, 85, 95 [*Niemela v. Malamas*], the court interpreted the earlier case law as having narrowed the traditional publication rule:
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- 819 *Crookes v. Newton*, note 814, para 36.
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- 820 Fischer & Lazier, note 815, 211.
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- 821 Laidlaw & Young, “Internet Intermediaries”, note 804, 34.
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- 822 *Baglow v. Smith*, 2015 ONSC 1175.
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- 823 *Weaver v. Corcoran*, 2015 BCSC 165, reversed and new trial ordered on other grounds 2017 BCCA 160. Also see *Niemela v. Malamas*, note 818, holding that Google was not a publisher prior to being notified of the existence of the defamatory content.
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- 824 *Bunt v. Tilley*, [2006] EWHC 407 (QB)
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- 825 *Metropolitan International Schools v. Designtech*, [2009] EWHC 1765 (QB)
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- 826 *Tamiz v. Google* (trial), 2012 EWHC 449 (QB).
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- 827 *Tamiz v. Google* (appeal), 2013 EWCA 68.
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- 828 Since the post-notice defamation was trivial, the appeal was dismissed.
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- 829 *Trkulja v. Google* (No 5), [2012] VSC 533. In another *Trkulja* proceeding, *Google v. Trkulja* [2016] VSCA 333, the Court found that search engines differed significantly from website operators in the degree of control over search results since these were a product of automated algorithms. It warned against a “one size fits all” analysis. On its reasoning, search engines were secondary publishers of search results rather than primary publishers. However, it decline to decide the issue of publication since it held that the material did not have defamatory meaning (paras 285, 347).
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- 830 *Duffy v. Google*, [2017] SASCF 130, affirming [2015] SASC 170.
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- 831 Laidlaw & Young, “Internet Intermediaries”, note 804, 20.
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- 832 *Visscher v. Maritime Union of Australia* (No 6), [2014] NSWSC 350.
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- 833 *Cripps v. Vakras*, [2014] VSC 110.
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- 834 *Oriental Press Group Ltd v. Fevaworks Solutions Ltd*, [2013] HKCFA 47.
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- 835 Riordan, note 782, para 8.83.
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- 836 *Karam v. Fairfax New Zealand Limited*, [2012] NZHC 1331, para 44.
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- 837 Laidlaw & Young, “Internet Intermediaries”, note 804, 33.
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- 838 The focus on a duty of reasonable care is also consistent with the reasonableness analysis emerging elsewhere in defamation law. See chapter IV, section E.
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- 839 Riordan, note 782, 230.
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- 840 This concern was influential in the US in legislating intermediary immunity in s.230 of the *Communications Decency Act*. Laidlaw & Young, “Internet Intermediaries”, note 804, 20-21.
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- 841 Laidlaw & Young, “Internet Intermediaries”, note 804, 86; Andrew Scott, *Reform of Defamation Law in Northern Ireland: Recommendations to the Department of Finance* (2016), para 2.59, [Scott, *Reform of Defamation*].
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- 842 Laidlaw & Young, "Internet Intermediaries", note 804, 85.
- 843 Scott, *Reform of Defamation*, note 841, para 2.54. Also see Ryan Turner, "Internet Defamation Law And Publication by Omission: A Multi-Jurisdictional Analysis" *UNSW Law Journal* V 37, 34, (2014).
- 844 Laidlaw & Young, "Internet Intermediaries", note 804, 89.
- 845 Laidlaw & Young, "Internet Intermediaries", note 804, 91-92; Joachim Dietrich, "Clarifying the Meaning of 'Publication' of Defamatory Matter in the Age of the Internet" (2013) 18 *Media and Arts Law Review*.
- 846 Matthew Collins, *Collins on Defamation*, (Oxford: Oxford University Press, 2014), para 4.86, [*Collins on Defamation*].
- 847 Laidlaw & Young, "Internet Intermediaries", note 804, 84.
- 848 Shea Huffman, "Electricity as utility. A model for the internet?", *Marketplace*, November 10, 2014. Online: <http://www.marketplace.org/2014/11/10/tech/numbers/electricity-utility-model-internet>.
- 849 Laidlaw, *Regulating Speech in Cyberspace*, note 783, 44,
- 850 Laidlaw, *Regulating Speech in Cyberspace*, note 783, 48, 243.
- 851 The issue of intermediary regulation can be divided into two broad categories: regulation of network or business processes (direct regulation) and regulation of harmful or illegal content (indirect regulation). It is this second category that we are concerned with in this project.
- 852 In chapter VI, we consider the relationship between defamation and related legal claims from a broader perspective.
- 853 *Defamation Act 1996* (UK), c 31, [UKDA 1996]; *Defamation Act, 2013* (UK), c 26, [UKDA 2013].
- 854 See Riordan, note 782, para 8.113.
- 855 UKDA 1996, note 853, ss 1(1).
- 856 UKDA 1996, note 853, ss 1(2) – 1(6).
- 857 *Collins On Defamation*, note 846, para 16:40.
- 858 Alastair Mullis and Andrew Scott, "Tilting at Windmills: the Defamation Act 2013" (2014) 77 *Modern Law Rev* 87.
- 859 UKDA 2013, note 853, s. 10.
- 860 See, for example, *Brett Wilson LLP v. Persons Unknown*, in which the operators of a website cataloguing third party complaints against solicitors were found to be editors of a defamatory post appearing in the complaints webpage and, thereby, not entitled to rely on s. 10 of the Defamation Act 2013: *Brett Wilson LLP v. Persons Unknown*, [2015] EWHC 2628.
- 861 *Defamation (Operators of Websites) Regulations 2013* SI 3028/2013, [*Website Operator Regulation*].
- 862 Laidlaw & Young, "Internet Intermediaries", note 804, 39.
- 863 *Website Operator Regulation*, note 861, Schedule.
- 864 *Website Operator Regulation*, note 861, Schedule, s 3.
- 865 Ministry of Justice, *Complaints about defamatory material posted on websites: Guidance on Section 5 of the Defamation Act 2013 and Regulations* (January 2014). Online: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/269138/defamation-guidance.pdf.
- 866 "In reality, therefore, where the poster is anonymous to the complainant, the post will often end up being taken down, either by the poster or the intermediary": Taylor Wessing, "The website operators' defence for defamatory user generated content," *Lexology* (8 July 2016), Online: <http://www.lexology.com/library/detail.aspx?g=246bc2af-f53a-4f8b-9564-6c75a64fce06>.
- 867 *Website Operator Regulation*, note 861, s 8.
- 868 Mullis & Scott, "Tilting at Windmills", note 858, 101.
- 869 Scott, *Reform of Defamation*, note 841, para 2.61.
- 870 Riordan, note 782, para 8.143.
- 871 Laidlaw & Young, "Internet Intermediaries", note 804, 39.

- 872 Laidlaw & Young, "Internet Intermediaries", note 804, 39.
- 873 CDA (US), note 812.
- 874 Laidlaw & Young, "Internet Intermediaries", note 804, 59.
- 875 Even the robust protection in section 230 is complicated by uncertainty over whether an intermediary is an "interactive computer service" or whether it participates in the development of content so as to become a publisher (CDA (US), note 812). See Laidlaw & Young, "Internet Intermediaries" note 804.
- 876 *Jones v. Dirty World Entertainment Recordings LLC* (2014).
- 877 Pro: Brian Holland, "In Defence of Online Intermediary Immunity" (2008); Laidlaw & Young, "Internet Intermediaries", note 804, 67-68; Con: Susan Freiwald, "Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation." 14.2 Harv J L & Tech 569, 656 (2001)
- 878 Laidlaw & Young, "Internet Intermediaries", note 804, 68; Ardia, "Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity under Section 230 of the Communications Decency Act" (2010) 43 Loyola of Los Angeles Law Review 373.
- 879 On one side of this argument, see Saul Levore, Martha Craven Nussbaum, *The Offensive Internet: Speech, privacy, and reputation*, (Harvard University Press, 2012). On the other side, see Jack Balkin, "The Future of Free Expression in a Digital Age", Faculty Scholarship Series. Paper 223, 433-436. Online: http://digitalcommons.law.yale.edu/fss_papers/223.
- 880 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [Directive].
- 881 Riordan, note 782, para 12.06.
- 882 Directive, note 880, Article 12.
- 883 Directive, note 880, Article 13.
- 884 Directive, note 880, Article 14.
- 885 Riordan, note 782, 12.116.
- 886 Riordan, note 782, 12.150.
- 887 Laidlaw & Young, "Internet Intermediaries", note 804, 50-59.
- 888 Laidlaw & Young, "Internet Intermediaries", note 804, 55-56.
- 889 Laidlaw & Young, "Internet Intermediaries", note 804, 58-59.
- 890 Directive, note 880.
- 891 *Digital Millennium Copyright Act* (DMCA) 17 U.S.C. § 512.
- 892 Laidlaw & Young, "Internet Intermediaries", note 804, 70.
- 893 *Copyright Modernization Act, 2012*, c 20, ss. 41.25-41.27. This legislation came into effect in 2015 but operated as a voluntary industry practice for the previous decade.
- 894 Laidlaw & Young, "Internet Intermediaries", note 804.
- 895 *Copyright Modernization Act*, note 893, ss 41.26(3).
- 896 Gregory R Hagen "Modernizing ISP Copyright Liability", in Michael Geist, ed, *From 'Radical Extremism' to 'Balanced Copyright': Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 359- 360.
- 897 Ryan J Black, Peter EJ Wells, Sarah Kilpatrick, "Copyright Reform Bill C-11", online: <http://www.mcmillan.ca/Copyright-Reform-Bill-C-11>. Also see, Evidence, Standing Committee on Canadian Heritage, 37th Parliament, 3rd Sess, (22 April 2004), online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1321572&Language=E&Mode=2>. See, for example, the comments made by Paul Spurgeon, VP, Legal Services and General Counsel, Society of Composers, Authors and Music Publishers of Canada, and Richard Pfohl, General Counsel, Canadian Recording Industry Association. It is also argued that a notice and notice schemes is simply not enough, on its own, to address complex issues such as file sharing. See Barry Sookman, "Copyright Reform for Canada: What Should We Do?", Copyright Consultations Submission" (2009) 2 Osgoode Hall Rev of Law and Policy 73, 99-100.

- 898 Laidlaw & Young, "Internet Intermediaries", note 804, 72-73.
- 899 *Crookes v. Newton*, note 814.
- 900 Laidlaw & Young, "Internet Intermediaries", note 804, 43.
- 901 *International Covenant on Civil and Political Rights* (ICCPR), Article 19(3), [ICCPR].
- 902 ICCPR, note 901, Article 19(3).
- 903 Human Rights Council, CCPR/C/GC/34 (July 2011), para 47.
- 904 Frank La Rue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, A/HRC/17/27 (2011), 8.
- 905 La Rue, note 904, 8.
- 906 La Rue, note 904.
- 907 *Joint Declaration on Freedom of Expression and the Internet* (Signatories: UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression, ACHPR Special Rapporteur on Freedom of Expression and Access to Inform) (1st June 2011). [Joint Declaration]. This Joint Declaration is consistent with Article 19(3) but provides more detail. For example, it warns that traditional regulatory approaches may not be appropriate for the internet and that "alternative, tailored approaches" for responding to illegal content should be developed which are "adapted to the unique characteristics of the Internet". Alternatives such as self-regulation and educational efforts are promoted as a means of fostering "autonomous, self-driven and responsible use of the Internet".
- 908 *Joint Declaration*, note 907, 2a.
- 909 *Joint Declaration*, note 907, 5.
- 910 David Kaye, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, A/HRC/32/38 (2016), [Kaye].
- 911 Kaye, note 910, 12, 14.
- 912 Laidlaw & Young, "Internet Intermediaries", note 804, 46-47.
- 913 Laidlaw & Young, "Internet Intermediaries", note 804, 75-76. Manila Principles, "Manila Principles on Intermediary Liability", Online: <https://www.manilaprinciples.org/principles>. The authors also review Brazil's *Marco Civil*, another similar rights-based approach to intermediary liability.
- 914 Gregory, "Intermediary Liability Part 2", note 781. Also see John Gregory, "Intermediary Liability Revisited: Part 1 – Examples", *Slaw* (8 July 2014), online: <http://www.slaw.ca/2014/07/08/intermediary-liability-revisited-part-1-examples/>.
- 915 See chapter V on jurisdictional issues.
- 916 Laidlaw, *Regulating Speech*, note 783, 244.
- 917 *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, para 127.
- 918 Scott, *Reform of Defamation*, note 841, para 3.73
- 919 There is empirical evidence that indiscriminate take-downs occur all too often: Keller, "Empirical Evidence of "Over-Removal" by Internet Companies under Intermediary Liability Laws," *Stanford CIS Blog* (12 October 2015). Online: <http://cyberlaw.stanford.edu/blog/2015/10/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws>.
- 920 Tamir Israel, "Crookes v. Newton: Speculations on Intermediary Liability...", *Slaw*, Substantive Law: Judicial Decisions (2 November 2011), online: <http://www.slaw.ca/2011/11/02/crookes-v-newton-speculations-on-intermediary-liability/>.
- 921 Scott, *Reform of Defamation*, note 841, para 2.63.
- 922 See, for example, *Canadian National Railway v. Google Inc.*, 2010 ONSC 3121.
- 923 Riordan, note 782, para 8.108.
- 924 La Rue, note 904, para 42.
- 925 The UK Website Operator Regulation attempts to address this by providing for automatic takedown of content that is the same or substantially the same as content that has already been the subject of two or more notices of complaint: *Website Operator Regulation*, note 861, Schedule, s 9.
- 926 Laidlaw & Young, "Internet Intermediaries", note 804, 96.

- 927 Laidlaw & Young, "Internet Intermediaries", note 804.
- 928 Laidlaw & Young, "Internet Intermediaries", note 804, 96-107.
- 929 Laidlaw & Young's proposal would also encourage corporate social responsibility by providing that an intermediary's terms of service and internal practices be taken into account by a court in assessing any fine under the regime.
- 930 Daniel J. Solove, *The Future of Reputation: Gossip, Rumor and Privacy on the Internet*, (New Haven and London: Yale University Press, 2007) ch 5 123, [Solove].
- 931 Laidlaw, "Are We Asking Too Much From Defamation Law? Reputation Systems, ADR, Industry Regulation And Other Extra-Judicial Possibilities For Protecting Reputation In The Internet Age: Proposal for Reform", *LCO Commissioned Paper*, 81, online: <http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Laidlaw.pdf>, ["Are We Asking"].
- 932 Emily Laidlaw, "Are We Asking", note 931.
- 933 Laidlaw "Are We Asking", note 931, 17-19.
- 934 Solove, note 930, ch 5, 122.
- 935 Bailey & Steeves, *Commissioned Paper*, discussed by Laidlaw, "Are We Asking", note 931, 29.
- 936 Laidlaw, "Are We Asking", note 931, 34, 91.
- 937 Jack M Balkin "Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society", (2004) 79 NYULR 1, 6.
- 938 We do not have statistics verifying this but it can be inferred from the 2,000,000 complaints received by Facebook alone in a week contrasted with the 50-some court decisions in England and Wales in 2012.... (confirm)
- 939 In the case of youth, another front line response will be to tell a teacher: Jane Bailey & Dr. Valerie Steeves, "Defamation Law in the Age of the Internet: Young People's Perspectives," (June 2017) *LCO Commissioned Paper*, 56, online: <http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-eQuality.pdf>
- 940 There are no defamation-specific statistics on the use of intermediary complaint systems. However, in the context of a study of online harassment, the Pew Research Centre found that 26% of adults had untrue information posted online (17% of which related to their reputation or character) and half of them sought to have the information removed or corrected. Pew Research Centre, discussed by Laidlaw, "Are We Asking", note 931, 21.
- 941 Facebook, "Code of conduct", online: <https://www.facebook.com/notes/msn-canada/code-of-conduct/310898272257690>. <https://www.facebook.com/notes/msn-canada/code-of-conduct/310898272257690> .
- 942 "Tips on writing a review to avoid defamation | Glassdoor", online: http://help.glassdoor.com/article/Tips-on-writing-a-review-to-avoid-defamation/en_US. http://help.glassdoor.com/article/Tips-on-writing-a-review-to-avoid-defamation/en_US.
- 943 Reddiquette - Reddit.com, online: <https://www.reddit.com/wiki/reddiquette> .
- 944 "The Twitter Rules – Twitter Help Center," online: <https://support.twitter.com/articles/18311#> .
- 945 "Rules – 4chan," online: <http://www.4chan.org/rules> .
- 946 4Chan: Janitor Application – 4Chan, <https://www.4chan.org/janitorapp>, Reddit: What is a moderator? | Reddit, online: <https://www.reddithelp.com/en/categories/reddit-101/moderators/what-moderator>, Microsoft: Building Your Reputation – Microsoft Community, online: <https://answers.microsoft.com/en-us/page/faq?auth=1#faqBuildingYourReputation1> .
- 947 James Grimmelman, "The Virtues of Moderation," 17 Yale JL & Tech (2015), 94.
- 948 Reddit has a very libertarian philosophy regarding what content should remain up, which hedges against defamation law very actively. For instance, during the aftermath of the Boston Marathon bombing, a group of users on a subreddit (smaller community discussion topics) actively misidentified an undergraduate, Sunil Tripathi, as one of the bombers. This led to a media-frenzy and reputational harm. Thus, ORSs can also enable

the fragmentation of defamation standards through self-appointed moderators, which challenges the concept of a single reasonable person in a community.

949 Laidlaw, "Are We Asking", note 931, 20.

950 Ken Manbert Salcedo, "Instagram Adds 'DeepText' Algorithm To Filter Out Offensive Comments, Harassment," *IBT* (June 29th, 2017), online: <http://www.ibtimes.com/instagram-adds-deeptext-algorithm-filter-out-offensive-comments-harassment-2559292>.

951 Julia Angwin and Hannes Grassegger, "Facebook's Secret Censorship Rules Protect White Men from Hate Speech But Not Black Children —" *Pro Publica*, (June 28th, 2017), online: <https://www.propublica.org/article/facebook-hate-speech-censorship-internal-documents-algorithms>.

952 See, for example, Gabriel Gimenes, Robson L. F. Cordeiro, and Jose F. Rodrigues-Jr, "ORFEL: Efficient Detection of Defamation Or Illegitimate Promotion in Online Recommendation," February 2017, *Information Sciences* 379, 274; Elijah Bitting, Jonathan Carter, and Ali A Ghorbani, "Detecting And Preventing Defamation in Multiagent Systems," at the *Communication Networks and Services Research Conference* 2003 (further developed in Elijah Bitting, and Ali A Ghorbani, "Protecting e-commerce agents from defamation," in *Electronic Commerce Research and Applications*, Volume 3 Issue 1, Spring 2004, 21).

953 Some, but not all, web hosts have appeal processes that enable users to defend themselves from disciplinary actions. These appeal processes allow users to ask other users to revise feedback and escalate when necessary (Ebay, "Seller Performance and Feedback Policy", *Ebay*, online: <https://pages.ebay.com/help/policies/defect-removal.html>), submit a form (Facebook, "My Personal Account was Disabled", *Facebook*, online: <https://www.facebook.com/help/103873106370583?helpref=search&sr=5&query=appeal>), or submit information proving the veracity of their claim (HomeStars, "What should I do if I think a review is fake" in *Frequently Asked Questions*, HomeStars, on <https://homestars.com/companies/faq>).

954 Danielle Keats Citron, "Technological Due Process" 85 *Wash U L Rev.* 1249, 1252. Also see

Karen Eltis, "The Unwitting Foreign Arbiters of Charter Rights: Facebook's "(Quasi) Judicial" Appointment", CBA National, January 2017.

955 Laidlaw, "Are We Asking", note 931, 79.

956 Facebook Help Center, "Reporting Abuse," *Facebook*, online https://www.facebook.com/help/1753719584844061?helpref=hc_global_nav

957 Laidlaw, "Are We Asking", note 931, 80.

958 Laidlaw, "Are We Asking", note 931, 80.

959 Charlie Warzel, "It Only Adds to the Humiliation" How Twitter Responds to Harrassers", *Buzzfeed News* (September 22, 2016). Online: https://www.buzzfeed.com/charliewarzel/after-reporting-abuse-many-twitter-users-hear-silence-or-wor?utm_term=.dry9IY8YL#.dtemEdrd1. Buzzfeed is careful to qualify that the study is not scientifically rigorous.

960 The legal and policy implications of the Google Spain decision are addressed in David Lindsay, "The 'Right to be Forgotten' By Search Engines", in Kenyon, *Comparative Defamation*, 199.

961 *Google Spain, SL, Google Inc v. Agencia Española de Protección de Datos, Mario Costeja González*, C-131/12, [2012] ECJ EUR-Lex LEXIS 1014 [*Google Spain*]; Court of Justice of the European Union, Press Release, 70/14, "Judgment in Case C-131/12 Google Spain SL, Google Inc v. Agencia Española de Protección de Datos, Mario Costeja González" (13 May 2014), para 93. Online: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140070en.pdf>. The Court described Right to be Forgotten (RTBF) as follows: the "operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information related to that person, [...] and even, as the case may be, when its publication in itself on those pages is lawful (*Google Spain*, para 94).

962 Jimmy Wales in *Advisory Council to Google Report*, February 6, 2015, online: http://www.cil.cnrs.fr/CIL/IMG/pdf/droit_obligi_google.pdf, 27 [*Advisory Council to Google Report*]. Also see Frank La Rue in *Advisory Council to Google Final Report*, 29 ("... [T]he protection of Human Rights is a

- responsibility of the State, and in the cases where there can be limitation to the exercise of a right to prevent harm or violation of other rights or a superior common interest of society, it is the State that must make the decisions.”)
- 963 Sabine Leutheusser-Schnarrenberger in *Advisory Council to Google Report*, note 962, 25.
- 964 *Advisory Council to Google Report*, note 962, 34.
- 965 *Advisory Council to Google Report*, note 962, 36.
- 966 DPAs are in charge of the protection of individual’s privacy.
- 967 Laidlaw, “Are We Asking”, note 931, 75.
- 968 Emily Laidlaw & Hilary Young, “Internet Intermediary Liability in Defamation: Proposal for Statutory Reform,” (July 2017) *LCO Commissioned Paper*, 95, online: <http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Laidlaw-and-Young.pdf>, [“Internet Intermediaries”]
- 969 Laidlaw & Young, “Internet Intermediaries”, note 968, 106-107.
- 970 Laidlaw, “Are We Asking”, note 931, 41.
- 971 Laidlaw, “Are We Asking”, note 931, 27.
- 972 Laidlaw, “Are We Asking”, note 931, 27-28.
- 973 See, for example, her discussion of the CIRA which manages registration of .ca domain names. Laidlaw suggests that CIRA is a good example of “a private dispute resolution body running alongside traditional actions in court and borne out of the inadequacy of costly, time-consuming litigation for the high-volume, low-value nature of the disputes at hand” (52-53). Laidlaw, “Are We Asking”, note 931.
- 974 Laidlaw, “Are We Asking”, note 931, 40-41.
- 975 Alastair Mullis & Andrew Scott, “Reframing Libel: Taking (All) Rights Seriously and Where It Leads”, LSE Legal Studies Working Paper No. 20/2010 (14 Dec 2010), online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1718998, [“Reframing Libel”].
- 976 Mullis & Scott, “Reframing Libel”, note 975, 23.
- 977 Mullis & Scott, “Reframing Libel”, note 975, 24.
- 978 Mullis & Scott, “Reframing Libel”, note 975, 24.
- 979 Mullis & Scott, “Reframing Libel”, note 975, 24.
- 980 Mullis & Scott, “Reframing Libel”, note 975, 25.
- 981 Laidlaw, “Are We Asking”, note 931, 56.
- 982 Laidlaw, “Are We Asking”, note 931, 59.
- 983 Laidlaw, “Are We Asking”, note 931, 60.
- 984 *Civil Resolution Tribunal Act*, SBC 2012, c 25.
- 985 See Laidlaw’s discussion, “Are We Asking”, note 931, 68-72.
- 986 Laidlaw, “Are We Asking”, note 931, 91.
- 987 Laidlaw & Young, “Internet Intermediaries”, note 968.
- 988 Laidlaw, “Are We Asking”, note 931, 99.
- 989 Laidlaw, “Are We Asking”, note 931, 100.
- 990 Laidlaw, “Are We Asking”, note 931, 101.
- 991 Laidlaw, “Are We Asking”, note 931, 62.
- 992 Laidlaw, “Are We Asking”, note 931, 107, fn 416.
- 993 *Cybersafety Act*, SNS 2013, C 2 s. 21 [CSA].
- 994 *Crouch v. Snell*, 2015 NSSC 340, [Crouch].
- 995 CSA, note 993, ss. 8, 21, and 26A.
- 996 The SCNA enables the governor in council to make regulations “to designate a person in public service as a director of public safety for an area of the Province specified in the purposes set out in subsection 2(1).” The CSA extended those purposes to include complaints (CSA, s. 28(1)(a)) related to cyberbullying, (s. 28(1)(b)) specifically, prevention orders (s. 40(b)(ea).) “New anti-cyberbullying act now law in Nova Scotia”, *The Chronicle Herald* (14 April 2014), online: <http://thechronicleherald.ca/novascotia/1146403-new-anti-cyberbullying-act-now-law-in-nova-scotia>.
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