Law Reform Commission of Canada | Commission de réforme du droit du Canada

Communiqué

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"FREEDOM OF EXPRESSION OF CANADIANS MUST BE PROTECTED FROM OUTMODED CRIMINAL LAWS"

Law Reform Commission Recommends Decriminalization of "Defamatory Libel"

The freedom of expression of Canadians is far too precious to be left exposed to the threat of prosecution under a criminal law which is outmoded, unnecessary and loaded with defects, said Justice Allen M. Linden, President of the Law Reform Commission of Canada, upon the release today, of Commission Working Paper 35 entitled Defamatory Libel which recommended the abolition of the criminal offence bearing that name.

"How," asked Justice Linden, "can we justify in Canada today, the continuation of a criminal offence developed in the English Court of Star Chamber in the 17th century which was aimed at preventing people from duelling in the streets in defence of their reputation and at stifling political criticism."

"Surely," he said, "Canadians today are better off defending their honour in more civilized ways, in civil actions whereby they can recover money compensation and can benefit from other civil judicial remedies such as injunctions. There is no need to invoke the strong arm of the criminal law for this purpose."

Canada

Noting that 'Defamatory Libel' (the publishing of matter which is likely to injure a person's reputation by exposing him or her to hatred, contempt or ridicule or which is insulting) is punishable by up to two years in jail and a maximum of five years where the defamatory matter is known to be false, Justice Linden asserted that retention of the archaic law creates an unhealthy, unwarranted chill on journalistic and artistic expression and conflicts with the provisions of Canada's new Charter of Rights and Freedoms guaranteeing freedom of thought, belief, opinion and expression.

Observing that the crime of defamatory libel is fortunately seldom prosecuted (available federal statistics indicate only 36 prosecutions in a ten-year period), Justice Linden stated that the abolition of the offence is warranted because, where a crime does not make a substantial contribution in dealing with a problem, there is no justification for retaining it in the criminal law.

Justice Linden stressed that although deliberate character assassination must not be tolerated by our society, nonetheless the criminal law must be used with restraint, especially where there are alternative, more effective means of dealing with the problem.

On release of the Working Paper, François Handfield, a Commission research coordinator, pointed out that nevertheless four Canadians were sentenced to jail for defamatory libel in the ten-year period surveyed.

He noted the four-month jail sentence imposed upon a Social Credit Member of the Alberta Legislature in 1938 for publishing a defamatory libel knowing it to be false. The accused person was jailed for publishing a leaflet labelling certain prominent lawyers and leaders of political parties as "Bankers' Toadies". The pamphlet read:

> "My child, you should never say hard or unkind things about Bankers' Toadies. God made Bankers' Toadies, just as He made snakes, slugs, snails and other creepy-crawly,

treacherous and poisonous things. NEVER therefore, abuse them --- just exterminate them!

"AND TO PREVENT ALL EVASION DEMAND THE RESULT YOU WANT $25.00 a month and a lower cost to live."

A second person convicted of publishing the same leaflet was sent to jail for six months with hard labour.

Mr. Handfield described the imposition of the jail terms for excessive language as an inappropriate application of the criminal law, which, as the Commission has consistently urged, should be confined to wrongful acts which seriously threaten and infringe fundamental social values. He also stated that as long as a criminal law is on the books there is a danger that its sanctions can be invoked at some future time.

On release of the Working Paper, Professor Jacques Fortin, Vice-President of the Commission observed that Criminal Code Defamatory Libel provisions are replete with redundancy and confusion, excess detail, legal fictions, gaps, uncertainties and inconsistencies. "One would expect," said Professor Fortin, "that Criminal Code language restricting freedom of expression would be crystal clear. This is, however, not the case. The Commission is most concerned that our Criminal Code should contain language which is clear, precise, straightforward, easily understood by lay persons and easily applied by judges."

Professor Fortin also expressed concern that the criminal offence of defamatory libel violates several fundamental principles of criminal law. He noted that:

- As in some circumstances it is an offence of 'vicarious liability', one person can be found criminally liable for another person's conduct.
- As intention to defame is not required, a person can be convicted of this serious crime even though there was no intent to defame another individual.
- As the crime does not recognize a defence based on honest 'mistake of fact', a person who honestly believes the matter is guilty, if it is not in fact true.

Professor Fortin noted that in a previous publication entitled Our Criminal Law, the Commission recommended that where the criminal law is to be applied, the focus should be to enable the accused to raise defences showing a lack of intention to commit the prohibited act.

"Also offensive," said Professor Fortin, "are some provisions of the offence requiring the accused person to prove his or her innocence." "Such provisions," he said, "are ripe for challenge under provisions of the Canadian Charter of Rights and Freedoms which preserve the presumption of innocence and require the State to prove the guilt of an accused person."

According to Commission Researcher Glenn Gilmour, several common law jurisdictions have abolished or modified their criminal defamation laws.

Mr. Gilmour said that reform bodies in New Zealand, the United States, and South Australia have recommended abolition of the crime of libel upon individuals and noted that a recent study in Great Britain has recommended major changes in the existing law to cure severe defects.

The Working Paper concludes that "... the criminal law must be used with restraint. For reasons previously explored at some length, we do not feel that a crime of defamation would be able to do better than that which is already done by the civil law of defamation. Nor would it seem to be an effective deterrent. Therefore, we do not feel that a crime of defamation could make a substantial contribution in dealing with the problem of defamatory publications in our society. Accordingly, we recommend that our Criminal Code should contain no crime of defamation, even in a restricted form".

The Working Paper presents the tentative views of the Law Reform Commission at this time.

The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament when the Commission has taken into account comments received in the meantime from the public.

This Working Paper is part of the Substantive Criminal Law Project currently being conducted under the direction of coordinator François Handfield.

The Law Reform Commission of Canada was established in 1971 for the purposes of modernizing Canada's federal laws and making them more meaningful, relevant and effective.

The Commission is now in the process of drafting a new Criminal Code for Canadians to reflect the Canada of the 1980s, and not that of one hundred years ago, when the predecessor of our current Criminal Code was enacted.

Copies of Working Paper 35 are available by mail free of charge from: Law Reform Commission of Canada, 130 Albert Street, 7th Floor, Ottawa, Ontario, K1A 0L6 or Suite 310, Place du Canada, Montréal, Québec, Canada, H3B 2N2

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CRIMINAL LAW

defamatory libel

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Law Reform Commission
of Canada

Working Paper 35

DEFAMATORY LIBEL

1984

Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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Good name in man, and woman, dear my lord,
Is the immediate jewel of our souls.
Who steals my purse steals trash. 'Tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed.

Shakespeare, *Othello*, III. iii. 155-61 (Iago).

CHAPTER ONE

Introduction

Those parts of the *Criminal Code* which define specific offences consist mainly of offences designed to protect persons against actual or threatened violence, such as murder and assault, and against loss of property, such as theft and fraud. Unlike these offences, however, the offence of defamatory libel is designed to protect against an attack upon the reputation of a person. The offence of defamatory libel may appear to be of minor importance compared to other crimes. Yet, on closer examination, it raises issues of fundamental importance. What are the limits of freedom of speech in a democracy? In particular, what criminal law powers should the state have to control abuses of freedom of speech, given the entrenchment of freedom of expression in the *Canadian Charter of Rights and Freedoms*? The crime of defamatory libel focuses our attention upon these questions. The *Criminal Code*, besides prohibiting the publication of defamatory libels, also prohibits the publication of seditious, blasphemous, and obscene libels.[1] However, since the offence of defamatory libel is the most far-reaching libel offence, this Paper will concentrate exclusively on the offence of defamatory libel.

CHAPTER TWO

History of Defamatory Libel

Originally, the common law gave no remedy for a defamatory attack upon the reputation of a person. However, in 1275, some defamatory attacks became criminal by the statutory offence of *scandalum magnatum*, or scandal of magnates, which was created to prevent the spread of false tales that could result in discord between the king and any great men of the realm.[2] By the sixteenth century, the common law made defamation actionable. This became immensely popular because the court could award damages to the plaintiff. In order to prevent a flood of defamation actions, the courts imposed restrictions upon the remedy. Defamation was not actionable unless it caused actual damage or fell within three narrow categories: imputations of a criminal offence, imputations of certain kinds of loathesome contagious diseases such as leprosy, or imputations upon a person's skill in any profession or calling.[3]

Meanwhile, one of the great technological and social events of modern history was occurring: the development of the printing press. The first printing press in England was set up by Caxton at Westminster in 1476. New and controversial ideas could be spread throughout society more efficiently than ever before.

However, by the beginning of the seventeenth century, the powerful English Court of Star Chamber recognized that additional measures had to be taken to protect the state from attacks upon its authority, and to prevent duelling. Since people were at that time accustomed to a high level of violence in English society, duelling was still recognized as an honourable way to defend a reputation which had been unjustly attacked. To provide an alternative to duelling, and to protect the state from attacks upon its authority,

the Star Chamber, in the case *De Libellis Famosis*,[4] created the common law offence of libel. A libel upon a private person was penalized on the basis that it tended to cause a breach of the peace by inciting the victim to seek revenge. A libel upon a public person was a more serious offence, because it concerned not only a breach of the peace, but also the scandal of government.

The struggle for power between Parliament and King which culminated in the English civil war led to the abolition of the Star Chamber in 1641 by the Long Parliament. However, the offence of defamatory libel, which fell within the jurisdiction of the common law courts, survived. Furthermore, by the late seventeenth century, another form of control over defamatory attacks had been created by the common law courts — the new and distinct tort of libel.

The new tort of "libel" differed from the older tort of "defamation" in two major ways. First, the new tort was actionable without proof of damage. Secondly, the new tort applied only to libels (generally, written defamations). The distinction between slander (generally, an oral defamation) and libel was now established. Slander continued to be governed by the restrictive rules of the original common law tort of defamation. By contrast, libel was governed by new rules free from these restrictions, which made the chances of a successful lawsuit greater.

An important feature of the common law courts, which did not exist in the Court of Star Chamber, was the jury. In criminal cases, the role of the jury came to be an issue of vital importance. Judges, more sympathetic to the executive, often tried to restrict the power of the jury to determine the guilt or innocence of the accused. However, in 1670, the principle of the sovereign right of the jury to acquit the accused was recognized.[5]

Criminal defamatory libel, however, was an exception to this principle. The role of the jury in such cases was essentially restricted to deciding whether a defamatory libel had been published. The jury did not have the power to decide whether the words were indeed libellous. That decision was left to the judge. The inevitable result was that the judge decided whether the accused was guilty or not. During the eighteenth century, legal reformers unsuccessfully attempted to assert the right of the jury to decide on the issue of whether the defamatory matter was libellous

or not.[6] The controversy was finally resolved by Parliament. In 1792, *Fox's Libel Act* made the question of libel or no libel in criminal law a matter for the jury alone to decide.[7] This statute was incorporated into Canadian law, and is now contained in section 281 of the *Criminal Code*.

At common law, truth was no defence to the crime of defamatory libel. Moreover, an employer was vicariously criminally liable for the publication of a defamatory libel by his servant. In 1843, *Lord Campbell's Act*[8] amended those aspects of the law by providing that:

(a) the accused was to be acquitted if he could prove that the libel was true and was published for the public benefit; and

(b) an employer was not criminally responsible for a libel published by an employee if the employer could prove that the publication was made without his consent, knowledge, or authority, and without a lack of due care on his part.

In 1874 the provisions of *Lord Campbell's Act* were incorporated into *An Act respecting the Crime of Libel*[9] which applied uniformly throughout Canada.

What was believed to be the position of the crime of defamatory libel at common law, as altered by the English statutory changes, was incorporated into the English *Draft Code*, which, in turn, was adopted almost verbatim by the first Canadian *Criminal Code* of 1892.[10] The previous criminal libel statute was generally repealed. For the first time, a statutory definition of the offence, and several defences, many of which were believed to be common to, and exhaustive of, both the crime and the tort of libel, were enacted. In addition, the *Code* created a new defence of fair newspaper reports of public meetings and provided a definition of "newspaper." Since 1892, the defamatory libel provisions in the *Criminal Code* have remained substantially unchanged.

CHAPTER THREE

Present Law

I. Civil Law

Since the publication of a libel is both a tort and a crime, and since the English common law, with notable exceptions, was similar for both the tort and the crime, it is necessary for our understanding of the criminal law in this area to deal at some length with the laws governing civil suits for defamation in Canada.

A. The English Common Law Provinces

Defamation is a tort. It consists of an unwarranted attack upon the reputation of a person by means of the publication of defamatory matter to a third party.[11] The victim is entitled to compensation for the damage caused by this attack.

As explained earlier in this Paper, at common law, the form of the defamatory matter determined in large part whether the defamation was actionable. Except for a limited number of categories, a slander (generally, an oral defamation) was not actionable unless actual damage was proved. By contrast, a libel (generally, a written defamation) was actionable *per se*. The majority of common law provinces have recognized the artificiality of this distinction, and they now either treat all defamations as libels, or treat all oral or visual defamatory broadcasts as libels.[12]

No single definition of "defamatory" has been adopted by the courts. Instead, they have created and applied several tests over the centuries. These range from matter tending to expose a person to hatred, contempt, or ridicule, to matter tending to cause a person to be shunned or avoided. Today, courts often use the test enunciated by Lord Atkin in 1936 — that defamatory matter is that which tends to lower a person in the estimation of right-thinking members of society generally.[13] In other words, the potential effect of the defamation is to harm the reputation of the victim. Mere insults are not defamatory. For example, calling a married woman "a tramp" has been held not to be actionable if it was understood by those hearing the remark to be mere abuse.[14]

In order for the defamation to be actionable, it must be made known to, or *published* to, a person who is not the victim. Publication to the victim alone is not a tortious act, because the reputation of the victim is not affected. A republisher of the defamation can be sued just as if he were an original publisher.[15]

The tort of defamation cannot be committed against (a) a dead person or (b) generally, a group of persons. It has been said that "[t]he dead have no rights and can suffer no wrongs."[16] This is consistent with the common law principle of *actio personalis moritur cum persona* — that a personal right of action dies with the death of the person having the right of action — which still applies to the tort of defamation even though it has been abolished by many provinces in relation to other tort or contract actions. A group defamation is generally not actionable unless it can be proved to attack the reputation of the individuals within the group.[17]

The defendant is liable even though he unintentionally defames the victim, or in other words, even though he does not know that what he publishes is defamatory because of facts unknown to him. For example, in *Jones* v. *E. Hulton and Co.*,[18] the defendant was held liable for defaming the plaintiff, notwithstanding the fact that the defamation consisted of matter about a fictitious person who had the same name as the plaintiff. Liability for unintentional defamation has been limited by some provincial defamation statutes.[19]

The defendant can also be liable in tort even though he does not know that what he is publishing contains a defamation. The

common law recognizes that an "innocent disseminator," that is, a person who is not the printer or first or main publisher of the defamation, is *prima facie* liable unless the person proves that he or she did not act negligently. In *Vizitelly* v. *Mudie's Select Library, Ltd.*,[20] the owners of a circulating library were liable in tort for negligently publishing a book containing a defamatory libel of which they were unaware.

The defences available to a defendant in a defamation action include: (a) absolute privilege; (b) qualified privilege; (c) justification (truth); (d) fair comment; (e) *volenti non fit injuria*; and (f) other defences provided by the provincial defamation statutes. Each will be considered.

When the defamation is published on an occasion of absolute privilege, the defendant has a complete defence even though he acted maliciously and caused the maximum damage to the victim's reputation. The occasions of absolute privilege are created both by common law and by statute. The common law occasions of absolute privilege, valid in the common law provinces, attach to statements published in: (a) proceedings of a court exercising judicial authority, or other quasi-judicial proceedings; (b) a petition to Parliament or a legislature; (c) debates in Parliament or a legislature; (d) communications by one high officer of state to another in the course of his official duty; and (e) communications between solicitor and client. A statutory occasion of absolute privilege is prescribed in the *Senate and House of Commons Act*,[21] which absolutely protects the publication of any reports, papers, votes, or proceedings, or any copy thereof published by order or under the authority of either Chamber. Moreover, the majority of the provincial defamation statutes absolutely protect a fair and accurate report of contemporaneous court proceedings published in a newspaper or broadcast.[22]

The common law also recognizes a defence of qualified privilege which provides a defence in respect of a defamatory statement published without malice, but only when the defendant has an interest or duty to communicate the defamatory statement and the recipient of the defamatory matter has a reciprocal interest or duty to receive it.[23] A reasonable belief that such an interest exists is insufficient to give rise to this defence.[24] Generally, the media are precluded from using this defence, on the ground that the media have no duty to publish defamatory matter to the public.

When the defamation is proved to have been published on an occasion of qualified privilege, the onus is on the plaintiff to prove that the defendant acted primarily out of malice — that is, out of spite, ill will, or for some purpose other than that purpose which makes the occasion privileged. While the common law applied the defence of qualified privilege to fair and accurate reports of public court proceedings or of parliamentary or legislative debates, the majority of provincial defamation statutes have extended the defence of qualified privilege to a wider variety of fair and accurate reports.[25] The *Senate and House of Commons Act*[26] protects a person who prints an extract or abstract of a report, paper, votes or proceedings published by order or under the authority of either Chamber, if the extract or abstract is published *bona fide* and without malice.

The defence of justification is the defence of truth. Truth is a complete defence to a tort action for defamation. At common law, the onus was on the defendant to prove the substantial truth of every defamatory imputation. Two provinces have modified the severity of this common law rule by providing that the defence of justification will not fail merely because the defendant has failed to prove the truth of *all* the defamatory allegations, so long as those which are not proved true do not materially injure the victim's reputation having regard to those proved to be true.[27]

The defence of fair comment on a matter of public interest comprises several elements. Generally, the facts upon which the comment is based must be true, and the comment must, of course, be on a matter of public interest. Moreover, the defendant must honestly believe the comment. Thus, in *Cherneskey* v. *Armadale Publishers Ltd.*,[28] it was held that publishers of a newspaper who did not honestly believe the defamatory matter contained in a letter to the editor could not claim a defence of fair comment. In response to *Cherneskey*, some provinces have amended their defamation statutes to protect a republisher of a defamatory comment even though he does not honestly believe it.[29]

Volenti non fit injuria, or consent, is also a complete defence to the tort of defamation. In *Jones* v. *Brooks*,[30] the defendant was protected by this defence from civil liability for having answered questions of private detectives whom the plaintiff had hired to question the defendant and to tape secretly his answers.

The majority of the common law provinces also provide procedural defences relating to a defamation which is published in a newspaper, or broadcast. Generally, no tort action is available unless the plaintiff first gives written notice to the defendant within a limited time period. In addition, the tort action itself must be commenced within a limited time after publication. Moreover, if the defendant publishes a retraction and satisfies other conditions, only actual damages can be awarded. Finally, the publication of an apology by the defendant can be used to mitigate damages.[31]

B. Québec Law

Civil liability for defamation in Québec, as governed largely by Article 1053 of the *Civil Code* and the *Press Act*, differs substantially from the tort of defamation in the English common law provinces. Any defamation, whether oral or written, is actionable if it falls within the general rules of negligence provided by Article 1053. Article 1053 of the *Civil Code* provides:

> Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

As a result, the plaintiff has the burden of proving three elements: (a) a fault on the part of the defendant; (b) a prejudice; and (c) a causal relationship between the one and the other.[32] The *Press Act*[33] provides limited defences for newspapers.

The complex English common law defences of absolute and qualified privilege do not apply in Québec civil law. In Québec, the publication of a defamatory statement in court by a lawyer, witness, or a party is not afforded absolute privilege.[34] So too, a publication of a defamation which would be afforded qualified privilege in English common law, in theory appears to be actionable in Québec civil law if it is determined that there was fault on the part of the defendant. The fact that the defendant acted in good faith is no defence.[35]

Truth, in itself, is no complete defence. Jean-Louis Baudouin states that civil liability can arise when the published facts are true, if the only purpose is to injure the victim.[36]

Insulting words which are published to the victim alone are actionable. In some cases, the insulting statements were contained in letters sent to the victims. No publication to a third party occurred. Nonetheless, the courts ruled that the statements were actionable.[37]

A libel upon a deceased person can give a living descendant a right of action for damages. In *Chiniquy* v. *Bégin*,[38] Greenshields, J., held that civil law in Québec gives a living descendant a right of action for defamatory libel, without justification, upon a deceased.

Thus, as regards non-criminal legal actions for defamation, in the matters of truth, publication, and defamation of a deceased person, the law of Québec differs from the law of the other provinces of Canada.

II. The Law of Criminal Defamatory Libel

A. Provisions of the *Criminal Code*

The provisions of Part VI of the *Criminal Code* concerning defamatory libel are attached as an appendix to this Paper. It will be noted that the *Code* creates three offences of defamatory libel:

Publishing a defamatory libel knowing it to be false	s. 264
Publishing a defamatory libel	s. 265
Extortion by defamatory libel	s. 266

Defences are prescribed in sections 267 through 280.

The following relevant procedural provisions of the *Code* (which are included in the appendix to this Paper) also deal with defamatory libel:

Sufficiency of a count of defamatory libel	s. 513

Requirement and effect of a plea of justification	ss. 539, 540
Private prosecutor not to direct juror to stand by	s. 566
Successful party to recover costs; method of enforcing costs	ss. 656-7
Place of trial when libel published in a newspaper	subs. 434(2)

B. Defamatory Libel Defined

Section 262 of the *Criminal Code* defines defamatory libel as follows:

> (1) A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.
>
> (2) A defamatory libel may be expressed directly or by insinuation or irony
>
> (*a*) in words legibly marked upon any substance, or
>
> (*b*) by any object signifying a defamatory libel otherwise than by words.

Thus, the definition of defamatory libel comprises three major components: (1) the *actus reus*, consisting of matter, publication, likelihood of injuring the reputation of the victim or designed to insult the victim; (2) *mens rea*; and (3) defences, which fall under the rubric of "lawful justification or excuse."

(1) *Actus Reus*

(a) "*Matter*"

"Matter" raises two important issues. These relate first to the form which the matter must have, and secondly to the meaning which the matter may have.

As far as the "form" of the defamatory matter is concerned, the common law distinction between slander and libel is reflected in subsection 262(2), which implicitly excludes slander (normally, an oral defamatory statement) from the ambit of this crime. However, oral statements are criminalized under other offences such as perjury (section 120) and maybe, although this is doubtful, blasphemous libel (section 260). To be a libel, the defamatory matter need not be written but must be an object which is permanent in the sense of being non-transient, for example, a wax figure.[39]

The distinction between slander and libel creates problems in attempting to categorize modern broadcasts. For this reason, many provincial defamation statutes deem defamatory broadcasts to be libels. The fact that the defamation is orally communicated does not mean that the defamation is a slander. In *John Lamb's Case*,[40] it was stated that if a person was aware that what he was reading was a libel, any oral communication of it was also a libel. Moreover, it appears that such an oral communication is a libel whether or not the hearer realizes that the oral communication originates from a written statement. Consequently, the dominant position is that a defamatory radio broadcast read from a script is libellous, while an extemporaneous oral remark is slanderous.[41] Similarly, defamatory words broadcast on live television appear to be libellous, if read from a script.[42] A defamatory motion picture is a libel.[43]

The law of criminal defamation, like the tort, recognizes that words can have two separate and distinct meanings. One meaning which may be defamatory is the natural and ordinary meaning of the words. This can be the literal meaning of the words or a meaning which an ordinary man would infer from the words without special knowledge of other facts. However, even if the natural and ordinary meaning is not defamatory, a defamatory meaning may arise by "true" innuendo, that is, by reason of

special facts and circumstances known to those to whom the words are published.[44] Subsection 513(3) provides that it is sufficient at trial to prove that the libel was defamatory, with or without innuendo.

At common law, the person defamed had to insert in an introductory averment the circumstances which gave rise to the innuendo, in addition to pleading the innuendo itself. However, subsection 513(2) of the *Criminal Code* provides that a count for publishing a defamatory libel can specify the sense of the libel by innuendo, without having to put in the count any introductory assertion to show how the libel was written in that sense. For example, in *R.* v. *Molleur (No. 1)*,[45] the Crown charged in the indictment that the libel arose by way of innuendo, namely, that the words "protector of childless widows" meant seducer of childless widows, and proved, at trial, the extrinsic circumstances which caused persons to understand the words in that sense. Although, in most cases, the matter complained of will be words, subsection 513(1) provides that a count for publishing a defamatory libel is not insufficient by reason only that it does not set out the words which are alleged to be libellous. However, there must be substantial references to identify the words or to locate the objectionable parts.[46]

(b) "*Publication*"

Sections 264 and 265 of the *Code* prohibit the publication of the defamatory libel. Section 263 defines publication as follows:

> A person publishes a libel when he
> (*a*) exhibits it in public,
> (*b*) causes it to be read or seen, or
> (*c*) shows or delivers it, or causes it to be shown or delivered, with intent that it should be read or seen by the person whom it defames or by any other person.

Every publication of a libel is technically a separate offence. Case law has held that each copy of a book sold by the accused is a separate publication, for each of which he could be criminally prosecuted,[47] but this is subject to the special pleas and defences

available in criminal law.[48] However, no offence of libel occurs when the defamatory matter is communicated by one spouse to another, because of the common law principle that husband and wife are one.[49]

Unlike the tort, publication to the person defamed is sufficient for the crime. Moreover, the *Code* requires that the defamer must intend to publish the libel. By analogy, Stephen states that in criminal law a man could not publish a seditious libel by having it fall accidentally out of his pocket.[50] By contrast, in tort, the defendant will be found to have published a libel if the publication is a result of his negligence.[51]

Because the common law provided that a publication occurred wherever the libel was communicated, a special statutory exemption from being amenable to multiple jurisdictions was created for newspapers in 1886. The purpose was to exempt a publisher of a libel contained in a newspaper from being tried in every place where the newspaper was published in Canada.[52] This exemption is now contained in subsection 434(2) of the *Criminal Code*, which provides, in part, that any person charged with publishing a libel in a newspaper is to be tried either in the province where he resides, *or* in the province where the newspaper is printed.

(c) *"Likely to Injure the Reputation of Any Person by Exposing Him to Hatred, Contempt or Ridicule"*

The crime initially focuses upon a libel that is likely to cause injury to reputation by exposing a person to "hatred, contempt, or ridicule." The "hatred, contempt, or ridicule" test has been a commonly used definition of defamation for both the tort and the crime. In 1938, *R.* v. *Unwin*[53] held that a pamphlet published by a Social Credit member of the Legislative Assembly in Alberta, and entitled "Bankers Toadies," which listed the names of several prominent citizens of Edmonton, was defamatory. However, the "hatred, contempt, or ridicule" test does not define all defamatory libels.[54]

(d) *"Or, Designed to Insult The Person of or Concerning Whom It Is Published"*

The crime focuses secondarily upon a libel designed to insult the person of, or concerning, whom it is published. Just as

publication to the victim, being sufficient for the crime, makes the crime broader than the tort, so too, this "designed to insult" tests expands the crime beyond the scope of the tort. In tort, words which tend to insult the victim are not defamatory unless they also tend to injure reputation.[55] This criminal definition captures an insult whether or not it is likely to affect one's reputation. Comparing a magistrate to Pontius Pilate has been held to fall within this definition,[56] although it may be argued that the comparison would also meet the "hatred, contempt, or ridicule" test as well.

This definitional requirement of the effects of the defamatory matter published is as interesting for what it does not say, as much as for what it does say. Although the rationale for creating the crime is the likelihood that a defamatory libel will provoke the person defamed to cause a breach of the peace, the definition does not provide that the libel must be likely to cause a breach of the peace. *R.* v. *Wicks*[57] held that it is not necessary to prove that the defamatory libel was likely to cause a breach of the peace. On the other hand, case law holds that a criminal prosecution is only available for a serious, and not a trivial, defamatory libel.[58]

(2) *Mens Rea*

While the law required that the accused had to have *mens rea* in order to be found guilty of most real crimes, criminal libel was a special case. At common law, prior to *Fox's Libel Act*, the judges concerned themselves with the issue of whether the matter which was published was libellous, and were generally unconcerned with the issue of *mens rea*. Defamatory libel, at common law, also differed from other real crimes because, like the crime of public nuisance, it could be committed vicariously by an employer through the acts of his employees. These historical differences, coupled with the incomplete statutory replacement of the common law, have created uncertainty as to the *mens rea* required for the offence.

The subject of *mens rea* must be considered under three topics: intention to defame; knowledge or ignorance as to the fact that a libel has been published, or that the matter is defamatory; and liability of an employer.

(a) *Intention to Defame*

In general, it appears that the *Code* does not require intention to defame. Cases often stated that malice, in the sense of intention to defame, was not a necessary ingredient of the offence which had to be proved.[59] In the *Georgia Straight* case, the accused had published an article which satirized a local magistrate, by awarding him a "Pontius Pilate Certificate of Justice Award." Morrow, Co. Ct. J., held that intention to insult the judge was not required under the "designed to insult" test because the word "intent" did not appear in the definition of the offence. He stated:

> [I]nstead of the word "intent" the section uses the word "designed"; this word simply means "to put together" or "purpose."[60]

This conclusion is confusing on two grounds. First, the word "design" has been interpreted to mean intention.[61] Secondly, the word "purpose" is used by the criminal law to mean intention.[62] Thus, it may be argued that the offence does require an intention to defame.[63]

(b) *Knowledge or Ignorance as to the Fact that a Libel Has Been Published or that the Matter Is Defamatory*

Although, generally speaking, it is unlikely that the publisher would be ignorant of either of these facts, it is especially likely when the publisher is an innocent disseminator who may not even know that he is publishing a libel, for example, a newspaper delivery boy. At one time, an innocent disseminator was guilty of the crime even if he did not know of the existence of the libel which he published.[64] Although the common law has developed to protect the innocent disseminator, the present state of the law is unclear. Some criminal cases support the principle that for the publisher to be guilty he must know that he is publishing the libel.[65] However, in tort, the defendant is liable if this lack of knowledge is merely due to his negligence.[66] Criminal liability for negligent publication may have been implicitly approved in *R.* v. *Munslow*,[67] but *R.* v. *City of Sault Ste. Marie*[68] is authority that negligence is insufficient to give rise to criminal liability for true crimes.

The *Criminal Code* provides defences for innocent disseminators, but the defences vary according to whether the disseminators

(a) sell anything but a newspaper, or (b) sell newspapers. By subsection 268(1), a person who sells a book, magazine, pamphlet, or other thing which is not a newspaper but which contains the libel, is deemed not to have published the libel if, at the time of sale, he does not know the libel was contained in it. By subsection 267(3), a person who sells a newspaper containing a libel is deemed not to have published the libel unless he knows the libel is contained in it or he knows that libels are habitually contained in it.

Unusual occasions can arise when, although a person knows what he is publishing, he does not know that it is defamatory because of facts unknown to him. In tort, the defendant is liable for these occasions of unintentional defamation. It may be argued that the crime should not include occasions of unintentional defamation, but the law is unclear.[69] However, the accused would clearly be guilty of the offence if he had knowledge of the defamatory words, but believed, in accordance with his own values, that the words were not defamatory — as, for example, a member of a fascist organization stating that a person is anti-Semitic.

(c) *Liability of an Employer*

As pointed out earlier, at common law, employers were vicariously liable for the crime of defamatory libel. For example, newspaper owners were guilty of publishing libels contained in their newspapers even though the owners were not at fault for their publication.[70] *Lord Campbell's Act* altered this position by protecting any employer who could prove that the publication was made without his knowledge, consent, or authority, and that the publication did not arise from want of due care on his part.[71]

Whereas *Lord Campbell's Act* protected any employer, the *Code* protects three kinds of employers, but to various extents: (a) newspaper proprietors, (b) employers of those who sell anything but a newspaper, and (c) employers of those who sell newspapers.

Newspaper proprietors are protected by subsections 267(1) and (2) of the *Code*. Subsection 267(1) deems a newspaper proprietor to be guilty of publishing a libel unless he proves that the libel was inserted into the newspaper without his knowledge and without negligence on his part. However, by subsection 267(2), the giving of general authority to manage the newspaper to a person as

editor, or otherwise, by the newspaper proprietor, is deemed not to be negligence on the part of the proprietor unless it is proved that (a) he intended the general authority to include the authority to insert a libel, or (b) he continued to confer general authority after he knew that a libel had been inserted in his newspaper. This statutory provision incorporated the decision arrived at in *R.* v. *Holbrook*.[72] Thus, in *R.* v. *Molleur (No. 1)*,[73] a newspaper proprietor was convicted of the offence, notwithstanding his testimony that he was absent on the date of publication of the libel complained of, because he knew that the editor had previously published libels in his newspaper. The use of the word "prove" in subsection 267(1) appears to place the persuasive burden upon the newspaper proprietor to prove that he was not negligent on the balance of probabilities.[74]

By subsection 268(2), an employer of a servant selling anything but a newspaper is not deemed to publish the libel unless it is proved that the employer authorized the sale knowing that the defamatory matter is contained in it or, in the case of a periodical (that is, by virtue of section 261, a periodical published at intervals exceeding thirty-one days), knowing that the defamatory matter was habitually contained in it. Thus, unlike newspaper proprietors, this employer is not criminally responsible for a negligent publication. An employer of a servant who sells a newspaper would appear to be protected to the same extent as the servant under subsection 267(3).

Since a corporation is a "person" as defined by section 2 of the *Code*, it is clear that a corporation can be either the victim of a libellous attack, or the accused. To the extent that the chapter on defamatory libel does away with vicarious liability, a corporation would appear to be criminally liable only if held to be liable by reason of the identification or delegation doctrines governing corporate criminal liability. Still, although it may be that employers, including corporations, not protected by the *Code*, such as managers or licensees of television or radio stations are vicariously liable for the offence,[75] this appears doubtful given the Supreme Court of Canada decision in *R.* v. *City of Sault Ste. Marie*,[76] in which it was stated that, with regard to a strict liability offence, an employer can raise a defence of due diligence to exempt himself from criminal liability. Thus, a corporation may be acquitted if those who were the directing mind and will of the corporation exercised due diligence.

(3) Defences — "Without Lawful Justification or Excuse"

Obviously, if the matter published is not defamatory, no offence is committed. But apart from that, the *Criminal Code* only prohibits those defamatory libels that are published "without lawful justification or excuse." Of course, this offence must be read subject to most of the general defences available for any crime. No one, for example, would suggest that a person would be guilty of this crime if the libel was published under duress. In addition to these defences however, other special defences exist for the crime of defamatory libel.

As regards these defences for the crime, six topics must be discussed, which include both specific *Code* defences, and common law defences: (a) absolute privilege, (b) qualified privilege, (c) fair comment, (d) justification, (e) public benefit, and (f) other defences.

(a) *Absolute Privilege*

At common law, when a libel is published on an occasion of absolute privilege, the accused has a complete defence whether or not he has a malicious intention, and no matter how harmful the libel. The occasions of absolute privilege were created by both the English common law and English statute. Although some of these are defences at common law by virtue of subsection 7(3) of the *Code*, others have been converted into statutory defences by paragraphs 269(*a*) and (*b*) and 270(*a*) and (*b*) of the *Code* without being referred to as "absolute privilege" defences, namely: proceedings of a court exercising judicial authority; an inquiry made under the authority of a statute, and so forth; a petition published to Parliament or a legislature; and a paper published by order or under the authority of Parliament or a legislature. We will discuss each in turn.

– *In Proceedings of a Court Exercising Judicial Authority*: Paragraph 269(*a*) of the *Code* protects a person who publishes defamatory matter in a proceeding held before or under authority of a court exercising judicial authority. This incorporates the common law position that generally any defamatory statement made by a judge, counsel, or witness, is absolutely privileged when made in the proceedings of a court exercising judicial authority.

- *In an Inquiry Made under the Authority of an Act*: Paragraph 269(*b*) protects a person who publishes defamatory matter in an inquiry made under the authority of an Act, or by order of Her Majesty, or under the authority of a public department,[77] or a department of the government of a province. In one respect, this defence may be broader than the common law. At common law, the rule extends to inquiries which are not courts of law only if they are conducted in a quasi-judicial manner.[78] However, the *Code* may include inquiries which are not quasi-judicial.[79]

- *In a Petition to Parliament or a Legislature*: Paragraph 270(*a*) protects a person who publishes defamatory matter contained in a petition to the Senate or to the House of Commons, or to a legislature. This is a parliamentary privilege recognized by the common law courts.[80]

- *In a Paper Published by Order or under the Authority of Parliament or a Legislature*: Paragraph 270(*b*) protects a person who publishes defamatory matter contained in a paper published by order or under authority of the Senate or House of Commons, or of a legislature. This is a statutory privilege, originally created in response to the case of *Stockdale* v. *Hansard*,[81] which held that no such parliamentary privilege existed. Section 280 provides that the accused may prove this by adducing as evidence a certificate, to the effect that the defamatory matter was published by order or under the authority of one of those respective bodies, which is signed by the respective Speaker or clerk. The judge shall then direct a verdict of not guilty to be entered.

In addition to these statutory defences, the common law recognizes three occasions of absolute privilege which completely protect a person who publishes defamatory matter. They are occasions when defamatory matter is published (a) by one high officer of state to another in the course of his official duty,[82] (b) by a member of Parliament or of a legislature in the course of Parliamentary or legislative debates,[83] and (c) between solicitor and client.[84] Because these defences are neither altered by, nor inconsistent with, the statutory defences provided by the *Criminal Code*, they are available to an accused.

(b) *Qualified Privilege*

In addition to the protection afforded by absolute privilege, the common law protected defamatory matter published on an occasion of "qualified privilege." An occasion of qualified privilege arises only when the accused has an interest or duty, whether legal, social, or moral, to communicate the defamatory matter, and the recipient of the defamatory matter has a reciprocal interest or duty to receive it.[85] In addition, the accused must not publish the libel maliciously, that is, primarily out of ill will or any other improper purpose. Generally, the accused's lack of belief in the truth of the libel is proof of malice, but this is not conclusive. Rare occasions exist when the common law protects a person who does not believe the truth of what he publishes because he is under a duty to pass it on. The drafters of the first Canadian *Criminal Code* drew up a series of defences which they believed were declaratory of qualified privilege at common law. However, because the principles which determined the defence of qualified privilege had not clearly evolved at that time, many of these defences were drafted in such a way that they were, and remain today, broader than the present common law.

The *Code* provides defences of qualified privilege which were designed to protect the publication of defamatory matter among certain individuals or groups, and the publication of defamatory matter to the public at large in privileged reports. However, the defences of the former category, as defined by the *Code*, are broader than the present common law, because they do not require reciprocity of duty or interest. Instead, under the *Code*, a unilateral interest or duty is sufficient. The *Code* provides five defences that *attempt* to codify the occasions of qualified privilege. We will discuss each of them in turn.

- *On Invitation or Challenge*: Paragraph 276(*a*) protects a person who publishes defamatory matter on the invitation or challenge of the person in respect of whom it is published. At common law, the principle of reciprocity requires that the person replying to the invitation or challenge must have a duty or interest to make the statement[86]; that the person receiving the reply must have an actual interest or duty to receive it; and that the publisher is not protected when he is the originator of the defamatory matter.[87] However, because this *Code* provision does not specifically require a reciprocal interest or duty,

it appears to be broader than the common law.[88] This *Code* defence may even protect the publisher when he is the originator of the defamatory matter.[89]

- *To Refute Defamatory Matter*: Paragraph 276(*b*) protects a person who publishes defamatory matter that is necessary to publish in order to refute defamatory matter published in respect of him by another person. As drafted, this defence may be both broader and narrower than the common law. At common law, the statement must be communicated to someone who has an interest or duty to receive it; moreover, the publisher need not be the victim of the original defamation which he is refuting, so long as he has a duty, or interest, to protect the victim (for example, a solicitor responding to a defamation on behalf of his client). Since this *Code* defence does not require reciprocity of duty or interest, the *Code* defence appears to be broader than the common law.[90] However, by not expressly protecting a publisher who is not the victim of the defamation, the *Code* defence is narrower than the common law.

- *To Answer Inquiries*: Section 277 protects a person who publishes defamatory matter in answer to inquiries made to him relating to a subject in respect of which the person by whom, or on whose behalf, the inquiries are made, has an interest in knowing the truth, or who, on reasonable grounds, the publisher believes has such an interest. At common law this defence would generally protect defamatory matter published about a servant by a former employer to a prospective employer,[91] but not defamatory matter published for profit by a commercial credit reporting agency, because seeking profit does not satisfy the requirement of duty needed for reciprocity.[92] This *Code* defence is broader than the common law, because it does not require that the defendant have a duty or interest to communicate the defamatory matter, nor that the recipient have an actual duty or interest to receive it.[93] Therefore, commercial credit reporting agencies may be protected by this *Code* defence.

- *To Give Information to a Person*: Section 278 protects a person who publishes defamatory matter to give information to a person who has an interest in knowing the truth with respect to the subject-matter of the libel, or is believed, on reasonable

grounds by the publisher, to have such an interest. This defence appears to be based on the tort case of *Coxhead* v. *Richards*.[94] The later tort case of *Watt* v. *Longdon*[95] held that *Coxhead* v. *Richards* meant that reciprocity of duty or interest had to exist between the publisher and the receiver of the libel. However, the *Code* defence is broader than the tort because the defence does not require that reciprocity of duty or interest exist.[96]

- *To Seek Remedy or Redress*: Section 279 protects a person who publishes defamatory matter for the purpose of seeking remedy or redress for a public or private wrong, from a person who has, or who the publisher believes, on reasonable grounds, has the right or is obligated to remedy the wrong. This defence was once recognized in early tort cases such as *Fairman* v. *Ives*.[97] The common law is now narrower than this defence, because it requires that the person who receives the libel must have an actual interest in receiving it.

These *Code* defences of qualified privilege themselves specify four additional conditions. First, the defamatory matter must be relevant. Secondly, the defamatory matter generally must be published in good faith. Thirdly, the defamer must believe that the defamatory matter is true. At common law (applying tort cases), this belief does not have to be based upon reasonable grounds. In fact, a belief which arises from gross, unreasoning prejudice is sufficient.[98] By contrast, section 278 of the *Code*, but only that section, requires that the accused must have reasonable grounds for his belief in the truth of the matter. Fourthly, either the matter must not exceed what is "reasonably sufficient" in the circumstances, or the conduct of the accused must be "reasonable" under the circumstances. At common law generally (again, applying tort cases), publication of defamatory matter in a newspaper, or by other media, is considered excessive unless, under the circumstances, there is a legitimate duty or interest for the publisher to do so — for example, where the defamation is intended to rebut a defamatory remark published "to the world" in Parliament or in a newspaper.[99] However, these *Code* defences appear to extend beyond the common law defence of qualified privilege to protect the media, provided that the public had a genuine interest in knowing about the defamatory matter.[100]

The *Code* also protects four types of reports that would fall within the second category of qualified privilege, namely: reports

that relate to proceedings in Parliament, and so forth; public court proceedings; extracts of papers published by order or under the authority of Parliament, and so forth, or in a petition to Parliament, and so forth; and public meetings. We will discuss each in turn.

Subsection 271(1) protects a person who publishes a defamatory libel in good faith in a fair report of the proceedings of the Senate or House of Commons or a legislature, or a committee thereof. However, by subsection 271(2), a report of evidence taken in these respective bodies upon a bill relating to any matter of marriage or divorce, is not so protected, if published without authority of the respective Houses. This provision, legislated in 1923 at the request of the Senate, was designed to prevent publication in newspapers of the evidence presented before the Senate Standing Committee on Divorce.[101] The report may be in the form of a parliamentary sketch of the proceedings, so long as it fairly and honestly conveys the impression made on the hearer.[102]

Subsection 271(1) also protects a person who publishes a defamatory libel in good faith in a fair report of the public proceedings of a court exercising judicial authority. A report of proceedings which are not open to the public (for example, *in camera* proceedings) is not protected. At common law, fair reports of foreign court proceedings are not protected unless the public has a legitimate and proper interest in the subject.[103] Section 162 makes it an offence to publish in these reports indecent matter, or certain particulars relating to marriage, subject to exceptions provided in section 162.

Paragraph 270(*c*) protects a person who publishes a defamatory libel in an extract from, or abstract of, a petition to, or a paper published by order or under the authority of, the House of Commons, Senate, or legislature, if published in good faith and without ill will. This statutory defence was first enacted in England by *The Parliamentary Papers Act, 1840*.[104] Unlike the common law, this defence places the onus upon the accused to prove absence of ill will.[105]

Section 272 protects a person who publishes a defamatory libel in good faith in a fair report in a newspaper of the proceedings of a public meeting if (a) the meeting is lawfully convened for a lawful purpose, (b) the report is fair and accurate, (c) the publication of the libel is for the public benefit, and (d) the accused does not

refuse to publish in a conspicuous place in a newspaper a reasonable explanation or contradiction by the person defamed in respect of the defamation. Unavailable at common law, this statutory defence was adopted from the *Newspaper Libel and Registration Act, 1881*.[106] This defence is available only when the report is published in a newspaper. A public meeting, as defined here, appears not to include a meeting where the public has no right to admittance even though a reporter is present, such as a municipal council meeting.[107] Because the meeting must be lawful, a meeting which results in an unlawful assembly, or riot, or which is held in contravention of municipal by-laws is not covered by this defence.[108]

(c) *Justification*

Truth, although a complete defence to a civil defamation suit in English common law, was originally no defence at all to a charge of criminal defamatory libel. In fact, it was said that "the greater the truth the greater the libel."[109] Although the severity of this rule was later modified by statute, truth is not a complete defence to a charge of criminal defamatory libel. By section 275, an accused person can defend a charge of criminal defamatory libel by proving that the defamatory matter, at the time of publication, was both true *and was published for the public benefit*. The accused must prove the truth of all the defamatory imputations complained of by the victim.[110] This defence appears to place a persuasive burden upon the accused to prove the truth of the libel.[111]

Subsection 539(1) requires that the defence of justification, if pleaded, must be in writing. Subsection 540(1) provides that if justification is not pleaded, truth can only be inquired into when the accused is charged with publishing a libel knowing it to be false to negative the assertion that the accused knew that the libel was false. Subsections 540(2) and (3) provide respectively that the accused may plead not guilty in addition to the plea of justification; that the two pleas will be inquired into together; and that when the accused is convicted even though he has pleaded justification, the court can consider whether the guilt of the accused is aggravated or mitigated by the plea.

(d) *Fair Comment*

At common law, this defence has evolved to become known as the defence of fair comment on a matter of public interest. The *Code* defence of fair comment lists the subjects which can be commented on. Section 274 of the *Code* protects a person who publishes a defamatory libel by reason only that he publishes fair comments: (a) on the public conduct of a person who takes part in public affairs, or (b) on a published book or other literary production, or on any composition or work of art or performance publicly exhibited, or on any other communication made to the public on any subject, if the comments are confined to criticism.

Applying common law tort principles, we conclude that this defence incorporates several conditions. The facts upon which the comment is based must be true, unless they are otherwise privileged as by originating in a forum where the facts are accorded absolute privilege.[112] The comment must be "fair," in the sense of being the honest opinion of the publisher of the libel. Each republisher of the libel must prove that he also honestly held the opinion, although it may be that evidence to show that the original publisher honestly held that opinion will protect the republisher.[113] Imputations of corrupt and dishonest motives are not protected unless warranted by the facts.[114] Finally, the comment must be on a matter of public interest.[115]

The following criminal cases have analysed this *Code* defence. In the criminal case of *Lafontaine* v. *Filion*,[116] it was stated that the fair comment must be made in good faith. In the *Georgia Straight* case, the trial judge stated that the defence of fair comment did not apply because "the comments were not proved to be true, and they were unfair."[117] If this means that to be a defence to a *Code* charge the comments must indeed be proved true, this is a radical departure from the common law.

(e) *Public Benefit*

Section 273 of the *Code* provides for a defence where a person publishes a defamatory libel that, on reasonable grounds, he believes is true, and that is relevant to any subject of public interest, the public discussion of which is for the public benefit.

This is a defence unique to the *Criminal Code*. It is unavailable at common law.[118] In the *Georgia Straight* case, a defamatory remark upon a magistrate was held not to be protected by the "public benefit" defence. In 1976, a charge of publishing a defamatory libel brought against Claude Ryan, the then editor of *Le Devoir*, was dismissed at the preliminary inquiry. *Le Devoir* had published an article alleging that the provincial government had rented certain machines from a company which was linked to the Mafia. The judge's decision clearly indicated that the reporter who wrote the article had reasonable grounds to believe in the truth of his allegations, and that the defamatory matter was published in the public interest.[119]

(f) *Other Possible Defences*

As mentioned earlier, the general defences available for all crimes would apply equally to the offence of defamatory libel. Thus, the defences of duress, being under seven years of age, and insanity, are available. However, an important exception is the defence of mistake of fact. The defence of justification, outlined in section 275 of the *Code*, clearly precludes the accused from defending himself on the ground alone that he honestly believed the libel to be true. Furthermore, an additional defence at common law to the tort of defamation is *volenti non fit injuria*, which is that the victim consented to the publication of the defamation. It appears that this is a common law defence to a charge of defamatory libel under the *Criminal Code* by virtue of subsection 7(3) of that *Code*.[120]

C. Offences Relating to Defamatory Libel

The *Code* provides two different offences for publishing a defamatory libel. Section 265 provides that every one who publishes a defamatory libel is guilty of an indictable offence and is liable to imprisonment for two years. Section 264 provides that everyone who publishes a defamatory libel that he knows is false is guilty of an indictable offence and is liable to imprisonment for five years. When an accused is charged under this latter section, the prosecution does not have to prove that the accused actually knew the libel was false. It is sufficient to prove that he had the means of such knowledge.[121] If such knowledge of falsity cannot be

proved beyond a reasonable doubt, he can still be convicted of the included offence of publishing a defamatory libel.[122]

Section 266 outlines the offence of extortion by libel. Subsection 266(1) provides that every one commits an offence who, with intent (a) to extort money from any person, or (b) to induce a person to confer upon or procure for another person an appointment or office of profit or trust, publishes or threatens to publish or offers to abstain from publishing or to prevent the publication of a defamatory libel. Subsection 266(2) provides that everyone commits an offence who, as a result of the refusal of any person to permit money to be extorted, or to confer or procure an appointment or office of profit or trust, publishes or threatens to publish a defamatory libel. Each offence is indictable, with up to five years imprisonment. An example of this offence is *R.* v. *Plaisted*,[123] where the accused attempted to reinstate a person to his former job by threatening the former employer with publication of the circumstances under which the employee resigned.

D. Who May Be Libelled?

At common law, the crime of defamatory libel could be committed when the libel was upon a group,[124] or upon a dead person if the accused intended to attack the living relatives of the deceased.[125] Unlike the ccmmon law, the *Code* appears to preclude a dead person from being the victim of a criminal libel.[126] However, whether the *Code* precludes any group from being the victim of a criminal libel is somewhat uncertain.[127]

E. Who May Commence a Criminal Prosecution?

The criminal prosecution, while usually commenced by the victim of the libel, can, by virtue of section 455 of the *Code*, be commenced by any person who, on reasonable and probable grounds, believes that the accused has committed the crime. In *R.* v. *Unwin*, Ford, J.A., stated that the crime appeared to be so much of a civil character that it was common practice for the Crown to take no part in the prosecution other than what is formally necessary to get the case before the Court.[128] However,

by subsection 496(1), if the accused elects a speedy trial by a judge alone, a private prosecutor cannot go to trial if the Attorney General or his agent or in British Columbia, a clerk of the peace, does not prefer the indictment, or the Attorney General refuses to allow a private prosecutor to prefer the indictment.[129] In provinces with no grand jury procedure, if the accused elects to be tried by judge and jury, a private prosecutor may prefer the indictment with the consent of the court, but, if the Attorney General or his agent opposes such leave being given, the private prosecutor may be unable to obtain the court's consent.[130] By section 566, a private prosecutor cannot direct jurors to stand by.[131]

F. Who May Be Liable for the Costs of the Prosecution?

The *Code* has unique provisions relating to costs incurred by a defamatory libel prosecution. By section 656, the person in whose favour judgment is given in defamatory criminal libel proceedings is entitled to a court order against the opposite party awarding him or her reasonable costs. By section 657, if those costs are not paid forthwith, the party in whose favour judgment is given may enter judgment for the amount of the costs by filing the order in the superior court of the province where the trial was held, and that judgment is enforceable against the opposite party in the same manner as if it were a judgment rendered there against him in civil proceedings.[132] The person who initiates the prosecution by laying an information for defamatory libel is liable to pay these costs even if the case is subsequently conducted by the Crown.[133]

CHAPTER FOUR

Defects in the Present Criminal Law

I. Constitutional Problems

Subsection 2(*b*) of the *Canadian Charter of Rights and Freedoms* guarantees freedom of thought, belief, opinion and expression. This is subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. It may be argued that the present *Code* offence of defamatory libel may violate this constitutional guarantee by its conditions in respect of (a) truth as a defence, and (b) *mens rea*.

As regards truth, in *Gleaves* v. *Deakin*,[134] Lord Diplock argued *in obiter* that the English common law offence of defamatory libel contravened Article 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, which guarantees freedom of expression subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society. Lord Diplock focused especially on the fact that under English law the accused must prove that the publication of a libel that was true was for the public benefit, or else be convicted.[135] In the United States, it has been held that truth alone is a complete defence in a criminal prosecution or civil action for defamation, at least when the defamation is upon a public figure or a public official.[136]

As regards *mens rea*, in the United States the guarantee of freedom of speech in the First Amendment of the *Constitution* of the United States limits severely the scope of the crime of

defamatory libel. In several cases,[137] the United States Supreme Court held that a defamatory statement published about a public official or public figure cannot give rise to criminal or civil liability unless it is proved that the statement was made with knowledge that it was false, or with reckless disregard as to its truth or falsity.

Subsection 11(*d*) of the *Charter of Rights and Freedoms* provides that any person charged with an offence has the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, subject to reasonable limits. This constitutional guarantee may render unconstitutional some reverse onus provisions present in the sections governing the *Code* offence of defamatory libel. Applying the principle that when a criminal statute requires an accused to "prove" an excuse, the burden of proof is imposed upon the accused to prove that defence on the balance of probabilities,[138] it appears that the chapter on defamatory libel contains *at least* three reverse onus clauses: (a) subsections 267(1) and (2), the defence for newspaper proprietors discussed previously; (b) section 275, the defence of justification; and (c) section 280, which outlines the method by which the accused proves that the libel was in a paper published by order or under the authority of Parliament or a legislature. Subsection 11(*d*) of the *Charter* may render unconstitutional the requirement that newspaper proprietors prove no negligence on their part and the requirement that the accused prove that a true libel is published for the public benefit. In *R.* v. *Oakes*,[139] the Ontario Court of Appeal ruled that for a reverse onus clause to be reasonable, and hence constitutionally valid, the connection between the proved fact and the presumed fact must, at least, be such that the existence of the proved fact rationally tends to prove that the presumed fact exists. The presumed fact must also be one which is rationally open to the accused to prove or disprove. It may be argued that, in the case of a newspaper proprietor charged with publishing a defamatory libel, the existence of the proved fact (publication of a libel in a newspaper) may not rationally tend to prove the existence of the presumed fact (publication of the libel by the newspaper proprietor). Therefore, this reverse onus clause may be an unreasonable limitation upon the presumption of innocence. One may argue that the reverse onus clause requiring an accused to prove that a true libel was published for the public benefit may be an undue burden of proof to place on the accused and therefore an unreasonable limitation upon the presumption of innocence.

Subsection 15(1) of the *Charter of Rights and Freedoms* provides that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. Although it does not come into effect until three years after the *Charter* came into force, this subsection, when it does come into effect, may render unconstitutional sections 267 and 268 on the basis that different laws apply to newspaper proprietors, newspaper sellers, sellers of other defamatory matter, and their employers.

Given this analysis, a constitutional challenge to the present *Code* offence may well succeed, unless appropriate legislative action is taken to amend the crime of defamatory libel so that it complies with the *Charter*.

In addition to constitutional problems, the law of criminal defamatory libel contains several other defects which can best be categorized under the headings of arrangement, expression, and substance.

II. Arrangement

The arrangement of the sections on defamatory libel in Part VI of the *Code* is too complicated. Some of the sections in the chapter on defamatory libel contained in Part VI of the *Code* might more appropriately belong elsewhere in the *Code*. Conversely, some sections in other Parts of the *Code* more appropriately belong in Part VI.

Two obvious sections which appear to belong elsewhere in the *Code* are sections 261 and 266. Section 261, the first section in the chapter on defamatory libel, is a definition section only. It defines "newspapers." Thus, it would be more conveniently located in section 2 at the beginning of the *Code*, which is the definition section. Section 266, which criminalizes extortion by libel, would

be more logically placed beside section 305, the offence of blackmail.

Two obvious sections which are located elsewhere in the *Code*, but might more appropriately be placed in the chapter on defamatory libel, are sections 539 and 540. Together, these outline the requirements and the effect on sentence of the plea of justification. These would be more conveniently located beside section 275, the defence of justification.[140]

III. Expression

Criticism can also be levelled at the chapter relating to defamatory libel with regard to the language used in the actual sections. Here we find redundancy and confusion, excessive detail, legal fictions, gaps, uncertainty, and inconsistency.

An example of redundancy and confusion is evident in subsection 262(1). It defines defamatory libel, and includes in its definition the requirement that the matter must be "*published*, without lawful justification or excuse." Using the word "published" is clearly redundant, because those sections which create the offence of defamatory libel, sections 264 and 265, specify that the offence is committed by *publishing* a defamatory libel. Moreover, defences to the crime are specifically provided by sections 267 to 280, which do not even use the words "lawful justification" or "excuse" in order to identify them as defences. Therefore, the use of the phrase "without lawful justification or excuse" in the section which defines defamatory libel is, one may argue, otiose. Worse still, the use of these terms is confusing, because the concepts of "publication," and "without lawful justification or excuse" are not relevant to the issue of whether the defamatory libel exists. Instead, they are relevant to the separate issue of whether the offence has been committed.

Criticism can also be levelled at the use of excessive detail in this chapter. Perhaps the best example of this fault is that the *Code*

has four different sections, sections 276 to 279, which were the defences of qualified privilege intended to protect libels published to a particular person or group, and not, generally, to libels published to the public at large. Section 276 protects a libel published on invitation or challenge or to refute defamatory matter. Section 277 protects a libel published in response to an inquiry. Section 278 protects a libel which is published to an interested person. Section 279 protects a libel which is published to obtain remedy or redress. Together these sections exemplify the principle that a libel is protected when there is at most a unilateral interest or duty to communicate or to receive the libel. A more concise and clearer defence of qualified privilege could be drafted.

The *Code* also suffers from gaps. Specifically, it is silent as to other defences which are provided by the law of defamation. Three defences of absolute privilege are not mentioned: (a) defamations published between solicitor and client; (b) defamations published in the course of Parliamentary or legislative debates; and (c) defamations published by one high officer of state to another in the course of his official duties. Consent, which appears to be a defence, is not mentioned. Moreover, the defences of qualified privilege and fair comment, as drafted in the *Code*, do not exhaust the full range of those same defences in tort.[141]

The *Code* can also be criticized because of its use of legal fictions. The *Code* creates defences for a defamatory libel which is published in certain circumstances. The rationale for these defences is that, in these circumstances, the right to know outweighs the right to reputation because the general welfare of society requires the right to know. The *Code* method of providing defences is to "deem" that no defamatory libel is published. It would be preferable for the *Code* to adopt another approach, since clearly the libel has been published or communicated to another person.

Uncertainty is also present in the *Code*. Three examples of uncertainty relate to: (a) the common law distinction between slander and libel; (b) the *mens rea* needed for the offence; and (c) defences.

As noted earlier, the *Code* reflects the common law distinction between slander and libel. By doing so, the *Code* also preserves the uncertainties which arise from this distinction. For example, it is uncertain whether defamatory television or radio broadcasts

could constitute the offence. If the broadcast is in a "permanent" form, it is a libel. As a result, the broadcast appears to be libellous only if it is recorded, or if live, when read from a script. Uncertainty also arises as to the *mens rea* needed to commit the crime. Sometimes the offence clearly requires *mens rea*. For example, subsection 268(1) requires that any person who sells anything other than a newspaper which contains a defamatory libel, is not guilty of the offence unless he knows that it contains the libel. However, the offence can be one of strict liability. Other innocent disseminators may be guilty of the offence because they acted negligently. Newspaper proprietors are guilty of the offence if they fail to prove that they were not negligent. Although doubtful, it may be that for those employers not expressly protected by the *Code*, the crime is one of vicarious liability. It is uncertain if unintentional defamation gives rise to criminal liability.

Uncertainty also exists with regard to which defences are defeated by the accused's failure to publish in good faith. Some sections clearly do not require that the libel must be published in good faith. These would include section 269 which protects defamatory matter published in a judicial proceeding or a statutory inquiry, paragraph 270(*a*) which protects defamatory matter published in a petition addressed to Parliament, and paragraph 270(*b*) which protects defamatory matter contained in any paper published by order of Parliament — all of which are in effect defences of absolute privilege although not defined in such terms. Also, section 275, the defence of justification, would appear not to require good faith.[142] Yet, other sections which are similarly worded would appear to require good faith. Indeed, one section — section 274, the defence of fair comment — has been stated to require that the accused publish in good faith.[143]

The *Code* also suffers from inconsistency in many areas. Its provisions that attempt to codify the defences of qualified privilege are inconsistent in defining whether malice defeats them. At common law, a libel which was published on an occasion of qualified privilege was not protected if it was published maliciously. Most of the relevant defence provisions in the *Code* have replaced the common law notion of malice with the requirement that the accused act in good faith. But not all defence provisions have done so. For example, section 276, which protects a libel published on invitation or challenge or to refute defamatory matter, does not expressly require that the accused act in good faith.

Perhaps this defence would protect a libel published out of any improper motive including ill will. Paragraph 270(*c*) requires that the accused publish a defamatory libel in an extract of a petition or paper published by order or under the authority of Parliament in good faith and without ill will. This defence places the onus upon the accused to prove that he acted without ill will. This differs from the common law, where the onus is placed upon the victim to prove that the accused acted maliciously.

The *Code* is also inconsistent in that the mental element provided by the *Code* for some innocent disseminators differs depending upon what the accused sells. For example, by section 268, sellers of anything but a newspaper are only guilty if they are proved to have knowledge of the libel complained of by the victim. By contrast, when the libel is contained in a periodical which is not a newspaper, the sellers are not guilty, but their employers are guilty if they knew that the periodical habitually contained libels. By subsection 267(3), sellers of newspapers are also guilty if they knew that the newspaper habitually contained libels. It is questionable that a seller of a thing which is not a newspaper should be acquitted of the crime if he knew that the thing habitually contained libels. This kind of inconsistency, because it affects the *mens rea* needed for the offence, is more serious than the other kinds. In fact, this kind of inconsistency is not so much a defect of form as a defect of substance.

IV. Substance

More serious than defects of form are defects of substance, which relate to the nature of the offence. The present offence can be criticized because in many ways it is broader in scope than the tort of defamation. Also, the offence is defective because it is not a full *mens rea* offence.

A. Unwelcome Inconsistencies between the Tort and the Crime

Defamatory libel is both a crime and a tort. Since the turn of the century, the common law of defamation has been found to be defective in several respects. As a result, the tort law of defamation has been amended by statute in several provinces, in order to bring the tort law of defamation in line with how our society now views the proper balance that should exist between the right to reputation and the right to free speech. However, the criminal law of libel, perhaps because it has so rarely been used and was so generally ignored, has remained largely unchanged. The result is that the crime of defamatory libel, moreso than the tort, largely preserves the common law of defamation and all its inherent defects. Clearly, this development has created unwelcome inconsistencies between the crime and the tort.

The close relationship between the crime and the tort gives rise to two problems. First, there is uncertainty as to whether some of the principles of the law of defamation which have been clearly developed in tort apply to the crime. Secondly, it is questionable whether a criminal prosecution for defamatory libel should be available to the victim when a tort action for defamatory libel would be unavailable to him. In other words, should the crime be broader than the tort? Generally, a person would expect tort law to be broader in its range and scope than criminal law, because the criminal law should be used with restraint, as an instrument of last resort, to remedy only those wrongs which are clearly public wrongs. Of course, some other torts are also crimes, but that is probably because the wrong is harmful to the public interest. We therefore feel that libels which are, it is argued, not public wrongs and which are not even actionable in tort should not amount to crimes. Making them crimes — as the *Code* now does — would appear to be a misuse of the criminal law.

The criminal definition of defamatory libel is at variance with the tort definition of defamation. The criminal definition uses two tests: (a) the "hatred, contempt, or ridicule" test and (b) the "designed to insult" test. The "hatred, contempt, or ridicule" test is only one of a series of tests used in tort law to define what is defamatory. Tort law now commonly uses a broader test: did the defamatory matter tend to lower the victim's reputation in the eyes

of right-thinking members of the community generally? The "designed to insult" formula is an unfortunate test. It means that a libel can be classified as defamatory for the crime, when it would not be classified as defamatory for the tort. An insulting remark does not necessarily attack a person's reputation. Consequently, the criminal definition of defamatory libel is broader than the tort definition.

The preservation by the crime of the common law distinction between slander and libel is also defective. The common law adopted the test of permanency to determine if defamatory matter is libellous. A major rationale for the permanency test was that a libel could be widely disseminated to a large audience, without having its effect lessened over time. However, with the creation of modern forms of broadcasting such as radio and television, a defamation, whether permanent or not, can be disseminated world-wide. Moreover, using the form of the defamatory attack to determine the remedies which are available to the victim is illogical, because it ignores the harm that can be caused by a defamation, whatever its form.

The "publication" required for the crime is defective in two ways. One defect relates to a difference between the tort and the crime; the other relates to a substantive defect of publication generally — that is, that each *publication* of a libel is a separate and distinct wrong for which the publisher can theoretically be sued or prosecuted.

The *Code* definition of "publication" for the purposes of the crime is broader than the meaning of "publication" for purposes of the tort, in that publication to the victim alone is sufficient for the crime. Publication to the victim alone is inconsistent with the concept that a defamatory libel is an attack upon reputation. A libel published to the victim alone cannot attack the victim's reputation because reputation is what other people think of the victim, not what the victim thinks of himself.

The criminal law meaning of publication is also defective because it can convert what is essentially one offence into a series of offences. Subject to the limitations imposed by Canadian law,[144] each publication of the libel is a separate offence for which the accused can be prosecuted. Therefore, theoretically a libel which is contained in a single edition of a book or newspaper may result in

more than one defamatory libel prosecution against the same accused. This theoretical possibility, although remote, is surely too onerous. All such publications should give rise to only one prosecution. However, if the accused otherwise republishes the defamation, it is justifiable that each republication should be a separate offence.

The tort of defamation has, in some circumstances, been modified to provide more defences for the publisher of the libel than exist at common law. The *Code*, however, has not made those changes. Again, this has resulted in the ambit of the crime inadvertently becoming broader than the tort. Three examples should suffice to illustrate the narrower range of defences in criminal law as compared to the tort: (a) the defence of fair comment; (b) the defence of qualified privilege; and (c) the defence of justification.

The defence of fair comment, at common law, requires that each republisher of the libel must have an honest belief in the comment. The consequences of this principle were clearly displayed in *Cherneskey* v. *Armadale Publishers Ltd.*,[145] where the Supreme Court of Canada held that a newspaper could be successfully sued for libel for publishing opinions expressed in a letter to the editor, if the editors of the newspaper did not honestly hold the same opinions, or at least, did not introduce any evidence to show that the authors of the letter honestly held those opinions. This appears to be the *Code* position. However, several provinces have amended their defamation statutes in order to avoid the result of *Cherneskey*.[146]

As regards the defence of qualified privilege, the crime of defamatory libel protects four kinds of privileged reports: extracts of papers published by authority of Parliament, and so forth; fair reports of the proceedings of Parliament or a legislature; fair reports of public court proceedings; and, fair and accurate reports in a newspaper of a public meeting. By contrast, several provinces have expanded the list of fair and accurate reports which can be published in good faith.[147] The result is that a victim could not sue for defamations contained in certain categories of fair and accurate reports, but could launch a criminal prosecution to obtain redress.

In addition, the *Code* is more restrictive than the tort in protecting some occasions of qualified privilege. The *Code*

generally requires that the publisher believe the libel to be true. However, on rare occasions tort law protects the publisher even though he does not believe in the truth of the libel.[148] For example, if a soldier were ordered by his commanding officer to report to him all information about another person, the soldier would probably have a valid defence to a tort action even if he believed that libellous information contained in the report was false, because he is under a duty to pass it on. Such a defence appears to be unavailable to an accused because it is inconsistent with the statutory defences of the *Code*.

The defence of justification is narrower in criminal law than in tort. In criminal law, the accused has to prove that the libel was true and that it was published for the public benefit. In tort, truth alone is a complete defence. As Mr. J. R. Spencer so cogently stated: "If it is inadvisable to make such conduct tortious, it is intolerable that it should be criminal."[149] Yet, some provinces have made true statements not published for the public benefit actionable by legislation designed to protect privacy.[150] Should the criminal law also be used to prohibit such statements?

B. Lack of Full *Mens Rea*

As we have seen, some uncertainty exists as to the *mens rea* needed to commit the offence, but it can be at least an offence of strict liability. First, there is not full *mens rea* as needed in other crimes. Thus, the defence of honest mistake of fact, or even a defence of reasonable mistake of fact, does not generally apply to this crime. For example, under part of section 275, the defence of justification, the defendant must prove the truth of the libel. Secondly, innocent disseminators who are not specifically protected by the *Code*, may be guilty if they are negligent; newspaper proprietors are guilty if they are negligent. Moreover, it is uncertain whether the offence is one of vicarious liability for those employers who fall outside the protection of the *Code*, and whether it covers unintentional defamers. It is inappropriate that a criminal offence be defined in such a manner so as not to fall clearly within the general principles of criminal liability. In addition, the constitutional guarantee of freedom of expression contained in the *Canadian Charter of Rights and Freedoms* may have fundamentally changed the offence of defamatory libel. Our

courts may now develop this offence along American lines, with the result that public officials or public figures could only prosecute for a defamation which the accused knew was false, or which he published with reckless disregard as to its truth or falsity.

CHAPTER FIVE

The Question of Abolition or Retention of Criminal Defamatory Libel

I. Defamatory Libel and Fundamental Values

The existing crime of defamatory libel is an offence which originated in a violent society ruled over by a powerful monarch and has yet survived relatively unscathed in our democratic, perhaps more peaceful society. Accordingly, in addition to the various issues raised by the defects in the *Criminal Code* provisions, there is the more fundamental issue of whether defamatory libel should be a crime at all.

In *Our Criminal Law*,[151] this Commission emphasized that the criminal law is a blunt instrument and one of last resort to be used with *restraint*.[152] Accordingly, "[t]he real criminal law should be confined to wrongful acts seriously threatening and infringing fundamental social values."[153]

The present crime of defamatory libel protects two fundamental values — reputation and privacy. Protection of reputation is apparent from the definition of defamatory libel outlined in subsection 262(1) which requires, in part, likelihood of injury to the reputation of any person by exposing him to hatred, contempt, or ridicule. Protection of privacy is apparent from the defence of justification outlined in section 275 which requires that, as well as being true, the libel must be published for the public benefit.

As was stated in *Damage to Property: Vandalism*:

> Internal logic will be achieved in part by ensuring that each offence is directed towards the protection of an appropriate value and that offences are grouped so as to avoid unnecessary mixing of values in any given area of the *Code*.[154]

Given that the use of the criminal law to protect the value of privacy is to be a separate study by this Commission, a crime of defamation which protects the values of both reputation and privacy would appear unnecessarily to mix those values.

If there is to be a crime of defamation, therefore, it should in our view be restricted to protection of one value — reputation. Those aspects of the present crime relating more to privacy (for example, the public benefit requirement in the present defence of justification, or a possible new crime such as the publication of "poison-pen" letters[155]), should be dealt with in offences designed to protect that separate value.

II. Defamatory Libel: The Problem Stated

The question is: Should there be a crime of defamation protecting reputation?

In answer we would begin by re-emphasizing the need to use criminal law with restraint. The Department of Justice has agreed with the Commission in this regard, arguing that as a general principle:

> [T]he criminal law should be employed to deal only with that conduct for which other means of social control are inadequate or inappropriate, and in a manner which interferes with individual rights and freedoms only to the extent necessary for the attainment of its purpose.[156]

We proposed the following test, among others, for determining whether an act should be a crime: "[A]re we satisfied that criminal

law can make a significant contribution in dealing with the problem?"[157]

Would a crime of defamation make a significant contribution in dealing with the problem of defamatory publications in our society? Creating such a crime in the new *Code* may well serve to educate the public that reputation is a fundamental value to be protected by society. However, in our view, this question can only be answered affirmatively if a crime of defamation can be demonstrated in the context of modern society to have a successful impact independent of other remedies which may be available to the victim.

III. A Crime of Defamation: A Significant Contribution?

Seven important factors need to be considered in this connection:

(a) How often is the crime prosecuted?
(b) How valid today is the original rationale for the crime?
(c) How have other jurisdictions considered reforming the crime of defamation?
(d) How would abolition of the crime affect society?
(e) How adequate is the civil remedy?
(f) How effective is the crime as a deterrent?
(g) How useful would a restricted crime of defamation be?

A. Frequency of Use

The crime of defamatory libel is rarely prosecuted. Although its statistics are not comprehensive, the Canadian Centre for Justice Statistics has provided information for the ten year period from 1963 to 1973 which illustrates that prosecutions for this crime are rare (See Table on page 48).

YEAR	PERSONS CHARGED	PERSONS CONVICTED	SUSPENDED SENTENCE WITH PROBATION	SUSPENDED SENTENCE WITHOUT PROBATION	FINE	GAOL
1963	6	4	1	1	2	
1964	4	1		1		
1965	2	1			1	
1966	3	1	(SENTENCE UNKNOWN)			
1967	5	4		1	1	2
**1968	3	3	1	1	1	
* 1969	5	2			2	
* 1970	2	2				2 (under 1 month)
* 1971	4	4	1	2	1	
* 1972	1	1	(SENTENCE UNKNOWN)			
* 1973	1	1	1			

** Does not include Québec.
* Does not include Québec and Alberta.

Another illustration to this effect is that we have been unable to find more than four published decisions on defamatory libel prosecutions since 1969.[158]

These statistics indicate that the problem of defamatory attacks is not often remedied by way of a criminal prosecution. By contrast, assault, which like defamatory libel is both a crime and a tort, is often prosecuted. Why is this? It may be argued that this is so because assault is considered a public wrong, whereas defamatory libel is considered largely a private wrong. For example, in the context of preferring an indictment by a private prosecutor, it has been stated that "a clear distinction must be drawn between cases involving offences of a 'public' nature such as murder or theft, and those which are fundamentally of a 'private' character, such as criminal libel."[159] Moreover, this notion of defamatory libel as more a private than a public wrong is borne out by the more frequent resort to the civil than to the criminal remedy, as shown by the larger number of reported cases of civil defamation actions than of criminal prosecutions.

B. Rationale

As noted earlier, the crime of libel was originally created by the Star Chamber for two reasons — to prevent attacks against state officials and to prevent duelling by private persons. It may be argued that neither suffices today.

In order to protect the institutions of the state, the common law created the crimes of seditious libel and blasphemous libel. These are presently outlined respectively in sections 60-62, and section 260 of the present *Code*. They are, however, separate crimes from defamatory libel and as such, fall outside the scope of this Paper.

The second reason was prevention of duelling. Now while this was a major problem in seventeenth century England, it no longer is today in Canada. People today pursue non-violent remedies for attacks on reputation.

C. Other Jurisdictions

Other jurisdictions have recognized the need to reform a crime of defamatory libel based largely on English common law.

The most recent proposals for reform of criminal defamatory libel are those of the English Law Commission, which proposed a restricted offence of defamation.[160] Rejecting the argument that defamation tends to cause a breach of the peace, they argued instead that an attack upon a person by means of a deliberate gravely defamatory lie is as morally wrong as an attack upon his person or property and is capable of doing serious harm both to the individual and to society. The Law Commission proposed, therefore, an indictable offence to catch the worst sort of case, the case of the "character assassin" — the person who, with intent to defame, publishes a defamatory statement about another which is untrue, likely to cause the victim serious harm, and known or believed to be untrue. In addition, the form of the defamation would be irrelevant; publication must be made to a third party (that is, not to the victim alone), and a defamation upon a deceased person or a group would not be a crime.[161]

Other jurisdictions go further. They either do not have, or have proposed the abolition of, criminal defamatory libel. Scotland does not have an offence of criminal defamatory libel, although some defamatory statements fall within the scope of other offences.[162] The New Zealand Committee on Defamation recommended abolition. Arguing that the only function of a criminal law against defamatory libel consistent with the general functions of criminal law would be where the defamation caused, or is likely to cause, a breach of the peace, they concluded that the civil action available for defamation provides adequate protection for defamatory statements and renders the criminal action superfluous.[163] The Criminal Law and Penal Methods Reform Committee of South Australia argued that the crime of libel should not be retained except for libels in relation to affairs of state and the administration of justice, because any tendency to breach the peace can be restrained sufficiently by the civil remedy of damages.[164] In the United States, the American Law Institute put no offence of defamation in its *Model Penal Code*. This omission was explained in an earlier tentative draft in which, although the issue of fomenting hatred against a group or individual was raised and

covering provisions drafted in brackets, it was agreed that libel of individuals should not be a criminal offence.

> It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security. This may be because the harm done is very grave, as in rape or murder, so that even the remote possibility of being similarly victimized terrifies us. Or our alarm may, as in the case of petty theft or malicious mischief, derive from the higher likelihood that such lesser harms will be inflicted upon us by those who manifest disregard of other people's ownership. It seems evident that personal calumny falls into neither of these classes in the U.S.A., that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country.[165]

D. Effect of Abolition on Society

Obviously, abolition of the crime of defamation would mean that an attack upon reputation would no longer be denounced by society as a public wrong. A major concern is that abolition would signal that society condones the publication of defamations. Consequently, it could lead to an increase in behaviour previously prohibited by the criminal law. However, abolition of the crime does not inevitably lead to the conclusion that the activity is condoned by society. After all, a defamatory publication would still constitute a private wrong remedied by a civil suit. As noted earlier, some jurisdictions argue that abolition of the crime is proper precisely because the civil remedy is adequate.

E. Adequacy of the Civil Remedy

The obvious alternative remedy to a criminal prosecution for defamatory libel is the civil action. After all, defamatory libel is both a crime and a tort. Accordingly, the victim can choose to prosecute, or to sue, or to do both.

In fact, the civil remedy appears to be a more suitable remedy for the victim than a criminal prosecution. This is because the civil action, unlike the crime, is designed to remedy the victim's injury to his reputation by compensation in terms of damages.

However, important questions arise as to the adequacy of the civil action in combatting the problem of defamations:

(a) Is the civil remedy available, and
(b) if available, does the civil remedy adequately compensate the victim?

(1) Is the Civil Remedy Available?

In the common law provinces the civil remedy does not cover all aspects of criminal libel. For the crime, publication of the libel to the victim alone is sufficient, and truth is not a complete defence. Yet, in our view, this broader scope of the crime is unjustified. Regarding publication of the libel to the victim alone, we re-emphasize that,. as a matter of principle, those defamations which are not actionable as torts should not amount to crimes. Regarding truth not being a complete defence, we have previously noted that whether there should be a crime to publish true but injurious statements not published for the public benefit is an issue best examined in the upcoming privacy study.

(2) If Available, Does the Civil Remedy Adequately Compensate the Victim?

It has been argued by some consultants that the civil remedy for damages is inadequate for the victim because, once costs are paid, the damage award is often insufficient compensation. However, recent defamation suits have resulted in large damage awards. In the civil cases *Vogel* v. *C.B.C.*[166] and *Munro* v. *Toronto Sun Publishing Corp.*,[167] the victims, who were both public officials, received damage awards of $125,000 and $75,000 respectively. Punitive damages too can be awarded not only in the common law provinces but also in Québec by reason of its *Charter of Human Rights and Freedoms*.[168] Moreover, in appropriate cases, an injunction, breach of which is punishable for contempt of court, can be granted to prevent publication of a defamation.

By contrast, in criminal prosecutions for defamatory libel, victims at present receive no damage awards (although the proposed *Bill C-19* would have permitted punitive damages[169]). All they are entitled to are costs in a reasonable amount if judgment goes in their favour. Moreover, even if the accused is fined, the fine is paid to the government, not to the victim.

Proponents of a crime of defamation may argue that a civil remedy is not as practical as the crime because the defamer may be too poor to be worth suing. Admittedly prosecution for the crime of defamatory libel provides a remedy against defamers too poor to be worth suing. However, in principle, to conclude that the crime of defamatory libel is needed to deal with libels by impecunious people "amounts to saying that there should be one law for the rich, who can afford to pay damages, and another for the poor, who cannot afford to do so and therefore should be sent to prison."[170] Nonetheless, concern was expressed by many consultants about the judgment-proof owners of sensationalist newspapers, some of whom may indeed have personal assets, but who successfully use the corporate shield to protect themselves from liability. In our view, such abuses are not widespread. We agree with Peter Burns that "[t]his rationale for retaining the crime is rather like using a sledgehammer to crack a nut."[171]

It has also been argued by some consultants that without a criminal law against defamation, disseminators of hate propaganda might circumvent the offences (attacks on groups) outlined in sections 281.1 to 281.3 of the *Code* by restricting such attacks to individuals. However, the effect of abolition of the crime of defamation on the dissemination of hatred is, we think, an issue better addressed by our current study on hate propaganda, than by this study on the crime of defamation. After all, the definition of "defamatory" is not restricted to an attack tending to cause a person to be hated. Nor are all modes of spreading hatred necessarily defamatory.

F. The Effectiveness of the Crime as a Deterrent

It has been forcefully argued by some consultants that a crime of defamation is needed to deter in particular the activities of the "yellow press." It was felt that the presence in the *Code* of a

crime of defamation deterred such papers from deliberately publishing a libel. Apparently, the publishers of such newspapers are not deterred by the possibility of civil actions against them because they regard damage awards as operating costs to be offset by the profits resulting from publication, or alternatively, they may have few financial resources to pay a damage award.

Central to this argument is the concept of deterrence. Deterrence may be defined as the preventive effect of the threat of punishment upon potential offenders, and of the actual experience of punishment upon previously punished offenders. The literature on deterrence reveals a complexity of issues. E. A. Fattah, for example, argues that the doctrine of deterrence is based on many assumptions, many of which have been seriously challenged, have never been adequately verified, and which, to some extent, are not capable of scientific validation.[172] The merits of a case for the crime of defamation on the basis that the present crime deters where the tort does not by reason of fear of punishment appears doubtful. The fact that defamations are rarely prosecuted supports the argument that the crime deters only if it prevents the publication of defamations. If this were so, one would expect that civil actions for defamations would be equally uncommon, which is not the case. If it is assumed that the severity of punishment or alternatively, that perceived certainty of punishment acts as a deterrent, then the deterrent effect of the present crime of defamation is doubtful. First, according to the previously noted statistics table, punishment does not appear to be severe, since a jail sentence is not often imposed. Secondly, there would appear to be the perceived certainty of a civil action, not criminal prosecution, given that the victims normally resort to the civil remedy.

Whether a restricted crime of defamation would, by contrast, act as an effective deterrent is an open question. The present crime, it may be argued, is an ineffective deterrent because prosecutors realize that it is in many ways anachronistic and incredibly complex. As a result, they may be reluctant to prosecute. Perhaps a restricted crime consistent with general principles of criminal law would be more simply defined. Prosecutors might then be willing to prosecute in appropriate cases, thereby increasing the effectiveness of the new crime as a deterrent.

G. The Usefulness of a Restricted Crime of Defamation

The issue here is whether a restricted crime of defamation would be useful. To answer this question, it is first necessary to determine how a crime of defamation should be defined.

This Commission believes that if there is to be a crime of defamation it should be treated as any other crime. In other words, it must remain consistent with general principles of criminal law both as to form and to substance. As regards form, the elements of the crime, and the defences to the crime, must be clearly defined in order to avoid uncertainty. As regards substance, the crime must be a full *mens rea* offence, there must be personal as opposed to vicarious liability, and the burden of proof must be on the prosecution to prove all the elements of the crime beyond a reasonable doubt. It is instructive here to consider the proposals of the English Law Commission for a restricted crime of defamation — which some consultants favoured — to see if those proposals satisfy these general principles of criminal law.

As noted earlier, the Law Commission proposed an indictable offence designed to catch the worst sort of case, the case of the "character assassin" — the person who publishes a deliberately defamatory statement about another which is untrue and which he knows or believes to be untrue and where there is a clear public interest in the prosecution of the accused. The elements of the offence can be summarized as:

(a) no statement should be the subject of criminal proceedings unless it was untrue, defamatory, and likely to cause the victim significant harm;

(b) "defamatory" should be defined as "matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally";

(c) "publication" would extend to any means of communication, whether by broadcasting, writing, speech or otherwise;

(d) it would be necessary to prove that the accused was a party to the defamatory publication itself and not merely to the publication of the book, etc. in which it was contained;

(e) publication to the person defamed alone would not suffice — publication would have to be to some third party;

(f) publication of defamatory material about the dead or of a group or class of persons would not be a criminal offence;

(g) the accused must have intended to defame and must have known or believed the statement to be untrue.[173]

However, the Law Commission recognized that the proposed offence of criminal defamation would not effectively sanction one particular kind of mischief, namely, the publication of "poison-pen" letters. First, it would be inappropriate because it is designed to prevent the deliberate publication of false defamations, not to prevent the shock and fear caused to the recipients of "poison-pen" letters. Secondly, it would be ineffective because it would not prevent (a) the publication of a letter with no defamatory content (the Law Commission gives the example of a letter sent to an elderly lady stating that a man can see her every time she goes to the bathroom[174]), and (b) the publication of a letter to the victim alone. Therefore, the Commission proposed a new summary offence to penalize those who publish "poison-pen" letters. This offence can be summarized as penalizing any person who causes any other person to receive a communication, written or otherwise, which is grossly offensive, or of an indecent, shocking or menacing character, for the purpose of causing needless anxiety or distress to that or any other person.[175]

These proposed offences are relatively clear and simple. However, in order to codify comprehensively the offence of defamation, the Law Commission had to resolve issues which were complex in nature: (a) the relationship between the crime and the civil law of defamation; (b) whether the offence should be a *mens rea* offence and one of personal liability; (c) whether the prosecution should prove all the elements of the offence; and (d) the procedural provisions needed to make the new restricted offence work.

Regarding the first issue, the civil law was relied upon to determine what is "defamatory" and what defences are available. The Law Commission adopted the definition of "defamatory" proposed by the Faulks Committee, that is, "matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally."[176] Yet, this definition has been criticized as too narrow, because it may not cover situations where a person falsely publishes that a woman has been raped, or that a person is insane, hideously deformed, or unable to

pay his debts.[177] The Australian Law Reform Commission proposed a broader definition of "defamatory" as matter

> ... which tends (a) to affect adversely the reputation of that person in the estimation of ordinary persons; (b) to deter ordinary persons from associating or dealing with that person; or (c) to injure that person in his occupation, trade, office or financial credit.[178]

Regarding defences the Law Commission argued that, in principle, no one should be guilty of the crime of defamation if he is not liable in a civil action. Accordingly, the defence of absolute privilege should apply on the same occasions as it applies to civil proceedings. However, the Law Commission did not propose defences equivalent to the civil law defences of qualified privilege and fair comment. These defences are defeated where the plaintiff proves that the defendant acted maliciously. In most cases, absence of belief in the truth of the defamatory statement is conclusive evidence of malice. These defences would seem to be largely irrelevant to an offence requiring that the accused intended to defame and knew or believed the statement to be false, since the accused, if convicted, would in effect be found to have acted maliciously. However, the Law Commission recognized one exception: a special defence, recognized in civil law, when the defendant passes on a defamatory statement made by another person which he does not believe to be true when he is under a duty to do so.

The problem in applying defences available in a civil action to the offence of defamation is compounded in Canada by the fact that a lack of uniformity exists in provincial legislation as to what defences are available in a civil defamation action. Moreover, this approach fails to address the more fundamental question of whether the defences available in a civil action are adequate. For example, the Australian Law Reform Commission proposed an expanded fair report defence to protect, in appropriate circumstances, the republisher of a defamatory statement.[179]

Regarding the issue of *mens rea*, the Law Commission proposed that the crime be a full *mens rea* offence. The accused must intend to defame and know or believe that the defamation is false. In addition, the crime must be one of personal liability.

Regarding the issue of burden of proof, the Law Commission proposed that the prosecution prove that the accused intended to

defame, and that the statement was untrue, defamatory, and likely to cause significant harm. However, they favoured a proposal that a reverse onus of proof be placed on the accused to prove on the balance of probabilities that he did not know or believe the statement to be untrue. Without this provision, the offence would be of limited usefulness. Otherwise, the accused could probably not be convicted where the untruth was not based on the accused's personal observation, because the fact of the untruth would be insufficient to establish knowledge or belief in its falsity.[180]

Regarding the issue of the procedural provisions needed to make the proposed offence of defamation work, the Law Commission proposed:

> (a) the Director of Public Prosecutions should have sole responsibility for the conduct of proceedings;
>
> (b) the accused should be obliged to give particulars before trial of the grounds of his not believing the statement to be false;
>
> (c) the accused should be obliged to give notice before the trial if he requires the prosecution to prove the falsity of the statement in question;
>
> (d) the accused should be required to give notice before trial of his intention to rely on the defence of absolute privilege, and of the special defence of passing on a defamatory statement although believing it to be untrue when under a duty to do so;
>
> (e) where the accused has made no admission as to the falsity of the statement in issue, and the jury has returned a verdict of not guilty, there should be a provision whereby the court could require the jury to return a special verdict as to whether the statement in question was true; and
>
> (f) where both civil and criminal proceedings are in progress relating to the same publication, the judge in the civil action should have a discretion to stay that action until after trial of the criminal offence.[181]

Obviously, as the proposals of the English Law Commission indicate, it is possible to draft a restricted crime of defamation which satisfies many of the general principles of criminal law. Yet, as evidenced by their proposals, the crime would be inevitably complex, given the need to define with certainty the elements of

the offence, appropriate defences, and necessary procedural matters. Serious attention would have to be given to potential constitutional problems. For example, a requirement that the accused prove on the balance of probabilities that he did not know or believe the defamation to be false runs contrary to the general principle that the prosecution prove all elements of the offence beyond a reasonable doubt. Would it contravene the presumption of innocence guarantee of the *Charter*? Not that these problems could not be overcome. However, the bottom line is whether a restricted crime would be useful in combatting the problem of deliberate and serious defamations in our society.

It may be argued that a restricted crime of defamation is useful if it is an effective deterrent and if it provides advantages over the civil remedy. But, given the inevitable complexity of any such crime, would these conditions be satisfied?

In our view, these conditions would not be satisfied. Consider the following questions. If there were no previously existing crime of libel, would it be necessary to create one now? Would a restricted crime of defamation result in a fundamental shift in the mode of legal redress chosen by the victim of the defamation? Given a choice between a civil action for damages (where negligence is sufficient and the burden of proof is on the defamer to prove truth), or a criminal prosecution (where to be consistent with general principles of criminal law *mens rea* and untruth should be proved by the prosecution), would a victim choose a criminal prosecution, knowing he would have to prove these elements beyond a reasonable doubt? We are inclined to the conclusion that a crime of defamation would not be used often even to prosecute the deliberate character assassin.

IV. Conclusion

Undoubtedly, reputation is a fundamental value in our society. An attack upon reputation may well result in serious consequences to the victim. Let us be frank. Deliberate character assassinations ought not to be tolerated by society. Nonetheless, as we have

emphasized throughout this Paper, the criminal law must be used with restraint. For reasons previously explored at some length, we do not feel that a crime of defamation would be able to do better that which is already done by the civil law of defamation. Nor would it seem to be an effective deterrent. Therefore, we do not feel that a crime of defamation could make a substantial contribution in dealing with the problem of defamatory publications in our society. Accordingly, we recommend that our *Criminal Code* should contain no crime of defamation, even in a restricted form.

CHAPTER SIX

Recommendations

1. There should be no offence of defamation in the new *Criminal Code* or elsewhere.

2. To carry out this primary recommendation, the following measures should be taken.

(a) The new *Code* should contain no provisions corresponding to the following present *Criminal Code* sections:

sections 262-263 (definition of "defamatory libel" and "publishes");

sections 264-265 (offences of publishing a libel knowing it to be false, publishing a libel);

sections 267-280 (defences to a defamatory libel prosecution);

section 281 (jury verdict in cases of defamatory libel);

sections 656-657 (costs in defamatory libel cases, method of enforcing costs);

section 566 (private prosecutor in defamatory libel cases not entitled to direct jurors to stand by); and

subsection 434(2) (place of trial when accused charged with publishing defamatory libel in newspaper, or conspiracy to so publish).

(b) If the new *Code* contains a provision corresponding to present *Code* section 513 concerning the sufficiency of a count charging libel, it should be amended by striking out the word "defamatory" in the present section.

(c) The definition of "newspaper" (presently section 261) should be located within the general definition section of the new *Code*.

(d) Sections 7, 8 and 9 of the *Senate and House of Commons Act* should be amended by striking out the words "or criminal" in all those sections, the words "and prosecuted" in subsection 7(1), and the words "or prosecuted" in sections 8 and 9.

The offence of extortion by libel, section 266, is a means of blackmail rather than an offence of defamation. As part of its reform of the present theft and fraud offences, this Commission previously recommended a new blackmail offence which would specifically include blackmail by threatening another with injury to reputation in order to obtain money, property or other economic advantage.[182] In addition, there is in progress a related study on threats and intimidation which will examine the question of obtaining non-economic advantage by threats to reputation and to other interests. Accordingly, we will make no recommendation here concerning this offence.

Endnotes

1. *Criminal Code*, R.S.C. 1970, c. C-34, s. 260 (blasphemous libel), ss. 60-2 (seditious libel), s. 262-5 (defamatory libel), s. 159 (obscene writing or thing). It has been held that publication is not an essential element of making an obscene photograph contrary to paragraph 159(1)(*a*) of the *Code*. See *Re Hawkshaw and The Queen* (1982), 69 C.C.C. (2d) 503 (Ont. C.A.). Leave to appeal to the Supreme Court of Canada granted Nov. 1, 1982.

2. The statutory offence of *scandalum magnatum* was created by 3 Edw. 1, c. 34 (U.K.). See also Veeder, "The History and Theory of the Law of Defamation (1)" (1903), 3 *Colum. L. Rev.* 546, at pp. 553-555; Kelly, "Criminal Libel and Free Speech" (1958), 6 *U. Kan. L. Rev.* 295, at pp. 297-298.

3. A fourth category was later created by statute, namely imputations of unchastity or adultery upon a woman. See, *e.g. Libel and Slander Act*, R.S.O. 1980, c. 237, s. 17.

4. *De Libellis Famosis* (1606), 5 Co. Rep. 125a; 77 E.R. 250 (Star Chamber).

5. *Bushell's Case* (1670), Vaughan 135; 124 E.R. 1006 (C.P.).

6. In *R.* v. *Shipley* (1784), 4 Dougl. 73; 99 E.R. 774 (K.B.), the position of the judges was reaffirmed, leading inevitably to parliamentary intervention to alter the law in favour of the jury.

7. *The Libel Act, 1792*, 32 Geo. III, c. 60 (U.K.).

8. *The Libel Act, 1843*, 6 & 7 Vict., c. 96 (U.K.), commonly known as *Lord Campbell's Act*.

9. *An Act respecting the Crime of Libel*, S.C. 1874, c. 38, later revised as *An Act respecting Libel*, R.S.C. 1886, c. 163.

10. *The Criminal Code*, 1892, S.C. 1892, c. 29.

11. Excellent texts about the English law of defamation include P. Lewis, *Gatley on Libel and Slander*, 8th ed. (London: Sweet and Maxwell, 1981); C. Duncan and B. Neill, *Defamation* (London: Butterworths, 1978); and P. F. Carter-Ruck, *Libel and Slander* (London: Faber and Faber, 1972).

12. Some provinces deem defamatory broadcasts to be libels. See, *e.g.*, *Libel and Slander Act*, R.S.O. 1980, c. 237, s. 2; *Defamation Act*, R.S.N.S. 1967, c. 72, s. 2; *Libel and Slander Act*, R.S.B.C. 1979, c. 234, s. 2. Other provinces have abolished the distinction between slander and libel, to make any defamation actionable *per se*. See, *e.g.*, *Defamation Act*, R.S.P.E.I. 1974, c. D-3, subs. 1(b), s. 2; *Defamation Act*, R.S.A. 1980, c. D-6, subs. 1(b), s. 2; *Defamation Act*, R.S.N.B. 1973, c. D-5, ss. 1, 2; *The Defamation Act*, R.S.M. 1970, c. D20, subs. 2(b), s. 3. This distinction is not recognized by the civil law of Québec.

13. *Sim* v. *Stretch* (1936), 52 T.L.R. 669 (H.L.).

14. *Field* v. *Davis*, [1955] C.L.Y. 1543.

15. *Watkin* v. *Hall* (1868), L.R. 3 Q.B. 396.

16. *R.* v. *Ensor* (1887), 3 T.L.R. 366, at p. 367 (Cardiff Assizes) *per* Stephen, J. In *Small* v. *Globe Printing Co.*, [1940] 2 D.L.R. 670 (Ont. H.C.), Rose, C.J.H.C., at p. 671 stated that "[t]he general rule that defamatory words written concerning a dead person ... give no cause of action to his relatives, is not contested."

17. *Knupffer* v. *London Express Newspaper Ltd.*, [1944] A.C. 116 (H.L.).

18. *Jones* v. *E. Hulton and Co.*, [1909] 2 K.B. 444 (C.A.), aff'd. [1910] A.C. 20 (H.L.). See also *Cassidy* v. *Daily Mirror Newspapers Limited*, [1929] 2 K.B. 331 (C.A.); *Newstead* v. *London Express Newspaper Limited*, [1940] 1 K.B. 377 (C.A.). See also Mauro, "Unintentional Libel in the Law of Defamation" (1956), 28 *Man. Bar News* 72, 103.

19. For example, Nova Scotia provides a specific defence for unintentional defamation. See *Defamation Act*, R.S.N.S. 1967, c. 72, s. 15 which provides a defence for an unintentional defamer if he exercises all reasonable care in publishing the libel, and makes an offer of amends.

20. *Vizetelly* v. *Mudie's Select Library Limited*, [1900] 2 Q.B. 170 (C.A.).

21. *Senate and House of Commons Act*, R.S.C. 1970, c. S-8, ss. 7-8.

22. Eight provinces now protect absolutely fair and accurate newspaper or broadcast reports of public court proceedings that are published contemporaneously. See, *e.g.*, *Defamation Act*, R.S.N.B. 1973, c. D-5, s. 10; *Defamation Act*, R.S.P.E.I. 1974, c. D-3, s. 11, *Libel and Slander Act*, R.S.O. 1980, c. 237, s. 4.

23. *Adam* v. *Ward*, [1917] A.C. 309 (H.L.).

24. *Hebditch* v. *MacIlwaine*, [1894] 2 Q.B. 54 (C.A.); *Wing Lee* v. *Jones*, [1954] 1 D.L.R. 520 (Man. Q.B.).

25. See, *e.g.*, the lengthly list of privileged reports contained in the *Libel and Slander Act*, R.S.O. 1980, c. 237, s. 3.

26. *Senate and House of Commons Act*, R.S.C. 1970, c. S-8, s. 9.

27. *Libel and Slander Act*, R.S.O. 1980, c. 237, s. 23; *Defamation Act*, R.S.N.S. 1967, c. 72, s. 8.

28. *Cherneskey* v. *Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067. Because they did not honestly believe in the comment, the publishers of a newspaper could not use the defence of fair comment for a letter to the editor. The majority judgment is unclear whether evidence to show that the orginal publisher honestly held the belief would have made the defence of fair comment available to the newspaper. For criticisms of *Cherneskey*, see: Klar, "Developments in Tort Law: The 1978-79 Term" (1980), 1 *Supreme Court L. Rev.* 311, at pp. 314-330; Doody, "Torts — Libel — Malice — Newspaper Loss of Fair Comment Defence for Letters to the Editor" (1980), 58 *Can. Bar Rev.* 174; Johnston, "Defamation — Fair Comment on a Matter of Public Interest" (1981), 1 *Canterbury L. Rev.* 260; Martin, *infra*, note 29.

29. Four provinces have made this change in defamation law, as have both the Yukon and Northwest Territories. See, *e.g.*, *Libel and Slander Act*, R.S.O. 1980, c. 237, s. 25; *Defamation Act*, R.S.A. 1980, c. D-6, s. 9; *Defamation Act*, R.S.N.B. 1973, c. D-5, as am. by S.N.B. 1980, c. 16; *The Defamation Act*, R.S.M. 1970, c. D-20, as am. by S.M. 1980, c. 30, s. 3. The protection offered these republishers generally falls into one of two categories. Either the republisher will be protected if a person could honestly hold that opinion, or the republisher will be protected if a person could honestly hold that opinion, and the republisher did not know that

the person expressing the opinion did not hold that opinion. Compare the Ontario and Manitoba statutes in this regard.

For an analysis of these statutory changes, see Martin, "Libel and Letters to the Editor" (1983), 9 *Queen's L.J.* 188. The push for this statutory change to the law of defamation came largely from the media. For details of this media lobby, see Skarsgard, "Freedom of the Press: Availability of Defences to a Defamation Action" (1980-81), 45 *Sask. L. Rev.* 287, at p. 311.

30. *Jones* v. *Brooks* (1974), 45 D.L.R. (3d) 413 (Sask. Q.B.).

31. See, *e.g.*, *Libel and Slander Act*, R.S.O. 1980, c. 237, ss. 5, 6, 9.

32. For example, see *Snyder* v. *The Montreal Gazette Limited*, [1978] C.S. 628, (1978), 87 D.L.R. (3d) 5; *rev'd.* as to damages (1983), 20 A.C.W.S. (2d) 485 (Qué. C.A.). Leave to appeal to S.C.C. granted November 3, 1983.

33. *Press Act*, R.S.Q. 1977, c. P-19.

34. See *Langlois* v. *Drapeau*, [1962] B.R. 277.

35. *Flamand* c. *Bonneville et Caouette*, [1976] C.S. 1580.

36. J.-L. Baudouin, *La Responsibilité civile délictuelle* (Montréal: Les presses de L'Université de Montréal, 1973), para. 174, at pp. 129-130.

37. See *Peters* v. *Tardivel* (1899), 15 C.S. 401; *Beaudoin* v. *Vaillancourt* (1926), 42 B.R. 42.

38. *Chiniquy* v. *Bégin* (1912), 7 D.L.R. 65 (Qué. S.C.). On appeal, emphasis was given to the fact that the defendant had defamed the plaintiff by inferring that she was illegitimate. *Chiniquy* v. *Bégin* (1915), 24 D.L.R. 687 (Qué. K.B.); See Symmons, "New Remedies against Libellers of the Dead? A Look at the Recommendations of the Faulks Committee on Defamation" (1979-80), 18 *U.W.O.L. Rev.* 521, at pp. 524-526.

39. See *Monson* v. *Tussaud's Limited*, [1894] 1 Q.B. 671 (C.A.), where Lopes, J., stated at p. 692:

> Libels are generally in writing or printing, but this is not necessary; the defamatory matter may be conveyed in some

other permanent form. For instance, a statue, a caricature, an effigy, chalk marks on a wall, signs, or pictures may constitute a libel.

40. *John Lamb's Case* (1610), 9 Co. Rep. 59 b; 77 E.R. 822 (Star Chamber).

41. The Porter Committee, *Report of the Committee on the Law of Defamation*, Cmnd. 7536 (London: HMSO, 1948), para. 42, at p. 13; Levy, "Open Line Radio Programs and the Law" (1969), 1 *Can. Com. L. Rev.* 160, at p. 164.

42. Whether a television broadcast is a libel or a slander at common law is uncertain. The Law Reform Commission of British Columbia in its *L.R.C. 50, Report on Cable Television and Defamation* (Victoria: Queen's Printer for British Columbia, 1981) at p. 9, argued that the position of television is ambiguous, pointing out that it may be that where the broadcast is not from a permanent source, such as a recording or a written script, but is "live" and extraneous, the broadcast may be a slander. The Faulks Committee, *Report of the Committee on Defamation* Cmnd. 5909 (London: HMSO, 1975) para. 436, at pp. 120-121 remarked that no prosecution for criminal libel could be brought in the case of a live broadcast unless it could be proved that the persons broadcasting the libel were reading from scripts and some listeners or viewers knew this, whereas for the recorded broadcasts it would presumably be easy to show that some listeners or viewers knew that the matter complained of was in a permanent form. Gatley, *supra*, note 11, para. 1600, n. 50, at p. 651, noted that, at an unreported prosecution in respect of a broadcast, it was argued that a broadcast play was not a libel and the prosecution was dismissed.

43. *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures Ltd.* (1934), 50 T.L.R. 581 (C.A.).

44. For example, the offering of services by one lawyer to another would cause some people, who know that advertising by a lawyer is unethical, to understand that the lawyer is guilty of professional misconduct. See the Australian Law Reform Commission, Working Paper 4, *Defamation: Background Paper on Present Law and Possible Changes* (Sydney: Australia Government Publishing Service, 1976), para. 2.31, at p. 37.

45. *R.* v. *Molleur (No. 1)* (1905), 12 C.C.C. 8 (Qué. K.B.)

46. *R.* v. *Bainbridge* (1918), 30 C.C.C. 214 (Ont. S.C., App. Div.). In *Pratte* v. *Maher and the Queen* (1963), 43 C.R. 214 (Qué. Q.B.,

Appeal Side) the count was held sufficient, even though the words complained of were not set out, because there were sufficient details to enable the accused to know what the charge referred to (*e.g.* the name of the victim, and the date and time on which the libel was published).

47. *R.* v. *Carlisle* (1819), 1 *Chit. R.* 451 (K.B.); *R.* v. *Calthorpe* (1863), 27 J. P. 581. In the tort case *Gorton* v. *Australian Broadcasting Commission* (1973), 22 F.L.R. 181 (A.C.T. S.C.), it was stated that a television programme is published in each place where it is seen. However, Canadian law has recognized that, in some circumstances, future tort actions, and presumably, prosecutions for publications of the same libel will not be permitted. See *Thomson* v. *Lambert*, [1938] S.C.R. 253, where the Supreme Court refused to permit a civil suit for defamation against the editor of a newspaper after the victims had successfully recovered against the western distributor of the newspaper in an earlier civil suit in part on the ground that the editor and western distributor were engaged in a joint commercial enterprise.

48. The special pleas of *autrefois acquit* and *autrefois convict* preclude a person from being tried twice for generally the same or a lesser included offence. These pleas would appear to apply to a case where the accused instantaneously broadcasts a defamatory libel to thousands of people. However, where the libel is contained in one edition of a book or newspaper, these pleas may not apply, depending on the circumstances. In *The Duke of Brunswick* v. *Harmer* (1849), 14 Q.B. 185; 117 E.R. 75 (Q.B.), the defendant was successfully sued for publishing a back copy of a newspaper which was more than seventeen years old. It may be argued that, if an accused is convicted for the original publication of the libel in a newspaper he could be prosecuted for his later publication of the same libel in a back copy. In the United States, several jurisdictions have adopted a "single publication" rule, so that the publication of a libel in one edition of a newspaper or book, or one broadcast over radio and television, or one exhibition of a motion picture to an audience, gives rise to only one cause of action. See, *e.g.*, L. Eldredge, *The Law of Defamation* (Indianapolis: Bobbs-Merrill, 1978), at pp. 209-213.

49. *R.* v. *Reinke* (1972), 7 C.C.C. (2d) 410 (Ont. Co. Ct.); *R.* v. *Lord Mayor of London* (1886), 16 Q.B.D. 772. However, *Gatley*, *supra*, note 11, para. 248, at p. 115, states that it is by no means certain that this is still the law.

50. J. Stephen, *A History of the Criminal Law of England*, Vol. 2 (London: Macmillan and Co., 1883), at p. 352.

51. See the circumstances of *Weld-Blundell* v. *Stephens*, [1920] A.C. 956 (H.L.).

52. *Debates of the House of Commons*, Dominion of Canada, Second Session — Sixth Parliament, 51 Victoria, 1888, at p. 1513.

53. *R.* v. *Unwin* (1938), 69 C.C.C. 197 (Alta. C.A.). By contrast, it was held in *R.* v. *Deslauriers*, [1968] R.L. 301, that a statement to the effect that the accused gave a large sum of money to an M.P. was not defamatory.

54. For example, an allegation of a clever fraud, while defamatory, may not fall within the "hatred, contempt, or ridicule" test. *Tournier* v. *National Provincial and Union Bank of England*, [1924] 1 K.B. 461 (C.A.), at p. 487 *per* Atkin, L.J. An allegation imputing that a woman was raped would be defamatory because it tended to cause others to "shun and avoid" her, even though no moral discredit could be imputed to her. *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures Ltd.*, *supra*, note 43.

55. See, *e.g.*, *Van Baggen* v. *Nichol* (1963), 38 D.L.R. (2d) 654 (B.C. S.C.), where an imputation alleging that the plaintiff was older than he actually was, was held not to be defamatory because there was no suggestion of senility verging on insanity; *Masters* v. *Fox* (1978), 85 D.L.R. (3d) 64 (B.C. S.C.) where it was held in part that allegations that a woman was an "old maid," etc., although insulting, were not defamatory; Handford, "Tort Liability for Threatening or Insulting Words" (1976), 54 *Can. Bar Rev.* 563, at p. 575; Levy, *supra*, note 41, at p. 164.

56. *R.* v. *Georgia Straight Publishing Ltd.* (1969), 6 C.R.N.S. 150 (B.C. Co. Ct.).

57. *R.* v. *Wicks*, [1936] 1 All. E.R. 384 (C.C.A.); *Gleaves* v. *Deakin*, *infra*, note 58. However, the English Law Commission, Working Paper No. 84, *Criminal Libel* (London: HMSO, 1982), para 3.8, at p. 45, argued that "it seems that, if the libel is published only to the person defamed, then the risk of a breach of the peace is, exceptionally, a necessary ingredient of the offence."

58. *R.* v. *Wicks*, *supra*, note 57, where du Parcq, J., stated at p. 386:

> It is true that a criminal prosecution for libel ought not to be instituted and, if instituted, will probably be regarded with disfavour by judge and jury, when the libel complained of is of so trivial a character as to be unlikely either to disturb the

peace of the community or seriously to affect the reputation of the person defamed.

Although the above statement only indicates that trivial defamatory libels ought not to be prosecuted, recent criminal defamation cases have also concluded that no criminal prosecution is available when the libel is not serious. See *Gleaves* v. *Deakin*, [1979] 2 All. E.R. 497 (H.L.); *Gleaves* v. *Yorkshire Television*, *The Times*, April 29, 1978, at p. 2. In *The Royal Gazette Limited* v. *The Attorney-General*, a 1982 decision of the Supreme Court of Bermuda, it was held that the libel complained of was not serious enough to warrant granting leave to prosecute *The Royal Gazette*, the only daily newspaper in Bermuda. This Commission thanks the Attorney-General of Bermuda, Mr. Saul Froomkin, Q.C., for his kind assistance in sending the Commission a copy of this case.

It may also be that the public interest should require the institution of criminal proceedings. In England, unlike Canadian law, section 8 of the *Law of Libel Amendment Act, 1888*, 51 & 52 Vict., c. 64 (U.K.), provides that an application must be made to a judge in chambers for leave to commence a prosecution for a criminal libel published by a newspaper. In two recent cases, *Goldsmith* v. *Pressdram Ltd.*, [1977] 2 All. E.R. 557 (Q.B.), and *Desmond* v. *Thorne*, [1982] 3 All. E.R. 268 (Q.B.), the courts have held that three principles must be satisfied before such an application can be granted: a) there must be a clear *prima facie* case; b) the libel must be serious, so serious that it is proper for the criminal law to be invoked; and c) the public interest should require the institution of criminal proceedings.

59. *R.* v. *Munslow*, [1895] 1 Q.B. 758 (C. Cas. Res.); *R.* v. "*The World*" (1876), 13 Cox C.C. 305; *R.* v. *Law* (1909), 15 C.C.C. 382 (Man. C.A.) (*obiter*). In *R.* v. *Lemon*, *R.* v. *Gay News Ltd.*, [1979] 1 All. E.R. 898 (H.L.) the majority of the House of Lords held that the crime of blasphemous libel required an intention to publish the libel, but not an intention to blaspheme. In so doing, the court rejected the concept that intention to blaspheme was relevant either because of *Fox's Libel Act*, or because of the presumption that a man intended the natural consequence of his acts. By analogy, intention to defame would appear to be irrelevant for the crime of defamatory libel. See Spencer, "Blasphemous Libel Resurrected — Gay News and Grim Tidings" (1979), 38 *Camb. L.J.* 245, at pp. 249-251. Later, in *Gay News Ltd. and Lemon* v. *United Kingdom* (1982), 5 E.H.R.R. 123, the European Commission of Human Rights held that the crime of blasphemous libel did not contravene the European Convention on Human Rights.

60. *Supra*, note 56, at p. 153. For criticisms of the *Georgia Straight* decision, see Burns, "Defamatory Libel in Canada: A Recent Illustration of a Rare Crime" (1969), 17 *Chitty's L.J.* 213; Powe, "The Georgia Straight and Freedom of Expression in Canada" (1970), 48 *Can. Bar. Rev.* 410; Parker, "History as Libel" (1970), 18 *Chitty's L.J.* 62.

61. *Wilson* v. *West Sussex County Council*, [1963] 2 W.L.R. 669 (C.A.) where, in the context of obtaining planning permission, it was held that using a building for the purposes for which it was designed meant using the building for the purposes for which it was intended; see Burns, *supra*, note 60, at p. 213.

62. Law Reform Commission of Canada, *The General Part: Liability and Defences*, [Working Paper 29](Ottawa: Minister of Supply and Services Canada, 1982), at pp. 32-33.

63. Peter Burns argues that, even if the "designed to insult" test requires an intention to insult, the factual presumption that a man intends the natural and probable consequences of his act would apply. Thus, the accused in the *Georgia Straight* case would still have been convicted because "the evidence raised by the defendants would be unlikely to be sufficient to rebut the presumption even on the lower standard of the evidentiary burden cast upon them." Burns, *supra*, note 60, at p. 216. That a person intends the natural consequences of his acts is not a presumption of law. See *R.* v. *Giannotti*, [1956] O.R. 349; 23 C.R. 259 (C.A.).

64. *R.* v. *Clerk* (1728), 1 Barn. K.B. 304; 94 E.R. 207 (K.B.); *R.* v. *Nutt* (1728), 1 Barn. K.B. 306; 94 E.R. 208 (K.B.) (*obiter*).

65. *Supra*, note 50, at p. 362, footnote 1, where Sir James Stephen stated that he advised a jury at the trial of a printer that if the printer had set up the type mechanically, without any intelligent perception of the meaning of what he was printing, he ought to be acquitted, because he did not knowingly print the libel. Directors of printing companies have been acquitted of the crime because they did not know about the libel contained in the material they printed. *R.* v. *Love* (1955), 39 Cr. App. R. 30; *R.* v. *Allison* (1888), 16 Cox C.C. 559 (Q.B.D.). In *Allison*, at p. 563, reference is made to a case where a newspaper boy was acquitted of the crime because he had no knowledge of the libel.

66. *Emmens* v. *Pottle* (1885), 16 Q.B.D. 355 (C.A.). *Vizetelly*, *supra*, note 20, held that the innocent disseminator has to satisfy three conditions: a) he did not know about the libel; b) he ought not to

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have known about the libel; and c) when he disseminated the libel, it was not because of his negligence that he failed to know about the libel. Also, the onus is upon the defendant to introduce this evidence, because he is *prima facie* guilty of publishing the libel.

67. *R.* v. *Munslow*, *supra*, note 59.

68. *R.* v. *City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 (S.C.C.).

69. During the debates on the revision of the *Code* in 1954, the then Minister of Justice expressed the view that such unintentional defamations might not fall within the ambit of the crime because they did not tend to cause a breach of the peace. *House of Commons Debates*, First Session, Twenty-Second Parliament, 2-3 Elizabeth II, Volume IV, 1953-54, at pp. 3614-3615. However, the only Canadian text on criminal libel concluded that an unintentional defamation which gives rise to a tort action can also give rise to a criminal prosecution. J. King, *The Law of Criminal Libel* (Toronto: The Carswell Company Limited, 1912), at p. 64. On the other hand, Glanville Williams argues that it is probable that if the accused publishes a libel which is only defamatory by reason of facts unknown to him, he would be acquitted. G. Williams, *Criminal Law — The General Part*, 2nd ed. (London: Stevens and Sons Limited, 1961), at p. 67. Moreover, criminal liability for unintentional defamation would appear to make the crime of defamatory libel an absolute liability offence. Courts are unlikely to make such a ruling in light of *R.* v. *City of Sault Ste. Marie*, *supra*, note 68. See also *Reference Re Section 94(2) of Motor Vehicle Act, R.S.B.C. 1979, c. 288* (1983), 33 C.R. (3d) 22 (B.C. C.A.). Notice of appeal filed in S.C.C. March 14, 1983.

70. *R.* v. *Gutch* (1829), M. & M. 432; 173 E.R. 1214 (N.P.); *R.* v. *Almon* (1770), 5 Burr. 2686; 98 E.R. 411 (K.B.); *R.* v. *Walter* (1799), 3 Esp. 21; 170 E.R. 524 (N.P). Also, see Spencer, "The Press and the Reform of Criminal Libel" in *Reshaping the Criminal Law: Essays in Honour of Glanville Williams*, 266, at p. 271, P. R. Glazebrook, ed. (London: Stephens and Sons, 1978).

71. *The Libel Act, 1843*, 6 & 7 Vict., c. 96, s. 7 (U.K.).

72. *R.* v. *Holbrook* (1878), 4 Q.B.D. 42.

73. *R.* v. *Molleur (No. 1)*, *supra*, note 45.

74. *R.* v. *Appleby* (1971), 3 C.C.C. (2d) 354 (S.C.C.).

75. For a discussion of the liability of licensees of open line radio stations, see Levy, *supra*, note 41, at pp. 166-167. Presumably to avoid this problem, in New South Wales, section 37 of the *Defamation Act, 1958*, No. 39 (which has since been repealed by the *Defamation Act, 1974*, No. 18), expressly protected a licensee, general manager, or manager, of a broadcasting or television station from criminal prosecution in terms similar to our *Code* defence for a newspaper proprietor.

76. *R.* v. *City of Sault Ste. Marie*, *supra*, note 68. However, it has been held that where defences for strict liability offences are prescribed, unless the statute otherwise clearly provides, they exclude the common law defence of due diligence which might otherwise be available. See, *e.g.*, *R.* v. *Consumers Distributing Co. Ltd.* (1980), 57 C.C.C. (2d) 317 (Ont. C.A.).

77. Section 2 of the *Code* defines "public department" to mean a department of the Government of Canada or a branch thereof or a board, commission, corporation or other body that is an agent of Her Majesty in right of Canada.

78. *Royal Aquarium and Summer and Winter Garden Society Limited* v. *Parkinson*, [1892] 1 Q.B. 431 (C.A.).

79. In the Australian case of *Wishart* v. *Doyle* (1926), St. R. Qd. 269, the majority of the court argued that a similar statutory provision applied only to inquiries of a quasi-judicial nature. However, Webb, J., argued that the provision was wide enough to apply to any inquiry, whether quasi-judicial or administrative.

80. This privilege exists on the basis that it is necessary for the functioning of Parliament. *Lake* v. *King* (1680), 1 *Wms. Saund.* 120; 85 E.R. 128 (K.B.).

81. *Stockdale* v. *Hansard* (1839), 9 Ad. & E.1; 112 E.R. 1112 (K.B.). As a result, the English Parliament created a statutory privilege to protect such papers. This statute was *The Parliamentary Papers Act, 1840*, 3 & 4 Vict., c. 9 (U.K.). This was the model for this *Code* privilege. Sections 7 and 8 of the *Senate and House of Commons Act*, R.S.C. 1970, c. S-8, also absolutely protect any report, paper, votes or proceedings published by or under the authority of the Senate or House of Commons, and any copy thereof. That Act extends this protection to both civil and criminal proceedings.

82. This privilege would protect a defamatory report made by a senior

military or naval officer to his superior (*Dawkins* v. *Lord Paulet* (1869), L.R.5 Q.B. 94), or by a senior government official to another senior government official (*Chatterton* v. *Secretary of State for India in Council*, [1895] 2 Q.B. 189 (C.A.)), but not by a police inspector to his superior (*Gibbons* v. *Duffell* (1932), 47 C.L.R. 520 (Austl.)). See also *Dowson* v. *The Queen* (1980), 124 D.L.R. (3d) 260 (F.C.A.).

83. This parliamentary privilege originally stems from the *Bill of Rights, 1688*, 1 Wm. & Mar. sess. 2, c. 2 (U.K.). However, this protection does not extend to a publication of the same libel outside of Parliament by a member of Parliament. See, *e.g.*, *R.* v. *Lord Abingdon* (1794), 1 Esp. 226; 170 E.R. 337 (N.P.); *R.* v. *Creevey* (1813), 1 M. & S. 273; 105 E.R. 102 (K.B.). Whether a member of Parliament would enjoy this privilege for a defamation published within Parliament but broadcast outside is a matter of some controversy. See Davis, "Parliamentary Broadcasting and the Law of Defamation" (1947-48), 7 *U. Toronto L.J.* 385, who argues that a member of Parliament only questionably enjoys qualified privilege for a parliamentary speech which is broadcast. *Contra*, Evans, "Defamation in Broadcasting" (1979), 5 *Dalhousie L.J.* 659, at p. 676, who suggests that an M.P. would be absolutely protected for defamatory words spoken in the House which are broadcast live, as does J. Maingot in *Parliamentary Privilege in Canada* (Toronto: Butterworths, 1982), at pp. 44-45.

84. Absolute privilege has been held to extend to statements made by a witness to a solicitor and his client in preparing for a trial (*Watson* v. *McEwan*, [1905] A.C. 480 (H.L.)), to a client consulting his solicitor for the purpose of obtaining legal advice (*More* v. *Weaver*, [1928] 2 K.B. 520 (C.A.)) and to a prospective client consulting a solicitor with a view to retaining the solicitor, even though the solicitor is not retained: *Minter* v. *Priest*, [1929] 1 K.B. 655 (C.A.). However, on appeal, the House of Lords, in reversing the Court of Appeal decision, in *obiter dicta*, strongly indicated that this is an occasion of qualified privilege when the client waives solicitor-client privilege: *Minter* v. *Priest*, [1930] A.C. 558 (H.L.).

85. *R.* v. *Wicks*, *supra*, note 57; *R.* v. *Rule*, [1937] 2 K.B. 375 (C.C.A.).

86. See *Force* v. *Warren* (1864), 15 C.B. (N.S.) 806; 143 E.R. 1002 (C.P.).

87. See *Smith* v. *Mathews* (1831), 1M. & Rob. 151; 174 E R. 52 (N.P.); *Griffiths* v. *Lewis* (1845), 7 Q.B. 61; 115 E.R. 411 (K.B.).

88. See J. Fleming, *The Law of Torts*, 6th ed. (Sydney: The Law Book Company Limited, 1983), at pp. 542-543, who argues that a similar Queensland Code provision may protect statements actionable at common law.

89. See Brett, "Civil and Criminal Defamation in Western Australia" (1951-53), 2 *U.W.A.L. Rev.* 43, at pp. 50-54.

90. See *Clines* v. *Australian Consolidated Press Ltd. (No. 3)*, [1966] 1 N.S.W.R. 481, where a somewhat broader provision in s. 17 of the *Defamation Act, 1958* was stated to be broader than the common law because it did not require that the publisher have a reciprocal interest.

91. *Child* v. *Affleck* (1829), 9 B. & C. 403; 109 E.R. 150 (K.B.); *King* v. *Waring* (1803), 5 Esp. 13; 170 E.R. 721 (N.P.).

92. *Macintosh* v. *Dun*, [1908] A.C. 390 (J.C.); *Gillett* v. *Nissen Volkswagen Ltd.*, [1975] 3 W.W.R. 520 (Alta. S.C.). Non-profit trading organizations which provide credit information to their members are protected. *London Association for Protection of Trade* v. *Greenlands, Ltd.*, [1916] 2 A.C. 35 (H.L.).

93. See Fleming, *supra*, note 88, and Brett, *supra*, note 89, who point out that this wording omits the requirement of reciprocal duty on the part of the informant.

94. *Coxhead* v. *Richards* (1846), 2 C.B. 569; 135 E.R. 1069 (C.P.). This case was relied on by the authors of the *English Draft Code* in order to draft the provision which this *Code* defence is based on.

95. *Watt* v. *Longsdon*, [1930] 1 K.B. 130 (C.A.). This reversed the decision at trial. The trial judge had directed that *Coxhead* v. *Richards*, *ibid.*, meant that the occasion was privileged if the recipient of the libel had an obvious interest in it, even though the defendant had no duty to communicate it.

96. See Fleming, *supra*, note 88, and Brett, *supra*, note 89; *Calwell* v. *Ipec Australia Ltd.* (1975), 135 C.L.R. 321 (Austl.).

97. *Fairman* v. *Ives* (1822), 5 B & Ald. 642; 106 E.R. 1325 (K.B.). See also *McIntyre* v. *McBean* (1856), 13 U.C.Q.B. 534.

98. In *Horrocks* v. *Lowe*, [1975] A.C. 135 (H.L.) Lord Diplock at p. 150 defined "honest" or "positive" belief, as follows:

> If [the publisher] publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is ... treated as though he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness, or irrationality in arriving at a positive belief that it is true .... [D]espite the imperfection of the mental process by which the belief is arrived at it may still be "honest," that is, a positive belief that the conclusions they have reached are true.

99. *Adam* v. *Ward*, *supra*, note 23; *O'Donoghue* v. *Hussey* (1871), Ir R. 5 C.L. 124 (Exch. Cham.).

100. Similar codified defences in Australia have been held to protect the media generally. See *Calwell* v. *Ipec Australia Ltd.*, *supra*, note 96; *Gorton* v. *Australian Broadcasting Commission*, *supra*, note 47.

101. See *Debates of the Senate of the Dominion of Canada 1923*, at pp. 255-256, 264, 277; *An Act to amend the* Criminal Code *with respect to publication of Evidence in Marriage or Divorce Proceedings*, S.C. 1923, c. 11.

102. *Cook* v. *Alexander*, [1973] 3 All. E.R. 1037 (C.A.).

103. *Webb* v. *Times Publishing Co. Ltd.*, [1960] 2 Q.B. 535.

104. *The Parliamentary Papers Act, 1840*, 3 & 4 Vict. c. 9, s. 3 (U.K.). Similar protection is also extended to these extracts by the *Senate and House of Commons Act*, R.S.C. 1970, c. S-8, s. 9.

105. By analogy to section 3 of *The Parliamentary Papers Act, 1840* and section 9 of the *Senate and House of Commons Act*, examined in J. Maingot, *supra*, note 83, at pp. 61, 63.

106. *Newspaper Libel and Registration Act, 1881*, 44 & 45 Vict., c. 60, s. 2 (U.K.).

107. In *Hughes* v. *Gibson* in 1886, Lord Coleridge expressed the opinion that a meeting of a board of guardians at which reporters were present, was not a public meeting open to the public. J. King, *The Law of Criminal Libel* (Toronto: The Carswell Co. Ltd., 1912), at p. 112, mentioning the case contained in W. Odgers, *A Digest of the Law of Libel and Slander*, 2nd ed. (London: Stevens and Sons, 1887), at p. 379. Odgers concluded that the English equivalent of this *Code* privilege in section 2 of the *Newspaper Libel and Registration Act, 1881*, did not include a town council meeting.

108. For unlawful assembly, see section 64 of the *Code*. The Australian Law Reform Commission, Report 11, *Unfair Publication: Defamation and Privacy* (Canberra: Australian Government Publishing Service, 1979) noted, para. 163, at p. 87, a case where a public meeting was unlawful because it was held in breach of a city ordinance.

109. The rationale for this statement was that the truth of the libel would be more likely to cause a breach of the peace. For example, a woman would not grieve to be told of her red nose if she did not have one. Hudson's *Treatise on the Star Chamber*, reprinted at pp. 102-3 of *Collectanea Juridica*, 1792, noted by the Faulks Committee, *supra*, note 42, para. 435, at p. 120.

110. *R.* v. *Newman* (1853), 1 E1, & B1. 558; 118 E.R. 544 (K.B.). For Canadian cases examining this defence, see *R.* v. *Moylan* (1860), 19 U.C. Q.B. 521; *R.* v. *Laurier* (1881) 11 R.L. 184 (B.R.); *R.* v. *Crocket* (1907), 3 E.L.R. 330 (N.B. S.C.).

111. *R.* v. *Appleby*, *supra*, note 74. See O'Hearne, "Burden of Proof, Presumptions and Reversals of the Burden," in *Studies in Criminal Law and Procedure* 77, at p. 83 (Toronto: Canadian Law Book Ltd., 1973).

112. *Mangena* v. *Wright*, [1909] 2 K.B. 958.

113. *Cherneskey* v. *Armadale Publishers Ltd.*, *supra*, note 28.

114. *Campbell* v. *Spottiswoode* (1863), 3F & F. 421; 176 E.R. 188 (N.P.) and 3 B. & S. 769; 122 E.R. 288 (K.B.). Some cases hold that the opinion in such a case must be proved true. However, the more prominent authority is that this comment is justified if a fair-minded person could reasonably draw the imputation from the facts. See *Masters* v. *Fox*, *supra*, note 55.

115. In *London Artists Ltd.* v. *Littler*, [1968] 1 All. E.R. 1075 (Q.B.), two general categories of public interest were outlined: (a) matters in which the public has a legitimate interest directly, or indirectly, such as national or local governments, public services, or institutions, and (b) matters expressly or impliedly submitted to public criticism, such as the performance of an artist. However, it was stated that the private life of a public performer was not a matter of public interest.

116. *Lafontaine* v. *Filion*, [1958] R.L. 194 (B.R.).

117. *R.* v. *Georgia Straight*, *supra*, note 56, at p. 154.

118. The fact that the public has an interest in receiving the defamatory matter is insufficient to protect the publication of it. *Douglas* v. *Stephenson* (1898), 29 O.R. 616 (Div. C.); *Banks* v. *Globe and Mail Ltd.* (1961), 28 D.L.R. (2d) 343 (S.C.C.).

119. *Lord* v. *Ryan* (1976), 19 C. de D. 265.

120. By analogy, *Gatley*, *supra*, note 11, para. 1597, at p. 650, argues that where an occasion is privileged at common law for the purposes of civil libel, it will also be privileged for the purposes of criminal libel. In the cases of *R.* v. *Munslow*, *supra*, note 59, and *R.* v. *Rule*, *supra*, note 85, civil cases were relied upon as precedents.

121. *R.* v. *Wicks*, *supra*, note 57, at pp. 387-388; *contra*, *R.* v. *Mabin* (1901), 20 N.Z. L.R. 451 (C.A.), where the view is expressed that actual knowledge of the falsity of the libel must be proved.

122. *Boaler* v. *The Queen* (1888), 21 Q.B.D. 284.

123. *R.* v. *Plaisted* (1909), 22 Cox C.C. 5 (Midland Circuit, Birmingham Winter Assizes).

124. In *R.* v. *Osborne* (1732), 2. Barn. K.B. 138, 166; 94 E.R. 406, 425 (K.B.), a criminal information was granted for a libel upon a group of Portugese Jews. The libel had actually caused a mob to attack the Jews. In the report of the same case in 2 Swanst R. 503n, the court granted the information because the libel necessarily tended to raise disorders among the people against the group. In the other report of the same case in W. Kel. 230; 25 E.R. 584 (Ch.), the court stated that the foundation of the complaint was not by way of an information for libel, but for a breach of the peace. In *R.* v. *Williams* (1822), 5 B. & Ald. 595; 106 E.R. 1308 (K.B.), a criminal information was granted for a libel upon the clergy of Durham. In *Gathercole's Case* (1838), 2 Lewin 237; 168 E.R. 1140 (Crown Cases), the accused was convicted for publishing a libel upon a nunnery. *Gatley*, *supra*, note 11, para. 1594, note 21, at p. 648, argues that it is far from clear that, if the facts fall short of seditious libel, criminal libel proceedings are available against a group.

125. *R.* v. *Ensor*, *supra*, note 16. Stephen, who tried the case, later added that he should have clearly stated that an actual intent to injure, or to provoke or annoy the relatives was essential to this offence. J. Stephen, *A Digest of the Criminal Law*, 9th ed. (London: Sweet and Maxwell Limited, 1950), at p. 289. See Zellick, "Libelling the Dead" (1969), 119 *N.L.J.* 769, and *Chiu Chut-fong* v. *Law Chup*, [1973] *Hong Kong L.R.* 36.

126. There is no case law determining the precise question as to whether a libel upon a deceased person can result in a criminal prosecution under the present *Code*. However, since case law has defined "person" to mean a human being having rights or duties recognized by law, it appears that a dead person would be excluded from this definition since the dead clearly have no rights or duties. See, *e.g.*, *R.* v. *Davie* (1980), 17 C.R. (3d) 72 (B.C. C.A.), which held that God was not a "person." Notice of appeal filed in the Supreme Court of Canada granted September 23, 1980. Since the offence of personation with intent to gain advantage (s. 361) specifically defines a person as a "person, living or dead," it may also be argued that "person" as defined in section 2 of the *Code* excludes a dead person in accordance with the rule of statutory construction *inclūsio unius est exclusio alterius*.

127. *Ex parte Genest* v. *R.* (1933), 71 Qué. S.C. 385 held that a libel upon a group, such as the clergy of a particular diocese, is not covered by the *Criminal Code* because an unincorporated group is not a "person" as defined therein. The *Report of the Special Committee on Hate Propoganda in Canada* (Ottawa: Queen's Printer, 1966), at p. 45, argued that the definition of defamatory libel in the *Code* precludes protection for groups. However, section 2 of the *Code* defines a "person" as including "societies ... in relation to the act and things that they are capable of doing and owning respectively." In *R.* v. *Atkinson* (1979), 28 N.B.R. (2d) 452 (N.B. Prov. Ct.), it was held at a preliminary inquiry that a political party was a "person." The New Brunswick Court of Appeal dismissed the accused's application for an order of *certiorari* to quash the order for committal for trial. Leave to appeal to the Supreme Court of Canada was granted on December 21, 1979, but the appeal was discontinued on April 13, 1981.

128. *R.* v. *Unwin*, *supra*, note 53, at p. 200.

129. Regarding the limitations imposed upon a private prosecutor in preferring an indictment, see *R.* v. *Schwerdt* (1957), 27 C.R. 35 (B.C. S.C.). See also Burns, "Private Prosecutions in Canada: The Law and a Proposal for Change" (1975), 21 *McGill L.J.* 269, at pp. 279-280; Kaufman, "The Role of the Private Prosecutor: A Critical Analysis of the Complainant's Position in Criminal Cases" (1960-61), 7 *McGill L.J.* 102, at pp. 106-108. However, *Bill C-19*, *Criminal Law Reform Act, 1984*, 2nd Session, 32nd Parliament, 32-33 Elizabeth II, 1983-84, First Reading, February 7, 1984, would, if enacted, have changed this law. The proposed section 496 of the *Code* provides that where an accused elects to be tried by a judge without a jury, an indictment may be preferred when proposed

section 504 applies. Subsection 504(3) provides that a private prosecutor cannot prefer an indictment without the written order of the court. In other words, when the accused elects to have a speedy trial before a judge alone, the refusal of the Attorney General to consent to the preferring of the indictment would not have absolutely prevented a trial from taking place.

130. In *R.* v. *Edwards* (1919), 31 C.C.C. 330 (Alta. S.C.), the judge refused to grant an application brought by the private prosecutor to prefer an indictment of criminal defamatory libel even though the accused had been committed for trial, because the Attorney-General opposed the application and could stay the proceedings. Because of the fundamentally "private" character of the offence of defamatory libel, it may be that if the preliminary inquiry has made out a *prima facie* case against the accused, the judge should grant his consent to the application to prefer the indictment. *R.* v. *Powell* (1938), 69 C.C.C. 205 (Alta. C.A.). *Re Johnson and Inglis* (1980), 52 C.C.C. (2d) 385 (Ont. H.C.), while generally holding that a private prosecutor must satisfy a more stringent test, appears to imply that this *prima facie* test applies to defamatory libel prosecutions.

131. However, proposed section 572 of the *Code* in *Bill C-19*, *supra*, note 129 would, if enacted, have entitled the prosecutor and the accused to a fixed number of peremptory challenges and would have repealed the right of the prosecutor to direct jurors to stand by. Consequently, the present section 566 of the *Code* would have been repealed, since it would no longer be necessary.

132. By proposed section 204 of *Bill C-19*, *supra*, note 129, these costs provisions with respect to defamatory libel would have been retained.

133. *R.* v. *Fournier* (1916), 25 C.C.C. 430 (Qué. K.B.).

134. *Gleaves* v. *Deakin*, *supra*, note 58.

135. See the comments of Lord Diplock in *Gleaves* v. *Deakin*, *ibid.*, at pp. 498-499. The European Commission of Human Rights has held that the Austrian crime of defamation which requires the accused to prove the truth of the statement does not contravene the European Convention on Human Rights. *Lingens and Leitgens* v. *Austria* (1981), 4 E.H.R.R. 373.

136. *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Cox Broadcasting Corporation* v. *Cohn*, 420 U.S. 469 (1975) (*obiter*).

137. *Garrison* v. *Louisiana*, *supra*, note 136; *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967).

138. *R.* v. *Appleby*, *supra*, note 74.

139. *R.* v. *Oakes* (1983), 2 C.C.C. (3d) 339 (Ont. C.A.). However, it should be noted that leave to appeal to the Supreme Court of Canada was granted on March 21, 1983.

140. Such a move would at least bring the requirements of the plea more to the attention of the ordinary citizen, and would assist in preventing results such as the one in *R.* v. *Richards and others*, *The Times*, July 31, 1879. There, an old pauper who was prosecuted for his complaints of ill-treatment in a poorhouse was not allowed to prove that his accusations were true because he failed to enter the written plea of justification. See Spencer, "Criminal Libel — A Skeleton in the Cupboard (1)," [1977] *Crim. L. Rev.* 383, at p. 392.

141. Regarding the defences of qualified privilege, *Gatley*, *supra*, note 11, para. 441, at pp. 185-186, states:

> The rule [for the occasions of qualified privilege] being founded on the general welfare of society, new occasions for its application will necessarily arise with continually changing conditions....

Regarding the defence of fair comment, that defence in section 274 of the *Code* protects criticism: (a) upon the public conduct of a person who takes part in public affairs, (b) upon a published book or other literary production or any composition or work of art publicly exhibited, or on any other communication made to the public on any subject. The common law now protects a fair comment on any matter of public interest, an arguably broader concept.

142. In other words, the issues of truth and public benefit, not the issue of the motive of the accused, appear to determine whether the defence of justification is available.

143. *Lafontaine* v. *Filion*, *supra*, note 49. By analogy, section 273, the defence of public benefit, would also appear to require that publication be made in good faith. See Burns, *supra*, note 60, at p. 216.

144. See *supra*, note 48.

145. *Cherneskey* v. *Armadale Publishers Ltd.*, *supra*, note 28.

146. *Supra*, note 29.

147. *Supra*, note 25.

148. See *Clark* v. *Molyneux* (1877), 3 Q.B.D. 237 (C.A.) *per* Brett, L.J., at p. 244; *Horrocks* v. *Lowe*, *supra*, note 98, *per* Lord Diplock, at pp. 149-150.

149. Spencer, "Criminal Libel — A Skeleton in the Cupboard (2)," [1977] *Crim. L. Rev.* 465, at p. 473.

150. The four common law provinces which have made such statements actionable are Newfoundland, Manitoba, Saskatchewan, and British Columbia. See *The Privacy Act*, 1981 S.N., c. 6; *The Privacy Act*, S.M. 1970, c. 74, as am. by S.M. 1971, c. 82, s. 49; *The Privacy Act*, R.S.S. 1978, c. P-24, as am. by S.S. 1979, c. 69, s. 19; *Privacy Act*, R.S.B.C. 1979, c. 336, as am. by S.B.C. 1982, c. 46, s. 32.

151. Law Reform Commission of Canada, *Our Criminal Law* (Ottawa: Information Canada, 1976).

152. *Ibid.*, at p. 31.

153. *Ibid.*, at p. 20.

154. Law Reform Commission of Canada, *Damage to Property: Vandalism* [Working Paper 31] (Ottawa: Minister of Supply and Services Canada, 1984), at p. 15.

155. The English Law Commission, in its Working Paper No. 84, *Criminal Libel*, *infra*, note 160, paras. 9.1-9.6, at pp. 192-202, proposed such an offence.

156. Government of Canada, *The Criminal Law in Canadian Society* (Ottawa, 1982), at pp. 52-53.

157. *Supra*, note 151, at pp. 33-34.

158. We use the word "published" in this context to mean cases in which the texts of those judgments have been reported in full. These cases are: *R.* v. *Georgia Straight Publishing Ltd.*, *supra*, note 56; *R.* v. *Reinke*, *supra*, note 49; *Société de Publication Merlin Ltée et Cloutier* v. *Sirois et Quintal*, [1971] Qué. C.A. 754; *Lord* v. *Ryan*, *supra*, note 119.

159. *Re Johnson and Inglis*, *supra*, note 130, at p. 388, *per* Evans, C.J.H.C.

160. The English Law Commission, Working Paper No. 84, *Criminal Libel* (London: HMSO, 1982). Other jurisdictions also have, or have proposed, a restricted crime of defamation. In the United States, when the libel is about a public figure, the crime requires that the accused be proved to have knowledge of its falsity, or reckless disregard of its truth or falsity. See *Garrison* v. *Louisiana*, *supra*, note 136. In New South Wales, the prosecution must prove that the defendant knew that it was probable that the defamatory matter would cause serious harm, or intended to cause serious harm. *Defamation Act, 1974*, S.N.S.W. 1974, No. 18, subs. 50(1). The proposal of the Australian Law Reform Commission would modify the New South Wales offence to protect a person who genuinely believes defamatory matter is true, by additionally requiring knowledge of its falsity, or reckless indifference as to its truth or falsity. The Australian Law Reform Commission, *supra*, note 108, paras. 203-205, at pp. 105-106. This proposal was also adopted by the Law Reform Commission of Western Australia, Project 8, *Report on Defamation* (Perth, W.A., 1979), paras. 22.5-22.9, at pp. 123-5.

161. The proposals of the English Law Commission are discussed at length later in the Working Paper.

162. For a summary of Scottish law in this area, see the Law Commission, *supra*, note 160, paras. 4.1-4.2, at pp. 71-73.

163. Report of the Committee on Defamation, *Recommendations on the Law of Defamation* (New Zealand, 1977), paras. 443-459, at pp. 100-103.

164. Criminal Law and Penal Methods Reform Committee of South Australia, Fourth Report, *The Substantive Criminal Law* (Adelaide: Government Printer, 1977), paras. 4-4.1, at pp. 248-250.

165. The American Law Institute, *Model Penal Code, Tentative Draft No. 13* (Philadelphia: American Law Institute, 1961), Section 250.7, Comments, at p. 44.

166. *Vogel* v. *C.B.C.* (1982), 35 B.C.L.R. 7 (S.C.).

167. *Munro* v. *Toronto Sun Publishing Corp.* (1982), 39 O.R. (2d) 100 (H.C.).

168. *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, ss. 4, 49.

169. Subsection 665(1)(*d*) proposed by *Bill C-19*, *supra*, note 129, would, if enacted, have provided that a court may make an order that an offender make restitution to another person by paying an amount for punitive damages not exceeding $10,000 where the offence is indictable and the offender is an individual, or an amount to be determined at the discretion of the court where the offence is indictable and the offender is a corporation.

170. Spencer, *supra*, note 149, at p. 471.

171. Letter from Peter Burns to the Law Reform Commission of Canada (January 4, 1984) (discussing the crime of defamatory libel).

172. Fattah, "Deterrence: A Review of the Literature" 1, at p. 99, in Law Reform Commission of Canada, *Fear of Punishment: Deterrence* (Ottawa: Minister of Supply and Services Canada, 1976).

173. The English Law Commission, *supra*, note 160, para. 10.4, at pp. 204-205.

174. *Ibid.*, para. 9.2 at p. 192.

175. *Ibid.*, para. 10.6, at p. 207.

176. The Faulks Committee, *supra*, note 42, para. 65, at p. 16.

177. Spencer, "Criminal Libel: The Law Commission's Working Paper," [1983] *Crim. L. Rev.* 524, at p. 530.

178. The Australian Law Reform Commission, *supra*, note 108, para. 84, at p. 47.

179. *Ibid.*, paras. 173-178, at pp. 92-95. Among the conditions which must be satisfied for this defence to be invoked are: (a) the statement must originally issue from some person other than the publisher; (b) the allegation must relate to a "topic of public interest"; (c) the statement must be reported accurately and reasonably contemporaneously; (d) the author of the original statement must be named; and (e) the victim has a right of reply.

180. If the accused bases the defamation upon his direct knowledge of an observed fact, *e.g.*, when the accused states that he himself paid

a bribe to a public official, then once the prosecution proves that the statement is untrue, the jury would have to accept that the accused knew the statement was untrue. However, when the accused publishes defamatory information received from another, the untruth of the defamation is no evidence that the accused knew or believed the statement to be untrue. The Law Commission argued that the prosecution would be unable to put this evidence before the court. Therefore, the only way to have the crucial question of the *actual* state of mind of the accused put before the court was to impose a persuasive burden upon the accused to prove that he did not know or believe the statement to be false. The English Law Commission, *supra*, note 160, paras. 8.24-8.26, at pp. 162-5.

181. The English Law Commission, *supra*, note 160, para. 10.4, at pp. 205-6.

182. In Report 12, *Theft and Fraud* (Ottawa: Minister of Supply and Services Canada, 1979), at p. 42, this Commission recommended that the present blackmail offence (section 305) be replaced with a new blackmail offence which would generally provide that "[a] person commits blackmail who threatens another with injury to person, property or *reputation* in order to obtain money, property or other economic advantage." [Emphasis added] This proposed blackmail offence would be broader than the present extortion by libel offence created by subsection 266(1) because it would include extortion by means of slanders as well as libels. However, it would not cover the case of publishing or threatening to publish a defamatory libel in order to have another appointed to an honorary, non-paying office since there is no economic advantage to be gained. Moreover, it may not include the offence created by subsection 266(2), *i.e.* publishing or threatening to publish a libel *as a result of a refusal* of any person to permit money to be extorted or to confer or procure an appointment or office of profit or trust. In this situation, it may be difficult to argue that the publisher intends to obtain an economic advantage, because this has been denied him by the refusal.

Under the present *Code*, could an extortion by means of libel fall within subsection 305(1), the general blackmail offence? In *R.* v. *Kendrick and Smith* (1931), 23 Cr. App. R. 1, it was held that the accused could not rely on *autrefois convict* to the charge of uttering "knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property or valuable thing," contrary to subsection 29(1)(i) of the *Larceny Act, 1916*, 6 & 7 Geo. V, c. 50 (U.K.), when

they had been previously convicted of extortion by libel contrary to section 31 of that *Act*, on the ground that the two offences were not the same or substantially the same. Swift, J., stated at p. 6 that "[i]t may be that the greater includes the less, and that if you prove a case under section 29, you must prove a case under section 31, but I do not decide that this is so." I. Lagarde, in *Droit Pénal Canadien* Vol. 1, at p. 710 (Montréal: Wilson & Lafleur Limitée, 1974), applies *Kendrick* to conclude that:

[TRANSLATION]
[t]he charge of extortion by libel is different from that of extortion by threats ... of death or injury. It follows then that extortion by libel is not an offence included in that set forth in section 305 or 331(1)*a*) ...

If this view is correct, the abolition of extortion by libel would have to be complemented by amending subsection 305(1) to include extortion by libel within its ambit.

However, the Commission is of the view that subsection 305(1) is defined broadly enough to include most instances of extortion by libel. In England, the extortion by libel offence in the *Larceny Act, 1916* was repealed by the *Theft Act 1968*, 1968, c. 60 (U.K.). Subsection 21(1) of that *Act* provides that a person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces. The Faulks Committee, *supra*, note 42, para. 438, at p. 121, argued that this subsection covers extortion by libel situations previously covered by section 31 of the *Larceny Act, 1916*. Subsection 305(1) of our *Code* provides that everyone who, without reasonable justification or excuse and with intent to extort or gain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done, is guilty of an indictable offence. Subsection 305(1) is similar to section 21 of the English *Theft Act 1968* in the use of broad concepts such as "to gain," and "menaces." However, unlike the English legislation which is restricted to gain or loss of *property*, the word "anything" in subsection 305(1) has been defined broadly to mean more than tangible material things related to property and to be of wide, unrestricted application. *R.* v. *Bird*, [1970] 3 C.C.C. 340 (B.C. C.A.). Publishing, threatening, or offering to abstain from publishing a defamatory libel with intent to extort money, or to procure for another person an appointment or office of profit or trust, prohibited by subsection 266(1), would appear to fall within the definition of an "intent to extort or gain anything," by "threats, accusations, menaces." It may be more questionable as to whether publishing or threatening to publish a defamatory libel as a result of the refusal of any person to permit money to be extorted or to confer an appointment or office of trust or profit, prohibited by subsection 266(2), is covered by 305(1), because there may be no intention to extort or gain anything at that point in time, but rather an intention to harm the person. However, the necessity of subsection 266(2) is questionable since in most cases, the publisher appears to be caught by subsection 266(1) at an earlier point in time.

APPENDIX

Criminal Code Sections Relating to the Crime of Defamatory Libel

Defamatory Libel

"Newspaper"

261. In sections 262 to 281, "newspaper" means any paper, magazine or periodical containing public news, intelligence or reports of events, or any remarks or observations thereon, printed for sale and published periodically or in parts or numbers, at intervals not exceeding thirty-one days between the publication of any two such papers, parts or numbers, and any paper, magazine or periodical printed in order to be dispersed and made public, weekly or more often, or at intervals not exceeding thirty-one days, that contains advertisements, exclusively or principally. 1953-54, c. 51, s. 247.

Definition

262. (1) A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.

Mode of expression

(2) A defamatory libel may be expressed directly or by insinuation or irony

(*a*) in words legibly marked upon any substance, or

(*b*) by any object signifying a defamatory libel otherwise than by words. 1953-54, c. 51, s. 248.

Publishing

263. A person publishes a libel when he

(*a*) exhibits it in public,

(*b*) causes it to be read or seen, or

(*c*) shows or delivers it, or causes it to be shown or delivered, with intent that it should be read or seen by the person whom it defames or by any other person. 1953-54, c. 51, s. 249.

Punishment of libel known to be false

264. Every one who publishes a defamatory libel that he knows is false is guilty of an indictable offence and is liable to imprisonment for five years. 1953-54, c. 51, s. 250.

Punishment for defamatory libel

265. Every one who publishes a defamatory libel is guilty of an indictable offence and is liable to imprisonment for two years. 1953-54, c. 51, s. 251.

Extortion by libel

266. (1) Every one commits an offence who, with intent

(*a*) to extort money from any person, or

(*b*) to induce a person to confer upon or procure for another person an appointment or office of profit or trust,

publishes or threatens to publish or offers to abstain from publishing or to prevent the publication of a defamatory libel.

Idem

(2) Every one commits an offence who, as the result of the refusal of any person to permit money to be extorted or to confer or procure an appointment

or office of profit or trust, publishes or threatens to publish a defamatory libel.

Punishment

(3) Every one who commits an offence under this section is guilty of an indictable offence and is liable to imprisonment for five years. 1953-54, c. 51, s. 252.

Proprietor of newspaper presumed responsible

267. The proprietor of a newspaper shall be deemed to publish defamatory matter that is inserted and published therein, unless he proves that the defamatory matter was inserted in the newspaper without his knowledge and without negligence on his part.

General authority to manager when negligence

(2) Where the proprietor of a newspaper gives to a person general authority to manage or conduct the newspaper as editor or otherwise, the insertion by that person of defamatory matter in the newspaper shall, for the purposes of subsection (1), be deemed not to be negligence on the part of the proprietor unless it is proved that

(*a*) he intended the general authority to include authority to insert defamatory matter in the newspaper, or

(*b*) he continued to confer general authority after he knew that it had been exercised by the insertion of defamatory matter in the newspaper.

Selling newspapers

(3) No person shall be deemed to publish a defamatory libel by reason only that he sells a number or part of a newspaper that contains a defamatory libel, unless he knows that the number or part contains defamatory matter or that defamatory matter is habitually contained in the newspaper. 1953-54, c. 51, s. 253.

Selling book containing defamatory libel

268. No person shall be deemed to publish a defamatory libel by reason only that he sells a book, magazine,

pamphlet or other thing, other than a newspaper that contains defamatory matter if, at the time of the sale, he does not know that it contains the defamatory matter.

Sale by servant

(2) Where a servant, in the course of his employment, sells a book, magazine, pamphlet or other thing, other than a newspaper, the employer shall be deemed not to publish any defamatory matter contained therein unless it is proved that the employer authorized the sale knowing that

(*a*) defamatory matter was contained therein, or

(*b*) defamatory matter was habitually contained therein, in the case of a periodical. 1953-54, c. 51, s. 254.

Publishing proceedings of courts of justice

269. No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter

(*a*) in a proceeding held before or under the authority of a court exercising judicial authority, or

(*b*) in an inquiry made under the authority of an Act or by order of Her Majesty, or under the authority of a public department or a department of the government of a province. 1953-54, c. 51, s. 255.

Parliamentary papers

270. No person shall be deemed to publish a defamatory libel by reason only that he

(*a*) publishes to the Senate or House of Commons or to a legislature, defamatory matter contained in a petition to the Senate or House of Commons or to the legislature, as the case may be,

(*b*) publishes by order or under the authority of the Senate or House of

Commons or of a legislature, a paper containing defamatory matter, or

(*c*) publishes, in good faith and without ill-will to the person defamed, an extract from or abstract of a petition or paper mentioned in paragraph (*a*) or (*b*). 1953-54, c. 51, s. 256.

Fair reports of parliamentary or judicial proceedings

271. (1) No person shall be deemed to publish a defamatory libel by reason only that he publishes in good faith, for the information of the public, a fair report of the proceedings of the Senate or House of Commons or a legislature, or a committee thereof, or of the public proceedings before a court exercising judicial authority, or publishes, in good faith, any fair comment upon any such proceedings.

Divorce proceedings an exception

(2) This section does not apply to a person who publishes a report of evidence taken or offered in any proceeding before the Senate or House of Commons or any committee thereof, upon a petition or bill relating to any matter of marriage or divorce, if the report is published without authority from or leave of the House in which the proceeding is held or is contrary to any rule, order or practice of that House. 1953-54, c. 51, s. 257.

Public benefit

273. No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter that, on reasonable grounds, he believes is true, and that is relevant to any subject of public interest, the public discussion of which is for the public benefit. 1953-54, c. 51, s. 259.

Fair comment on public person or work of art

274. No person shall be deemed to publish a defamatory libel by reason only that he publishes fair comments

(*a*) upon the public conduct of a person who takes part in public affairs, or

(*b*) upon a published book or other literary production, or on any composition or work of art or performance publicly exhibited, or on any other communication made to the public on any subject, if the comments are confined to criticism thereof. 1953-54, c. 51, s. 260.

When truth a defence

275. No person shall be deemed to publish a defamatory libel where he proves that the publication of the defamatory matter in the manner in which it was published was for the public benefit at the time when it was published and that the matter itself was true. 1953-54, c. 51, s. 261.

Publication invited or necessary

276. No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter

(*a*) on the invitation or challenge of the person in respect of whom it is published, or

(*b*) that it is necessary to publish in order to refute defamatory matter published in respect of him by another person,

if he believes that the defamatory matter is true and it is relevant to the invitation, challenge or necessary refutation, as the case may be, and does not in any respect exceed what is reasonably sufficient in the circumstances. 1953-54, c. 51, s. 262.

Answer to inquiries

277. No person shall be deemed to publish a defamatory libel by reason only that he publishes, in answer to inquiries made to him, defamatory matter relating to a subject-matter in respect of which the person by whom or on whose behalf the inquiries are made has an interest in knowing the truth or who, on reasonable grounds, the person who publishes the defamatory matter believes has such an interest, if

(*a*) the matter is published, in good faith, for the purpose of giving information in answer to the inquiries,

(*b*) the person who publishes the defamatory matter believes that it is true,

(*c*) the defamatory matter is relevant to the inquiries, and

(*d*) the defamatory matter does not in any respect exceed what is reasonably sufficient in the circumstances. 1953-54, c. 51, s. 263.

Giving information to person interested

278. No person shall be deemed to publish a defamatory libel by reason only that he publishes to another person defamatory matter for the purpose of giving information to that person with respect to a subject-matter in which the person to whom the information is given has, or is believed on reasonable grounds by the person who gives it to have, an interest in knowing the truth with respect to that subject-matter if

(*a*) the conduct of the person who gives the information is reasonable in the circumstances,

(*b*) the defamatory matter is relevant to the subject-matter, and

(*c*) the defamatory matter is true, or if it is not true, is made without ill-will toward the person who is defamed and is made in the belief, on reasonable grounds, that it is true. 1953-54, c. 51, s. 264.

Publication in good faith for redress of wrong

279. No person shall be deemed to publish a defamatory libel by reason

only that he publishes defamatory matter in good faith for the purpose of seeking remedy or redress for a private or public wrong or grievance from a person who has, or who on reasonable grounds he believes has the right or is under an obligation to remedy or redress the wrong or grievance, if

(*a*) he believes that the defamatory matter is true,

(*b*) the defamatory matter is relevant to the remedy or redress that is sought, and

(*c*) the defamatory matter does not in any respect exceed what is reasonably sufficient in the circumstances. 1953-54, c. 51, s. 265.

Proving publication by order of legislature

280. (1) An accused who is alleged to have published a defamatory libel may, at any stage of the proceedings, adduce evidence to prove that the matter that is alleged to be defamatory was contained in a paper published by order or under the authority of the Senate or House of Commons or a legislature.

Directing verdict

(2) Where at any stage in proceedings referred to in subsection (1) the court, judge, justice or magistrate is satisfied that matter alleged to be defamatory was contained in a paper published by order or under the authority of the Senate or House of Commons or a legislature, he shall direct a verdict of not guilty to be entered and shall discharge the accused.

Certificate of order

(3) For the purposes of this section a certificate under the hand of the Speaker or clerk of the Senate or House of Commons or a legislature to the effect that the matter that is alleged to be defamatory was contained in a paper published by order or under the authority of the Senate, House of Commons or legislature, as the case may be, is conclusive evidence thereof. 1953-54, c. 51, s. 266.

Verdicts

Verdicts in cases of defamatory libel

281. Where, on the trial of an indictment for publishing a defamatory libel, a plea of not guilty is pleaded, the jury that is sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon the indictment, and shall not be required or directed by the judge to find the defendant guilty merely on proof of publication by the defendant of the alleged defamatory libel, and of the sense ascribed thereto in the indictment, but the judge may, in his discretion, give a direction or opinion to the jury on the matter in issue as in other criminal proceedings, and the jury may, on the issue, find a special verdict. 1953-54, c. 51, s. 267.

434. (2) Every proprietor, publisher, editor or other person charged with the publication of a defamatory libel in a newspaper or with conspiracy to publish a defamatory libel in a newspaper shall be dealt with, indicted, tried and punished in the province where he resides or in which the newspaper is printed.

Sufficiency of count charging libel

513. (1) No count for publishing a blasphemous, seditious or defamatory libel, or for selling or exhibiting an obscene book, pamphlet, newspaper or other written matter, is insufficient by reason only that it does not set out the words that are alleged to be libellous or the writing that is alleged to be obscene.

Specifying sense

(2) A count for publishing a libel may charge that the published matter was written in a sense that by innuendo made the publication thereof criminal, and may specify that sense without any introductory assertion to show how the matter was written in that sense.

Proof

(3) It is sufficient, on the trial of a count for publishing a libel, to prove that the matter published was libellous, with or without innuendo. 1953-54, c. 51, s. 494.

Libel, plea of justification

539. (1) An accused who is charged with publishing a defamatory libel may plead that the defamatory matter published by him was true, and that it was for the public benefit that the matter should have been published in the manner in which and at the time when it was published.

Where more than one sense alleged

(2) A plea that is made under subsection (1) may justify the defamatory matter in any sense in which it is specified in the count, or in the sense that the defamatory matter bears without being specified, or separate pleas justifying the defamatory matter in each sense may be pleaded separately to each count as if two libels had been charged in separate counts.

Plea in writing

(3) A plea that is made under subsection (1) shall be in writing, and shall set out the particular facts by reason of which it is alleged to have been for the public good that the matter should have been published.

Reply

(4) The prosecutor may in his reply deny generally the truth of a plea that is made under this section. 1953-54, c. 51, s. 520.

Plea of justification necessary

540. (1) The truth of the matters charged in an alleged libel shall not be

inquired into in the absence of a plea of justification under section 539 unless the accused is charged with publishing the libel knowing it to be false, in which case evidence of the truth may be given to negative the allegation that the accused knew that the libel was false.

Not guilty, in addition

(2) The accused may, in addition to a plea that is made under section 539, plead not guilty and the pleas shall be inquired into together.

Effect of plea on punishment

(3) Where a plea of justification is pleaded and the accused is convicted, the court may, in pronouncing sentence, consider whether the guilt of the accused is aggravated or mitigated by the plea. 1953-54, c. 51, s. 521.

Standing by in libel cases

566. A prosecutor other than the Attorney General or counsel acting on his behalf is not entitled, on the trial of an indictment for the publication of a defamatory libel, to direct a juror to stand by. 1953-54, c. 51, s. 546.

Costs to successful party in case of libel

656. The person in whose favour judgment is given in proceedings by indictment for defamatory libel is entitled to recover from the opposite party costs in a reasonable amount to be fixed by order of the court. 1953-54, c. 51, s. 631.

How recovered

657. Where costs that are fixed under section 656 are not paid forthwith the party in whose favour judgment is given may enter judgment for the amount of the costs by filing the order in the superior court of the province in which the trial was held, and that judgment is enforceable against the opposite party in the same manner as if it were a judgment rendered against him in that court in civil proceedings. 1953-54, c. 51, s. 632.

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