Reconceptualizing Reputation and Defamation for Cyber Speech: An analysis of *Baglow v Smith*

Spencer Keys, J.D. (2016)
Peter A. Allard School of Law
University of British Columbia

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Introduction

Canadian defamation law requires a plaintiff to prove that the allegedly impugned words or images were defamatory, "in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person."[1] The presumption underlying the legal treatment of online defamation is that web communication (blogs, bulletin boards, etc.) operates within the same context as traditional forms of communication – the content is as credible as broadcast, print, and personal communication, the audience's expected level of civility is the same, and the standard for what could reasonably lower a person's reputation is identical.

This paper challenges those presumptions by using the case study of *Baglow v. Smith* ("*Baglow*")[2] to understand the interplay between free speech and reputation. It will trace the legal history of defamation to understand the fundamental values behind the tort and its defenses, then evaluate one contemporary interpretation of the reputation element of defamation within the context of that history. Finally, in applying that interpretation to *Baglow*, it will demonstrate that defamation is not sufficiently constructed to balance the goals of free speech and the protection of reputation in an online setting.

In a 2012 appeal on a motion arising from *Baglow* ("*Baglow 2012*"), the Ontario Court of Appeal ("ONCA") characterized the importance of our case study thusly:[3]

> 27. In this case, the parties have put in play a scenario that, to date, has received little judicial consideration: an allegedly defamatory statement made in the course of a robust and free-wheeling exchange of political views in the Internet blogging world where, the appellant concedes, arguments "can be at times caustic, strident or even vulgar and insulting." Indeed, some measure of what may seem to be a broad range of tolerance for hyperbolic language in this context may be taken from the apparent willingness of the appellant to absorb the slings and arrows of the "traitor" and "treason" labels without complaint.
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> 28. Nonetheless, although the respondents come close to asserting – but do not quite assert – that "anything goes" in these types of exchanges, is that the case in law? Do different legal considerations apply in determining whether a statement is or is not defamatory in these kinds of situations than apply to the publication of an article in a traditional media outlet? For that matter, do different considerations apply even within publications on the Internet – to a publication on Facebook or in the "Twitterverse", say, compared to a publication on a blog?

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[1] *Grant v Torstar Corp*, 2009 SCC 61, paras 28–29.

[2] *Baglow v Smith*, 2015 ONSC 1175.

[3] *Baglow v Smith*, 2012 ONCA 407, paras 27–29.

> 29. These issues have not been addressed in the jurisprudence in any significant way. The responses may have far-reaching implications.

Dr. John Baglow is a former public servant and an executive of the Public Service Alliance of Canada, and writes the left-wing political blog "Dawg's Blawg" under the pseudonym "Dr. Dawg".[4] Dr. Baglow has self-identified as "Dr. Dawg" numerous times in columns he has written for the *National Post*.[5]

On August 10, 2010, Mr. Roger Smith, in a post to the right-wing political discussion forum "Free Dominion" and writing under the pseudonym "Peter O'Donnell", said that Baglow is "one of the Taliban's more vocal supporters" in response to a previous blog post by Baglow referring to Conservative Party of Canada supporters as "yokels with pitchforks".[6] While acknowledging "that debates on political blogs can be caustic, strident or event vulgar and insulting at times", Dr. Baglow believed "Mr. Smith went too far" with this label,[7] and filed suit against Smith and the moderators of Free Dominion, Mark and Connie Fournier.

In 2011, the defendants sought a summary judgment motion to dismiss the action.[8] The Ontario Superior Court found the issue was justiciable on a summary basis and determined the comments were neither defamatory nor without the defence of fair comment.[9] Baglow appealed the decision to the ONCA, which decided the motion judge "erred in granting summary judgment"[10] because there were issues in the case that could only be dealt with by a full trial, including an assessment of the individuals and how they interpreted the exchange,[11] whether previous exchanges on the Internet were sufficient evidence of the presence or absence of malice,[12] the lack of cross-examination on the affidavits presented in the trial record,[13] and a lack of expert evidence about how political discourse functions on the Internet.[14] The trial commenced, and a decision was released on February 23, 2015.[15]

This paper seeks to answer some of the questions raised by the ONCA. Part I of looks at the importance of free speech and defamation's role in limiting it. Part II uses a literature review to draw out the essential elements of defamation and reconceptualize the tort of defamation in a way that aligns with its social utility. It then applies this new approach to

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[4] *Baglow v. Smith*, *supra* note 2, paras 27–28.
[5] *Ibid*, para 30.
[6] *Ibid*, paras 11, 17.
[7] *Ibid*, para 6.
[8] *Baglow v Smith*, 2011 ONSC 5131.
[9] *Ibid*, paras 3–5.
[10] *Baglow v. Smith*, *supra* note 3, para 22.
[11] *Ibid*, para 31.
[12] *Ibid*, para 32.
[13] *Ibid*, para 33.
[14] *Ibid*, para 36.
[15] *Baglow v. Smith*, *supra* note 2.

Baglow and Madame Justice Polowin's ultimate decision. Finally, it looks at how this reconceptualized defamation model fits within the current Canadian jurisprudence on the subject. Finally, Part III looks at ways to reshape our assumptions about defamation and how to better protect reputation through new privacy torts.

PART I: The Balance Between Free Speech and Defamation

> "Political debate in the Internet blogosphere can be, and, often is, rude, aggressive, sarcastic, hyperbolic, insulting, caustic and/or vulgar. It is not for the faint of heart."[16]

So begins Polowin J.'s decision in *Baglow*. As a case study, *Baglow* is an excellent example of the court balancing the complicated issues around freedom of speech because the controversy, at its very foundation, is about a stark difference in values about freedom. As Polowin J. writes, "The battle between the left and the right in the political blogosphere played out in the courtroom, their ideological differences with respect to the issue of free speech an undercurrent throughout."[17]

To understand defamation and the balance between free expression and reputational interests held by individuals, we must identify what these concepts mean.

A. Understanding Free Expression in Canada

In Canadian jurisprudence there are two dominant philosophical traditions explaining the importance of free expression – "the marketplace of ideas" and "human liberty and self-fulfillment". [18] Respectively, they represent an absolute approach to freedom of expression and a more contextual one. Any alteration to defamation law must be placed within this philosophical context.

(i) Marketplace of Ideas

The marketplace of ideas approach, a phrase coined by Justice Oliver Wendell Holmes[19] but principally advanced earlier by John Milton and John Stuart Mill, believes the discovery of truth and human flourishing is best protected by an uninhibited level of free speech where ideas compete with one another and have their truth verified by the testing of opinions against one another.[20]

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[16] *Ibid*, para 1.

[17] *Ibid*, para 8.

[18] Philosophically, there is another school of rationale based in democratic self-governance or "political speech" but within Canada that approach has largely been subsumed by the other two categories: see generally Peter N Amponsah, *Libel Law, Political Criticism, and Defamation of Public Figures: The United States, Europe, and Australia* (New York: LFB Scholarly Publishing LLC, 2004) at 23.

[19] *R v Keegstra*, [1990] 3 SCR 697 at 803.

[20] Amponsah, *supra* note 18 at 24.

In Canada, this approach has been both in and out of favour. The marketplace of ideas is considered a foundational justification of the *Canadian Charter of Rights and Freedoms* section 2(b) protection of free expression.[21] However, critics have argued this approach is detached from how human beings evaluate truth – we cannot identify falsehood because we cannot evaluate our own experiences objectively and are easily persuaded to believe dominant beliefs and what is most advantageous for ourselves.[22] Furthermore, similar to the dilemmas of a *laissez-faire* market, a *laissez-faire* approach to speech presupposes an equality of voices that ignores the impact of wealthy and powerful voices – "democratic society can achieve the discovery of truth only if citizens have all the appropriate tools for the search, such as education, access to information, and unhindered fora for open debate."[23]

The substance of this critique can be found in *R. v. Keegstra*, where Dickson C.J. found hate speech is a limit to the marketplace approach:

> "Indeed, expression can be used to the detriment of our search for truth; the state should not be the sole arbiter of truth, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas. There is very little chance that statements intended to promote hatred against an unidentifiable group are true, or that their vision of society will lead to a better world. To portray such statements as crucial to truth and the betterment of the political and social milieu is therefore misguided."[24]

In dissent, McLachlin J., as she then was, argued against this critique:

> "Notwithstanding the cogency of this critique, it does not negate the essential validity of the notion of the value of the marketplace of ideas. While freedom of expression provides no guarantee that the truth will always prevail, it still can be argued that it assists in promoting the truth in ways which would be impossible without freedom. One need only look to societies where free expression ahs been curtailed to see the adverse effects both on truth and on human creativity. It is no coincidence that in societies where freedom of expression is severely restricted truth is often replaced by the coerced propagation of ideas that may have little relevance to the problems which the society actually faces. Nor is it a coincidence that industry, economic development and scientific and artistic creativity may stagnate in such societies."[25]

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[21] *Irwin Toy Ltd v Quebec (Attorney general)*, [1989] 1 SCR 927 at 976; *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199, para 107.
[22] Amponsah, *supra* note 18 at 25–27.
[23] *Ibid* at 27.
[24] *R. v. Keegstra*, *supra* note 19 at 763.
[25] *Ibid* at 803–04.

In 2009, McLachlin C.J. had the opportunity to buttress the marketplace of ideas justification by affirming her dissent from *Keegstra*, deciding the rationale "extends beyond the political domain to any area of debate where truth is sought through the exchange of information and ideas."[26] However, she later concurred with the majority of *Saskatchewan (Human Rights Commission) v. Whatcott*, when the Court followed Dickson CJ's less doctrinaire approach.[27]

(ii) Human Liberty and Self-Fulfillment

An alternate purpose for freedom of expression is "self-fulfillment" which fosters "the development of the personality of those who express the ideas and of those who receive them."[28] Primarily identified with Professor Thomas Irwin Emerson, this justification for free expression first found its way into Canadian jurisprudence in *Ford v. Quebec (Attorney General)* where the court directly sited Emerson's work; it was determined that commercial expression has individual and societal value because it serves to assist in making informed choices, which is "an important aspect of individual self-fulfillment and personal autonomy."[29]

The rationale of self-fulfillment consists of four distinct but interdependent values: "(1) individual self-fulfillment through expression; (2) the advancement of knowledge and truth; (3) the participation by all members of society in the decision-making process, and (4) the achievement of a stable community through consensus."[30]

While the idea of a marketplace of ideas can be an aspect of the advancement of knowledge and truth, freedom of expression in this model is contextual rather than absolute, concerned deeply with the purposes of the speech at hand. Political speech may become "the single most important and protected type of expression"[31] but if the purpose of that speech is to deny members of society from involvement in the decision-making process, it is open to government interference.[32]

Self-fulfillment became a staple of Canadian expression jurisprudence post-*Ford*, receiving affirmation as the justification for such varied forms of expression as commercial advertising [33] commercial pornography, [34] and personally created sexual images of minors,[35] but excluding hate speech[36] and libel[37] because of their ability to

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[26] *Grant v. Torstar Corp.*, *supra* note 1, para 49.

[27] *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, paras 104, 171.

[28] Amponsah, *supra* note 18 at 28.

[29] *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712, paras 56, 59.

[30] Amponsah, *supra* note 18 at 28; see also Thomas I Emerson, *The System of Freedom of Expression* (New York: Random House, 1970) at 6–9; Thomas I Emerson, "First Amendment Doctrine and the Burger Court" (1980) 68 Cal L Rev 422 at 423.

[31] *Harper v Canada (Attorney General)*, 2004 SCC 827, para 11.

[32] See *R. v. Keegstra*, *supra* note 19 at 763.

[33] See *Irwin Toy Ltd. v. Quebec (Attorney general)*, *supra* note 21 at 976.

[34] *R v Butler*, [1992] 1 SCR 452 at 499.

[35] *R v Sharpe*, [2001] 1 SCR 45, paras 24–24, 107–09.

undermine the social and political participation of members of the community. Within the jurisprudence it has principally served as an analytical tool in *Charter* section 1 analyses, arguably making it the dominant approach in considering the freedom of expression.

(iii) Reputation May Trump Free Expression

With respect to defamation, despite the general preference for self-fulfillment in section 2(b) cases, the leading defamation cases offer unclear guidance as to which justification is most important. Neither *Hill v. Church of Scientology of Toronto*[38] nor *WIC Radio Ltd. v. Simpson* ("*WIC Radio*")[39] discuss the justification of freedom of expression and *Grant* only gives the most cursory analysis, ultimately dismissing self-fulfillment as a meaningful grounds upon which to defend defamatory speech.[40] The Court claims self-fulfillment "is of dubious relevance to defamatory communications on matters of public interest" and "Charter principles do not provide a license to damage another person's reputation simply to fulfill one's atavistic desire to express oneself."[41]

Given the strength of self-fulfillment in other cases, denying that free expression has a meaningful impact on the personality of alleged tortfeasors gave the plaintiff's reputation more weight in the final decision in *Grant* and pushed the Court towards a more conservative outcome. *Grant* demonstrates the direction of defamation will depend not on the court's understanding of free expression, but on how it values reputation.

B. The Risks of Free Speech

In order to develop a meaningful understanding of reputation on the Internet, consideration must also be given to the unique challenges presented by online communication.

(i) The Ease of Spreading Falsehoods

Cass Sunstein argues the Internet presents practical problems that must be considered when evaluating online defamation; false rumours, spread through the dual mechanisms of "social cascades" and "group polarization", cause sensible people to rationally accept falsehoods.[42]

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[36] *R. v. Keegstra*, *supra* note 19 at 763; *R v Zundel*, [1992] 2 SCR 731 at 752.

[37] *Grant v. Torstar Corp.*, *supra* note 1, para 51.

[38] *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130.

[39] *WIC Radio Ltd v Simpson*, [2008] 2 SCR 420.

[40] *Grant v. Torstar Corp.*, *supra* note 1, paras 47–57.

[41] *Ibid* at 51.

[42] Cass R Sunstein, "Believing False Rumors" in Saul Levmore & Martha C Nussbaum, eds, *The Offensive Internet: Privacy, Speech, and Reputation* (Cambridge, MA and London, UK: Harvard University Press, 2010) at 91.

Social cascades happen with the quick spread of information or reputations. It starts when a person announces her view on a subject.[43] A subsequent group member considers their own information on the topic, then considers the degree to which they trust the first person, and makes a decision about what to believe. As each group member thereafter considers their own views on the subject, they also have more and more information about the views of other group members and the degree to which they trust those people plays a larger and larger role, regardless of whether their own private information is better. In this mechanism, even if the initial person made a mistake their judgment plays an outsized role in the beliefs of others. The result is 1) "people will believe a falsehood, possibly a damaging one", and 2) there is a tendency for group views to appear definitive because the question asked of the group effectively evolves from how to weigh the available information to whether the previous actors can be trusted in their opinions.[44]

A reputational cascade functions similarly when "people think they know what is right, or what is likely to be right, but they nonetheless go along with the group or the crowd in order to maintain the good opinion of others."[45] They may not want to appear ignorant or indifferent to the views of the first actor, or "face their hostility or lose their good opinion."[46]

Group polarization is another social phenomenon that serves to rapidly spread false rumours on the Internet. It has been founded that like-minded people deliberating in a group tend to drift towards the most extreme positions within that group.[47] Sunstein cites several studies confirming this tendency, including examples where groups of people were far more likely to aggressively protest "police brutality against African Americans; an apparently unjustified war; and sex discrimination by a local city council" after deliberating with each other than they were prior to the deliberation.

Sunstein believes group dynamics induce extreme polarization for three reasons: 1) the initial distribution of views in a group effectively highlights strong arguments for the dominant views while ignoring and forcing minority views to respond to those dominant views, thereby reinforcing their power, 2) corroboration of your views by other group members makes you more confident in your interpretation, and more likely to accept information corroborating that view, and 3) people are concerned about their social standing within a group and will often adjust their views to conform with it, or at least not oppose it.[48]

The application of these phenomena to the Internet is plainly apparent. One well-documented example was the fate of Justine Sacco, a corporate communications professional, who in December 2013 tweeted to her 170 followers before getting on a

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[43] *Ibid* at 92–93.
[44] *Ibid* at 93.
[45] *Ibid* at 95.
[46] *Ibid*.
[47] *Ibid* at 96.
[48] *Ibid* at 99–102.

plane, "Going to Africa. Hope I don't get AIDS. Just kidding. I'm white!"[49] The intended joke was making fun of privileged American views of the rest of the world, but while on the 11-hour flight from London to Cape Town, communities on Twitter found her tweet, determined it was racist, and began to express their vitriol. Of the tens of thousands of people commenting on her, few more than a handful had any private information to contribute and, on such a charged topic like race, there was no incentive for anyone to speak out on her behalf. By the time she landed, her name was the number one worldwide topic on Twitter, hotel workers were threatening to strike where she was staying, and soon thereafter she was fired from her job. In this case the false rumour was that Justine Sacco was a racist, or at least a racist disproportionally more than any other person, and through a social cascade and group polarization, she went from having no reputation to speak of to no reputation anyone would want within a 12-hour period.

(ii) "Cyber-Cesspools"

Whereas Twitter and social media provide unbelievable speed of communication, there are corners of the Internet that some consider particularly vicious and worthy of concern. "Cyber-cesspools", writes Brian Leiter, are places "devoted in whole or in part to demeaning, harassing, and humiliating individuals" such as online bulletin-boards, blogs, and other websites.[50] There are several interdependent problems that turn these spaces into arenas of "implied threats of physical or sexual violence . . . non-defamatory lies and half-truths about someone's behavior and personality . . . demeaning and insulting language . . . [and] tortious defamation and infliction of emotional distress."

Internet anonymity plays a role. To use one example from a website for prospective and current law students in the United States, anonymous posters repeatedly targeted a woman by name with a range of misogynist, violent speech[51] - it seems unlikely that prospective lawyers would publicly say such things without the cloak of anonymity. The same website was not limited to violent misogyny but unequivocal examples of racism, anti-Semitism, and homophobia.[52]

In economic terms, the Internet has eliminated the barriers to entry for any person who wants to publish their thoughts to the world.[53] The other side of this decentralized model of publication is a greater proportion of writing lacks intellectual merit. Barriers to entry functioned as a means of pre-vetting ideas before they spread beyond an individual's social group.

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[49] Jon Ronson, "How One Stupid Tweet Blew Up Justine Sacco's Life", *The New York Times* (12 February 2015), online: <http://www.nytimes.com/2015/02/15/magazine/how-one-stupid-tweet-ruined-justine-saccos-life.html>.

[50] Brian Leiter, "Cleaning Cyber-Cesspools: Google and Free Speech" in Saul Levmore & Martha C Nussbaum, eds, *The Offensive Internet: Privacy, Speech, and Reputation* (Cambridge, MA and London, UK: Harvard University Press, 2010) at 155.

[51] *Ibid* at 159.

[52] *Ibid* at 158.

[53] *Ibid* at 161.

Together, anonymity and easy access to publishing platforms means there are few incentives to discourage the publication of false rumours or reputation-damaging material. The additional difficulty of cyber speech is that information on these platforms tends to be divorced from its original context, widely available to any person with an Internet connection, and made permanently discoverable through search engines.

(iii) Low Value Speech Does Harm

These practical counterpoints to the philosophical benefits of free speech are important and demonstrate free speech can have real costs for the reputations of the people being spoken about. And while these costs may be dismissed as collateral damage in a free speech regime generally benefiting humanity, there are arguments that cyber-cesspools could never offer value to the "marketplace of ideas"[54] nor should the preference-satisfaction from expressing offensive speech be given particular moral weight.[55] Leiter argues this point strongly, noting laws against strategic lawsuits against public participation and the cost of private litigation are sufficient barriers to prevent abuses of the legal system.[56]

PART II: Discussing Reputation

A. A Moral Community Theory of Reputation

Defamation is a limitation on free speech to protect the reputations of individuals from the harms of low-value speech. The principal test (also referred to as the reasonable person test) for defamation requires that a plaintiff prove the allegedly defamatory words or images "would tend to lower the plaintiff's reputation in the eyes of a reasonable person".[57] To understand the reputational impact of speech in specific circumstances, the court requires a theoretical framework that unpacks the meaning of "reputation".

Defamation's principal test externalizes reputation by establishing it as the view that "ordinary or right-thinking" people within a community have of an individual.[58] Thomas Gibbons argues this is a problem because it allows courts to jump from determining defamatory material *could* negatively impact the reputation of a plaintiff to assuming that it *did,* and to assume the plaintiff already possesses a good reputation rather than going through the exercise of deciding whether that is the case.[59] Essentially, just as the reasonable person is a legal fiction, so too is reputation as defined in the common law because it is divorced from the reality of both a plaintiff's reputation and how the impugned communication impacted that reputation, despite research demonstrating no

[54] *Ibid* at 164–68.
[55] *Ibid* at 168–69.
[56] *Ibid* at 169.
[57] *Grant v. Torstar Corp.*, *supra* note 1, paras 28–29.
[58] Lawrence McNamara, *Reputation and Defamation* (Oxford University Press, 2007) at 21.
[59] Thomas Gibbons, "Defamation Reconsidered" (1996) 16:4 Oxford Jo*urnal of Legal Studies 587 at 599.*

such assumptions can be made.[60] In these contrasting models, reputation under the principal test is a legal construct, whereas Gibbons sees it as a social one.[61]

Gibbons's point makes logical sense. Imagine you are in a room full of people and one of them quite earnestly tells the audience you are a known neo-Nazi (sufficed to say, this is untrue). Under the legal test, a judge would ask themselves whether a right-thinking person in the community could consider accusations of neo-Nazism harmful, and would likely determine they could. Now imagine the person making the claim is himself a neo-Nazi. Under the legal test that is irrelevant. Imagine also that the room is full of people who are also neo-Nazis. Under the legal test that is also irrelevant. You could sue this person for what they said about you and would likely win the test for defamation, despite the factual scenario offering no serious possibility that your reputation would have been diminished at all. After all, neo-Nazis probably do not think less of people who are called neo-Nazis.

Reputation is therefore not an objective standard but a subjective one, dependent on the community in which the speech occurs. This is why Lawrence McNamara argues we need a better understanding of reputation as "a social judgment of a person based upon facts which are considered relevant by a community."[62] Firstly, this requires courts to recognize that reputations exist within communities, which are a group of people bound by a set of moral norms.[63] One man's reputation as trustworthy in prison may be the exact opposite outside of a prison – but the man is the same person, he just holds multiple, true identities and reputations. Therefore, an effort needs to be made to determine which community is defining his reputation at the relevant time to establish the benchmark for judgment (i.e. a moral community) and that cannot be assumed but requires the court to engage in a process of moral inclusion or exclusion.[64] To use McNamara's example, if a court determines being called a homosexual is defamatory, it is assuming a moral community that excludes homosexuals. Similarly, when determining whether an offensive word would tend to lower the reputation of its target, the court is assuming a moral community that excludes people who use that word.

Secondly, the court must determine tests for what is defamatory and apply those tests, but within the context of that moral community.[65] McNamara believes the principal test for defamation should continue[66] because "the defamatory status of imputations is not [usually] an issue in litigation",[67] but with recognition that the reasonable person should not be considered "a fixed and certain point of reference but . . . as [a set of] *presumptions*" that can be disregarded in favour of a competing set of moral norms

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[60] *Ibid*.
[61] McNamara, *supra* note 58 at 21.
[62] *Ibid* at 35.
[63] *Ibid* at 26.
[64] *Ibid* at 34.
[65] *Ibid* at 36.
[66] *Ibid* at 212.
[67] *Ibid* at 34.

("moral taxonomies").[68] These presumptions include a commitment to "equal moral worth, freedom of choice, protection from harm, and moral diversity."[69]

Some have reasonably criticized this presumed moral taxonomy as not adding clarity nor being sufficiently practical for a jury to administer.[70] Given McNamara's own admission that moral taxonomy is not an issue in most litigation, it seems like an odd approach. However, in considering cyber speech, the presumption of a continuous moral taxonomy may be ignored because there is reason to believe online speech can be better understood as having a different moral taxonomy than our offline moral community. This is the heart of our analysis.

B. Applying a McNamara's Moral Taxonomies to Baglow

(i) Background Facts

In order to have expert evidence about Internet political culture, Polowin J. ordered a report be drafted by Dr. Greg Elmer, "an expert qualified in the area of Internet social media, culture and communications, including communications of a political nature",[71] about the culture of online political chat rooms, message-boards, and blogs, and the expectations and sensibilities of audiences and online actors on blogs and message boards.[72] Effectively, the Court was provided a report about the moral community of the political blogosphere, giving a unique opportunity to apply McNamara's theory to a concrete example.

A great deal of Dr. Elmer's report made its way into Polowin J.' s decision:

- Humour, sarcasm, irony, self-deprecation, jokes and offensive language are used by a significant portion of bloggers, with political bloggers being even more prone to their use, including language on political blogs and message boards that is generally "harsher, more vulgar, spirited and personally directed" and prone to "invective or hyperbole";[73]
- The number of monthly readers of blogs (28% of Canadians) is far greater than the number who engage with posts through comments (15%);[74]
- Standards of conduct are "often discussed" and "either set by the heavier users of a site or more tightly governed by the moderator(s) or owners" with differences

[68] *Ibid* at 212.
[69] *Ibid* at 213.
[70] Elspeth Reid, "Lawrence McNamara, Reputation and Defamation" 14 The Edinburgh Law Review 168 at 170; H Johnson, "Review of L. McNamara, Defamation and Reputation" (2008) 13 Communications Law 63 at 64; Paul Mitchell, "Reputation and Defamation, by Lawrence McNamara" (2008) 37 Common Law World Review 299 at 303.
[71] *Baglow v. Smith, supra* note 2, para 98.
[72] See Greg Elmer, *Political Communications on the Internet [Unpublished]* (Toronto, 2014) My thanks to Dr. Elmer for kindly providing me a copy of his report to the court.
[73] *Baglow v. Smith, supra* note 2, para 102.
[74] *Ibid*, para 103.

being explained by the nature of the board or blog's members, principal set of issues, and historical founding;[75]

- "[O]nline political actors are well aware of the confrontational nature of Internet-based political activity and communication";[76]
- Political blogs or boards tend to consist of "[p]eople seeking to establish their own presence and reputation";[77]
- Unlike mainstream media with agreed standards, ethics and guidelines, online political actors are not held to common norms of behavior;[78]
- Personal attacks are not uncommon in the subset of online political actors. However, there is a difference of opinion about how they are perceived. One researcher considers them frequent, expected and calculated but Dr. Elmer believes readers consider "the structure of blogs and boards, their ownership, moderation, mission and history, the reputation of the actors in question and the broader partisan environment" as factors that determine how an audience differentiates fact from personal attack;[79] and
- Many bloggers post anonymously, but credibility is determined by "the contributions of an actor, their treatment of others in the blogosphere, and perhaps most importantly their overall reputation."[80]

Additionally, on cross-examination Dr. Elmer provided the following evidence:

- There may be more people reading blogs and boards than participants and determining the characteristics of those people is difficult;[81]
- Anonymous posters must work harder to establish a reputation than identified people; [82]
- Across the political spectrum, heavy-handed approaches to comment moderation on blogs and boards is not appreciated;[83]
- Both political actors who post or comment and frequent readers of blogs and boards will understand the tone of discourse they will find there;[84] and
- Persons who do "not participate at all in social media, but who went on Free Dominion would be surprised" at the tone they find, including a greater likelihood of comparisons to Stalin or Hitler.[85]

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[75] *Ibid*, para 104.
[76] *Ibid*, para 106.
[77] *Ibid*, para 108; see also *ibid*, para 109.
[78] *Baglow v. Smith*, *supra* note 2, para 111.
[79] *Ibid*, para 114; Elmer, *supra* note 72 at 9.
[80] Elmer, *supra* note 72 at 10; *Baglow v. Smith*, *supra* note 2, para 116.
[81] *Baglow v. Smith*, *supra* note 2, para 117.
[82] *Ibid*, para 120.
[83] *Ibid*.
[84] *Ibid*, para 124.
[85] *Ibid*, para 125.

Finally, Dr. Elmer gave his opinion that readers of Mr. Smith's comment "would likely think that the poster was trying to provoke debate" and if it was "over the top" the readers would likely ignore it.[86] He based this opinion on the assumptions that the words were on a partisan political message board that allowed extreme comments, known for open debate, and were made by a person known for this kind of rhetoric.[87]

There were also a number of findings that curiously did not make their way into the decision: individuals who visit and read online blogs and boards tend to have higher levels of formal education;[88] the "vast majority" of individuals who posted to blogs were generally characterized as political operatives, heavy users of the Internet, political partisans, political activists (more committed to ideology than party), and political observers of various stripes;[89] and that "visitors of blogs and bulletin boards are relatively well[-]versed in political matters, policies, and debates and that their interest in political debate and engagement extends beyond the [I]nternet to the daily life of their communities".[90] These are all points applicable to the moral taxonomy of the political blogosphere – what is the nature of the moral community that exists there and what are its shared values?

The appropriate context of Mr. Smith's post was a significant section of the decision in *Baglow*.[91] Polowin J. considered arguments that the place of publication (Free Dominion) would prevent a reasonable reader from thinking less of Baglow.[92] The post was self-evidently opinion,[93] incoherent,[94] and also within the normal standards of blogs and boards.[95]

However, Polowin J. dismissed these arguments on five grounds: 1) the logical implication of those arguments would seemingly prevent anything from being considered defamatory, 2) *WIC Radio* involved defamatory statements of "shock jock" radio host Rafe Mair where listeners would expect extravagant opinions and discount them, but the Supreme Court of Canada ("SCC") concluded his comments *were* defamatory, 3) it is difficult to determine the views and sensibilities of blog and board readers, and presume they have the same sensibilities as bloggers and commenters, 4) there are no accepted conclusions on how personal attacks are viewed and "many people are still shocked by personal attacks", 5) unlike her prior belief that "people do not believe what they read on the Internet as compared to mainstream people" there was evidence that "[c]redibility for online anonymous political actors can be gained over time", and 6) the impugned words

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[86] *Ibid*, para 129.
[87] *Ibid*, para 128.
[88] Elmer, *supra* note 72 at 3.
[89] *Ibid* at 4.
[90] *Ibid* at 6.
[91] *Baglow v. Smith*, *supra* note 2, paras 197–220.
[92] *Ibid*, para 199.
[93] *Ibid*, para 200.
[94] *Ibid*, para 201.
[95] *Ibid*, paras 202–06.

were not in the context of a heated debate but a throwaway comment on a post about other issues, on a political bulletin board not used by Baglow.[96] She applied the principal test of defamation and found all of its elements were met.

(ii) Finding a Moral Taxonomy

With respect to Polowin J., her conclusions misread the existing jurisprudence (see Part II.C) and fail on a major category error – she mistook the Internet as fundamentally being a broadcast medium rather than a vibrant moral community of its own.

Of course, she would not be the first. Polowin J. cites an ONCA ruling that emphasizes the broadcast nature of the Internet.[97] It characterized the "ubiquity, universality and utility" of the Internet as establishing a unique context for assessing damages in defamation, citing an Australian case describing the Internet as "ubiquitous, borderless, global, and ambient in nature . . . accessible in virtually all places on Earth . . . [where] the only constraint on access to the Internet is possession of the means of securing connection to a telecommunications system and possession of the basic hardware."[98] It went further to say the impersonal, "anonymous nature of such communications may itself create a greater risk that the defamatory remarks are believed".[99]

The first response to this point of view is that the information presented to the Court largely contradicts it. Dr. Elmer's evidence points to a politically engaged community that is more educated than the general public, generally understands the comments in these forums to be cut-throat in nature, and actively considers the reputations of the people who are publishing their opinions. While anonymous invective can be credible based on the reputation the publisher has developed over time, all of the contextual factors for assessing that credibility would continue to be a background to any particular claim. Hypothetically, Smith could have developed a credible reputation for making interesting arguments on Free Dominion and elsewhere without having built a reputation as a sober-minded communicator of those arguments. Polowin J. starts from the presumption that anonymous publishers are not credible but then leaps to the assumption that Smith's reputation was purely positive, citing Dr. Elmer's evidence. In fact, Elmer's evidence supports a conclusion that Smith's posts would have generally been disregarded and, while credibility as an opinion writer can be built, in this case Smith's own reputation would have acted against the literal believability of his words.

One example in support of this alternate point of view comes from the saga of former Toronto mayor Rob Ford. On May 16, 2013 the website *Gawker* published the startling allegation that they had viewed a video of Ford smoking what appeared to be crack cocaine.[100] This started a media firestorm that took off around the world. What is less

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[96] *Ibid*, paras 207–12.

[97] *Ibid*, para 169.

[98] *Barrick Gold Corp v Lopehandia*, [2004] 71 OR (3d) 416 (Ont CA), para 30.

[99] *Ibid*, para 31.

[100] "For Sale: A Video of Toronto Mayor Rob Ford Smoking Crack Cocaine", online: *Gawker* <http://gawker.com/for-sale-a-video-of-toronto-mayor-rob-ford-smoking-cra-507736569>.

known is that a person under the pseudonym "Rinse" published the same allegation on March 26, 2013 on the well-read blog "Toronto Mike" with details that Ford would come to the house of a friend's mother to smoke crack cocaine. These were damning allegations without any evidence at the time, and the reaction was . . . nothing. Almost no comments were made in response on the blog and it was not picked up elsewhere until after the *Gawker* report.

The supposed ubiquity of the Internet and its ability to attract an audience in the billions did not draw any attention to the original Rob Ford crack cocaine allegation. One can hypothesize that it was because the information was offered by a pseudonym without credibility. But another reason could be that the Internet is a passive form of communication that gives more control to the consumer than any other form – unlike print, radio or television where there are limited broadcast stations or newspapers in a given marketplace and the consumer has little say over what information they receive, the Internet assumes an active consumer role where the reader is searching for particular kinds of information and can access not only "defamatory" material but also a great deal of other positive information putting that negative material in context.

Also, the ubiquity of the Internet does not simply increase the audience size of existing broadcasts but changes people from consumers to consumer/creators. Professor Lawrence Lessig characterizes more traditional media consumption as "Read/Only" culture "less practiced in performance, or amateur creativity, and more comfortable . . . with simple consumption" as opposed to "Read/Write" culture where consumers "add to the culture they read by creating and re-creating the culture around them."[101] There is also a different approach in expectations: Read/Only "culture speaks of professionalism. Its tokens of culture demand a certain respect. They offer themselves as authority. They teach, but not by inviting questions" [102] whereas Read/Write culture "extends itself differently. It touches social life differently. It gives the audience something more. Or better, it asks something more of the audience. It is offered as a draft. It invites a response."[103]

Unlike traditional broadcasting that tries to speak with authority and actively trades on offering an authoritative voice, the Internet offers a medium in "draft" form that expects more will be added to whatever perspective is offered. Blog and video comments, message board responses, and replies on social media turn the broadcast monologue into a dialogue that invites direct responses from the audience and provides accountability for what is said. This all provides valuable context demonstrative of an active moral community existing separately from the one that's away from the keyboard – the form and function of cyber speech is different and demands a moral community approach to media consumption, rather than one presuming the Internet is just a more powerful broadcast medium.

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[101] Lawrence Lessig, *Remix: Making art and commerce thrive in the hybrid economy* (Bloomsbury Publishing, 2009) at 28.
[102] *Ibid* at 84.
[103] *Ibid* at 85.

So when Polowin J. argues we cannot presume the views and sensibilities of blog and board readers are the same sensibilities as bloggers and commenters, and many people still find personal attacks shocking, we have to assume a moral community where 1) readers cannot respond to those points of view, 2) readers cannot find alternate information on the Internet to provide context to those points of view, and 3) readers did not need to actively opt-in to the Internet community in which the impugned words appear.

The final point is possibly the most important because it recognizes the way in which the impugned words would be seen by a reader – either they would have been a reader who frequents Free Dominion or was interested in the content on it and the point of view it espoused, or they would have been looking for information about Dr. Dawg and would have seen the posts on Free Dominion alongside Dr. Dawg's own blog posts and comments elsewhere on the Internet. In the former approach, there's no reason to believe Dr. Dawg would have had a meaningful reputation among Free Dominion frequenters that could have been lowered. In the latter approach, the comments of Peter O'Donnell would have existed in a richer contextual environment. And on the chance that there's a third group of people who would go to Free Dominion to browse its forum without having the forum's conservative perspective, and stumble upon the comment by Peter O'Donnell, the evidence suggests the comment would be given no credibility.

(iii) Polowin J's Category Error

The moral community approach identified by McNamara requires recognition that reputations exist within communities, which are a group of people bound by a set of moral norms. Also, the approach asks the court to determine tests for what is defamatory and the application of those tests, but within the context of that moral community. In *Baglow,* Polowin J. dismissed this approach, generally on the grounds that it would prevent anything from being considered defamatory and be too difficult to determine the views and sensibilities of blog readers who do not comment, and followed the existing case law.

The most significant problem with this decision is that it fails to understand the information communicated by the evidence at trial and improperly characterizes the Internet itself. The fundamental category error of seeing the Internet as a broadcast medium of a general moral community, rather than a distinct moral subculture that functions differently, caused her to draw an incorrect conclusion about the defamatory nature of Smith's words.

C. Can Moral Taxonomy Agree with the Common Law?

Of interest is Polowin J.'s comment that the SCC found defamation was present in the case of *WIC Radio*. As the leading case on the defence of fair comment, *WIC Radio* provides an important guide for legally analyzing reputation. As mentioned, the case involves comments made by Rafe Mair, a "shock jock" talk show host, well-known in

British Columbia on the dominant news/talk radio station, CKNW.[104] In one of his editorials he spoke about Kari Simpson, "a social activist with 'a public reputation as a leader of those opposed to schools teaching acceptance of a gay lifestyle'".[105] There he said Simpson was not "proposing or supporting any kind of holocaust or violence but . . . neither did Hitler or Governor Wallace . . . They were simply declaring their hostility to a minority. Let the mob do as they wished."[106] The imputation was "that Simpson 'would condone violence toward gay people'".[107] Binnie J.' s judgment for the majority found the defence of fair comment protected these words.

Polowin J. reads Binnie J.'s decision as accepting the words were defamatory, but that is not exactly instructive. Whether the words were defamatory was not a live issue before the SCC, having been conceded by the appellants and therefore not receiving much scrutiny by the Court – the main issue of the case was about the defence of fair comment. Binnie J. writes at para 45:

> "Mair's editorial about Kari Simpson clearly defamed her. Attributing to Simpson bigotry of a type associated with Hitler and a couple of notoriously racist Governors in the Southern United States at the height of the desegregation crisis would, I think, tend to lower her in the opinion of right-thinking people (some might call it a "smear"), and the appellants were right to concede the point in this Court."

It is interesting, however, to look at the moral community implied in Binnie J.'s comments. Simpson's speeches about homosexuality included claims that "[homosexuals] want your children", "militant homosexuals seek to lower the age of consensual sexual intercourse between homosexual men and young boys to the age of 14", and homosexuality is "destructive".[108] By finding Mair's comparison was defamatory, Binnie J. accepts that it is qualitatively different to make these kinds of statements about homosexuals than African Americans or Jews, thereby excluding gays and lesbians from the full protection of the Court. Furthermore, given that Simpson herself was on the record as not only expecting *but accepting* harsh words, the words were not necessarily defamatory on a standard as defined by the plaintiff:

> "Quite often people when they first go out they say, 'Oh, Kari, somebody said something mean to me,' and I go 'uh, uh.' I said, 'War, you shoot, they shoot.' Your aim is better. It's really not complicated."[109]

Finally, Binnie J. recognizes the impugned words must be considered in their full context, and "the Court is to avoid putting the worst possible meaning on the words".[110] In *WIC*

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[104] *WIC Radio Ltd. v. Simpson*, *supra* note 39, para 3.
[105] *Ibid*, para 6.
[106] *Ibid*, para 3.
[107] *Ibid*, para 4.
[108] *Ibid*, para 7.
[109] *Ibid*.
[110] *Ibid*, para 56.

Radio, the question is what the words meant. But if the audience hearing the words defines the moral community in which the words were uttered, analyzing the words in their full context demands a consideration of the audience and the ways the audience interacts with the words. On this point, *WIC Radio* neither raises the issue nor gives any clear guidance on how to address it.

In partially concurring reasons, LeBel J. took issue with Binnie J.'s conclusions and conducted the analysis of whether Mair's editorial was defamatory that was skipped by the majority. Recognizing the "low level of the threshold which a statement must pass in order to be defamatory",[111] LeBel J. clarified "[t]he test is not whether the words impute negative qualities to the plaintiff, but whether, in the factual circumstances of the case, the public would think less of the plaintiff as a result of the comment."[112] "Relevant factors to be considered . . . include: whether the impugned speech is a statement of opinion rather than of fact; how much is publicly known about the plaintiff; the nature of the audience; and the context of the comment."[113] While LeBel J. does not draw upon any sources from this paper, he is plainly advocating for a consideration of the relevant moral taxonomy: "before a *prima facie* case can be made out, there must be a realistic threat that the statement, in its full context, would lower a reasonable person's opinion of the plaintiff" and in this case "Mair's comments posed no realistic threat to Kari Simpson reputation."[114]

LeBel J. believes the jurisprudence is open to a moral community approach, and while the majority had the opportunity to engage with his concurring reasons it chose to ignore his opinion rather than refute it. Perhaps, therefore, the SCC is open to this approach but needs a fact pattern that is simpler to distinguish. For example, the nature of cyber speech may create the kinds of significant audience differences that would let the court treat it differently from the speech in *WIC Radio*; audience assumptions in a Read/Only model are inappropriate in a Read/Write context.

It should also be understood that applying this approach would also allow the Court to distinguish itself from *Grant*, which found libel does not help the self-fulfillment goals of free speech.[115] There, the Court's statement that "one's atavistic desire to express oneself" does "not provide license to damage another person's reputation" is based on a presumption of the words in question being able to genuinely damage their target's reputation.[116]

However, if the SCC is open to a shift in defamation law, it may find itself put off by the policy concerns Polowin J. identified – a moral community approach may prevent much

[111] *Ibid*, para 68.
[112] *Ibid*, para 69.
[113] *Ibid*.
[114] *Ibid*, para 78.
[115] *Grant v. Torstar Corp.*, *supra* note 1, para 51.
[116] *Ibid*.

of what is considered defamation today from being classified as such, and that may fail to protect the reputations of many. [117]

PART III: Looking Beyond Defamation

Can Polowin J.'s concern be assuaged? Potentially it can be by looking at the nature of who is being defamed online. Whereas the incentives to pursue defamation claims in the past were primarily for public figures – either individuals or corporations – the Internet makes it possible for any person to become a public figure, such as Justine Sacco. Sometimes this happens intentionally and sometimes the spotlight is forced upon them. At that moment, the moral community they lived in is suddenly redefined – jokes or ideas previously published on the Internet may be stripped of their context and become incredibly damaging. Or maybe they have no reputation on the Internet and are simply being defined by it, such as the woman being victimized in Brian Leiter's cyber cesspool example. Moreover, if the culture of cyber speech is 'anything goes' then what protection could be afforded these individuals? The policy argument for maintaining the principal test for defamation as it exists is that no protection would exist without it.

The SCC has said "The publication of defamatory comments constitutes an invasion of the individual's personal privacy and is an affront to that person's dignity." [118] In a fashion, when we have sought to protect reputation, we have always been trying to protect our right to privacy. Perhaps better privacy rights are a better way to protect reputation.

The online reputation of private individuals can be protected through more robust privacy rights – rather than limiting *what* can be said about individuals, the question becomes *if* or *when* or *how* anything can be said about them. The benefit of privacy is that it is inherently proportional to the different kinds of speech on the Internet. Discussions about a person on a message board that will need to be actively accessed by readers may be manifestly different than a reader who passively follows a person on Twitter or Facebook and has information broadcast to them. Perhaps informational or reputational cascades would be prevented if people with large social media followings could be held accountable for drawing attention to the actions of private figures, while a moral community approach concurrently accepts that people who actively put themselves into the public eye may have unflattering things said about them from time to time. Baglow wrote columns for the *National Post* and was an active contributor to the political blogosphere – while his dignity deserves constitutional protection, it's arguable that such protection should only extend to the areas of his life he kept private.

While in Canada, in general, there is no general common law tort of privacy, recent decisions in Ontario have established specific privacy torts. The Ontario Court of Appeal found in *Jones v. Tsige* "the existence of a right of action for intrusion upon seclusion" when someone "intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns . . . if the invasion would be highly offensive to

[117] *Baglow v. Smith*, *supra* note 2, para 207.
[118] *Hill v. Church of Scientology of Toronto*, *supra* note 38, para 121.

a reasonable person."[119] Intrusion upon seclusion is part of a group of privacy torts in the United States that have largely been used to prevent "intrusive information gathering".[120] Daniel J. Solove argues two more privacy torts have direct relevance to the spread of information online: appropriation and public disclosure of private facts.[121] The former "protects against the use of a person's name or likeness for the benefit of another"[122] and has long been a cause of action in Canada.[123] And now the latter has been recently adopted in Ontario.[124] The public disclosure of private facts exists where 1) a public disclosure is made, 2) the disclosure concerns facts not known to the public, and 3) the matter made public "would be offensive and objectionable to a reasonable man or ordinary sensibilities."[125] The purpose of this tort is that it provides a remedy when said disclosure is "'highly offensive to a reasonable person' and 'not of legitimate concern to the public.'"[126] By focusing on the character of commentary and the outcome of that commentary, these privacy torts may get at the problem of protecting online reputations more directly, without sacrificing free expression about prominent figures.

While no individual tort may be sufficient in itself to properly protect the reputation of genuinely private individuals, using privacy as the paradigm for future research on the protection of reputation may be more appropriate than continuing with defamation. By focusing on privacy to protect reputation, rather than the principal test's reasonable person, the law may find it easier to move towards a moral community approach, without ignoring Polowin J.'s concern that a contextual reading of cyber speech could arguably cause little to be defamatory. Reputation is still worth protecting, but just in a different way from a status quo that infringes so heavily on free speech.

Conclusion

In *Baglow 2012*, the Ontario Court of Appeal asked, "Do different legal considerations apply in determining whether a statement is or is not defamatory in [online speech than] an article in a traditional media outlet?"[127] Based on an analysis of the principal test of defamation, how reputation is understood in the law, and how it ought to be understood for online speech, the answer must be yes. The tension between free speech and reputation animates the debate over the future of defamation law, but reputation has historically been understood in a way that is detached from real life situations. The principal test of defamation presumes a lowering of the plaintiff's reputation where none may have occurred. In the online context, in particular, communication exists in a draft

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[119] *Jones v Tsige*, 2012 ONCA 32, paras 65, 70.
[120] Daniel J Solove, *The Future of Reputation: gossip, rumor, and privacy on the Internet* (New Haven and London: Yale University Press, 2007) at 119.
[121] *Ibid*.
[122] *Ibid*.
[123] See generally *Krouse v Chrysler Canada Ltd*, 1973 CarswellOnt 884 (Ont CA); *Athans v Canadian Adventure Camps Ltd*, 1977 CarswellOnt 453 (Ont HC).
[124] See *Doe 464533 v ND*, 2016 ONSC 541, paras 41–48.
[125] *Ibid*, para 43.
[126] Solove, *supra* note 120 at 119.
[127] *Baglow v. Smith*, *supra* note 3, para 28.

form that can constantly be improved upon, as opposed to the broadcast model that has formed the basis of defamation law to date, and space must be given for speech that is not perfectly formed but nonetheless conforms to the norms of the moral community in which it appears.

Balancing these interests is necessarily complex but the answer is not to ignore that complexity, as defamation law has done. Instead, defamation law should recognize this complexity as well as the underlying value being protected by defamation – the right to control our personality – and protect it through more robust privacy protection.

Fortunately for the litigants in *Baglow* this issue was not the one upon which the outcome turned, and their dispute was brought to a close. Smith's comments were determined to be defamatory, but the defence of fair comment was found to apply.[128] However, it is unfortunate for legal scholars because the issues in the case do have far reaching consequences, and there is reason to believe Polowin J. was wrong in her analysis of the *prima facie* claim of defamation. And getting that aspect right does matter; laws affect social norms and if the end result was one where "[b]oth sides were successful and unsuccessful" there is not much future guidance to be gained from the case for either scholars or people writing online. There is still an incentive to litigate political disputes that are best left to the court of public opinion. Instead, those interested in the reform of defamation law will need to wait for another case where two litigants with conviction can push the law in further directions, or turn their focus to the expansion of privacy as the principal means of protecting online reputation.

[128] *Baglow v. Smith*, *supra* note 2, para 249.

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