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IS “TRUTHTELLING” DECONTEXTUALIZED ONLINE STILL REASONABLE? RESTORING CONTEXT TO DEFAMATION ANALYSIS IN THE DIGITAL AGE

Defamation Law in the Internet Age

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“We live in an age drenched in data ...On the Internet, we constantly live in a twilight between fact and fiction.”¹

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On the medium: “The web can make someone famous in a matter of minutes. But it can tarnish their reputation in but one click”.²

“[T]he nature of the unforgetting Internet has caused all of one’s present actions to be framed by past mistakes, making the possibility of a “second chance” almost nonexistent”.³

EXECUTIVE SUMMARY

A few years ago, Judge Silcoff of the Quebec Superior Court first posed and then answered a significant inquiry, which he framed thusly:

Is there something about defamation on the Internet - "cyber libel", as it is sometimes called - that distinguishes it, for purposes of damages, from defamation in another medium? My response to that question is "Yes"... Communication via the Internet is instantaneous, seamless, interactive, blunt, borderless and far-reaching. It is also impersonal, and the anonymous nature of such communications may itself create a greater risk that the defamatory remarks are believed.⁴

This relatively recent predicament, extensively dealt with by Quebec courts of late, both summarizes and foretells this Report’s proposal to re-orient Ontario cyber defamation analysis towards a Civilianesque approach, whose hallmark flexibility and adaptability lends itself particularly well to the digital age. Indeed, as further discussed herein, harnessing the ordinary rules of negligence, and – in principle⁵ – foregoing defences⁶, the civilian construction is chiefly interested in the *contextual reasonableness* of the impugned expression (rather than in its truth or falsity strictly speaking), in contradistinction to its somewhat categorical Common Law counterpart. It is therefore recommended that Ontario defamation law evolve towards a ‘negligence standard’ in common law parlance. Plainly put, this would require the plaintiff to make a showing of the contextual unreasonableness of impugned speech, an analysis which

subsumes truthfulness and obviates the need for defences, this comporting with *Charter* imperatives as discussed below.

Such is the case in Quebec. Under 1457 CCQ's three pronged approach, statements deemed unreasonably expressed under the circumstances, mindful of the Internet's proclivities as part and parcel thereof, give rise to liability if they are found to have caused reputational harm, often exacerbated qualitatively by the digital medium. This even if they were truthful. What matters is the unreasonable character of the expression under the circumstances and the injury it causes. The burden of proof rests firmly on the Plaintiff, as courts struggle to reach equipoise between protecting privacy and reputation⁷ made fragile in the cyber era, and freedom of expression, also protected in both the Canadian and Quebec *Charter*.⁸ Furthermore, exemplary damages are available (and often awarded in the Internet context) by virtue of the Quebec *Charter* (art 49(2)) if the defamatory comments are found to have been made 'intentionally' (a term generously interpreted to often include recklessly⁹).

Moreover and compounding the importance of revisiting the matter, "in a world where boundaries are porous and shifting"¹⁰ – **and data is global**, a cyber-publication in one jurisdiction may be read and reposted anywhere in the world, thus potentially causing reputational harm transcending traditional or national parameters. Therefore, enforcing rights flowing from conduct originating outside of Canada increasingly preoccupies our courts who are gradually fearful of losing the ability to enforce local norms and policy or rectify domestically

felt harm originating elsewhere.¹¹ This preoccupation with judicial helplessness in Internet cases is evidenced by the notably liberalized jurisdiction test in *Goldhar and Black inter alia*¹² and by the presence of two cyber jurisdiction oriented cases on the Supreme Court of Canada's docket this past fall alone.¹³ It is therefore essential to at least summarily address the jurisdiction question - alongside the potential responsibility of intermediaries- if we are to have a true contextual understanding of cyber defamation as recommended herein.

Cognizant of the above and of the jurisdictional challenges faced in the information age¹⁴, Quebec courts, which the following posits to offer as a basis for advancing the analytical framework in Ontario, consider third party liability and anonymity. This is also true and particularly so of German courts.

The following submits that defamation law has a particularly instrumental role to play in this regard in an age where the poorly articulated Right to Be Forgotten (RTBF) is controversially but commonly¹⁵ advanced as a "bad solution to a very real problem".¹⁶ Moreover, it may eventually, in view of the new European GDPR eventually be expected of or even imposed on Canadian businesses¹⁷ notwithstanding its arguably significant infringement on Freedom of Expression. In other words, if the GDPR is understood as constraining Canadian businesses to adopt the 'Right to be Forgotten' in practice, innovators would bear a heavy burden and perhaps more importantly, Freedom of Expression might be disproportionately restrained in light of the *Charter*.¹⁸ Perhaps more alarmingly, as currently defined, the RTBF inadvertently

appoints foreign, private entities (search engines/ data controllers) to quasi-judicial roles, absent oversight or qualifications.¹⁹ As one student argued, it “hands over the keys to the [Canadian] judicial system”²⁰ to US private entities.

Accordingly, and with an eye towards preventing such a worrisome state of affairs, Quebec courts harness the principles of defamation law to hold third parties, most notably ‘data controllers’ (search engines and the likes) accountable, thereby pre-empting the emasculation of local defamation law²¹ in the borderless, ‘anonymous’ digital age and its supplantation by the infamous RTBF.

Indeed, as evidenced in *Corriveau c. Canoe*²² Quebec Courts may deem *intermediaries* in a privileged position to *control* online data and accordingly, at times, hold them to reasonably curtail the spread of defamatory material in order to mitigate reputational damages. Unreasonably failing to do so in the circumstances when reasonably warned (as per 1457 CCQ) can give rise to direct third party liability (fault of omission) when this failure is shown to directly cause or reputational damage, even in part (i.e. exacerbate that damage).²³ Such willingness, retaining the obiter remarks in *Crookes v. Newton*²⁴ is not alien to the Common Law, as Australia’s highest court has recently retained in *Duffy v. Google*.²⁵ For when “ [d]igital platforms are often disassociated from the territorial boundaries that guide the legal and normative expectations”²⁶ and reputational harm can strike oceans away from the impugned – oft *anonymous*- statement, clearer rules regarding intermediary liability are of the essence.

That is the case in Europe where failure to remove following notice (“take-down notice” model) is deemed negligent.

As Ronen Perry notes in an elucidating piece:

A victim of online anonymous defamation can frequently bring an action against the content provider. True, Article 14 of the E-Commerce Directive provides that some intermediaries (such as hosting service providers) are liable only if they knew about the wrongful statement and failed to remove it following the victim’s request (a notice-and-takedown regime).²⁷

Indeed in the Delfi case²⁸ “the European Court of Human Rights held that a news website was liable for defamation in anonymous user comments. The Court agreed that the website was a publisher rather than an intermediary, and that it therefore was not exempt from the duty to monitor or from liability, despite implementing a notice-and-takedown system.”²⁹ In mid-June 2015, the Grand Chamber of the Court upheld the earlier decision confirming that: “[i]t had been the applicant company’s choice to allow comments by non-registered users, and by doing so it had to be considered to have assumed a certain responsibility for such comments”³⁰. The company should have expected offensive posts, and exercised an extra degree of caution so as to avoid being held liable for damage to an individual’s reputation.³¹

While an exhaustive discussion of the complex, multifaceted and dynamic European Framework is beyond the scope of this discussion, suffice it to note the trend toward third party liability in light of the vicissitudes of digital speech.

As Perry concludes in his review of the European caselaw (2010):

Concurrent liability has two advantages. First, by imposing liability on content providers in addition to online speakers, it overcomes the main flaw of exclusive direct liability: underdeterrence resulting from the high cost of identifying and pursuing anonymous speakers (and to a lesser extent from the problem of judgment-proof defendants). If the speaker is not sufficiently deterred because he or she can be identified only at a very high cost or not at all, or if he or she cannot fully compensate the victim, indirect liability incentivizes content providers to take the necessary precautions. Second, parties who are jointly liable for a particular harm have an interest in reducing their own shares of the burden. Because any difficulty in identifying and pursuing speakers will result in greater expected liability for the content provider, the latter has an incentive to facilitate the identification of anonymous speakers. To do so, content providers may collect user information and volunteer this information in the case of a lawsuit.³²

Although not without serious fairness concern, particularly with respect to algorithms such as Google which may be said to merely present the ills already present online without necessarily adding to them, concurrent liability narrowly understood strikes the author of the Report (and presumably intermediaries themselves) as a state of affairs far preferable to an ill-defined ‘Right to be Forgotten’, gaining popularity and inching in when defamation law is perceived as ineffective to rectify cyber reputational harm.³³

Here too, as with the matter of anonymity, Quebec courts appear to have taken a position worth heeding, examining the limits of freedom of expression in the context of anonymity³⁴ further distinguishing anonymity from pseudonymity. What follows below endeavors to shine comparative light on this instructive approach with an eye towards informing the development of Ontario Defamation law, in line with the LCO’s stated objectives.

I. PART I: INTRODUCTION

A. Evolving Visions of Reputational Privacy and Expression in the Digital Age

Prior to proceeding to a more in-depth discussion of Quebec defamation law and its distinct pertinence to advancing the Ontario framework, it is incumbent upon us to first touch on the very nature of the social and technological change upon us. Cognizant of these medium shifts, the Supreme Court of Canada has laudably evolved its approach to digital privacy, *inter alia* as a means for protecting reputation, commonly predicated on the dignity and control theory discussed below, particularly in civilian thought.³⁵ It therefore stands to reason that defamation or “cyber libel” should similarly be revisited in light of levelled critiques.³⁶

Namely, the changed circumstances of expression – the *context* in which defamation – where facts are of the essence- potentially occurs. Social media of course is characterized by a “general lack of error correction, and gatekeeping”³⁷ and conducted within a broader medium (the Internet) that rarely forgets or contextualizes. This, needless to say, is most salient for purposes of revisiting the correct balance between freedom of expression and reputation/privacy in the digital age, cognizant of *Charter* imperatives.

In a word, we are witness to a culture of instantaneous sharing, enabling anyone to communicate random thoughts potentially with everyone literally worldwide, without the

ability to correct, retract, control or contextualize subsequent dissemination. They may further – to a certain degree- do so anonymously.

Without a doubt, the Internet has laudably democratized expression, shifting the narrative from freedom *from* government muzzling to freedom *to* express oneself to a far, far broader audience, irrespective of financial means or social status (see e.g. *R. v. Guignard* – the right not only to speak but to be heard).³⁸ Whereas prior to the digital age only the monied or otherwise influential could fathom reaching a significant audience, thereby arguably emasculating any purposive construction of free expression enshrined in a constitution prizing equality³⁹, the Internet has become the proverbial 'soapbox' of the 21st century,⁴⁰ providing everyone and anyone with what may be deemed an optimal platform for expression. But again, unlike their predecessors, these new media sources are subject to little if any oversight, scrutiny or accountability.⁴¹

In contradistinction to the institutional press, which by most accounts boasts built in safeguards (editorial oversight, and a civil if not purportedly neutral tone) bloggers and tweeters inter alia can share information in a manner that serves to radically compound the difficulties related to traditional defamation -even punitive shaming- and may ultimately force us to recalibrate the balance reached between free speech known as the “very life blood of our freedom and free institutions”⁴² and reputational considerations.

For the ability of sheer vilification and distortions of information to instantaneously reach and mislead even the most educated is amplified by the lack of editorial oversight online.⁴³ It is indeed the medium's very structure that tends to bestow the appearance of legitimacy and veracity on even the most mendacious of sites, in the absence of gatekeepers or other traditional controls. Therefore, as a medium, it may help legitimate the most pernicious forms of hate and incitement, if only due to the arduous task of distinguishing between reliable, authoritative cyber sources, and those peddling racism and fabrications, under the guise of respectability, that the networked environment uniquely imparts.⁴⁴ To say the least, a criticism "framed in less inhibited language".⁴⁵

Accordingly, a recent Canadian (BC) defamation case, occupied with defamatory statements on social media- recognized the pernicious nature of the medium, opining (per Justice Saunders) as follows: "the nature of Facebook as a social media platform and its structure mean that anyone posting remarks to a page must appreciate that some degree of dissemination at least, and possibly widespread dissemination, may follow."⁴⁶ Couple that republication, exponential multiplication and "widespread dissemination" peculiar to social media⁴⁷ with an increasing "shaming culture" and what Quebec CJ Guy Gagnon almost a decade ago called "a decline in the culture of deference".⁴⁸

That decline as previously noted in our introductory comments is surely exacerbated by the rise of anonymity or perceived anonymity, as further discussed below.

In light of the above, insisting on a pigeonhole multi-tier approach as the Common Law does today may be unduly onerous and inadvertently undermines the general objectives of defamation law in the internet age: shielding reputation – impressions left.

B. A Notable Shift in Canadian Law: Privacy as Means for Protecting Reputation

At this juncture, we deem it helpful even necessary to incorporate privacy, a constitutional value, protected both by the Canadian and Quebec Charters as well as the *Civil Code of Québec*, into the discussion. For privacy, particularly as a means for safeguarding personal dignity⁴⁹, ultimately seeks to give people greater control over their reputations.⁵⁰ This control over the tidbits of information that ultimately shape (or distort) reputation, particularly decontextualized is of the essence in the age of Internet which as leading privacy theorist Daniel Solove explains : “makes gossip a permanent reputational stain, one that never fades”.⁵¹ It is available around the world, and with Google it can be readily found in less than a second.

For our purposes, this signifies a shift from a binary understanding of truthful and untruthful speech in the defamation setting. Instead, on the Internet, decontextualized ‘truths’ strictly speaking can be just as destructive to one’s reputation as outright lies do.

Therefore, as noted previously and in a word: unnecessarily emphasizing ‘truth’ or falsity of impugned communications is counterproductive in the digital age, where a distorted view of an individual resulting from the decontextualization of tidbits of information is more readily feared than the perpetuation of lies.

Constant online scrutiny, divorced from the brick and mortar world and drafted to fit a particular platform can be, in the New York Times’ parlance “as oppressive as it is liberating” and can “invite attacks” that -even when true- are toxic and misleading when divorced from context. This necessarily occurs online where “there is a certain pressure [for online commentators] to conform to certain esthetics... and each social media platform tends to rewards... certain styles of posting”.⁵²

Moreover focusing on truth as a defence, rather than a mere element in the contextual analysis of reasonableness, places a disproportionate burden on defendant and unduly frustrates freedom of expression. For websites, unlike traditional mediums of communication disrupt the traditional distinction between truth and lies. Indeed tweets or social media posts and the like by their very nature more often than not represent verifiable truth under the “cover of subjectivity”.⁵³

In a world of ‘alternative facts’ and ‘fake news’ opinion masking as truth lie on a continuum and demonstrating that a post is ‘objectively true’ or verifiable as a defence places a high bar on

defendant, which may not pass *Charter* muster. Instead, assessing truth as part and parcel of reasonableness contextually, as the Civilian tradition endeavors to do infringes less on freedom of expression by placing the burden of making a showing of the comments unreasonableness (rather than falsity) in context on plaintiff. It further accounts as noted for the medium's tendency to decontextualize and therefore distort even truth.

Privacy as first recognized in Warren and Brandeis' seminal piece was born of the need to safeguard reputation in view of what were then new technologies⁵⁴, which speaks to the former's importance let alone relevance to the latter.⁵⁵ What is more, the Civilian/Continental and European construction of privacy is itself predicated on human dignity, itself serving as a fundamental rationale underlying the protection of reputation.

In fact, article 3 of the *Quebec Civil Code* as previously noted protects reputation, dignity and privacy in one breath: "this confirming ... As Robert Post observes, the "theory of reputation", is that we protect it in the name of human dignity" dignity that defamation law protects is thus respect (and self-respect) that arises from full membership in society. We protect people from having their reputation unjustly ruined because we respect their dignity"⁵⁶.

More often than not, attempts at elucidating the nature of privacy – a value pertinent to balancing reputational considerations- and its affiliation to the governing framework of defamation, give rise to nebulous or conflicting guidelines at best. *AB v. Bragg* – reputational considerations – corresponding with the Charter values of privacy and access to justice must be

balanced against public's right to open courts — and freedom of the press and in this case outweigh and prevail. This in turn manifestly prompts ad hoc responses in an area where predictability and stability are key, especially in the digital era. For many years, therefore, Canadian courts, not unlike their counterparts, tended to steer towards a more cautious understanding of long-standing or established normative frameworks, notwithstanding the advent cyber technologies, a development invariably deemed akin to the invention of the printing press in its day.⁵⁷ But the change in circumstances has – and continues to cause considerable quandaries in terms of reconciling modern day, cross jurisdictional problems with an outdated legal structure in place. Thankfully, *AB v. Bragg*, a unanimous landmark Supreme Court of Canada decision rendered in the fall of 2012 appears to herald a remarkable transformation, marking an important progression in both judicial attitudes and understanding of privacy harm. What is more, Canada's highest court appears to be taking serious notice of the indisputable impact that the Internet has had and continues to have on various areas of law, very notably, defamation (or commonly referred to as cyber defamation)⁵⁸, significantly recognizing anonymity as a component of privacy.⁵⁹ For:

[t]he Internet is, at its core, a medium of instantaneous, long-distance communication. It makes communicating with a thousand, or a million, people no more difficult than communicating with a single person. For the first time, it brings mass communication to the masses: anyone with a computer and an Internet connection can utilize its potential. It facilitates communication in any combination of writing, sounds, and pictures. It knows no geographical boundaries: any Internet user can communicate globally, with a potentially limitless audience. While other media of communication may have some of these qualities, their confluence in the Internet is unique. The Internet represents a communications revolution.⁶⁰

In effect, the Canadian Supreme Court appear primed for the first time to revisit notions of prevailing concepts and approaches, reversing its own longstanding caselaw.⁶¹ This momentous

break with the past is further evidenced by two such cases on its fall docket, a disproportionate percentage no doubt. Devising a framework that will accommodate the vicissitudes of the digital age, and of cross border reputational harm in particular is its ultimate objective it stands to reason. The Court echoes the increasingly prevailing understanding that the “common law should develop in a manner that is consistent with and protective of the right to privacy”.⁶²

Accordingly, the ambition here is to revisit Ontario defamation analysis cognizant of the above surveyed legal, social and technological advances. Defamation law, carved as an exception to freedom of expression is positioned to protect reputation, in turn doubtlessly depends chiefly on perception.⁶³ All the more so in the digital age and what QC CA Chief Justice Nicole Duval Hesler labels the “democratization of Internet”.⁶⁴

The following, as above mentioned posits that, mindful of Charter values, Canadian courts should look to the Civilian experience towards evolving defamation, beyond pigeonholed defences, as one Saskatchewan court has arguably already done in *Whattcott*.⁶⁵

That Saskatchewan case may be a source of comfort for Ontario courts as the court in that defamation case, as if it were Civilian, chose to focus on whether the impugned communication “created a false impression” of the Plaintiff’s views contextually, rather than insisting on whether the words were actually false, recognizing that the latter approach would not properly satisfy the underlying rationale of defamation law: protecting reputation. Succinctly, and

although not a cyberdefamation case strictly speaking, the matter attests to the dangers of decontextualization of facts, even when these, narrowly speaking, are not necessarily false.

The facts may be summarized thusly: Plaintiff Whatcott argued that he was defamed by a video clip aired by the CBC:

the plaintiff here complains about the defendant's depiction of words that he authored in a flyer which he also printed and distributed. The essence of his argument *is that the manner and context in which his words were presented seriously distorted and misrepresented his views, thereby giving the words a defamatory meaning.* (emphasis added)

He attacked the prominence of certain clips – snippets of his flyers which although theoretically accurate (he did not contest that the flyers pictured were indeed his) the way they were depicted without referencing the disclaimer that followed on the second page of the flyer, decontextualized the emphasized words, thereby creating a false impression of the plaintiff and his message. As the court opined:

The plaintiff's complaint focuses on that portion of the broadcast, near the beginning, where the defendant's camera depicted the first page of the Alberta flyer. In his statement of claim, the plaintiff contends that by depicting the Alberta flyer in the manner it did, without referencing the disclaimer on the second page, the defendant conveyed the impression that the plaintiff advocated the killing of homosexual people, which was the opposite of the meaning he actually conveyed in the flyer, when read as a whole.

Plainly put the depiction “created false impression” (rather than was false) and was therefore unreasonable and defamatory. Underscoring the danger of decontextualization a fortiori in the digital age, the court opined (at para. 52) :

In my view, by focusing the camera's attention on the phrase “kill the homosexual”, as it appeared in the Alberta flyer, and doing so early on in the broadcast, the defendant conveyed the impression that the plaintiff's activism was considerably more extreme than it

actually was. Indeed, it conveyed the impression that the plaintiff's views extended to inciting violence against homosexual people. Despite the fact that the focus on these words was no more than five seconds long, I am satisfied that it was long enough to have injured the plaintiff's reputation in the estimation of reasonable viewers. While the rest of the broadcast did nothing to support or reinforce this impression, it also did nothing to reduce it or to diminish the injury.

Consequently, and unknowingly applying a Civilian framework of analysis the court concluded "selective editing" of otherwise accurate (or truthful) information may be deemed defamatory if decontextualized to create a false (harmful) and defamatory impression⁶⁶.

C. Laying the Foundation

1. Understanding Reputational Privacy Conceptually

As I have argued elsewhere,⁶⁷ privacy today is not about wanting to be hidden from view, as many, particularly of the younger generation, reject seclusion and take pains to be exposed (be it via social networking, YouTube videos, or Twitter).⁶⁸ It is not that we do not wish to be known or seen, but rather than we expect to be seen as we portray ourselves when we set out to bare our identities online.

Plainly put, where the idea is to share personal information, in the cyber — as in the "real" — world, the intention is, not surprisingly, to expose what one considers an accurate rendering of oneself (whether it is in truth precise or not). More cynically, one might say that those sharing

personal information online wish to preserve control over their ability to represent themselves to the world.⁶⁹

In most cases, people do not fear revealing even very personal information. Rather, they fear it's — often irreparable — distortion and deformation⁷⁰ and it's arguably indelible impact on reputation in the digital age. Indeed, as Paul Schwartz observes: “[t]he weight of the consensus about the centrality of privacy-control is staggering...privacy (including — perhaps even foremost reputational privacy) as control “has emerged as the foremost theory for example, privacy as control has emerged as a dominant theory of informational privacy, in part because it promises individuals (rightly or wrongly) the ability to both disclose and control dissemination of information online”.⁷¹

As Fairfield too buttresses: “[m]odern privacy approaches have developed and intensified the emphasis on individual notice, choice, and control over information flows”.⁷² And again, inter alia: “[t]he conventional wisdom of *privacy as control* on personal information flows is so widespread that “control” has become a code-word”.⁷³

In other words, instead of isolation (or “aloneness”), people covet and in fact require what sociologist Erving Goffman labeled “impression management.”⁷⁴ According to Goffman, most people deploy significant efforts to control or manage their identity (or the perception thereof) through what he called “presentation of self”. Offline that is achieved by way of personal style,

dress, body language and “the revealing and withholding of personal information to convey to the world who they are, or who they want to be taken to be.”⁷⁵

As Goffman explains, “[t]he physicality of the offline world provides built-in protections. When people talk to a group of friends, they can look around to see who is listening. When they buy a book or rent a video, if they pay in cash, no record is made connecting them to the transaction.”⁷⁶

Not so in the cyberspace. Accuracy, especially that relating to identity, is significantly *contextual* in a fragmented, inherently decontextualized networked environment. In cyberspace, depending on algorithm results, even otherwise exact information can easily convey a most misleading impression, (take, for instance, the above-mentioned supposedly defunct psychologist related in *The New York Times*). Worse still, search results may yield maliciously stage-managed data that is otherwise “accurate”. Similarly, time-tested truths may be presented alongside on a par with blatant falsehoods to the point of being indistinguishable from one another.⁷⁷

Given the nature of the digital environment, the end-result might well be to bring individuals into disrepute — not for a finite period or in a manner that might be corrected with reasonable effort. Worse still, an unassailable version of one’s identity, entirely incompatible with one’s one truth (or perhaps even “*the truth*”), might emerge and become entrenched as public

record, upon which future thought is built. What Goffman calls “virtual versus actual identity.”⁷⁸ An individual might thus, in Goffman’s words (discussing stigma more generally), be “reduced in our minds from a whole and usual person to a tainted discounted one.”⁷⁹ What is more, identity, which Michel Foucault of course presented as a flexible construct, is no longer (or certainly less) malleable, as we become trapped in our deeds or even self-presentation of years past (what *The New York Times Magazine* labelled “the end of forgetting”⁸⁰). The capacity to reinvent oneself is therefore presumably either lost or severely compromised. Identity and its potential evolution is frozen in time, decontextualized, or in Goffman’s parlance “spoiled.”⁸¹

D. A Purposive Construction of Defamation in the Digital Age Informed by Comparative Approaches

As noted, defamation law endeavors to protect reputation and to reach a fragile equipoise between two constitutionally protected values: Freedom of Expression on the one hand and Privacy (and Dignity) on the other, broadly speaking.

As the Supreme Court of Canada clarified in *Prud'homme*: “freedom of expression is not an absolute right. It must be tempered by the right of third parties to the protection of their reputation (par. 43).”⁸² In consequence, the rules of civil liability that apply to cases of alleged defamation in the court’s words act as a “safety valve” (*soupape de sûreté*) to stop those who would take advantage and abuse freedom of expression in order to defile another’s reputation, itself a fundamental attribute of personality rights per the civilian perspective (see Part II *infra*).

Recent years have witnessed a convergence between legal systems, thereby rendering comparative analysis more attractive than ever. Thus, as Justice Levin (ret.) observes:

systems faithful to the Common Law tradition, based on the adversarial system, appear less “adversarial” than they were, whereas the supposedly inquisitorial Civil Law systems have lost some of their “inquisitorial” character. Judges too travel more and more, thereby allowing them to interact with their counterparts internationally and familiarize themselves with judicial training methods used abroad- models, which often differ from country to country. More and more, judges communicate via judicial exchange programs. Moreover, international conferences are becoming increasingly prevalent, particularly regionally, with the objective of advancing and improving judicial training techniques and achieving a certain degree of harmony between the various approaches.⁸³

All the more so is cross-pollination of systems or at the very least comparative analysis natural here in Canada home to a meeting of great legal traditions of western world, or “bi-systemism”⁸⁴.

Whereas Quebec Civil Law, as previously noted, was traditionally heavily influenced by its Common Law counterpart, the reverse is increasingly true in Canada, as evidenced by a number of Supreme Court cases, citing the former towards evolving the latter.⁸⁵

Moreover, it is helpful to have Charter rights conceived uniformly nationwide, all while maintaining the particularities of each tradition, as Justice Dechamps opined in *Crookes* supra: “[f]or my part, in order to set out the guidelines, I prefer delineating a rule’s contours in a manner compatible with both common law and civil law defamation, souple enough to apply to future developments in Internet law”.⁸⁶

Coherence and flexibility are of the essence⁸⁷ and the Civilian approach has always prided itself on malleable adaptable principles rather than pigeonholed categories.

It is therefore all the more fitting for Canadian jurisdictions such as Ontario to seek out inspiration from sister provinces for defamation renewal. Particularly instructive is the Civil Law view of reasonable truthfulness or what Descheemaeker labels “moving away from malice towards negligence”⁸⁸, as discussed herein.

II. PART II: THE CIVIL LAW VIEW⁸⁹

A. A Word on the CIVILIAN Understanding of Reputational Privacy

Broadly speaking, Civilian privacy generally and reputational privacy as an aspect thereof⁹⁰ is a matter of affirmative rights, and consists of two parts. First, privacy can be conceived of as the right to engage in individual self-definition and self-invention, rather than a right to be secluded or free from surveillance. Second, adopting civilian parlance, which correlates rights with duties, privacy is also the responsibility not to unnecessarily compromise one's own information in the naïve hope that the information will not be misused.

Furthermore, in the Civilian tradition, privacy is considered to be a “personality right,” a concept alien to the common law.⁹¹ Therefore, in Civil Law jurisdictions, privacy attaches to persons rather than property, irrespective of property or special constraints⁹². In other words, “[p]ersonality rights focus on the être -- the being -- in contrast with the avoir -- the having” and are significantly divorced from territory”.⁹³ Privacy, as a personality right, is predicated on

dignity and control of one's identity.⁹⁴ For example, Article 2 of the German Constitution (Grund Gesetz) provides that: "everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or against morality."⁹⁵ In the privacy context, the concept of dignity in Germany is encompassed within "the right to free unfolding of personality".⁹⁶

For our purposes, in Quebec they are enshrined more specifically in Articles 3-5 and 35-41 of the *Civil Code of Quebec* (CCQ), which explicitly recognizes the right to reputational privacy and enumerates examples of violations⁹⁷ and in Articles 4, 5 of the *Quebec Charter of Human Rights*⁹⁸.

In effect, the *Quebec Charter*, an instrument of quasi constitutional value, which applies to private parties and the provincial government, explicitly.

While very important differences exist between the approaches discussed above, conceiving of the right to privacy as a personality right, free of spatial or property constraints, generally allows the civilian legal method to grasp privacy as a zone of intimacy delineated by the basic needs of personhood, rather than by space or ownership.⁹⁹ On effect, "personality allows one to define oneself in relation to society" and can, therefore, be a very important "impression management" tool in the Internet age due to the difficulties set out herein.

As Resta observes more generally:

In Continental Europe, by contrast [to the common law world], the evolution [of privacy] has been different. Instead of breaking up the traditional category of personality rights, courts have resorted to techniques of dynamic interpretation to adapt old provisions on name, image and privacy rights to changing social and economic landscapes. They have favored, in other words, a functional evolution (Funktionswandlung) of the category of personality rights, rather than a radical paradigm shift, like the one implied in the recognition of a full-scale intellectual property right in one's own identity. It should be underlined that this development has been feasible only because the Continental law of personality has--from the very beginning--maintained a deeper and more ambiguous connection with the universe of property rights than a Warren style right to privacy....At stake in these cases was the value of autonomy, which lies at the core of the continental system of personality protection.¹⁰⁰

Returning to above-referenced duties, as Popovici opines: “personality rights, as subjective rights, comprise both an active and corresponding passive side. The active side is the ‘power’ of the right's holder over the object of the right; the passive side is the ‘duty’ of others to respect this very same object”.¹⁰¹

This takes on particular relevance in Part III, when we turn our attention to intermediaries.

B. From the General to the Specific

With particular regard to defamation, the Quebec ‘hybrid’ approach, anchored in French law but heavily influenced by its Common Law counterparts¹⁰² may be summarized thusly:

Defamation in Quebec as in the Civilian tradition more broadly is subsumed within the general realm of Civil Liability under the ‘catch all’ (negligence) provision of the Civil Code. *Diffamation* is therefore not a separate civil delict with distinct rules and defences as in the Common Law tradition where headings are compartmentalized or pigeonholed. This as Descheemaeker

explains is possibly due to the fact that in France, unlike Quebec, additional treatment of defamatory statements is provided for under the Criminal Law under the '*infraction d'injure*'.¹⁰³

The standard in private law and under the Quebec Civil Code (art. 1457) for assessing fault¹⁰⁴ is that of the reasonable person assessed contextually.¹⁰⁵ The mechanism as Pierre Trudel observes "provides tremendous adaptability"¹⁰⁶, which is particularly salient in the Digital Age.

Succinctly, 1457 imposes a duty of reasonable conduct onto every person, thereby doing away with any need for classic Common Law 'duty analysis' (i.e. determining whether a duty was owed by the defendant to the specific plaintiff). Instead, the breach of this general overarching duty to act reasonably, assessed by an objective standard, applies to all. The breach (by commission or by omission) thereof constitutes a fault, which if causally linked to injury (pecuniary and/or even purely non pecuniary)¹⁰⁷ gives rise to damages. The tripartite requirement must be shown by plaintiff on a balance of probabilities.

As a general rule, therefore, the Civil Code provides that the tortfeasor is held to repair all "bodily, material and moral" injury attributable to him.¹⁰⁸ As the proximity requirement is alien to the Civil Law, a broad duty of care being owed to all, rather than a specific "neighbour", recognizing a broad category of potential claimants appears to pose few difficulties.

Defamation in a word “constitutes one of the most frequent and most serious breaches of the obligation to respect the reputation of others”.¹⁰⁹

Because reputation is, as noted above, also protected by the Quebec Charter (a normative instrument of quasi constitutional status) infringing thereupon may entitles the causally injured to both ordinary and exemplary damages under 49 of the Quebec Charter (in combination with 1621).¹¹⁰

What is more, under Quebec Civil Law, unlike its Common Law counterparts, the question is not whether the defamatory statements care true or false but rather whether expressing them under the circumstances was reasonable according to an objective standard.¹¹¹ Thus for instance, it may be unreasonable to report an extra-marital affair of a colleague on a social network, even if it did in fact occur, given the disastrous potential unless circumstances dictate otherwise.

It bears repeating, truth is not a determining factor¹¹². Perhaps surprisingly to Common Law readers, a lie reasonably told in the circumstances does not meet the defamation threshold, whereas truth, *unreasonably* disclosed publically, thereby causing harm to reputation does.

Thus, for instance, in *Piquemal c. Cassivi-Lefebvre* the Quebec Court of Appeal reiterates:

The impugned facts can be false or true. If they are false, the author may be liable; if on the other hand they are true, the author may similarly be held liable if he did not have a duty or serious, legitimate interest in reporting/disclosing these facts. Whether he felt any degree of satisfaction in so doing is irrelevant [for purposes of determining fault].¹¹³

So too in *Laforest c. Collins*¹¹⁴, the judge confirmed that the fact that the impugned statements were believed to be true does not mitigate liability for comments expressed unreasonably thereby causing reputational harm.¹¹⁵

As neatly summarized and in the leading Supreme Court case of *Prud'homme*, which reaffirmed the Civil Law view of defamation¹¹⁶:

J.-L. Baudouin and P. Deslauriers point out that in defamation cases, the wrongful act may derive from two types of conduct, one malicious and the other merely negligent:

The first is an act in which the defendant, knowingly, in bad faith, with intent to harm, attacks the reputation of the victim and tries to ridicule or humiliate him or her, expose the victim to the hatred or contempt of the public or a group. The second results from conduct in which there is no intent to harm, but in which the defendant has nonetheless interfered with the reputation of the victim through the defendant's temerity, negligence, impertinence or carelessness. Both kinds of conduct constitute a civil fault and entitle the victim to reparation, and there is no difference between them in terms of the right. In other words, we must refer to the ordinary rules of civil liability and resolutely abandon the false idea that defamation is only the result of an act of bad faith where there was intent to harm.

Based on the description of these two types of conduct, we can identify three situations in which a person who made defamatory remarks could be civilly liable. The first occurs when a person makes unpleasant remarks about a third party, knowing them to be false. Such remarks could only have been made maliciously, with the intention to harm another person. The second situation occurs when a person spreads unpleasant things about someone else, when he or she should have known them to be false. A reasonable person will generally refrain from giving out unfavourable information about other people if he or she has reason to doubt the truth of the information. The third case, which is often forgotten, is the case of a scandalmonger who makes unfavourable but true statements about another person without any valid reason for doing so. (See J. Pineau and M. Ouellette, *Théorie de la responsabilité civile* (2nd ed. 1980), at pp. 6364.)

Accordingly, in Quebec civil law, communicating false information is not necessarily a wrongful act. On the other hand, conveying true information may sometimes be a wrongful act. This is an important difference between the civil law and the common law, in which the falsity of the things said is an element of the tort of defamation. However, even in the civil law, the truth of what is said may be a way of proving that no wrongful act was committed, in circumstances in which the public interest is in issue (see the comments by Vallières, *supra*, at p. 10, cited with approval by the Quebec Court of Appeal in *Radio SeptÎles*, *supra*, at p. 1819).¹¹⁷

C. Context

What is determinant therefore, it bears repeating, is neither truth nor public interest as independent determining elements, but rather *context*.

This in order to strike the proper balance between freedom of expression and the protection of reputation (under the overarching Charter values of human dignity and privacy as above noted¹¹⁸) in the Internet information context. One in which we are as Solove sets out “drenched in data” and the “digital scarlet letter”¹¹⁹ can forever attach in a word where “alternative facts” are possible.

In his edifying critique. Robert Danay faults Common Law defamation for “repeatedly equating” the Internet with “traditional broadcast media” notwithstanding significant differences and accordingly failing to strike the correct balance between the above cited values.¹²⁰

While a full discussion of this critique exceeds the scope of this endeavor, Danay further impugnes the outdated approach to defences observing:

the *medium* of an allegedly defamatory communication has always been—and indeed continues to be—one of the most important determinants of how a plaintiff in a common law defamation action will fare in meeting the requisite elements of the tort, fending off any defences that the defendant might raise, and collecting a significant damage award at the close of proceeding.

Canadian courts have seemed to view their role in cyber-libel actions as that of a final bulwark against the defamatory excesses of those members of the general public who might abuse the tremendous new power entrusted to them by the Internet. This has led the courts to hold that when defamatory words are transmitted using the Internet, the availability of any qualified privilege that

would otherwise have immunized the defendant from liability under traditional defamation principles will be vitiated, and will substantially increase any resulting award of damages. By treating the vast and diverse world of Internet communications as an undifferentiated and uniformly menacing whole, the courts improperly favour plaintiffs in most cyber-libel cases to the detriment of vibrant online free expression, and devalue individual dignity and reputation in cases involving other, less-feared media.¹²¹

It naturally follows. Context is key.

Accordingly, in the *Néron* case, Justice Lebel remarks:

[t]his is not to say that whether the statements were true or of public interest is irrelevant. Truth and public interest are factors that are taken into account when engaging in the global contextual evaluation of fault under the CCQ. They are but pertinent examples in the puzzle but do not necessarily play a determining role in all circumstances.¹²²

Unlike the Common Law, the Civil Law does not – in principle and strictly speaking recognize any defences to defamation, other than the absence of fault or causation of course. That is a relatively recent state of affairs (as the courts clarified post *Prudhomme* and *Néron* supra), following many years where confusion reigned on point and Common Law defences were routinely – albeit erroneously raised (and often times accepted) by Quebec courts, due to the historically prevalent Common Law influence which inevitably distorted Quebec Civil Law.

The practical result of this distinction is as follows: the Quebec approach – a hybrid of the pure continental view, which may at times consider defences of Common Law ilk as “part of the puzzle”, however not in a determinant manner, lends itself particularly well to digital age. For truthful comments can be decontextualized, misread and just as harmful as noted above examples illustrate.¹²³

1. An Affirmative Duty to Take Reasonable Precautions

It may further be said that in the Internet age, a reasonable person, cognizant of the “volatile” nature of social media described herein (including but not limited to the potential of instantaneous worldwide dissimulation with difficult recall)¹²⁴, must take reasonable precautions to avoid forever tarnishing another’s reputation lest he be held liable for defamation (negligent breach the general duty enshrined in 1457 supra).¹²⁵

In consequence, Civilian reasoning foresees that a reasonable person would not in most circumstances disseminate *even true information* that is expected to cause reputational harm in the delicate Internet context where reputation is more tenuous than ever.

Needless to say, he who purposefully sets out to tarnish their fellows’ reputation will *a fortiori* be judged unreasonable and indeed held liable should this conduct be found to have directly engendered reputational harm.¹²⁶ The reputational impact – unlike the conduct itself for purposes of determining fault is assessed from Plaintiff’s perspective once fault (of omission or commission) and causal link have been established as described above.

D. Damages

While a thorough discussion of damages is beyond the scope of this report a few words at this juncture are helpful. The Quebec approach to damages in the defamation context is relatively similar to the Common Law's, save the willingness to compensate purely emotional harm and any third party who satisfies the tripartite inquiry, irrespective of remoteness.

In terms of assessing damages, Quebec courts proffer a number of recurring criteria namely:

- 1) the intrinsic severity of the defamatory act/ statement
- 2) its particular scope in relation to the victim (subjective element in terms of impact);
- 3) the extent/ significance of its publication;
- 4) the sort of individuals who gained knowledge thereof and the impact that these defamatory statements may have had on their impression of the plaintiff;
- 5) The degree of lowering in esteem as compared to prior status;
- 6) The reasonably foreseeable eventual and projected duration of the damages and disrepute caused;
- 7) Duty to mitigate: the victim's contribution to their own damages;
- 8) The external circumstances that may have independently probably caused damages, independent of the alleged fault, thus contributing independently at least in part to the

III. PART III: MATTERS OF FALSITY AND CONTEXT/DOING AWAY WITH 'UNREASONABLE TRUTH' IN THE DIGITAL AGE? A RECOMMENDATION

Mark Twain presciently observed: "a lie can make its way half way around the world before the truth has a chance to put its boots on".¹²⁷

All the truer is this statement in the digital age when:

[c]ommunication via the Internet is instantaneous, seamless, inter-active, blunt, borderless and far-reaching. It is also impersonal, and the anonymous nature of such communications may itself create a greater risk that the defamatory remarks are believed. [The] **Internet [has a] distinctive capacity to cause instantaneous, and irreparable, damage to the business reputation of an individual or corporation by reason of its interactive and globally all-pervasive nature and the characteristics of Internet communications.**¹²⁸

And yet, Common Law defamation analysis "is [still] premised on falsity...It therefore bears only a passing relationship to an individual's interest in preserving his private life, or more specifically, in keeping certain *true* aspects of his life within the private realm."¹²⁹

As Kary explained years ago, incredulously to Civilian ears:

[t]ruth is an absolute defence to a defamation claim in the common law. If the defendant can prove that the statement was true, the lawsuit fails. Justifiable error or innocent mistakes, however, are not excuses. No matter how reasonable it may have been to believe in the truth of the statement, one will be liable if it turns out to have been false.¹³⁰

That is problematic for "[i]n that sense, English defamation can justifiably be said no longer to protect reputation in the wider sense of fama, i.e. whether justified or not, but rather deserved reputation, sometimes also called 'reputation founded in character'. In turn, this evolution

transformed the Common Law of defamation into something quite different from Roman iniuria. The focus shifted from the protection against insulting or outrageous words to something akin to a right not to be lied about.¹³¹

Perhaps the time has come to give **Cyber libel a 'special' status**¹³² as in the civil law, whereby truth is not a determinant element but rather a "piece" in the proverbial puzzle (as above stated), assessed contextually. **In a word, 'responsible communication' as a standard of conduct rather than as a mere defence.** Accordingly, the burden firmly affixes to the Plaintiff to show negligence (omission or commission) on a balance of probabilities, rather than compelling the defendant to assert reasonableness in her defence, an undue burden it stands to reason on Charter rights.

A. Anonymity and Defamation: Distinguishing Between Identifiable and Non-Identifiable Sources

For the first time, in *R. v. Spencer*¹³³, the Supreme Court of Canada under the pen of Justice Cromwell, explicitly recognized anonymity as a necessary component of modern Charter privacy.¹³⁴

Although handed down in the criminal law context, this landmark recognition - it stands to reason - builds on *AB v. Bragg supra*, where the Court came alive to the importance of protecting anonymity in certain circumstances. For instance, to protect access to justice where

the *reputational price of seeking it is too high* be it due to the Streisand effect (exacerbating reputational harm by attracting attention to it when commencing an action thereby deterring access)¹³⁵ or related.

Notwithstanding, and in line with the above said, which emphasizes the need to restore context to the digital realm, Justice Cromwell underscored that analysis pertaining to informational privacy must address the totality of the circumstances. In consequence, whereas “anonymity may, depending on the totality of the circumstances, be the foundation of a privacy interest that engages constitutional protection”¹³⁶ given its relevance to personal growth and dignity¹³⁷. It might also do exactly the opposite.

All the more so in the cyber defamation context, the new faceless anonymity is said to embolden cruelty via the Gyges disinhibition effect: “the faceless communication social media creates, the linked distances between people, both provokes and mitigates the inherent capacity for monstrosity”.¹³⁸ It may further reduce accountability and encourage vigilantism. One example of many evidencing anonymity’s capacity for undermining even emasculating domestic (Canadian) courts, the remedies they mete out and indeed the justice system is in *Banque Nationale*. In that cyber defamation case, featuring an anonymous defendant, the Court was left with little other choice than to issue a contempt of order as enforcement against a recidivist unidentifiable defamer. Notwithstanding and evidence in domestic court’s

increasing and lamentable impotence in a borderless world, enforcement seems implausible, thereby rendering a court victory for Plaintiff hollow.¹³⁹

Fundamental principles such as accountability, transparency and – perhaps most importantly - human rights, shaped by their respective communities – as understood by them – may be reduced to nothing more than the singularity of their absence in a borderless world. Plainly put and as noted, the unprecedented fluidity of communication facilitated by the Internet, with the potential to besmirch individuals residing in their own state, with little apparent effective legal recourse when rights and interests are not respected unidentifiably, raises several conceptual difficulties specifically pertaining to access to justice that the literature has thus far overlooked.

Cognizant of these complications and of their potential to undermine justice and render the domestic normative regime addressed herein effectual, Justice Rochon offered in *Prud'homme*: “[n]ot all forms of expression merit the same protection”.¹⁴⁰ Rather, said he exceptional remedies¹⁴¹ aimed at unmasking anonymous defendants¹⁴² need to be carefully tailored or “chiseled” to the circumstances.¹⁴³

As commentator Michel Poutré observes: “it is the combination of anonymous insults which seems most problematic”.¹⁴⁴ A classic scenario in defamation context. In consequence, Poutré proposes that we only **address the impact of anonymity after having established fault** (the defamatory character of the expression). Plainly put he cautions, anonymity per se cannot

constitute or indicate fault. Accordingly, he puts forward: “it is best to broadly interpret the protection favoring anonymity and limit its scope thereafter...anonymity can subsequently be sanctioned when it is misused.”¹⁴⁵

That approach, involving an independent assessment helping to distinguish defamatory speech as an exception to the general rule protecting freedom of expression, as discussed below, comports with addressing the serious issues related to the thorny implications for members of vulnerable populations in particular (for example historically targeted minorities, political objectors, LGBTQ community members etc...).¹⁴⁶ Going a step further, it stands to reason that pseudonyms (rather than ‘anonymity’) as unidentified but identifiable data may be a useful compromise in this vein. For it in one breath protects and leaves a window open for redress as “a person is entitled to establish and use a pseudonym if this use does not have fraudulent intent and *is not meant to evade any legal obligation*”.¹⁴⁷

A further nuance at this juncture is helpful. Rather than conceiving data merely as anonymous or not, an ancillary distinction may be drawn between pseudonymity and anonymity. The above cited court in *Prud’homme* does exactly that in the defamation context, noting the former’s obvious advantages: “a pseudonym bestows the appearance of anonymity but does not allow one to escape their legal obligations as these arise”.¹⁴⁸

Interestingly, the above-referenced and much-debated GDPR too¹⁴⁹ mentions Pseudonymous (rather than anonymous) Data – “defined as data that does not allow identification of individuals without additional information and is kept separate”.¹⁵⁰ Leading US Privacy scholars Schwartz and Solove for their part define three specific states of data: identified, identifiable, and non-identifiable. Identified information is that which “singles out a specific individual from others”¹⁵¹. Identifiable information under Schwartz and Solove’s definition is information that does not currently “single out” an individual but could be used to identify an individual at some point in the future. Finally, non-identifiable information is that which cannot reasonably be linked to an individual.¹⁵²

Non-identifiable data is problematic in the defamation context, as noted, whereas identifiable data under pseudonym may be said to serve the rationale underlying online namelessness without the drawbacks of ‘non-identifiable data’ in terms of undermining legal obligations.

B. Intermediaries: Affirmative Duties as Corollaries to Rights

Worldwide access to Internet communications, compounded by the thorny question of anonymity as previously stated, inevitably requires us to reassess third-party liability in the defamation context. Primarily with an eye towards preventing domestic courts from losing their enforcement abilities and succumbing to the temptation to transfer reputation restoration to private parties as per the above mentioned Right to be Forgotten. Cognizant of this need for reevaluation and of changed circumstances, Quebec Justice Blondin in *Corriveau c. Canoë* held

an intermediary liable for failing to adequately enforce its own community standards policy, holding that the intermediary Canoë had a “significant measure of control to stop a “spillover” of the impugned defamatory communications¹⁵³ the extent of which may never be accurately ascertained”. For on the Internet, truly and more than ever “words once spoken can never be recalled”.¹⁵⁴

Opined the judge [under Quebec civil law]:

The decisive factor for intermediary liability is the degree of control over the content that he/she allowing for the distribution of the impugned speech has. If the degree of control is high, it will be far easier to make a finding of liability, particularly if the intermediary could have withdrawn the defamatory communication.¹⁵⁵

This approach appears to comport with the traditional Civilian conception of duties as corollaries of rights and more particularly, the duty to mitigate injury, enshrined in the Quebec Civil Code.¹⁵⁶

In other words, broadly speaking, Civilian privacy is a matter of affirmative rights, and consists of two parts. First, privacy, a personality right, can be conceived as the right to engage in individual self-definition and self-invention, rather than a right to be secluded or free from surveillance.¹⁵⁷ Second, adopting civilian parlance, which correlates rights with duties, privacy is also the responsibility not to unreasonably compromise one's own information or that of another in the naïve hope that the information will not be misused.

1. Precedent for this View in France

In effect and as delict authority Pierre Trudel observes in his edifying piece on point¹⁵⁸, French courts such the Tribunal de Grande Instance de Paris too at times qualify intermediaries (as in one case MySpace) as ‘editors’ able to control data for purposes of liability. Indeed, the Tribunal asserted as far back as 2007 : “[My Space] profits from advertisements, assumes editor status and must therefore assume the responsibility”.¹⁵⁹ “The active side is the ‘power’ of the right’s holder over the object of the right; the passive side is the ‘duty’ of others to respect this very same object.”¹⁶⁰ This is particularly salient as the civil code, and particularly the law of delicts (civil liability) was – long prior to the Charter Revolution, conceived as an instrument central to promoting human rights.¹⁶¹

That said, Pierre Trudel spoke eloquently to the concerns and remaining uncertainty pertaining to intermediary liability. Namely:

Intermediary liability can be too easily secured, in order to protect themselves, these companies might be tempted to reject any risk-laden messages a priori. On the other hand, if they entirely evade liability, they would not have any incentive to take reasonable steps in order to curtail illicit activities on their networks. The challenge is therefore to find an equitable balance in order to ensure that users human rights and intermediary interests are protected. That said, we must act to avoid creating a situation where intermediaries would be prone to taking on the role of censors, which would serve to limit the free circulation of information.¹⁶²

In other words, one must distinguish between various types of intermediaries (some, like Google, may have a more passive, cataloguing role whereas others, in the social media context inter alia, participate more actively in content monitoring for advertising purposes). Moreover, whereas constant monitoring is ruled out not only as far too onerous a burden but is in nobody’s interest to inadvertently appoint foreign (US) corporate intermediaries as arbiters of

free speech¹⁶³, the Civil Law has always viewed duties as ancillary to right.¹⁶⁴ Control within the parameters of reasonableness in the circumstances (1457), as advanced in *Corriveau c. Canoë* remains a useful criteria, as does recognizing duties alongside rights.

German courts, as civilian sister jurisdictions too are inclined to find an affirmative duty to monitor reviews in the Internet age, as exemplified recently by the German Federal Court of Justice (*Bundesgerichtshof*) ruling in VI ZR 34/15 –March 2016). In that case, involving a dentist facing negative reviews, the site was held liable for failing to act to monitor and remove defamatory reviews. It is not a stretch that companies that monitor for their own commercial purposes take a similar ‘peek’ when reasonably warned of defamatory content.

True to the rationale cited herein opines the German court,

due to the fact that review sites have a comparatively higher risk of personal right infringements than other portals. Users’ ability to post reviews anonymously or under a pseudonym further increased this risk. In addition, reviews posted under a concealed identity made it more difficult for the doctor to take direct measures against the reviewer.¹⁶⁵

This process in *Jameda*¹⁶⁶ comports with the Quebec doctrinal approach (Trudel *infra*) of potential liability only if failure to conduct verifications follows clear complaint, thereby reducing administrative burdens and balancing between expression and reputation, especially on sites so integral to the latter.

C. Convergence Between Common Law and Civilian Imposition of Intermediary Duties in the Digital Age

For even in the Common Law world, courts are more recently inclined to hold intermediaries liable based on what this report will label “contextual control”. In other words, knowingly publishing defamatory material despite explicit and verified requests to investigate/suppress. Thus for instance, citing the Canadian case of *Crookes v. Newton (Obiter)*¹⁶⁷ “the Supreme Court of South Australia found Google liable for defamatory content published in search result “snippets”, auto-complete suggestions and even third party websites to which it provides hyperlinked search results”.¹⁶⁸

In a nutshell, the facts are as follows: Dr Duffy had discovered that extracts of professionally defamatory material had become especially and immediately visible via Google searches, which not only displayed this material whenever her name was searched but that the algorithm even suggested derogatory terms when her name was searched, using auto-complete (e.g. “Janice Duffy Psychic Stalker”).

She complained vociferously but the intermediary to her account fell short of taking the necessary steps. Rather than attempt to sue the multiple and geographical diverse sources of communication (presumably in light of the difficulties associated with both anonymity and jurisdictional enforcement), she proceeded to sue the search engine itself, who she deemed publisher of defamatory material. The court agreed.

Akin to above-described Quebec reasoning in *Corriveau c. Canoë*, the Australian court:

found that **if Google personnel were made aware of the existence of the defamatory website**, snippets generated by Google on software programs and failed to remove them, their continuing existence thereafter is the direct result of human action or inaction rather than merely the result of machine operation. The same analysis applied in respect of the autocomplete suggestions. Additionally, in an even more significant finding, it held that as the Google website is programmed automatically. Google was also a secondary publisher of that [defamatory] webpage if it failed to remove the hyperlink after reasonable notice by the person alleged to be defamed by it (emphasis added).¹⁶⁹

With regard to the onerous duty of surveillance the court proposed what this author deems a “contextual control” test. Plainly put, duties are triggered: “upon being notified that a particular website is considered to be defamatory, a search engine provider which fails to remove the website from its search results within one month, may be held separately liable for defamation every time someone clicks on a link to that material from the search results.”¹⁷⁰

Parenthetically and far beyond the immediate scope of this endeavor, an approach such as this, cognizant of the hardships of pursuing individual defamers in the porous and ‘anonymous’ digital age, may serve to keep at bay the spread of controversial solutions such as the much-criticized ‘Right to be Forgotten’, which for its part unnecessarily infringes upon Freedom of Expression.¹⁷¹ Instead, greater equipoise, respectful of the Charter, might be reached via Duffyesque analysis. The latter permits seasoned Courts of Law, rather than unaccountable and untrained corporate actors, to adjudicate what material is truly defamatory (rather than merely “irrelevant...” as per Costeja) and therefore must be deindexed. It significantly does so by adopting and explicitly citing the Crookes obiter for when third parties *go beyond mere*

hyperlinking. In other words, as the Supreme Court remarks in *Crookes* (cited in *Duffy supra*), there could be liability for intermediaries under different facts if the latter goes beyond simply hyperlinking and fails to heed reasonable warnings.

Pierre Trudel's description of the underlying rationale, although offered in a different context and prior to the *Duffy* ruling, is edifying herein:

[TRANSLATION] This reasoning corresponds to the principle advanced by caselaw in several jurisdictions whereby an owner is not, in principle, liable for the faults/ misdeeds committed by his tenants. That said, a hotel, for its part, that is knowingly at the center of illicit activities will be liable for damages caused as would the owner of a website that endorses defamatory communications transmitted by its users.¹⁷²

We consider that an owner made aware of the presence of damaging material on its 'property walls' and does nothing to remove them is considered a publisher and is responsible for damages caused by these communications. Similarly, an intermediary will always be held to remove information that it knows to be damaging, lest it be held liable as publisher.¹⁷³ Accordingly, when we apply the metaphor of proprietor to an intermediary, a preliminary condition for liability is fault (first condition of civilian liability (– the unreasonable (negligent)) character of the impugned electronic communications.¹⁷⁴ "Conversely, a librarian [as search engines oft qualify themselves] is under an obligation to withdraw information once it has been informed of its delictual character, lest it be held liable for damages that flow therefrom."¹⁷⁵ When they are made aware of the illicit nature of the information under their auspices or to which they grant access, intermediaries or search engines are under an affirmative duty to act. The factor which triggers this obligation is knowledge of the information's delictual character,

as enshrined in art 22 Quebec law (*Loi concernant le cadre juridique des technologies de l'information*, 2001 Chap C 1.1 art 22.).¹⁷⁶

1. Independent Confirmation

Finally, in order to maintain freedom of expression, and we add, prevent handing over the burden and judicial discretion of suppressing expressive content to intermediaries alone , Trudel suggests that the latter should obtain independent (third party) evaluation upon receiving a complaint.

As US scholar Danielle Citron too cautions: “intermediaries have the ability to decide whether and how to shape online expression. Many have elected to use that freedom to challenge online hate speech. Of course many others have not, Indeed, some intermediaries base their business on tolerating or encouraging hate speech.”¹⁷⁷

That absolute discretion vested firmly in the hands of (mostly foreign) private entities in turns, as noted, risk rendering the Charter values central to the balance inherent to defamation law superfluous. Accordingly, civilian thinking requires that duties re-attach to rights and proportionally contain intermediaries to take responsibility for suppressing defamatory speech in the presence of control; warnings (take-down notice) and independent confirmation thereof.

IV. PRELIMINARY CONCLUSIONS: INTEGRATING LESSONS FROM THE CIVIL LAW APPROACH

In her instructive paper on law and technological evolution generally, Lyria Bennet Moses explores the merits of revisiting norms in light of technological change: “existing rules were not formulated with new technologies in mind. Thus, some rules in their current form inappropriately include or exclude new forms of conduct”.¹⁷⁸ This, to our thinking, is particularly true of defamation, as traditionally conceived at Common Law. Fundamentally, and as previously noted, the Common Law’s pigeonholed, categorical approach is problematic in many ways, as the Supreme Court itself recognized in *Grant v. Thorstar*¹⁷⁹. It accordingly moved towards a “broader paradigm”¹⁸⁰, attempting then to soften notoriously rigid classifications towards greater fairness, practicality and with an eye towards striking equilibrium between the relevant Charter values. This equipoise between Freedom of Expression and Reputation/Reputational Privacy in the Digital Age is precisely our objective and underlay the thinking animating the foregoing.

Indeed, the Internet, as Danay cautions in his instructive critique of defamation law, cannot be equated with traditional broadcast media for many purposes including defamation. More specifically, whereas a binary, categorical understanding of ‘truth’ may have had a determinative role to play hitherto, the preceding recommends a more nuanced, contextual understanding of defamatory expression, which better lends itself to striking a constitutional amenable balance between digital expression and reputation (including but not limited to

reputational privacy). Accordingly, as a bisystemic country and cognizant of the above-mentioned convergence between legal systems upon us, Ontario would do well to look to its civilian counterparts (Quebec and beyond) for practical and conceptual inspiration. Particularly in the notion of the *contextual reasonableness* of the impugned expression in defamation analysis. For this far more malleable approach than the ‘truth defence’¹⁸¹, accounts for the promise and perils of unvetted, often instinctive gradations of digital expression and is better equipped to remedy the sort of “overdeterrence” Perry laments in the cyberworld¹⁸² as undermining the otherwise empowering digital speech uniquely imparted by technological advances.¹⁸³

Accordingly, under Quebec Civil Law, unlike its Common Law counterparts, the question - perhaps somewhat surprisingly – is not necessarily whether the purportedly defamatory statements are true or false. But rather whether expressing them under the circumstances was reasonable according to an objective standard (an ex post facto built-in fair-comment defence, one might posit). Circumstances, of course, can and must account for the vicissitudes of the digital variety where pre-existing reputational difficulties can be compounded by punitive shaming in an era of ‘infinite memory’ and ‘alternative facts’ where the proverbial lie can “make its way halfway around the world before the truth has a chance to put its boots on”.¹⁸⁴ Context therefore is key. Such a standard can assist in reintroducing much needed context oft divested by the digital medium or ‘recontextualizing’ digital expression, thereby aligning it with a purposive understanding of the very Charter values that inform defamation law post-Grant.

As noted, reform is especially salient as defamation law has a particularly instrumental role to play in light of the poorly articulated Right to Be Forgotten's worrisome ascendance on the world stage and the precarious reality of (chiefly US) companies unwillingly "pre-monitoring"¹⁸⁵ expression and unwittingly but increasingly playing the role of "amateur judges" absent a proper normative framework.¹⁸⁶

Furthermore, absent protections in Ontario for reputational privacy and personality rights akin to those found in the Quebec *Charter* and the Civil Code, the preceding made the case for more nuanced legal rules, cognizant of context – often the primary casualty of fragmented digital exchanges.

At this juncture, it behooves us to reiterate: this report by no means purports to answer or even fully touch on many of the issues raised by the topic. These challenges should be addressed in future discussions. In particular, although not limited to, the potential relevance of a "hybrid" model, which marries civil and common law approaches, one where context and good faith supplant 'truth' and other defence with an eye towards better balancing Charter values.¹⁸⁷ In a word, two interrelated recommendations were advanced: first, to adopt a 'contextual reasonableness' approach as a Canadian court has already done (however inadvertently) in *Whatcott* above. Second, in line with rejecting a pigeonholed approach ill-suited to the digital age, to retreat from the truth defence, which places undue burden on freedom of expression by requiring defendant to show verifiable truth (rather than for plaintiff

to show lies or unreasonable expression). In Common Law parlance, moving to a negligence standard in defamation law, particularly post-reasonable communication defence post Grant.

Reviewing and revising laws in a changing technological and sociological landscape is how to best protect the civil liberties. A rigid view, practically unworkable in the digital age, can be made more adaptable by turning to the Civil Law's broad and flexible time-tested principles.

¹ Daniel Solove, *The Future of Reputation: Gossip, Rumor and Privacy on the Internet*, (New Haven: Yale University Press, 2007).

² *Laforest c. Collins*, 2012 QCCS 3078, JE 2012-1440, para. 117 [*Laforest*] [translated by author].

³ *Formulating and Implementing a right to Be Forgotten in the United States: American Approaches to Law of International Origin* (2015), 10. Online:

https://getinspired.mit.edu/sites/default/files/documents/ST118_Report.pdf.

⁴ *Banque nationale du Canada c. Weir*, [2010] R.J.Q. 823, 2010 QCCS 402 [*Banque Nationale*], paras. 31- 32.

⁵ Although not always in practice; please see Part III further on.

⁶ In principle and in its pure form, Quebec Civil Law does not offer specific defences such as truth or qualified privilege, as discussed below. Although heavily influenced by Common Law for many years, with judges routinely albeit erroneously citing that tradition's defences in Quebec, the Supreme Court recently clarified the mistaken nature of that practice, alien to the Civil law. See *Prud'homme v. Prud'homme*, [2002] 4 SCR 663, 2002 CSC 85 (see para. 48 inter alia). See also *Gilles E. Néron Communication Marketing Inc. v. Chambre des notaires du Québec*, [2004] 3 SCR 95 [*Néron*], 2004 SCC 53, para. 60.

⁷ A personality right as discussed below protected by the *Code civil du Québec* and the *Quebec Charter of Human Rights and Freedoms* inter alia.

⁸ the latter applying to private disputes as well unlike the *Canadian Charter of Rights and Freedoms*.

⁹ Thus for instance, comments maliciously expressed with the sole goal of ruining another's reputation are relevant for exemplary damages i.e. bad faith- sole goal to ruin reputation. See e.g. *Kanavaros c. Artinian*, 2014 QCCS 4829, JE 2014-1853 [*Kanavaros*].

¹⁰ See Dean Robert Leckey, "Dean's Welcome Address", *McGill University Faculty of Law website*. Online: <http://www.mcgill.ca/law/about/deans-welcome>.

¹¹ See e.g. Robert Kalanda, "Ontario Court of Appeal Split Decision on Appropriate Jurisdiction in Online Defamation Case". Online: <http://canliiconnects.org/en/summaries/43835>; "Supreme Court sides with Conrad Black in libel suit", *CBC News* (18 April 2012). Online: <http://www.cbc.ca/news/business/supreme-court-sides-with-conrad-black-in-libel-suit-1.1282083>; John Schofield, "Award of \$1.4M for reputational damages", *The Lawyers Weekly* (22 July 2016). Online: <http://www.lawyersweekly-digital.com/lawyersweekly-sample/3560-sample?pg=3>; See also Andre Mayer, "How do you fight back against online defamation", *CBC News* (7 May 2013). Online: <http://www.cbc.ca/m/touch/technology/story/1.1314609> ("While teaching in Malaysia several years ago, Lee David Clayworth dated a woman named Lee Ching Yan. After they broke up, the woman started posting slanderous material about him on websites, suggesting, for example, that he was a pedophile and that he was having amorous relations with his students. He sued her in Malaysia, where she was found guilty of defamation and ordered to pay Clayworth the equivalent of \$66,000 in damages. The Malaysian judge also ordered search engine providers Google, Yahoo and Bing to block Clayworth's name from being searchable. But due to differing international interpretations of cyber-law, a Malaysian judge cannot compel a company in California to remove offensive material, and so Clayworth's name continues to come up in search engine results. Clayworth, who now lives in Vancouver, says the online harassment continues to this day").

¹² *Breeden v. Black*, [2012] 1 S.C.R. 666, 2012 SCC 19[*Black*]; *Goldhar v. Haaretz.com et al.*, 2015 ONSC 1128, 125 OR (3d) 1128 [*Goldhar*].

¹³ *Google Inc. v. Equustek Solutions Inc. et al.*, 2015 BCCA 265, leave to appeal granted [*Equustek*]; *Douez v. Facebook Inc.*, 2015 BCCA 279, leave to appeal to SCC requested [*Douez*].

¹⁴ See detailed discussion below.

¹⁵ EC, *Commission Regulation (EC) 2016/679 of the European Parliament and Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation)*, [2016] OJ, L119/1 (most recently by the EU's 2016 General Data Protection Regulation). Online: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.119.01.0001.01.ENG&toc=OJ:L:2016:119:TOC

¹⁶ Jonathan Zittrain, "Europe's Bad Solution to a Real Problem", *U.S. News* (4 December 2014). Online: <http://www.usnews.com/debate-club/should-there-be-a-right-to-be-forgotten-on-the-internet/europes-bad-solution-to-a-real-problem>.

¹⁷ Via the EU's General Data Protection Regulation, see note 15.

¹⁸ See Top 10 operational impacts of the IAPP, "GDRP: Part 6 - RTBF and data portability". Online: <https://iapp.org/news/a/top-10-operational-impacts-of-the-gdpr-part-6-rtbf-and-data-portability/>. (A thorough discussion far exceeds the scope of this endeavor. That said, in a word: the GDPR, Europe's new privacy regulation post-Schrems, requires a "right of erasure" for businesses who wish to benefit from a recognition of adequacy as they had during the Safe Harbour Regime. As the IAPP summarizes: "The General Data Protection Regulation (GDPR) is set to replace the Data Protection Directive 95/46/ec effective May 25, 2018. The GDPR is directly applicable in each member state and will lead to a greater degree of data protection harmonization across EU nations. With new obligations on such matters as data subject consent, data anonymization, breach notification, trans-border data transfers, and appointment of data protection officers, to name a few, the GDPR requires companies handling EU citizens' data to undertake major operational reform. In a significant departure from Directive 95/46/ec, the GDPR recognizes a "right to erasure." This right builds on and expands the so-called "right to be forgotten" recognized by the European Court of Justice in its *Google Spain v. AEPD and Mario Costeja González* ruling in 2014. There, the Court required search engines, upon a person's request, to remove links to

webpages that appear when searching that person's name unless "the preponderant interest of the general public" in having access to the information justifies the search engine's refusal to comply with the request. The GDPR for the first time codifies the right and applies it to all controllers. Under Article 17, controllers must erase personal data "without undue delay" if the data is no longer needed, the data subject objects to the processing, or the processing was unlawful).

¹⁹ See "Forget About it", *The Canadian Bar Association National Magazine* (29 April 2016). Online: <http://nationalmagazine.ca/Blog/April-2016/Forget-about-it.aspx>.

²⁰ [Translated by author]

²¹ (and arguably domestic law more broadly) see *Douez*, note 13.

²² *Corriveau c. Canoe*, 2010 QCCS 3396, 194 ACWS (3d) 1138 [*Corriveau*].

²³ Subject to *Crookes v. Wikimedia Foundation Inc.*, [2011] 3 SCR 47 2011 SCC 47, [*Crookes*]. See *Laforest*, note 2.

²⁴ *Crookes*, note 23.

²⁵ Discussed further on.

²⁶ *Douez v. Facebook Inc.*, 2015 BCCA 279 (Memorandum of argument of Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic para. 14) [*Douez* Memorandum].

²⁷ Ronen Perry and Tal Zarsky, "Who Should Be Liable for Online Anonymous Defamation?" (2015) 82 U Chi L Rev Dialogue 162. Online: <https://lawreview.uchicago.edu/page/who-should-be-liable-online-anonymous-defamation#46N>.

²⁸ *Delfi AS v. Estonia* (2015), App No 64569/09 (ECtHR) [*Delfi*].

²⁹ Ronen Perry and Tal Z. Zarsky, "Who Should Be Liable for Online Defamation?" (2015) 82 U Chi L Rev Dialogue 162 [Footnotes omitted]. Online: <https://lawreview.uchicago.edu/page/who-should-be-liable-online-anonymous-defamation>.

³⁰ *Delfi*, note 28, 33.

³¹ *Delfi*, note 28.

³² His paper proceeds to way the drawbacks, namely and inter alia "double censorship" and administrative costs.

³³ See CBA, note 19.

³⁴ *Prud'homme c. Rawdon (Municipalité de)*, [2010] RJQ 794, 2010 QCCA 584, Rochon A.; see Michaël Poutré, “Diffamation et Anonymat”. Online: <http://docplayer.fr/15157109-Diffamation-et-anonymat-michael-poutre-introduction-1-partie-i-un-concept-fondamental-a-la-democratie-la-liberte-d-expression.html>.

³⁵ In *AB v. Bragg*, [2012] 2 SCR 567, 2012 SCC 46 [*AB*]; *R. v. Spencer*, [2014] 2 SCR 212, 2014 SCC 43 [*Spencer*]; *R. v. Cole [Cole]*, 2012 SCC 53, [2012] 3 SCR 34.

³⁶ See Robert Danay, “The Medium is not the Message: Reconciling Reputation and Free Expression in cases of Internet Defamation” (2010) 56:1 McGill LJ, 1.

³⁷ Christina Spiesel, “Eyes on the Horizon”, Book Review of *Courts, Litigants and the Digital Age: Law, Ethics and Practice* by Karen Eltis, (2013) 58:3 McGill LJ 1061.

³⁸ *Bhasin v. Hrynew*, [2014] 3 SCR 494, 2014 SCC 71, [*Bhasin*]; for summary and analysis see “*R. v. Guignard*”, *Columbia Global Freedom of Expression*. Online: <https://globalfreedomofexpression.columbia.edu/cases/r-v-guignard/>.

³⁹ *Bhasin*, note 38.

⁴⁰ *Bland v. Roberts* (18 September 2013), No. 12-1671, (4th Cir 2013).

⁴¹ Lauren Guicheteau, “What is the Media in the Age of the Internet? Defamation Law and the Blogosphere” (Spring 2013) 8:5 Wash JL Tech & Arts 573.

⁴² In *WIC Radio Ltd v. Simpson*, [2008] 2 SCR 420, 2008 SCC 40.

⁴³ Karen Eltis, “Hate Speech, Genocide, and Revisiting the ‘Marketplace of Ideas’ in the Digital Age”, (Winter 2012) 43:2 Loy U Chicago LJ 267.

⁴⁴ Eltis, note 43.

⁴⁵ *Dyson*, para 35.

⁴⁶ *Pritchard v. Van Nes*, 2016 BCSC 686, 265 ACWS (3d) 3288 [*Pritchard*], para. 83.

⁴⁷ See e.g. Justice Saunders in *Pritchard*, note 46.

⁴⁸ The Honorable Justice Gagnon, “Judges and the Media” (paper delivered at Judge’s Day, 19 August 2008).

Online: [http://www.tribunaux.qc.ca/mjq_en/c-](http://www.tribunaux.qc.ca/mjq_en/c-quebec/Communiqués/GGagnonJuges_m%C3%A9dias_19août08anglais.pdf)

[quebec/Communiqués/GGagnonJuges_m%C3%A9dias_19août08anglais.pdf](http://www.tribunaux.qc.ca/mjq_en/c-quebec/Communiqués/GGagnonJuges_m%C3%A9dias_19août08anglais.pdf).

⁴⁹ As interpreted by the Supreme Court of Canada inter alia in *Hill v. Church of Scientology*, [1995] 2 SCR 1130, 126 D.L.R (4th) 129.

⁵⁰ Alan F. Westin, *Privacy and Freedom*, (Atheneum, 1969), 487,7.

(In his much celebrated article on point, Westin defines privacy as “the claim of individuals...to determine for themselves when, how and to what extent information about them is communicated to others”); C. Fried, “Privacy” (1967-8) 77 Yale LJ 475, 482 [emphasis original] (A modern common law commentator (Harvard), Charles Fried, writes: “privacy is not simply an absence of information about us in the minds of others; rather, it is the *control* we have over information about ourselves”); and likewise see C. Fried, *An Anatomy of Values*, (Harvard University Press, 1970), 140; See also Miller, *The Assault on Privacy: Computers, Databanks and Dossiers*, (University of Michigan Press, 1971), 25.

⁵¹ Solove, note 1.

⁵² Jenna Wortham , « On Technology », New York Times Magazine March 15th 2017 p. 15.

⁵³ David Grossman

⁵⁴ “through new technologies like photography and faster newspaper printing and distribution.”

⁵⁵ Solove, note 1 (“According to William Prosser, one of the most famous tort law scholars, the article was prompted by Warren’s outrage over the media’s snooping on his daughter’s wedding. Prosser quipped that Warren’s daughter had a “face that launched a thousand lawsuits” 109).

⁵⁶ Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 Calif. L. Rev. 691, 694 (1986) (quoting J. Hawes “Lectures Addressed to the Young Men of Hartford and New Haven” 95 (1828); see also Thomas Starkie, “A Treatise on the Law of Slander, Libel and Scandalum” (1826),701-711. Online: <https://archive.org/details/slanderlibelinci00star>.

⁵⁷ *Néron*, note 6, para. 60.

⁵⁸ See Karen Eltis, “Workplace Privacy: Piecing Together Jones, Cole and A.B. V. Bragg: Towards a ‘Proportional’

Model of Shared Accountability” (2015) 18:2 CLEJ 493-515. Online: <https://ssrn.com/abstract=2767544>.

⁵⁹ *Spencer*, note 35.

⁶⁰ Matthew Collins, *The Law of Defamation and the Internet*, 2th ed. (New York: Oxford University Press, 2005), 3.

⁶¹ *AB*, note 35.

⁶² *Douez* memorandum, note 26.

⁶³ Clement Gatley, Patrick Milmo and W. V. H. Rogers, *Gatley on Libel and Slander*, 10th ed. (London: Sweet&Maxwell Ltd., 2007) (“A defamatory imputation is one to the claimant’s discredit; or which tends to lower him in the estimation of others; or causes him to be shunned or avoided; or exposes him to hatred contempt or ridicule” at 1250).

⁶⁴ Nicole Duval Hesler, *Legal TI. Droit et technologies de l’information. Devenir aujourd’hui, l’avocat de demain*, (Cowansville: Éditions Yvon Blais, 2008) 51, 57.

⁶⁵ *Whatcott v Canadian Broadcasting Corporation*, 2015 SKQB 7 (CanLII), <<http://canlii.ca/t/gg18l>>, [*Whatcott*].

The case was first brought to the author’s attention by Me David Grossman of Irving Mitchell Kalichman, Montreal.

⁶⁶ Appeal [Canadian Broadcasting Corporation v Whatcott, 2016 SKCA 17 \(CanLII\)](#). The finding of defamation was not reversed (only damages based on malice).

⁶⁷ See Karen Eltis, “Breaking Through the “Tower of Babel”: A “Right to be Forgotten” and How Trans-Systemic Thinking Can Help Re-Conceptualize Privacy Harm in the Age of Analytics” (2011) 22 *Fordham IP Media & Ent LJ*

69. Although not a cyber defamation case, the court’s realization of the need for contextual analysis is all the more so relevant in the digital age.

⁶⁸ See Karen Eltis, *Courts, Litigants and the Digital Age: Law, Ethics and Practice*, 2^e ed. (Toronto: Irwin Law, 2016).

⁶⁹ Garrett Lynch, *A Metaverse Art Residency: Yoshikaze “Up-in-the-air” Second Life Residency*, (2012) 2 *Metaverse Creativity* 163. Online: www.asquare.org/works/yoshikaze-up-in-the-air-second-life-residency.

⁷⁰ Sarah Lyall, “For \$1,000, Site Lets Celebrities Say It Ain’t So”, *The New York Times* (27 March 2011). Online: www.nytimes.com/2011/03/28/world/europe/28icorrect.html?_r=2.

⁷¹ James Q. Whitman “The Two Western Cultures of Privacy: Dignity versus Liberty” (2004) 113 Yale LJ 1151. (“The idea that privacy is really about the control of one’s public image has long appealed to the most philosophically sophisticated American commentators, from Alan Westin, to Charles Fried, to Jeffrey Rosen, to Thomas Nagel.” [citations omitted] 1167); see also Paul M. Schwartz, “Internet Privacy and the State” (2000) 32 Conn L Rev 815, 820; See also e.g. inter alia Anita L. Allen, “Privacy-as-Data Control: Conceptual, Practical, and Moral Limits of the Paradigm” (2000) 32 Conn L. Rev., 861. Online:

http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1789&context=faculty_scholarship. Carl Anderson Johnson, “Privacy as Control”. Online:

https://www.researchgate.net/publication/268370076_PRIVACY_AS_PERSONAL_CONTROL_1.

⁷² Joshua A.T. Fairfield and Christoph Engel, “Privacy as a Public Good” (2015) 65:3 Duke LJ 385. Online:

<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3824&context=dlj> Fairfield.

⁷³ Laura Brandimarte, Alessandro Acquisti and George Loewenstein, “Misplaced Confidences: Privacy and the Control Paradox”. Online: <http://www.heinz.cmu.edu/~acquisti/papers/acquisti-SPPS.pdf>.

⁷⁴ Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity*, (New York: Simon & Schuster, 1974) 130.

⁷⁵ Adam Cohen, “One Friend Facebook Hasn’t Made Yet: Privacy Rights”, *The New York Times* (18 February 2008).

Online: www.nytimes.com/2008/02/18/opinion/18mon4.html (Goffman argued that people spend much of their lives managing their identity through “presentation of self.” Offline, people use clothing, facial expressions, and the revealing and withholding of personal information to convey to the world who they are, or who they want to be taken to be. . .It’s more complicated online. Social networking sites like Facebook and MySpace create identities for people and disseminate information about them to large numbers of people.)

⁷⁶ Cohen, note 72.

⁷⁷ See, for example, Anthony Lewis, “Digital Age: When Should the First Amendment Lose?” (18 May 2008). Online: www.youtube.com/watch?v=RxHExkcWKFo.

⁷⁸ Goffman, note 71, 2.

⁷⁹ Goffman, note 71, 25.

⁸⁰ Jeffrey Rosen, “The Web Means the End of Forgetting”, *The New York Times Magazine* (21 July 2010). Online: www.nytimes.com/2010/07/25/magazine/25privacy-t2.html.

⁸¹ Goffman, note 71.

⁸² reiterated by QCCA in *Kanavaros*, note 9.

⁸³ On file with author [translated by author].

⁸⁴ See Albert Breton and Micheal Tribilcock, *Le bijuridisme : une approche économique*, (Paris: Éditions ESKA, 2006), 228 and Albert Berton, Anne Des Ormeaux, Katharina Pistor and others, *Le multijuridisme : manifestations, causes et conséquences*, (Paris: Éditions ESKA, 2010) 256.

⁸⁵ See e.g. *Bow Valley Husky (Bermuda) Ltd. c. Saint John Shipbuilding Ltd.*, [1997] 3 R.C.S. 1210, 153 D.L.R. (4th) 385. Online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1574/index.do>.

⁸⁶ *Crookes*, note 23, para. 57 [translated by author].

⁸⁷ Florence Fortier-Landry, *La diffamation sur Internet: Actualiser la responsabilité en droit civil et en common law au Canada* (LLM Thesis, University of Montreal, 2013) [unpublished].

⁸⁸ See Eric Descheemaeker, “Truth, Truthfulness and Defamation” in *Anne-Sophie Hulin, Robert Leckey and Lionel Smith, eds, Les apparences en droit civil* (Montreal 2015) 13. Online:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2434603. (“Quebec law very much represents the Roman-French tradition in this area”)

⁸⁹ See Descheemaeker, note 85.

⁹⁰ Whose underlying rationale is dignity, to which reputational considerations are inherent.

⁹¹ For a discussion of the many other differences that exist between the French and German concepts of privacy and dignity, and personality rights generally, compare Popovici, note 66 (discussing the French approach in which personality rights are private law rights first and foremost), with Eberle, note 66 (“German personality law is thus a creature of the Constitutional Court, as rights of privacy are of the Supreme Court.”979).

⁹² Adrian Popovici, “Personality Rights--A Civil Law Concept” (2004) 50 *Loy L Rev* 349 358; Edward J. Eberle, “Human Dignity, Privacy, and Personality in German and American Constitutional Law” (1997) *Utah L Rev* 963.

⁹³ Popovici, note 89, 352.

⁹⁴ See also Eberle, note 89.

⁹⁵ Eberle, note 89, 976.

⁹⁶ Eberle, note 89, 966.

⁹⁷ See discussion of above cited articles by former Privacy Commissioner, Jennifer Stoddart urging Common Law provinces to look to the Civil law for extending privacy reputational rights in a manner similar to personality rights “Article 3 [CCQ] states that every person is the holder of personality rights, including the right to integrity of his person and the right to the respect of his name, reputation and privacy. Article 35 elaborates on the rights to respect of reputation and privacy. No one may invade the privacy of a person without the consent of the person, unless authorized by law. Article 36 specifies the actions that can be considered invasions of privacy. These include keeping a person's private life under observation by any means. Article 37 requires that every person who establishes a file on another person must have a serious and legitimate reason for doing so. The Québec Charter of Human Rights and Freedoms⁶ states that every person has a right to respect for his private life. Any unlawful interference enables the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting from the act.” Online : https://www.priv.gc.ca/en/opc-news/speeches/2004/sp-d_041119/?wbdisable=true.

⁹⁸ Article 5 states that every person has a right to respect for his or her private life.

⁹⁹ Eberle, note 89, (“[p]ersonality allows one to define oneself in relation to society.” 980.)

¹⁰⁰ Giorgio Resta, “The New Frontiers of Personality Rights and the Problem of Commodification: European and Comparative Perspectives” (2011) 26 *Tul Eur & Civ LF* 33, 35 [footnotes omitted]. Online: ssrn.com/abstract=1952695.

¹⁰¹ Popovici, Note 89.

¹⁰² See e.g. Benoît Clermont, “La diffamation dans un contexte médiatique : Les enseignements de la jurisprudence du nouveau millénaire” (2007) 19 :1 *C.P.I.* 43, 46 ; Caselaw (absent French criminal sanctions for prohibited speech) ; see Descheemaeker, note 85 (note for historical aperçu).

¹⁰³ Pierre Trudel, “Les responsabilité sur Internet en droit civil quebécois”. Online:

http://www.pierretrudel.net/files/sites/6/2015/01/TRUDEL_resp_internet.pdf.

¹⁰⁴ the first of a tripartite for liability composed of fault, causality and injury)

¹⁰⁵ *Code civil du Québec*, CQLR c C-1991 [CCQ] (“Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another. Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person and is liable to reparation for the injury, whether it be bodily, moral or material in nature.” article 1457).

¹⁰⁶ Trudel, note 100 [translated by author].

¹⁰⁷ Adequate causation

¹⁰⁸ In Quebec, articles 1457 and 1607 of the *Quebec Civil Code*

¹⁰⁹ Nicole Vallières, *La presse et la diffamation*, (Montréal: Wilson & Lafleur, 1985) [translated by author]

(“constitue l'un des manquements les plus fréquents et les plus graves à [l'obligation] de respect envers la réputation des autres.”6).

¹¹⁰ see e.g. *Kanavaros*, note 9.

¹¹¹ see e.g. *Wade v. Diop*, [2009] RRA 334, 2009 QCCS 350.

¹¹² See e.g. *Société Radio-Canada c. Radio Sept-Îles Inc*, [1994] R.J.Q. 1811, 49 A.C.W.S. (3d) 1018

“À l'inverse, la communication d'une information même vraie peut parfois engager la responsabilité civile de son auteur” para. 37).

¹¹³ *Piquemal c. Murielle Cassivi-Lefebvre*, 1997 CanLII 10603 (QCCA) [translated by author] (“Les faits rapportés par l'auteur peuvent être faux ou vrais. S'ils sont faux, il y a responsabilité; s'ils sont vrais, il y a également responsabilité dans le cas où l'auteur n'avait pas un devoir ou un intérêt sérieux et légitime de les rapporter [...] J'ajoute que, si l'auteur a un devoir ou un intérêt sérieux et légitime de rapporter des faits, il est non pertinent de savoir si, ce faisant, il éprouve de la satisfaction.”6).

¹¹⁴ *Laforest*, note 2.

¹¹⁵ *Prud'homme c. Rawdon*, note 34.

¹¹⁶ For years ‘corrupted’ or at the very least heavily influenced by Common Law principles, including but not limited to defences such as ‘public interest’ expressions, themselves alien to the Quebec system, however commonly cited.

¹¹⁷ *Prud’homme c. Rawdon*, note 34 [translated by author].

¹¹⁸ See *Hill v. Church of Scientology*, [1995] 2 SCR 1130, 126 D.L.R (4th) 129.

¹¹⁹ Daniel Solove, *The Future of Reputation: Gossip, Rumor and Privacy on the Internet*, (New Haven: Yale University Press, 2007).

¹²⁰ Danay, note 36.

¹²¹ Danay, note 36, 4-5.

¹²² *Néron*, note 6 [translated by author] (as in “*Prud’homme*, « il importe de souligner que la déclaration de l’intimé doit être considérée dans son contexte et dans son ensemble. L’impression générale qui s’en dégage doit guider l’appréciation de l’existence d’une faute » (je souligne). Donc, pour déterminer si une faute a été commise, il ne suffit pas de mettre l’accent sur la véracité du contenu du reportage diffusé le 12 janvier. Il faut examiner globalement la teneur du reportage, sa méthodologie et son contexte. Cela ne signifie pas qu’il est sans importance que les propos diffamatoires soient véridiques ou d’intérêt public. La véracité et l’intérêt public ne sont toutefois que des facteurs dont il faut tenir compte en procédant à l’analyse contextuelle globale de la faute dans une action pour diffamation intentée sous le régime du *Code civil du Québec*. Ils ne représentent que des éléments pertinents de l’ensemble du casse-tête et ne jouent pas nécessairement le rôle d’un facteur déterminant en toutes circonstances [...]” para. 59-60) *Lapierre c. Sormany*, 2012 QCCS 4190, 230 ACWS (3d) 617 (That said, the simple, straight-forward standard, contextually assessed has in the past been ‘corrupted’ by Common Law principles that crept into the jurisprudence, which can create unfortunate confusion as to the coherence of their Civil Law analysis. In *Prudhomme & Néron*, courts confirmed & attempted to stop...)

¹²³ For additional examples see *Eltis*, note 56.

¹²⁴ See eg *Lapierre c. Sormany*, note 119.

¹²⁵ *Bou Malhab c. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 SCR. 214, para.25. *Hébert & Fils c.*

Desautels et Léveillé, [1971] C.A. 285 (CAQ), page 291. Jean-Louis Baudouin et Patrice Deslauriers, *La responsabilité civile*, 7th ed., volume 1 (Cowansville: Les Éditions Yvon Blais Inc., 2007), 262 -268.

¹²⁶ Baud: Pour que la diffamation donne ouverture à une action en dommages-intérêts, son auteur doit avoir commis une faute. Cette faute peut résulter de deux genres de conduite. La première est celle où le défendeur, sciemment, de mauvaise foi, avec intention de nuire, s'attaque à la réputation de la victime et cherche à la ridiculiser, à l'humilier, à l'exposer à la haine ou au mépris du public ou d'un groupe. La seconde résulte d'un comportement dont la volonté de nuire est absente, mais où le défendeur a, malgré tout, porté atteinte à la réputation de la victime par sa témérité, sa négligence, son impertinence ou son incurie. Les deux conduites donnent ouverture à responsabilité et droit à réparation, sans qu'il existe de différence entre elles sur le plan du droit. En d'autres termes, il convient de se référer aux règles ordinaires de la responsabilité civile et d'abandonner résolument l'idée fausse que la diffamation est seulement le fruit d'un acte de mauvaise foi emportant intention de nuire.

¹²⁷ John D.R. Craig, "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens" (1997) 42 McGill L Rev 355, 366.

¹²⁸ *Banque Nationale*, note 4.

¹²⁹ Craig, note 124.

¹³⁰ Joseph Kary, "The Constitutionalization of Quebec Libel Law" (2004) 42:2 Osgoode Hall LJ 229, 233.

¹³¹ eg Eric Descheemaeker, " 'Veritas non est defamatio'?: Truth as a Defence in the Law of Defamation" (2011) LS 31, 1; New South Wales Law Reform Commission, *Defamation (Report 11)* (Sydney: NSWLRC, 1971), § 64 (the idea was most succinctly encapsulated by the New South Wales Law Reform Commission, who argued that 'gratuitous destruction of reputation is wrong, even if the matter published is true')

¹³² *Banque Nationale*, note 4 (Judge Silcoff distinguished rep damages from traditional defamation: "[the trial judge] failed to take into account the distinctive capacity of the Internet to cause instantaneous, and irreparable, damage to the business reputation of an individual or corporation by reason of its interactive and globally all-pervasive nature and the characteristics of Internet communications").

¹³³ *Spencer*, note 35.

¹³⁴ *Spencer*, note 35.

¹³⁵ Eltis, note 65, ch 3.

¹³⁶ *Spencer*, note 35, 48 (Note that this is in the police context “against unreasonable search and seizure”).

¹³⁷ inter alia when it comes to protecting individuals from the power of the State or vulnerable plaintiffs such as A.G. (victim of cyberbullying) and allowing her to vindicate her rights

¹³⁸ Stephen Marche, “The Epidemic of Facelessness”, *The New York Times* (14 February 2015). Online: www.nytimes.com.

¹³⁹ *Banque Nationale*, note 4.

¹⁴⁰ *Prud’homme c. Rawdon*, note 34, 53 [translated by author].

¹⁴¹ a discussion of which exceeds the scope of the present endeavor

¹⁴² Discussion of remedies the kinkes of Norwich/Anton Pillar imported from Common Law exceeds the scope of this endeavor.

¹⁴³ *Prud’homme c. Rawdon*, note 34, 72-74 beyond the scope to discuss these in detail herein

¹⁴⁴ Poutré, note 34.

¹⁴⁵ Poutré, note 34,12 [translated by author].

¹⁴⁶ Amanda Hopuch, “Native American activist to sue Facebook site’s ‘real name’ police”, *The Guardian* (19 February 2015). Online: <https://www.theguardian.com/technology/2015/feb/19/native-american-activist-facebook-lawsuit-real-name>. See e.g.: (“ As a woman who’s written about feminism online and received anonymous hate mail and death threats for doing so, I would like to preserve my right to post under a pseudonym to keep myself safe in the real world and if I choose, so I’m not identified as a woman online in places where it might not be safe to do so. [...] I don’t believe that getting rid of anonymity online will stop bad behaviour like the abuse and death threats I’ve received. I do think that getting rid of anonymity and pseudonymity online will make it easier for people like myself to become targets of abuse and potentially put us in danger. Note that these comments suggest that simply *being* a woman or member of any kind of minority may make one a target of

harassment. Also notice that these comments tend to frame real name policies as an expression of the privileged—real name policies only *appear* innocuous because of the assumption that the experiences of financially privileged English-speaking white men are universal, and that knowledge of the experiences of marginalised groups is not necessary to design safe and effective policies for consumers of technology. According to feminist blogger critiques of real name policies, it is this privilege that assumes that those using pseudonyms are the “Others” that decent people must be protected from, instead of examining the possibility that those using the pseudonyms might be the ones in danger”).

¹⁴⁷ GrrrScientist, “Google + and pseudonymity: An open letter to Google”, *The Guardian* (28 July 2011) [emphasis added]. Online: <https://www.theguardian.com/science/punctuated-equilibrium/2011/jul/28/google-open-letter-google>

¹⁴⁸ *Prud’homme c. Rawdon*, note 34.

¹⁴⁹ which is beyond the scope of this endeavor

¹⁵⁰ See note 15.

¹⁵¹ Paul M. Schwartz and Daniel J. Solove, “Reconciling Personal Information in the United States and European Union” (2013) 102: 877 *Cal L Rev* 877, 905. Online: [http://paulschwartz.net/wp-content/uploads/2014/08/Schwartz%20and%20Solove%20Reconciling%20PII%20\(FINAL%20CLR%202014\).pdf](http://paulschwartz.net/wp-content/uploads/2014/08/Schwartz%20and%20Solove%20Reconciling%20PII%20(FINAL%20CLR%202014).pdf).

¹⁵² Shwartz and Solove, note 148.

¹⁵³ *Corriveau*, note 22, 63 - 68.

¹⁵⁴ Dean Roscoe Pound

¹⁵⁵ ID : Le facteur décisif pour retenir la responsabilité de celui ou celle qui permet la diffusion de propos diffamatoires envers autrui sur Internet est le degré de contrôle sur le contenu des propos en question. Si ce degré de contrôle est élevé, il sera certainement plus facile de retenir la responsabilité de celui ou celle qui assure ainsi la diffusion de tels propos et qui aurait pu les retirer.

¹⁵⁶ Madeleine Caron, “Le Code civil québécois, instrument de protection des droits et libertés de la personne?” (1978) 56 *Can Bar Rev* 197.

¹⁵⁷ See *Corriveau*, note 22.

¹⁵⁸ Trudel, note 100.

¹⁵⁹ “Tribunal de grande instance de Paris Ordonnance de référé 22 juin 2007”, *Legalis* (7 July 2007). Online : <https://www.legalis.net/jurisprudences/tribunal-de-grande-instance-de-paris-ordonnance-de-refere-22-juin-2007/>.

¹⁶⁰ Popovici, note 89 [translated by author].

¹⁶¹ Caron, note 153.

¹⁶² Trudel, note 100.

¹⁶³ Karen Eltis, “The Unwitting Foreign Arbiters of Charter Rights” *Can. Bar Review* online (2017). Online: <http://nationalmagazine.ca/Members/karenE.aspx>.

¹⁶⁴ See Caron, note 153.

¹⁶⁵ Hasche Sigle, “Germany: Medical review website operators must verify user posts”, *Lexology* (10 March 2016). Online: <http://www.lexology.com/library/detail.aspx?g=7cf6ad97-34b0-461f-a0e5-7afd752b714a>.

See also Alexander Milstein and Giancarlo Frosco, “Review Portals have to Verify Anonymous User Reviews, Says the German Supreme Court”, *Center for Internet and Technology* (24 March 2016). Online:

<http://cyberlaw.stanford.edu/blog/2016/03/review-portals-have-verify-anonymous-user-reviews-says-german-supreme-court> (“the Court noted that the “operation of a review portal carries an increased risk of defamation compared to other portals” and “this risk is enhanced by the ability to add reviews on an anonymous or

pseudonymous basis.” Therefore, a provider is obligated to verify the review if the anonymity of its portal makes it difficult for the person affected to directly address the reviewer.” See “German Court increases pressure on comparison sites”, *Duetsche Welle* (1 March 2016). Online (in German): <http://www.dw.com/en/german-court-increases-pressure-on-comparison-sites/a-19085419>.)

¹⁶⁶ Andreas Splittgerber, “Notice and take-down in Germany: Requirements for proper notice” (5 August 2016). Online: <https://www.linkedin.com/pulse/notice-take-down-germany-requirements-proper-andreas-splittgerber>

(more recently confirmed by a Hamburg court).

¹⁶⁷ *Crookes*, note 23 (the Supreme Court of Canada considered that it was critical to take into account the text comprising or surrounding a hyperlink to determine whether the operator of the website upon which the hyperlink resided was a publisher of the material contained on the external webpage to which the hyperlink led. The Court held that merely creating a hyperlink without more did not amount to publication of the material on the external webpage. The Court held that the position might be different if some text from the external webpage were reproduced. Abella J (with whom Binnie, LeBel, Charron, Rothstein and Cromwell JJ agreed) gave as an example: “This might be found to occur, for example, where a person places a reference in a text that repeats defamatory content from a secondary source”, 40); Rebekah Gay and Peter FitzPatrick “Duffy v Google – Liability for Statements Made by Third Parties Online”, Case comment on (19 November 2015) *Herbert Smith Freehill Legal Briefings*. Online: <https://www.herbertsmithfreehills.com/latest-thinking/duffy-v-google-liability-for-statements-made-by-third-parties-online> (“[p]assing on a defamatory representation per se increases the harm caused by the defamatory representation whether or not the representation has been adopted by the intermediary. It is arguable that consumer harm is only exacerbated only where a third party passing on a misleading and deceptive representation itself endorses or adopts the representation or appears to do so.”)

¹⁶⁸ Natale Ilardo and Scott Traager, “Duffy v Google – is this the end of the Internet as we know it?”, Case comment on (30 October 2015) *Lander&Rogers Defamation eBulletin*. Online: <http://www.landars.com.au/publications/dispute-resolution/duffy-v-google-is-this-the-end-of-the-internet-as-we-know-it/>.

¹⁶⁹ Ilardo and Traager, note 165.

¹⁷⁰ “Duffy v Google: is this the end of the Internet as we know it?” *Defamation e-bulletin* (30 October 2015). Online: <http://www.landars.com.au/publications/dispute-resolution/duffy-v-google-is-this-the-end-of-the-internet-as-we-know-it/>.

¹⁷¹ Karen Eltis, “The *Anglo-American* Continental Divide: How Personality Rights Can Help Re-conceptualize the Right to Be Forgotten” (2016) 94 *Can Bar Rev*.

¹⁷² Trudel, note 159 [Translated by author]

¹⁷³ Eric Schlachter, “Cyberspace, the Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions” (1993) 16 *Hastings Comm & Ent LJ* 87, 118.

¹⁷⁴ Jay R. McDaniel, “Electronic Torts and Videotext – At the Junction of Commerce and Communications” (1992) 18 *Rutgers Computer & Tech. LJ* 773, 825.

¹⁷⁵ D. Slee, “Liability for Information Provision” (Septembre 1992) 23 *The Law Libr’n* 155; J. A. Gray, “Personal Malpractice Liability of Reference Librarians and Information Brokers” (1988) 9:2 *JLibr Admin* 71; J.A. Gray, “Strict Liability for Dissemination of Dangerous Information?”, (1990) 82 *L Libr J* 497; D.J. Loundy, “E-LAW 4 : Computer Information Systems Law and System Operator Liability” (1998) 21 *Seattle UL Rev* 1075.

¹⁷⁶ let it be noted that while the (somewhat outdated) Quebec *Loi concernant le cadre juridique des technologies de l’information* (which is undergoing review and is beyond the scope of this present endeavor) does not require intermediaries to actively monitor activities, it holds them not to serve as impediment to lawful access, thus bolstering the notion of ‘identifiable’ anonymity. Art. 22 specifically states: “[c]ependant, il peut engager sa responsabilité, notamment s’il a de fait connaissance que les documents conservés servent à la réalisation d’une activité à caractère illicite ou s’il a connaissance de circonstances qui la rendent apparente et qu’il n’agit pas promptement pour rendre l’accès aux documents impossible ou pour autrement empêcher la poursuite de cette activité.” France too has taken a similar view in *Décret no 2011-219 du 25 février 2011*, JO 1mars 2011, 3643.

¹⁷⁷ Danielle Keats Citron, *Hate Crimes in Cyberspace*, (Cambridge: Harvard University Press, 2014), 1453.

¹⁷⁸ See Bennett Moses, L (2007) ‘Why have a Theory of Law and Technological Change?’ 8(2) *Minnesota Journal of Law, Science & Technology* 589–606, 595.

¹⁷⁹ *Grant v. Thorstar*, [2009] 3 SCR 640, 2009 SCC 61, paras 38-40.

¹⁸⁰ Me David Grossman, Guest Lecture, uOttawa February 2017.

¹⁸¹ and perhaps even defences more generally if we wish to go a step further

¹⁸² Perry and Zarsky, note 29.

¹⁸³ Generally Karen Eltis, *Courts, Litigants and the Digital Age*, 2nd ed. (Toronto: Irwin Law, 2016).

¹⁸⁴ attributed to Mark Twain

¹⁸⁶ Eltis, note 168.

¹⁸⁷ An example that should not be adopted as is, but is nonetheless instructive is Israel, itself a hybrid jurisdiction. There, truth is no longer a stand-alone defence but unfortunately must be married to a factor in a pidgeonhold list of circumstances. The interesting aspect is that the defamation Law 2014 borrows “good faith” from the civil law as a principal defence. See discussion: Kelly Warner Law, “Defamation Law in Israel”. Online: <http://kellywarnerlaw.com/israel-defamation-laws/>.