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THE IRONY OF *CAMPBELL v. JONES*: TOLERATING SLANDER IN THE PURSUIT OF JUSTICE

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ABSTRACT

In determining whether the defence of qualified privilege should shield defamatory comments from liability, Canadian courts must assess many contextual factors that aim to strike an appropriate balance between the right to free expression and the protection of an individual's reputation. This paper examines the Nova Scotia Court of Appeal's decision in Campbell v. Jones, where the majority found that this privilege should extend to cover remarks alleging racist police motivations to the world at large. Chief Justice Glube and Justice Roscoe held that the two lawyers who made these comments had a professional responsibility to seek improvements to the administration of justice. This duty corresponded with the general public's interest in hearing the information, especially given the severity of the Charter violations in the search of three young black girls. In contrast, the dissent of Justice Saunders upheld the trial judge's decision to deny the defence of qualified privilege, or found, in the alternative, that the comments exceeded any such privilege. It is argued that the dissent's treatment of the contentious issues raised by this appeal represents the more thorough and desirable approach.

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I. INTRODUCTION

On October 24, 2002, the Nova Scotia Court of Appeal released its highly anticipated decision on a \$240,000 defamation award assessed the year before against prominent Halifax lawyers Anne Derrick and Burnley “Rocky” Jones.¹ The judgment represents the latest development in an ongoing saga that began in 1995 and may well be destined for the Supreme Court of Canada. Indeed, the circumstances of the case offer a compelling opportunity for legal argument. The conflicting judgments offer two sophisticated attempts to strike the careful balance required between the right to free expression and the protection of an individual’s reputation. Given the magnitude of disagreement on this fundamental issue between the majority and dissent at the Court of Appeal, these opinions are well worth scrutinizing in further detail.

This comment will briefly state the case’s overall factual background and summarize the results of the initial jury trial. Emphasis will be placed on the details of the press conference where the alleged defamation took place and also on the *Charter*-breaching search of the three young girls by Constable Carol Campbell, which initially motivated Derrick and Jones to speak out. The defamation charges, insinuations that Campbell’s behaviour was motivated by the race and economic status of the girls, will also be discussed. The analysis will then review the current Canadian jurisprudence related to the deciding factor in this appeal and its application by the various Justices involved.

The trial judge’s denial of the defence of qualified privilege split the Court of Appeal and emerged as the major focus of debate. Roscoe J.A., writing for the majority, held that the trial judge erred at law in not allowing privilege to shield Derrick and Jones from liability for any defamatory comments made about Campbell during their press conference. In the process, Justice Roscoe and Chief Justice Glube effectively rendered the findings of the jury moot. In contrast, Justice Saunders, in dissent, affirmed the trial judge’s decision on qualified privilege and upheld the overall award by dismissing all other grounds of appeal. Moreover, even if the occasion deserved the protection of privilege at law, Saunders J.A. ruled that the comments made by Derrick and Jones

¹ *Campbell v. Jones*, [2002] N.S.J. No. 450 (C.A.) [*Campbell*].

would have exceeded any legitimate purpose. His dissenting opinion also differed from the majority on the seriousness of the slander, the extent of the lawyers' obligation to ensure improvements to the administration of justice, and the degree of deference owed to the jury in assessing questions of fact. In its entirety, the decision of Justice Saunders seems more in keeping with Canadian law and the delicate and careful balancing of rights required by the unique circumstances of this case.

Overall, however, the matter of *Campbell v. Jones* cannot properly be separated from its factual context, so this work concludes by stepping away from strict legal analysis and viewing the case through a broader societal lens. It should be noted that this case received a substantial amount of public attention and involved, at its core, the contentious and unsettling issue of police behavior toward historically disadvantaged sectors of society. In addition, the egregious nature of the search was frankly acknowledged and Constable Campbell was disciplined internally by the police force. When the shocking extent of her actions are viewed in combination with the sizeable defamation awarded by the jury, it is reasonable to assume that the Justices on the Court of Appeal may have felt heightened pressure to reduce or strike down the verdict altogether. Amidst such controversial circumstances, is the age-old maxim of Oliver Wendell Holmes that "hard cases make bad law" a potentially valid critique of the outcome, or does the majority's apparent broadening of the qualified privilege defence still possess adequate constraints? In any event, their expansive approach does provide lawyers with the potentially dangerous ability to make slanderous statements with impunity, especially when calling attention to perceived injustices.

II. FACTS

In March of 1995, Constable Carol Campbell reported to Saint Patrick's - Alexandra Junior High School in Halifax, Nova Scotia, to investigate two separate thefts. Acting in her capacity as a police officer, she proceeded to conduct an invasive and unconstitutional search of three twelve-year-old black girls who were suspected by the Vice Principal of

stealing \$10. Constable Campbell did not advise the girls of their right to refuse the search or their right to counsel. She did not take appropriate measures to ensure their parents or guardians were contacted. Although the evidence regarding the search's degree of intrusiveness differs to some extent, at a minimum Constable Campbell conceded that she asked the girls to pull their underwear away from their bodies to look for the money. She later admitted to the highly improper nature of this search and was disciplined accordingly.²

Anne Derrick and Rocky Jones were retained by the guardians of the three students shortly after this occurred, and decided to file a complaint against the officer pursuant to the *Police Act*.³ The lawyers held a joint press conference to announce the launching of their complaints and to relate the accusations to the general public. In doing so, they described the students' version of the events in factual terms, making no attempts to ascertain the truth of their story. Constable Campbell was never referred to by name, but no attempt was made to protect her identity in the distribution of the complaints to those in attendance.

Ms. Derrick and Mr. Jones then responded to several questions posed by the media regarding the motivations underlying Constable Campbell's conduct during the search. When asked if a clear connection existed between the search and the race of the girls, Mr. Jones replied, "...there is no doubt in my mind that this would not have happened to white children."⁴ He also wrote in his complaint to police that "[g]iven the race of all three girls and the economic class of the residents of the area in which they live and attend school, harsher and more drastic measures were taken than were necessary for the situation."⁵ Similarly, Ms. Derrick commented that "...it's quite a reasonable assumption to make that there's a connection between the race of the girls and their socio-economic status and the events that they were subjected to."⁶ The lawyers seemed most intent on addressing what they perceived as systemic racism, and Campbell's behavior in this particular case was offered as an example of this problem.

² *Campbell v. Jones*, [2001] N.S.J. No. 373 (T.D.) [*Trial Decision*]. Moir J's factual summary of the case is found at paras. 2-7.

³ R.S.N.S. 1989 c.348.

⁴ *Campbell*, *supra* note 1 at para. 15.

⁵ *Trial Decision*, *supra* note 2 at para. 6.

⁶ *Trial Decision*, *supra* note 2 at para. 6.

Following extensive media coverage, Carol Campbell demanded a retraction by Derrick and Jones. When the lawyers refused to do so, she initiated a defamation action against them. Her claim alleged that their comments, by their ordinary meaning and by innuendo, suggested she was racist, motivated by racism and that she performed her duties discriminatorily on the grounds of race, economic status and social status.⁷ She alleged that the statements accusing her of conducting a "strip search" were slanderous as well. Derrick and Jones filed separate defences, asserting that the spoken or written words were either not defamatory, true matters of fact, fair comment on a matter of public interest, or subject to the protection of qualified privilege.⁸

As a question of law, Justice Moir determined at trial that the Defendants could not rely on the defence of qualified privilege, primarily due to the timing and widespread publication of the communication. The case proceeded to trial, where the jury returned a verdict in favour of Constable Campbell, finding Derrick and Jones jointly liable for \$240,000 in damages and \$70,000 in costs.⁹ Seventeen months later, the Nova Scotia Court of Appeal overturned this decision, holding that Justice Moir had erred in finding that the press conference was *not* an occasion of qualified privilege. A two-one majority ruled that even if any serious defamatory comments were made, they should be completely protected from liability at law.

III. THE DEFENCE OF QUALIFIED PRIVILEGE

As the decisive factor at the Court of Appeal, it is necessary to briefly review the legal test used to determine the existence of qualified privilege before proceeding to an analysis of the decisions themselves. The traditional rationale for this defence is grounded in the values to the public interest of freedom of speech, transparency, scrutiny of public officials, and the pursuit of truth. Its overall application derives chiefly from principles that "advance the common convenience and welfare of society."¹⁰ Gatley further states that:

⁷ *Campbell*, *supra* note 1 at para. 18.

⁸ *Campbell*, *supra* note 1 at para. 19.

⁹ *Campbell*, *supra* note 1 at para. 20.

In such cases no matter how harsh, hasty, untrue or libelous the publication would be but for the circumstances, the law declares it privileged because the amount of public inconvenience from the restriction of freedom of speech or writing would far *out-balance* that arising from the infliction of private injury.¹¹

To establish that an occasion deserves the protection of qualified privilege, the court must carefully assess the extent of the speaker's duty to disseminate the information and the audience's corresponding interest in receiving it.¹² By necessity, the test involves the discretionary weighing of numerous factors and therefore contains no simple rules. Brown introduces the factors necessary to determine the existence of a qualified privilege by stressing the difficulty of articulating clear rules and standards.¹³ Ultimately, no "bright light test"¹⁴ exists to identify privileged occasions with certainty. The court must simply measure the appropriateness of allowing the defence to succeed by evaluating a host of relevant factors. These factors were succinctly expressed in the 1926 case of *Sapiro v. Leader Publishing Co. Ltd.*:

The Judge will consider the alleged libel, who published it, why, and to whom, and under what circumstances. He will also consider the nature of the duty which the defendant claims to discharge, or the interest which he claims to safeguard, the urgency of the occasion, and whether or not he officiously volunteered the information, and determine whether or not what has been published was germane and reasonably appropriate to the occasion.¹⁵

The British Columbia Court of Appeal recently affirmed this general test in *Moises v. Canadian Newspaper Co. (c.o.b. Times - Colonist)*.¹⁶

In addition to the above list, Canadian jurisprudence has also endorsed the position that publications to the general public make it extremely difficult to justify a finding of qualified privilege.¹⁷ This

¹⁰ *Jones v. Bennett*, [1969] S.C.R. 277 at 284 [*Jones*].

¹¹ *Gatley, Gatley on Libel and Slander*, 8th ed. (London: Sweet & Maxwell, 1981) at 441 [emphasis added].

¹² *Osborne, Law of Torts*, (Toronto: Irwin Law, 2000) at 364 [*Osborne*].

¹³ *Brown, The Law of Defamation in Canada*, 2nd ed., (Toronto: Thomson Canada, 1994) vol. 1 at 670 [*Brown*].

¹⁴ Per Kooper J. in *Garson v. Hendlin*, 532 N.Y.S. 2d 776 at 780 (1988).

¹⁵ (1926), 20 Sask. L.R. 449 at 453 (C.A.).

¹⁶ [1996] B.C.J. No. 125 at para. 19 (C.A.).

¹⁷ *Osborne, supra* note 12 at 365.

qualification derives from the initial requirement for reciprocity. Only in the rarest instances would the entire world have a clear interest in receiving a communication deserving of qualified privilege protection. In the 1969 case of *Jones v. Bennett*, the Supreme Court of Canada entrenched this opinion, holding that:

...it must be regarded as settled that a plea based on a ground of the sort relied on in the case at bar cannot be upheld where the words complained of are published to the public generally or, as it is sometimes expressed, "to the world at large."¹⁸

This outright restriction on the applicability of the qualified privilege defence has been narrowly construed since the *Jones* decision. In fact, several Canadian courts have determined that such broad publication alone will not prevent the finding that an occasion deserves the protection of qualified privilege.¹⁹ The recent House of Lords case of *Reynolds v. Times Newspaper Ltd.*²⁰ expressly rejected a total prohibition on a publication to the world at large, favouring an application of the standard approach in which the court considers the extent of the communication as merely one of the many factors to be weighed.

In addition, a finding of qualified privilege does not provide an absolute shield from liability. Even if an occasion is found to be protected, the defence will be defeated if the communication is motivated by actual or express malice or if the limits attached to the privilege are exceeded. In *Campbell*, the trial judge initially determined that there was insufficient evidence to allow the question of malice to go before the jury, and this finding was not appealed. The Court of Appeal judgments do address, to varying degrees, whether the comments exceeded the privilege, so some elaboration on this issue is still important here.

Osborne states conclusively that qualified privilege will cease to apply "in respect of defamatory statements that are not relevant to, or in furtherance of, the purpose for which the privilege is given."²¹ In *Hill* v.

¹⁸ *Jones*, *supra* note 10 at 284-285.

¹⁹ For example: *Parlett v. Robinson*, (1986), 30 D.L.R. (4th) 247 (B.C.C.A.); *Silva v. Toronto Star Newspapers Ltd. et al.* (1998), 167 D.L.R. (4th) 554 (Ont. Gen. Div.); *Dhami v. C.B.C.*, [2001] B.C.J. No. 2773 (Q.L.) (S.C.).

²⁰ [1999] 4 All E. R. 609 (H.L.) [*Reynolds*]. See paras. 17-19.

²¹ Osborne, *supra* note 12 at 366.

Church of Scientology,²² the Supreme Court of Canada assessed defamatory comments in a similar context to those at issue in *Campbell*: remarks made by a lawyer at a press conference. There the court considered the seriousness of the language, the extent of publication, and the urgency required, concluding that the scope of the remarks “far exceeded the legitimate purposes of the occasion.”²³ Therefore, in order to receive the full protection of any qualified privilege defence, the information communicated must be relevant, pertinent, and reasonably appropriate in the context of all the circumstances.

IV. THE DECISIONS

1. Trial Judge

Justice Moir did not fully embrace the broader view on publication to the world at large that the House of Lords proposed in the 1999 *Reynolds* case. However, although he felt that the court should be strictly bound by the decision in *Jones v. Bennett*, he did explicitly note that communication to the general public would not absolutely defeat the defence in every instance.²⁴ Moir J. also questioned whether the duty of the lawyers to call attention to *Charter* violations and potential faults in the current administration of justice was an obligation sufficient enough to trigger the defence. While he did emphasize the importance of bringing any such impropriety to light, especially for incidents involving traditionally oppressed minorities, the fact that Derrick and Jones had only just filed an official complaint was very significant. Moir J. held that the threshold in proving an appropriate duty and audience must be high when making serious, factual statements as to the motivation of Constable Campbell. Here, the defendants took no steps to verify the accuracy of their statements. The investigation process would begin shortly, a process that could lead to a public hearing and judicial determination. In refusing to allow the defence of qualified privilege, he

²² [1995] 2 S.C.R. 1130 [*Hill*].

²³ *Ibid.* at para. 155.

²⁴ *Trial Decision*, *supra* note 2 at para. 29.

held that the “need had not yet arisen” for Derrick and Jones to call attention to their concerns about racial impact on police behavior to the world at large.²⁵ In his opinion, the general public’s interest in the statements had not been engaged sufficiently to outweigh society’s interest in protecting Carol Campbell’s reputation.

2. Court of Appeal: Majority

Justice Roscoe and Chief Justice Glube held that the trial judge erred in law by finding that the press conference did not satisfy the requisite test for qualified privilege. Their opinion criticized him for interpreting the precedent in *Jones v. Bennett* strictly, resulting in an overly stringent and narrow test that did not adequately assess all of the circumstances. The majority felt that the trial judge’s reasoning placed too onerous a burden on publications to the world at large, a position inconsistent with the more recent developments recognized in *Reynolds*.²⁶ They also determined that Moir J. placed too much emphasis on the timing of the publication by Derrick and Jones and assigned inordinate weight to this sole factor. Furthermore, in considering the circumstances, the majority downplayed the seriousness of the slander by referring to *R. v. Golden*.²⁷ This Supreme Court of Canada decision, released a few months after the conclusion of the jury trial in *Campbell*, establishes a very broad definition of “strip search” in law that would apply to the actions of Constable Carol Campbell. Roscoe J.A.’s reasons also expressed that Moir J. underestimated the ethical responsibility of lawyers to speak out in the face of patent injustices perpetrated against their clients. The majority held that this duty to improve the administration of justice and uphold the law was entirely sufficient to ground a defence of qualified privilege.²⁸ The opinion concluded by noting that the trial judge’s most serious oversight was his failure to give proper consideration to the serious *Charter* values and rights at the heart of this case.²⁹

²⁵ *Trial Decision*, *supra* note 2 at para. 33.

²⁶ *Campbell*, *supra* note 1 at para. 54.

²⁷ [2001] S.C.J. No. 81 [*Golden*].

²⁸ *Campbell*, *supra* note 1 at paras. 55-59.

²⁹ *Campbell*, *supra* note 1 at paras. 63-70.

3. Court of Appeal: Dissent

In dissent, Justice Saunders held that the trial judge correctly stated the legal test for assessing whether the defence of qualified privilege applied to the case at bar and upheld the jury's verdict by dismissing all other grounds of appeal. He felt that Moir J.'s reasoning did not place too onerous a burden on the Defendants because the publication was made to the whole world. Rather, in the opinion of Saunders J.A., the trial judge simply recognized the difficulty in proving the requirements of this defence when the communication is directed to such a large audience. His reasoning simply treated this point as a strong factor weighing against the Appellants in the overall circumstances. Justice Saunders felt this hardly created a rebuttable presumption that a qualified privilege ought not to apply, as counsel for Ms. Derrick contended.³⁰ The dissenting opinion also disputed the majority's belief that the trial judge placed too much emphasis on the timing and urgency of the publication itself. In the view of Saunders J.A., the trial judge merely considered these issues in conjunction with all other factors. The dissent considered it inappropriate for an Appeal Court to substitute its own discretionary view as to the relative weight each element should be assigned.³¹ This dissent also held that any duty owed by the lawyer in this case must be tempered by professional restraint, and that here the duty was fully satisfied by the filing of complaints that initiated an investigation into the matter.³²

Justice Saunders went on, in any event, to consider whether the comments would exceed any privilege that might be attached to the occasion. He canvassed this issue extensively, relying heavily on the Supreme Court of Canada's recent decision in *Hill*. Ultimately, he applied Cory J.'s description of the impugned behaviour in *Hill* to the Appellants, characterizing the conduct of Mr. Jones and Ms. Derrick as "high-handed and careless, void of any semblance of professional restraint or objectivity...grossly unfair and far exceed[ing] any legitimate purpose the press conference may have served."³³ As well, he consid-

³⁰ *Campbell*, *supra* note 1 at paras. 109-110.

³¹ *Campbell*, *supra* note 1 at para. 126.

³² *Campbell*, *supra* note 1 at para. 179.

³³ *Campbell*, *supra* note 1 at para. 134.

ered the decision in *R. v. Golden* to be irrelevant in evaluating the seriousness of the slander. According to Justice Saunders, the jury must be left to determine whether a "strip search" occurred by deciding questions of credibility on the evidence. The jury ought then compare any allegedly defamatory comments with their own evaluation of the facts, not with a legal definition of the term as used in criminal cases.³⁴

V. DISCUSSION

It is respectfully submitted that the approach advanced by Justice Saunders is more consistent with established Canadian law. Although the determination of qualified privilege is difficult and highly circumstantial, it seems Moir J. carefully considered and correctly applied the appropriate legal test. In the alternative, Saunders J.A. also analyzed the comments themselves in great depth and concluded that they would exceed the bounds of any privilege as per *Hill*. Compare this with Roscoe J.A.'s reasoning, which glosses over this last point in one paragraph without even mentioning the leading Supreme Court of Canada case at issue. This telling oversight is consistent with other questionable aspects of a majority decision that seems more intent on reaching a certain outcome than evenly balancing all the factors involved. This analysis will critically examine the conclusions of the majority with respect to four fundamental areas of disagreement: the legal test applied by the trial judge; the duty relied upon by the lawyers to ground the defence; the relevance of *R. v. Golden*; and whether the remarks would exceed any privilege. In all, the dissent of Justice Saunders consistently addresses these issues in a more balanced fashion, in keeping with the requirements of the law.

In terms of the test for qualified privilege, Roscoe J.A. claimed that the trial judge placed too much significance on the broad publication of the remarks and imposed an unduly onerous burden on Derrick and Jones to meet these requirements. She emphasized that the "test... is the same whether the publication is to a few people or to the world at

³⁴ *Campbell*, *supra* note 1 at para. 144.

large.”³⁵ Reading over Moir J’s consideration of the *Jones v. Bennett* precedent, he clearly does stress the size of the audience as a factor “indicating strongly against qualified privilege.”³⁶ However, this seems to be more in keeping with a logical recognition of reality. The defence of qualified privilege is rarely applied to communications that extend to such a widespread audience. Consider the wording used by Brown in his significant review of this aspect of law: “[p]ublication to a newspaper directly may be considered publication to the world, and, generally, will have the effect of defeating a qualified privilege...a court’s conclusion, however, may be affected by the circumstances of the case.”³⁷ Nothing in this type of language denotes the application of a different test. It is a simple acknowledgement that the size of the group receiving the communication is an issue of fundamental importance.³⁸ It should be noted that the trial judge reviewed numerous cases in his analysis and also duly considered the other factors involved. Seen in this light, the distinction drawn here by Roscoe J.A. appears to involve concern over semantics as opposed to the development of a different standard by Moir J.

The majority also criticized the strong focus placed on urgency in the trial judge’s test for qualified privilege. Roscoe J.A. held that inordinate weight was placed on this particular factor. She also cited *Parlett v. Robinson*³⁹ to reinforce the position that if defendants maintain a reasonable belief that going public is the only effective way to ensure their concerns are addressed, then the issue of timing may well cease to be problematic. Roscoe J.A. neglects to mention that in *Parlett* the court explicitly noted the serious attempts made to exhaust other avenues before commenting to the world at large.⁴⁰ Here, the circumstances of the press conference were well outlined by Justice Moir and Justice Saunders. They each emphasized that the lawyers had already initiated the appropriate process for registering their complaint and spurring an investigation of the incident. A review was underway that would necessitate a response, with appropriate consequences.⁴¹ The fact

³⁵ *Campbell*, *supra* note 1 at para. 50.

³⁶ *Campbell*, *supra* note 1 at para. 53.

³⁷ Brown, *supra* note 13 at 862, 863.

³⁸ *Campbell*, *supra* note 1 at para. 110.

³⁹ (1986), 30 D.L.R. (4th) 247 (B.C.C.A.).

⁴⁰ *Ibid.* at para. 29.

⁴¹ *Campbell*, *supra* note 1 at paras. 39, 179.

that the Defendants “moved immediately to give the broadest possible publicity to their allegations” while taking absolutely no steps to verify their accusations must be accorded some consideration in determining whether the defence of qualified privilege applies.⁴²

The majority and the dissent disagree not only on the extent of the general public’s interest in hearing these complaints, but also on the scope of the lawyer’s reciprocal duty to speak out. Derrick and Jones argued that pursuant to their ethical duty under Chapter 21 of *Legal Ethics and Professional Conduct, A Handbook for Lawyers in Nova Scotia* (among other professional guidelines), they were obligated to make the communication because “[t]he lawyer has a duty to encourage public respect for justice and to uphold and try to improve the administration of justice”⁴³ and “[t]he lawyer, therefore, has a duty to provide leadership in seeking improvements to the legal system.”⁴⁴ The Appellants contended that they had not only the right, but the duty to call public attention to the *Charter* violations and patent injustice in this case. The majority held that this moral and social duty is fully sufficient to advance a defence of qualified privilege.

Saunders J.A. and Moir J. did not deny this important duty to seek improvements to the administration of justice. Nothing in their statements suggest any disagreement with the inherent value of bringing awareness to the *Charter* rights possessed by all Canadians. However, even the words of these guidelines suggest that a balancing must take place and that the obligation to improve the administration of justice is not unqualified. The same chapter relied upon by the majority also states that “in discharging this duty, the lawyer should not be involved in violence or injury to the person”.⁴⁵ The reasoning of Justice Saunders goes to considerable lengths to emphasize the reasons behind the litigation: a lawsuit by Constable Campbell to protect her reputation as a police officer. He considered the duty of the lawyers satisfied by the filing of the complaint, emphasizing (as in *Hill*) that lawyers also have a professional obligation to exercise restraint.⁴⁶

⁴² *Campbell*, *supra* note 1 at para. 121

⁴³ (Nova Scotia Barristers’ Society, 1990) at 93.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Campbell*, *supra* note 1 at paras. 179-181.

In stark contrast, the majority's decision fails to recognize that any existing duty to highlight *Charter* violations must be qualified by a reciprocal responsibility to ensure the statements are true or reasonable under the circumstances. Given the emphasis by the Supreme Court of Canada in *Hill* on the fundamental importance of an individual's reputation, it is surprising that Roscoe J.A. neglected to consider the impact of the slander on Carol Campbell's dignity and integrity. No attempt is made by the majority to seek a balance between these competing interests, or to more fully articulate the injury to the person caused by the defamation. Although the egregious nature of the conduct being commented upon deserves considerable attention, the excessive nature of the comments and their consequences should not be casually avoided.

Justice Roscoe also considered the impact of *R v. Golden*, a Supreme Court of Canada case released following the conclusion of the *Campbell* trial. Although the two sides offered substantially different accounts of Carol Campbell's search, the legal definition of "strip search" provided in *Golden* encompasses even the actions admitted to by Campbell herself. Roscoe J.A. found this point relevant for assessing the defamatory comments, despite the fact that the jury is traditionally responsible for making these factual findings.⁴⁷ This decision to incorporate *Golden* represents a further example of the majority's willingness to downplay the seriousness of libelous remarks that a jury found worthy of \$240,000 in damages. This jury, not the Court of Appeal, had the opportunity to hear the various witnesses, weigh all the evidence, decide which account of the search they believed, and determine if statements asserting the "strip search" as fact amounted to defamation. Justice Saunders' decision held that the majority should have refrained from substantially interfering with the jury's conclusions.

Finally, any finding of qualified privilege will be defeated if the limits of the duty or interest have been exceeded. In other words, the court must determine if the comments in question were "germane and commensurate with the occasion."⁴⁸ Without considering the defamatory statements in much detail, Roscoe J.A. held that the remarks made by Jones and Derrick were relevant to the type of search and the flagrant *Charter* violations, and so were reasonably appropriate.⁴⁹ In reaching

⁴⁷ *Campbell*, *supra* note 1 at para. 26.

⁴⁸ *Hill*, *supra* note 22 at para. 146.

⁴⁹ *Campbell*, *supra* note 1 at para. 72.

this conclusion, the majority emphasized that the lawyers had not been malicious, careless, or reckless and that the actions of Constable Campbell technically constituted a "strip search", as per *Golden*. Justice Saunders emphatically dissented from this position with a thorough analysis of the statements. He did not dispute the necessity of protecting *Charter* rights, taking exception only to whether the remarks themselves were reasonably linked to this noble purpose. Justice Saunders concluded that the accusations pertaining to the potentially racist motivations of Constable Campbell overstepped this boundary.

The dissent noted that it would have been entirely possible to bring the treatment of the students to light, to articulate the very obvious *Charter* violations, and to publicize the official complaint without stating Constable Campbell's motivations with certainty. Note that these remarks were officiously volunteered and particularly damaging to Campbell's reputation as a public official. Furthermore, Derrick and Jones took no steps whatsoever to verify their opinions concerning the motivations of Constable Campbell, and actually admitted knowing nothing about her.⁵⁰ Derrick and Jones had no grounds for believing that Campbell would perpetuate a *Charter* violation on discriminatory grounds. Saunders J.A. compared the behavior of these lawyers to the actions of Morris Manning, the defendant in *Hill*. The press conference convened by Mr. Manning was found to be privileged, but the Supreme Court placed significant weight on the fact that he immediately sought the "widest possible dissemination" to make his defamatory comments despite the existence of an ongoing investigation. By portraying the plaintiff in "the worst possible light", Manning's comments exceeded any qualified privilege attached to his remarks.⁵¹ Given the similar circumstances between *Hill* and *Campbell*, the majority's failure to mention or attempt to distinguish this recent Supreme Court of Canada precedent represents yet another glaring omission in their overall judgment.

⁵⁰ *Campbell*, *supra* note 1 at para. 179.

⁵¹ *Hill*, *supra* note 22 at para. 156.

VI. CONCLUSION

Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.⁵²

Within the law's broad and discretionary test for assessing the merits of a qualified privilege defence, the argument advanced by the Appellants and accepted by the majority in the Nova Scotia Court of Appeal can be made. The fundamental question, however, is should such a claim succeed at law? If it does in this fact scenario, how does it affect the development and protection of the individual's interest in preserving an untarnished reputation? Does it give *carte blanche* for lawyers to speak with impunity, so long as the libel can be said to occur in the pursuit of justice? In this context, the majority's decision looks all the more ominous, since it fails to clarify what qualifies as an effort to improve the overall administration of justice. Nor does it seriously address the permissible scope of remarks made during a privileged occasion. In all, the decision fails to impose a clear limit or boundary on the amount of media posturing that lawyers may engage in to attract attention and support for their clients with erroneous allegations. Will any advocate who publicizes a violation of *Charter* rights be granted similar latitude to defame?

Justice Roscoe criticizes the trial judge for making the issue of urgency the "centerpiece" of his judgment and not taking all the circumstances into account.⁵³ However, her opinion contains a notable slant toward the "patent injustice" committed against the young girls and the corresponding duty to inform the public of these actions, with little regard for the rights of Carol Campbell. Compare this with the Supreme Court of Canada's bold emphasis on the value of preserving individual reputations in *Hill*, reasoning conspicuously absent from the majority's reasoning:

⁵² Per Wendell Holmes J.'s dissent in *Northern Securities Company v. United States* (1904), 193 U.S. 197 at 400-401.

⁵³ *Campbell*, *supra* note 1 at para. 62.

...good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws... [It is] a concept that underlies all the *Charter* rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society.⁵⁴

It appears ironic that in emphasizing the need to apply *Charter* values to this analysis, the actual effect of Roscoe J.A.'s position is to undermine the rights of individuals to their dignity and reputation, in favour of the public's right to be informed about potential injustices. She focuses heavily on the extent of the perceived injustice, without adequately considering the accuracy, fairness, and harm of any slanderous statements in the same manner.

The position taken by the majority might be more easily justified in the absence of many other defences that offer "sufficient protection" to lawyers who would call attention to such injustice.⁵⁵ In the most obvious example, Derrick and Jones could have tempered their press conference by merely stating their opinions as fair comment on the situation, as opposed to defaming a person they admittedly knew nothing about with such serious factual accusations and stigmatizing catchphrases.⁵⁶ They could also have taken steps to inquire more thoroughly into the situation, or wait for the investigation to run its course. The unwillingness of these lawyers to retract, clarify, or apologize for such statements following the media coverage of the press conference and the emergence of new facts further demonstrates their low regard for the harsh impact their actions might have on Carol Campbell in her public role as a police officer. To prevent the undermining of such an important value in the future, the law must contain appropriate safeguards to protect against the possibility of cavalier attacks on individual reputations.

Instead, the broad application of qualified privilege tacitly reinforces the ability of lawyers in a similar position to publish slanderous remarks to the world at large, providing little incentive to exercise due caution and moderation. As George MacDonald, Q.C., counsel for Carol Campbell, remarked in his summation at trial, if discriminatory behavior is the harm to be remedied, countering it with the further

⁵⁴ *Hill*, *supra* note 22 at paras. 107 and 120.

⁵⁵ *Campbell*, *supra* note 1 at para. 129.

⁵⁶ *Campbell*, *supra* note 1 at paras. 152 and 174.

stereotyping of a different group seems like a poor manner of accomplishing this desired goal.⁵⁷ While the specific nature of the case will likely narrow its impact as a precedent, Canada's Supreme Court may be interested in hearing the case itself to reinforce the need to appropriately balance respective interests in such cases, especially given the length the majority went to in interfering with the trial judge's overall analysis.

Taken in its entirety, the reasoning of the majority could be viewed as reflecting a more emotional and instinctual response to the specific matter at hand than the rational, systematic approach required by a legal system that successfully weighs competing interests evenly. Granted, the sense of racial tension in this area may be so gripping and the conduct of Constable Campbell so egregious as to warrant considerable sympathy for the objectives of the Appellants. Any attempt to restore faith in the legal system for those groups traditionally disadvantaged is clearly a noble and worthy cause. The question remains: should the pursuit of this goal come at the expense of stretching the law beyond certain established limits? Obviously, the scope of this comment is not a practical forum for discussing the historical backdrop or level of racial tensions that exist in society and demand rectification. It seems equally clear, however, that this specific litigation will not be able to fully address the enormity of the situation either. Although this underlying context must not be overlooked or easily dismissed, it should not be regarded as the determinative factor in this narrow defamation proceeding.

Ultimately, society must be trusted to draw appropriate inferences from the facts on its own, and there is no doubt that people will do so, especially amidst such polarizing and controversial circumstances. Encouraging the occurrence of this type of process is much different than approving laws that permit the broad-based publication of mere assumptions as damning statements of concrete fact. Justice demands a fuller consideration of the individual's interest in their reputation when it is challenged by false or unsubstantiated slander. While the outcome of this decision demonstrates a noble recognition of historic wrongs and a commitment to their rectification, it entirely fails to recognize the gravity of the damages caused by defamation and seems to bend the law on qualified privilege in order to compensate. If this judgment stands, it

⁵⁷ *Campbell*, *supra* note 1 at para. 379.

provides lawyers and others with an ability to make serious public condemnations before hearing from the victim of these attacks, or even verifying the basic facts. How can we hope to properly achieve justice by tolerating such injustice in its pursuit? Quite plainly, we cannot.