Dalhousie Law Journal

Volume 7 | Issue 2 Article 13

4-1-1983

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Recommended Citation
David O'Brien, "Case Comment: Burnett v. C.B.C. & MacIntyre", Comment, (1982-1983) 7:2 DLJ 431.

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David O'Brien*

Case Comment: Burnett v. C.B.C. & MacIntyre**

> The combinations and permutations available to an audio-visual type of presentation are endless. How, then, should the established legal principles which have stood the test of time respond to a broadcast...? Are they appropriate or adequate or must we now develop modifications or even entirely new principles to be fair to all sides?
> - Miller J., in *Lougheed* v. *C.B.C.* (1978), 4 C.C.L.T. 287 (Alta.S.C., T.D.), at 297.

The *Burnett* cases[1] had their origin in an episode of "the MacIntyre File", a public affairs programme produced by the Canadian Broadcasting Corporation (C.B.C.) and narrated by host Linden MacIntyre (MacIntyre). The epidsode in question was broadcast to the three Maritime provinces by the defendant corporation on 22 September 1978.

The plaintiffs launched two separate defamation actions. The actions were tried together, unconsolidated, by Grant J., sitting without jury in Truro. *Burnett* (No. 1) alleged defamation in the television programme itself; *Burnett* (No. 2) alleged defamation in connection with an interview conducted in preparation for the television documentary. In *Burnett* (No. 1), nothing in the script was found to be defamatory regarding the plaintiffs. But portions of the script, when considered in conjunction with the visual pictures on the screen while the words were spoken, were held to be defamatory in their combined effect. In *Burnett* (No. 2), there was found to be no defamation because the interview at issue between MacIntyre and the mayor of Port Hawkesbury was deemed to have occurred in circumstances giving rise to the defence of qualified privilege.

* David O'Brien, LL.B. Dalhousie 1983.

** This paper was submitted in partial fulfillment of the requirements for the course in Media Law at Dalhousie Law School.

1. *Joseph Burnett, Burnac Leaseholds Ltd., Burnac Corporation Ltd. and Burnac Realty Investors Ltd.* v. *C.B.C. and Lynden MacIntyre* (1981), S.T. 00842; S.H. 26110 (N.S.S.C., T.D.), hereinafter referred to as *Burnett* (No. 1). *Joseph Burnett, Burnac Leaseholds Ltd., Burnac Corporation Ltd., and Burnac Realty Investors Ltd.* v. *C.B.C. and Lynden MacIntyre* (1981), S.T. 00843; S.H. 26111 (N.S.S.C, T.D.), hereinafter referred to as *Burnett* (No. 2). All page references to the *Burnett* cases refer to the page numbers of the unreported judgments. Since the writing of this comment the two judgments have been reported. They are to be found at (1981), 48 N.S.R. (2d) 1, and 48 N.S.R. (2d) 181, respectively.

This case comment is concerned primarily with *Burnett* (No. 1) and the case's implications for defamation actions where the subject matter complained of is audio-visual material. It might be noted as a point of interest that the *Burnett* cases received substantial attention from the media in Nova Scotia. The pleadings were extensive, and the trial decisions run some 197 pages in length. The parties settled the question of damages privately after the decisions on liability were handed down.

At issue in *Burnett* (No. 1) was an episode of the "MacIntyre File" entitled "Law of the Jungle". It dealt extensively with the business of shopping mall development in Eastern Canada, and the attendant financial problems of such developments. The plaintiffs were financiers and contractors involved in mall construction. The main theme of the "Law of the Jungle" episode was the legal liability of mall developers,—Joe Burnett in particular. This primary theme was supplemented by a secondary theme of abuse of receivership and bankruptcies. MacIntyre examined Burnett operations in five locales.[2] As a result of his investigations, MacIntyre suggested the existence of a "formula", which may be regarded as the essence of the "story" the programme sought to convey:

> It's a deceptively simple formula and it's been repeated many times in Eastern Canada. A development company with obscure origins shows up. He's got a handful of cash, but reassuring backing on paper. There's a worrisome construction period, a financial catharsis, legal confusion. Then, when the dust settles, a new owner, who isn't exactly new in the overall picture. There are people who claim Burnett is in the process from the start, somehow behind the development company, even the early mortgage money. It can't be proved yet, but there are grounds to support that belief.[3]

This passage conveys the flavour of the script. Visual shots included pictures of Burnett from a C.B.C. Toronto production on organized crime called "Connections". Other video pictures included a shot of the Watergate building in Washington, and a picture of a graveyard in the opening. This brief summary should indicate the general tenor or nature of the programme. Grant J. found that,

> ... the programme was defamatory of the plaintiffs. I have examined the words spoken by the host, the defendant Linden MacIntyre ... and found the words themselves were not defamatory. I have found the

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2. Kirkland Lake, Ont.: Cornerbrook, Nfld.; Dartmouth, N.S.; Port Hawkesbury, N.S.; and Sydney, N.S.
3. *Burnett* (No. 1) at 54.

> *cumulative effect of the words and the images were defamatory* of the plaintiffs.[4] [Emphasis added.]

This would seem to be the first explicit instance in Anglo-Canadian law where the cumulative effect of non-defamatory words and images in an audio-visual presentation has been held to be defamatory. How did Grant J. arrive at this finding?

The learned trial judge, in each *Burnett* case, includes a weighty section subtitled "The Law". Here he sets out lengthy excerpts, from several authorities, on the various elements of a defamation action and the defences available.[5] Extensive use was made of fair comment as a defence in *Burnett* (No. 1), but in his section on "The Law" of fair comment[6], Grant J. makes reference to only one recent case: *Barltrop* v. *C.B.C.*[7] No reference at all is made to the recent Supreme Court of Canada ruling on fair comment in *Cherneskey* v. *Armadale Publishers et al.*[8] Mr. Justice Grant does not enter into any discussion of the roughly sixteen pages of excerpts of "The Law" which he reproduces from the authorities. It is a ponderous mass of black letter doctrine. Although Grant J. makes no comment on the various principles enunciated, he does distil from it a summary of the different functions of the judge and jury in determining questions of fact and law in a defamation trial. This analysis is contained in almost identical forms *Burnett* (No. 1) and *Burnett* (No. 2). This summary is reproduced here in full:

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4. *Id.* at 1-2.
5. He relies principally on *Gatley on Libel and Slander*, 7th Ed.; *Salmond on Torts*, 17th Ed.; Wright and Linden on *Canadian Tort Law*, 7th Ed.; and Williams on *The Law of Defamation.*
6. *Burnett* (No. 1) at 20-24.
7. *Barltrop* v. *C.B.C.* (1978), 25 N.S.R. (2d) 637 (N.S.S.C., App. Div.).
8. *Cherneskey* v. *Armadale Publishers et al.* (1979), 90 D.L.R. (3d) 321 (S.C.C.). The majority opinion held that, in order for fair comment to apply, each publisher must establish his honest belief in the matter published. The *Cherneskey* ruling *re* fair comment has been considered in *Vander Zalm* v. *Times Publishers,* [1980] 4 W.W.R. 259 (B.C.C.A.); *Whittaker et al.* v. *Huntington* (1980) 15 C.C.L.T. 19 (B.C.S.C.); and *Thomas* v. *C.B.C.* (1981), 16 C.C.L.T. 113 (N.W.T.S.C.). The majority opinion in *Cherneskey* has come under heavy criticism. See, e.g., M. R. Doody, "Comment on *Cherneskey*" (1980), 58 Can.B.Rev. 174. In the New Brunswick case of *Baxter* v. *C.B.C. & Malling* (1979), 28 N.B.R. (2d) 114 (Q.B.,T.D.), Stratton J. makes no reference to the majority in *Cherneskey,* but rather cites the test for fair comment which Dickson J. unsuccessfully advocated in the *Cherneskey* dissent. When the *Baxter* case went on appeal, the New Brunswick Court of Appeal did not find it necessary to comment on Stratton J.'s apparent approval of the Dickson dissent in *Cherneskey*. It will be interesting to see if other Canadian courts follow the example of Stratton J. in "losing" the *Cherneskey* majority holding.

> Most cases of defamation of this province are tried by a judge sitting with a jury. As I understand the law and practice, there are clearly defined roles for each to play. I am sitting as both judge and jury and I consider that I should make my findings and rulings on fact and law in each instance.
>
> Whether there was in fact a publication of certain words, I understand is a question of fact for the jury with the burden of proof being on the plaintiffs.
>
> Whether the words or images complained of refer to the plaintiffs is a question of fact for the jury with the burden of proof being on the plaintiffs.
>
> Whether the words or images or sounds complained of are reasonably capable of a defamatory meaning in their natural and ordinary meaning, that is, of being defamatory, is a question of law for the judge.
>
> Whether the words, images or sound complained of in their natural and ordinary meaning, under the existing facts and circumstances are defamatory of the plaintiffs is a question of fact for the jury.
>
> Whether the words, images or sounds complained of are capable of being interpreted by right thinking members of society in the meaning attributed to them by the plaintiffs in their pleadings, is a question of law for the judge.
>
> Whether the words, images or sounds complained of under the peculiar existing facts and circumstances bear the meaning attributed to them by the plaintiffs in their pleadings (the innuendo pleaded), that is, whether they are defamatory of the plaintiffs, is a question of fact for the jury.
>
> Relating to the defence of justification whether a fact is substantially true in substance and in fact is a question of fact for the jury.
>
> Relating to the defence of fair comment whether the words are capable of being comment is a question of law for the judge. Whether they are in fact comment is a question of fact for the jury. If they are comment it is a question of fact for the jury to determine if they are fair comment or not.
>
> The question of public interest is a question of law for the judge to determine.
>
> Whether the occasion of publication is one enjoying a qualified privilege is a question of law for the judge. If the surrounding facts are in issue then these facts are for the jury to decide.
>
> If there is evidence of malice then the question of whether the defendant was actuated by malice is a question of fact for the jury.[9]

This summary is to be regarded as a useful practice aid for counsel involved in defamation actions. It would be a handy *aide-mémoire* to

9. *Burnett* (No. 2) at 23-4.

keep at one's side during the trial and Mr. Justice Grant is to be commended for producing it.

Grant J. proceeds to examine the script using the summary set out above as a framework of sorts. Much of the judgment concerns assessment of individual statements made in the course of the programme. The learned trial judge finds that none of the words spoken by MacIntyre or his guests were defamatory of any of the plaintiffs.[10]

In the interests of brevity, I restrict my comment on this aspect of the judgment to one allegedly defamatory instance in the script, which may be regarded as representative of others.

Burnett objected to the term "loan sharking" made in reference to him in the following context:

> Today he borrows from banks and American investment syndicates at moderately high interest rates and lends it out at very high rates. It's *a legal form of loan sharking* called short term and bridge financing. It's a risky business, but Burnett's talent for manipulating money and using the law to his advantage practically eliminates risk for him.[11] [Emphasis added.]

The trial judge finds that right-thinking members of society would understand "loan sharking" to mean "charging excessive amounts of money for lending money."[12] The evidence suggested that Burnett sometimes charged prime plus three percent or prime plus four percent on loans, together with other fees added on top for finding the loan money. Grant J. analyzes the statement as follows:

> I find this statement to be capable of a defamatory meaning. I find it, in fact, was not defamatory of the plaintiffs. I find the term 'loan sharking' to be capable of being a comment. I find it to be a comment and fair comment as defined herein.
>
> I find that the interest plus the various charges would amount to 'loan sharking' in the interpretation of that term by the viewers being 'right thinking members of society generally'.[13]

Let us examine this analysis more closely.

It is not at all clear why Grant J. finds this statement is capable of being defamatory, and yet concludes it is not defamatory. The question of whether words are capable or not capable of being defamatory is one which arises principally when,

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10. *Burnett* (No. 1) at 65-6.
11. *Id.* at 60.
12. *Id., Webster's Third New International Dictionary* (1971) finds the term a little stronger in meaning, There, "loanshark" is defined as one who lends money to individuals at *extortionate* interest rates.
13. *Burnett* (No. 1) at 62-3.

> the defendant will wish to contend that the words are incapable of bearing the meaning or meanings (or some of the meanings) put forward by the plaintiff.[14]

That does not seem to have been the case here; the meaning of "loan sharking" does not appear to have been much at issue. The real question is simply whether the term is defamatory or not. The classic test is that set out by Lord Akin in *Sim* v. *Stretch*:

> ...would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?[15]

Applying this to the "loan sharking" statement, one would tend to think the words would so lower the reputation of the plaintiff. One might cite *Gatley* in support of this view:

> It has been held defamatory ... to impute 'any dishonourable conduct to another though not involving a breach of positive law'.[16]

Loan sharking could hardly be regarded as "honourable". With all respect to the learned trial judge, it is submitted the term is defamatory. But this does not necessarily mean that liability should follow. The defences of fair comment or justification might still be established to absolve the defendant of his liability.

The learned trial judge says that fair comment does apply in this instance. But recall that in the very next sentence, he says:

> I find that the interest plus the various charges would amount to 'loan sharking' in the interpretation of that term ....[17]

This sounds very much as if the term is being treated as a question of fact, rather than comment, and that justification is being applied. Grant J. seems to be saying here that it is a true statement of fact, although he has already held it to be fair comment. Can it be both fact and comment? The learned trial judge does not tackle the "fact or comment" issue here, although it seems to be an obvious problem.

The problem of "fact or comment" received attention from MacKeigan C.J.N.S. in the *Barltrop* case:

> To be comment, fair or unfair, a statement must be a statement of opinion and *not a statement of fact.* It must be an expression of opinion about facts which must have been presented to the readers or

14. *Duncan and Neill on Defamation* (1978) at 15.
15. *Sim* v. *Stretch*, [1936] 2 All E.R. 1237 (H.L.) at 1240.
16. *Gatley on Libel and Slander, supra,* note 5 at para. 50. This paragraph from *Gatley* was referred to with approval by MacKeigan C.J.N.S. in the *Barltrop* case, *supra,* note 7 at 656.
17. *Burnett* (No. 1) at 63.

listeners, or be well known to them, and which must themselves be substantially true.[18] [Emphasis added.]

MacKeigan C.J.N.S. says very clearly that a statement of fact cannot qualify as comment. With great respect, this may be too broad. In the case of *Sheppard* v. *Bulletin*[19], Stuart J. says that, *in general*, comment can only be an expression of opinion. But there is an exception, he says, where comment may consist of fact. He refers to the words of Field J. in *O'Brien* v. *Marquis of Salisbury* in support:

> It seems to me that *comment may sometimes consist in the statement of a fact*, and may be held to be comment, if the fact so stated appears to be a deduction or conclusion come to by the speaker from other facts stated or referred to by him, or in the common knowledge of the person speaking, and those to whom the words are addressed and from which his conclusion may reasonably be inferred.... [I]f, although stated as a fact, it is preceded or accompanied by such other facts and it can reasonably be based upon them, the words may reasonably be regarded as comment ....[20] [Emphasis added.]

See also *Duncan & Neill on Defamation*, where the learned authors say:

> The defence of fair comment is not restricted merely to such epithets as the commentator may apply to the subject matter commented upon, but can include inferences of fact drawn by the commentator.[21]

Let us now return to the allegedly defamatory statement itself:

> ...It's a legal form of loan sharking called short term and bridge financing....[22]

MacIntyre is saying that Burnett was invovled in short term and bridge financing and that such conduct is a legal form of loan sharking; in short, that Burnett was involved in legal loan sharking. Is this statement one of opinion such as MacKeigan C.J.N.S. would require for fair comment; or is it rather a statement of fact, not capable of being comment? Following the *Barltrop* principle, where comment excludes fact, it looks very much like a statement of fact. Justification would be available, but fair comment could not apply.

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18. *Barltrop, supra*, note 7 at 657. The treatment of the "fact or comment" issue by the Chief Justice here has been well regarded. See *e.g.* K. R. Evans, "Defamation in Broadcasting" (1979) 5 Dal.L.J. 659 at 675.
19. *Sheppard* v. *Bulletin* (1916), 27 D.L.R. 562 (Alta.S.C.), rev'd on other grounds at (1917), 55 S.C.R. 454.
20. Cited *id.*, at 566-7. *O'Brien* v. *Marquis of Salisbury* (1889), 6 T.L.R. 133 (Q.B.Div.).
21. *Duncan & Neill on Defamation, supra*, note 14 at 66.
22. See also context of statement, *supra*, at 6.

But it is submitted the statement should more properly be classified as falling within the ambit of the *O'Brien* and *Sheppard* cases. It is argued that the allegation of loan sharking here is one of fact which is a "deduction or conclusion come to by the speaker from other facts stated or referred to by him," as Field J. put it. It is argued this classification of "fact *as* comment" is semantically more appropriate here than a classification of "fact" *or* "comment" as defined in *Barltrop.* The defence of fair comment therefore would become available on the basis of *O'Brien* and *Bulletin.*

Let us summarize at this point. If the impugned statement *re* loan sharking must be classified as fact or comment, as defined in *Barltrop,* then it is argued the impugned statement was more "fact" than "comment". If Grant J. purported to follow a strict reading of MacKeigan C.J.N.S. in *Barltrop,* it is argued he probably erred in applying "comment" and consequently "fair comment" here. But Grant J. did find the statement to be one of comment. In doing so, it is argued, he must have been taking the "fact as comment" approach outlined in *Bulletin* v. *Sheppard.* It should be apparent that the approaches set out in *Barltrop* and *Bulletin* cannot live happily together. Which should prevail?

It is acknowledged that in advocating a re-affirmation of the "fact as comment" category, one might be accused of "muddying the waters". But it is suggested that the result of re-affirming "fact as comment" is simply to enlarge the scope of "comment" even if the boundary between "comment" and "fact" remains muddy as a result. The instant example of loan sharking exemplifies the need for the retention of "fact as comment". Although but a single phrase is involved, and its defamatory meaning seems clear, yet that one phrase would seem to defy precise categorization as either fact or comment (when comment is defined to mean only "opinion"). The intermediary classification of loan sharking as "fact as comment" seems more in accord with accurate semantical construction. Retention of the intermediary classification provides more maneuverability of construction by the judge. Retention of the intermediary classification can also be advocated on policy grounds.

Fair comment, as Chief Justice MacKeigan himself affirms, "has been rightly termed 'a basic safeguard against irresponsible political power' and 'one of the foundations supporting our standards of personal liberty'."[23] By retaining "fact as comment" as part of the legal definition of "comment", this legal category of "comment"

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23. *Barltrop, supra,* note 7 at 657.

could have wider scope than it would if limited to only "opinion" as was suggested (perhaps *obiter*?) in *Barltrop*. Because "comment" would have wider scope, the defence of fair comment would have wider application. "Fact as comment", it is argued, is a useful sub-category of "comment". Its legitimacy, impugned in *Barltrop*, should be clarified. The "loan sharking" allegation in *Burnett* (No. 1) would have been a suitable occasion for doing so.

It should be apparent from the foregoing analysis that the learned trial judge's reasoning in this instance was less than clear. In most of the instances of alleged defamations in the script, he merely gives his conclusions. This is a major problem with the judgment. One other example will suffice to illustrate this. One of MacIntyre's guests, a certain John Gamble, says in reference to Burnett:

> In his case I don't think that I would advise [another contractor] to have anything whatever to do with him [Burnett], in any way, shape or form.[24]

The learned trial judge treats this alleged defamation in the following manner:

> I find this latter statement of Gamble to be capable of a defamatory meaning. I find, however, that it is, in fact, not defamatory of the plaintiffs.[25]

Why not? There is no further elaboration on this particular finding.

No part of the script gave rise to liability. We must now turn our attention to the part of the programme which did give rise to liability.

Imagine the following television scene. The words are being spoken by Linden MacIntyre, with reference to Joe Burnett:

> His deals are under constant observation by the R.C.M.P. The Department of National Revenue has seized many of his corporate records and in August of this year launched an inquiry under the Income Tax Act (Picture of Department of National Revenue shown) into his and his companies' finances between 1970 and 1977. Places like this thrive on the competition for wealth and influence. (Picture of Toronto's financial district shown again) [*sic*] Competition is an industry in itself, an industry that is finely programmed so that the first and greatest impacts of success happen here and the worst shocks of failure are absorbed somewhere else. (Picture of Joe Burnett in black car smoking cigar shown again) The law is supposed to neutralize the *manipulations* and *dirty tricks* that make big business a *predatory, cut-throat* game for some people. If the legitimate

24. *Burnett* (No. 1) at 64.
25. *Id.* at 65.

instrument, receivership, is being used as a weapon to *victimize* people, then perhaps the law should be improved.

Linden MacIntyre: (Picture of following car - presumably Burnett's) Should there be more policing and if so, where and by whom?[26] [Emphasis added.]

Grant J. holds that the words spoken here are covered by fair comment or justification. He then pinpoints the specific words emphasized in the script, *supra*, and holds as follows:

"I find the use of these terms themselves by MacIntyre does not refer to the plaintiffs but the showing of Burnett's picture or that of the car in which he is seated, while the words are being said or shortly before, draws the irresistable inference that Burnett and/or his companies are involved in these activities.

I find this to be the part of the film where the viewer, already saturated with facts and situations, now draws the conclusion that the man shown is engaged in these activities. I find also a viewer would conclude that the man in the picture is Burnett and that the man in the car is Burnett."[27]

It was at this point in the programme, according to Grant J., that the viewer would connect the abuse of receivership/bankruptcies theme with the theme of Burnett's doings in the mall development business. The viewer would conclude that "Burnett abuses the law of receivership and/or bankruptcy in that industry."[28] This was the narrow defamatory meaning which arose from the script combined with the visual effects in the portion of the programme described above. It is important to note that the judge did *not* find the programme, considered as a *whole*, to be defamatory of the plaintiffs. He *did* hold that the "words and images used in the programme (considering the same as a whole) *were capable* of a defamatory meaning"[29], but he elaborates no further.

The first question which arises immediately is why it is only in one particular segment where strong language, not *per se* defamatory according to Grant J., combines with a picture of Burnett in his car to crystallize into defamation. If at this point, why not at others in the programme? Next. If the two "themes" of abuse of law and Burnett's dealings are brought together in the course of the programme, and we know that the audio-visual presentation as a whole was *capable* of

26. *Id.* at 90-1.
27. *Id.* at 93.
28. *Id.*
29. *Id.* at 96.

a defamatory meaning, would not the reasonable viewer find the *whole* programme defamatory? Applying the test from *Sim* v. *Stretch* again, would not the entire programme tend to lower the plaintiffs in the estimation of right-thinking members of society? With great respect to the learned trial judge, it is submitted that these are questions which he ought fairly to have dealt with in his reasons. They are questions which will surely arise in similar cases in this area in the future. Some conjecture on how they will be dealt with is in order.

This case presents what may be the first instance in Anglo-Canadian law in which non-defamatory words in conjunction with visual parts of a television programme have given rise to liability in defamation. It seems that neither the words by themselves, nor the pictures by themselves would have resulted in liability; it was the combination which gave offence.[30] Indeed, the film production editor of the programme testified that the showing of the photo of Burnett and/or his car, with MacIntyre talking about "dirty tricks" at the same time, would link Burnett with those dirty tricks. The film editor said that "this implication arose and that such is a professional technique."[31] This aspect of the decision is of enormous potential consequence to makers of television documentaries and news programmes. *Burnett* (No. 1) makes it clear that such broadcasters, accused of defamation, have to be concerned with more than getting their facts straight and keeping their vocal comment fair. In light of *Burnett* (No. 1) they must have regard to the context or format of the presentation: the combined effect of the whole "package". It is therefore the producer, he who "puts the show together", who must now be more vigilant. The executive and field producer for the episode in question was Paul Kells. He seems to have been under the impression that to guard against defamation he need only have ensured that:

> "MacIntyre and anyone else working on the show, had all sufficient information to back up what was said on the programme."[32]

That is not enough. *Burnett* (No. 1) clearly suggests that the format of presentation must also be fair. How is the producer to gauge this fairness?

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30. There is nothing in the trial judgment to indicate that any of the video-pictures used, or any combinations thereof in the programme, could be considered to be defamatory, independent of the script. In light of the *Vander Zalm* and *Youssoupoff* cases, discussed *infra*, it is suggested there would be adequate legal grounds for such a finding in some future case.
31. *Burnett* (No. 1) at 105.
32. *Id.* at 4.

It may be possible to avoid liability in such a situation simply by avoiding the use of the plaintiff's picture, or any picture identifying him, while the "strong language" is being used. It is possible to read *Burnett* (No. 1) so that the pictures were relevant to the defamation only in that they identified Joe Burnett as the subject of MacIntyre's "dirty tricks" comments. In that case, the pictures would not have contributed to the defamatory meaning; they would have been relevant only to the question of identification of Burnett as the subject of the remarks. It will be recalled that Grant J. says that the use of the pictures led to the inference that the comments concerned Burnett. On this narrow reading of the case, where the pictures served only the purpose of identification, it might be argued forcefully that the defamatory imputation arose from the words alone and not from the words *and* pictures; that the pictures did not contribute to the actual defamation. The case might well be distinguished on this basis. But there are serious problems with such an argument. It will be recalled that the judge says explicitly that the "cumulative effect of the words and the images were [*sic*] defamatory."[33] Also, Grant J. explicitly found that the words *by themselves* were not defamatory. Aside from identifying the plaintiff, then, there must have been something in the pictures which did contribute to the defamatory imputation. This is probably the better reading of the case. But that brings us back to the question of how the pictures, in conjunction with the words, are to be judged for defamatory meaning. Recourse to the few decided cases in the area may suggest an answer.

There are a handful of cases which Grant J. might have cited as support for his decision. Early in the age of broadcasting, Sankey L. J., *obiter*, foresaw the problems which would arise in the area of defamation:

> Spoken words divorced from their context and surroundings may appear to be a slander which when controlled by such context and surroundings are nothing of the sort. Gesture, tone of voice, expression of countenance ... may materially affect the spoken words.[34]

The relationship between speech and pictures in an audio-visual presentation was discussed briefly in *Youssoupoff* v. *Metro-Goldwyn-Mayer*. This was the famous case in which a Russian princess alleged a film defamed her by inferring she had been raped by the mad monk, Rasputin. In holding that publication of a film is libel, not slander, Slesser L. J. commented:

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33. See passages cited at 3, 13, *ante*.
34. *Broome* v. *Agar* (1928), 138 L.T. 698 (C.A.) at 702.

> I regard the speech which is synchronized with the photographic reproduction and forms part of one complex, common exhibition as an ancillary circumstance, part of the surroundings explaining that which is to be seen.[35]

This could be interpreted as a basis for holding that the two elements, audio and visual, together can give rise to a defamatory meaning, although such as not the narrow *ratio* of the Youssoupoff case. A recent Canadian case is more directly on point. *Lougheed* v. *C.B.C.* arose out of a television play which alledgedly defamed Alberta Premier Peter Lougheed. In the course of a judgment on an appeal from an order for further particulars made by the trial judge, Clement J. A. said:

> In many instances the matter complained of as defamatory may consist in the combination of several factors. It is to be taken, of course, that this particularity will have as its background the totality of the production in the context of which the particular matters of complaint are to be judged.[36]

This view was given in relation to a play. But another case shortly thereafter, also arising on an interlocutory matter, suggested that the *Lougheed* view expressed above would also apply in the case of a television news documentary.

In *Vulcan Industrial Packaging Ltd.* v. *C.B.C. et al.*, the Ontario Master said:

> In my view, the same considerations apply to this type of television programme as apply to a television play, since they both have the vast potential for presenting a message from elements in the programme other than the spoken words themselves.[37]

Unfortunately, none of these cases were alluded to by Grant J. in *Burnett* (No. 1). But although the *Broome* and *Yousoupoff* comments are *dicta*, and the *Lougheed* and *Vulcan* comments arose on interlocutory matters, *Burnett* (No. 1) appears to be the first trial

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35. *Youssoupoff* v. *Metro-Goldwyn-Mayer* (1934), 50 T.L.R. 581 (C.A.) at 587.

36. *Lougheed* v. *C.B.C.* (1979), 8 C.C.L.T. 120 (Alta. S.C., App. Div.) at 144.

37. *Vulcan Industrial Packaging Ltd.* v. *C.B.C. et al.* (1979), 23 O.R. (2d) 213 (Ont.S.C., M.Ch.) at 226. *Cf.* the approach in the recent case of *Vogel* v. *C.B.C.* (1982), 21 C.C.L.T. 105 (B.C., S.C.). There, Esson J. suggested that the elements other than the spoken words may contribute more to the seriousness of the defamation than the spoken words themselves. At p. 170: "Images, facial expressions, tones of voice, symbols and the dramatic effect which can be achieved by juxtaposition of segments *may be more important* than the meaning derived from the careful reading of the words of the script.... Here, regard *must* be had to *the devices used to create an impression....*" [Emphasis added.]

decision to have found defamation to arise from the combined audio-visual elements of the programme or a portion thereof. That being the case, the next question which arises concerns how the combined elements are to be constructed to determine if their cumulative effect is indeed defamatory.

There is little jurisprudence on the construction of pictures, let alone of pictures and accompanying sound. The problem of translating visual images into words was touched upon in *Vander Zalm* v. *Times Publishers et al.* In oral arugment, an attempt was made to translate the pictorial cartoon concerned into words, and then to decide whether those words were defamatory. Seaton J. A. said:

> That is an exercise of limited value and it contains within it a hazard. It tends to focus attention on the words that have been substituted for the cartoon rather than on the cartoon itself. If the translation from cartoon to words is not done completely accurately, the proper test might give an improper result because it is being applied to the wrong subject.[38]

In the end, Seaton J. A. says, you have to consider the cartoon *per se.* Aikins J. A. concurred in the result, but suggested that the judge, in construction of the meaning of the cartoon, *should* translate it into words for the purpose of determining defamatory meaning.[39] The question of whether pictures by themselves were defamatory does not appear to have been an issue in *Burnett* (No. 1), but there was a defamatory allegation concerning pictures combined with music. The plaintiffs said in their statement of claim:

> During the introduction, the title of the programme 'Law of the Jungle' was portrayed on the screen across the picture of a graveyard and in a manner and designed to create in the viewer a feeling that he was witnessing something of a sinister or menacing nature.[40]

Grant J. held:

> I find that the pictures and the music during the introduction did create the impression of suspense or eeriness, perhaps, even evil. However, they did not relate to the plaintiffs or any of them.[41]

Grant J. does not allude to any interpretation problem here; nor does he discuss plaintiffs' interesting argument that such an opening would create a context of evil or menace against which the rest of the programme should be judged. Grant J. appears to frown on this

38. *Vander Zalm* v. *Times Publishers et al.,* [1980] 4 W.W.R. 259 (B.C.C.A.) at 268.
39. *Id.* at 285.
40. Quoted in *Burnett* (No. 1) at 71.
41. *Id.*

argument, but support might have been found for that argument in two Canadian cases.

There is some confusion over the question of to what extent separate segments of an audio-visual presentation may be adjudged in relation to one another or in relation to the programme as a whole. Grant J. proceeded by analyzing each impugned segment on a separate basis. He appeared loath to judge one segment in relation to other segments, or in relation to the context of the whole programme. In this way, he differed from the approach suggested in the *Lougheed* case *per* Clement J.A.:

> In my opinion, the whole must be taken into account in determining whether any particular episode is defamatory, since it creates a background or aura composed of all the elements of communication: the spoken word in statements, or in dialogue of motives and objectives, the inferences that may reasonably be drawn from them, the skill of acting by gesture and expression, the emotional effect of sound, and the like. These are all artfully done and recorded to advance an effect of dramatic unity. Against this background which constitutes the aura or atmosphere, episodes may be defamatory ... although if taken in isolation they may appear innocuous.[42]

In *England* v. *C.B.C. & Clarkson,* Tallis J., as he was then, was even more explicit. That case concerned a coroner who sued over a television public affairs programme, (an episode of the "Fifth Estate" series), allegedly portraying him as incompetent. The trial judge in *England* was concerned with only words, not words *and pictures.* But even with this less complicated *res controversa,* Tallis J. did not think it useful to consider each impugned segment as a watertight compartment:

> "It seems to me that the authorities support the view that it is the broad effect of the publication that counts. There is no purpose and it would be improper for me to dissect the words of the television broadcast neatly as one might do in interpreting an insurance contract. It is what the ordinary man hearing and viewing the television broadcast would think."[43]

This led Tallis J. to conclude that "... the alleged irregularities described in the programme must be viewed in a cumulative way."[44] It is suggested that if Grant J. had adopted the approach of Tallis J., the whole episode attacked in *Burnett* (No. 1), or at least more segments

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42. *Lougheed, supra,* note 36 at 142-3.
43. *England* v. *C.B.C. & Clarkson,* [1979] 3 W.W.R. 193 (N.W.T.S.C.) at 209.
44. *Ibid.,* p. 210.

of it, might very well have been found to be defamatory. It is respectfully submitted that the approach discussed in *England* and *Lougheed* is to be preferred to that followed in *Burnett* (No. 1). Not only does it seem more in accord with common sense, but it is also more conducive to brevity of judgments.

One interesting aspect of *Burnett* (No. 1) may be considered briefly: the finding of personal liability of Linden MacIntyre.[45] The learned trial judge found that none of MacIntyre's words were defamatory of the plaintiffs. Nor was he involved in the selection of pictures and captions shown, or the sequence in which they were fitted together in production of the programme. Grant J. says:

> The defamatory material was inserted by others and approved by others, not MacIntyre.
>
> However, the programme bears his name and he has been nominated for and received awards for other performances in this series. One can hardly absolve him from all responsibility for a telecast if he stands in a position where he can receive an award for it.[46]

This is an extraordinary basis for liability. It has always tended to be considered trite law that it is a complete defence where it is established that the defendant did not publish the words complained of.[47] Receiving an award can hardly be considered a basis for attaching legal liability in such circumstances. This liability finding is all the more remarkable in view of the following comment of the trial judge:

> It seems to me to be difficult that a person who performs his or her functional responsibility in a lawful manner should be held liable in defamation because another, not under his direction or control, in performing his or her function inserts some improper material ....[48]

With great respect, the finding of liability against MacIntyre must be in error.

In summary, it should be seen that there are a substantial number of issues raised in *Burnett* (No. 1) which are of consequence to the law of defamation in Canadian broadcasting. The "fact as comment" question is one which might well have arisen in relation to the "loan sharking" allegation; in any event the trial judge's handling of this specific allegation leaves much to be desired. The practice aide of the functions of the judge and jury is a useful summary of undisputed law. The analytical approach to determining defamatory meanings

45. See *Burnett* (No. 1), pp. 103-5.
46. *Ibid.*, p. 105.
47. *Duncan & Neill on Defamation, supra,* note 14, p. 53.
48. *Burnett* (No. 1), p. 104.

was awkward and probably out of whack with what is probably the sounder approach in *Lougheed* and *England.* The difficult issues revolving around the inter-relationship of pictures and words/pictures and music, the interpenetration of their meanings and the method of interpenetration of their meanings; these issues were skirted in the opinion. The learned trial judge tended to state his conclusions without explaining how he arrived at them.

The narrow *ratio* of the case, that non-defamatory words and pictures may in combination be defamatory, is new law. That's the good news. This ruling makes it clear that the law will take into account the method of presentation, as well as the information communicated in determining defamatory meaning. The bad news is that it is not clear what test may be used to determine when the "cumulative effect" of the audio-visual presentation has gone too far. For example, how does one determine whether sinister background music leads the viewer to think less of the plaintiff? And once it is determined that the cumulative effect of sound and imagery is defamatory, what defences apply? Might fair comment still be available? If so, what test could be utilized to determine whether the "cumulative effect" of the defamatory segment might still be protected? For example, could one argue that the use of sinister background music is "fair comment" in some circumstances? These are difficult questions; they do not admit of easy answers.

For the answers, though, we should not have to wait too long. We are likely to see more defamation cases like *Burnett* (No. 1) in the not-too-distant future.