NOVA SCOTIA COURT OF APPEAL

[Cite as: *Jones v. Campbell, 2002 NSCA 128*]

Date: 20021024
Docket: CA 174355; CA 174346
Registry: Halifax

Glube, C.J.N.S.; Roscoe and Saunders, JJ.A.

BETWEEN:

BURNLEY A. JONES and ANNE S. DERRICK

Appellants

- and -

CAROL CAMPBELL

Respondent

REASONS FOR JUDGMENT

Restriction on Publication: **Publishers of this case please take note** that s. 38(1) of the *Young Offenders Act* applies and may require editing of this judgment or its heading before publication. Section 38(1) provides:

> 38(1) No person shall publish by any means any report
>
> (a) of an offence committed or alleged to have been committed by a young person, unless an order has been made under section 16 with respect thereto, or
>
> (b) of a hearing, adjudication, disposition, or appeal concerning a young person who committed or is alleged to have committed an offence
>
> in which the name of the young person, a child or a young person aggrieved by the offence or a child or a young person who appeared as a witness in connection

with the offence, or in which any information serving to identify such young person or child, is disclosed.

Revised Decision: The text of the decision has been corrected according to the erratum released October 24, 2002.

Appeal Heard: June 10 and 11, 2002

Judgment Delivered: October 24, 2002

Counsel: William L. Ryan, Q.C./Nancy G. Rubin
for the Appellant Jones
S. Bruce Outhouse, Q.C./Lester Jesudason
for the Appellant Derrick
George W. MacDonald, Q.C./Hugh H. Wright
for the Respondent

THE COURT: The appeal is allowed as per reasons for judgment of Roscoe, J.A.; Glube, C.J.N.S., concurring; and Saunders, J.A. dissenting by separate reasons.

ROSCOE, J.A.:

[1] As a result of comments made at a press conference by Anne Derrick and Burnley "Rocky" Jones, two prominent lawyers, a Halifax police officer, Carol Campbell, brought an action in defamation against them. After a 22 day trial, the jury delivered a general verdict in favour of the police officer, finding that the lawyers had defamed her and awarded her damages of $240,000.

[2] Ms. Derrick and Mr. Jones appeal from the jury verdict and damage award and several rulings made by the trial judge in the course of the trial, including the denial of their defences of qualified privilege and qualified reporting privilege. It is also submitted that the trial judge made many errors in his instructions to the jury and in various evidentiary rulings. They appeal, as well, from the award of costs in the amount of $75,000 made against them by the trial judge.

BACKGROUND:

[3] On March 6, 1995, Constable Carol Campbell, a police officer with the Halifax Regional Municipality Police Force, was called to St. Patrick's - Alexandra School to investigate a theft. The school is an inner-city school in a neighbourhood where many of the students are Black and many are poor. Upon arriving, the respondent was advised by the Vice-Principal that there had, in fact, been two thefts at the school; one involving $300.00 stolen from the library assistant, and the other involving $10.00 missing from the backpack of a university student who had been working in the guidance area of the school. Two separate groups of students were identified as possible suspects. One group suspected of the theft from the library assistant was held in a classroom. Three 12 year old girls, L.S., J.-L. F. and T.V., suspects in the $10.00 theft, were in the guidance office. These three girls had previously denied any knowledge of the missing $10.00.

[4] The respondent entered the guidance office with Peter Wicha, the Vice-Principal, and the girls again denied any knowledge of the theft. The Vice-Principal left and Constable Campbell conducted a personal search of the three girls. There is conflicting evidence as to the nature of the search. The three girls testified that they were required to remove their socks, shoes, and jeans and pull down their underwear. The respondent, on the other hand, testified that the girls were not asked to pull down their underwear, but only to pull it away from their bodies so that she could see if the $10.00 was in their underwear. The respondent also testified that one of the girls, L. S., without being asked to, pulled her panties down to her knees.

[5] At no time prior to the search were the girls informed of their right to counsel or that they had the right to refuse to be searched. None of the parents or guardians of the girls was contacted prior to the search. Each girl was searched in the presence of the other two in an office with windows facing the hallway. No money was found during the search.

[6] The police officer left the room as did T. V. and J.-L. F. The police officer was then advised by T.V. that L.S. had the missing $10.00 "between her legs." The respondent re-entered the room with a rubber glove, either on her hand or in her hand. She advised L.S. that she knew she had the money and asked her to hand it over which L.S. did. She was charged with the theft of the $10.00.

[7] The local media became aware of the events at the school and several newspaper articles, beginning on March 10, 1995, reported on the incident. The headlines included “Girls Strip Searched At School”, “Complaint Expected After Girls Strip Searched”, “Parents Furious Over Strip Search”. Constable Campbell was reported to be the police officer involved. The parents of the three girls, Mr. Wicha and a Director of the Canadian Civil Liberties Association were quoted in the articles.

[8] The parents of two of the girls retained the appellant, Burnley A. Jones, to represent them with respect to a complaint they intended to make to the police department. The guardian of the third girl retained the appellant, Anne S. Derrick, for a similar purpose. On April 3, 1995, Mr. Jones filed a formal letter of complaint under the **Police Act** with the Halifax Police Chief respecting the conduct of the search at the school. On the same day, Ms. Derrick filed a similar complaint on behalf of the third girl, adopting the first complaint. The two lawyers issued a press release “ . . . in their joint capacity as solicitors for the three young women who were strip searched at St. Pat’s Alexandra Junior High . . . ” to announce a press conference regarding the matter.

[9] On April 5, 1995, Ms. Derrick and Mr. Jones held a press conference which approximately 40 people attended, including members of the electronic and print media. Copies of the complaints made to the Chief of Police, from which the names of the three girls had been deleted, were circulated at the meeting. In addition, letters prepared by the parents and guardian of the three girls were read. Ms. Derrick and Mr. Jones made statements to the media and responded to questions put to them by persons in attendance.

[10] References to systemic racism within the Halifax Police Department, as well as the strip search at the school, were made by each of the appellants. There was extensive press coverage of the comments made by the appellants, including stories on each of three local television news programs later that evening and articles in the two daily newspapers the following day.

[11] On September 5, 1995, the three girls and their parents and guardian commenced action against the City of Halifax, the Halifax Police Department, the Halifax District School Board, Mr. Wicha and the respondent claiming damages as relief pursuant to s. 24(1) of the **Charter of Rights and Freedoms** for

infringement and denial of the girls' constitutional rights. The appellants did not act for any of the plaintiffs in that case.

[12] The complaints pursuant to the **Police Act** were resolved informally before the defamation trial and the respondent acknowledged that the **Charter** rights of the girls had been breached during the investigation and search.

[13] On October 4, 1995, Constable Campbell commenced a defamation action against Mr. Jones and Ms. Derrick, as well as various media entities, which had reported on the press conference. The respondent eventually settled the case against the media defendants prior to the trial of the matter. The total amount paid by the media to settle the claims by the respondent was $14,500.

[14] In her statement of claim, the respondent alleged that several statements made by the appellants at the press conference were defamatory, both in their natural and ordinary meaning, and by innuendo. Based on a transcript of the press conference which was tendered at the trial, the following statements made by the appellants were claimed to be defamatory:

> **Mr. Jones:** . . . So there is absolutely no real privacy in the room where they were being searched. One of the young girls was told, basically, to strip. She lifted her shirt and pulled down all of her clothes including her underwear so that the police officer could see her private parts. This was done in front of the other two girls and obviously, in view of anyone in the hallway. . . . Subsequent to that, the other two young girls had to pull down their clothes . . . .
> . . . I mean, as parents all of us are always afraid of our children and this has got to be a parent's worst nightmare of the violation of their -- of a child.
>
> ....
>
> . . We have three young women who are prepared to say under oath that they had to remove their clothes because of the directions given to them directly by a police officer of the City of Halifax and that the vice principal of the school told them that they were to be searched.
> . . . I think that they all presumed powerlessness, and I think that as has been mentioned earlier, because the school is in an area where people are basically poor and because they were black girls, I think both the police officer and the school administrator felt they could do

> whatever they wanted to these two girls. And so they strip searched them.
>
> . . .
>
> **Ms. Derrick:** . . . Well I understand her to be basically fairly matter of fact. Obviously the objection on the part of what was occurring was the fact of it occurring at all, the fact that what was being conducted here was a strip search no matter how methodical or matter of fact it was the conducting a strip search on adolescent girls was an oppressive act in itself . . .
> . . . I mean as you would have heard in the letters, it is very much the view of the parents and guardians of these children that this incident would not have occurred so perhaps "naturally"in a different neighbourhood with a different socio-economic and racial mix. That is gravely concerning if that is in fact the case; that there are certain neighbourhoods that be made more vulnerable to intrusive . . . And those are certainly trends and features of Canadian society that are replicated in many other places so it is quite a reasonable assumption to make that there is a connection between the race of the girls and their socio-economic status and the events that they were subjected to. . . . Well, we take the position that the way it was done, the strip searching of these girls, was a direct violation of their Constitutional guarantees. . . .

[15] As well, in the interview after the main part of the press conference had concluded, Mr. Jones' comments in the following exchange were claimed to be defamatory:

> Q: Is there a clear connection between this strip search and race?
> JONES: Yes.
> Q.: How clear is it?
> JONES: I think it's clear that they were all black. All of the children were black. The officer was white. The vice-principal, I do believe, is white. And there's no doubt whatsoever in my mind that this would not have happened to white children.

> However, having said that, I do believe that class has a lot to do with this issue also. That because these children are in a community that is basically poor, the school authorities and the police felt that they could trample on their constitutional rights.

[16] The respondent also claimed that the complaint letters falsely and maliciously published at the press conference, were defamatory, again both in their natural and ordinary meaning and by innuendo. The parts of the letter by Mr. Jones to the Chief of Police which contained the following words were said to defame the respondent:

> There was a complete disregard for the privacy of the girls involved. The girls were instructed to remove their clothes, exposing their private areas. This was ordered in the presence and clear view of one other.
> The girls were told to remove their clothes in an unsecured area that was totally inappropriate for a strip search . . .
> . . . it is strongly felt that the children would not have been treated in the manner described if they were white and in a school that saw a different social and economic class of society...

[17] The parts of the complaint letter written by Ms. Derrick and read at the press conference said to defame the respondent are:

> . . . was stripped searched by a Halifax Police officer . . . Please treat this complaint . . . as a companion complaint to the . . . complaints. These complaints should be dealt with together and as one complaint: my clients concur with, and rely upon, the facts and grounds set out in the other complaints, which we have reviewed in the preparation of this letter.
> My client's complaint . . . is against each of . . . Constable Carol Campbell.
> . . . was searched by way of patting down at first, including a pat search around her breasts with her shirt pulled partially up. She was then required to take off her pants and other layers including taking down her underwear.

> . . . race was a factor in her treatment . . . She does not think that white girls in a predominantly white school would have been subjected to the same treatment.
> With respect to the grounds for my clients' complaint, they are advancing this complaint on the identical grounds as set out in the . . . complaint you have also received.

[18] The respondent claimed that the words written and spoken by the appellants carried all or any of three innuendos:

> (1) that the plaintiff is racist,
> (2) that the plaintiff is motivated by racism, or
> (3) that the plaintiff discriminates in the conduct of her duties as a constable on improper grounds including race, economic status and social status.

[19] The appellants filed separate defences to the action in which the remarks were claimed to be either subject to qualified privilege and without malice, or insofar as the words stated matters of fact, they were true, and insofar as they were matters of opinion, they were fair comment on a matter of public interest. As well, the words spoken or written by them were claimed not to be defamatory in their natural and ordinary meaning or by innuendo.

[20] The trial was heard by Justice Gerald R. P. Moir with a jury and commenced on April 3, 2001. The jury deliberated over the course of two and one-half days and returned with a general verdict on May 10, 2001, in which it found Mr. Jones and Ms. Derrick liable in defamation, and apportioned liability equally between them. The award for general damages was $240,000. Justice Moir subsequently awarded the respondent costs in the amount of $75,000, plus disbursements.

ISSUES:

[21] Each of the appellants filed separate notices of appeal raising numerous issues. In addition, the respondent filed a notice of contention by which it is claimed that the trial judge erred in instructing the jury with respect to the manner they should treat the injury to the plaintiff that may have been caused by

publications of defamatory remarks prior to any statements made by the defendants, and that the appellants' notice of appeal perpetuates and renders more severe the defamatory imputations against the respondent. The issues raised by each of the parties can be conveniently combined, restated and listed as follows:

A. Defences to the respondent's claim:

1. **R. v. Golden**
2. Qualified Privilege
   a. press conference as an occasion of privilege
   b. publication of complaint under the **Police Act** subject to reporting privilege
3. Fair Comment
   a. failure to properly instruct jury on law of fair comment
   b. failure of jury to find fair comment

B. Granting relief to respondent from implied undertaking rule

C. Peremptory challenges pursuant to s. 16(2) of the **Juries Act**

D. Evidentiary Issues

1. refusal to permit Ms. Derrick to tender respondent's discovery evidence as an exhibit
2. refusal to permit Ms. Derrick to give evidence as to reasonable and probable grounds when the respondent was permitted to give evidence on the same topic
3. refusal to permit Ms. Derrick to give evidence re breach of s. 15 of the **Charter**
4. refusal to permit Ms. Derrick to give evidence that the respondent made a monetary settlement demand when she gave evidence that all she wanted was an apology
5. permitting the respondent to give evidence on redirect from answers she gave at discovery in **Voeltz v. The City of Halifax** on a matter that did not arise during cross-examination
6. refusal to admit significant portions of expert reports

7. admissions of portions of internal investigation report of Sergeant Gregory Mosher

E. Permitting all pleaded innuendos to go to the jury

F. Damages

1. excessive general damages of $240,000

G. Errors in Jury Instructions

1. failure to properly counteract inflammatory comments of plaintiff's counsel
2. instruction to jury that it could consider aggravating circumstances
3. failure to properly instruct jury on the law of fair comment
4. instructions to jury to award damages if plaintiff proved words on the subject of "Removing Clothing" were defamatory
5. instructions to the jury that it could not consider expert reports when assessing defamatory meaning
6. failure to properly instruct jury as to inferences to be drawn from record of informal resolution
7. instructions to jury that Ms. Derrick must prove truth of allegations with respect to privacy to establish justification
8. failure to give balanced presentation of the evidence

H. Power of the Court on Appeal

I. Assessment of Jury Verdict

J. Issues raised by Notice of Contention

1. instructions re prior publication
2. perpetuation of the defamation

A. **Defences**

1. **R. v. Golden**

[22] Three main defences were advanced on behalf of the appellants at trial: qualified privilege, fair comment and justification. The plea of justification was limited to the issues of whether the girls had been strip searched and whether their constitutional rights had been violated. Since the conclusion of the trial, the Supreme Court of Canada has released its decision in **R. v. Golden**, [2001] S.C.J. No. 81, which specifically addresses the powers of the police to conduct strip searches. The appellants submit that if one applies the definition of strip search adopted by the Supreme Court in **Golden**, there can be no doubt that the respondent strip searched the girls. Justices Iacobucci and Arbour, for the majority of the court, wrote at ¶ 47:

> The appellant submits that the term "strip search" is properly defined as follows: the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments. This definition in essence reflects the definition of a strip search that has been adopted in various statutory materials and policy manuals in Canada and other jurisdictions (see for example Toronto Police Service. Policy & Procedure Manual: Search of Persons. Arrest & Release at p. 3; *Crimes Act 1914* (Austl.), Part 1AA, c. 3C, s. 1 "strip search"; Cal. Penal Code § 4030 (West 1984); Col. Rev. Stat. Ann. § 16-3-405 (West 1982); Wash. Rev. Code Ann. § 10.79.070(1) (West 1983). In our view, this definition accurately captures the meaning of the term "strip search" and we adopt it for the purpose of these reasons. This definition distinguishes strip searches from less intrusive "frisk" or "pat down" searches, which do not involve the removal of clothing, and from more intrusive body cavity searches, which involve a physical inspection of the detainee's genital or anal regions. While the mouth is a body cavity, it is not encompassed by the term "body cavity search". Searches of the mouth do not involve the same privacy concerns, although they may raise other health concerns for both the detainee and for those conducting the search.
>
> [emphasis added]

[23] The following passages from Constable Campbell's evidence both on direct and in cross-examination are illustrative of her evidence regarding the search of the three girls:

123. Q. And tell us how you dealt with Ms. [S]?

A. We talked, and I told Ms. [S] that I'd like to search her. I proceeded - now, I can't remember whether she had her jacket on or her jacket was beside her on the desk or chair, and I went and searched the pockets. So whether she took it off or whether I picked it up off the chair, I'm not sure, but I checked all the pockets. I then proceeded to say I wanted to check her pockets in her pants and stuff. So I, I checked her pockets, out of her pockets that she had on, in her pants. I then, I knew the three girls, one of them had the money stuck in the front part of their pants, in their underwear, from the information I had received outside.

So I explained to her that, "I just want you to open the front of your jeans, and just loosely pull the front of your underwear", because I figured if she had stuck the money in the front of her underwear that it would move and you'd be able to tell. It was just, if it was right there, I'd know. The underwear would just move and you'd be able to tell if there was something stuck right in front of her. So I proceeded to ask that.

. . .

127. Q. And so what did you ask her to do?

A. I had asked her to open the top of her, open her jeans so she could just pull the front of her underwear. When she opened her jeans, they were, you know, the really baggy style of jeans she had on, so they sort of fell down a bit, you know, close to, towards her ankles, but they probably didn't fall to her knees. You know, somewheres there. But she had track pants on . . .

128. Q. Underneath the jeans?

A. . . . underneath her jeans. So I, so then I said, "Could you just pull those a little bit?", because I wanted to tell whether there was anything in her, at the bands, you know, with the underwear. So I asked her to do that . . .

. . .

1143. Q. Okay. So she's got her, the baggy pants are down to the floor, or thereabouts, she has her gym shorts partway down so you can see around her panties . . .

A. Just - I wouldn't call them down.

1144. Q. Well, she has them - you said she's pulled them down enough so that you could see around the panties?

A. The top . . .
1145. Q. Down a bit . . .
A. Like, they're not down.
1146. Q. What, what you said . . .
A. Yes, I . . .
1147. Q. . . . she pulled the gym pants down a bit, just so - and you could see around the panties. Right?
A. They're not down off her. They're just down from the rim of her panties.
1148. Q. Okay. She's got to let go of them now, because you're asking her to move her panties, right?
A. Yes.

. . .

2779. Q. Thank you. Now, I know the next four paragraphs deal with your conversations with the various parents, and I know that you've been questioned on that. It's not my intent, and the two parents will be called to give evidence. Go down to the bottom, "Privacy", please. It says:

> There was a complete disregard for the privacy of the girls involved. The girls were instructed to remove their clothes, exposing their private areas. This was ordered in the presence and clear view of one another.

Would you agree that you asked each of the three girls to open their pants and pull their panties away from their body in the presence of each other?
A. Pull out, pull their underwear slightly out, just to have it move. Yeah.
2780. Q. Pull it slightly out away from their body.
A. It wasn't out, it wouldn't be out from their body very far because it just wouldn't happen.
2781. Q. Okay. I'm not talking about how far. You asked them to pull the panties away from their bodies. Isn't that correct?
A. That's correct.
2782. Q. And it was in view of each other.
A. Yes.

It is clear that Constable Campbell required the girls to rearrange their clothing so as to permit a visual inspection of their private areas and undergarments, which, according to **Golden** equates to a strip search.

[24] The appellants also refer to ¶ 83 of the majority opinion in **Golden:**

> While the respondent and the interveners for the Crown sought to downplay the intrusiveness of strip searches, in our view it is unquestionable that they represent a significant invasion of privacy and are often a humiliating, degrading and traumatic experience for individuals subject to them. Clearly, the negative effects of a strip search can be minimized by the way in which they are carried out, but even the most sensitively conducted strip search is highly intrusive. Furthermore, we believe it is important to note the submissions of the ACLC and the ALST that African Canadians and Aboriginal people are over represented in the criminal justice system and are therefore likely to represent a disproportionate number of those who are arrested by police and subjected to personal searches, including strip searches (Report of the Aboriginal Justice Inquiry of Manitoba (1991), Vol. 1, at p. 107; The Cawsey Report: *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta* (1991), Vol. II, at 2.48 to 2.50; Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide* (1996) at 33-39; Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (1995)). As a result, it is necessary to develop an appropriate framework governing strip searches in order to prevent unnecessary and unjustified strip searches before they occur.
>
> [emphasis added]

[25] The definition adopted by the Supreme Court of Canada is not a new one; as noted, ". . . it reflects the definition of a strip search that has been adopted in various statutory materials and policy manuals in Canada and other jurisdictions ..." The appellants argue that even if the evidence of the respondent respecting the nature of the search was accepted in its entirety and the evidence of the girls was rejected, there was, in fact, by definition, a strip search and therefore all remarks by them to that effect were true and therefore justified. The appellants also submit that

the views expressed by them at the press conference as to the seriousness of the infringement of privacy and personal dignity resulting from a strip search were similar to those later expressed by the Supreme Court of Canada in **Golden**.

[26] In my view, the definition of strip search adopted by the Supreme Court of Canada and its observations regarding their intrusiveness should be pertinent to our analysis of the legal issues raised on this appeal, including the qualified privilege issue. While I would agree with the respondent that this court should not simply overturn a finding of fact by a jury, as a result of a subsequent court decision, the law as established in **Golden** is relevant to our examination of the seriousness of the alleged slanders made by the appellants and to the question of whether the privilege was exceeded.

2. Qualified Privilege

a. press conference as an occasion of privilege

i. introduction

[27] Whether or not the defendants are entitled to rely on the defence of qualified privilege is a question of law to be decided by the trial judge not the jury. Here, Justice Moir determined that the defence was not available. The appellants claimed that all of their statements made at the press conference were subject to the defence of qualified privilege and that the respondent's claim should therefore have been dismissed. The appellants offered two alternative bases upon which the finding that the press conference was an occasion of privilege could have been established:

(1) on the basis of reciprocal duties and interests of those who publish and those who receive the defamatory statements; and,

> (2) on the basis that the defendants were publishing a fair and accurate report of a judicial or **quasi** judicial proceeding, since they were reporting on the complaints made under the **Police Act**.

[28] The trial judge dismissed both of these arguments, the first one essentially because the appellants had published to the world at large, and there was, at that time, no need to relate their clients' stories to the public. The alternative argument

was dismissed because the trial judge found that privilege did not arise at the time the complaint was initially filed because at that point no public hearing was contemplated. The matter would not have been a public proceeding until such time as the internal police investigation was concluded, and then only if one of the parties filed a notice of review. The trial judge indicated that the immediate purpose of a complaint was to initiate an investigation, not to engage a judicial process.

[29] On appeal, it was argued firstly that the trial judge erred in law in not finding that the press conference was an occasion of qualified privilege on the basis of reciprocal duties. The rejection of the qualified reporting privilege defence is raised by the second ground of appeal.

ii. **general principles**

[30] The defence of qualified privilege is described by Raymond E. Brown in *The Law of Defamation in Canada*, 2nd edition, 1994, at page 13-4, as follows:

> There are certain occasions on which a person is entitled to publish untrue statements about another, where he or she will not be liable even though the publication is defamatory. One such occasion is called a conditional or qualified privilege. No action can be maintained against a defendant unless it is shown that he or she published the statement with actual or express malice. An occasion is privileged if a statement is fairly made by a person in the discharge of some public or private duty, or for the purpose of pursuing or protecting some private interest, provided it is made to a person who has some corresponding interest in receiving it. The duty may be either legal, social or moral. The test is whether persons of ordinary intelligence and moral principle, or the great majority of right-minded persons, would have considered it a duty to communicate the information to those to whom it was published.

[31] Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. In a statement endorsed by Justice Cory in **Hill v. Church of Scientology of Toronto**, [1995] 2 S.C.R. 1130 (S.C.C.) at § 143, Lord Atkinson in **Adam v. Ward**, [1917] A.C. 309 (H.L.), at p. 334 explained:

> . . . a privileged occasion is . . . an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

[32] More recently, in **RTC Engineering Consultants Ltd. v. Ontario**, [2002] O.J. No. 1001 (C.A.) (Q.L.), Laskin, J.A. said:

> [16] At the heart of the defence of qualified privilege is the notion of reciprocity or mutuality. A defendant must have some interest in making the statement and those to whom the statement is made must have some interest in receiving it. "Interest", however, should not be viewed technically or narrowly. The interest sought to be served may be personal, social, business, financial, or legal. The context is important. The nature of the statement, the circumstances under which it was made, and by whom and to whom it was made are all relevant in determining whether the defence of qualified privilege applies.
>
> [emphasis added]
>
> . . .
>
> [18] Not everything said or written on an occasion of qualified privilege is protected. As is evident from the term "qualified privilege" itself and from the previous discussion, the privilege is not absolute. It may be lost in one of two ways. First, it may be lost if the dominant motive for making the statement was malice. In this context, malice means not just ill will towards another but any ulterior motive that conflicts with the interest or duty created by the occasion. And it includes recklessness. Both dishonesty and a reckless disregard for the truth may amount to malice. Second, a privilege may be lost if the statement is not commensurate with the occasion, either because the statement is not germane and reasonably appropriate to the occasion or because the recipients of the statement have no interest in receiving it. Put differently, to maintain privilege a defendant must communicate appropriate information to appropriate people. See Hill v. Church of Scientology, supra, and Douglas v. Tucker, [1952] 1 S.C.R. 275, [1952] 1 D.L.R. 657.

[33] The rationale for qualified privilege is described in *Gatley On Libel and Slander*, 9th ed. 1998, ¶ 14.2, p.327:

> Statements published on an occasion of qualified privilege "are protected for the common convenience and welfare of society". "It was in the public interest that the rules of our law relating to privileged occasions and privileged communications were introduced, because it is in the public interest that persons should be allowed to speak freely on occasions when it is their duty to speak, and to tell all they know or believe, or on occasions when it is necessary to speak in the protection of some (self or) common interest." "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 a private injury." "It may be unfortunate that a person against whom a charge that is not true is made should have no redress, but it would be contrary to public policy and the general interest of business and society that persons should be hampered in the discharge of their duty or the exercise of their rights by constant fear of actions for slander." "It is better for the general good that individuals should occasionally suffer than that freedom of communication between persons in certain relations should be in any way impeded. . . .
>
> [footnoted citations omitted]

[34] The question of whether the occasion was privileged is a question for the judge and the defendant bears the burden of proving the facts necessary to create the privilege. (See**:** *Gatley***, ibid**, ¶14.1, p. 326 and the cases cited there.) Whether there is sufficient evidence to submit the issue of malice to the jury is also a question of law for the judge to determine. If the occasion is found by the judge to be privileged, and there is no evidence of malice, the plaintiff must be non-suited, or there should be a directed verdict for the defendant. It is sufficient if there is one piece of evidence tending to establish malice to have the issue go to the jury, but because a qualified privilege gives rise to a presumption against malice, the question of malice should not be put to the jury unless the trial judge is of the

opinion that the evidence adduced raises a probability of its existence. (*Brown*, **ibid**. pp. 16-74 to 16-75.) Here, Justice Moir determined that there was insufficient evidence of malice for that issue to be put to the jury, and there is no appeal from that finding.

iii. the decision at trial

[35] As noted already, the trial judge determined that the appellants had not satisfied the conditions for the defence of qualified privilege. In the decision, reported at [2001] N.S.J. No. 373 (Q.L.), the trial judge considered a list of relevant factors as itemized in **Moises v. Canadian Newspaper Co.** (1996), 30 C.C.L.T. (2d) 145 (B. C.C.A.), citing **Sapiro v. Leader Publishing Co.**, [1926] 2 W.W.R. 268 (S.C.A.) at p. 271:

> In determining whether or not it is so privileged, 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.

[36] After listing the types of statements and reports typically covered by the privilege, such as:

> . . . a report to those who administer a child abuse registry, a report to a union as to why a member was not hired, a report of a private investigator to the client, a report of a former client to a present client concerning a lawyer's competency, an employer's report to employees as to why a fellow employee was fired, a parent's report to school officials concerning a teacher's ill-treatment of a child, a report to a father concerning a son's failing grades, a report to directors concerning misconduct of the auditor, a report to a lending institution concerning an applicant for a loan, and a report to an investigatory or disciplinary body . . .

the trial judge noted that the appellants acknowledged that traditionally the defence had only been available where the audience was limited, and not where the publication was to the general public or the world at large.

[37] Next, the trial judge considered **Reynolds v. Times Newspapers Ltd.**, [1999] H.L.J. No. 45 (H.L.), which the appellants submitted had "loosened the restraints" respecting the publication to the public at large, and compared it to the Supreme Court of Canada decision on the subject, **Jones v. Bennett**, [1969] S.C.R. 277. The trial judge was not prepared to accept the argument that the law in Canada had progressed as far as **Reynolds** and after examining several other cases cited by the appellants where broader publication was protected, such as, **Stopforth v. Goyer** (1979), 97 D. L.R. (3d) 369 (O.C.A.); **Camporese v. Parton** (1983), 150 D.L.R. (3d) 208 (B.C.S.C.); **Parlett v. Robinson** (1986), 30 D.L.R. (4th) 247 (B.C.C.A.); **Baumann v. Turner** (1993), 105 D.L.R. (4th) 37 (B.C.C.A.); **Re International Association of Bridge, Structural and Ornamental and Reinforcing Ironworkers (Local 97) et al.** (1997), 152 D.L.R . (4th) 547 (B.C.S.C.); **Silva v. Toronto Star Newspapers Ltd. et al.** (1998), 167 D.L.R. (4th) 554 (Ont. Gen. Div.), he considered he was bound by **Jones v. Bennett**. He said:

> . . . I read **Reynolds** as setting a new approach to publications for the world at large, an approach markedly different from that of **Jones v. Bennett**. I am bound by **Jones v. Bennett**. The Court of Appeal in this province has not, to my knowledge, protected such a broad publication as we see here by bringing anything like it within the shield of qualified privilege. Thus, I do not have the liberty to say, with the British Columbia Supreme Court, that the 'too broad' argument no longer has application. Further, the integral importance of an individual's reputation as explained in **Hill v. Church of Scientology** suggests to me continued restraint where privilege is claimed over a defamatory statement made to the world at large.
>
> I do not understand **Jones v. Bennett** to have shut the door on qualified privilege where duty is so strong, interest so compelling and circumstances so justified that the public should be told even if the information may turn out to be defamatory and untrue. The decision

> shut that door for "a plea of privilege based on a ground of the sort relied on in the case at bar." That indicates a high standard where privilege is sought for a broad publication, but it does not rule out a plea of privilege based on grounds different from those at issue in **Jones v. Bennett**. In my opinion, Canadian law recognizes that publication to the world at large is a factor indicating strongly against qualified privilege, but not necessarily defeating application of the defence. Where the defendants assert it on broad principles rather than upon one of the recognized categories, I must, I believe, consider the factor referred to in **Sapiro**, "to whom" the publication was made, as weighing heavily against the sufficiency of reciprocal duties or interests where the publication was to the world at large, but I must still consider the other factors mentioned in **Sapiro** and the circumstances as a whole in determining sufficiency. By sufficiency I mean whether the reciprocal duties or interests "warranted the communication" (**Halls v. Mitchell**, p. 134) or whether the "[public] interest is of sufficient importance to outweigh the need to protect reputation" (**Reynolds**, para. 10).

[38] The trial judge then assessed the duty the appellants claimed to have, based on Chapter 21 of ***Legal Ethics and Professional Conduct, A Handbook for Lawyers in Nova Scotia*** (Nova Scotia Barristers' Society, 1990) at p. 93:

> The lawyer has a duty to encourage public respect for justice and to uphold and try to improve the administration of justice.
>
> . . .
>
> The lawyer, by training, opportunity and experience, is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions and public authorities. The lawyer, therefore, has a duty to provide leadership in seeking improvements to the legal system. Any criticisms and proposals the lawyer makes in doing so should be *bona fide* and reasoned. In discharging this duty, the lawyer should not be involved in violence or injury to the person.

[39] Justice Moir then set out his conclusions for rejecting the defence of qualified privilege, which I quote at length, as follows:

According to the defendants, the press conference was called to raise with the public systemic issues respecting the manner in which the state deals with vulnerable individuals; the young, the poor and persons of African heritage. According to the defendants, the goal was to improve the administration of justice in regard to such dealings. Certainly, those positions are supported by what was said by the defendants at the press conference and by what they said on the stand. No right thinking person could deny a duty to speak about and a public interest in hearing about police misconduct involving the mistreatment of individuals because of their youth, poverty or Black heritage. Particularly the latter in this province where, as everyone knows, the long history of African Nova Scotians involves the sufferings of racism, overt and unconscious, individualistic and systemic, in the past and in the present. I accept that public exposure is an effective tool for combatting systemic racism. I base that upon the testimony of the experts in this case and upon common sense. I agree that combatting racism is properly among the duties or interests of any citizen and that the public interest is served by combatting racism. Of course, the identification of these reciprocal duties or interests is not sufficient. The authorities make it clear that there must be such a duty or such an interest as, in all of the circumstances, warranted the communication. Mindful of the reluctance of the courts to shield broad communications with privilege and mindful of the rationale for providing that shield in some circumstances, "the need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source" (*Reynolds*, para. 17), I am not satisfied that the defendants were warranted in providing media with the information communicated at the press conference. I do not think that the question of reciprocal interests or duties can be answered only by reference to the goals of which the defendants spoke. The goals of the press conference cannot be separated from the instance which gave rise to it: the conduct of the plaintiff at the school that day in March 1995. Facts as relayed by the clients were laid out in detail for the media and it was said to the media and, through them, to the public that race was a factor in Constable Campbell's behaviour. So long as the facts were stated in substance and were substantially true and so long as the concerns about race and poverty were stated as opinion, Mr. Jones and

> Ms. Derrick would have had the defence of fair comment available to them. The additional defence of qualified privilege would protect them where there was a need to lay their clients' versions of the facts before the public and to call public attention to the consequential concerns about race and status, even though the versions related by the clients may have turned out to be untrue and defamatory. That need had not yet arisen. The clients had initiated a process that would lead immediately to an investigation and that process could have led to a public hearing and judicial determination of the facts. I do not see the need for having gone to the public before the process of investigation and determination had even begun. While I agree that "the nature of the duty which the defendant claims to discharge" (*Sapiro*, p. 271) is a weighty one, "the alleged libel" (*Sapiro*, p. 271) and slanders were also very serious. In my assessment the latter consideration coupled with the official fact-finding processes instituted by the defendants for their clients, the lack of urgency and the publication to the world at large before the investigative processes had even begun are such that the communications were not warranted at the time they were made, and the public interest in the scrutiny of police behaviour on matters of race had not yet, at the time of the press conference, been engaged sufficiently to outweigh protection of reputation.

iv. the standard of review

[40] Whether the facts and circumstances give rise to an occasion of qualified privilege is a question of law and as such this court must review the decision to determine its correctness. (See: **St.-Jean v. Mercier**, [2002] Carswell Que. 142 (S.C.C.), at § 33 and 34, *Brown*, **ibid**, (2nd ed., p.13-100) and **RTC Engineering Consultants Ltd. v. Ontario**, **supra**.)

v. analysis

[41] The analysis should begin with **Jones v. Bennett**, the case the trial judge concluded obligated him to disallow the defence of qualified privilege. Justice Moir accurately and succinctly abstracted the case as follows:

Mr. George Jones was Chairman of a provincial commission in British Columbia. The premier was Mr. W.A.C. Bennett. Charges were laid against Mr. Jones that he had been unlawfully accepting benefits. He was acquitted, but the government introduced a bill to remove him from office. At a meeting of his Social Credit Party, the premier gave a speech on many subjects including a brief reference to Mr. Jones: "I could say a lot, but let me just assure you of this; the position taken by the government is the right position." There were two reporters sitting at a table reserved for the press. The remark was reported in the press. Jones sued Bennett. The premier set up qualified privilege as one of his defences. The trial judge found for the plaintiff. The Court of Appeal decided the occasion was privileged. The Supreme Court of Canada disagreed. The decision of the court was written by Chief Justice Cartwright: *Jones v. Bennett*, [1969] S.C.R. 277. There is a qualified privilege that may apply when a candidate for political office reports to electors concerning an opposed candidate. The court refused to endorse an extension of the privilege to occasions where an elected official reports to electors between elections. It is "perfectly proper" to make such reports, but the court was not prepared to protect the speaker who "sees fit to make defamatory statements about another which are in fact untrue": p. 284. It was "difficult to see why the common convenience and welfare of society requires that such statements should be protected": p. 284. Although the court expressed reluctance to apply qualified privilege on such occasions, that was not the basis of its decision. The qualified privilege protecting a report made by a candidate to electors is lost if the publication is made through a newspaper: *Douglas v. Tucker*, [1952] 1 S.C.R. 275. In *Jones v. Bennett*, the court said that even if there were a qualified privilege protecting an elected official's report to electors between elections, the privilege would have been lost by reason of the presence of reporters. The court said,

> . . . it must be regarded as settled that a plea of privilege 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."

> The court went on to distinguish the situation where parties choose to air their differences in public media.

[42] To that summary, I would add and emphasize that the court was careful to restrict its finding that there could be no qualified privilege "... based on a ground of the sort relied on in the case . . ." where the publication was to the world at large. In **Jones v. Bennett**, the basis upon which the defence of qualified privilege was claimed was described by Chief Justice Cartwright as:

> 23 ... It involves the assertion that whenever the holder of high elective political office sees fit to give an account of his stewardship and of the actions of the government of which he is a member to supporters of the political party to which he belongs he is speaking on an occasion of qualified privilege ...

[43] As noted by Moir, J., the Supreme Court also distinguished the facts of the **Bennett** case from one where wide publication may be justified to respond to comments made by the other party. These would appear to be the statements that have allowed lower courts to subsequently circumvent **Jones v. Bennett** and restrict its application to the facts.

[44] In **Reynolds v. Times Newspaper Ltd., supra,** involving the publication by a newspaper of allegations of deceit and non-disclosure by the former prime minister of Ireland, decided 30 years after **Jones v. Bennett**, in 1999, the House of Lords held that the defence of qualified privilege could apply despite publication to the world at large.

[45] Lord Nicholls with whom Lord Cooke and Lord Hobhouse agreed, stated:

> ¶ 17 The requirement that both the maker of the statement and the recipient must have an interest or duty draws attention to the need to have regard to the position of both parties when deciding whether an occasion is privileged. But this should not be allowed to obscure the rationale of the underlying public interest on which privilege is founded. The essence of this defence lies in the law's recognition of the need, in the public interest, for a particular recipient to receive

frank and uninhibited communication of particular information from a particular source. That is the end the law is concerned to attain. The protection afforded to the maker of the statement is the means by which the law seeks to achieve that end. Thus the court has to assess whether, in the public interest, the publication should be protected in the absence of malice.

¶ 18 In determining whether an occasion is regarded as privileged the court has regard to all the circumstances: see, for example, the explicit statement of Lord Buckmaster L.C.in London Association for Protection of Trade v. Greenlands Ltd. [1916] 2 A.C. 15, 23 ('every circumstance associated with the origin and publication of the defamatory matter'). And circumstances must be viewed with today's eyes. The circumstances in which the public interest requires a communication to be protected in the absence of malice depend upon current social conditions. The requirements at the close of the twentieth century may not be the same as those of earlier centuries or earlier decades of this century.

¶ 19 Frequently a privileged occasion encompasses publication to one person only or to a limited group of people. Publication more widely, to persons who lack the requisite interest in receiving the information, is not privileged. But the common law has recognised there are occasions when the public interest requires that publication to the world at large should be privileged. In Cox v. Feeney (1863) 4 F. & F. 13, 19, Cockburn C.J. approved an earlier statement by Lord Tenterden C.J. that 'a man has a right to publish, for the purpose of giving the public information, that which it is proper for the public to know'. Whether the public interest so requires depends upon an evaluation of the particular information in the circumstances of its publication. Through the cases runs the strain that, when determining whether the public at large had a right to know the particular information, the court has regard to all the circumstances. The court is concerned to assess whether the information was of sufficient value to the public that, in the public interest, it should be protected by privilege in the absence of malice.

[46] Lord Nicholls rejected the American approach of a special privilege for political information and concluded as follows:

> ¶ 56 My conclusion is that the established common law approach to misstatements of fact remains essentially sound. The common law should not develop 'political information' as a new 'subject-matter' category of qualified privilege, whereby the publication of all such information would attract qualified privilege, whatever the circumstances. That would not provide adequate protection for reputation. Moreover, it would be unsound in principle to distinguish political discussion from discussion of other matters of serious public concern. The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern.

[47] Lord Nicholls listed ten factors that were illustrative of those that should be taken into account by a judge in the determination of whether a particular occasion is privileged. The list is quite similar to that noted herein at ¶ 35 from **Sapiro** and for the purposes of this case it is not necessary to note any distinguishing features of the **Reynolds'** list of factors, which, as Lord Nicholls stated, was not exhaustive.

[48] As noted above at ¶ 37, **Jones v. Bennett** has been restricted in its application and several Canadian courts have concluded that publication to the world at large does not necessarily defeat a claim of qualified privilege, for example: **Parlett v. Robinson**, **supra**; **Camporese v. Parton**, **supra**; **Silva v. Toronto Star Newspapers Ltd., supra**; and **Dhami v. C.B.C.** , [2001] B.C.J. 2773 (Q.L.) (S.C.).

[49] In **Parlett v. Robinson**, the defendant, Svend Robinson, a Member of Parliament and the NDP critic for the Solicitor General held a press conference alleging that the plaintiff, a correctional services employee, had abused his position by making a personal profit from the sale of violin chin rests carved by a prison inmate. Prior to the press conference, Mr. Robinson had unsuccessfully tried to persuade the Minister to hold a public inquiry into the matter. The trial judge

disallowed the defence of qualified privilege on the basis of **Jones v. Bennett**, having found that publication to the world at large defeated the defence. The British Columbia Court of Appeal allowed the appeal. Hinkson J.A., for the court, considered **Jones v. Bennett** and noted at p. 257 that the defendant in **Jones** ". . . was under no duty to communicate the concern he had about the plaintiff to anyone". In contrast, Mr. Robinson had a ". . . duty to ventilate the subject-matter and the electorate [had] an interest in knowing of the matter . . .". The court considered whether the publication "to the world" was too broad and decided that the publication was not unduly wide since the group with a ". . . *bona fide* interest in the matter was the electorate in Canada." Application for leave to appeal to the Supreme Court of Canada was dismissed - [1986] S.C.C.A. No. 322.

[50] It is therefore incorrect to suggest that the defence of qualified privilege is unavailable when the publication is to the world at large. Furthermore, the test for determining whether the comments were made on an occasion of qualified privilege is the same whether the publication is to a few people or to the world at large.

[51] Returning to the case at bar, based upon these authorities, I conclude the learned trial judge erred when he found that the press conference was not an occasion of qualified privilege. In my view, he fell into error by interpreting **Jones v. Bennett** too strictly and taking too narrow a view of the overall circumstances of this case. As a consequence, he erred by applying too stringent a test in assessing the circumstances, by failing to find that the ethical responsibility of lawyers to speak out against injustice was sufficient to ground the defence in the circumstances, by overemphasizing the timing of the publication, and by failing to consider **Charter** values when examining the overall circumstances.

[52] Before elaborating on my conclusions in more detail, I will restate the test for determining whether a publication is protected by qualified privilege. What is required is that a judge first consider whether there is a reciprocity of duties and interests that creates an occasion of qualified privilege. In so doing, the judge must consider the circumstances surrounding the making of the statements, since the defendant’s duty to publish defamatory statements and the recipients’ interest in receiving them often arise from those circumstances. The judge must then ask whether the statements were “. . . germane and reasonably appropriate to the occasion . . . ”. Finally, the judge must consider whether there is evidence of malice.

[53] I agree with the appellants' characterization of the trial judge's application of the test, as "an extremely high threshold". This is apparent from the following passages quoted in full above at ¶ 37 and repeated in part herein for convenience:

> I do not understand **Jones v. Bennett** to have shut the door on qualified privilege where duty is so strong, interest so compelling and circumstances so justified that the public should be told even if the information may turn out to be defamatory and untrue. The decision shut that door for "a plea of privilege based on a ground of the sort relied on in the case at bar." That indicates a high standard where privilege is sought for a broad publication, but it does not rule out a plea of privilege based on grounds different from those at issue in **Jones v. Bennett**. In my opinion, Canadian law recognizes that publication to the world at large is a factor indicating strongly against qualified privilege, but not necessarily defeating application of the defence. Where the defendants assert it on broad principles rather than upon one of the recognized categories, I must, I believe, consider the factor referred to in **Sapiro**, "to whom" the publication was made, as weighing heavily against the sufficiency of reciprocal duties or interests where the publication was to the world at large, but I must still consider the other factors mentioned in **Sapiro** and the circumstances as a whole in determining sufficiency...
>
> [emphasis added]

[54] The underlined segments are all demonstrative of the higher test imposed because the publication was to the world at large. In effect, the trial judge imposed a more onerous burden on the appellants to prove the requisite reciprocity of duties and interests than is required by the authorities.

[55] The second error relates to the trial judge's conclusion that Chapter 21 of ***Legal Ethics and Professional Conduct, A Handbook for Lawyers in Nova Scotia*** (1990) was ". . . not an adequate basis upon which to found a duty supporting a privilege protecting public criticism aimed at improving the administration of justice." The Rule and the relevant principles and commentary are as follows:

Rule

> The lawyer has a duty to encourage public respect for justice and to uphold and try to improve the administration of justice.
>
> **Guiding Principles**
>
> . . .
>
> The lawyer, by training, opportunity and experience, is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions and public authorities. The lawyer, therefore, has a duty to provide leadership in seeking improvements to the legal system. Any criticisms and proposals the lawyer makes in doing so should be *bona fide* and reasoned. In discharging this duty, the lawyer should not be involved in violence or injury to the person.
>
> **Commentary**
>
> . . .
>
> 21.2 The lawyer's responsibilities are greater than those of a private citizen.
>
> . . .
>
> 21.4 The lawyer has a duty not to weaken or destroy public confidence in legal institutions or authorities by broad, irresponsible allegations of corruption or partiality. The lawyer in public life must be particularly careful in this regard because the mere fact of being a lawyer lends weight and credibility to any public statements. <u>For the same reason the lawyer should not hesitate to speak out against an injustice.</u>
>
> [emphasis added]

[56] In the view of the trial judge, the ethical guidelines provided in Chapter 21 were more consonant with the law of fair comment than ". . . suggestive of a duty so clear as to license defamation through qualified privilege." While I agree that not all public statements made by a lawyer are clothed in privilege upon merely the invocation of the duty to improve the administration of justice, a lawyer faced with a patent injustice, such as the violation of her clients' **Charter** rights by law enforcement officers, has a substantial and compelling duty to ensure such injustice is remedied in an effective and timely manner. Such duty may well provide a basis for qualified privilege.

[57] Although the trial judge obviously did not have the benefit of the Supreme Court's guidance found in **R. v. Golden**, **supra**, at this stage of this proceeding it is instructive. The Court, in censuring the use of strip searches by police, indicated that unjustified searches should be prevented, and confirmed that *post facto* remedies are seldom sufficient. At ¶ 89, of **Golden**, Justices Iacobucci and Arbour wrote:

> Given that the purpose of s. 8 of the *Charter* is to protect individuals from unjustified state intrusions upon their privacy, it is necessary to have a means of preventing unjustified searches before they occur, rather than simply determining after the fact whether the search should have occurred (*Hunter*, supra, at p. 160). The importance of preventing unjustified searches before they occur is particularly acute in the context of strip searches, which involve a significant and very direct interference with personal privacy. Furthermore, strip searches can be humiliating, embarrassing and degrading for those who are subject to them, and any *post facto* remedies for unjustified strip searches cannot erase the arrestee's experience of being strip searched. Thus, the need to prevent unjustified searches before they occur is more acute in the case of strip searches than it is in the context of less intrusive personal searches, such as pat or frisk searches. As was pointed out in *Flintoff, supra*, at p. 257, "[s]trip-searching is one of the most intrusive manners of searching, and also one of the most extreme exercises of police power".

and at ¶ 99 and 102 , the Court summarized the prerequisites for the exercise of the police power as follows:

> In light of the serious infringement of privacy and personal dignity that is an inevitable consequence of a strip search, such searches are only constitutionally valid at common law where they are conducted as an incident to a lawful arrest for the purpose of discovering weapons in the detainee's possession or evidence related to the reason for the arrest. In addition, the police must establish reasonable and probable grounds justifying the strip search in addition to reasonable and probable grounds justifying the arrest. Where these preconditions to conducting a strip search incident to arrest are met, it

> is also necessary that the strip search be conducted in a manner that does not infringe s. 8 of the *Charter*.
>
> . . .
>
> Strip searches should generally only be conducted at the police station except where there are exigent circumstances requiring that the detainee be searched prior to being transported to the police station. Such exigent circumstances will only be established where the police have reasonable and probable grounds to believe that it is necessary to conduct the search in the field rather than at the police station. Strip searches conducted in the field could only be justified where there is a demonstrated necessity and urgency to search for weapons or objects that could be used to threaten the safety of the accused, the arresting officers or other individuals. The police would also have to show why it would have been unsafe to wait and conduct the strip search at the police station rather than in the field. Strip searches conducted in the field represent a much greater invasion of privacy and pose a greater threat to the detainee's bodily integrity and, for this reason, field strip searches can only be justified in exigent circumstances.

[58] In this case, it was acknowledged by the respondent before trial that the **Charter** rights of three young girls were violated. Though suspected of stealing only $10.00, they were subjected to intrusive personal searches, which were not conducted "incidental to arrest". Their personal dignity and privacy was ignored in the absence of exigent circumstances. Their parents and guardians were not contacted. They were never advised of their rights to counsel. To my mind, such serious violations certainly constituted a patent injustice triggering the duty of the appellants discussed in Chapter 21. In any event, lawyers, by virtue of their role as officers of the court with a specific duty to improve the administration of justice and uphold the law, have a special relationship with and responsibility to the public to speak out when those involved in enforcing our laws violate the fundamental rights of citizens.

[59] It was the trial judge's failure to give sufficient weight to the nature of the injustice that occurred which led him to err by concluding the ethical duty found in Chapter 21 was "insufficient" to ground the defence of qualified privilege. In **Parlett**, the defendant, as a Member of Parliament, had a duty to the electorate to

advise of possible misconduct by senior officials when he had reason to believe the government was unwilling to act. By analogy, it seems to me that lawyers, who are officers of the court with duties to improve the administration of justice and uphold the law, have a special relationship with and responsibility to the public to speak out when elements of the justice system itself have breached the fundamental rights of citizens and they have reason to believe that complaints pursuant to the **Police Act** will not provide an adequate remedy.

[60] In my view, the third error arose in the trial judge's consideration of the timing of the publication. He began by acknowledging that:

> According to the defendants, the press conference was called to raise with the public systemic issues respecting the manner in which the state deals with vulnerable individuals; the young, the poor and persons of African heritage. According to the defendants, the goal was to improve the administration of justice in regard to such dealings. Certainly, those positions are supported by what was said by the defendants at the press conference and by what they said on the stand. No right thinking person could deny a duty to speak about and a public interest in hearing about police misconduct involving the mistreatment of individuals because of their youth, poverty or Black heritage. Particularly the latter in this province where, as everyone knows, the long history of African Nova Scotians involves the sufferings of racism, overt and unconscious, individualistic and systemic, in the past and in the present. I accept that public exposure is an effective tool for combatting systemic racism. I base that upon the testimony of the experts in this case and upon common sense. I agree that combatting racism is properly among the duties or interests of any citizen and that the public interest is served by combatting racism . . .

[61] However, he then went on to find that the communication was not warranted, because the process of investigating the complaints filed by the appellants' clients had yet to begin. He said: "... That need had not yet arisen ..." and concluded:

> . . . While I agree that "the nature of the duty which the defendant claims to discharge" (*Sapiro*, p. 271) is a weighty one, "the alleged libel" (*Sapiro*, p. 271) and slanders were also very serious. In my assessment the latter consideration coupled with the official fact-finding processes instituted by the defendants for their clients, the lack of urgency and the publication to the world at large before the investigative processes had even begun are such that the communications were not warranted at the time they were made, and the public interest in the scrutiny of police behaviour on matters of race had not yet, at the time of the press conference, been engaged sufficiently to outweigh protection of reputation.
>
> [emphasis added]

[62] I agree with the appellants that it was an error for the trial judge to make the timing of the press conference the "centrepiece" of his decision in this way. If there is a reciprocal duty and interest the occasion is privileged. If the message is too strong, then the privilege may have been exceeded, but that does not mean the privilege was not established to begin with. The timing of publication is only one factor to be considered in determining whether a defendant may rely on the defence of qualified privilege and it should not be accorded inordinate weight. Further, qualified privilege does not arise only when it becomes necessary for a defendant to publish the defamation in order to satisfy his or her duty – "necessary" in the sense that no other avenue for fulfilling the duty is available. As **Parlett v. Robinson** illustrates, a defendant's reasonable belief that going public with his or her concerns is the only effective way to ensure they are properly addressed may be sufficient. It would render the defence nugatory to permit a defendant to rely on it only after allegations have been tested in a judicial or quasi-judicial proceeding. Such a proposition is not supported by the authorities. A right to criticize the conduct of public officers in the exercise of their authority, must be exercisable in a timely manner, if it is to be effective. The trial judge found, however, that the public interest in the police conduct had not been sufficiently engaged at the time of the press conference. That finding is inconsistent with the admission by the respondent during the trial that there was sufficient public interest in the matter for the purposes of the defence of fair comment. As Justice Moir accepted, public discussion is an effective tool in combatting systemic racism. I would add that discussion close to the time of the relevant events would reasonably be expected to be more effective than discussion months after the fact.

[63] Finally, I would agree with the appellants that the most serious oversight in the trial judge's assessment of the defence of qualified privilege is that there is little attention to the **Charter** values and **Charter** rights implicated by the facts of this case. As often recognized by the Supreme Court, and, for example very recently, in **Golden**, at ¶ 86:

> . . . the common law must be interpreted in a manner that is consistent with *Charter* principles (*RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *R. v. Salituro*, [1991] 3 S.C.R. 654; *Cloutier, supra*). Where the common law is out of step with the *Charter* and it is possible to change the common law rule without upsetting the proper balance between judicial and legislative action, then the common law rule should be changed (*Salituro, supra*, at pp. 675-76; *R. v. Pan*, 2001 SCC 42).

[64] It should be noted that at the trial the appellants did not develop this argument as thoroughly as they have on appeal.

[65] As can be seen from the excerpts of the press conference quoted above (¶ 14 *et seq.*), there was discussion by the appellants of the **Charter** rights of the three girls. It is now, and was at the time of the trial, beyond dispute that the girls' constitutionally protected right to counsel, their right not to be arbitrarily detained and their right to be secure from unreasonable search were all violated. Furthermore, in light of **Golden**, it is now settled that, even if they had been properly arrested and notified of their right to counsel, they should not have been searched in the place and manner in which they were, regardless of whether one accepts the girls' account of the search or the respondent's.

[66] That **Charter** principles were featured in the discussions by the appellants at the press conference is clearly evident from the following statements by Ms. Derrick:

> As I understand from the discussions that we have had and also that we've had with our clients, the issues here wouldn't be focused solely in the manner that you've described them, i.e., that there should be discipline and that there should be some redress for

> the individual girls. There's a broader systemic issue that has to do with how is policing delivered in a diverse community. And ensuring that policing is delivered in a manner that is properly responsive and sensitive to everybody's diversity. Whatever your socioeconomic status, your racial heritage, your sexual orientation, your gender, any of the range of characteristics on the basis of which people are discriminated on, that is what - that is the place where the police department needs to move to so that it would never even be dreamed of - there would be no - a police officer would never dream of conducting a search of this nature because the entire department would be infused with attitudes and values and principles that would make that an impossibility.
>
> . . .
>
> There are certainly constitutional violations that are raised by the incident and those, you know, constitutional violations would relate to the security of the person, they would relate to equality, they would relate to rights that people have in relation to detention, in relation to unreasonable search and seizure, in relation to right to counsel in detention circumstances. Those are all rights that are guaranteed by the Charter. . . .
>
> . . .
>
> . . . there was certainly no assumption that these girls were autonomous persons carrying constitutional rights. And I think that that is something that obviously needs to be changed. That in our relationship with the state we need to remind the state that we as individuals bear constitutional rights and they must be respected in relationship to the state. And the state here assumed away those rights and conducted itself in complete disregard of those rights. And that is part of the problem that we're seeking to try and address.

[67] Considering that the press conference dealt with the application of **Charter** rights and values to disadvantaged groups, it is important to bear in mind that the **Jones v. Bennett** decision pre-dated the **Charter** by over 12 years. The public interest in the multiple constitutional violations of three young, black girls from a poor neighborhood, was running high at the time of the press conference, as a result of the several press accounts relating the events at the school in which the

term “strip search” had figured prominently. The girls were members of a historically doubly-disadvantaged group, whose rights to equal protection of the law were being examined at the press conference. Surely, if equality rights are to be achieved, those who exercise a constitutionally protected right of freedom of expression, on behalf of disadvantaged persons, in accordance with their duty to “... encourage public respect for justice and to uphold and try to improve the administration of justice” should be protected by qualified privilege so long as their comments are not motivated by malice, and so far as the comments do not exceed the privilege.

[68] In determining whether the press conference was an occasion of qualified privilege, the trial judge had to consider all of the circumstances. Here, there was an intertwining of **Charter** rights: the right to counsel and the right not to be subjected to an unreasonable search, with **Charter** values: freedom of speech and equality rights. Freedom of speech was being exercised to promote equality rights and to draw attention to violations of **Charter** rights.

[69] It has always been the task of judges to determine what constitutes an occasion of qualified privilege, and it is, therefore, within the power of the common law courts to modify the common law incrementally to ensure that it conforms with **Charter** values. As Justice Cory stated in **Hill**, the vital importance of freedom of expression cannot be overemphasized. Indeed, as the Supreme Court of Canada has said recently in **Pepsi-Cola Canada Beverages (West) Ltd.** v. **Retail, Wholesale and Department Store Union Local 558 et al.,** [2002] S.C.J. No. 7 at § 67:

> While freedom of expression is not absolute . . . if we are to be true to the values expressed in the **Charter** our statement of the common law must start with the proposition that free expression is protected unless its curtailment is justified ...

[70] In a case such as this where freedom of expression is exercised not merely for its own sake, or to advance one’s own self-interest, but to bring attention to and to seek redress for multiple breaches of such important **Charter** rights as the right to counsel, the right to security of the person, including the right not to be subject to unreasonable search, and the right to equal protection and benefit of the law, one would expect it to be even more difficult to justify its curtailment. In any event, in

my view, it was incumbent on the trial judge to at least turn his mind to the myriad of **Charter** rights and values at issue in the case before him. If constitutional rights are to have any meaning, they must surely include the freedom of persons whose **Charter** guarantees have been deliberately violated by officials of state agencies, to cry out loud and long against their transgressors in the public forum, and in the case of children and others less capable of articulation of the issues, to have their advocates cry out on their behalf.

vi. conclusion

[71] I would conclude that in all the circumstances of this case, observed with "today's eyes", in today's social conditions, that it is in the public interest that the press conference be found to be an occasion of qualified privilege. The appellants, in accordance with the principles of their professional ethics, had a duty to speak about the events at the school, the complaints filed against the respondent and the **Charter** breaches they reasonably understood had taken place. The members of the public in attendance at the meeting had a reciprocal interest in hearing about the exercise of the authority of the police in a neighborhood school. In the whole context, including the **Charter** rights and values implicated, the previous press coverage and the resulting community interest in the matter, and given the position of the appellants as counsel for the girls, the occasion ought to have the protection afforded by the defence of qualified privilege.

[72] Although the trial judge did not go on to determine whether the privilege had been exceeded, he did note that the comments made by the appellants at the press conference were "very serious". That finding however was made in the context of his observation that the search was " not technically a strip search". Given the decision in **Golden**, **supra**, which affirms that even on the evidence of the respondent, the searches in question were in fact strip searches, I would conclude that the statements made were reasonably appropriate to the occasion. As noted, the trial judge found there was no malice, and in so concluding, indicated that there was nothing to suggest personal animosity, and that the appellants had not been careless or reckless. The comments by the appellants at the press conference were relevant to the type of search and the **Charter** violations to which the girls were subjected, and thus were germane and commensurate with the occasion.

[73] The appeal should accordingly be allowed on this issue, and the respondent's claims of defamation against the appellants dismissed. It is therefore not necessary to discuss qualified reporting privilege or to deal with the other grounds of appeal or the notice of contention.

[74] I would allow the appeal, set aside the jury verdict and the order made after trial. I would order the respondent to pay costs of the trial to the appellants in the amount ordered by the trial judge: $75,000, to be divided equally between them, plus disbursements, and costs of the appeal, in the total amount of $30,000, to be divided equally between them, plus reasonable disbursements, which includes the costs of the application for a stay pending appeal.

Roscoe, J.A.

Concurred in:

Glube, C.J.N.S.

Saunders, J.A. (In Dissent):

INTRODUCTION

[75] For ease of reference in this lengthy judgment I refer the reader to the Index which appears at the beginning of the decision.

[76] I have had the advantage of reading my colleague Justice Roscoe's reasons for judgment. With great respect, I am unable to accept her conclusion that the trial judge erred in failing to find that the appellants' actions at the press conference were protected by qualified privilege.

[77] In my view, no reversible error was committed by the trial judge on this or any other issue of significance in what was a lengthy and difficult case. Although for somewhat different and additional reasons than those expressed by Moir, J., I believe he was correct in his finding that the defence of qualified privilege did not apply to the occasion of the press conference. I see no error in the manner in which he analyzed the binding case law or applied it to the circumstances before him. For reasons I will explore, I see no basis warranting our intervention.

[78] Of necessity, I have gone on to address each of the other grounds of appeal advanced by the appellants. Having done so, none of their submissions have persuaded me that there is any sound basis requiring us to interfere with the jury's verdict and award of damages.

[79] I will begin with a consideration of the appropriate standard of review, then turn to an analysis of the defence of privilege as it applies to this case, and then go on to deal with the many other individual errors said by the appellants to require a new trial or a reduction in the damage award. Whenever a particular issue engages its own standard of review I will address that separately.

QUALIFIED PRIVILEGE

Standard of Review

[80] Notwithstanding the intriguing submission of counsel for the respondent, I cannot accept the proposition that in view of the Supreme Court of Canada's recent decision in **Housen v. Nikolaisen**, [2002] S.C.C. 31, we ought to treat the question of whether qualified privilege applies, as being a matter of mixed law and fact, a finding which will not be disturbed, absent palpable and overriding error.

[81] **Housen** was a case arising from a motor vehicle accident. The appellant was badly injured and rendered a quadriplegic when the truck in which he was a passenger crashed on a sharp curve along a notorious stretch of highway in Saskatchewan. No hazard warning signs were posted on the route, despite a spate of accidents along the same stretch of highway. The trial judge held that the appellant Housen was 15% contributorily negligent in failing to take reasonable precautions for his own safety by accepting a ride from the driver, Nikolaisen. The judge apportioned the remaining joint and several liability 50% to Nikolaisen and 35% to the municipality. The Court of Appeal overturned the trial judge's finding that the municipality was negligent. On appeal to the Supreme Court of Canada the Court divided 5:4. Iacobucci, and Major, JJ. writing for the majority (joined by McLachlin, C.J., l'Heureux-Dubé and Arbour, JJ.) in discussing the proper standard of review to the circumstances of that case said at ¶36-37:

> ¶36 To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the

> matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in Jaegli Enterprises, supra, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.
>
> ¶37 In this regard, we respectfully disagree with our colleague when he states at para. 106 that "[o]nce the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts". In our view, it is settled law that the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law. (Underlining mine)

[82] In my view, it would not be appropriate to apply those stated principles to this, a case of defamation. **Housen** was concerned with an assessment and apportionment of liability following a motor vehicle accident. Damages of 2.5 million dollars had been agreed to prior to trial. It was clearly a case where a legal standard – that is negligence in tort – had to be applied to the judge's interpretation of the evidence as a whole. It was, therefore, the application of a legal standard to a set of factual findings, a question of mixed fact and law, subject to the standard of palpable and overriding error.

[83] That is quite different from the situation here where in deciding whether the defence of qualified privilege was available, Moir, J. was not applying a legal standard to a set of factual findings, but rather was required to decide, as a matter of law, whether the protection afforded by qualified privilege was open to the appellants Jones and Derrick.

[84] In making such a determination, the trial judge was obliged to answer a question of law, to which, upon appellate review, a standard of correctness will be applied. See: **Housen, supra; Van de Perre v. Edwards**, [2001] 2 S.C.R. 1014.

The Chronology

[85] Before discussing this subject and the trial judge's handling of it, it would be helpful to briefly recall the chronology of the case. Jury selection took place on April 3, 2001. Once the jury was chosen, counsel for the respondent and both appellants made opening statements. Evidence was presented on behalf of all three parties to this litigation over the course of sixteen days – from April 3-26, 2001. There then followed four days of submissions by counsel to the trial judge on a variety of subjects, including malice, qualified privilege, justification, fair comment and use of discovery excerpts.

[86] Counsel for the respondent and the appellants made their closing submissions to the jury on Thursday, May 3, 2001. The jury was then instructed to return on Monday, May 7, to receive the judge's directions. The trial judge spent all of Monday, May 7, in charging the jury. He brought the jurors back briefly on Tuesday, May 8, for further directions on the defence of justification and to instruct the jury of the requirement for unanimity, but that after deliberating for four hours a majority of five would be sufficient to deliver the jury's verdict.

[87] The jury deliberated for two and a half days before returning a verdict in favour of the respondent.

[88] On April 30, 2001, during the interval of four days set aside to consider the submissions of counsel, Moir, J. gave a brief, oral decision rejecting the defence of qualified privilege. He said:

> I have concluded that the defence of qualified privilege is not made out. I have concluded that neither the press conference, as a whole, nor the distribution of the Police Act complaint at the press conference were occasions of privilege.

> I've also concluded that S. 13(2) of the Defamation Act does not apply. In due course I will state my reasons for these conclusions in writing.

[89] The next day, May 1, 2001, the trial judge entertained submissions on the plea of malice. After considering the very detailed submissions of counsel, the trial judge returned to court and said:

> I have concluded that there is not sufficient evidence to the plea of actual or express malice be left (sic) to the Jury. I will give reasons in writing later on.
>
> > It should also be noted that the trial judge had the benefit of detailed written submissions and case authorities filed in advance by counsel.

[90] On August 30, 2001, Moir, J. filed a 71-page written decision which was divided into four parts and recorded his reasons on the subjects of: qualified privilege; malice; pre-judgment interest; and costs. It will only be necessary here for me to consider his reasons on the first two matters.

Analysis of the Trial Judge's Reasons

[91] The portion dealing with qualified privilege covers some 37 typed pages. In my respectful opinion, it reflects a thoughtful and comprehensive analysis of all of the pertinent leading authorities, a clear understanding of the evidence, and arrives at a correct conclusion in law. I see no basis justifying our interfering with it.

[92] Moir, J. begins his reasons by noting the two arguments advanced in support of the appellants' claim that their words and actions at the press conference were protected by privilege. First, it was said that the vetting of their formal complaint to the Chief of Police was akin to commenting upon pleadings in the context of judicial proceedings and that, as a consequence, the press conference was an occasion to which qualified reporting privilege extended. Second, relying upon the recent decision of the House of Lords in **Reynolds v. Times Newspapers Ltd.**,

[1999] H.C.J. No. 45 (H.C.), the appellants argued that their statements concerning the respondent to the public at large were protected by a general privilege because their words were intended to inform the community on a matter of considerable importance, thus making the publication justifiable, in the circumstances. The trial judge put it this way:

> The defendants submitted that this case fell within either of two circumstances where courts will recognize an occasion as privileged although the general public is the intended audience. It was argued that the press conference was within the privilege afforded to fair and accurate reports of court proceedings, which has recently been extended to reports upon pleadings, notices of motion and affidavits not yet read in open court. In this argument, an analogy is drawn between proceedings in open court and proceedings before a tribunal functioning judicially, such as the Police Review Board, and an analogy is also drawn between pleadings in the ordinary courts and a document initiating administrative proceedings, such as a complaint under the *Police Act*. In addition to reports of judicial proceedings, the defendants submitted that a privilege arose outside any categorically recognized set of circumstances. This argument returns to the principle of reciprocal duties or interests. Relying on a recent decision of the House of Lords, the defendants submit that publication at large is subject to privilege where the information is of importance to the public and where the publication is justifiable in the circumstances. This argument emphasizes the importance of public scrutiny of police activities, including scrutiny of activities that may reflect systemic racism or other systemic harms to vulnerable persons; it emphasizes the effectiveness of public exposure in correcting or managing the evil of systemic racism and similar harms; and, it emphasizes the social or moral duty of lawyers and others to seek improvements in the administration of justice, including the police. According to the defendants, the permission to defame a police officer among the general public, which would come with this privilege, is controlled not only by the qualification respecting malice, but also by a requirement of circumstantial justification, which, according to the House of Lords, is inherent in the common law principle of reciprocal duties or interests.

[93] In a thorough and well-reasoned judgment, Moir, J. carefully analyzed each of the submissions, together with the most authoritative jurisprudence on the subject. Ultimately, for reasons I will briefly summarize, the trial judge was not persuaded by either submission that the appellants' words were protected by any qualified privilege. Neither am I.

[94] Dealing first with the claim of a qualified reporting privilege based, so it was alleged, on the proposition that the appellants' letters of complaint and the investigation it prompted ought to be likened to a judicial proceeding, the trial judge began his analysis with a detailed review of the **Police Act**, R.S.N.S. 1989, c. 348, as amended. He described the processes, procedures and matters of policy that are engaged, depending upon the stage reached, when certain steps are taken or events are triggered, pursuant to the legislation. I need not repeat that analysis here. It is enough to say that in the opinion of the trial judge the Legislature clearly envisioned various and distinct stages of review and levels of decision making. These appellants' complaints invoked a phase that related to the internal discipline of Cst. Campbell. It had not engaged the next level of adjudication, with the potential for public hearing, upon referral to the Police Review Board.

[95] After noting that these complaints under the **Police Act** "were publicized by the defendants and their remarks were made outside any proceedings, at a press conference" the trial judge addressed the appellants' argument that their complaints were part of a quasi-judicial process such that they were:

> ...no different than publicization of documents filed with the court for the purposes of qualified privilege as extended by Hill v Church of Scientology. [1995] 2 S.C.R. 1130.

[96] In **Hill**, **supra**, particularly at ¶149-154, Cory, J. observed that public scrutiny of the courts in a democratic society was of fundamental importance which has resulted in change to both societal standards and legislation with regard to access to court documents. To my mind, these observations by the Court in **Hill** were well understood and properly emphasized by the trial judge in this case when he said:

> However, it was the importance of public scrutiny of court proceedings which impelled the decision in *Hill.* The qualified privilege still focuses

> upon the public hearing, and I think that for the analogy to be made it is essential to see that the document in question is a part of or is soon to be a part of a hearing which is open to the public and is judicial in nature.

[97] After conducting a detailed analysis of the legislation, Moir, J. concluded:

> In my opinion, the initial laying of a complaint under this legislation does not resemble the filing of pleadings, notices or affidavits with a court and it does not engage the public interest in scrutinizing judicial or quasi-judicial proceedings. Nothing authorizes the release of complaints to members of the public, and the evidence was that this is not done. The investigator's report is given to the chief officer and the member only, and it forms the basis for the chief officer's decision. The complaint leads to a private "meeting" attended by the police officer and another member of the force, who has authority to discipline. The complainant is only advised of the outcome. At this stage, the decision-making closely resembles internal discipline. The more public aspect of this legislative scheme and the aspect which involves a judicial tribunal arises in a second stage initiated not by the complaint, but by a request for review. It is only when the complainant or the officer requests review of the internal decision that there is any prospect of a public hearing. Until referral to the Police Review Board, the process is outside the rationale for the longstanding privilege that protects fair and accurate reports of judicial proceedings as stated by Cory, J. at para. 151 of *Hill* v. *Church of Scientology* because, until referred, there is no proceeding to which the public has the right of access. Too, the process is outside the rationale for the extension of the rule in *Hill* v. *Church of Scientology*. Only upon referral to the Police Review Board is there a prospective hearing in respect of which public scrutiny may extend to "knowing the kinds of submissions which can be put forward." I conclude that if the qualified privilege protecting reports of judicial proceedings extends to *Police Act* complaints, it does so only when the public and judicial stage arises, that is, upon request for review and referral to the Police Review Board.
>
> Further, in my opinion, it is appropriate to distinguish a legislative scheme which has elements of compulsory investigation from a court process which does not follow an inquisitorial model. The *Police Act* incorporates features of both. Referral to the Police Review Board

> engages a process resembling proceedings in court. However, the *Police Act* mandates two levels of investigation into complaints. The complaint may lead to a judicial proceeding, but initially it causes an investigation. Pleadings frame the issues to be dealt with in court and, in the words of Justice Cory, "the kinds of submissions which can be put forward." A complaint serves another purpose: to candidly inform a legally authorized authority of allegations, even suspicions, thought to be worthy of investigation. The public interest in scrutinizing judicial proceedings is to be distinguished from the public interest in knowing about the details of such an investigation, and I think it would be dangerous to extend the license of qualified privilege to the publicizing of a document designed to launch an investigation, rather than solely to define the issues for a public hearing.
>
> . . .
>
> In conclusion, I agree with the defendant's submission that the qualified privilege protecting reports of judicial proceedings, including documents filed with the court, may extend to documents to be produced before a tribunal. However, in the case of a complaint under the *Police Act*, the privilege does not arise merely on the filing of the complaint because no public judicial hearing is engaged until there is a notice of review of an internal decision and, where the complainant seeks review of the internal decision, a determination by the Police Commission to refer the complaint to the Police Review Board. Further, it is my opinion the privilege should not arise where the immediate purpose of the complaint concerns an investigation rather than a hearing.

[98] I endorse the trial judge's analysis and I accept his conclusion as being correct in law.

[99] It will be recalled that the appellants' secondary argument was that the decision of the House of Lords in **Reynolds**, **supra**, ought to be applied in Canada, such that while convening a press conference clearly expanded the appellants' publications to the "world at large", nonetheless any unintended defamation of Cst. Campbell was justified by the circumstances surrounding the unlawful search of these three young girls. In disposing of this submission, the trial judge carefully considered the various speeches of the Law Lords in **Reynolds**, and contrasted

those judgments with the leading authorities in this country, including **Hill**, **supra**; **Adam v. Ward**, [1917] A.C. 309 (H.L.); **Sapiro v. Leader Publishing Co.,** [1926] 2 W.W.R. 268 (Sask. C.A.); **Douglas v. Tucker,** [1952] 1 S.C.R. 275; **Jones v. Bennett**, [1969] S.C.R. 284; **Parlett v. Robinson** (1986), 30 D.L.R. (4th) 247 (B.C.C.A.); **Moises v. Canadian Newspaper Co.** (1996), 30 C.C.L.T. (2nd) 145 (B.C.C.A.), among others. Upon consideration, Moir, J. declined to follow **Reynolds**, saying:

> However, I read *Reynolds* as setting a new approach to publications for the world at large, an approach markedly different from that of *Jones* v. *Bennett*. I am bound by *Jones* v. *Bennett*. The Court of Appeal in this province has not, to my knowledge, protected such a broad publication as we see here by bringing anything like it within the shield of qualified privilege. Thus, I do not have the liberty to say, with the British Columbia Supreme Court, that the 'too broad' argument no longer has application. Further, the integral importance of an individual's reputation as explained in *Hill* v. *Church of Scientology* suggests to me continued restraint where privilege is claimed over a defamatory statement made to the world at large.

[100] I would not disagree with the trial judge's assessment. In my opinion, we need not endorse **Reynolds** as having any application to this case. For reasons I will now outline, I am satisfied that the Supreme Court's decision in **Hill**, **supra,** and the principles stated therein by Cory, J. for the majority, are entirely apposite and sufficient to dispose of this case.

[101] Before doing that, let me say concerning the **Reynolds** case, that I do not think it insignificant that the judgment concerned press publications about politicians; whereas, both **Hill** and this case concern the publication of statements by members of the bar about public officials who were not politicians. Thus, the circumstances involving Messrs. Morris Manning, Casey Hill and the Church of Scientology offer the closest parallel to Mr. Jones' and Ms. Derrick's defamation of Cst. Campbell.

[102] I note as well that in concluding his judgment in **Reynolds**, Lord Nichols emphasized on more than one occasion the critical importance of the facts of each case and that the balance between freedom of speech and adequate protection for

reputation must reflect all of the circumstances of any given case. Lord Nichols wrote:

> The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury. Over time, a valuable corpus of case law will be built up.(H.L.J.¶58) (Underlining mine)

[103] While Lord Nichols was undoubtedly intent on providing guidance to the press in putting forward a list of ten (not exclusive) features that he described as illustrative only of "matters to be taken into account", depending on the circumstances, some are worth repeating here:

> 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. ...
>
> . . .
>
> 4. The steps taken to verify the information...
>
> . . .
>
> 6. The urgency of the matter...
>
> . . .
>
> 8. Whether the article contained the gist of the plaintiff's side of the story.
>
> 9. The tone of the article...
>
> 10. The circumstances of the publication, including the timing. (H.L.J. ¶57)

[104] The features that I have extracted from Lord Nichols' list to me reflect the kind of objectivity and fairness that ought to be exercised by the trial judge when conducting this balancing operation.

[105] That said, were it necessary to import such an analysis to this case (which I say with respect is neither necessary nor appropriate), it seems to me that the trial judge implicitly considered Lord Nichols' suggestions in any event in arriving at his conclusion. Such is confirmed when one reviews the trial judge's reasons. This is what he said in part:

> Counsel have referred me to authorities for the basic principles governing qualified privilege. The defence protects a defamatory statement made on a privileged occasion. That is, "an occasion where the person who makes a communication has an interest or duty, legal, social or moral, to make it to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it": *Adam* v. *Ward,* [1917] A.C. 309 (H.L.) at p. 334, quoted approvingly in *Hill* v. *Church of Scientology of Toronto* at para. 143. Privilege attaches to the occasion. Thus, a defendant's subjective belief in his or her duty to communicate and in the audience's duty to receive the information cannot ground the defence: *Halls* v. *Mitchell*, [1928] S.C.R. 125. The interest or duty to communicate and the interest or duty to receive the information must be reciprocal: *Adam* v. *Ward* above. The defence is based upon public policy or the public interest. "There are occasions upon which, on grounds of public policy and convenience, less compelling than those which give rise to absolute privilege, a person may yet, without incurring liability for defamation, make statements about another which are defamatory and in fact untrue": Patrick Milmo, Q.C. and W.V.H. Rogers ed., *Gatley on Libel and Slander*, 9th ed. (Sweet & Maxwell, 1998) at para. 14.1. This passage from *Gatley* is consistent with Canadian authorities: see for example *Jones* v. *Bennett*, [1969] S.C.R. 284 at p. 284; *Crandall* v. *Atlantic School of Theology et al.* (1993), 120 N.S.R. (2d) 219 (S.C.) at para. 37; *Moises* v. *Canadian Newspaper Co.* (1996), 30 C.C.L.T. (2d) 145 (B.C.C.A.) at para. 17. The reciprocal duties or interests that will found a defence of qualified privilege are those which advance "the common convenience and welfare of society", to choose the phrase from *Jones* v. *Bennett* at p. 284. The courts have recognized categories of qualified privilege but those can never be closed, see for example *Moises* at para. 18. It is always open to a defendant to show a reciprocity of duties or interests sufficient to raise a public interest in disclosure no matter that the disclosure may turn out to be false and defamatory. Some courts have endorsed factors to be considered in such

> an assessment: *Moises* at para. 19, "There are a number of factors which the court must consider when deciding whether or not any given occasion is one of qualified privilege" and this passage quoted with approval at para. 19 of *Moises* citing *Sapiro* v. *Leader Publishing Co.*, [1926] 2 W.W.R. 268 (S.C.A.) at p. 271:
>
> > In determining whether or not it is so privileged, 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.
>
> No statement of factors could be exhaustive. It has long been recognized that ascertaining the sufficiency of reciprocal duties or interests to raise the defence involves an inquiry into all of the circumstances: *London Association for Protection of Trade* v. *Greenlands Ltd.*, [1916] 2 A.C. 15 at p. 23.

[106] In my opinion, Justice Moir identified and applied the proper test, recognizing that any such privilege attaches to the occasion provided certain essential requirements are met. The interest or duty to communicate and the interest or duty to receive the information must be reciprocal. The categories or instances where qualified privilege will be said to apply can never be closed. Determining the sufficiency of reciprocal duties or interests thereby invoking the defence will involve an inquiry into all of the circumstances.

[107] Justice Moir referred to the decision of Williams, J.A. for the British Columbia Court of Appeal in **Moises, supra,** approving the statement by the Saskatchewan Court of Appeal in **Sapiro**, which I believe is still an accurate statement of the law in Canada. I repeat it now for clarity and add my endorsement to it:

> In determining whether or not it is so privileged, 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.

[108] The trial judge then proceeded upon such an inquiry, and carefully considered all of the important circumstances of the case before him. He said:

> I do not understand *Jones* v. *Bennett* to have shut the door on qualified privilege where duty is so strong, interest so compelling and circumstances so justified that the public should be told even if the information may turn out to be defamatory and untrue. The decision shut that door for "a plea of privilege based on a ground of the sort relied on in the case at bar." That indicates a high standard where privilege is sought for a broad publication, but it does not rule out a plea of privilege based on grounds different from those at issue in *Jones* v. *Bennett.* In my opinion, Canadian law recognizes that publication to the world at large is a factor indicating strongly against qualified privilege, but not necessarily defeating application of the defence. Where the defendants assert it on broad principles rather than upon one of the recognized categories, I must, I believe, consider the factor referred to in *Sapiro*, "to whom" the publication was made, as weighing heavily against the sufficiency of reciprocal duties or interests where the publication was to the world at large, but I must still consider the other factors mentioned in *Sapiro* and the circumstances as a whole in determining sufficiency. By sufficiency I mean whether the reciprocal duties or interests "warranted the communication" (*Halls* v. *Mitchell, p.* 134) or whether the "[public] interest is of sufficient importance to outweigh the need to protect reputation" (*Reynolds*, para. 10).

[109] In argument, Mr. Outhouse, counsel for Ms. Derrick, contended that the portion of the trial judge's reasons I have just quoted establish – so it is argued – that the judge imposed too high a standard upon the appellants. The judge's language, it is said, suggests that proof of publication to the world at large effectively creates a rebuttable presumption that a qualified privilege ought not apply. I disagree.

[110] In my respectful view, the trial judge has simply recognized, and properly so, that in this country publication of defamatory information to the world at large is a factor attracting considerable significance, but it does not preclude the availability of the defence of qualified privilege.

[111] A most instructive review of the litigious history behind **Jones v. Bennett**, **supra,** may be found in the recent decision of the British Columbia Court of Appeal in **Ward v. Clark** [2001] B.C.J. No. 2687, reversing the trial judgment [2000] B.C.J. No. 1261. That helpful background aside, I would choose not to apply the court's reasoning to this case. I respectfully disagree with Esson, J.A.'s characterization of Cory, J.'s remarks in **Hill** as meaning:

> The privilege is not absolute but can be defeated only by a finding that the dominant motive for publication is actual or express malice.
>
> Once the jury, or the judge as jury, reaches the conclusion that there was no malice, that should be the end of the inquiry with respect to qualified privilege. (Underlining mine) (Per Esson, J.A. at paras. 60-61)

[112] The case is easily distinguishable on many bases, not the least of which was that the appellant was the premier of British Columbia whose alleged slander was directed at countering the criticisms made by Mr. Ward, a marine engineer, who had achieved considerable media attention by his repeated attacks on the government for incompetence in its high-speed catamaran ferry project. Mr. Clark's statements came as he emerged from the Legislature and was confronted by a media "scrum" where one reporter put to him the plaintiff's criticisms and invited his response.

[113] In any event I do not agree with the Court of Appeal's suggestion that absent proof of malice there is an automatic qualified privilege, or put another way that the "only" way to defeat a qualified privilege is to find that malice was the principal motive behind the publication.

[114] With great respect, I do not believe that to be an accurate characterization of Justice Cory's reasons in **Hill**. There, Cory, J. did not limit the defeat of privilege to "only" malice. On the contrary, Cory, J. took pains to explain how even though the impugned words

> ...took place on an occasion of qualified privilege. If so it remains to be determined whether or not that privilege was exceeded and thereby defeated. (**Hill, supra**, ¶149)

I will deal with this secondary and essential inquiry more fully later in these reasons. (**infra** at ¶130)

[115] The essentials of qualified privilege have been in place since the House of Lords seminal decision in **Adam v. Ward**, almost a hundred years ago. Those essentials have not materially changed since that case was decided. The test expressed by Lord Atkinson in **Adam v. Ward** was quoted with approval by the Supreme Court in **McLouglin v. Kutasy,** [1979] 2 S.C.R. 311, and by Justice Cory in **Hill** at ¶143:

> ...a privileged occasion is ... an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

[116] The test is necessarily a flexible one and, as I have said, the categories or instances of qualified privilege are not closed. The test requires a consideration of all of the circumstances of the publication to determine whether the speaker had a duty, the recipient had a corresponding interest, and whether, in the circumstances, the reciprocal duty and interest justified the communication that was made.

[117] It is clear to me that this test was well understood and applied by the trial judge. As I have said, there is no blanket prohibition or exclusion against publications “to the world at large” when deciding whether the occasion of such a publication is one to which a qualified privilege will attach. It is open to a defendant to show that his or her publication “to the world” does satisfy the duty/interest analysis. Where, as here, the appellants called a press conference, thereby choosing to speak to an extremely broad audience, they then acquired the burden of showing that such a broad audience had a reciprocal interest in receiving the communication. It was to these circumstances that the trial judge turned his attention when addressing the appellants’ submissions.

[118] Among them was the appellants' contention that they were duty bound to speak out, in the public interest, on matters said to involve police misconduct and the mistreatment of citizens on account of their race, economic status, or vulnerability.

[119] This inquiry engaged two important features: the audience and the timing of the publication. Each was thoroughly considered by the trial judge in his careful analysis.

[120] As we have seen, qualified privilege attaches to an *occasion* rather than a particular communication. While a citizen's interest in making a complaint regarding the conduct of a police officer is a significant matter, it does not justify any and all communications which allege misconduct on behalf of a police officer, to whatever audience. The authors of *Gatley on Libel and Slander* confirm at ¶14.55 that, when making a complaint about a public official, a speaker is not relieved of the responsibility to choose an appropriate audience.

> Thus, it is not only for the victim, in his own interests, but it is the duty of everyone, in the interests of public efficiency and good order, to bring any misconduct or neglect of duty on the part of a public officer or employee, or any public abuse, to the notice of the proper authority for investigation. Any complaint or information as to such misconduct, neglect of duty, or abuse is privileged, provided it is made in good faith to the person or body who has the power to remove, punish or reprimand the offender, or merely to inquire into the subject matter of the complaint. Any citizen who bona fide believes that wrong has been done has the right and duty to bring the alleged fact before the proper authority for investigation. (Underlining mine) *(Gatley on Libel and Slander*, 9th ed.,(London: Sweet & Maxwell, 1998), at para. 14.55)

[121] I find that the trial judge was right to conclude that no qualified privilege arose in this case. The defendants published their defamatory remarks far more broadly than was required to initiate the complaint process. The evidence disclosed that the appellants moved immediately to give the broadest possible publicity to their allegations about Cst. Campbell's conduct. It must be emphasized that the occasion with which we are here concerned is the press conference – where the appellants published the complaints to everyone they could reach through the

assistance of local and regional media. This should not be confused with the occasion on which the appellants "published" the complaints to Police Chief Vincent MacDonald by sending their letters to him. In his reasons, the trial judge was very careful not to confuse these two occasions. The issue was not whether the complaint sent to the appropriate authority would be privileged from its inception. Rather, the issue was whether trumpeting the contents of the complaint "to the world at large" was protected by qualified privilege. The trial judge found that it was not.

[122] Recognizing the requirements of the **Sapiro** case, **supra**, the trial judge went on to consider the timing, that is to say the urgency of the occasion. He was well aware of the importance of public dialogue and vigilance in rooting out racism and exposing other forms of prejudice and discrimination in our society. Of this he said:

> According to the defendants, the press conference was called to raise with the public systemic issues respecting the manner in which the state deals with vulnerable individuals; the young, the poor and persons of African heritage. According to the defendants, the goal was to improve the administration of justice in regard to such dealings. Certainly, those positions are supported by what was said by the defendants at the press conference and by what they said on the stand. No right thinking person could deny a duty to speak about and a public interest in hearing about police misconduct involving the mistreatment of individuals because of their youth, poverty or Black heritage. Particularly the latter in this province where, as everyone knows, the long history of African Nova Scotians involves the sufferings of racism, overt and unconscious, individualistic and systemic, in the past and in the present. I accept that public exposure is an effective tool for combatting systemic racism. I base that upon the testimony of the experts in this case and upon common sense. I agree that combatting racism is properly among the duties or interests of any citizen and that the public interest is served by combatting racism.

[123] However, such a necessary and worthy objective is not, of itself, sufficient to ground a claim of qualified privilege, or uttering and publishing defamatory remarks. There still remains a burden upon the appellants to establish the essential

reciprocal interest/duty relationship before qualified privilege will attach to the occasion on which they chose to make their statements. This critical point was appreciated by the trial judge when he continued his discussion of the public interest being served by combatting racism with these words:

> Of course, the identification of these reciprocal duties or interests is not sufficient. The authorities make it clear that there must be such a duty or such an interest as, in all of the circumstances, warranted the communication. Mindful of the reluctance of the courts to shield broad communications with privilege and mindful of the rationale for providing that shield in some circumstances, "the need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source" (*Reynolds,* para. 17), I am not satisfied that the defendants were warranted in providing media with the information communicated at the press conference. I do not think that the question of reciprocal interests or duties can be answered only by reference to the goals of which the defendants spoke. The goals of the press conference cannot be separated from the instance which gave rise to it: the conduct of the plaintiff at the school that day in March 1995. Facts as relayed by the clients were laid out in detail for the media and it was said to the media and, through them, to the public that race was a factor in Constable Campbell's behaviour. So long as the facts were stated in substance and were substantially true and so long as the concerns about race and poverty were stated as opinion, Mr. Jones and Ms. Derrick would have had the defence of fair comment available to them. The additional defence of qualified privilege would protect them where there was a need to lay their clients' versions of the facts before the public and to call public attention to the consequential concerns about race and status, even though the versions related by the clients may have turned out to be untrue and defamatory. That need had not yet arisen. The clients had initiated a process that would lead immediately to an investigation and that process could have led to a public hearing and judicial determination of the facts. I do not see the need for having gone to the public before the process of investigation and determination had even begun. While I agree that "the nature of the duty which the defendant claims to discharge" (*Sapiro*, p. 271) is a weighty one, "the alleged libel" (*Sapiro*, p. 271) and slanders were also very serious. In my assessment the latter consideration coupled with the official fact-finding

> processes instituted by the defendants for their clients, the lack of urgency and the publication to the world at large before the investigative processes had even begun are such that the communications were not warranted at the time they were made, and the public interest in the scrutiny of police behaviour on matters of race had not yet, at the time of the press conference, been engaged sufficiently to outweigh protection of reputation. (Underlining mine)

[124] I find no error in the trial judge's analysis or conclusion.

[125] Moir, J. also found that the appellants' report of the contents of their clients' complaints was made too soon to be protected by any qualified reporting privilege said to attach to accurate reports of documents filed in court. The right of public access which underlies that species of privilege did not exist at the time the appellants held their press conference. If the complaint had not been informally resolved, and were put before the Police Review Board for a hearing, a public right of access to the proceedings would then arise. However, at the time Ms. Derrick and Mr. Jones convened their press conference, the complaint had only just been filed. The filing of the complaint triggered an investigation pursuant to the **Police Act**, and with such a process under way, I think the trial judge was correct in finding that the appellants were not protected in publicizing the complaint through the media. The appellants could have simply filed the complaint on behalf of their clients and followed it through, taking advantage of all legal processes at their disposal under the statute. Instead, they proceeded to publish their complaint as broadly as possible, thus losing the protection of qualified privilege.

[126] The appellants complain that the trial judge erred by giving too much weight to the factor of "urgency" in considering the timing of the communication. The appellant Mr. Jones suggests that Moir, J. overemphasized the issue of "urgency" in evaluating whether the occasion was privileged. As noted earlier in these reasons, the timing of a particular communication is a crucial factor among all of the circumstances of a case when conducting the necessary duty/interest analysis. While "urgency" should not be considered to the exclusion of all else, the trial judge did not err by identifying "urgency" (more accurately, the lack thereof) and according it significant weight. It is not for this court to substitute its own view of what deserves greater or lesser importance.

> We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. (**Housen**, **supra** at ¶23. Underlining in original)

[127] Largely for the reasons given, I find that the trial judge understood and applied the correct legal test to a careful assessment of all of the relevant circumstances, thereby satisfying his responsibility in deciding as a matter of law whether the defence of qualified privilege was available to the appellants. He committed no error in doing so.

[128] In concluding this point Moir, J. did not err in declining to apply the decision of the House of Lords in **Reynolds**. In my respectful view, the opinions of the Law Lords in **Reynolds** need not be imposed on these facts and the judge did not err in declining to do so.

[129] There is no need to extend the protection afforded in Canada by qualified privilege beyond the principles articulated by the Supreme Court in **Hill**. There is no requirement on grounds of public policy that its scope be enlarged to shield these appellants. They were accurately described as counsel who often advocate on behalf of the poor and the oppressed. The common law defences of qualified privilege, justification and fair comment are sufficient protection, whether to pro-active lawyers or ordinary citizens. While the categories of qualified privilege are not foreclosed, there is no special protection to be attached to occasions where activists or lawyers happen to be in attendance.

EXCEEDED THE PRIVILEGE

[130] I would go further and say that we need not look beyond **Hill** to dispose of this aspect of the appeal for another reason. I would do so on the basis that whatever

qualified privilege may have extended to Ms. Derrick and Mr. Jones as the authors of the complaints, the protection afforded them was lost when the privilege was exceeded by their conduct at the press conference. While the trial judge did not consider it necessary to go on to consider this issue, I would find that his decision may also be supported as being correct in law for that reason.

[131] In order to deal with this aspect of the appeal, I think it is important to remember the issues that lay at the heart of this law suit. It really came down to three simple questions. First, what happened to the three girls in the Guidance Room? Second, what was said about whatever happened to the girls? Third, was what was said defamatory and, if it was, was it defensible?

[132] Each of these inquiries is a question of fact, entirely within the province of the jury, once properly directed on matters of law. I will say more about the jury's authority and the deference owed to it later in these reasons.

[133] In **Hill v. Church of Scientology**, when describing the conduct of Morris Manning and finding that the defence of qualified privilege would not protect him, Justice Cory wrote:

> ¶ 146 Qualified privilege may also be defeated when the limits of the duty or interest have been exceeded: see Raymond E. Brown, The Law of Defamation in Canada, 2nd ed. (Scarborough: Carswell, 1994), at pp. 13-193, 13-194; Salmond and Heuston on the Law of Torts, 20th ed. by R.F.V. Heuston and R.A. Buckley (London: Sweet & Maxwell, 1992), at pp. 166-7. As Earl Loreburn stated at pp. 320-21 in Adam v. Ward, supra:
>
> > ... the fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that is not relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected.
>
> ¶147 In other words, the information communicated must be reasonably appropriate in the context of the circumstances existing on the occasion when that information was given. For example, in Douglas v. Tucker, [1952] 1 D.L.R. 657, [1952] 1 S.C.R. 275, the defendant, during an election campaign, stated that the plaintiff, who was the officer of an investment company, had charged a farmer and his wife an exorbitant rate

of interest causing them to lose their property. The plaintiff maintained that the allegation was without foundation. In response, the defendant asserted that the plaintiff was facing a charge of fraud which had been adjourned until after the election. This court held that the defendant had an interest in responding to the plaintiff's denial, ***[page172]*** thereby giving rise to an occasion of qualified privilege. However, it ruled that the occasion was exceeded because the defendant's comments went beyond what was "germane and reasonably appropriate" (p. 665).

. . .

¶154 The public interest in documents filed with the court is too important to be defeated by the kind of technicality which arose in this case. The record demonstrates that, prior to holding the press conference, Morris Manning had every intention of initiating the ***[page174]*** contempt action in accordance with the prevailing rules, and had given instructions to this effect. In fact, the proper documents were served and filed the very next morning. The fact that, by some misadventure, the strict procedural requirement of filing the documents had not been fulfilled at the time of the press conference, should not defeat the qualified privilege which attached to this occasion.

¶155 This said, it is my conclusion that Morris Manning's conduct far exceeded the legitimate purposes of the occasion. The circumstances of this case called for great restraint in the communication of information concerning the proceedings launched against Casey Hill. As an experienced lawyer, Manning ought to have taken steps to confirm the allegations that were being made. This is particularly true since he should have been aware of the Scientology investigation pertaining to access to the sealed documents. In those circumstances he was duty bound to wait until the investigation was completed before launching such a serious attack on Hill's professional integrity. Manning failed to take either of these reasonable steps. As a result of this failure, the permissible scope of his comments was limited and the qualified privilege which attached to his remarks was defeated.

¶156 The press conference was held on the steps of Osgoode Hall in the presence of representatives from several media organizations. This constituted the widest possible dissemination of grievous allegations of professional misconduct that were yet to be tested in a court of law. His

> comments were made in language that portrayed Hill in the worst possible light. This was neither necessary nor appropriate in the existing circumstances. While it is not necessary to characterize Manning's conduct as amounting to actual malice, it was certainly high-handed and careless. It exceeded any legitimate purpose the press conference may have served. His conduct, therefore, defeated the qualified privilege that attached to the occasion. (Underlining mine)

[134] Cory, J.'s characterization of Mr. Manning's conduct corresponds with my own view of the actions of Mr. Jones and Ms. Derrick in this case. I regret to say that in my opinion, their statements were high handed and careless, void of any semblance of professional restraint or objectivity, were grossly unfair and far exceeded any legitimate purpose the press conference may have served.

[135] Let me begin by first disposing of the appellants' reliance upon the recent decision of the Supreme Court of Canada in **R. v. Golden**, [2001] S.C.C. 83. The facts of the case were rather unique. Officers from the Toronto Police Department set up an observation post in an unoccupied building across from a sandwich shop in an effort to detect illegal drug activity in an area where trafficking was known to occur. From their vantage point approximately 70 feet away, one of the officers saw Mr. Golden, a black male, in the shop and observed two transactions in which individuals entered the shop and subsequently received a substance from Mr. Golden. The officer testified that he saw Mr. Golden take a white substance from the palm of his hand and that he believed, given all the circumstances, that the substance was cocaine and that Mr. Golden was trafficking. After the second transaction, the officer communicated with four other police officers who formed part of the "take down" team and instructed them to arrest Golden. The officers subsequently entered the shop and arrested Mr. Golden for trafficking in cocaine. Two other individuals were also arrested. During the arrest the police found what they believed to be crack cocaine under the table where one of the suspects was arrested. The officer also observed Mr. Golden crushing what appeared to be crack cocaine between his fingers. Following the arrest, an officer conducted a "pat down" of Mr. Golden and looked into his pockets. No weapons or narcotics were found. The officer then decided to conduct a visual inspect of Mr. Golden's underwear and buttocks. He obtained the key to the door leading to the basement where the public washroom was located and at the stairwell landing undid Mr. Golden's pants and pulled back his pants and long underwear. Looking inside Mr.

Golden's underwear, he noticed a clear plastic wrap protruding from Mr. Golden's buttocks, as well as a white substance within the wrap. The officer testified that when he tried to retrieve the plastic wrap, Mr. Golden "hip checked" and scratched him such that he lost his balance and almost fell down the flight of stairs. The officer testified that he then pushed Mr. Golden into the stairwell face first and, concerned that the landing was not a safe place to continue the search, he and his partner escorted Mr. Golden to a seating booth at the back of the sandwich shop. The patrons who were still inside the store were asked to leave and the front door was locked. However, the two other arrested suspects, five officers, and the shop's employee remained inside.

[136] The officers forced Mr. Golden to bend over a table and at this point his pants were lowered to his knees and his underwear was pulled down. His buttocks and genitalia were thus completely exposed. However, according to the evidence, the partitions between the booths in the shop were high enough to block the view from the outside to the part of the shop where the search was conducted. The store employee testified that a passerby would not have been able to see what was taking place inside.

[137] The officers attempted to remove the package from Mr. Golden's buttocks but were unsuccessful given the fact that Mr. Golden continued to clench his muscles very tightly. Following the unsuccessful attempts, Mr. Golden accidentally defecated; however, the package did not dislodge. An officer then retrieved a pair of rubber dishwashing gloves from the shop's employee which he put on and again attempted to remove the package. According to the testimony of the employee, the gloves were used for cleaning the shop's washroom and toilets. At this point, Mr. Golden was face down on the floor, with one officer holding his feet. The officers instructed Mr. Golden to relax. Finally, one officer was able to remove the package once Mr. Golden unclenched his muscles. The package contained 10.1 grams of crack cocaine with a street value of between $500.00 and $2,000.00. Mr. Golden's pants were pulled up and he was arrested for possession of a narcotic for the purpose of trafficking, and for assaulting a police officer. He was then taken to the police station located about two minutes away. He was strip searched again at the police station, fingerprinted and detained pending a bail hearing.

[138] At trial Mr. Golden applied to have the evidence obtained from the search excluded under sections 8 and 24 of the **Charter**. On the *voir dire* his application was denied and the evidence was admitted. He was found guilty of the possession

charge and acquitted on the assault charge. He was sentenced to 14 months' imprisonment. The Ontario Court of Appeal dismissed his appeal from conviction and sentence. Mr. Golden appealed to the Supreme Court of Canada. The two issues to be decided were whether the Ontario Court of Appeal erred in concluding that the strip search did not violate s.8 of the **Charter** and, if it did, would the admission of the evidence bring the administration of justice into disrepute under s.24(2) of the **Charter**.

[139] The Court divided 5:4, the majority holding that the appeal should be allowed, the accused's conviction overturned and an acquittal entered.

[140] The appellants Ms. Derrick and Mr. Jones place considerable reliance upon the majority conclusion that there were three strip searches of Mr. Golden which violated s. 8 of the **Charter**, and in particular the definition of strip search adopted by Justices Iacobucci and Arbour writing for the majority:

> ¶47 The appellant submits that the term "strip search" is properly defined as follows: the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments. This definition in essence reflects the definition of a strip search that has been adopted in various statutory materials and policy manuals in Canada and other jurisdictions. [Citations from original omitted.] In our view, this definition accurately captures the meaning of the term "strip search" and we adopt it for the purpose of these reasons. ...
>
> ¶48 Applying this definition of strip search to the facts, the appellant was subjected to three strip searches in the present case.

[141] It was the appellants' submission before this court that it was now "clear beyond dispute" that the three girls were strip searched by Cst. Campbell in accordance with the Supreme Court's reasons in **Golden**. It was said that even if one accepted, in its entirety, the respondent Campbell's own version of the search, to the exclusion of all other accounts, it would prove that her actions constituted an illegal and unwarranted search, and a clear violation and contempt for the girls' constitutional rights. Accordingly, the appellants say that the trial judge erred in law by failing to instruct the jury as to the legal definition of a strip search.

[142] I reject the appellants' submission. I agree with counsel for the respondent that **Golden** is irrelevant to the circumstances of this case.

[143] I know of no requirement obliging a trial judge, in this a case of defamation, to instruct a jury as a matter of law on the legal definition it ought to apply when discussing among themselves the manner in which the three girls were searched by the respondent Cst. Campbell.

[144] In my respectful view, restricting one's analysis to the "undisputed facts" of what occurred during the search ignores the critical function undertaken by this jury, that is to decide difficult issues of credibility. Only after assessing the truthfulness and reliability of the witnesses' testimony could the jury decide the question put to it by the parties.

[145] I prefer, therefore, to point out in some detail the evidence concerning the search. The account given by Cst. Campbell is fundamentally at odds with the description afforded by the three girls, each 18 years of age by the time they testified at trial. There were, as well, significant disparities in the complainants' own accounts, which the jurors may well have considered important and which may have affected their view of the truthfulness and reliability of their testimony.

[146] The jurors had the considerable advantage – denied an appellate court – to see and to hear these people testify during direct and cross-examination under oath. Demeanour, attitude, responsiveness, tone, argumentativeness, are all subtle but often very persuasive facets of a trial's dynamics and would be powerful tools in the jury's assessment of the weight, if any, they chose to give to a witness's testimony.

[147] Ultimately, after two and a half days of deliberations, they found in favour of Cst. Campbell. I accept her counsel's submission that in doing so the jury must have believed Cst. Campbell and preferred her evidence to that of the three complainants. That careful scrutiny of the evidence, that measure of whom to believe or not to believe, or to what degree, was entirely within the jury's province. That was their task and theirs alone. They had sworn an oath to do so. Their verdict is deserving of great deference by this court.

[148] It follows that the question of whether a "strip search" took place was one solely within the purview of the jury. There was a vast amount of evidence on the

precise circumstances that occurred on the day in question at the school and it fell to the jury to weigh that evidence. In particular, Cst. Campbell was adamant in her evidence that she did not strip search the girls, but merely asked them to loosen the band on their underwear and did not ask them to expose their private areas. If the jury made a finding that no strip search occurred, that was a finding that was reasonable in light of Cst. Campbell's evidence. Whether this court, the appellants or anyone else is of the view that the search was a strip search, is not germane to the case or to this appeal.

[149] In spite of this evidence, the appellants argue that it was not open to the jury to make a finding that no strip search occurred. They say the judge was obliged to direct them as to what would constitute a strip search carried out by a police officer, and that his failure to do so was a fatal error. In effect the appellants now submit that the jury was restricted to making its finding in accordance with the law as set out in a decision in the Supreme Court of Canada rendered subsequent to the jury verdict. Such a proposition is patently contrary to established principles regarding the role of the jury. A jury is required to make its determinations based on the evidence before it. It is neither required nor equipped to make determinations as to the law.

[150] The real question, in this case, was whether the jury preferred the three girls' accounts or Cst. Campbell's version of what happened in the Guidance Room. It was for the jury to decide which account was more likely true and assign to that finding their own characterization of what the trial judge wisely attempted to describe in more neutral terms. One must remember that the two versions were absolutely at odds. Even if the jury were to have accepted Cst. Campbell's account, the appellants' repeated characterization of her actions as constituting a "strip search" may still be defamatory. Such an allegation, as well as the appellants' linking it to being motivated by the girls' race, youth and low economic status, were clearly matters for the jury to decide.

[151] The appellants have always described what occurred as a "strip search". They pointed to a few reports in the press, published before the press conference, where such a description was used. That however, in my opinion, does not excuse the appellants' repeated endorsement of such an attention-grabbing and emotive label. The fact is the appellants embraced such a description. They gave careful thought to planning the press conference days in advance. They conferred about their strategy. The invitation they prepared was issued as a press release as follows:

PRESS RELEASE

> B.A. “Rocky” Jones and Anne Derrick, in their joint capacity as solicitors for the three young women who were strip searched at St. Pat’s Alexandra Junior High, will be holding a press conference, on Wednesday, April 5, 1995, 10:30-11:30 a.m. at Club 55 on Gottingen Street.
>
> If you have any questions, or need further information, please feel free to contact Rocky Jones or Melinda Shaw at 423-8105.

[152] Clearly, the appellants’ announcement condemned the officer’s search of the girls and asserted the strip search as fact. There was no attempt whatsoever to temper the claim by expressing it as an allegation.

[153] Only four persons, Cst. Campbell and the three girls, were in a position to say what happened in the Guidance Room. The officer’s testimony was in marked contrast to the evidence given by the three complainants. As noted earlier, Cst. Campbell was adamant that she did not strip search the girls, but merely asked them to loosen the band on their underwear and did not ask them to expose their private areas. She was questioned and cross-examined at length on her evidence and the record is replete with her description of the events that unfolded. To illustrate, I simply refer to this exchange on direct examination:

> Q: Alright, tell us what occurred then.
>
> A. After I told them I’d like to search them, I went to the girl that was closest to me – in the room, when I entered the room, where I was standing, the three girls were just sort of beside a – I don’t know, I’m trying to figure out how to explain it without showing – but the closest girl that was in front of me, I spoke with and dealt with her first.
>
> Q. Do you know her name?
>
> A. [L.S.].
>
> Q. And tell us how you dealt with [L.S.]?
>
> A. We talked, and I told [L.S.] that I’d like to search her. I proceeded – now, I can’t remember whether she had her jacket on or her jacket was beside her on the desk or chair, and I went

and searched the pockets. So whether she took it off or whether I picked it up off the chair, I'm not sure, but I checked all the pockets. I then proceeded to say I wanted to check her pockets in her pants and stuff. So I, I checked her pockets, out of her pockets that she had on, in her pants. I then, I knew the three girls, one of them had the money stuck in the front part of their pants, in their underwear, from the information I had received outside.

So I explained to her that, "I just want you to open the front of your jeans, and just loosely pull the front of your underwear", because I figured if she had stuck the money in the front of her underwear that it would move and you'd be able to tell. It was just, if it was right there, I'd know. The underwear would just move and you'd be able to tell if there was something stuck right in front of her. So I proceeded to ask that.

Q. How far away would she be?

A. She would be about half (inaudible) – not the distance between us here. I would say three, four feet, probably.

Q. From you to her?

A. Yes.

Q. Okay.

A. Roughly guessing, about that distance, yeah.

Q. And so what did you ask her to do?

A. I had asked her to open the top of her, open her jeans so she could just pull the front of her underwear. When she opened her jeans, they were, you know, the really baggy style of jeans she had on, so that sort of fell down a bit, you know, close to, towards her ankles, but they probably didn't fall to her knees. You know, somewhere there. But she had track pants on ..

Q. Underneath the jeans/

A. ...underneath her jeans. So I, so then I said, "Could you just pull those a little bit?", because I wanted to tell whether there was anything in her, at the bands, you know, with the underwear. So I asked her to do that. And when I asked her to do that, she just

took the track pants and her underwear and just ripped them down towards her knees. And I was quite shocked that she did this, and I quickly said, “Don’t, I don’t want you to do that. Pull them back up.” So she put them back up. And I don’t remember she said just before I had asked her to open the pants or whether it was when she pulled her pants down. I know she said, “Search me”, laughing, telling me to search her.

Q. Mmm hmm. And did you notice anything in her clothing at that time?

A. No, I didn’t see any money, and I was more shocked that she’d actually pulled her pants down as she did. I got her to pull them up right away, which she did. It would be a second or two, or however long it – for me to get it out of [my] mouth to say, “I don’t want you to do that, pull them back up”, and she did it right away. She did that, and after that I asked her if she would remove her sneakers and her socks in case the money was in her pants. I just asked if she would remove them in case it fell down in the motion of the pants and movement that happened. So I checked her sneakers and socks and did not find any money, and I thanked her for doing that.

. . .

Q. Alright, what happened after that?

A. After I dealt with [L.S.], there was still two girls in the room right there, so I said to the next girl – now, I’m not sure which girl was the next girl of the other two girls. I can’t remember the names, which girl was the second girl and which girl was the third girl, but I went to her, and I said, “I don’t want”, I said, “I want to check the same thing, check your pockets of your jacket”, I checked the pockets of her pants, and then I said, “Now, I don’t want you to do what [L.S.] did. I don’t want you to pull your pants down”. I said, “All I want you to do is just undo the top of your pants and just loosely pull the underwear”. Again, if the money was right at the, at the top of her underwear where I was told before I entered, that there’d be some type of movement and you’d notice that there was something there. She

did exactly what I asked. I proceeded to the third girl, and she did the same thing, we went through the same process.

[154] Officer Campbell testified that she then left the room and went out into the hallway to indicate to school officials that she had searched the girls but had not found the money, whereupon either J.-L.F. or T.V., she believed it was T.V., informed her that she had missed the money and that “[L.S.] has the money in her pants”. Consequently, Cst. Campbell testified that she proceeded back into the Guidance Room and said to her:

> ... “ [L.S.], I know you have the money. I want it". So she proceeded to get the money for me. She...
>
> Q. Where did she get the money from?
>
> A. She took her hand, she stuck it down in the front of her pants, and I don't know a polite way to say it other than she put her hand right down in her crotch area and pulled her hand back out, and she had two five-dollar bills in her hand. So when she pulled that out, I wasn't going to just take it in my hands, so I dug into my police jacket, I had a police jacket on, because it was March. So I had my jacket on, and I dug in one of my pockets, because I usually had gloves with me for searching somebody, or if you're dealing with anybody with blood. So I had, they're, like, latex, thin gloves. I took one out, laid it on my hand, and she placed the two five-dollar bills on the glove, and I just wrapped up the two five-dollar bills in the glove.
>
> Q. Did you ever, at any time, put the glove on your hand, wearing it as a glove?
>
> A. No.
>
> Q. What did you do with the money, then, that you had lying on the glove?
>
> A. Well, I just, I wrapped it up, and I explained to [L.S.], I said, "This time, I'm not sure whether the" - Y. W. is the one that lost the $10, so when I first entered she, you know, she just wanted the money back, was her big thing. So I explained to [L.S.], I said, "I don't know if there will be any charges laid". And I

explained to her, you know, if there was going to be any charges that the Youth Court would be in touch.

And so I walked back out, I had the money in my hand, and when I walked back out Y. W. and her mother, Mrs. B., and the two parent assistants were there. I told them that I had, that she gave me the $10, and I'm not sure if it was that time or a little bit later on, I know Y. W. and her mother were talking, and her mother really wanted [L.S.] charged with the theft of the $10.

Q. What color is Y. W. and her mother?

A. They're both black.

[155] Cst. Campbell's evidence was in sharp contrast to L.S.' testimony. L.S. was 18 at the time she testified. She told the jury that she opened the wallet and stole $10.00, in two 5-dollar bills, folded the bills and tried to hide the money by putting the bills within the lips of her vagina. She said Cst. Campbell told her to lift her shirt and started feeling around her bra area and then asked her to pull down her pants and her underwear and she complied so that her pants and underwear were down to her ankles. She said the officer then bent down and looked at her genital area and underneath her legs but didn't find the money. L.S. said that Cst. Campbell then asked T.V. and J.-L.F. to strip in the same fashion so that she could feel around their breasts and check their genitals.

[156] Much the same account was given by T.V. and J.-L.F. T.V. said she could see the two 5-dollar bills sticking out from between L.S.'s legs.

[157] Each of the girls was cross-examined and was shown to have quite different views as to their own individual culpability for stealing money at the school that day or whose idea it was to do it.

[158] This and other evidence was certainly pertinent to the jurors' ultimate determination of credibility.

[159] Much has been said, and justifiably so, about the rights of the three complainants. But what of the rights of the respondent, Cst. Campbell? With great respect, it seems to me that the approach taken by my colleagues in the majority places far too much emphasis on the search per se and fails to address the central

point of this litigation. The law suit with which we are concerned in this appeal was not a claim by the girls against the police officer, her department or the school board for damages arising from, for example, unlawful detention and search. Rather, we are dealing with a claim by the officer that she was defamed by two lawyers who, so she alleged, said her treatment of these girls was motivated by racism, and discrimination based on their economic status and their youth. That is the central issue, the essence of this case. It follows, in my opinion, that the *degree* to which the girls' constitutional rights may have been violated was not central to the issues the jury was required to decide. Rather, having deliberated and made up their minds as to what happened in the Guidance Room, the jurors then turned to the important question surrounding the incident: was Cst. Campbell defamed by either or both appellants and if so were the appellants' published words defensible in law.

[160] Even the most egregious breach of one's **Charter** rights cannot trump the necessary prerequisites to a defence of qualified privilege. One must not forget why Cst. Campbell was at the school. She was investigating criminal activity said to have occurred that morning, two thefts, one of $300.00 and one of $10.00. Upon arrival, officials at the school had told her that the three girls in the room were considered suspects. Evidently with the best of intentions, Cst. Campbell made a serious error in judgment when she chose to proceed with the search without first advising the girls of their Charter rights. It was a mistake for which she acknowledged responsibility and was disciplined by her department.

[161] Whatever Officer Campbell's treatment of the girls, her conduct was the subject of a police investigation, formal discipline and documented reprimand, facts all established and repeatedly emphasized by counsel for the appellants throughout this trial.

[162] However, at the end of the day it was entirely for the jury to decide from the evidence they considered important and reliable what truly happened when the police officer and the three girls were alone in the room.

[163] The much more important question which formed the basis of this litigation arose from the connection drawn by the appellants between the search of the girls and their youth, race and poverty. It was that allegation, linking Cst. Campbell's manner of treating these girls to their vulnerability, poor economic status and skin colour which lay at the heart of this difficult case.

[164] Following the search at the school, Y. W. decided that she wanted charges to be laid against L.S. L.S. was charged and convicted. An absolute discharge was entered.

[165] T.V. and J.-L.F. and their parents or guardians retained Mr. Jones to represent them with respect to a complaint to be filed under the **Police Act** against Cst. Campbell. L.S. and her guardian retained Ms. Derrick.

[166] Subsequent to March 6, 1995, there were certain publications which appeared in local newspapers reporting on the incident at the school, describing it as a strip search, and indicating that a police complaint would be forthcoming. These reports did not allege the motivation for the search to be racism or discrimination on socio-economic grounds.

[167] As we have seen, on April 3, 1995, Mr. Jones filed a formal letter of complaint under the **Police Act** with the Chief of Police respecting the conduct of the search at the school. A similar complaint on behalf of the third girl, which adopted the first complaint, was also filed on April 3, 1995, by Ms. Derrick. The appellants then issued their press release extending the invitation to the press conference. The press conference was held on April 5, 1995. Representatives of the electronic and print media, with national circulation, were present. Mr. Jones and Ms. Derrick circulated copies of their complaints against Cst. Campbell which had been filed with the police. The complaints had been edited to remove references to the names of the girls and their parents or guardians. However, Cst. Carol Campbell's name remained on the complaint.

[168] Mr. Jones or Ms. Derrick read or had read certain open letters prepared by the parents or guardians of the three girls. They made a statement to the media and then responded to questions from media representatives.

[169] The press coverage received enormous publication, being featured in the 6:00 o'clock news of three television stations that evening and being prominently displayed in both the Halifax *Chronicle Herald* and the *Daily News* the next day.

[170] The transcript of the press conference was admitted into evidence and the appellants were questioned at length about their objectives, their tactics and what they said. Although Ms. Derrick and Mr. Jones spoke independently, it seems clear

that each countenanced the views and statements of the other. Certainly that inference was a reasonable one for the jury to draw from the evidence.

[171] In answer to a question at the press conference, Ms. Derrick said:

> And those are certainly trends and features of Canadian society that are replicated in many other places so it is quite a reasonable assumption to make that there is a connection between the race of the girls and their socio-economic status and the events that they were subjected to.

[172] Later on in the press conference this exchange took place:

> FEMALE VOICE: Do you get a sense that young people in general are vulnerable to these kinds of violations of their rights? And they're [inaudible] not having –
>
> MS. DERRICK: Yes. Yes. There is a hierarchy of rights in society and certainly young people would, you know, be at the bottom of the heap. And if you're a young person, you know, who is a member of a visible minority or an Aboriginal person or, you know, black child, then you're likely going to experience increased discrimination.

[173] Similar accusations were made by Mr. Jones who said this:

> FEMALE VOICE: Is there a clear connection between this strip search and race?
>
> MR. JONES: Yes.
>
> Q. How clear is it?
>
> A. I think it's clear that they are all black. All of the children were black. The officer was white. The vice-principal, I do believe is white. And there's no doubt whatsoever in my mind that this would not have happened to white children.

> However, having said that, I do believe that class has a lot to do with this issue also. That because these children are in a community that is basically poor, the school authorities and the police felt that they could trample on their constitutional rights.

[174] On cross-examination at trial Ms. Derrick expressed the view that the police officer and the school disregarded the girls' rights because they were black and because of their socio-economic status. While they deliberately deleted the names of the girls and their parents or guardians in the material that was distributed at the press conference, Ms. Derrick said it didn't bother her at all that Cst. Carol Campbell's identity was not protected. Both Mr. Jones and Ms. Derrick admitted knowing nothing about Cst. Carol Campbell or her beliefs. Each denied saying that Ms. Campbell was a racist or saying anything to suggest or imply that she was a racist. What they intended or understood by the term "racist" was deliberate and overt racism, quite different they said from "systemic racism".

[175] No such distinction was ever made in broadly distributed news reports subsequent to the press conference. For example, the headline in the *Halifax Herald* the next day, April 6, 1995, read "Racism alleged in school strip search". On cross-examination both Mr. Jones and Ms. Derrick testified that allegations of racism were the particular spin or slant put on the story by the press and that nothing they did or said was reflective of Cst. Campbell personally. To illustrate, Mr. Jones said:

> The, the press have their own slant. The press want to sell newspapers and the press want to highlight certain things. We, at the press conference, were aware of race but there's a difference between the awareness of race as I've said before, a big difference between the awareness of race and racism. As I said before, I mean, I didn't know Carol Campbell. I don't know whether Carol Campbell is a racist or not. At that time, it wasn't important to me. I wa - , I didn't raise the issue of racism with respect to Carol Campbell.

[176] Much the same denials were advanced by Ms. Derrick.

[177] These statements by the appellants to which I have referred are, in my opinion, evidence which illustrates that any qualified privilege the appellants may have enjoyed by filing complaints on behalf of their clients with the Deputy Chief of Police, was exceeded and therefore lost by what they said at the press conference.

[178] To repeat the words of Cory, J. in **Hill**, their statements far exceeded the legitimate purpose of the occasion. There was no immediate peril or pressing urgency in the community requiring them to make such volatile and defamatory statements. The circumstances of the case called for great restraint on their part as experienced lawyers and respected members of their community. There was no meaningful attempt made to ascertain the respondent's version of the incident or whether her treatment of the three girls was motivated by the factors the appellants alleged in a public forum.

[179] The appellants had fulfilled their duty as counsel in taking on the case and precipitating an investigation under the **Police Act** by filing their complaints. They ought to have allowed matters to proceed, in confidence, through the procedures outlined in the legislation. In my respectful opinion, and in light of the circumstances of the case, they were duty bound to wait until that investigation was completed before launching such a serious attack upon the respondent, Carol Campbell. There was no emergency which prompted convening the press conference, nor would justify the excessive statements to which I have referred. Persons lives, health or safety were not at risk. It was clearly a case that called for professional restraint and objectivity while inquiries into what actually occurred were officially concluded.

[180] Upon any reasonable reading of the statements made by Mr. Jones and Ms. Derrick at the press conference, it seems hardly surprising that such remarks were interpreted and reported by the media as portraying the respondent to be a racist or motivated by racism in her search of the girls. While the appellants might protest they would have preferred that the media had expressed itself in terms of systemic racism, a person in the position of the respondent could not be expected to draw much comfort from the suggestion that it was not she but rather an amorphous "system" which had been singled out for opprobrium.

[181] It was hardly comforting to be thought of as a member of a group that practised "systemic racism" as opposed to being an "overt" or a "direct" racist. The sting is no less sharp. There is arguably no more vile a label in today's parlance

than to be described as a “racist”. It constitutes one of the most egregious attacks upon character and reputation that one could imagine. It is a human stain and for this generation a scarlet letter.

[182] In all of the leading cases on qualified privilege one is struck by what I would characterize as the courts’ attempt to do justice between the parties. It is a balancing exercise, so as to protect freedom of expression on the one hand and one’s good reputation on the other. This inquiry obliges the trial judge to consider all of the circumstances when deciding in an individual defamation case, where the facts are so important, whether, as a matter of law, the defence of qualified privilege ought to apply. Such a question is obviously of critical importance in a case such as this one where the respondent sued to protect her reputation as a police officer whose personal integrity is the cornerstone of the public trust she holds. The judge’s duty in deciding this question of law is to balance the necessity of ensuring the welfare of the community in keeping it informed on matters of public importance, and protecting one’s good reputation from scandalous attacks.

[183] In **Jones v. Bennett, supra**, at pp. 282-83,Cartwright, C.J.C., after appearing to endorse the trial judge’s rejection of the defence of qualified privilege in finding:

> ...there <u>was no need or duty which required the defendant to make the statement</u> complained of. (Underlining mine)

went on to state at p. 284:

> ...but if in the course of addressing them he sees fit to make defamatory statements about another which are in fact untrue it is difficult to see why the common convenience and welfare of society requires that such statements should be protected and the person defamed left without a remedy unless he can affirmatively prove express malice on the part of the speaker.
>
> However, I do not find it necessary to pursue this line of inquiry further because, assuming although I am far from deciding, that had no newspaper reporters been present the occasion would have been privileged, I am satisfied that any privilege which the defendant would have had was lost by reason of the fact that, as found by the learned trial judge:

> The Premier must have known that whatever he did say would be communicated to the general public. The two reporters sat at a press table in full view of the speaker's table.
>
> In view of the unanimous judgments of this Court in *Douglas v. Tucker* ... and in *Globe & Mail Ltd. v. Boland*, it must be regarded as settled that a plea of qualified privilege 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".

[184] In **Moises, supra,** Williams, J.A. considered the exigencies of the case to be an important factor when deciding whether the decision attracted a qualified privilege. After approving the portion of judgment of the Saskatchewan Court of Appeal in **Sapiro, supra** (already quoted, ¶107), Williams, J.A. observed:

> ¶31 The issue remains, was this an occasion of qualified privilege? Suppose a neighbour of Moises had gone out on the street with a loudhailer and, without malice, shouted "Francisco Nota Moises is a terrorist official". Even if the neighbour had followed this hail by statements similar to those contained in the impugned article, could it be said, merely because of the immigration controversy which had occurred earlier in the year, that this was an occasion of qualified privilege? I think not. If the neighbour could not avail himself of the defence in such circumstances, it follows that the Times-Colonist would not be entitled to the defence despite the controversy that swirled in the press for a number of months.
>
> ¶32 I am not satisfied that, even if the public had a legitimate interest in receiving the information concerning Moises, the Times-Colonist was under a duty to publish the impugned article. <u>This was not, after all, a situation where either Moises or Renamo presented any threat to Canada, or to anyone in Victoria.</u> (Underlining mine)

[185] Thus in **Moises**, there was no urgency, no imminent peril which might otherwise have constituted a duty to publish the impugned article, even assuming the public had a legitimate interest in receiving it. The court also noted, and I would respectfully concur, Justice Cory's emphasis in **Hill** as to the importance of individual reputation. There the court said at p.1179 (from **Hill** at [1995] 2 SCR 1130; 126 D.L.R. (4th) 129 at ¶120):

> Although it is not specifically mentioned in the Charter, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which 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.

[186] Accordingly, and with great respect to my colleagues who take a different view, I would hold that Moir, J.'s decision declining to attach a qualified privilege to this occasion was correct in law. He did not err in too strictly following **Jones v. Bennett** or taking too narrow a view of all of the circumstances. He did not apply too stringent a test nor impose too high a standard. On the contrary, he simply concluded, correctly in my view, that where the speaker chooses a large audience it may be more difficult to satisfy the reciprocal duty and interest analysis that is always required.

[187] Neither would I find that the trial judge erred by failing to find that the appellants' ethical responsibility to speak out was, in this case, sufficient to ground the defence of qualified privilege. Rather, the appellants' duty to inform their community and represent the "disadvantaged" in their dealings with the state was satisfied by their filing the complaint. As we have seen, qualified privilege attaches to an occasion rather than a particular communication. While a citizen's interest in making a complaint regarding the conduct of a police officer is always a significant one, it does not warrant or justify that any and all communications alleging misconduct on behalf of the police officer be disseminated to an indiscriminate audience. The authors of *Gatley on Libel and Slander* confirm at §14.55 that, when making a complaint about a public official, a speaker is not relieved of the responsibility to choose an appropriate audience. (See ¶120 of these reasons, **supra**.)

[188] Further, I disagree with my colleagues that the trial judge erred in overemphasizing the timing of the press conference in his reasons. With respect, Moir, J. did not treat it as the "centre piece" of his decision but rather weighed it as a factor deserving considerable emphasis, a matter clearly within his authority to decide. I cannot conclude that the weight accorded this feature was misplaced. The authorities to which I have already referred, for example **Moises** and **Sapiro, supra**, all recognize that the urgency of the situation is a feature that must be considered in the trial judge's inquiry.

[189] Finally, I do not agree that Moir, J. erred by failing to turn his attention to the several **Charter** rights and values implicated by this case. On the contrary, the respondent's violation of the girls' **Charter** rights was well known. **Charter** values of freedom of speech and equality rights was a central theme in the case mounted by the appellants. Constable Campbell had been disciplined for her actions. The complainants' constitutional rights and the violation of those rights at the hands of the respondent were thoroughly canvassed by the trial judge in his instructions to the jury. These same **Charter** issues were considered in detail by counsel during their oral submissions on qualified privilege and in the exchanges between counsel and the trial judge during argument. Finally, Moir, J. was obviously alive to these issues in his written decision. He began the section dealing with qualified privilege by pointing out:

> Cst. Campbell searched the girls in that room. She did so without warrant or arrest. She did not advise the children of their rights to counsel or their rights not to be searched without warrant or arrest. She did not take steps to see that parents or guardians were contacted, which appears to have been standard procedure in circumstances like these. She later acknowledged her failures and was disciplined...Both lawyers have been involved in human rights advocacy throughout their careers. They saw a connection between the search and race. All three of the girls are black. Cst. Campbell is white. The lawyers and their clients decided to file complaints under the *Police Act* against both Cst. Campbell and the Halifax police department. The complaints would include allegations that race and status played a role in Cst. Campbell's decision to perform very invasive searches. Reference would be made to the *Human Rights Act* and to the equality provisions of the *Charter*.

[190] I think it also important to emphasize again that Justice Moir released his written reasons on August 30, 2001, as a *single* decision divided into four parts, each dealing with a separate segment of the proceedings: first, his amplified reasons for rejecting the defence of qualified privilege; second, his amplified reasons for finding that there was insufficient evidence to put a plea of actual or express malice before the jury; third, pre-judgment interest; and fourth, costs. It would not be fair to parse parts of the trial judge's reasons without taking into account the entire decision nor read it ignoring what else took place during the lengthy trial. Simply to illustrate the

trial judge's careful attention to the proper treatment of **Charter** values and rights in this case, he noted in the section dealing with costs:

> It is obvious that the complaint process progressed and the settlement agreement was achieved conscious of this action and another, which has been brought by the three young women for the violation of their constitutional rights...

[191] While I do not disagree with my colleagues' reference to the importance of the **Charter** issues arising herein, in my view Justice Moir was alert to their implication, gave them due consideration, and need not have said anything more about them in disposing of the defence of qualified privilege.

[192] The appellants are two highly educated professionals, trained as lawyers and respected members of their community. Their remarks were not, by contrast to some of the other cases, an ill-advised response to a personal charge against them, or a hurried answer when confronted by a scrum of reporters. Rather, their statements were given in a controlled environment of their own choosing where one assumes their words would be measured and carefully selected. By expressing themselves as they did, I am of the opinion that the appellants exceeded whatever privilege attached to their complaints. Their words were not prompted by any emergency, peril or compelling need. Like **Hill, supra**, their statements were out of all proportion to the occasion and exceeded any legitimate purpose the press conference may have served.

[193] For these reasons, I would find that the decision of Justice Moir rejecting the claim of qualified privilege was correct in law and should also be upheld because the statements made by the appellants went beyond that which is protected by qualified privilege.

DEFENCES OF JUSTIFICATION AND FAIR COMMENT

Standard of Review

[194] While these two defences also relate to the appellants' published statements at the press conference, we are not here dealing with alleged error on a question of law but rather a complaint by the appellants that Justice Moir's charge to the jury was flawed, thus entitling them to a dismissal of the action or alternatively a variation of the judgment. I would reject these submissions.

[195] I think it is important to introduce this subject concerning the judge's treatment of the two defences in his charge to the jury, with a brief commentary on the general principles applicable to appellate review of a jury charge.

[196] Between them the appellants have made seventeen challenges to the trial judge's instructions to the jury. The defences of justification and fair comment are the two that I intend to address in this part of my decision. The general principles applicable to the review of a jury charge are apposite to each of the challenges advanced by the appellants, and are more conveniently considered here.

[197] It is well established that a jury charge is not to be picked apart and examined microscopically. See for example **R. v. Evans** [1993], 2 S.C.R. 629 at p. 640, and **R. v. W. (D.)**, [1991] 1 S.C.R. 742, at p. 758.

[198] Not every misdirection will result in a new trial. They must be substantial or result in a potential for a substantial wrong or miscarriage of justice before a court will intervene. See **Williams v. Reason**, [1988] 1 All E.R. 262 (C.A.); **Leslie v. Canadian Press,** [1956] S.C.R. 871; and **McLean v. Campbell** (1905), 38 N.S.R. 416 at 426-7 (C.A.).

[199] Delay in raising concerns regarding the contents of a charge to the jury is a factor weighing against interference with the charge. Most recently in **Morriscey v. Zwicker** (2001), 192 N.S.R. (2d) 298, this court observed at ¶33 and 40:

> Any appellant is well advised to remember the over arching principle that a jury charge is not to be parsed, word for word, looking for error as if under a microscope. The entire charge must always be read and considered as a whole.
>
> ...
>
> I am also entitled to take into account the fact that counsel for the appellant failed to raise the issue with the judge following the charge or in any way

> urge that the alleged "error" be corrected. After he completed his charge, Davison, J. provided counsel with the opportunity to address him and express any concerns they had. Other matters were raised by the appellant, but not this one. In *Rogers, supra*, the appellant raised an issue on appeal that was not raised at trial. Freeman, J.A. stated at §16-17:
>
> > The Appellant alleges errors in the jury charge relating to Dr. Loane's evidence, instructions as to past loss of income, the claim for lost wages and earning capacity, and the distinction between earning capacity and loss of future income.
> >
> > At the conclusion of Justice Davison's charge to the jury, after the jury had retired, he asked counsel for their remarks. Counsel for the appellant replied that she had none, indicating the jury charge had met with her satisfaction.
> >
> > In *Royal Bank of Canada v. Wilton et al* (1995), 123 D.L.R. (4th) 266 at page 275, the Alberta Court of Appeal held:
> >
> > > In a civil jury trial, lack of objection with respect to the jury charge and the questions put the jury are a strong factor against a finding of the jury charge as faulty and that a new trial should be ordered.

[200] I emphasize here that with the possible exception of whether the review of evidence was balanced, none of the challenges to the jury charge now being raised by the appellants was put to the trial judge when he invited comment from counsel. While by no means fatal it does give an appellate court a good sense of counsels' level of satisfaction with what they are hearing.

Justification

[201] It should be remembered that the trial judge delayed charging the jury until first hearing four days of submissions from counsel on a variety of legal issues that included the defences of justification and fair comment.

[202] He was careful to point out to the jury the distinct elements of each defence and how they ought to address those elements in their consideration of the evidence.

To illustrate his thorough introduction to the subject I will quote at some length from his charge:

> If you determine, in accordance with the principles that I have discussed with you, that the defendants, or either of them, defamed Constable Campbell by their express words or by innuendo or by both, then you will have to decide upon the defences raised by the defendants. They are called justification and fair comment. These are two separate defences, but they are closely related to one another in the circumstances of this case.
>
> If, when considering the elements of defamation, you decide that words of which Constable Campbell complains would not reasonably be understood to refer to her, or if you decide that there were no defamatory statements or innuendos, then that is the end of the matter and you do not go on to consider defences.
>
> If, however, you decide that the words complained of were defamatory of Constable Campbell, then, obviously, you have to turn to the defences. In this regard, you will need to be mindful of which words you have found to be defamatory and which, if any, innuendos were established and found to be defamatory.
>
> You will have noticed that so far we have not discussed whether there was truth in any of the statements complained about. That is because, if you are satisfied by the plaintiff on a balance of probabilities that there was defamation, then the defamatory statement or inference is presumed to be false. If the defendants maintain, or either of them maintain, that any statement that you find to be defamatory was, in fact, true, they must prove that to you on a balance of probabilities. The onus of proof is upon the plaintiff as regards the elements of defamation. The onus of proof is upon the defendants as regards the defences we are about to discuss.
>
> The defendants plead the defence of justification only in a limited way. You will see that this is also related to the defence of fair comment. The defendants do not maintain that Constable Campbell is a racist or that she is motivated by racism or that she discriminated in the conduct of her duties on the improper grounds as specified. The defence of justification is raised only to prove the truth of allegations respecting the way the children were searched and the privacy afforded to them. This is why we stopped one witness, Mr. Smith, from testifying about the way Constable Campbell

generally treats people of colour compared with white people. No one is attempting to approve...no one is attempting to prove anything against Constable Campbell in that regard. So, whatever Mr. Smith would have had to say on that subject is simply irrelevant to the issues that you have to decide.

As you will see, the defence of justification and the defence of fair comment overlap in this case. I will return to the written materials and remarks at the press conference and discuss them in greater detail when I instruct you on the law of fair comment. However, to determine the defence of justification, you must consider the whole of what was written and said on the limited subjects delineated by the defences, which do not concern race, status or discrimination...delineated by the defence of justification, I should say. You should have reference to the amended defence of Ms. Derrick at Tab 7, if you want to make a note of that, of the book of pleadings, and the order further amending that document, which is at Tab 30, in order to see exactly how the defence of justification for Ms. Derrick is delineated, and with respect to Mr. Jones, you should refer to the Second Amended Defence, which is at Tab 31. You will see that the latest changes in that pleading and the order in respect of the other one identify clearly for you what is the setup for justification and its limits. Generally speaking, these pleadings put in issue the way Constable Campbell is said to have searched the girls, including removal of clothes and privacy afforded by the room. You are not here concerned with references to race or socio-economic class, because those are not sought to be justified by the defendants, and you are not concerned with the legality of the search, because references of that kind are no longer alleged by the plaintiff to be defamatory.

The complaint prepared by Mr. Jones, the complaint prepared by Ms. Derrick, the letters from parents and the guardian, and the remarks made by Mr. Jones and Ms. Derrick all do, I believe, contain the word “strip” or the words “stripped search” or the words “strip searched” or “strip searching”. Of course, you will understand these references in their full context which will include milder descriptions than what some might take “strip search” to mean in other contexts. During the conference, Mr. Jones provided these details:

- one girl lifted her skirt and pull down all of her clothes, including her underwear;

- the police officer could see that girls' private parts;
- the other two girls had to pull down their clothes;
- the girls are prepared to swear that they had to remove their clothes.

Ms. Derrick stated that the search was a "matter of fact" and she used the word "methodical". In the complaint letter on behalf of her client, Ms. Derrick referred to "a pat search around her breasts" and being "required to take off her pants and other layers, including taking down her underwear", and Mr. Jones said, in the complaint on behalf of his client, that the children he represented "were instructed to remove their clothes...exposing their private parts".

If, after understanding all references to removal of clothes in their context, you are satisfied that Constable Campbell has proved that she was defamed by the defendants in that regard, you will have to go on to determine whether the statements were justified. You will have to determine whether the defendants have established, on a balance of probabilities, that the defamatory meaning of those words is justified as true. If the defendants have established this, then they will have overcome the presumption of falsehood that would arise if you found the words on the subject of removing clothes to have been defamatory. Justification would provide a complete defence to that aspect of the allegedly defamatory statements.

The defendants do not have to prove the literal proof of all that was said on the subject of removing clothes. Substantial truth is the test. The justification must meet the gist or the sting of the allegation. You will answer the question whether the remarks concerning the removal of clothes are justified as true by deciding whether the whole of those remarks are substantially true...whether the whole of those remarks are substantially true. To decide that, you must determine what happened in the guidance room that day in March of 1995.

[203] The trial judge then embarked upon a lengthy and balanced review of the evidence in order to assist the jurors with this part of their deliberations. He concluded this portion of the charge by saying:

Some of the evidence concerning the legality of the search is circumstantially relevant to facts sought to be justified. You will want to

> consider all of the relevant evidence together, but I shall review this evidence just a little later on.
>
> So, that concludes the review of the evidence as noted by me on the subjects of removal of clothes and privacy, subjects generally for your determination under the defence of justification. Again, I refer you to the pleadings for the exact delineation of the defence of justification. If you found the statements and the words complained of regarding these subjects were defamatory, and if you found that these words have been justified as true according to the principles I discussed earlier, then that is the end of that aspect of the case for defamation. If you found that the remarks concerning race or socio-economic status were defamatory, you would still have to consider the next defence, fair comment.

[204] In my opinion, the trial judge properly instructed the jury on the defence of justification and there is no merit to this ground of appeal.

Instruction on "Strip Search" and Privacy

[205] The appellants complain that the judge erroneously instructed the jury that it ought to consider the allegations with respect to privacy and that in order to establish the defence of justification the appellants had to prove the truth of the privacy allegations. This instruction, so the appellants allege, was wrong and misleading in light of what they say amounted to a concession by the respondent's counsel that the only justification issue was in relation to the "strip search".

[206] With respect, I disagree with the appellants' characterization. This being an action in defamation, the matters in issue were framed by the contents of the defamatory statements. I view the extracted exchanges between counsel for the respondent Mr. MacDonald as nothing more than Mr. MacDonald's attempt to summarize the pleadings. His reference to "strip search" was simply to draw a distinction between the allegations concerning the *nature* of the search – what, if any, clothing was required to be loosened or removed – and the *legalities* of the search. It seems clear to me that all Mr. MacDonald was saying was that the **Charter** violations or legality of the search were not to be considered as being in dispute. Mr. MacDonald was in no way conceding an amendment to his pleadings.

[207] Given the allegations made in the statements by Jones and Derrick at the press conference (*i.e.* that the girls had been "strip-searched", and that there was a lack of privacy in the room—portions of the statements which the Defendants conceded were statements of fact), Moir J. chose to divide the factual statements made by Jones and Derrick into two "headings" for the sake of clarity. Earlier in the trial, Jones and Derrick had clarified their pleading on justification by making it clear that they only sought to justify certain portions of their statements—these were the portions of the statements which even they, apparently, viewed as being indisputably statements of fact. With respect to the allegation of strip-search, the parties' agreement that this was a factual allegation which needed to be justified is on the record.

[208] When he described the requirements of the defence of justification, Moir J. was careful to explain to the jury how limited Jones' and Derrick's pleas of justification were. He instructed the jury that the pleas extended only to allegations about the extent of the search and the degree of privacy in the room. He described one aspect as "removal of clothes", and made use of this compendious term so that he could deal with both the text of the allegedly defamatory statement and the evidence with minimal confusion. Thereafter, he could use the term "removal of clothes" to refer to all of the various statements made by Jones and Derrick, in varying language, relating to the extent of the search, while making it clear that he was not referring to Jones' and Derrick's other statements relating to "race" and other factors. Rather than repeating the particular words again and again, Moir J. simply chose a label for the sake of convenience and clarity. The meaning of the term "strip-search" was very much in issue before the jury, and Moir J. was appropriately leery of using that term to instruct the jury. I am satisfied that using a term like "removal of clothes" was an appropriately uncontentious substitute.

[209] The choice of that label also allowed Moir J. to give clear instructions to the jury with respect to the evidence that would be relevant to their decision on justification. He found it convenient to speak about the evidence of Campbell, J.-L.F., L.S. and T.V. under the same two headings: (1) removal of clothes; and (2) extent of privacy. This symmetry no doubt made the instructions much clearer for the jury, and helped to clarify which evidence was related to which issues. Presumably, Moir, J. also settled on the term "removal of clothes" in part because it was sufficiently unspecific to include both the minimal re-arrangement of clothes described in Campbell's account of the search, and decidedly more intrusive searches described by L.S., J.-L.F. and T.V.. He could then refer to the "evidence

relating to the removal of clothes" without intimating in any way to the jury whose version of events he might favour.

[210] In conclusion, I find that Moir J.'s choice of vocabulary in his jury charge was perfectly balanced and fair, and effectively gave the jury a clear description of the issues before them. By using the term "removal of clothes" from time to time in his instructions, Moir J. was merely using apparently uncontentious language, which the Appellant Derrick now seeks to make a bone of contention on appeal. It is, with respect, ironic that the trial judge's efforts to be scrupulously fair have been attacked as a source of unfairness. This ground of appeal should be dismissed.

Privacy

[211] The Appellant Derrick makes the same arguments as those in relation to "removal of clothes" with regard to the trial judge's instructions in reference to "privacy".

[212] In particular, she alleges that Campbell's counsel "stipulated that, 'leaving racism aside', the only words which were complained of as being defamatory were 'strip search'". For the reasons outlined above, there is simply no merit to this position.

[213] Further, here again, the statements impugned by the pleadings clearly include references to lack of privacy:

> There was a complete disregard for the privacy of the girls involved. (...) This was ordered in the presence and clear view of one another.
>
> The girls were told to remove their clothes in an unsecured area that was totally inappropriate for a strip search.
>
> **...**
>
> So there is absolutely no real privacy in the room where they were being searched. (...) This was done in front of the other two girls and obviously in view of the – anyone in the hall way.

[214] Finally, the question of the privacy afforded the girls during the search was part and parcel of the allegation that an improper strip-search was carried out. It relates directly to the nature of Cst. Campbell's conduct. It is an allegation that is so interwoven with the strip-search allegation that it cannot be divorced from it. Therefore, the truth of these statements was clearly directly relevant to the questions of defamation and justification.

[215] In conclusion, the pleadings in this case unequivocally placed the question of privacy in issue. The trial judge's instructions on this were appropriate and should not be disturbed.

[216] I would dismiss each of the several grounds of appeal concerning alleged error in charging the jury on the defence of justification, as being without merit.

Fair Comment

[217] I now turn to the appellants' assertion that the judge's charge to the jury on the defence of fair comment was fatally flawed. I would dismiss this ground of appeal. As each of the appellants has raised different arguments in support of this ground of appeal, I will address their submissions separately. I emphasize, again, that neither appellant raised an objection to this aspect of the charge.

[218] Again, to illustrate the thoroughness of the judge's charge I will quote at length from the part of his directions dealing with this defence:

> Fair comment is a defence available to a defendant – you will notice we are a little further on now in the outline – so, we are into (3), the defence of fair comment, and as you can tell from the outline, there are three elements to that, or three issues that need to be decided by you. As I was saying, fair comment is a defence available to a defendant in a defamation action, in order that a person's right to hold and express opinions should be protected. The onus is on the defendant, and the defence must be established on a balance of probabilities by them.
>
> Of course, you will not reach this point unless you have found that some or all of the words complained of were defamatory of Constable Campbell as against the defendant, Mr. Jones, or as against the defendant, Ms. Derrick. Within limits, the defence of fair comment permits one to express a

defamatory opinion. In explaining the defence, I will refer to defamatory comment and defamatory assertions of fact. Please bear in mind that I am speaking hypothetically. I am not suggesting my own opinion on whether any of the words complained of were defamatory. That is for you to decide.

Firstly, you must decide whether words you have found to be defamatory were put forward by the defendant as a comment, or a statement of opinion, rather than a statement of fact. Secondly, if defamatory statements were comment, you must decide whether the facts stated in support of the comment were true in substance. Thirdly, if defamatory statements were comment and were supported by the facts, you must decide whether the defendants, or either of them, had an honest belief in the opinion put forward as comment. I want to repeat that for you. First, you must decide whether words you have found to be defamatory were put forward by the defendants as comment or a statement of opinion rather than a statement of fact. Secondly, if defamatory statements were comment, you must decide whether the facts stated in support of the comment were true in substance. Thirdly, if defamatory statements were comment and were supported by the facts, you must decide whether the defendants, or either of them, had an honest belief in the opinion put forward as comment. You are to decide each of these points on a balance of probabilities, the onus being on the plaintiffs...on the defendants.

You will see that these three points are noted in my outline. There is a fourth element. The subject under discussion has to have been one of public interest. You do not decide that issue. It is common ground in this case if the subject was of public interest.

Turning to the second point, the defence protects comment or criticism..I'm sorry...turning to the first point, the defence protects comment or criticism. It does not protect allegations of fact. It allows for criticism of the proved acts of a person, not the assertion as fact of particular acts of misconduct. The defamatory statement which is protected is the expression of opinion about facts, not the assertion of a fact. So, you must decide whether a defamatory statement was comment rather than fact.

You may regard the statements identified by the limited defence of justification as assertions of fact. On the whole, you can take the statements and the written materials and the remarks at the press conference about removal of clothes and the surrounding circumstances of

the room to be assertions of fact. Also, the statements concerning violations of rights and the lack of professionalism are not put forward by the defendant as defamatory, and you need not concern yourself with those as being fact or comment, for the purpose of deciding the first issue.

The effect of the pleaded defences of justification and fair comment is to focus your attention on the statements concerning race and socio-economic status as being either assertions of fact or assertions of opinion. The plaintiff's position is that these are statements of fact and, if that is so, the defence fails (assuming, of course, that you have found those statements to be defamatory or you have found that they gave rise to any of the pleaded innuendos as defamatory).

The defendants' position is that those statements are comment. If that is so, you will have to proceed to the next elements in the defence of fair comment.

In order for the defendants to succeed on this first element of the defence, the evidence must demonstrate with reasonable clarity that the words are comment and not statements of fact. If you find that the statements concerning race and status in the words complained of were defamatory, you will have to decide whether the remarks have been shown to be comment.

To determine whether the statements about race and class were fact or opinion or comment, you should consider the whole of what was communicated at the press conferences, and ask yourselves whether the statements would be recognizable to an ordinary, right-thinking member of society as a comment upon facts and not as a bare statement of facts. A comment is a statement of opinion about the facts. It often appears as a deduction, an inference, conclusion, criticism, judgment, remark or observation. It is a subjective evaluation of fact. A statement of fact is more open to objective testing.

In determining whether a statement is comment, you must examine the totality of the circumstances and the entire context in which the statement was made. Again, you are to consider the press conference as the evidence showed it to be, both in terms of the written materials and the defendants' remarks. The audience is part of the context. The speakers, particularly Mr. Jones and Ms. Derrick, are part of that context.

> It cannot be determinative of the question, but the extent to which the remarks contain phrases indicating opinion may assist you in deciding whether the statements were opinion. References to “I believe”, “She thinks”, “We take the position that”, tend to indicate opinion. There are references of that kind in the words complained of and elsewhere in the materials and remarks at the press conference. You should consider the stated qualifications and the extent to which they were or were not cautions indicating opinion.
>
> Similarly, you should consider the extent to which the materials and remarks separated fact from opinion. If the statements concerning race and status are so bound up with allegations of fact that the reader and hearer cannot distinguish fact from comment, then you may not be satisfied the defendants have demonstrated those statements to have been comment. On the other hand, in examining the materials distributed at the press conference and the remarks, to the extent they have been evidenced, you may find that statements of fact have been reasonably separated or distinguished from opinions regarding race and status.
>
> As I said, you must assess these statements in their whole context. You must not isolate any one sentence which standing literally and on its own would be an assertion of fact or an assertion of opinion, and allow that to be determinative. Look at all that was said. Would it convey to the audience that what was being said about race or status was established fact or was the speaker’s and writer’s opinion? ...

[219] I can find no error in the judge’s instructions on the law of fair comment. He followed with a detailed and balanced review of the evidence in order to assist the jury in its assessment of this defence.

[220] Mr. Jones argues that the judge’s directions to the jury on fair comment were flawed for two reasons: first, because the charge did not instruct the jury that Cst. Campbell’s counsel had made an alleged legal error in his submissions to the jury; and, second, because it instructed the jury to consider whether Jones honestly believed any of the innuendo meanings pleaded. The crux of both submissions is that any innuendo pleaded must amount to comment and cannot be found by the jury to be fact. This issue was not raised by counsel after the jury charge was completed.

Further, in pre-charge submissions, all parties agreed that all statements other than those related to the alleged strip search were capable of being comments or fact.

[221] I would find that there is no merit to this submission by Mr. Jones as there is no basis in law for the proposition that an innuendo, or the innuendoes in this case, cannot be found to be assertions of fact.

[222] The statement of claim makes the following allegations after setting out each of the statements alleged to be defamatory:

> The said words are defamatory in their natural and ordinary meaning.
>
> In the alternative, the said lines are defamatory in their natural and ordinary meaning in that the words meant and were understood to mean that the Plaintiff:
>
> (a) is racist or, in the alternative,
>
> (b) is motivated by racism or, in the alternative,
>
> (c) discriminated in the conduct of her duties as Constable on improper grounds including race, economic status, and social status.

In light of these pleadings, which amount to a plea of false or popular innuendo, Cst. Campbell's counsel had pointed out to the jury that they could find that the statements bore the meanings alleged, namely the "racism and discrimination meanings".

[223] The respondent further noted that the jury could find that the racism and discrimination meanings amounted to statements of fact given that the statement of defence did not plead justification in relation to such statements of fact. Mr. MacDonald therefore, correctly in my view, indicated to the jury that if they made such findings, they need not consider the defence of fair comment but should proceed directly to an assessment of damages.

[224] The question of whether something amounts to fact or comment is clearly within the province of the jury. See, for example, **Vander Zalm v. Times Publishers** (1980), 18 B.C.L.R. 210 (B.C.C.A.); and **Pound v. Scott,** [1973] 4 W.W.R. 403 (B.C.S.C.). As pleaded and as stipulated by counsel in their pre-charge

discussions with the trial judge, it was open to the jury to treat the racism and discrimination meanings as statements of fact, for which a specific averment of the truth would be required in order to rely on the defence of justification. The fact is that the appellants chose to defend against such a potential meaning, not on the basis that it was true or justified, but rather on the basis that the words complained of "do not mean and were not understood to mean that the plaintiff was racist, motivated by racism or discriminated against persons in the conduct of her duties as constable on improper grounds including race, economic status and social status". In doing so, the appellants took the risk that the jury would disagree and conclude that the innuendo meanings were defamatory allegations of fact. As stated in **Brown**, **supra**, ¶15.3(2):

> Where, however, the facts and comments are intertwined so as to become indistinguishable from each other, the court must determine whether the defamatory sting is in the one or the other. (...) In such a case, the defendant must accept the risk that what he or she has framed as an expression of opinion might reasonably be perceived by the public as a statement of fact, to which the defence of fair comment will not attach. (Underlining mine)

[225] Accordingly, I find that Mr. Jones' complaint that the trial judge ought to have given a specific and pointed direction that Cst. Campbell's counsel was wrong in his jury summation, to be untenable. For the same reasons I would reject the complaint that the trial judge's instruction was inadequate in relation to this issue.

[226] Mr. Jones' second submission alleges that it was an error for the trial judge to have instructed the jury that it could consider whether Mr. Jones had an honest belief in the innuendo meanings. In his charge to the jury, Moir, J. directed:

> I am required to instruct you on how to treat innuendo as going to honest belief in the circumstances of this case. In dealing with the case for defamation, you may come to the conclusion that one or more of the extended meanings alleged by Cst. Campbell are implied by the words actually spoken by Mr. Jones or Ms. Derrick. They have both indicated that they do not believe any of those things of Cst. Campbell. So, they could not have had an honest belief in any innuendo you may find.
>
> My instruction is that is not enough for a finding of no honest belief. If in their actual words Ms. Derrick or Mr. Jones were expressing her or his

> honest belief, it does not matter that the words, in fact, carry derogatory imputations. They may honestly express themselves even though other people may read more into what they say. However, if in light of all the relevant evidence, you are satisfied that Ms. Derrick or Mr. Jones knew their words would be taken in any of the three extended meanings then you cannot find honest belief. (Underlining mine)

[227] In support of this submission, the appellant Jones relies on the following passage from **Slim v. Daily Telegraph**, [1968] 1 All E.R. 497 (C.A.) at p. 503:

> In considering a plea of fair comment, it is not correct to canvass all the various imputations which different readers may put on the words. The important thing is to determine whether or not the writer was actuated by malice. If he was an honest man expressing his genuine opinion on a subject of public interest, then no matter that his words conveyed derogatory imputations: no matter that his opinion was wrong or exaggerated or prejudiced; and no matter that it was badly expressed so that other people read all sorts of innuendoes into it; nevertheless, he has a good defence of fair comment. His honesty is the cardinal test. He must honestly express his real view. So long as he does this, he has nothing to fear, even though other people may read more into it.

With respect, in my opinion the appellants' interpretation of this passage, by focusing on the use of the word "imputations", fails to take account of the key point made by Denning, M. R., namely that the appellants' state of mind is the very gravamen of honest belief. I find no error in the trial judge's charge to the jury which properly directed them to determine the state of mind of the appellants as to the meaning likely to be imputed to their comments, since it is relevant to the honesty of their beliefs therein.

[228] The appellant Ms. Derrick argues that the trial judge erroneously instructed the jury that it had to find that all of the facts contained in the impugned statements had to be proven in order that the defence of fair comment prevailed. Again, this point was not raised with the trial judge after the charge to the jury.

[229] I would reject this submission as being entirely without merit. Indeed, the trial judge gave a clear instruction to the contrary effect:

> So, it is sufficient if the facts stated by Ms. Derrick at the time of the press conference in support of the comments regarding race and status are proved to you to be substantially true, and so with the facts stated by Mr. Jones. The defendants do not need to prove that each and every stated fact that you can ascertain from the press conference is true. They must prove that the stated facts upon which the comment was based are substantially true. (Underlining mine)

[230] The appellant Derrick says that while this portion of the charge is proper in substance, the jury may nonetheless have been misled into placing undue emphasis on peripheral facts, because the trial judge went on to review the facts contained in the statements. This submission fails to recognize that it was for the jury, and not the appellants or the trial judge, to determine which facts were significant and which were peripheral. As Moir, J. reminded the jury on more than one occasion, the weighing of the evidence was a matter entirely within their province.

Innuendo

[231] Both appellants have advanced grounds of appeal relating to the trial judge's decision to allow each of the three innuendos pleaded by Cst. Campbell to be put to the jury.

[232] As I have already explained, in her statement of claim Cst. Campbell alleged a "false" or "popular" innuendo with respect to the words published by Mr. Jones and Ms. Derrick. This pleading was an allegation that the words spoken by Mr. Jones and Ms. Derrick, in their natural and ordinary meaning, meant or would have been understood to mean that Cst. Campbell was a racist; or was motivated by racism; or discriminated against the complainants in the conduct of her duties as a police officer on improper grounds.

[233] The parties made submissions to the trial judge on the innuendo issue during post-trial submissions on April 27, 2001. This segment of the argument was included

in a more general discussion of “publication issues”, which included most of the elements of the *prima facie* case and defamation.

[234] After hearing the submissions of the parties Moir, J. concluded his decision with respect to innuendo by stating:

> I am satisfied also that the words are capable of defamatory meaning, and that the words are reasonably capable of bearing each of three extended meanings alleged by the plaintiff.

Justice Moir made no mistake in arriving at this conclusion.

[235] It is well established that deciding the meaning of allegedly defamatory words is a matter falling within the exclusive jurisdiction of the jury in a defamation trial. As regards any pleaded innuendos, the trial judge’s only responsibility is to decide a “threshold question”. That question is whether the words spoken by the defendant(s) are reasonably capable of bearing the extended meanings alleged by the plaintiff. This threshold inquiry is sometimes referred to as the trial judge’s “gatekeeper function”. See, for example, **Laufer v. Bucklaschuk** (1999), 181 D.L.R. (4th) 83 (Man. C.A.).

[236] In deciding whether the words are capable of conveying a defamatory meaning, the court should reject those meanings that can only arise from a forced or entirely unreasonable interpretation. **Jones v. Skelton**, [1963] 1 W.L.R. 1362 (PC).

[237] In **Lewis v. Daily Telegraph Ltd.** , [1963] 2 All E.R. 151 (H.L.) Lord Devlin considered the trial judge’s gatekeeper function when multiple extended meanings are pleaded, as they were in this case:

> ... In the result, I think that all Your Lordships are now clearly of the opinion that the judge must rule whether the words are capable of bearing each of the defamatory meanings, if there be more than one, put forward by the plaintiff. This supports indirectly my view on the desirability of pleading different meanings. If the plaintiff can get before the jury only those meanings which the judge rules as capable of being defamatory,

> there is good reason for having the meanings alleged set out precisely as part of the record. (at p. 174-75).

[238] Lord Diplock made much the same point in his reasons in **Slim v. Daily Telegraph Ltd., supra,** at p. 506:

> Where an action for liable (sic) is tried by judge and jury, it is for the parties to submit to the jury their respective contentions as to what is the natural and ordinary meaning of the words complained of, whether or not the plaintiff's contention as to the most injurious meaning has been stated in advance in his Statement of Claim. It is for the judge to rule whether or not any particular defamatory meaning for which the plaintiff contends is one which the words are capable of bearing. The only effect of an allegation in the Statement of Claim as to the natural and ordinary meaning of the words is that the judge must direct the jury that it is not open to them to award damages on the basis that the natural and ordinary meaning of the words is more injurious to the plaintiff's reputation than the meaning alleged, although if they think that the words bear a meaning defamatory of the plaintiff which is either that alleged or is less injurious to the plaintiff's reputation, they must assess damages on the basis of that natural and ordinary meaning which they think is the right one.

[239] These same principles apply in Canada. For example, in **Allan v. Bushnell T. V. Co. Ltd.** (1969), 4 D.L.R. (3rd) 212, the Ontario Court of Appeal found that the trial judge in a defamation action erred when he simply submitted a number of innuendo meanings to the jury, without having first considered whether the words complained of were capable of bearing each of the extended meanings pleaded by the plaintiff.

> [The trial judge] would not appear to have considered each innuendo separately or determined in his own mind if the words published were reasonably capable of being given the extended meanings assigned to them by the plaintiff ... I merely wish to emphasize the point that the innuendos as pleaded should not have been given to the jury unless the learned trial judge was of the opinion that the words used were reasonably capable of bearing the extended meanings assigned to them. (at p. 221-222)

[240] As these cases make clear, the trial judge's responsibility when considering innuendo meanings in a defamation action is to turn his mind to each of the extended meanings and decide whether the words complained of are capable of bearing each of the extended meanings. It seems perfectly clear from the record that Moir, J. asked the correct question and concluded that each of the pleaded innuendos should go to the jury, as meanings which the words published by Mr. Jones and Ms. Derrick could reasonably bear.

[241] In summary, there is no merit to any of the arguments put forward by the appellants alleging error in the judge's charge on the issues of justification, fair comment, or innuendo. These grounds of appeal are dismissed.

EVIDENTIARY RULINGS

[242] Among the several grounds of appeal advanced by the appellants, five may be categorized as challenges to evidentiary rulings made by Justice Moir during the course of the trial. I have identified them as follows, but before dealing with each individually it would be helpful to review the legal principles that are applicable to such challenges.

[243] I will identify the so-called evidentiary rulings challenged by the appellants as:

1. Admitting portions of the Mosher Report;
2. Refusing to admit portions of the expert reports;
3. Refusing evidence of Ms. Derrick's opinion as to the existence of reasonable and probable grounds for arrest;
4. Refusing evidence relating to a monetary demand contained in without prejudice correspondence;
5. Refusing Ms. Derrick's evidence regarding the complainant [L.S.'s] reasons for moving to another jurisdiction.

Standard of Review

[244] In *The Law of Evidence in Canada*, Sopinka, Lederman, Bryant, 2nd Ed., Toronto, Butterworths (1999), the authors state at p. 23:

> A piece of evidence must satisfy a number of requirements before it can be considered by the trier of fact in the ultimate deliberation on the facts in issue in a civil or criminal proceeding. Once it meets these requirements the evidence can be received by the Court. To be received, evidence must meet two basic requirements. First, it must be admissible. Second, the trier of law must not have exercised his or her judicial discretion to exclude the evidence. Two further concepts make up the principle of admissibility. Evidence is not admissible unless it is: (1) relevant; and (2) not subject to exclusion under any other rule of law or policy.

[245] Consequently, there are two levels of decision making involved when deciding whether to admit evidence. First, the trial judge must make an initial decision as to whether the evidence is admissible. This involves an initial decision as to whether the evidence is relevant and, if it is, going on to decide whether it is subject to any exclusionary rule. Second, if the evidence is admissible, the trial judge must then decide whether to exercise a discretion and exclude it in any event. As such there are both legal and discretionary components when deciding whether to admit evidence. This duality is significant in appellate review.

[246] With respect to the discretionary component of this decision making process, the Supreme Court of Canada recently affirmed the decision of the Ontario Court of Appeal to the effect that such decisions are not matters of law reviewable on a correctness standard. In **R. v. A.R.B.** (1998), 41 O.R. (3d) 361, at 367 (C.A.), aff'd [2001] 1 S.C.R. 781, the Court of Appeal refused to overturn the decision of the trial judge excluding evidence as to whether the complainant in a sexual assault case had been previously assaulted. Justice Finlayson for the majority stated at p. 367:

> The type of evidence proposed by the appellant engages the rule against the collateral facts and is subject to the general discretion of a trial judge to exclude evidence where its probative value is outweighed by its prejudicial

> effect. In this regard, prejudice to the trial process is to be considered in addition to the prejudice that might arise with respect to any party or witness to the proceeding.
>
> The exercise of such discretion is not a question of law and the trial judge did not err in law by excluding the proposed evidence. (Underlining mine)

[247] Similarly, in **R. v. B. (C. R.)**, [1990] 1 S.C.R. 717, the Supreme Court described the standard of review to be applied to this exercise of discretion as a deferential one at pp. 738-39:

> In these circumstances the view taken by this Court in *Morris* and affirmed in subsequent cases applies in this case, namely, that deference must be paid to the trial judge's conclusion on where the balance between prejudice and probative value lies with respect to a particular piece of similar fact evidence...
>
> While I may have found this case to have been a borderline case of admissibility if I had been the trial judge, I am not prepared to interfere with the conclusion of the trial judge, who was charged with the task of weighing the probative value of the evidence against its prejudicial effect in the context of the case as a whole.

[248] Most recently in **671122 Ontario Ltd. v. Sagaz Industries Canada Inc.**, 2001 SCC 59, while reviewing a trial judge's decision not to reopen a trial to hear new evidence, Major, J. writing for the court stated at ¶60:

> This Court provided in *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092 (S.C.C.), at para. 26:
>
> > It has long been established that, absent an error of law, an appellate court should not interfere with the exercise by a trial judge of his or her discretion in the conduct of a trial.

[249] In **Temple v. Riley** (2001), 191 N.S.R. (2d) 87 (C.A.) , this court affirmed that it will not interfere with the exercise of a trial judge's discretion unless a wrong principle of law was applied or a patent injustice would occur.

[250] I will turn now to the five evidentiary rulings challenged by the appellants.

1. Admitting portions of the Mosher Report

[251] Some background would be helpful. As indicated by the trial judge in his charge to the jury, the three girls and their parents and guardians filed complaints under **The Police Act**. The first level of response to such complaints was to carry out an internal investigation. This was done by Sgt. Gregory Mosher and resulted in his completing a report (the "Mosher Report"). Sergeant Mosher concluded that Cst. Campbell had engaged in discreditable conduct by failing to read the girls their rights and failing to tag evidence. His report did not, however, find that other aspects of the complaint dealing with the nature of the search of the young girls, were well founded. The Mosher Report was sent to both Mr. Jones and Ms. Derrick. Each of the appellants reviewed it with their respective clients as part of their decision to appeal to the Police Commission. Following the completion of the internal investigation, a complainant may pursue the matter further by way of appeal to the Commission.

[252] The appellants allege that the trial judge erred in admitting portions of the Mosher Report. I disagree. At trial, counsel for Cst. Campbell sought to rely upon this report in cross-examining Mr. Jones as to his state of mind and motivation for pursuing the **Police Act** complaint during both the investigative stage and the subsequent Commission appeal. As the Mosher Report was an important step in this process, the conclusions therein as to the issues raised by the complaints were, in my opinion, clearly relevant to Mr. Jones' state of mind which was in turn directly relevant to the ultimate issues of justification, malice and fair comment.

[253] It is important to emphasize that Moir, J. refused to admit the entire Mosher Report. He stated:

> The report has relevance to two backbone issues. One is it's (sic), helps to delineate the issues that were under appeal or that were subject to review under the *Police Act*. The other is it goes to Mr. Jones' state of mind and motivation but only at the time, at a time well after the press conference and after suit.

> In my opinion, the parts of the report referred to by Mr. Ryan and Mr. Outhouse are extremely prejudicial, would never be admitted for their contents....
>
> I am prepared to review the statement again to see if it can be, if we can isolate those parts which make it clear what issues were under appeal so that those might be put verbally to Mr. Jones and confirmed or otherwise by him. (...)
>
> I do think that defining with precision the issues that were under review with the Police Commission is relevant, given the extent of testimony provided by Mr. Jones in direct as well as accomplished through that process.

[254] After entertaining further submissions, the judge held that an edited version of the report was admissible for its relevance to the status of the **Police Act** complaint and to Mr. Jones' state of mind following receipt of the report. The judge stated;

> The other parts of the report were excluded on the basis of prejudicial influence outweighing probative value. I see the part which is called response to the complaint is going to both issues of Mr. Jones' understanding at the time which I see as being relevant, though not necessarily central, and to the issue of defining the issues that were left for, they were brought forward on review (inaudible).I do not see trying to part of, that part of the report nor do I see that it contains material that is significantly prejudicial. I think the Jury can be appropriately instructed at the end as to how to approach this document and I'm prepared to allow it to be put to the witness for both purposes subject to the one revision Mr. MacDonald suggests. (Underlining mine)

[255] It is important to remember that the judge had made two earlier rulings dealing with the Mosher Report. First, he did not permit certain portions of the report to be used in conducting the direct examination of Cst. Campbell. At that point it was also clear, however, that the issue of admitting the report would be revisited during the cross-examination of Mr. Jones since Cst. Campbell's counsel made it clear that he intended to rely upon the report at that time:

> Mr. MacDonald: Those are to be removed on what basis, My Lord? If Mr. Jones received the document and read it, then surely he's entitled to question...
>
> The Court: Alright. We'll deal with that when the time comes, Mr. MacDonald.

[256] The trial judge had also prohibited any cross-examination relating to a conclusion in the Mosher Report to the effect that the young complainants were "deceptive". The judge ruled that there was no basis in the evidence upon which this statement could be put to Mr. Jones and that, in any event, the prejudicial effect of the evidence outweighed any probative value.

[257] Thus, the trial judge dealt with the Mosher Report on three separate occasions. Each time he had regard to the purpose for which the report was being proffered, its potential relevance and its potential prejudice. On the first occasion, the report was inadmissible to prove the truth of the events disclosed by Sgt. Mosher's investigation on the basis that it would amount to inadmissible hearsay evidence. On the second occasion relating to Sgt. Mosher's opinion of the young girls' veracity, the report was rejected on the basis that there was no proper evidentiary foundation and in any event that the prejudicial effect of the evidence outweighed its probative worth. On the third and final occasion the report was tendered for the clear purpose of exploring Mr. Jones' state of mind. On this limited basis the trial judge held that only an edited version of the evidence was admissible, for that purpose, with the caveat that it would be accompanied by a jury instruction as to the limited use to which the evidence could be put.

[258] Justice Moir read his proposed charge on this issue to counsel inviting their comments before it would be delivered to the jury. Counsel stipulated to their concurrence on the record. I need not recite the two sets of instructions given by Moir, J. in relation to the Mosher Report. They were clear and properly reminded the jurors of the limited purpose for which the report was admissible. The trial judge's careful instructions were reinforced by the caution given by Cst. Campbell's counsel in his submissions to the jury. In summary, I am satisfied that the trial judge applied proper legal principles in his disposition of the matter and no patent injustice resulted from its admission. There is no basis for interfering with the trial judge's discretion. This ground of appeal should be dismissed.

2. Refusing to admit portions of the expert reports

[259] Here again some background would be helpful. In response to the defamation claim advanced by Cst. Campbell, both appellants attempted to put the whole Halifax Police Department on trial. Mr. Jones brought a wide-ranging interlocutory application seeking production of a host of documents concerning general police treatment of minorities in the Halifax area. This application was heard before MacAdam, J., of the Nova Scotia Supreme Court, who issued a written decision on March 30, 1998, in which he stated:

> ... this is a lawsuit commenced by the plaintiff alleging defamation by the defendants with respect to certain comments made by them in respect to her. This is not a lawsuit by the Halifax Regional Police Department, nor are they a party to the proceeding. The scope of examination of the plaintiff is in respect to her lawsuit and her allegations of defamation as against the defendants and is not, in respect to the general question of how "... police respond to situations involving minorities and disadvantaged groups". (*Campbell v. Jones et al.* (1998) 168 N.S.R. (2d) 1, at 8)

Neither Mr. Jones nor Ms. Derrick appealed that decision.

[260] Subsequently, both Mr. Jones and Ms. Derrick filed expert reports. Ms. Derrick retained a social anthropologist, Professor Frances Henry. Mr. Jones retained Professor Wanda Bernard, a sociologist with a specialty in social work. Professor Henry's report focused on the relationship between police forces and minorities in England and in Canada. Professor Bernard's report reviewed the historical and current situation of African-Canadians living in Nova Scotia, highlighting that group's interactions with government authorities. The subject matter of both reports went beyond the scope of the claim considered by MacAdam, J. in his decision. Consequently, Cst. Campbell immediately gave notice that she would challenge the admissibility of these reports and the matter was dealt with by the trial judge.

[261] Justice Moir determined that only a portion of each report would be admissible at trial and that the experts' evidence would be restricted to the subjects covered in the admissible portions of their reports. In a lengthy and carefully

reasoned decision rendered March 27, 2001, the judge canvassed the leading authorities and the submissions made by counsel. Neither Mr. Jones nor Ms. Derrick appealed from that decision but they now argue before this court that Moir, J. erred in not admitting the full reports prepared by Drs. Bernard and Henry and that as a result the case should be set down for retrial before a new judge and jury. I disagree.

[262] In **R. v. Mohan**, [1994] 2 S.C.R. 9, at p. 14, Sopinka, J. writing for the unanimous court, set out four criteria for the admissibility of expert opinion:

> (a) relevance;
>
> (b) necessity in assisting the trier of fact;
>
> (c) the absence of any exclusionary rule; and
>
> (d) a properly qualified expert.

[263] Justice Moir concluded that portions of the reports were not admissible under the criteria in **Mohan** but that the portions of each report which explained the meaning of "systemic racism" were admissible as they would assist the jury in understanding a phenomenon that would likely be outside their experience. In making this determination the judge decided that the excluded portions of the reports were not relevant to the issues before the court. He also expressed doubts (without deciding) whether the impugned opinions satisfied the second criteria, in other words whether they were even necessary in assisting the trier of fact.

[264] In conducting his analysis Moir, J. was careful to recognize the potential dangers of introducing evidence of the kind presented in the Henry and Bernard reports. In a jury trial there is always a danger that the triers of fact will simply "attorn to the opinion of the expert". Such a danger was apparent in this case where the opinions expressed in the experts' reports closely echoed the sentiments expressed by the appellants at their press conference. While sensitive to this danger, Moir, J. was careful <u>not</u> to apply anything resembling an "ultimate issue" rule, which would exclude any evidence which attempts to answer the very question the jury must decide.

[265] Both Ms. Derrick and Mr. Jones maintained throughout the trial that their words at the press conference were not directed at Cst. Campbell personally and could not be construed as factual statements about her, but were instead of a more

general nature, and presumably as a form of commentary, calculated to expose systemic racism in police institutions. The respondent's reply was that the statements were clearly directed at her personally and that the appellants' remarks constituted an individualized allegation of racism. This conflict lay at the heart of the lawsuit. The experts' reports were held to be admissible insofar as they shed light on this crucial dispute, in other words to explain to the jury what is meant by "systemic racism" and how it differs from "direct racism". The judge thought this was important for the jury to understand when they came to evaluate one of the defences advanced by both appellants, fair comment.

[266] The remainder of the experts' reports were excluded on the ground of relevance which Justice Moir reviewed extensively in his decision. He noted the extreme generality of the reports, both in terms of source material and the nature of the conclusions drawn. In my opinion, this generality was properly taken into account by Moir, J. in assessing relevance. He appropriately found the excluded portions of the reports to be unhelpful because of their very generality. At ¶26 and 28 of his decision he highlighted the generality of both reports, the "apparent reasoning from great generalization into the particular" in Dr. Henry's report, and the "proceeding from general proposition to the highly specific opinions rendered" by Dr. Bernard. I concur.

[267] Moir, J. also said he doubted that the opinions passed the necessity criteria of **Mohan, supra**. Neither am I persuaded that the reports were necessary for the proper disposition of this law suit. Mere relevance or helpfulness is not enough. The evidence must also be necessary. (**R. v. D. D.**, [2000] S.C.C. 43 at ¶46 and 57.) The purpose of expert evidence is to assess, interpret and explain evidence in order to assist the trier of fact in matters beyond the trier's capabilities and experience. While undoubtedly the portions of the two experts' reports were properly excluded by Moir, J. on the basis of being irrelevant, it also seems to me that they were unnecessary to allow the jury to discharge its function as the trier of fact. I find that the evidence was properly excluded and this ground of appeal should be dismissed.

3. Refusing evidence of Ms. Derrick's opinion as to the existence of reasonable and probable grounds for arrest

[268] The appellant Ms. Derrick argues that the trial judge erred in refusing to admit evidence of whether she believed that Cst. Campbell had reasonable and probable

grounds to arrest the students suspected of theft at the school, in view of the fact that the respondent herself gave evidence as to her own beliefs on the point. Ms. Derrick's evidence was tendered in order to attack the credibility of Cst. Campbell's own testimony.

[269] The trial judge ruled as follows:

> You're free to fully examine on what she meant about unreasonable search and seizure, but you're not... [interruption] ...free to direct her into giving her opinions as to what constitutes reasonable grounds.

[270] There is no merit to this ground of appeal. The evidence proffered by Ms. Derrick was not admissible. It was her opinion. She was a party to this law suit. Her opinion was irrelevant. Further, such evidence by Ms. Derrick would usurp the position of the trial judge in instructing the jury as to the law. As well, it would be improper for a party to give opinion evidence directed to the credibility of another party. Moir, J. did not err in reaching his decision. He properly exercised his discretion to exclude such evidence. No patent injustice resulted from his refusal to admit it. This ground of appeal should be dismissed.

4. Refusing evidence relating to a monetary demand contained in without prejudice correspondence

[271] The appellant Ms. Derrick argues that the judge erred in not allowing her to give evidence as to the contents of a letter containing a settlement proposal from Cst. Campbell's lawyer. In particular, Ms. Derrick sought to introduce evidence that a monetary demand had been made along with the request for an apology contained in that letter. She argued that this evidence was necessary to refute evidence from Campbell that all she was looking for was an apology.

[272] What is telling, however, is that Ms. Derrick sought to introduce this evidence without having the jury see the rest of the letter. Cst. Campbell initially took the position that the question regarding the monetary demand in the letter should not be allowed on the basis that the letter was written without prejudice and therefore subject to privilege. Counsel for Campbell argued that if the question were

permitted, then the whole letter should be placed in evidence in order for the jury to have the context and details of the monetary demand before it. Counsel for Ms. Derrick took the position initially that the letter was admissible and subsequently changed their position and urged that the letter be excluded. Counsel for Mr. Jones refused to waive privilege.

[273] After considering these submissions, the trial judge decided not to either allow the question or admit the letter, stating:

> I'm not satisfied that the without prejudice character of this letter has been sufficiently waived by the three parties who enjoy the privilege that comes from that. By reference, either, to the testimony of Constable Campbell and the questions that have been asked of Ms. Derrick thus far. I'm not prepared to allow Mr. MacDonald to prove the entire letter at this stage. I will stop Mr. Outhouse from questioning further on this letter in view of the position taken by Mr. Jones as to his privilege in (inaudible). You can give that letter back (inaudible).

[274] There is no basis for disturbing the trial judge's ruling. He reached his decision having regard to the submissions of all of the parties. The letter clearly contained a settlement proposal and was therefore subject to privilege which had not been waived. Constable Campbell was willing to waive privilege if the whole letter were introduced. Mr. Jones was not. Ms. Derrick was only willing to waive privilege with regard to a portion of the letter. The trial judge's ruling was made within the exercise of his discretion. No patent injustice arose from his decision not to admit this evidence, particularly in light of the specific instruction he gave to the jury. This ground of appeal should be dismissed.

5. Refusing Ms. Derrick's evidence regarding the complainant L.S.'s reasons for moving to another jurisdiction

[275] The appellant Ms. Derrick alleges that the judge erred in not permitting her to give evidence as to her understanding of why L.S. had moved to another jurisdiction. The evidence was tendered in order to respond to cross-examination of L.S.'s guardian which had dealt with the subject. The judge ruled the evidence was not admissible, stating:

> So we've heard from her [L.S.]. There's always the possibility of hearing from the guardian herself. I'm not going to allow the question, Mr. Outhouse.

[276] While the trial judge did not say so explicitly, it is apparent that his refusal was made on the basis of the rule against hearsay. Any evidence that Ms. Derrick could give would be nothing more than her account of what she had been told by others. The trial judge noted that both L.S. and her guardian had already given evidence. Ms. Derrick would have nothing to add on the point. In any event, in my opinion L.S.'s motivation in moving to another jurisdiction was irrelevant to the issues before the court. There is no basis for interfering with the trial judge's ruling.

[277] For all of these reasons, the several challenges to evidentiary rulings made by the trial judge should be dismissed.

DISCRETIONARY RULINGS REGARDING COURT PROCESS

[278] Several challenges have been made by the appellants to various rulings made by the trial judge which more closely relate to matters of procedure and process than to matters of evidence. For ease of reference I have grouped these together as being discretionary rulings relating to court process and will now consider each ground separately.

1. Granting relief from the implied undertaking rule

[279] Here, some brief background would also be helpful. **In [T.V.] et al v. The City of Halifax et al**, S.H. No. 120138, the three complainants brought an action against the City of Halifax, the Halifax Police Department, Constable Campbell, the Halifax District School Board, and the vice-principal on duty that day claiming general, aggravated and punitive damages said to have resulted from a violation of their **Charter** rights, as well as their "humiliation, degradation...(and)...assault and

battery". The parties, including the three girls and Cst. Campbell, were questioned at discovery and their evidence was recorded and transcribed.

[280] Applications were made before Justice Moir in this trial to make use of the discovery testimony given in [**T.V.], supra**, S.H. No. 120138.

[281] Both appellants have appealed from the trial judge's decisions to grant all parties leave from the implied undertaking rule and access to copies of certain discovery transcripts. Neither appellant appealed from Moir, J.'s interlocutory decision; rather, they include it now as a separate ground in the omnibus appeal before this court. They say that Justice Moir misapplied the law and erred in finding that the legal issues in the two proceedings were sufficiently similar to justify granting relief from the implied undertaking rule. I disagree and would reject this ground of appeal.

[282] While acknowledged in argument, it is interesting that neither appellant mentions in their written factum that each also made application for relief and was granted relief from the implied undertaking rule ("the rule") to obtain and use Cst. Campbell's discovery evidence from the **T.V.** action. That transcript was referred to at trial in cross-examination of Cst. Campbell by counsel for both appellants on numerous occasions. Thus, while the appellants used Cst. Campbell's transcript from the **T.V.** law suit extensively in this proceeding, they now seek a decision from this court that the transcripts ought not to have been used.

[283] This court's most comprehensive discussion of the implied undertaking rule and granting relief therefrom is **Sezerman v. Youle** (1996), 150 N.S.R. (2nd) 161. There Chipman, J.A. writing for the court, adopted as an accurate statement of the effect of the rule, the formulation proposed by John Laskin (as he then was) in his article entitled "The Implied Undertaking in Ontario" (1989-90), 11 *The Advocates' Quarterly 298***:**

> There is an implied undertaking by a party conducting an oral examination for discovery the information so obtained will not be used for collateral or ulterior purposes; any such use is a contempt of court.

[284] The mischief which the rule seeks to prevent is the use of discovery evidence in a manner which is unfair to the party who gave it. In situations where a litigant

comes into possession of otherwise confidential information under the auspices of pre-trial discovery or disclosure procedures, the courts have held the litigant to an implied undertaking not to use that information for an improper purpose. Thus the rule operates to protect the privacy of a litigant when that privacy has been breached by court sanctioned procedures.

[285] As this court noted in **Sezerman,** application of the rule is not absolute. There are circumstances where relief will be granted. At ¶25 of **Sezerman**, Chipman, J.A. endorsed Laskin's analysis as a correct explanation of the primary exception to the rule:

> Laskin addresses relief from the undertaking at p.313, noting that it is only with leave of the court that a party obtaining the disclosure is free to use it in a manner not contemplated by the implied undertaking...

Laskin says at p. 314:

> Where leave is sought to use the material in other proceedings, an important factor is the extent to which those proceedings are connected with the proceedings in which disclosure is made. Where the two sets of proceedings involve the same or similar parties and the same or similar issues, leave will most readily be granted ...
>
> Also important is the use to which the party seeking leave wishes to put the material. Use for the purpose of related proceedings is regarded as a proper use consistent with the purposes for which discovery was made available and with the public interest in the administration of justice. (Underlining mine)

[286] It is true, as the appellants argue, that the legal issues in these two proceedings were distinct. One was an action in defamation, the other a claim for **Charter** damages. However, this difference is not determinative. As distinct as the legal issues undoubtedly were, it is equally clear that the same series of events lay at the heart of both actions. Even before the trial, it was apparent to Moir, J. that the events between Cst. Campbell and the three girls would be of crucial importance in this law suit. Thus, for the purposes of the girls' discovery evidence, this was enough for the trial judge to conclude that the proceedings were related, and that relief from the rule should be granted.

[287] Later, it became apparent that the reactions of the parents/guardians, as well as Cst. Campbell's discussions with the parents/guardians were going to be put before the jury in some detail. Moir, J. concluded that relief should be granted in respect of their discovery evidence as well.

[288] Moir, J. also recognized that the use which Cst. Campbell sought to make of the discovery evidence was limited and legitimate. The rule prohibits using information gained from pre-trial discovery to a "collateral or ulterior purpose". In **Sezerman, supra**, Chipman, J.A. noted that in determining whether permission ought to be granted to use discovery evidence in a related proceeding, it was appropriate to consider the use to which that evidence would be put by the party seeking relief from the rule. If that use "is regarded as a proper use consistent with the purposes for which discovery was available and with the public interest in the administration of justice," relief should be granted.

[289] Constable Campbell sought relief to use the discovery examinations for the limited purpose of impeachment. In the event that the girls' or the parents/guardians' testimony at trial was at odds with their sworn discovery evidence, Cst. Campbell sought to be able to bring these conflicts to the jury's attention. In my opinion, with this purpose in mind, the trial judge was correct to grant leave from the rule.

[290] Another factor the trial judge is to consider is the injustice that might arise from an overly strict application of the rule. As Chipman, J.A. noted in **Sezerman**, (at ¶25) one must balance protection of privacy and confidentiality and encouragement of full and frank disclosure on the one hand against the public interest "in the full disclosure of and use of the truth".

[291] These same principles were echoed recently by the Supreme Court of Canada in **Lac D'Amiante du Quebec Ltee. v. 2858-0702 Quebec Inc**., [2001] S.C.C. 51 wherein Lebel, J. confirmed that relief from the rule should be granted where having considered the necessary balance between the interests of the parties and the interests of justice, the court is satisfied that the benefits of granting relief outweigh any harm that would ensue.

[292] In my opinion, Justice Moir performed precisely the sort of analysis which was endorsed by the Supreme Court in **Lac D'Amiante**. He carefully analyzed the "harm" which might result for the girls if Cst. Campbell were permitted to make use

of their discovery evidence from their **Charter** law suit No. S. H. 120138, and concluded that it would be minimal. In my view he was correct in his assessment.

[293] Before concluding my analysis of this ground of appeal it should also be noted that at the time Moir, J.'s decision was rendered, the **T.V.** action was still very much alive. It was anticipated that each of the girls and their parents/guardians would be testifying in that action in their attempt to substantiate the allegations made out in the statement of claim. In such circumstances, Moir, J. recognized that it would be highly incongruous to be insisting on confidentiality over testimony which would form much of the substance of their own litigation. Undoubtedly these events would be probed in great detail, regardless of whether the transcript from the discovery was made available for the purposes of impeachment in this case. In view of those circumstances, Moir, J. found that the harm which might flow from granting relief was minimal.

[294] In any event, Justice Moir's order also specified that all of the parties would be permitted to use the discovery evidence from **T.V.**. He concluded that giving all counsel access to the transcripts would be the fairest result. In the circumstances of this trial Moir, J. fashioned a fair and sensible result in granting relief from the rule, which appropriately balanced the confidentiality interests of the witnesses, the interests of Cst. Campbell, and the integrity of the trial process as a vehicle for getting at the truth. He did not err and his decision should not be disturbed.

2. Not permitting Jones to exercise peremptory challenges for reasons of his race

[295] The appellant Mr. Jones complains that Moir, J. erred in refusing to allow him four peremptory challenges of his own in the jury selection process. The trial judge granted the two defendants (appellants) four jury charges collectively, on the ground that Mr. Jones and Ms. Derrick were not sufficiently adverse in interest to justify granting each defendant four peremptory challenges.

[296] Section 16(1) of the **Juries Act**, S.N.S. 1998, c. 16, provides that the plaintiff or plaintiffs and the defendant or defendants, shall respectively have four peremptory challenges. Section 16(2) provides:

> (2) Notwithstanding subsection (1) but subject to the Civil Procedure Rules, where there are defendants who are adverse in interest, the presiding judge may permit each group of defendants who have a common interest to peremptorily challenge four persons chosen pursuant to subsection 15(1).

[297] The appellant Mr. Jones submits that the trial judge erred in failing to consider Jones' race as a factor when addressing the "adverse in interest" standard under s. 16(2). As he put it in his factum:

> Race and racial attitudes was (sic) the core of this defamation action. This case was well publicized and notorious in the community. Jones submits that as a black man he had an interest separate and distinct from that of his white co-defendant, Derrick to ensure the representativeness of the jury.

[298] I see no merit in the appellant's submission. In my opinion, the standard set by s. 16(2) clearly requires that the two defendants be "adverse in interest". Unless such an adversity exists, there is no discretion in the trial judge to grant each defendant his or her own "set" of peremptory challenges.

[299] In **Peddle v. Rowan and Co.** (1993), 123 N.S.R. (2d) 24 (N.S.S.C.) I had occasion to consider the meaning of the words "adverse in interest". That was a case where Peddle, an off-shore oil worker, sued the two corporate defendants for wrongful dismissal. He alleged that he was hired in December, 1990, and less than a year later terminated without just cause and that as a consequence he suffered injury, loss and damage. The two corporate defendants were the Canadian subsidiary by whom he was engaged, and the international parent company. There was a paucity of law on the subject. The approach taken in **McKay v. Gilchrist et al** (1962), 40 W.W.R. (N.S.) 22 (Sask. C.A.) commended itself to me. There, as I noted at the time, the Gilchrist case arose from a bizarre set of circumstances:

> ¶ 15 Very briefly, the Gilchrist case arose from a bazaar (sic) set of circumstances where following a car crash involving the defendant, Gilchrist, the late plaintiff, suffered a knee injury which did not heal properly. He went through a regimen of physiotherapy and hospitalization, and ultimately surgery. During the course of the surgery things went wrong. He became unconscious. Various attempts were made to resuscitate him through heart massage and other techniques. He suffered cardiac arrest and died. His Estate brought an action against several defendants,

> including the motorist and the countless physicians who had responsibility for his care. Not surprisingly, the court in that case decided that each defendant would have the opportunity to exercise the number of peremptory challenges provided under that province's Juries Act. In my opinion, those defendants had distinct if not competing interests. I can well imagine the court ordering an equal number of peremptory challenges for each and every defendant in that case. (**Peddle**, **supra**, at ¶15.)

[300] Later I commented:

> It seems to me upon a reading of the Nova Scotia **Juries Act** and the **Civil Procedure Rules** that where there are separate defendants who have distinct, if not competing interests, it may well be fair to give each of those defendants their own limited number of peremptory challenges ... (**Peddle**, **supra**, at ¶16)

[301] In his ruling Justice Moir obviously recognized that this case was much different. Here there is a direct correlation between the respective degrees of liability of the two co-defendants, Jones and Derrick. One would not be able to lessen his or her liability by showing a higher degree of fault on the part of the other. The two appellants uttered their words on the same occasion, so there could not be any divergence between them with respect to the defence of qualified privilege. Similarly, the defence of fair comment pleaded by each appellant stood on the same underlying factual basis. As well, there was no adversity of interest in the defences they filed.

[302] The trial judge undertook a close analysis of the respective positions of Mr. Jones and Ms. Derrick. In my opinion he was correct in concluding that their interests in this litigation were closely aligned and could not be described as being "adverse" to one another as that standard has been interpreted in this province. While it is true that the appellants retained separate counsel and pleaded separately, their defences and trial strategy were very similar. Although they retained separate experts, those experts' opinion were entirely consistent with one another and undoubtedly each appellant expected to rely upon the other's expert. Ultimately, Moir, J. concluded:

> On my assessment, the factors tending to suggest possible adversity, such as the possibility of diverse findings and the points referred to by

> Ms. Rubin, are outweighed by the extent to which the two defendants are unified in their approach to the case.

[303] In my opinion, Moir, J. conducted the appropriate assessment and came to the proper conclusion. I say as well that Mr. Jones' race was not a factor, on the facts of this case, in deciding whether he and Ms. Derrick were "adverse in interest" thereby engaging the trial judge's discretion under s. 16(2). The fallacy of such a proposition is apparent in simply stating it. What it implies is that people with distinct racial backgrounds are necessarily adverse, an altogether frightening proposition. The submission invites this court to rewrite the **Juries Act**. It confuses our role with that of the Legislature. Moir, J.'s reasoning applied the proper legal principles. He was right to conclude that there was no basis upon which his discretion under s. 16(2) of the **Juries Act** could be engaged. To permit Mr. Jones a separate "set" of peremptory challenges would be contrary to the clear wording of the **Juries Act** and without precedent. The parties all agreed to have the case tried by a jury. The fact is this jury was representative of the urban community. We were advised by counsel in argument that it consisted of "four men and three women and one of the males was a person of colour". Some of the people whose money was stolen and who wanted the thief or thieves to be prosecuted were black. To assert that Mr. Jones would want a racially distinct jury, but that Ms. Derrick would not, is untenable. Given the legal issues engaged and the people concerned, it was as much in Ms. Derrick's interests to have a racially mixed jury as it was in Mr. Jones.

3. Allowing Campbell to give redirect evidence on her discovery evidence

[304] The appellant Ms. Derrick argues that the redirect examination of Cst. Campbell dealing with discovery evidence given in separate proceedings was improper and should not have been allowed. The evidence in issue has to do with an exchange between Cst. Campbell and L.S. during the search. In particular, Cst. Campbell said in her direct examination that L.S. had pulled down her pants and said "search me" and laughed.

[305] During cross-examination, counsel for Ms. Derrick questioned Cst. Campbell regarding this evidence. The transcript of the exchange between Derrick's counsel in questioning Ms. Campbell clearly shows that the purpose of the examination was to discredit the respondent by impeaching her credibility in suggesting that she was manufacturing evidence to suit her ends. The respondent's counsel then sought a

ruling from the court that he be permitted to put questions to Cst. Campbell on redirect as to discovery evidence she gave in the **T.V.** (**Charter)** action, wherein Cst. Campbell did describe the fact that L.S. said “search me” in a joking manner.

[306] The discovery transcript in question had already been used by counsel for Mr. Jones in his cross-examination of the respondent as to events surrounding the search and in particular to impeach her testimony that she had told L.S. that she “could be charged” by referring Campbell to portions of the discovery where she said that she had told L.S. that she “would be charged”.

[307] In **R. v. Evans**, **supra,** at p. 643, the Supreme Court of Canada commented on the scope of redirect examination:

> ...Generally, the narration by a witness of her previous declarations made to others outside of the court should be excluded because of its general lack of probative value and because such a repetition is, as a rule, self-serving. However, they may be admitted in support of the credibility of a witness in situations where that witness's evidence is challenged as being a recent fabrication or contrivance. See R. v. Campbell (1977), 38 C.C.C. (2d) 6 (Ont. C.A.), at p. 18, per Martin J.A., and R. v. Béland, [1987] 2 S.C.R. 398, at p. 409.
>
> Further, it has been held that there need not be, in cross-examination, any express allegation of recent fabrication for the prior statements to be admissible. It is sufficient if, in light of the circumstances of the case and the conduct of the trial, the apparent position of the opposing party is that there has been a prior contrivance. In those situations, fairness and ordinary common sense require that the jury receive a balanced picture of the whole of the witness's conduct throughout the police investigation. To demonstrate that the evidence of the witness is not a recent fabrication it may be essential to introduce on re-examination a prior statement which shows the consistency of the witness' testimony. See R. v. Simpson, [1988] 1 S.C.R. 3, at p. 25.
>
> > As is apparent from this passage, the rehabilitation of a witness's credibility is within the proper scope of re-examination. A witness may be re-examined on any new matter that arose on the cross-examination of that witness.

> It is appropriate in re-examination to elicit evidence which explains, qualifies, clarifies, minimizes or limits the effect of testimony given in cross-examination or which puts into perspective any facts revealed in cross-examination which might discredit the witness. During re-examination, the witness is entitled to clear up confusion or explain ambiguities in their cross-examination evidence. Explanations may be given for apparent inconsistencies in the witness' testimony. Courts have long recognized that re-examination of a witness may be appropriate where cross-examination has obscured evidence given in direct or has cast doubt on the credibility of the witness in relation to such evidence. See, for example: **Edmonton v. Lovat Tunnel Equipment** (2000), 260 A.R. 245 (Q.B.); *Law of Evidence in Canada* by Sopinka, Lederman and Bryant (Butterworths Canada Ltd., 1992) at p. 879; and **Gervais v. Yewdale** (1994), 51 B.C.A.C. 97 (C.A.).

[308] In my opinion, counsel for the respondent's request for permission to conduct such a re-examination was perfectly appropriate as was Moir, J.'s decision permitting it. The proposed redirect examination dealt with the question of whether Cst. Campbell's evidence regarding L.S.' comments had been accurately reported in her direct examination. This had a direct bearing on Campbell's credibility since counsel for Ms. Derrick had used cross-examination to raise a suggestion that this evidence amounted to a recent fabrication on Cst. Campbell's part. In particular, the cross-examiner suggested that Campbell's version of events as told on direct had never been given when she had been previously examined under oath. This was not an accurate impression to leave with the jury and it was, in my opinion, correct and just that Cst. Campbell be given an opportunity to respond. Moir, J's ruling should not be disturbed.

4. Not allowing Derrick to give re-direct evidence on s. 15 of the Charter

[309] The appellant Ms. Derrick argues that the trial judge erred in not permitting redirect examination of her on the question of how s. 15 of the **Canadian Charter of Rights and Freedoms** had been interpreted.

[310] In direct examination of Ms. Derrick her counsel explored with her the basis for her statement that the search of the girls gave rise to certain constitutional violations. During the course of her testimony on direct, she gave evidence regarding the rights she felt had been infringed, as well as commenting upon her understanding of the content and purpose of those rights.

[311] In cross-examination Ms. Derrick was examined about an allegation in a letter sent to the Nova Scotia Police Commission dated April 30, 1997, and in particular about a reference in the letter to an alleged violation of s. 15(1) of the **Charter**. Cst. Campbell's lawyer simply asked Ms. Derrick whether the reference to s. 15(1) amounted to a suggestion that the respondent had discriminated on the basis of race. Mr. MacDonald asked:

> 1077. Q. ...Now wasn't that being referred to because you were suggesting that Constable Campbell had discriminated on the basis of race?

[312] Ms. Derrick's initial response to the question was to provide an exegesis on the meaning of adverse effect discrimination and the fact that intention is not a necessary element of such discrimination. Because her answers were not directly responsive to the question posed, Mr. MacDonald repeated his question approximately six times. Ms. Derrick's responses throughout focused on the difference between adverse effect discrimination and intentional discrimination.

[313] On redirect examination Mr. Outhouse, counsel for Ms. Derrick, asked her how s. 15 had been interpreted by the courts. He sought to have this evidence introduced as going to the state of Ms. Derrick's belief as to what she was saying at the press conference. Counsel for Cst. Campbell objected.

[314] Moir, J. did not allow the questioning, ruling that it was improper redirect examination since the question of s. 15 had already been raised on direct.

[315] In my opinion, Justice Moir's ruling was a correct exercise of his discretion and should not be disturbed. As I pointed out earlier in these reasons, the right to redirect examination arises in relation to new matters raised in cross-examination or matters which have been rendered unclear by cross-examination.

[316] As I see it, the matter of a violation of s. 15 equality rights had already been dealt with on direct examination. What had not, however, been expressly elicited on direct examination was that s. 15 guarantees equality "without discrimination based on race". This was brought out on cross-examination by the respondent's counsel in an apparent effort to clarify why s. 15 was being invoked against Cst. Campbell. This was not a new matter. Nor did it render anything dealt with in direct examination obscure. It was not a proper subject for redirect examination in the circumstances of this case. The trial judge's ruling fell squarely within his power to control the trial.

[317] Further, in my view, Ms. Derrick had already given considerable evidence on the subject of adverse effect discrimination. More evidence from her on this point would not have been helpful to the jury and I think would have constituted improper opinion evidence on a matter of law. This ground of appeal should be dismissed.

5. Not allowing Derrick to tender portions of a discovery transcript as an exhibit

[318] At the close of the appellant Derrick's case, her counsel sought to tender portions of Cst. Campbell's discovery evidence. The transcript of the respondent 's discovery evidence was several hundred pages long but only a few excerpts were sought to be tendered. There was no dispute over the admissibility of the discovery evidence. While Moir, J. permitted the reading in of the evidence by Ms. Derrick's lawyer, he refused to allow the excerpts to be tendered as an exhibit. The trial judge ruled:

> In my opinion there is no right to both read agreed questions and answers from a discovery transcript into the record, and have the excerpts marked as an exhibit, but Rule 18.14(3)(d) would allow both in the discretion of the Court. (Underlining mine)

[319] The appellant Ms. Derrick argues that the trial judge erred in not permitting her to tender portions of the discovery transcript as an exhibit after having read those portions into the record,

[320] While I agree with counsel for Ms. Derrick that the trial judge erred in his application of **CPR 18.14**, no injustice arose as a result.

[321] **Civil Procedure Rule 18.14** provides:

> 18.14 (1) At a trial or upon a hearing of an application, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who is present or represented at an examination for discovery, or who received due notice thereof, for any of the following purposes:
>
> ...
>
> (b) where the deponent was a party, or an officer, director, or manager of a party that is a corporation, partnership or association, for any purpose by any adverse party.
>
> (3) Any part of a deposition received in evidence on a trial or hearing shall be placed on the record by,
>
> (a) reading any agreed question and answer into the record;
>
> (b) the parties agreeing that certain numbered questions and answers be inserted in the record;
>
> (c) the parties filing, either during or after the trial or hearing, the questions and answers agreed upon;
>
> (d) the direction of the court.

[322] The provisions of **CPR 18.14** are extremely broad and are designed to allow counsel to make use of an adverse party's discovery evidence as counsel sees fit. As this court noted in **Burton v. Howlett** (2001), 191 N.S.R. (2d) 147, there is no discretion to refuse a party from tendering the evidence of an adverse party provided the evidence is admissible. In the case at bar only a very limited portion of Cst. Campbell's discovery testimony was sought to be introduced as an exhibit. There was no dispute with respect to its admissibility.

[323] That said, this was a lengthy and difficult case tried with a jury. Constable Campbell was on the witness stand for days. The excerpts from her discovery evidence were read into the record by counsel for Ms. Derrick. Mr. Outhouse also made detailed reference to her discovery evidence and her trial testimony in his closing summations to the jury. This therefore was not a case of the jury being deprived of certain evidence. On the contrary, it was all before them and thoroughly explored by counsel in advocating their theory of the case. No harm resulted and while the ground of appeal has merit in a technical sense, it ought to be dismissed.

CHALLENGES TO THE JURY CHARGE

[324] Between them the appellants have made 17 challenges to the trial judge's instructions to the jury. I have already addressed justification and fair comment as they relate to the charge earlier in these reasons. There is some overlap with the remaining grounds of appeal and to avoid repetition I have distilled the balance to nine points, which I will now consider separately.

[325] I have previously reviewed the legal principles to be applied when a jury charge is subjected to appellate review (See ¶197, ff., **supra**.) The charge should be considered as a whole and not picked apart and scrutinized microscopically or with the perfect clarity gained in hindsight. Not every misdirection will result in a new trial. Errors must be serious or point to a substantial wrong or miscarriage of justice before a court will intervene. Even where there may be some potential for confusion in a jury charge, the principle of restraint in intervening will apply. See, for example, the decision of this court in **Lunenburg District School Board v. Piercey** (1998), 167 N.S.R. (2d) 68.

[326] Delay in raising concerns about the contents of a judge's charge is an important factor when the charge is attacked on appeal. See **Morriscey v. Zwicker, supra.**

[327] With the possible exception of whether his review of the evidence was balanced, not one of the challenges now being raised by the appellants was put to him when he invited counsels' comments following his charge. As I have already

said, counsels' failure to object to particular parts of a trial judge's charge will not be fatal on appeal but it is an important factor and keeps any subsequent attack in proper perspective.

[328] After a thorough consideration of counsels' oral and written submissions, I am not persuaded that there is any merit to the challenges raised by the appellants. Their appeals that the judge erred in his instructions to the jury should be dismissed for reasons that I need only briefly explain.

1. Not instructing the Jury on the meaning of "strip-search"

[329] As noted at ¶143 et seq., there was no requirement in this, a civil case of defamation tried by a jury, for the judge to provide the jury with a legal definition of "strip search" which the jury would then be bound to apply to their consideration of the evidence. On the contrary, it was entirely within this jury's province and in fulfilment of their sworn obligation as representatives of their community to decide as a question of fact what happened in the guidance room and how they would choose to characterize it. For this reason, in my respectful view, the pronouncements of the Supreme Court of Canada in **R. v. Golden** are irrelevant to the issues this jury was obliged to decide.

[330] The substance of the appellants' submissions with respect to **R. v. Golden** is that the search performed by Cst. Campbell, even on her own version of the events of March 6, 1995, constituted a "strip search" within the meaning given to that term by the Supreme Court in **Golden**. They argue on the strength of the Court's definition that the jury was bound to find that Derrick and Jones' allegations that a "strip search" had been performed were necessarily true, and it should not have been open to the jury to find that they were defamatory.

[331] In my opinion, this proposition is flawed for two reasons. First, as I have explained, the decision of the Court in **Golden** is irrelevant to this case. Second, it ignores one of the critical dynamics of what went on in this case: that is the absolute conflict between the account given by the three girls and Cst. Campbell's version of

the event. Deciding where the truth lay in this, a law suit alleging defamation, obliged the jurors to decide whom they believed. To simply fasten upon the police officer's own version of the events and then suggest that because of the Court's decision in **Golden** the jury was somehow bound to find that the appellants' allegations that "strip search" had, in law, occurred and therefore were necessarily true, and that consequently it should not have been open to the jury to find against the appellants, would be to ignore the reality of what happened in this case and render the jury's function nugatory.

2. Instructions relating to the "removal of clothes"

[332] The appellants complain that the trail judge erred in directing the jury to consider the evidence in relation to the "removal of clothes" when deciding whether the appellants had defamed the respondent; in particular, in considering whether the impugned statements were defamatory and whether they were justified.

[333] The appellants emphasize that on several occasions during his jury charge Moir, J. instructed the jury that it should consider all references to "removal of clothes" in assessing whether or not the respondent had been defamed. The appellants say that the judge erred in instructing the jury that it should consider such references to "removing clothes" on the issue of defamatory meaning and justification because, so it is argued, the respondent was not complaining about references to "removal of clothing" but rather about the use of the phrase "strip search" since, for her, this had an extremely negative connotation which involved the removal of all of a person's clothing.

[334] I would reject this ground of appeal. Neither Ms. Derrick nor Mr. Jones objected to this aspect of the jury charge at trial. In my view their present complaint ignores the substance of the pleadings and amounts to disingenious semantic hair splitting. Using phrases like "on the subject of removing clothes" was clearly nothing more than a wise attempt by the trial judge to find an umbrella term capable of describing all of the language in the impugned statements having to do with this subject, including but not limited to the words "strip-search". In my opinion, this was a perfectly reasonable approach to take and, when considered together with the pleadings, could not have resulted in any confusion as to the task before the jury. What was in issue for the claimant Cst. Campbell in her law suit is to be determined

by reference to the pleadings, not by extracting certain brief passages lifted from her trial testimony. The statements impugned in the pleadings clearly contain references to the removal of clothes. Further, the passages which the appellants have extracted from Cst. Campbell's testimony by no means suggest that she was not concerned about imputations that she required the removal of clothing. On the contrary, her concerns about public opinion regarding her alleged involvement in a strip search focused on the question of whether she obliged the girls to remove their clothes. The respondent's evidence was expressly that she understood "strip search" to mean the removal of all clothing. For her, the meaning "removal of clothes" as communicated by "strip-search" was most definitely in issue. Finally, the term "strip-search" is clearly capable of a meaning involving the removal of clothes to some degree. Therefore this was a matter for the jury.

3. Instructing the Jury in the defence of justification related to the "removal of clothes"

[335] This ground of appeal is identical to the one just discussed. It attempts to cast the trial judge's encapsulation of the evidence in an entirely disingenious light.

[336] This being an action in defamation, the matters in issue were framed by the contents of the defamatory statement. Given the allegations made in the statements by Mr. Jones and Ms. Derrick at the press conference, that is that the three girls had been strip searched and that there was a lack of privacy in the room, portions of the statements which the defendants conceded were statements of fact, Justice Moir chose to divide the factual statements made by Mr. Jones and Ms. Derrick into two "headings" for the sake of clarity.

[337] Earlier in the trial Mr. Jones and Ms. Derrick had clarified their pleadings on justification by making it clear that they only sought to justify certain portions of their statements – these were the portions of the statements that even they apparently viewed as being indisputably statement of fact. With respect to the allegation of strip search, the parties' agreement that this was a factual allegation which needed to be justified was clearly stipulated on the record.

[338] When charging the jury as to the requirements of the defence of justification, Moir, J. was very careful to explain how limited the appellants' pleas of justification were. He instructed the jury that the pleas extended only to allegations about the

extent of the search and the degree of privacy in the room. He described one aspect as “removal of clothes” and made use of this umbrella term so that he could deal with both the text of the allegedly defamatory statement and the evidence with minimal confusion. Thereafter he could use the term “removal of clothes” to refer to all of the various statements made by Mr. Jones and Ms. Derrick, in varying language, relating to the extent of the search, while still making it clear that he was not referring to the appellants’ other statements relating to “race” and other factors. Rather than repeating the particular words again and again, Moir, J. simply chose a useful label for the sake of convenience and clarity.

[339] Further, given the extent to which the meaning of the term “strip-search” was very much in issue, it is apparent that Moir, J. was appropriately leery of using that term to instruct the jury. Choosing a term like “removal of clothes” was a wise and uncontentious substitute.

[340] In my opinion, the judge’s choice of vocabulary in his charge to the jury was perfectly balanced and fair and is unassailable.

4. Instructions regarding privacy

[341] The appellant Ms. Derrick repeats the same arguments in challenging the trial judge’s directions in reference to “privacy” as she did in relation to “removal of clothes”. In particular, she alleges that Cst. Campbell’s counsel “stipulated that, ‘leaving racism aside’ the only words which were complained of as being defamatory were ‘strip search’”. I reject this complaint.

[342] The statements impugned by the pleadings clearly include references to the lack of privacy. The question of privacy afforded the girls during the search was a component of the allegation that an improper strip search had been carried out. It relates directly to the nature of Cst. Campbell’s conduct. It is a plea that is so interwoven with the strip search allegation that it cannot be divorced from it. Therefore the truth of these statements was clearly directly relevant to the questions of defamation and justification.

[343] In my opinion, the pleadings in this case unequivocally placed the question of privacy in issue. Justice Moir’s instructions were therefore appropriate and should not be disturbed.

5. Failing to properly instruct the jury concerning the Record of Informal Resolution

[344] The appellants' complaints to the Halifax Police Department were eventually settled very shortly before they were to be heard by the Nova Scotia Police Review Board. The settlement was negotiated by Mr. Jones and Ms. Derrick on behalf of their respective clients, and Mr. Patrick Duncan, Q.C. who was acting both for the respondent and the Halifax Regional Police Department at the time. The settlement was formalized in a document now referred to as the Record of Informal Resolution ("the Record").

[345] During his cross-examination of Mr. Jones, counsel for the respondent pursued a line of questioning which emphasized that the Record did not contain any admission by Cst. Campbell that she had strip searched the girls.

[346] Given this cross-examination of Mr. Jones, Ms. Derrick was then asked in direct examination why the strip search allegation was not dealt with in the Record. Counsel for the respondent objected, saying that it would be improper as it would necessitate talking about the negotiations and "going behind" the agreement.

[347] The jury was excused and Moir, J. heard lengthy submissions from counsel, ultimately ruling that he would not allow such questioning of Ms. Derrick, based largely on the concession made by counsel for Cst. Campbell that in effect he would not take the position, in his final summation to the jury, that by signing the Record the girls and their parents and guardians were agreeing that there had not been other violations than those admitted by Cst. Campbell.

[348] The appellants now argue that the judge erred in his instruction to the jury with regard to the Record negotiated by the parties. This ground of appeal was not raised with the trial judge following his charge. Essentially the appellants now say that the respondent's counsel improperly suggested to the jury that they could infer that the girls and their guardians had agreed that no strip search had occurred and that this impropriety warranted a corrective instruction. This raises two issues: first whether Cst. Campbell's lawyer's summation to the jury in fact suggested such an inference; and second, whether the judge's charge was sufficient in all of the circumstances.

[349] Having carefully reviewed the entire record, I am not persuaded that this portion of Mr. MacDonald's summation left the jury with the wrong impression, that is that it should draw an improper inference that the alleged defaults did not occur. Mr. MacDonald said:

> ...After the search was committed, was conducted, (sic) that's what was admitted to on (sic) the informal resolution. That was what was agreed by everyone. That a search had occurred, not a strip-search.

[350] On balance, and in the context of the entire summation, I think Mr. MacDonald's words were simply factual statements unaccompanied by any overt suggestion that the jury should draw any particular inference from them. There is nothing in any way inaccurate about the submissions. It is true that Cst. Campbell did not admit to ever having conducted a strip-search. It is equally true that the settlement proceeded without such an admission.

[351] In his charge Moir, J. gave this specific instruction:

> Both Mr. Jones and Ms. Derrick were cross-examined on the Settlement Agreement. <u>The agreement does not contain admissions by any party as to whether or not the allegations of a strip search were true or whether or not the complaints respecting race and socio-economic status were well-founded. The complaints were disposed of by agreement, and the allegations respecting removal of clothes, race and status were taken off the table for the purposes of the complaint process.</u> (Underlining mine)

[352] The judge explicitly stated that there was no agreement one way or another as to either the question of the strip search or the racism allegations. He expressly noted that these issues were not "on the table" and did not form part of the Record. In my opinion, this charge was appropriate in the circumstances and more than adequate to correct the slightest chance that any improper view may have been taken from Mr. MacDonald's remarks to the jury.

[353] In summary, Moir, J.'s charge was clear and unequivocal that the jury could not rely on the Record as evidence that the girls had abandoned their position on the question of strip search and racism. The instruction was appropriate and complete in the circumstances. No exception was taken to it at trial. There is no merit to this ground of appeal.

6. Instructions regarding the expert evidence

[354] Both appellants have advanced grounds of appeal stating that the trial judge erred when instructing the jury with respect to their task of determining whether the words complained of were defamatory of the respondent. In his directions Moir, J. said:

> Similarly, what...Mr. Jones and Ms. Derrick told you about what they intended their words to mean is irrelevant to the present issue. That evidence may go to one element of a defence that they raised, fair comment, and it may go to a factor you would consider if you award damages, but it has nothing to do with the present issue. The present issue involved an objective assessment.
>
> Nor are the opinions of Dr. Henry or Dr. Bernard relevant to this issue. Their evidence may be helpful to you when, or if, you consider one element of the fair comment defence. However, their definitions of forms of racism and their opinions about its existence in society have nothing to do with your determining whether the words of Ms. Derrick or Mr. Jones, at issue, have a defamatory meaning. And, so any other witness who may have seemed to comment on the meaning of the words.
>
> What is required is for you to determine the question of defamatory meaning: (1) objectively, from the stance of a right-thinking member of society; (2) by understanding the words in their ordinary meaning; and (3) by understanding the words in their full context.

[355] The appellants argue that the judge erred in directing the jury not to consider the expert evidence in relation to whether or not the words spoken by Mr. Jones or Ms. Derrick had a defamatory meaning. I disagree.

[356] **Brown, supra,** describes at para. 5.3(2) the vantage point from which the impugned words are to be assessed by the jury:

> The court must determine what meaning the published words are fairly calculated to produce, or what impression they would engender on the minds of ordinary and reasonable persons. Would the words 'tend to lower the plaintiff in the estimation of reasonable members of society'?:
>
> > The test...is, whether under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense.
>
> The defamatory meaning must be a reasonable one as objectively determined by reference to the ordinary reasonable person, or ordinary decent folk in the community, or persons of common ordinary intelligence or sense. The meaning is to be determined by reference "to the reasonable and fair minded reader" and not to "a perverse of unreasonable reader." It is a fair and natural meaning given to the words by a reasonable person of ordinary intelligence. The court will assume that the ordinary reasonable person is someone of fair, average intelligence. They are persons who have a common understanding of the meaning of language and who, in their evaluation of the imputation, apply moral and social standards reflecting the views of society generally.
>
> It is not whether the words are defamatory in the sense in which they might be understood if read critically, or if they were "subjected to critical analysis of a mind trained in the law" or one better informed on the subject matter. Nor is the sense to be determined as if it was the result of the "painstaking parsing of a scholar in his study"...

[357] Justice Moir did not err in his directions. The question of whether a statement is defamatory is for the jury alone to decide. The jury must answer the question of whether the words complained of, in their natural and ordinary meaning, would lower the plaintiff's reputation in the eyes of right-thinking members of society. The test to be applied is an objective one and in the absence of a pleaded "true innuendo", special expertise or knowledge of extrinsic facts are not to be imputed to the "reasonable person" from whose perspective the statement is to be assessed.

[358] Accordingly, in deciding whether the words conveyed a defamatory meaning, the jury needed no help from the experts called to testify by Ms. Derrick and Mr. Jones. The jury's task was to consider the words published at the press conference and decide whether they would lower Cst. Campbell's reputation in the eyes of reasonable members of the community. That is what they were told to do and the trial judge did not err in his instructions.

7. Balanced review of the evidence

[359] The appellant Ms. Derrick has raised as a ground of appeal the complaint that in his charge to the jury the judge failed to give a balanced presentation of the evidence, particularly with respect to how the jury should view the testimony of the three girls, and with respect to the conduct of the respondent after the search. Ms. Derrick says the charge was inadequate in that no mention was made of the age of the girls at the time of the search "or its possible impact on their evidence" and "only passing reference" was made to Cst. Campbell's conduct following the search which behaviour is said to have been inconsistent with her evidence that she did not strip search the girls. I reject this ground of appeal.

[360] It bears repeating that this was a long and complicated trial and the evidence stretched over more than three weeks. By the time the jury returned to begin its deliberations it had been over a month since the start of the trial. In the circumstances the judge felt it appropriate to give a brief recapitulation of the evidence for the benefit of the jury. Rather than undertake a global review of the evidence at one stretch, Moir, J. obviously felt that it would be more helpful to relate certain segments of the evidence to particular legal issues. His approach was sound. A failure to relate the principal items of evidence that tend to support the parties' respective theories so that the jurors can fully understand the issues being presented to them is an error in law. **Clair v. R**. [1992] N.S.J. No. 305 (C.A.).

[361] The appellant Derrick's first complaint relates to the relatively young ages of the three girls at the time of the incident. She suggests that the judge ought to have reminded the jury that the three girls were all 12 years of age at the time of the search, and 18 when they testified at trial, such that:

> ...it would be quite normal and, indeed, expected that there would be inconsistencies in their evidence...especially on matters of detail. Absent

> any instruction from the Trial Judge on this point, the jury, in assessing the credibility of the girls, may well have placed far greater weight on such inconsistencies and (sic) was appropriate.

I absolutely disagree. To go as far as the appellant suggests is in my view an invitation that the trial judge ought to have aided the credibility of the appellants' key witnesses. Such an instruction would have been improper. The three complainants were practically adults at the time they testified under oath before this jury. The jurors were free to assign whatever weight, if any, they chose to their evidence, recalling if they wished to consider it, the six years that had intervened between the incident at the school and this trial.

[362] Counsel for Ms. Derrick addressed this issue in his closing address to the jury, where he encouraged jurors to ignore imperfections and inconsistencies between the version of events given by the three girls. This was proper advocacy.

[363] Ms. Derick's second complaint relates to the judge's "almost complete silence" on the issue of Cst. Campbell's subsequent conduct following the search. In my opinion, Moir, J. was not silent on this subject at all. For example, he specifically referred to the extracts from her journal, introduced as an exhibit, and directed the jury to have regard to the evidence which the appellant now claims he ignored.

[364] In addition to this reference to Cst. Campbell's evidence, the judge also directed the jury's attention to the testimony of the parents and guardian who testified about their conversations with the respondent in the aftermath of the search.

[365] It is also clear from the record that counsel for Ms. Derrick in his closing address to the jury referred at length to the evidence of Cst. Campbell's conduct after the search and in particular the conclusions he wished the jurors to draw from that behaviour.

[366] As I have already stated in these reasons, a jury charge is not to be parsed word by word. The complete charge is to be evaluated and any particular instruction or omission ought not to be placed under a microscope in isolation from the substance of the charge as a whole. The crucial point is that each party must be given the opportunity to place his or her theory of the case fully before the jury. In reviewing the evidence, the trial judge is not required to make a party's arguments

on their behalf, or to track and repeat every piece of evidence consistent with that party's position. In addition to accurately stating the law, a trial judge who chooses to review the evidence in his charge must remind the jury of certain segments of the evidence which are relevant to the questions they must decide. He or she must also present his charge in a way that the jury will be able to understand and retain. Clearly, a trial judge must make decisions about what to include and what to leave out and so long as no material injustice results from a particular inclusion or omission, an appellate court should not, in my view, interfere with the verdict on the grounds of misdirection.

[367] In conclusion, it cannot be said that the jury was misinstructed as regards the evidence. Justice Moir's review of the evidence was balanced and referred to the evidence and exhibits which supported both the plaintiff's and the defendants' positions. The charge was a fair guide to the issues that arose. This ground of appeal should be dismissed.

8. Instructing the jury to consider certain aggravating circumstances

[368] The appellants argue that the trial judge should not have instructed the jury on factors capable of aggravating damage, since the issue of aggravated damages was not before them. This complaint was not raised by either counsel at the conclusion of the jury charge.

[369] I find that there is no merit to the appellants' submission. With respect, I think the argument is flawed in that it fails to take into account the distinction between general and aggravated damages, specifically that the latter are only available upon proof of malice, whereas the former are presumed and are at large. The appellants' argument confuses "aggravated damages" as a separate and distinct head of damage, with factors or features of a defendant's conduct which may legitimately be taken into account by the trier of fact when fixing an appropriate award for general damages.

[370] The thrust of the appellants' submission is that once the trial judge made a finding that there was no malice, he was obliged to withdraw from the jury's consideration certain factual matters relevant to the question of Cst. Campbell's actual damage. Such a proposition would, in my opinion, lead to the untenable result that a plaintiff could not recover for the effects of any circumstances which are

relevant to malice, unless actual malice were found. Such would amount to an erosion of the plaintiff's right to be compensated for damage actually suffered. This result would be contrary to common sense and the law.

[371] The issue of malice was before the court for three reasons. It was relevant to the defences of justification and fair comment and it was the threshold for an award of aggravated damages sought by the plaintiff. After inviting submissions on the point from all counsel, the trial judge ruled that there was insufficient evidence to meet the threshold for malice and said that written reasons in support of his finding would follow. Accordingly, it is not technically accurate for Mr. Jones to have argued, as he did at ¶223 of his factum to the effect that counsel *agreed* to withdraw the issue of aggravated damage from the jury. Once Moir, J. made his finding that there was insufficient evidence to satisfy the threshold for malice, the issue of aggravated damage could not, as a matter of law, go to the jury. See **Hill, supra**.

[372] The question of malice is one that goes directly to the motivation or state of mind of a defendant. Further, the defendants' conduct may be careless, entitling the claimant to damages, even though it falls short of the threshold for malice. Thus, aggravated damages flow from the motivation of the defendant in carrying out certain actions whereas compensatory damages flow from the conduct of the defendant per se, regardless of the motivation which lies behind that conduct. As such, aggravated damages recognize that the damage suffered by the plaintiff may be compounded due to the existence of malice. In **Hill, supra,** the Supreme Court has expressly recognized the fact that there will inevitably be an overlap in the factors relevant to damages generally and those relevant to aggravated damages in particular. At ¶182 in **Hill** the court adopted the following statement regarding the factors to be considered by a jury in assessing the damages as set out in *Gatley on Libel and Slander*, 8th ed., 1981:

> In an action of libel 'the assessment of damages does not depend on any legal rule'. The amount of damages is 'peculiarly the province of the jury', who in assessing them will naturally be governed by all the circumstances of the particular case. They are entitled to take into their consideration the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology, and 'the whole conduct of the defendant from the time when the libel was published down to the very moment of their verdict. They may take into consideration the conduct of the defendant before action,

> after action, and in court at the trial of the action', and also, it is submitted, the conduct of his counsel, who cannot shelter his client by taking responsibility for the conduct of the case. They should allow 'for the sad truth that no apology, retraction or withdrawal can ever be guaranteed completely to undo the harm it has done or the hurt it has caused'. They should also take into account the evidence led in aggravation or mitigation of the damages.

After quoting this statement, Justice Cory went on to note:

> There will of necessity be some overlapping of the factors to be considered when aggravated damages are assessed. (At ¶183)

[373] The cases relied upon by the appellants, **Brown v. Cole** (1998), 114 B.C.A.C. 73 (C.A.) and **Hodgson v. Canadian Newspapers Co.** (1998) 39 O.R. (3d) 235 (Gen. Div.), rev'd on other grounds and aff'd (2000), 49 O.R. (3d)161(C.A.), leave to appeal to S.C.C. ref'd May 3, 2001 (S.C.C.), ¶514 do not stand for the proposition that there can be no consideration of aggravating factors absent a finding of malice. On the contrary, in my opinion the cases relied upon by the appellants in recognizing the dangers of "double counting", impliedly echo Justice Cory's statements in **Hill, supra,** to the effect that there is an inevitable overlap between the types of conduct which may be relevant both as circumstances aggravating injury and as proof of malice justifying a separate award of aggravated damages.

[374] This is what the trial judge said in instructing the jury with regard to damages:

> There are considerations the law recognizes as going to damage in a defamation case as augmenting the principle of compensation for harm to reputation and feelings. These considerations concentrate on the behaviour of the defendants, although the award is compensatory rather than punitive.
>
> An unnecessarily harsh and prolonged cross-examination of the plaintiff may aggravate damages. Bear in mind, though, that the parties have a right of cross-examination. Counsel have a duty of vigour towards their clients in that regard.
>
> A failed defence of justification may add damages. Pleading in court that the defamation is true when it is not is taken to be aggravating. Bear in mind the defendants made only a limited plea of justification.

> The failure to provide an apology is aggravating. (...) ...the fact is, an apology was demanded and no apology was given, and that is recognized in law as being aggravating, whether the apology is demanded or not.

[375] I find no error in these directions. It is obvious from reviewing his entire charge that Moir, J. was well aware that the question of damages suffered by the plaintiff were largely factual matters within the province of the jury. In a case of defamation the jury is particularly suited to the task and must weigh and decide both matters of aggravation and mitigation. See **Brown, supra**, ¶25.9(2).

[376] I am not persuaded that the trial judge erred. This ground of appeal ought to be dismissed.

9. Allegedly inflammatory comments by Cst. Campbell's counsel

[377] The appellants say that the jury was subjected to an inflammatory jury address by Mr. MacDonald, counsel for the respondent, which, so it is argued, amounted to an exhortation to award aggravated or punitive damages, thus leading to an inordinately large and erroneous judgment.

[378] To place this ground of appeal in context and give proper perspective to the appellants' complaints, I intend to quote at some length from Mr. MacDonald's summation. But before doing that I point out that the word "inflammatory" was never mentioned by Mr. Outhouse on behalf of Ms. Derrick or Mr. Ryan on behalf of Mr. Jones when given the opportunity to comment upon Mr. MacDonald's summation after Moir, J. had excluded the jury and invited counsel to speak. But for a scant concern noted by Mr. Outhouse in which he took umbrage with Mr. MacDonald characterizing Ms. Derrick as "arrogant" and complained that Mr. MacDonald's illustration was inaccurate, neither Mr. Ryan nor Mr. Outhouse pressed with any vigour the kind of impropriety they now suggest in their written submissions and oral argument before this court.

[379] Counsel for these parties are all seasoned advocates and senior and highly respected members of the bar. Failure to object is a matter of some importance. Where, as here, senior and able counsel represented all parties, reticence by appellants' counsel is a factor upon which I place considerable weight. Had Mr. MacDonald's remarks been as "improper" and "inflammatory" as the appellants now

suggest, one would have expected their counsel to have been quick to leap to their feet and complain at the first opportunity. This is especially so when one considers that there were meaningful intervals between Mr. MacDonald's summation and Justice Moir's charge and between the judge's charge and the jury starting its deliberations. Let me now quote at some length from Mr. MacDonald's summation:

> My friends say we didn't identify Carol Campbell. We didn't talk about her at the press conference. They handed out the document that says this is a complaint against Carol Campbell and it was circulated around at the press conference. And all of the press had it. And all of the press, according to the witness (sic), to their evidence, were expected to and did read it. They knew who they were talking about – Carol Campbell. She was the only policeman, police person, at the school that day. There was nobody else. So when they talk about...the state assumed away their rights. The state wasn't there. Carol Campbell was there.
>
> . . .
>
> ... You've heard a lot of comments about public interests, public outcry, and so on and that's why Ms. Derrick and Mr. Jones had to call a press conference. ... that what they're asking you to assess (sic - accept?) well, the evidence does not support that. Mr. Jones was portrayed here as somebody who had his pulse, his finger on the pulse of that community. He knows what's happening in his community. The events at the school occurred on March 6. The press reports are on March 10, 11 and 12. Mr. Jones was not retained, he says, until around March 18, maybe a couple of days earlier, maybe a day or so later. And he had no recollection of knowing anything about it. No recollection of seeing any of those press reports. So it wasn't a burning issue in the community. This person with his hand, pulse, finger on the pulse knew nothing about it.
>
> There's only one press clipping after March 18. ...
>
> Some people said there was public interest a day or so after it happened or when those first press reports came out on March 10 or 11. No continuing interest. No evidence of it. And Ms. Derrick said she read those earlier reports, she was given them. She doesn't recall reading them at the time. She says she probably did. No one from the press was in touch with her prior to the press conference. Nobody. She relied solely on what she was told by Mr. Jones to support her conclusion that there was a great public

interest, public outcry, so she can't help us at all. Her evidence is of no help. And Mr. Jones wasn't able to give us any evidence.

We didn't hear any evidence about this great public outcry, either. They created it from the press conference jointly in the names of Rocky Jones and Ann Derrick. .... They created the public outcry. ...

Mr. Jones said he wanted to have a public debate over concerns he had with the police training of its officers. He made no attempt to determine what training was going on ... No attempt to find that out. Neither did Ms. Derrick.

Ms. Derrick says she wanted a press conference to make sure all the press had the same story. That was her reason ... Well, you can solve that, just put ... something in writing and send it to all the press if that's a concern. That's just an explanation of convenience, not necessity. No public outcry.

What is clear is that this is an absolutely unusual and extraordinary step and a step that was not provided in the process that is established for people who file a complaint against the police or a police officer... They initiated the process on April 3rd. They filed a complaint. And that process provided a mechanism whereby you can have that complaint considered and ultimately resolved. Nothing in there about calling a press conference...

In a matter of 22 months of practice, in his entire practice, Mr. Jones has filed nine complaints against the Halifax Police Department. The police. He was aware of the procedure. Never before had he distributed publicly a copy of the complaint (inaudible) to the press. Never before. He knows the procedure doesn't call for that and that it's wrong. Never before had he called a press conference to discuss the substance of the complaint...

A very telling piece of evidence was introduced...as exhibit 87. ... There isn't any mention in there about anything involving the Halifax Police Department. It is strictly a complaint against Carol Campbell. That's all that was going up to the Review Board. Don't be fooled by this fiction, I call it, that this is really a complaint against the Halifax Police Department. It was prosecuted as, treated as, and was a complaint against Carol Campbell. The only thing that was going to the Review Board was the complaint against Carol Campbell...

They were alleging that Carol Campbell discriminated based on race. That was a factual allegation. It wasn't the Police Department that

discriminated. It was only after this matter was set for hearing at the Police Review Board that the police became involved and they worked out this resolution. But up until this stage, there was not - , no involvement whatever of the police department. None.

These complaints were drafted by lawyers. There is no suggestion in those letters that they're allegations. They have put forth statements of fact. People whose profile, such as Ms. Derrick and Mr. Jones, should realize that when they make a statement purporting to be a fact, it's likely to be given a lot more credence than similar statements made by the mothers or the girls. They have an obligation to act more responsibly. They failed to discharge that obligation.

Ms. Derrick has been held up to you as a champion of the rights of women, yet she denied Carol Campbell the protection of one of the most fundamental principles that we have. That's the principle that says you are presumed innocent until you are proved guilty. Carol Campbell was denied that right. Ms. Jones (sic), Ms. Derrick and Mr. Jones had no hesitation in throwing away that very basic right. At the press conference, they charged her and they convicted her without a trial, without ever giving her the chance to have her say or present her side of the story.

They initiated a process which they knew called for an investigation, that they weren't prepared to wait for the results of the investigation. They denied Carol Campbell the right to be presumed innocent until proven guilty. They tried the accused, they accused her, they tried her and they convicted her in the Court of public opinion. That's what they did.

Ladies and gentlemen we can and we must demand more responsible conduct from those who are given the special status as lawyers which you heard describing (sic). They have to act better than that...

COURT RECESSED (TIME 3:16 P.M.)

COURT RESUMED (TIME: 3:33 P.M.)

...ladies and gentlemen, just let me briefly touch on how (inaudible) struck me a couple of times throughout the evidence and, and the only word I can find to describe it is arrogance. The – let me, first of all, refer to Dr. Henry. You recall Dr. Henry who wrote the book, "The Colour of Democracy". And using the word arrogance in respect to her is kind.

...She implied or expressly stated the view you wouldn't be able to understand the concept of her book. She had to re-write it for you. How arrogant can that be? What could be more arrogant than that?

No wonder we don't leave the serious questions that you have to decide to experts. Now, Ms. Derrick, at times, testified in a manner that would undoubtedly please Dr. Henry. Listening to some of her answers and explanations of apparently simple concepts and apparently simple words leaves one with the impression that she may have been speaking to post-doctorate students.

. . .

... She was shown that video, sorry, she was referred to the words that were in the video I played to you. It was no accident and so on. I suggested that that meant since it's no accident, it must be intentional. If it's not an accident, it's an intentional thing. Unintentional/intentional. She said no, no. Accident means it's a random event about compounded vulnerability. What does that mean? It was no non-random event about compounded vulnerability? And that's what accident means. How can anyone understand that? When you see the word accident, most people know what that means. They assume (inaudible) people of ordinary (inaudible) common sense know what it means. It's not an accident. It's intentional.

Then she said it was likely that any member of the Halifax Police Department who attended at St. Patrick's Alexandra School on that day, March 6th, would have assumed away the rights of those students and strip-searched them because the students were black and poor. How dare she tar every member of the Halifax Police Department with that type of allegation? And then she refused to concede that that amounted to stereotyping of the entire Halifax Police Department.

Dr. Henry, in her report, at tab 4, page 4, said:

> Stereotypes rob people of their individual traits and characteristics and they are seen simply as members of a particular group.

That's from her book. And then she said, in answer to questions from me, stereotypes deprive people of their individuality, deprive them of their humanity, is demeaning and un-, and is a demeaning and unfair way of judging people, that people, it's wrong to stereotype all members of an institution equally as it is to stereotype all members of a race. But she says

it's likely that any member of the Halifax Police Department on March 6th would have strip-searched those girls because they're black and poor.

Is that not stereotyping? How can it be anything but? The thing that her own expert says is absolutely wrong to do. That's another example of arrogance. She robbed the members of the Halifax Police Department of their individual traits and characteristics.

Finally, she says that, in a democracy, it's essential to have the right and ability to speak critically of public institutions. And particularly important when dealing on behalf of disadvantaged or vulnerable groups. (Inaudible) well, don't you know the Supreme Court of Canada says that freedom of speech and freedom of expression doesn't take priority? And I quoted to her, these are the words from the Supreme Court of Canada:

> Freedom of speech, like any other freedom, is subject to the law and must be balanced against the essential needs of individuals to protect their reputation.

And her answer? I don't accept the Supreme Court of Canada. I don't agree. How arrogant can that be? How can you be more arrogant as a lawyer to say I don't, I don't accept what the Supreme Court of Canada says. I don't believe it. Are you tired of arrogant people saying whatever they please just to justify their own conduct? Imagine the consequence if there were separate laws that applied only to activists but not to the rest of society. The rest of society had to abide by the laws of defamation but activists don't.

Well, let me tell you some of the things the courts have said about reputation and the importance of reputation and what you should consider when determining how much money to reward (sic) ...

There are two types of damages that you consider in defamation cases. The first is damage to reputation and then there's also damages for injury to feelings. They're all lumped together in the sum but you consider them separately. His Lordship will advise you that damage to reputation is presumed. If there's a defamation, it's presumed that it damages your reputation. The plaintiff doesn't have to prove that there has been damage to her reputation. That is presumed. And damages are what are known as at large (inaudible) and, by that, it means there is not (sic) limit on the damages. The Supreme Court of Canada has been asked to limit the amount of damages one can recover in defamation, similar to the way they

limited the amount one can recover in motor vehicle accidents, for example, for pain and suffering, and they said no. We will not limit the amount of damages that can be awarded for defamation. It's too important. Reputation is too important.

...

An amount that will clearly demonstrate to the community the vindication of Carol Campbell's reputation. And then, this is what our Nova Scotia Court of Appeal has said:

> The law allows general damages for sullied reputations. Such damages are at large because they are no (sic) susceptible to any exact monetary calculation. A good name proverbially is rather to be chosen than great riches but its loss may require heavy financial solace.

A good name is better than great riches. And if you take it away, there should be heavy financial solace (inaudible -coughing).

> Serious damage to reputation requires heavy compensation, even if no specific loss is or can be shown.

That's from our Court of Appeal in Nova Scotia.

The press were called, knowing that the press, the written press, has province-wide circulation and the electronic press is Maritime-wide. They were all invited. They all were expected to publish. They all did. The remarks of people who, as we told you and paraded before you, was very prominent. Those words will be given credibility of greater impact than the words of other people. All of that has to be taken into account ... But consider this case. Carol Campbell is a police officer who depends on her reputation as being fair, unbiased, truthful and that she treats all members of the community, which she comes into contact with, with respect and courtesy. Tarnishing that reputation could be disastrous in her ability to function properly as a police officer. She has no way of knowing what members of the public, her colleagues, prosecutors with whom she has to work, judges before whom she has to appear, have been affected and may have nagging doubts about her ability to discharge her duties in a fair, unbiased way. She has no way of knowing that...

Carol Campbell’s reputation has been destroyed ...

Most defendants (sic) repeated over and over Carol Campbell strip-searched the girls and she did so because they were poor and black. Most

said she would not have done what she did on March 6 to white girls (inaudible) more affluent neighbourhood (sic). In other words, she did it because of the black people. If you conclude that there has been defamation and that her reputation is damaged (inaudible) presume to be, then you must determine what amount of money would clearly demonstrate to the community the vindication of her reputation. That is your challenge. ... Equally distressing, she said, was waiting for the complaint which the parents said would be forthcoming...

But that distress paled compared to the utter devastation she experienced when two prominent lawyers called a press conference and announced to the world that she had strip-searched three girls because they're black and poor. The expected complaints from the parents had now become an accusation and a conviction publicly because of the words stated by these lawyers. They weren't stated as allegations. They were factual. They didn't even admit of any guilt. When Mr. Jones was asked, during the press conference, look, isn't there some suggestion that that's not what happened? His only response was, I have three girls who are going to testify. He didn't admit of any guilt at all. Carol Campbell prided herself on treating all people equally. She has good friends who are black. She was scheduled to spend time with one of those in Bermuda a couple of days after this happened. All of a sudden, she was a cop who had done something wrong but had done it for terrible reasons.

The affect (sic) on her feelings was and it is almost incalculable but you're going to have to deal with that ...

She says, on the witness stand, I don't think I deserve this. I wouldn't wish this on anybody. If you agree with that, then come back to the statement that will let everyone know that. We wouldn't wish this on anybody. We're not going to allow this to happen again if we can help it...

During his opening, Mr. Ryan said Carol Campbell is the author of her own misfortune. And he implied the same thing this morning. Aren't you tired of people who will not take responsibility for what they do? Who are always taking the position that it's somebody else's fault? Or that racism and discrimination are at the heart of every interaction that goes wrong between those in authority and those of minorities? Every time something goes wrong, it's because of race or discrimination. It can never be just the fact that we have a difference of opinion, you did something wrong, it's always race. Aren't you tired of that?

> Carol Campbell was at that school because theft had occurred. The defendants want you to ignore that fact. The defendants say it's Carol Campbell's fault that they labelled her a racist and said she discriminates on the basis of race and socioeconomic status. Aren't you tired of that sort of position being adopted and used to brand people without any effort being made to determine if it's correct? If there's any possible merit for those accusations.
>
> Don't condone this type of unacceptable behaviour. If you agree that the defendants defamed Carol Campbell, make your award of such a magnitude that her reputation is (inaudible) ... ("restored"?) as possible now... in the eyes of those right-thinking members of our community and that's the role you are to play...

[380] After Mr. MacDonald had concluded his remarks and the jury retired, Ms. Rubin, who appeared with Mr. Ryan as counsel to Mr. Jones, made no objection alleging that Mr. MacDonald's words were inflammatory or intended to incite the jury to award unreasonably excessive damages.

[381] All Mr. Outhouse on behalf of Ms. Derrick did was express a concern that Mr. MacDonald's comments might have left the jury with the impression that they were entitled to award punitive damages (which the judge had ruled earlier would not be left with the jury) and that when charactering Ms. Derrick as "arrogant" he had misquoted her evidence. He pointed out that his client had not testified that she *did not accept* the passage put to her from **Hill, supra**, but rather that she *did not agree* with that particular pronouncement of the Court. To this Mr. MacDonald replied that if he had mistakenly used the word "accept" as opposed to "agree" then the trial judge could point out counsel's error when charging the jury. In his instructions Moir, J. addressed the subject of Ms. Derrick's view of the law in an entirely appropriate fashion.

[382] I have already explained why in my opinion the trial judge properly instructed the jury on the legal principles they were obliged to apply in their determination of damages. He well understood the difference between aggravated damages as a separate head of damage (not available here because the threshold for malice had not been satisfied) and circumstances which might legitimately be taken into account by the jury as aggravating the damages.

[383] Further, he specifically directed the jury:

> On the assessment of damages, your award is not an opportunity for punishment or to send a message to others or to deter a defendant. Your award must be compensation, nothing else.(Underlining mine)

[384] As noted, following his charge the jury retired, but before they began deliberations Moir, J. invited counsel to comment upon his charge. Significantly, the only substantive legal issues raised by any counsel were two points Mr. MacDonald insisted be placed on the record on behalf of his client, Cst. Campbell. For their part, Mr. Ryan on behalf of Mr. Jones and Mr. Outhouse on behalf of Ms. Derrick raised what they characterized as “minor matters”, essentially factual, none of which is relevant to my discussion of this ground of appeal.

[385] Given the seriousness of this ground of appeal and the appellants’ assertion that Mr. MacDonald’s summation led to an award of damages that ought to be overturned, I have necessarily reviewed at length the relevant portions of counsel’s summation and his adversaries’ first reaction upon hearing it.

[386] After considering their written submissions and their arguments before this court I am satisfied that their complaint is without merit. In my view, it must be dismissed.

[387] Justice Moir was well placed to interrupt or intercede when necessary. The record in this case shows that he was hardly reluctant to interject himself in the proceedings where warranted throughout this long, emotional and difficult trial.

[388] But for the obvious exceptions for incidents of outrageous rhetoric, unseemly personal attacks or reckless misstatements of the evidence, all of which would draw an immediate rebuke from the presiding judge, litigation rests in the hands of counsel subject only to the judge’s application of the law and enforcement of the rules of evidence and procedure. Counsel are the advocates whose sworn duty it is to present the case and represent their clients’ interests as vigourously and ably as they can. Subject to the professional canons of ethics that bind them, lawyers have an ethical obligation to zealously and fearlessly act in their clients’ best interests.

[389] Counsel in a jury trial is entitled to put his or her client's case to the jury in the most forceful terms. Although dated, the principles articulated by the Appeal Division of the Ontario Supreme Court in **Dale v. Toronto Rwy. Co.** (1915), 24 D.L.R. 413 at pages 415-16, are applicable today:

> ...counsel has the right to make an impassioned address on behalf of his client—nay, in no few cases it may be a duty to make an impassioned address—mere earnestness, fervour, or even passion, is not in itself objectionable—so long as counsel does not transgress the decorum which should be observed in His Majesty's Court and does not offend in other respects -- Courts do and must give considerable latitude even to extravagant declamation.

Riddell, J., writing for the court, summarized its thinking in what has become a oft quoted statement of the law relating to jury addresses:

> ...a jury trial is a fight and not an afternoon tea. (at p. 416)

[390] More recently, citing **Dale** as an accurate statement of general principle, the Ontario Court of Appeal elaborated on the topic of inflammatory jury addresses in **Stewart v. Spear**, [1953] O.R. 502 at p. 505:

> ...there is a general rule which common sense alone dictates, and that is that the language of counsel to a jury should not be of such character as is likely to prejudice the cause of an opponent in the minds of honest men of fair intelligence to such an extent as to work an injustice.

[391] In their facta the appellants cite a number of criminal cases which discuss inflammatory comments by Crown attorneys in a criminal prosecution. As the Supreme Court of Canada noted in **R. v. Boucher**, [1955] S.C.R. 16, a Crown attorney has certain duties which go beyond the standard expected of civil advocates. Further, criminal trials raise issues which are totally foreign to civil trials, for example the possibility that the jury will associate the Crown with a government they may trust, and the fact that the accused's liberty is at stake. In my view, one ought to be very cautious before applying principles or dicta from a criminal trial to a civil case.

[392] In argument Mr. Ryan, counsel for Mr. Jones, relied upon the decision of Ferguson, J. in **Hall v. Schmidt**, [2002] 56 O.R. (3rd) 257 (Ont. S.C.). I note that in that case defence counsel objected to the opening address of plaintiff's counsel. Ferguson, J. declared a mistrial, later filing written reasons. It is not necessary for me to pronounce upon his list of "duties" for both counsel and the court. Suffice it to say that the points relied upon by the appellants here are not, in my respectful opinion, an accurate statement of the law, more particularly in Nova Scotia.

[393] In this case Cst. Campbell had made very serious allegations that the appellants had defamed her. Ms. Derrick and Mr. Jones maintained throughout that Cst. Campbell had put an overly sinister construction on the words spoken, and that it was never their intention to make an individualized allegation of racism against her. The appellants maintained that their words were directed to "systemic factors" only, and not at the respondent personally. Not surprisingly, the disagreement between the parties was intense and, in my opinion, Mr. MacDonald made an appropriately impassioned jury address.

[394] Based upon their written submissions and oral arguments before this court, the appellants' primary concern is with the statements Mr. MacDonald made in his jury address about the "arrogance" of the appellants and certain witnesses. Both appellants submit that Mr. MacDonald's closing address encouraged the jury to make an award for purposes of general deterrence and to punish Ms. Derrick and Mr. Jones. I disagree.

[395] In his careful charge to the jury Moir, J. made it clear that they were not to award damages as a deterrent or in order to "teach lawyers a lesson". Instead, he advised the jury repeatedly that their award was to be compensatory in nature. He specifically directed the jury to have regard only to relevant factors in their deliberations. In my opinion, nothing in counsel's jury address could have so prejudiced the jury that they would have ignored their oath and declined to follow the judge's instructions. No prejudice to the appellants could have arisen from any remark made by counsel for Cst. Campbell. Neither can it be suggested that the jury was so inflamed by prejudice that they ignored the issues they had promised to decide, upon their oath.

[396] Cst. Campbell alleged that she had been defamed, while Mr. Jones and Ms. Derrick maintained that their words did not even refer to her. Where such a stark

conflict exists between the parties, counsel is entitled to put his client's position to the jury in the strongest possible terms.

[397] I reject the appellants' submission that Mr. MacDonald's summation was objectionable for the reasons stated or that Moir, J. erred by failing to intercede, or take sufficient steps to counteract the allegedly inflammatory comments. The jurors heard the evidence. The jurors observed the witnesses and could judge for themselves the attitude, the demeanour, the sympathies, the spontaneity in response, the circumlocution in reply, the combativeness in tone and deportment, of the people who took the oath and appeared before them. Such features are always legitimate markers when assessing the credibility, reliability and weight of the evidence. It is an assessment the law recognizes as being particularly suited to the collective judgment of a jury.

[398] Within the bounds of ethics and proper advocacy, counsel is permitted to characterize testimony and demeanour, and seek to persuade the jury that his characterization is apt. As the triers of fact, it is for the jury and the jury alone, exercising its special power of deliberation and collective decision making, to decide whether to accept or not counsels' submissions. This is the essence of closing argument. Advocacy is and has always been the art of persuasion.

[399] In my opinion, Mr. MacDonald was merely inviting the jurors to find that the appellants or their testimony to which he referred was "arrogant". Having thoroughly considered the entire record, I am satisfied his invitation was neither unreasonable nor unfair.

Conclusion

[400] In conclusion I see no merit to any of the appellants' challenges to Justice Moir's charge to the jury. I would order that the appeals on these grounds be dismissed.

JURY VERDICT

[401] The appellants challenge the jury's verdict in two respects. I will consider each separately.

1. The jury's verdict on liability
2. The jury's award of damages

1. The Jury's Verdict on Liability

[402] The appellants argue that the jury's findings in this case are perverse, plainly unreasonable and patently unjust and amount to findings which no jury reviewing the evidence as a whole and acting judicially could have reached. For reasons I will now explain, I would reject this submission. There was ample evidence to allow the jury to reach its findings on any one of a number of bases. Their verdict is subject to a high standard of review and I am not persuaded that there is any reason to interfere.

[403] The guiding principle in reviewing factual findings made by juries was stated by Chief Justice Duff in **McCannell v. McLean**, [1937] S.C.R. 341, at ¶3:

> The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.....

[404] A jury verdict in a civil case is accorded great deference. This principle was emphasized by Justice Estey in **Dube v. Labar**, [1986] 1 S.C.R. 649, ¶15-17:

> At the outset it was observed that the Courts accord a jury verdict rendered in civil proceedings with great deference. With reference to a special verdict, it was said some time ago in this Court, "we also fully agree that answers by a jury to questions should be given the fullest possible effect, and, if it is possible to support the same by any reasonable construction, they should be supported", per Nesbitt, J. in *Jamison v. Harris* (1905), 35 S.C.R. 625, at page 631. (...)
>
> The jury's conclusion that the Plaintiff consented to bear the legal risk when he entered the car as passenger, knowing of the Defendant's state of

> impairment, is doubtless one that not every jury would have reached. It does not have the character of unreasonableness, however, that must be apparent on the face of jury verdict before an Appellate Court can upset it. . .
>
> The paramount principle here operating is the duty residing in the Court to sustain, so long as it be reasonable to do so, the jury's disposition of the issues without judicial intervention. The Court is concerned, of course, at all times, with providing ultimate justice consistent with the principle of the law. Here, two routes lie open to the reviewing tribunal but in the selection of the appropriate route the paramount principle of support of a jury verdict governs. Despite, therefore, the potential of the jury charge to confuse, this appeal must be dismissed. It is not apparent from their answers to the questions put that the jury members were in fact, when in the throes of ultimate disposition of the issue, confused, nor is their conclusion on the vital issue of *volenti* so unreasonable as to justify its reversal by an Appellate Court. (Underlining mine)

[405] It is not the role of this court to re-weigh the evidence so long as there is some evidence upon which the jury could have reached its conclusion. In **Weare v. Anthony** (1981), 47 N.S.R. (2d) 411 (C.A.), Pace, J.A. observed at ¶59:

> In *Cameron v. Excelsior Insurance Company* (1979), 32 N.S.R. (2d) 668; 54 A.P.R. 668, Mr. Justice Hart in a dissenting judgment of this court (later approved by the Supreme Court of Canada said at pp. 704-705:
>
> > The jury had the opportunity of observing all of these witnesses and deciding which part of the evidence they would accept. In my opinion it is not for this court to disagree with their findings when there is some evidence upon which they could have reached the conclusion that they did.
> >
> > Even though we as judges might reach a different conclusion than the jury did at this trial it would not be proper for us to set aside this verdict as being against the weight of the evidence because it cannot be said that it was so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have reached it. (Underlining mine)

See, as well, **Toneguzzo-Norvell v. Burnaby Hospital**, [1994] 1 S.C.R. 114, at p. 122. Most recently, in **Housen, supra**, the Supreme Court explained the reasons of public policy that underlie the high level of deference given to findings of fact. I need not repeat those policies here. However, it is important to note that the Court's review of the rationale underlying appellate deference was made in the context of a trial by judge alone. Obviously, at least the same high standard of review is to be applied to a jury's findings.

[406] All of the principles I have just discussed are accorded special importance in defamation cases. I adopt the following commentary from **Brown, supra**, ¶24.2 as a proper statement of the law in Canada:

> It is only in an extreme case, where "very strong grounds" or grave reasons are shown, that a judge or appellate tribunal should interfere with or set aside a verdict of a jury. As stated by Scrutton L.J.:
>
> > 'Libel or no libel' is peculiarly a question for the jury: ...only in the most extreme cases should the judge allow his view to override that of the constitutional tribunal.
>
> This is particularly true where the question is principally one based on the weight of the evidence even if the judge may have thought, on the basis of that evidence, that a verdict should more properly have been found for the other party.
>
> > (Quoting from **Broome v. Agar** (1928) 138 L.T. 698, at 700 (C.A.), which quotation was approved at **Lockhart v. Harrison** (1928), 44 T.L.R. 794 at 796 (H.L.))

[407] In this case, the jury was asked for and returned a general verdict, such that it is not possible to determine precisely what findings form the foundation for their disposition of Cst. Campbell's suit. All that is necessary to sustain the judgment is sufficient evidence to support any one of the potential bases for a finding of liability. As was noted by Masten, J. in **Raspberry v. Canadian National Railway Co.** (1928), 62 O.L.R. 406 (C.A.):

> The jury having given a general verdict, every intendment of fact consistent with the evidence in any reasonable view is to be presumed in

> support of their verdict. Considered from that standpoint, there is, in my opinion, ample evidence to support the verdict.(at p. 408)

[408] In their factum counsel for the respondent provided a very useful and complete list of the potential avenues through which the jury in this case could have reached their verdict in favour of Cst. Campbell. Since for the purposes of this appeal the questions of publication and whether the statements referred to Cst. Campbell are not in issue, the possible routes to the jury's verdict therefore include the following paths of reasoning:

a. a finding that factual statements to the effect that Campbell had required the girls to remove their clothes and infringed their privacy interests (the "strip-search statements") were defamatory and were not justified;
b. a finding that the statements to the effect that the search would not have been conducted had the girls been white were defamatory statements of fact and were not justified;
c. a finding that the statements to the effect that the search would not have been conducted had the girls come from more affluent families were defamatory statements of fact and were not justified;
d. a finding that the impugned statements amounted to factual statements to the effect that Carol Campbell was racist and were defamatory (justification not pleaded);
e. a finding that the impugned statements amounted to factual statements to the effect that Carol Campbell was motivated by racism and were defamatory(justification not pleaded);
f. a finding that the impugned statements amounted to factual statements to the effect that Carol Campbell discriminated in the conduct of her duties as Constable on improper grounds including race, economic status, and social status and were defamatory (justification not pleaded);
g. a finding that the impugned statements were comment, but that the factual basis was not proven in substance;
h. a finding that the impugned statements were comment, but that they exceeded the bounds of what was "fair"; and

i. a finding that the impugned statements were comment but were made without an honest belief in their truth.

All parties agreed that the words relating to the allegation that a strip search occurred are fact. All other statements were capable of being comment or fact. As I have already explained in earlier parts of this lengthy judgment, there was evidence upon which the jury could reasonably have reached any one of the above noted conclusions. I need not refer again to that evidence.

[409] Accordingly, I am satisfied that there were many bases upon which the jury could justifiably have reached its conclusion that the appellants had defamed Cst. Campbell and that their statements did not attract the protection of any of the available defences. In view of the high standard of deference owed to jury verdicts, it is not enough to suggest that a different result might have been reached on one or more of these points. Consequently, I would say that this ground of appeal is without merit and should be dismissed.

2. The Jury's Award of Damages

[410] The appellants say that the jury award of general damages of $240,000.00 is so excessive as to shock the conscience. Further, they say it must have been influenced by the inflammatory comments of respondent's counsel in his closing address, as well as by the trial judge's erroneous instructions regarding aggravated damages. I have already rejected the appellants' arguments concerning Mr. MacDonald's jury address or that the trial judge erred in any respect in his directions to the jury on damages. I will therefore restrict my comments now to the size of the jury award.

[411] The calculation of damages in an action for defamation is not an exact science. As **Brown, supra,** observes, at ¶25.2:

> The law provides no fixed or exact measure for the assessment of damages in an action for defamation. There is no mathematical formula by which the quantum can be determined. Nor is there any requirement that they be assessed with mathematical certainty, or slide rule precision. "They cannot be measured by any objective monetary scale and are not capable of

> precise calculation." Where the damages include personal humiliation and anguish, they are necessarily imprecise. The calculation "is essentially a matter of impression and not addition." The aim of the court, as in other tort actions, is to insure *restitutio in integrum* wherever that is possible. In that respect, an award must have regard for both probable past and prospective future damages.

[412] It is well established that a jury's award of damages in a defamation trial will not be lightly disturbed by an appellate court. As noted by the Ontario Court of Appeal in **Hill**, **supra**, and affirmed on this point by the Supreme Court, the power of an appellate court is narrowly restricted. An appeal court owes great deference to the jury because the jury has been charged with the important and unique task of representing the community. Accordingly, the assessment of damages by a properly instructed jury should rarely be disturbed on appeal and only in extraordinary circumstances. As Cory, J. observed:

> Jurors are drawn from the community and speak for their community. When properly instructed, they are uniquely qualified to assess the damages suffered by the plaintiff, who is also a member of their community. ... Therefore, an appellate court is not entitled to substitute its own judgment as to the proper award for that of the jury merely because it would have arrived at a different figure. (At ¶158)

[413] It should also be remembered that the jury in this case was given no guidance on the issue of the particular "dollar figure" which they were to award. All counsel scrupulously avoided suggesting any appropriate figure; no awards from other cases were cited; and the trial judge did not give the jury any explicit guidance in the sense of suggesting a precise figure or a range. He did – properly, in my view – instruct the jury that if they found the harm done to Cst. Campbell to be substantial, the damages awarded to her ought to be substantial as well.

[414] Having thoroughly reviewed the trial judge's directions to the jury on this issue, I am satisfied that they were appropriate, consistent with the principles I have outlined, and complete. The jury was asked to assess compensation which can never be precisely measured in monetary terms. Moir, J. left to the jury the task of assessing damages according to their own good judgment as representatives of the community at large who are taken to know the value of a good reputation. All

defamations are unique. This jury was in the best position to value the damage done to Cst. Campbell by the appellants' defamatory statements. In **Hill, supra**, the appellants there urged the Supreme Court of Canada to impose a "cap" on damages for defamation such as had been done in the context of personal injury claims. The Court refused. It is therefore a paramount principle in defamation cases that no artificial limits be imposed, nor figures even suggested to the jury.

[415] I am not at all persuaded that the jury's award in this case is out of proportion to other defamation cases. On the contrary, and recognizing that comparisons between cases are of limited assistance, it is my opinion that this jury's award is in no way "out of line" with recent defamation cases in Canada which have repeatedly recognized that serious damage to one's reputation must be compensated by a large damage award. Cory, J. eloquently described the compensatory nature of general damages in **Hill, supra**, at ¶164-66:

> It has long been held that general damages in defamation cases are presumed from the very publication of the false statement and are awarded at large...They are, as stated, peculiarly within the province of the jury. These are sound principles that should be followed.
>
> The consequences which flow from the publication of an injurious false statement are invidious... A defamatory statement can seep into the crevices of the subconscious and lurk there ever ready to spring forth and spread its cancerous evil. The unfortunate impression left by a libel may last a lifetime. Seldom does the defamed person have the opportunity of replying and correcting the record in a manner that will truly remedy the situation. It is members of the community in which the defamed person lives who will be best able to assess the damages. The jury as representative of that community should be free to make an assessment of damages which will provide the plaintiff with a sum of money that clearly demonstrates to the community the vindication of the plaintiff's reputation.

[416] Mr. Jones and Ms. Derrick are high profile lawyers with a record of service and advocacy in cases of some celebrity. The record reflects that they are used to courting the press. Their convening a press conference could be expected to draw a crowd and lend weight to statements made concerning Cst. Campbell's conduct. The appellants published damaging allegations about the respondent in strong language and consciously and deliberately gave their allegations the maximum possible media

exposure. The devastating personal impact of the press conference upon Cst. Campbell was explored at length before the jury. Both Mr. Jones and Ms. Derrick maintained that their words were blameless, and that they were true (insofar as they were factual). In my opinion, this constitutes a very grave defamation and the jury had more than enough evidence before it to make a substantial award of damages.

[417] This ground of appeal should be dismissed.

TRIAL JUDGE'S AWARD OF PRE-JUDGMENT INTEREST AND COSTS

[418] As far as I am aware, no appeal is taken from the decision of Moir, J. dated August 30, 2001, awarding lump sum costs of $75,000.00 plus disbursements to Cst. Campbell and allowing pre-judgment interest on $225,500.00 at the rate of 2.6% a year from April 5, 1995, until the date of his order. Not a word was said about it in argument and nothing in the myriad grounds of either appeal challenges Moir, J's costs decision. Consequently, it is not necessary for me to in any way endorse or otherwise address the trial judge's analysis, reasons or conclusions.

DISPOSITION OF APPEALS

[419] For all of these reasons, I would reject every ground of appeal advanced by the appellants and would dismiss both appeals. I would order that the respondent be entitled to costs on appeal in the amount of 40% of her trial costs, together with complete recovery of her disbursements on appeal as allowed on taxation, such appeal costs and disbursements to be divided equally between the appellants, Burnley A. Jones and Anne S. Derrick.

THE RESPONDENT CST. CAMPBELL'S NOTICE OF CONTENTION

[420] By notice of contention dated October 17, 2001, the respondent raised two issues:

> 1. That the trial judge erred in instructing the jury on the assessment of general damages for defamation, and
>
> 2. That the appellants' notice of appeal perpetuates and renders more severe the defamatory imputations against the respondent.

In the respondent's submission these two arguments are "alternative grounds for upholding the verdict of the jury at trial".

[421] I do not consider either contention merited and I would reject them both. Both before and after Moir, J. charged the jury, Cst. Campbell's counsel implored the judge to instruct the jury that they were free to consider in their award of damages to Cst. Campbell any injury caused by media publications *prior to* the press conference. Moir, J. rejected that approach and chose to instruct the jury on what he believed to be the current law on this subject in Canada. At the conclusion of the charge Mr. MacDonald – quite properly – asked that his objection be noted on the record, alleging error on the part of the trial judge in this portion of his charge.

[422] I am not persuaded that Justice Moir erred. In this case it is clear that Ms. Derrick and Mr. Jones had absolutely nothing to do with the prior publications. There was no concerted action between them and the media outlets which published the prior publications. The prior publications were not raised in the statement of claim. In my respectful opinion, there can be no basis on which the appellants were responsible for any damage caused by the prior publication and Moir, J. was right to instruct the jury that they should not award damages to Cst. Campbell for harm to reputation caused by the prior publications since, according to the law of defamation in Canada, a defendant should only be held liable for damages for harm to reputation that he or she causes and not for harm done by others. See **Brown, supra**, ¶25.3 and 25.4.

[423] I would also dismiss the respondent's second contention, that is that the appellants' notice of appeal perpetuates and renders more severe the defamatory imputations against her. The case authorities cited by the respondent in support of her contention can be distinguished. In those cases malice was found against the

appellants at trial. That is very different from the case here where Moir, J. held that the threshold for malice had not been met by the respondent, which ruling has not been appealed. Having thoroughly reviewed the written and oral submissions of the parties I am satisfied that the issues and arguments raised on appeal were all *bona fide* and need not be taken into account in the damages to which Cst. Campbell is entitled.

[424] Very little time was taken in the presentation or defence of the respondent's notice of contention. Accordingly, I would order that the respondent's notice of contention be dismissed and that each party absorb his or her own costs in this minor aspect of the appeal.

FINAL DISPOSITION

[425] I would order that the appeals brought by Burnley A. Jones and Anne S. Derrick be dismissed, that the respondent Carol Campbell be entitled to her costs and disbursements on appeal, and that the verdict of the jury and the decisions of the trial judge be affirmed.

[426] I would order that the respondent's notice of contention be dismissed with each party absorbing his or her costs relative to it.

[427] I wish to thank all counsel for the quality of their advocacy before the court.

Saunders, J.A.

INDEX