CASE COMMENT

LOUTCHANSKY V. TIMES NEWSPAPERS: THE IMPACT OF THE U.K.'S *HUMAN RIGHTS ACT* ON PRIVATE LAW AND A COMPARISON WITH THE CANADIAN APPROACH

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In 1998, the United Kingdom (U.K.) imported and internalized the standards of the *European Convention on Human Rights* (*ECHR*)[1] through the *Human Rights Act* (*HRA*).[2] While Parliament remains supreme in the sense that the *HRA* is not constitutionally entrenched, for all practical purposes the U.K. now has an explicit and domestic human rights regime. From the start, it was clear that the *Act* would have "vertical" effect in the public sphere — legislation and acts of the state and its agents were to be measured against the standards of the *ECHR*. Less clear, however, was the "horizontal" impact that the *HRA* would have in the realm of private law and private disputes. While there is no direct reference in the *HRA* to the common law, s. 6(3) makes it clear that courts are to be considered "public authorities" and are therefore required to act in accordance with the *ECHR*. Before the *HRA* came into effect, there was an intense debate in legal circles about how much it would — or should — constitutionalize the common law, especially in areas such as defamation, where freedoms are plainly at stake. Would, for example, the law of defamation be transformed in a manner similar to the U.S. Supreme Court's decision in *New York Times v. Sullivan*?[3] Voicing generally-felt concern, one observer noted that the "silence on horizontal effect" made this the *HRA*'s "area of the greatest obscurity" and an issue to be determined by the courts themselves.[4]

Decided roughly one year after the *HRA* came into full effect, *Loutchansky v. Times Newspapers*[5] offers a useful snapshot of the impact of the *HRA* on the common law. It also provides an early chance to compare the English jurisprudence in this area with the Canadian "*Charter* values" approach. *Loutchansky* seems to indicate that the English courts will take

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1 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221.

2 *Human Rights Act 1998* (U.K.), 1998, c. 42.

3 376 U.S. 254 (1964) [*New York Times*]. In that case, the United States Supreme Court held that unless malice or reckless disregard for the truth were present, statements about public officials were privileged. This finding is contrary to notions of corrective justice which centre on the idea of formal or transactional equality between private law parties. For a persuasive account of the role transactional equality plays in the private law – or at least an internally intelligible, "apolitical" private law, see E. Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press, 1995).

4 G. Phillipson, "The Human Rights Act, 'Horizontal effect' and the Common Law: A Bang or a Whimper?" (1999) 62 Modern L.R. 824 at 825. Phillipson provides a good bibliography of the pre-*HRA* debate. His own prediction was that "[p]laintiffs seeking to invoke Convention rights in private common law cases will not be able to rely solely on the right in question, but will have to anchor their claim in an existing common law cause of action; they may then invoke the relevant Convention rights in support of the claim" (*ibid.* at 847). As this case comment hopes to show, Phillipson's prediction was accurate.

5 [2002] Q.B. 783 (C.A.) [*Loutchansky*].

a progressive but cautious approach to changing the common law, not unlike the approach used when considering *Charter* values in connection with the common law.

I. HORIZONTAL EFFECT AND THE COMMON LAW OF DEFAMATION

Loutchansky was a defamation action brought by a Russian businessman against the *Times* after the newspaper linked the claimant to international money-laundering activities. A number of interesting questions were addressed in the case, including whether posting an article on the newspaper's web site constituted republication of the original printed article.[6] Ultimately, the case turned on the *Times'* defence of qualified privilege for its printed articles: the focus of this case comment. The *Times* did not plead justification and no attempt was made during the trial to show that the allegations were true. Rather, the newspaper argued that it had a duty to publish and that the public had a legitimate interest in knowing about international criminal matters.

The classic common law test for qualified privilege is stated in *Adam v. Ward*: "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 made has a corresponding interest or duty to receive it. This reciprocity is essential."[7] This is known as the "duty-interest" test and may be used to protect the making of otherwise defamatory remarks in, for example, employment references or reports of criminal activity to the police. It is important to note, however, that the privilege attaches to an "occasion" (such as the request and response for a reference letter) and that the privilege can be defeated if malice or actual malice (publishing despite knowing claims are false or being reckless as to the truth) can be shown, or if the defamatory remarks exceed or abuse the occasion (for example, publishing to a wider audience than necessary). It should be noted that malice was not an issue at trial in *Loutchansky*.

The qualified privilege defence was considered by the House of Lords in the leading case of *Reynolds v. Times Newspapers*,[8] decided shortly before the *HRA* came into effect. In that case, involving the publication in the U.K. of defamatory statements about the Irish Prime Minister, the question arose as to whether the duty to publish matters of political significance to "the world at large" was sufficient to invoke qualified privilege. There have been cases where courts have found a duty to publish to the world at large, but these have been rare. As Stephenson L.J. put it: "There may be extreme cases where the urgency of communicating a warning is so great, or the source of the information so reliable, that publication of suspicion or speculation is justified; for example, where there is danger to the public from a suspected terrorist or the distribution of food or drugs."[9] In *Reynolds*, the House of Lords reaffirmed the duty-interest test and declined to create a special category of qualified

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6 The Court refused to adopt the U.S. "single publication rule" and held that the traditional common law position that each individual publication of a libel gives rise to a separate cause of action should apply. The Court also addressed the question of whether there was a duty to republish (or archive) materials on the internet that could invoke qualified privilege. On the implications of this case for the Internet, see N. Shanmuganathan, "Libel online: an update" (2002) 152 New L.J. 7039.

7 [1917] A.C. 309 at 334 (H.L.), Lord Atkinson.

8 [2001] 2 A.C. 127 (H.L.) [*Reynolds*].

9 *Blackshaw v. Lord*, [1984] Q.B. 1 (C.A.) at 27.

privilege for political speech or a generalised right of the public to know. It did not, however, leave the traditional understanding of qualified privilege intact. Lord Nicholls set out an "elastic" approach and listed some of the factors for courts to consider:

> 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. 2) The nature of the information, and the extent to which the subject matter is a matter of public concern. 3) The source of the information. Some informants have no direct knowledge of the events. Some of have their own axes to grind, or are being paid for their stories. 4) The steps taken to verify the information. 5) The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6) The urgency of the matter. News is often a perishable commodity. 7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8) Whether the article contained the gist of the plaintiff's side of the story. 9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10) The circumstances of the publication, including the timing.[10]

Although the case was decided before the *HRA* came into full effect, the Lords made reference to it and noted that freedom of expression must be central to decision-making in defamation cases and that any restrictions on that freedom must be justifiable.[11] The non-exhaustive list was intended to provide guidance to courts in deciding circumstances under which freedom of expression might be restricted to protect reputation.

Several courts and writers have suggested that *Reynolds* represents a "sea change" in the way that defamation cases are to be handled, a change that involves a new definition of privilege and emphasizes the freedom of expression.[12] Another key change, it has been suggested, is the assimilation of the question of whether an occasion of qualified privilege exists in regards to the question of what circumstances can defeat that privilege. As the Court of Appeal in *Loutchansky* put it:[13]

> [w]hereas previously it could be said of qualified privilege that it attaches to the occasion of the publication rather than the publication, *Reynolds* privilege attaches, if at all, to the publication itself: it is impossible to conceive of circumstances in which the publication could be privileged but the article itself not so. Similarly, once *Reynolds* privilege attaches, little scope remains for any subsequent finding of malice.

Despite changing the qualified privilege rule, however, the House of Lords used common law concepts — still centred on the duty-interest test — to balance freedom of expression with the protection of reputation. Indeed, the House of Lords ultimately found for the claimant despite the fact that the matter concerned a public official and was of public concern. This finding would have undoubtedly been different had the case been decided in the U.S. following the *New York Times* approach.

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10 *Reynolds*, *supra* note 8 at 205.

11 *Ibid.* at 200.

12 See *e.g.* W.R. Atkin, "Defamation Law in New Zealand 'Refined' and 'Amplified'" (2001) 30 C.L.W.R. 237.

13 *Loutchansky*, *supra* note 5 at 806.

In *Loutchansky*, the *Times* argued that the House of Lords in *Reynolds* had not gone far enough in changing the common law to protect the freedom of expression. It claimed that in keeping the duty-interest test alive, albeit in an expanded version, *Reynolds* left the media vulnerable. The duty-interest test should be rejected, it argued, and replaced with a "shared test" similar to the approach taken in New Zealand.[14] The proposed shared test had two components:

> 1) whether in all the circumstances, other than the conduct of the newspaper, the subject matter of the communication is in the public interest (the "right to know"), giving rise to a prima facie occasion of qualified privilege; and 2) whether the newspaper failed to comply with the ethics of responsible journalism so as to abuse the occasion of privilege.[15]

In other words, the *Times* attempted to have the traditional statement of qualified privilege reconsidered in light of the *HRA*, which had come into effect since *Reynolds*. In particular, s. 12 of the *Act* required courts to have "particular regard" for the freedom of expression.[16] It argued that all courts were required to heed the new *HRA* and that the Court of Appeal was not necessarily bound to follow the *Reynolds* decision because the *HRA* trumped precedent where the two collided. The Court of Appeal disposed of the argument summarily:

> We, of course, are bound to follow that [approach] favoured by the House of Lords in *Reynolds's* case.... Complain as he may that their approach conflates a two-part test and effectively pre-empts the jury's role in deciding malice, Lord Lester [counsel for the Times] must recognise the constraints of binding authority. The most we can do is attempt to illuminate the single composite test which *Reynolds's* case undoubtedly dictates and to identify certain of the crucial considerations likely to influence its application.[17]

The Court thus made clear that the onset of the *HRA* would not involve any fundamental rethinking of what would otherwise be binding authority. Admittedly, the situation might have been different had the Lords in *Reynolds* not themselves dealt explicitly with the freedom of expression. At no point, however, did the Court indicate that binding authority exists only in cases that have considered the rights protected under the *ECHR*.

The Court did, however, clarify the test for whether journalists have a duty to publish an article such as the one in question to the world at large. The Court relied on Lord Nicholl's dictum: "the common law does not seek to set a higher standard than that of responsible journalism."[18] In clarifying the test, Lord Phillips for the Court outlined the balance that must be struck between setting the standard of journalistic responsibility too low (encouraging the publication of defamatory material), and setting the standard too high (deterring newspapers from keeping the public properly informed). He held that the lower court's formulation of the duty owed — "such that a publisher would be open to legitimate criticism if he failed to publish the information in question" — was setting the standard too high:

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14 See *Lange v. Atkinson*, [2000] 3 N.Z.L.R. 385.

15 *Loutchansky*, *supra* note 5 at 791.

16 In addition, the newspaper claimed that Lord Nicholl's non-exhaustive list was too vague to meet the human rights requirement of certainty in the law.

17 *Loutchansky*, *supra* note 5 at 804.

18 *Reynolds*, *supra* note 8 at 202.

> There will undoubtedly be occasions when one newspaper would decide to publish and quite properly so, yet a second newspaper, no less properly, would delay or abstain from publication. Not all journalists can or should be expected to reach an identical view in every case. Responsible journalism will in certain circumstances permit equally of publication or of non-publication.[19]

Thus, at the end of the day, while both *Reynolds* and *Loutchansky* were willing to take freedom of expression as the starting point in the context of defamation and the media, and though they did expand qualified privilege, such incremental changes left the common law rules easily recognizable.

In a recent article considering the impact of the *HRA*, one of the *HRA*'s sponsors, Lord Irvine, the Lord Chancellor, claimed that the *HRA* has had a "profound" effect on the common law, "reinvigorating" it and bringing to it "clarity and coherence."[20] At the same time, he noted the "inherent capacity of the common law to develop."[21] Based on *Loutchansky*'s post-*HRA* adoption and clarification of *Reynolds,* this seems to be an accurate portrayal of developments in the law of defamation as well as in other areas of the law such as privacy. Recent privacy cases such as *Douglas and Others v. Hello! Ltd.*,[22] for example, have seen the common law — buttressed by the *HRA* — expanded to recognize that an individual has a right of personal privacy. This right, however, has been grounded in the equitable doctrine of breach of confidence (if on a private occasion everyone knows that no photographs are to be taken, anyone then taking photographs breaches a duty of confidence), and not the creation of a new category of right.[23]

II. SO DIFFERENT FROM *CHARTER* VALUES?

The "profound but go slow" approach described by the Lord Chancellor has resonance with Canada's *Charter* values approach. Although admittedly these are early days in the life of the *HRA*, it seems that English and Canadian jurisprudence will not diverge as much as might have been expected given the countries' differing theoretical orientations to the application of human rights provisions to private law.

Aharon Barak has suggested that there are four broad theoretical models by which to consider the relationship between human rights and the private law: direct application, non-

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19 *Loutchansky*, *supra* note 5 at 811. The Court of Appeal sent the case back to the lower court for a reconsideration of the facts under the correct standard.

20 Lord Irvine of Lairg, "The Impact of the Human Rights Act: Parliament, the Courts and the Executive (2003) Pub. L. 308 at 321.

21 *Ibid.* at 321-22.

22 [2001] Q.B. 967 (C.A.).

23 Not everyone has been pleased with the "profound but go slow" approach lauded by the Lord Chancellor. With respect to privacy law for example, one critic has suggested that the traditional common law categories should be replaced *holus bolus* by the Strasbourg jurisprudence. Paul Kearns, "Privacy and the Human Rights Act 1998" (2001) 151 New L.J. 377 at 378, suggests:

> Privacy Law cannot be simply neatly streamed under an expanded breach of confidence doctrine in English law or develop only within one of the other legal areas in English law which addresses privacy matters ... we should, in England, arguably collapse the classic boundaries of English privacy law and re-structure it around the four main heads of privacy protection that have evolved in the case law of the Strasbourg court.

application, indirect application and application to the judiciary.[24] Under the direct application model, private parties can invoke constitutional rights against other private parties. If, for example, there is a constitutional right to privacy and one private individual interferes with the privacy rights of another, a claim may be based directly on that right.[25] The non-application model is straight-forward in that human rights are those claimed against the state and the constitution simply does not address private disputes.[26] With the indirect approach, human rights apply to the private law but are embraced *through* private law doctrines. As Barak put it:

> Application of constitutional human rights indirectly in private law does not create a new system of human rights. Indeed, the advantage of the indirect application model is that it works within the old private law system, imbuing old tools with new contents or creating new tools with traditional private law techniques. In the past, common law human rights infiltrated private law by means of private law value terms. Now constitutional rights do the same.[27]

Under the application to the judiciary model, courts are considered to be state actors. In the U.S. for example, courts must apply the Constitution in the creation and development of common law.[28] The clear example here is *New York Times v. Sullivan*, which to a large extent constitutionalized the law of defamation in the U.S.

Although Barak does not place the U.K. in his scheme, the U.K. fits both the indirect model and, like the U.S., the application to the judiciary model. As noted earlier, the courts are public authorities bound to act in a human rights-compliant manner. At the same time, human rights are imported through traditional common law doctrines. By contrast, Barak places Canada in the non-application model. While this may be an inappropriate categorization, there are undoubtedly important doctrinal differences between the Canadian and English approaches.

The *Charter* values approach was first developed by the Supreme Court of Canada in its 1986 decision, *Retail, Wholesale and Department Store Union Local 580 v. Dolphin Delivery Ltd.*[29] In that case, the Court was asked to consider the question of secondary picketing in a labour dispute. Justice McIntyre said that where

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24 A. Barak, "Constitutional Human Rights and Private Law" in D. Friedmann & D. Barak-Erez, eds., *Human Rights in Private Law* (Oxford: Hart Publishing, 2001) at 13.

25 *Ibid.* at 17. The problem with this approach is that generally it does not have a textual foundation in most jurisdictions — usually constitutional provisions are directed only at the state. Barak also sees this approach as being conceptually untenable: "human rights necessarily limit one another, if we apply constitutional human rights to relations between private parties, we will at the same time have to negate them" (*ibid.*).

26 This approach is subject to criticism because abuses of power come from private as well as state interests. On the other hand, it is in keeping with the idea that private individuals have autonomy of will in contract law, for example.

27 Barak, *supra* note 24 at 22. Barak also suggests a refinement of this model, which he terms the "strengthened indirect application model." In this view, where the private law does not have doctrine or mechanisms to allow human rights to pervade, then new doctrines or mechanisms must be created (*ibid.* at 31).

28 This approach is subject to the criticism that it does violence to a constitutional order where courts are held to stand as neutral arbiters between citizens and state.

29 [1986] 2 S.C.R. 573 [*Dolphin Delivery*].

> private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the *Charter* will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the *Charter* is far from irrelevant to private litigants whose disputes fall to be decided at common law.[30]

The Court expanded the doctrine in *Hill v. Church of Scientology* by adopting a flexible balancing approach when faced with the claim that the common law of defamation did not accord with *Charter* values.[31] Justice Cory said: "*Charter* values, framed in general terms should be weighed against the principles which underlie the common law. The *Charter* values will then provide the guidelines for any modification of the common law which the court feels is necessary."[32] Stated simply, *Charter* values *influence* the development of the common law; *Charter* rights do not *apply per se* in private disputes.[33] This principle is easily distinguished from the English jurisprudence. Whereas Canadian courts speak of an "approach" or a "methodology," in England it is clear that there is a rights "test" to be met.[34] Whereas Canadian courts speak of the development of the common law in line with *Charter* values — application *per se* is explicitly ruled out — English courts speak of the "application" of human rights standards.[35] However, the doctrinal differences have had less impact on the ground in defamation and other private law cases.

In placing Canada in the non-application model, Barak has suggested that *Hill* "left the common law action of defamation intact."[36] Similarly, Loraine and Ernest Weinrib suggest that in both *Dolphin Delivery* and *Hill* "prior doctrine remained unchanged in the face of the *Charter*'s reference to freedom of expression."[37] These assertions may be based on a misreading of *Hill*. Although the Court made no sweeping changes to defamation law in *Hill* — refusing to adopt the American "actual malice" test — it is inaccurate to say that the Court made no changes. In fact, there was an extension of the defence of qualified privilege to include reports about pleadings and other court documents that have been filed or,

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30 *Ibid.* at para. 39.

31 [1995] 2 S.C.R. 1130 [*Hill*].

32 *Ibid.* at para 97.

33 There are other principles that could be added, for instance that the onus is on the party challenging the common law principle to show the inconsistency and that far reaching changes are to be left to the legislature.

34 The term "methodology" was adopted by the Supreme Court of Canada in *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Beverages (West) Ltd.*, [2002] 1 S.C.R. 156 at 186 [*Pepsi-Cola*].

35 In *Reynolds*, *supra* note 8, the House of Lords put it this way: "The common law is to be developed and applied in a manner consistent with article 10 [the freedom of expression provision] of the European Convention for the Protection of Human Rights and Fundamental Freedoms." And it is clear that, to borrow a Canadian legal phrase, a "section 1" type analysis must be undertaken: "To be justified, any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved" (*ibid.* at 200). The Court of Appeal in *Loutchansky*, *supra* note 5 at 803 cites this approach with approval.

36 Barak, *supra* note 24 at 20.

37 "Constitutional Values and Private Law in Canada" in Friedmann & Barak-Erez, *supra* note 24 at 46. Ultimately Weinrib and Weinrib offer their own suggestion on how private law reasoning can be maintained while importing human rights; specifically, they advocate reconfiguring the idea of transactional equality to include *Charter* values through a rough proportionality calculus.

controversially on the facts of this case, were about to be filed.[38] This incremental change is in keeping with the Court's view that *Charter* values should be assimilated into the common law gradually. Furthermore (and in fairness Weinrib and Weinrib recognize this) the lack of change in *Hill* may be explained by the possibility that the common law already reflected *Charter* values and that no change or, rather, that only fine-tuning was needed. As the Court states in *Hill*, "the common law of defamation complies with the underlying values of the *Charter* and there is no need to amend it."[39]

The fact that *Charter* values do matter and are not simply hortatory is brought into sharper focus in post-*Hill* cases such as *Daishowa Inc. v. Friends of the Lubicon*.[40] In that case, involving political expression through a consumer boycott, the *Charter* values approach led to a substantive change in outcome from that dictated by strict application of economic torts, such as inducing breach of contract. Freedom of expression was given precedence over some of the competing interests at stake. Reference must also be made to the Supreme Court of Canada's decision in *Pepsi-Cola*. In that case, the Court amended the common law rules on secondary picketing. The court considered the disparate strands of jurisprudence on the subject. These ranged from the "secondary picketing is illegal *per se*" approach to the "secondary picketing is only illegal if it involves a separate tort or a crime" approach, with various approaches in between. The Court came down on the side that was in accordance with the *Charter* value of free expression. As in *Reynolds* and *Loutchansky*, free expression was to be the starting point, the Court said, and "was to be protected unless its curtailment [was] justified."[41] Ultimately, the Court found that the "only illegal if accompanied by tortuous/criminal activity" approach to secondary picketing was preferable. At the end of the day, the Court has incorporated *Charter* values, but in a way which does not fundamentally disrupt common law concepts and which maintains the transactional equality and autonomy of will that are fundamental to our private law traditions. Despite doctrinal differences, this is very similar to the English situation, where courts have changed the common law through traditional private law reasoning guided by the *ECHR*.

III. CONCLUSION

There are various reasons why English and Canadian private law remain similar despite travelling different "horizontal" paths. First, the common law largely meets human rights standards: both *Hill* and *Reynolds* show that freedom of expression and protection of reputation have already undergone a rough balancing by the common law. Furthermore, there is path dependency: an inclination among lawyers framing cases and judges deciding them to use familiar tools. Finally, human rights issues will not arise in most private law cases, though admittedly there are some instances where human rights issues are simply not spotted.[42] Human rights may be relevant to private law cases outside the freedom of expression field, but they do not seem to arise with sufficient frequency to make human rights

38 *Hill*, *supra* note 31 at paras 143-54.
39 *Ibid.* at para 141.
40 (1998), 39 O.R. (3d) 620 (Gen. Div.).
41 *Ibid.* at 186.
42 See I. Rogers, "How to spot a human rights point in a private law case" (2002) 152 New L.J. 1723.

the common starting point of private law cases generally.[43] Meanwhile, in cases involving freedom of expression, courts in both Canada and England (if *Loutchansky* is any indication) have fashioned means of maintaining the integrity of common law reasoning while paying due deference to human rights standards.

[43] For a case involving human rights outside the freedom of expression context, see *Marcic* v. *Thames Water Utilities* [2002] Q.B. 929 (C.A.), leave to appeal to the House of Lords granted, a nuisance case raising the right to peaceful enjoyment of property.