

Indexed as:
Grassi v. WIC Radio Ltd. (c.o.b. CKNW/98)

Between
Phillip Eugene Grassi, plaintiff, and
WIC Radio Ltd., carrying on business as CKNW/98,
Yvonne Eamor, Southam Inc., carrying on business as
The Province, Stuart Hunter, Vancouver City Police
Inspector Ken Doern, Vancouver Police Department,
and City of Vancouver, defendants

[2000] B.C.J. No. 170

2000 BCSC 185

Vancouver Registry No. C974723

British Columbia Supreme Court
Vancouver, British Columbia

Lysyk J.

Heard: October 4 - 7, 12 - 15, 21 - 22 and November 2 - 3,
1999.

Judgment: January 28, 2000.

(101 paras.)

Libel and slander -- The statement -- Inferences from -- What constitutes defamatory statements --
From meaning of words themselves -- Publication -- Defences -- Qualified privilege -- Fair comment
-- Damages -- General damages, measure.

Action by Grassi for damages against Eamor, a reporter for CKNW Radio, CKNW, Hunter, a reporter
for the Province, the Province newspaper, Doern, a police officer, and the City of Vancouver. The
police had targeted persons seeking the services of prostitutes. The police released the names of 30
men, including Grassi, who had been charged with solicitation to the media. In the group of 30, three
men had been charged with obtaining for consideration the sexual services of a person under 18.
Grassi was not one of those three men. Eamor reported that Grassi was a firefighter and that he had
been charged with communicating for the purposes of engaging in prostitution, and that he had been
arrested in an area known to offer child prostitutes. Hunter wrote an article for the Province news-

paper stating that the names of the men charged had been released by the police, but the paper had decided not to publish the names. He attributed a comment that they were not prepared to tolerate putting the children of the city at risk to the police. A subsequent article named Grassi specifically and stated that he was a minor hockey league coach and firefighter. It mentioned that he coached eight and nine-year-old hockey players. It reiterated that the paper did not reprint police lists of those charged with prostitution offences but it made exceptions in cases where public safety issues were involved. Doern, a police officer, was interviewed by Eamor. He also made a statement to the media that it was in the public interest to know that there were people out there who were trying to buy sex from young persons. He noted that the employers of two men were advised of the charges because of the nature of the business and the trust the public had in those persons. He did not mention Grassi specifically. The City of Vancouver was sued as Doern's employer. Grassi sought additional damages against Doern and the City of Vancouver on the ground that they breached his right under section 11(d) of the Canadian Charter of Rights and Freedoms to be presumed innocent until proven guilty. Grassi was eventually acquitted of the charge against him. None of the media defendants contacted Grassi to verify the news stories.

HELD: Action allowed against Eamor, WIC Radio, and Southam Inc. The action was dismissed against Hunter, Doern, and the City. The radio stories were defamatory. When given their ordinary meaning, the stories stated that Grassi was under suspicion of seeking to purchase the sexual services of a minor. The newspaper story by Hunter was not defamatory. It did not mention Grassi by name. It was not rendered defamatory by the publication of the later story. The article by the staff reporter was defamatory. An ordinary reasonable person would draw the inference from the article that Grassi could not be trusted with children. Doern did not defame Grassi in his interviews with the media. He did not tell Eamor that all of the persons named in the media release were suspected of having sought sex with minors. Certain comments made by him were taken out of context. No qualified privilege attached to the news stories. There was no public duty to disclose the information. The allegations were serious, and no steps were taken to verify the information. Nobody contacted Grassi for his comments. The defence of fair comment failed because the defamatory words were neither comment nor based upon true facts. Damages of \$35,000 were awarded against WIC Radio. It had apologized publicly to Grassi. Damages of \$45,000 were awarded against Southam. It had not apologized. Aggravated damages were not appropriate as there was no malice. Punitive damages were not warranted in the circumstances.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 11(d), 24(1).

Constitutional Question Act, R.S.B.C. 1996, c. 68, s. 8.

Criminal Code, R.S.B.C. 1985, C. C-46, ss. 212, 212(4), 213, 213(1)(c).

Libel and Slander Act, R.S.B.C. 1996, c. 263, s. 2.

Police Act, R.S.B.C. 1996, c. 367, s. 20.

Counsel:

Robert D. **Gibbens**, for the plaintiff.

Daniel W. Burnett and Harley J. Harris, for the defendants, WIC Radio Ltd., carrying on business as CKNW/98.

Bruce T. Quayle, for the defendants, Vancouver City Police Inspector Ken Doern, Vancouver Police Department and City of Vancouver.

Roger D. McConchie and Jennifer D. McNaught, for the defendants, Southam Inc., carrying on business as The Province, and Stuart Hunter.

LYSYK J.:--

Nature of the Proceedings and Background Facts

1 The plaintiff Phillip Grassi ("Grassi") asserts that he was defamed by, and he seeks damages from, six defendants: three individuals and their respective employers. Yvonne Eamor ("Eamor") is a reporter employed by WIC Radio Ltd., carrying on business as CKNW/98 ("CKNW"). Stuart Hunter ("Hunter") is a reporter employed by Southam Inc., carrying on business as The Province newspaper ("The Province"). Ken Doern ("Inspector Doern" or "Doern") is a police officer employed by the City of Vancouver. The four defendants -- Eamor, CKNW, Hunter and The Province -- will be referred to collectively in these reasons as the "Media Defendants". (The style of cause also lists as a defendant the Vancouver Police Department; however, it is common ground that the latter is not a legal entity and not a party to these proceedings).

2 The statements alleged by Grassi to be defamatory relate to an occurrence on April 2, 1997. Around 11:00 p.m. that night, on the way to his home in North Vancouver, Grassi drove through an area in Vancouver frequented by prostitutes. He stopped at the intersection of Victoria and Pandora Streets, where he had a brief conversation with an undercover female police officer, Constable Elizabeth Miller, who was posing as a prostitute. The basic facts relating to that encounter are not in dispute.

3 Grassi did not know that Constable Miller, who was then 35 years of age, was a police officer. He did not leave his vehicle and she did not enter it. The conversation lasted less than a minute. He drove away. Following a signal from Constable Miller to other members of the police team, Grassi was detained and served with an appearance notice.

4 Grassi was charged under s. 213(1)(c) of the Criminal Code R.S.B.C. 1985, c. C-46, with the summary conviction offence of communicating in a public place for the purposes of obtaining the sexual services of a prostitute. He was tried and acquitted of that charge on August 19, 1997, in Provincial Court.

5 Publication of the statements alleged to be defamatory occurred within three weeks of the date of the alleged offence, in the period of April 18 to 22, 1997. As against the defendants Inspector Doern and the City of Vancouver, the statements take the form of certain remarks made by Doern when interviewed by Eamor in the morning of April 18, tape-recorded segments of which were broadcast on CKNW later that day. As against the defendants Eamor and CKNW, the statements in question were contained in radio broadcasts on the same date. As against Hunter and The Province, the statements appeared in newspaper articles published on April 20 and April 22.

6 In defamation cases, the pleadings are particularly important, and extracts from the amended statement of claim set out in the following section of these reasons detail the manner in which Grassi asserts he was defamed. In general terms, however, he says that the sting of the statements published

by the defendants lies in the false imputation that he is a paedophile who was, on the night of April 2, 1997, seeking the sexual services of a person under the age of eighteen years. He pleads that, in their natural and ordinary meaning, the words employed by the defendants mean, among other things, that he can not be trusted in the company of children, and that he poses a serious danger to them.

7 Under s. 212(4) of the Criminal Code, a person who, in any place, obtains or attempts to obtain, for consideration, the sexual services of a person who is under the age of eighteen, or who that person believes is under the age of eighteen, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. Obviously, this crime, in law, is more serious than the summary conviction offence with which Grassi was charged and, in due course, found not guilty. Grassi makes the further point, which the defendants do not contest, that in the eyes of the general public there is a substantial difference in the moral spectrum between an adult-related prostitution offence and a prostitution offence involving minors. Counsel for Grassi puts it this way: one who commits the latter type of offence is, in our society, "a pariah, shunned by all."

8 The evidence is that, commencing in early 1997, and continuing through April of that year, the Vancouver City Police had pursued a policy of targeting persons seeking the services of prostitutes. One of the geographic areas concentrated upon encompassed a few city blocks north of Hastings Street, including the intersection of Victoria and Pandora Streets, which was where Grassi's conversation with Constable Miller took place. Inspector Doern testified that this area, known as a "kiddie stroll", is frequented by the great majority of Vancouver's prostitutes who are minors, that is, under the age of 18. Nevertheless, according to his testimony, most of the prostitutes working that area are adults.

9 Inspector Doern, who was in charge of the Vice Unit during the early months of 1997, testified that at that time a policy was initiated of publicizing the names of persons charged with seeking the services of prostitutes, whether the latter were minors or adults. In accordance with that policy, he authorized and signed a "Media Release" dated April 18, 1997, which he issued to the media on the same date. That document lists the names of 30 males, of whom Grassi is one, and includes some personal data about them -- age, home address and occupation, information about the location, date and time of the alleged offence, and the date set for a court appearance. The names listed in the Media Release are divided into three categories. Section "A" lists the names of 24 persons described as having been charged since January, 1997 with "communicating for the purposes of engaging in prostitution" under s. 213 of the Criminal Code. It is in Section "A" that Grassi's name, with accompanying data, appears. Section "B" lists names of three persons who, since January, 1997, had pleaded guilty to the same charge and the information provided includes the sentence each received. Section "C" lists the names of three persons, with accompanying data, who are described as having been charged, since November, 1996, under s. 212(4) of the Criminal Code with "obtaining or attempting to obtain for consideration the sexual services of a person under 18 years of age." It may be noted at once that the accuracy of the information in this Media Release is not challenged.

10 On the morning of April 18, 1997, Inspector Doern supplied this Media Release, with a covering memorandum, to Constable Anne Drennan, a police Media Liaison officer. The latter made the Media Release available to representatives of the media at a news conference held at 10:00 that morning. Also that morning, Inspector Doern was interviewed twice by Eamor, once before and once after Constable Drennan's news conference. Inspector Doern testified that, in the second interview by Eamor, he, for the first time, referred by name to several individuals listed in the Media Release,

including Grassi. With Doern's permission, Eamor tape-recorded their discussion. Extracts from the recorded interview were included in CKNW broadcasts later that day.

The Pleadings and the Issues

11 Grassi attributes publication of the alleged defamatory words to the defendants Eamor and CKNW in the following extracts from the amended statement of claim:

11. On Friday, April 18, 1997 beginning at or about noon, and thereafter throughout the day at hourly news segments the Defendant, CKNW, and the Defendant, Yvonne Eamor, published by broadcasting and caused to be published for general reception, news reports containing the following words defamatory of the Plaintiff:

At noon

"A Vancouver firefighter...among thirty men charged with trying to buy sex from a prostitute. Both men were picked up in an area of Vancouver known to offer child prostitutes. Forty-nine year old Phillip Grassi of North Vancouver is a Vancouver firefighter. He was arrested earlier this month and charged with communicating for the purposes of engaging in prostitution.

Vice squad inspector Ken Doern says the employers of both men have been advised.

Because of the nature of the business and the trust that the public has in those persons."

At 1:00 p.m.

"Vancouver Police have released the names of thirty men charged with prostitution offenses. The offenses occurred in an area of Vancouver where child prostitutes sell sex.

Only three men face charges of trying to buy sex from kids, although it's suspected all the men charged were looking for just that.

. . .

Vice squad inspector Ken Doern says it is important the information be given to the public "I think it's in the public interest for the public to know that there are these types of people that could be your neighbour that are out there trying to buy sex from young persons"."

and later,

"The crackdown on johns who frequent the kiddie strolls in Vancouver continues and today police released the names of some who have been caught.

Police say 30 men have been charged, however three have been dinged for actually trying to buy sex from kids, all the others face less serious offences.

Vice Squad Inspector Ken Doern says it is important this information be made public because who knows those busted could be your neighbour.

Doern says it is hoped by [naming] the men they will think twice before trying to buy sex from children. 49 year old Phillip Grassi of North Van is a Vancouver firefighter and he has been charged with communicating for the purpose of engaging in prostitution...."

and at 5:35 p.m.

"For the first time, police are releasing detailed personal information on men charged with prostitution offenses, and in two cases, employers have been notified...

McComb: Whose employers are being notified?

Eamor: Well, two so far that have been notified, there is a Vancouver firefighter who is charged... And Inspector Ken Doern felt that because of the nature of the business that the men do and trust the public has in them, and considering what their jobs are, police felt that they had the responsibility to notify the employer, which they have done.

McComb: I suppose one can ask the question about privacy issues here. Do police alert employers in other offences besides prostitution?

Eamor: I asked him exactly the same question - we don't do this if someone's charged with armed robbery, we don't do it if some-

one is charged with theft over 5000 dollars, and Ken Doern said he thinks that it's in the public interest for the public to know that there are these types of people out there who could be your next door neighbour, who could be people you work with, who are trying to buy sex from children."

12 As to the alleged defamatory nature and meaning of the words attributed to the defendants Eamor and CKNW, the amended statement of claim contains this paragraph:

12. The said words of the radio broadcast news reports which referred to or were understood to refer to the Plaintiff, in their natural and ordinary meaning meant and were understood to mean that:
 - (i) Because of the trust placed in the Plaintiff as a firefighter by the public he is in a position to take advantage of that trust and abuse it and, therefore, he poses a special danger to the public and children in particular;
 - (ii) the Plaintiff was out looking to buy sex from kids;
 - (iii) the Plaintiff is a paedophile;
 - (iv) the Plaintiff could not be trusted in the company of children;
 - (v) the Plaintiff is a criminal sexual pervert who buys sex from children;
 - (vi) the Plaintiff is liable to sexually assault children;
 - (vii) the Plaintiff poses a serious danger to children;
 - (viii) the Plaintiff should be removed from any contact with children because of his sexual perversion involving children.

13 With respect to the defendants Hunter and The Province, the words attributed to them and their alleged defamatory import are set out in the following extract from the amended statement of claim:

14. That on page A4 of the Defendant newspaper, The Province, dated Sunday, April 20, 1997 and Tuesday, April 22, 1997, the Defendant, Stuart Hunter, wrote and the Defendant, The Province, published the following words defamatory of the Plaintiff, on April 20, 1997, at page A4 in an article entitled "COPS NAME JOHN AS 'STERN WARNING'"

"Cst. Anne Drennan said 'we're not prepared to tolerate putting the children of our city at risk'"

The Province has chosen not to publish the names of the men"

and on Tuesday, April 22, 1997 again at page A4 in an article entitled "TEACHERS, COACH ON LIST OF ACCUSED"

"Charged with communicating for the purposes of engaging in prostitution was Phillip Eugene Grassi, forty-nine, a North Vancouver minor hockey league coach and firefighter.

Police say the alleged offence occurred April 2 at Pandora and Victoria.

Grassi coached eight and nine year old hockey players during the 1996-1997 season that ended last month

Grassi's court date is set at May 8

The Province generally does not reprint police lists of those charged with prostitution offenses. But exceptions may be made in cases where public safety issues are involved"

14A The article published by the Defendant newspaper, The Province, on page A4 on Tuesday, April 22, 1997 identified the Plaintiff as one of the men referred to in the article published by the Defendant, The Province, on page A4 on Sunday, April 20, 1997.

15. The said words of the newspaper articles referred to or were understood to refer to, the Plaintiff, and in their natural and ordinary meaning the words complained of in the newspaper articles dated April 20, 1997 and April 22, 1997 meant and were understood to mean that the Plaintiff:

- (i) is an 'exceptional' case because he posed a serious risk to public safety;
- (ii) because he coached eight and nine year old children he was a public safety risk because he was trying to buy sex from kids;
- (iii) had had his name published and is therefore a public safety risk to children;
- (iv) is a risk to the children of the city, especially the children he coached, because he was trying to buy sex from kids,

and also that

- (v) the Plaintiff was out looking to buy sex from kids;
- (vi) the Plaintiff is a paedophile;
- (vii) the Plaintiff could not be trusted in the company of children;
- (viii) the Plaintiff is a criminal sexual pervert who buys sex from children;
- (ix) the Plaintiff is liable to sexually assault children;
- (x) the Plaintiff poses a serious danger to children;
- (xi) the Plaintiff should be removed from any contact with children because of his sexual perversion involving children.

14 Finally, Grassi attributes to the defendants Doern and the City of Vancouver the words and alleged defamatory meaning referred to in the following paragraphs in the amended statement of claim:

17. On or about Friday, April 18, 1997 the Defendant, Vancouver City Police Inspector Doern, stated to the media which was broadcast at or about 3:00 p.m. and thereafter on the Defendant radio station CKNW which published by broadcasting for general reception the following words of the Defendant, Vancouver City Police Inspector Doern, in addition to those set out in paragraph 11, which were defamatory to the Plaintiff:

"I think it's in the public interest for the public to know that there are these types of people that could be your neighbours that are out there trying to buy sex from young persons"

and later, the Defendant, Vancouver City Police Inspector Doern stated that the employers of both men have been advised

"Because of the nature of the business and the trust that the public has in those persons".

- 17A Further, the Defendant, Vancouver City Police Inspector Doern, stated on the same occasion as that described in paragraph 17,

"it is important this information be made public because who knows those busted could be your neighbour"

and

"it is hoped by [naming] the men they will think twice before trying to buy sex from children".

- 17B The Defendants the City of Vancouver and Vancouver City Police Inspector Doern specifically released the Plaintiff's name, age, address, occupation and marital status.

18. The words set out in paragraphs 11, 17 and 17A referred to, or were understood to refer to, the Plaintiff. Particulars are as follows:

- (a) the Plaintiff's employer was notified by Vancouver City Police Inspector Doern
- (b) The Plaintiff's name was released to the media by the Defendant, Vancouver Police Department.

19. The said words of the Defendant, Vancouver City Police Inspector Doern, in the radio broadcast news report in their natural and ordinary meaning meant and were understood to mean that the Plaintiff:

- (i) was one of those "types" of people that could be your neighbour who was trying to buy sex from young persons;
- (ii) should not be in a position of trust because he is a type who would purchase sex from young persons;

and also that

- (iii) because of the trust placed in the Plaintiff as a firefighter by the public he is in a position to take advantage of that trust and abuse it and, therefore, he poses a special danger to the public and children in particular;
- (iv) the Plaintiff was out looking to buy sex from kids;
- (v) the Plaintiff is a paedophile;
- (vi) the Plaintiff could not be trusted in the company of children;
- (vii) the Plaintiff is a criminal sexual pervert who buys sex from children;
- (viii) the Plaintiff is liable to sexually assault children;
- (ix) the Plaintiff poses a serious danger to children;
- (x) the Plaintiff should be removed from any contact with children because of his sexual perversion involving children.

15 The Media Defendants admit that the words attributed to them in the amended statement of claim were in fact published by them. Transcripts of the radio broadcasts and copies of the newspaper articles in question leave no room for contention as to what was said.

16 Inspector Doern admits to making the statements set out in para. 17 of the amended statement of claim. These are transcripts of voice clips from Eamor's interview of Doern, and they are included in the extracts from Eamor's noon and 1:00 p.m. radio reports of April 18 that are set out in para. 11 of the amended statement of claim. The facts alleged in para. 17B are also admitted. As will appear, however, Doern takes issue with certain other statements attributed to him elsewhere in the pleadings, specifically in paras. 11 and 17A.

17 It may be noted that, with respect to all of the statements he alleges to be defamatory, Grassi relies on the natural and ordinary meaning of the words in question. No reliance is placed upon innuendo.

18 Each of the defendants denies that the words published carry the defamatory meaning attributed to them by the plaintiff. In the alternative, a number of defences are raised, including qualified privilege and fair comment.

19 The defendants also raise a constitutional issue relating to certain common law principles which, in their submission, fail to conform with the Canadian Charter of Rights and Freedoms (the "Charter"). At the same time, however, they acknowledge that authorities binding upon this court preclude my sustaining their constitutional challenge, the latter being advanced merely to preserve the issue for possible examination in an appellate court. In the notice filed on behalf of all of the defendants under s. 8 of the Constitutional Question Act, R.S.B.C. 1996, c. 68, the constitutional issue is framed in the following terms:

[T]he Defendants take the position that the common law of libel must be interpreted or revised in a manner which accords with the values reflected in the Canadian Charter of Rights and Freedoms, and as such, must provide that:

- a) The plaintiffs prove the words complained of were false;
- b) The plaintiffs prove this defendant was at fault, meaning malicious, or alternatively negligent, in publishing the words complained of;
- c) The plaintiffs prove they have suffered damage as a consequence of the words complained of;
- d) The qualified privilege defence applies to public discussion of matters of political or public importance.

It may be noted in this connection that in *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, Cory J., writing for six of the seven judges on the panel, undertook a thorough review of the common law of defamation in light of the values underlying the Charter: see paras. 99-156. He stated, at para. 141:

In conclusion, in its application to the parties in this action, the common law of defamation complies with the underlying values of the Charter and there is no need to amend or alter it.

L'Heureux-Dubé J. agreed with that conclusion: para. 208. She differed from the majority only on a point which has no application to the present case, namely, whether (as the majority held) the defence of qualified privilege is available with respect to pleadings upon which no judicial action has yet been taken.

20 It is the case that *Hill*, supra, did not involve the media. However, an argument urging modification of the common law on the basis of Charter values was subsequently rejected by the Court of Appeal of this Province in an action against a newspaper: *Moises v. Canadian Newspaper Co.* (1996), 24 B.C.L.R. (3d) 211 (C.A.), leave to appeal to S.C.C. refused, [1996] S.C.C.A. No. 439 (S.C.C.). Accordingly, argument on the point in this court is foreclosed.

21 The plaintiff, in turn, raises a constitutional issue in the context of damages. In addition to damages claimed against all defendants, he seeks to recover damages against the defendants Doern and the City of Vancouver under s. 24(1) of the Charter on the basis of a violation of his right under s. 11(d) of the Charter, as a person charged with an offence, to be presumed innocent until proven guilty.

22 It is common ground that at no time whatsoever was there any factual basis for believing or suspecting that, on the night of April 2, 1997 (or on any other occasion), Grassi had sought the sexual services of a person who was, or whom he believed to be, under 18 years of age. That is to say, none

of the defendants advances justification or truth as a defence to Grassi's assertion that he was defamed by such an imputation. What each of the defendants does say is that the published words do not carry such an imputation.

23 It is also common ground that, prior to publication of the statements alleged to be defamatory, none of the Media Defendants or anyone on their behalf contacted, or attempted to contact, Grassi to verify their news stories.

24 The consequences that Grassi says flowed from publication of the statements complained of are more conveniently reviewed later in these reasons in the context of assessment of damages. It may be noted in a preliminary way, however, that evidence was led about the impact of the statements upon his personal and family life, upon his activities involving contact with young people (notably, in coaching junior hockey and other sports), and upon his situation in the workplace. Grassi says that at work, in a wordplay on his first name, he was called "Paedophilia Phil", or "Paedo-Phil", or a variant of such nicknames. He asserts that it also affected his career to some extent, but he does not advance a claim for income loss.

Elements of the cause of action

25 The law of defamation is concerned with the protection of reputation against the publication of falsehoods that are defamatory in the sense of tending to lower reputation in the estimation of reasonable persons in the community.

26 It is a question of law whether any imputation carried by the words complained of is capable of being defamatory. If so, it is for the trier of fact to determine whether the words are in fact defamatory. In a trial without a jury, where the judge will decide both issues, the questions of whether the words are capable of being defamatory and whether they are in fact so are likely to be run together. Thus, in *Slim v. Daily Telegraph Ltd.*, [1968] 2 Q.B. 159 (C.A.), Diplock L.J., after discussing the respective roles of judge and jury, stated at 176:

But where a judge is sitting alone to try a libel action without a jury, the only questions he has to ask himself are: "Is the natural and ordinary meaning of the words that which is alleged in the statement of claim?" and: "If not, what, if any, less injurious defamatory meaning do they bear?"

As to reliance on lesser defamatory meanings, see also the decision of the Divisional Court in *Pizza Pizza Ltd. v. Toronto Star Newspapers Ltd.* (1998), 42 O.R. (3d) 36 (Gen. Div.), and *Gatley on Libel and Slander*, 9th ed., (London: Sweet & Maxwell, 1998), at 858, para. 34.5.

27 In considering whether the words complained of carry a defamatory meaning, they must be considered in the context of the entire radio broadcast or newspaper article or other form of publication. A passage torn from context might be considered defamatory, but its sting may be taken away by another part of that publication. In the frequently quoted words of Baron Alderson, "the bane and the antidote must be taken together": see, R. Brown, *The Law of Defamation in Canada*, Vol. 1, 2d ed. (Toronto: Carswell, 1994), at 176.

28 The words alleged to be defamatory are not to be given their best or worst possible meaning. The question is whether an ordinary and reasonable person to whom the words were published would understand them in a defamatory sense.

29 In this case, I understand the defendants to concede that a published assertion that Grassi was seeking the sexual services of a minor on the occasion in question would be both false and defamatory. However, they deny that the words which they published and of which Grassi complains carry that imputation. On this threshold issue, it is necessary to consider the import of the words attributable to each of the three pairs of defendants.

Eamor and CKNW: did the broadcasts defame Grassi?

30 As previously noted, these defendants admit publication of the excerpts from the CKNW news broadcasts of April 18, 1997 that are set out in the amended statement of claim and quoted above in para. 11 of these reasons. Would these broadcasts, or any of them, be understood by a reasonable person to have a defamatory imputation?

31 The submissions on behalf of Grassi, as I understood them, centred on two related propositions. The first is that he was defamed by the assertion that he, along with others named in the Media Release, was suspected by police of having sought the services of a child prostitute. The second proposition is that words in the broadcasts which might have been relatively innocent standing alone were juxtaposed in such a way as to create a defamatory imputation.

32 Eamor testified that, in 1996 and early 1997, she had been preparing a documentary on child prostitution in Vancouver. On the morning of April 18, 1997, prior to the 10:00 a.m. news conference, she had obtained a copy of the Media Release. She testified that she recalled being told by Constable Drennan that all of the 30 persons listed had been arrested on the "kiddie stroll." She testified that, as a result of her discussions with Doern and another unidentified police officer that morning, she was left with the impression that all 30 of the men listed in the Media Release were suspected by the police of having sought sex with minors. Her evidence on this point was straightforward and unambiguous. She testified that she believed the police suspected all 30 men of seeking "child sex" and that is what she intended to communicate in her news stories. Further, from the standpoint of a reasonable and ordinary person, that is the clear import, in particular, of her remark in the 1:00 p.m. broadcast that: "Only three [of the 30] men face charges of trying to buy sex from kids, although it is suspected all the men charged were looking for just that." The broader context supplied by that or other broadcasts, taken as a whole, does not neutralize the defamatory imputation but, if anything, reinforces it. That context includes the juxtaposed references made by Eamor to the occurrences being "in an area of Vancouver where child prostitutes sell sex" and to Doern's comments about people trying to buy sex from "young persons", "kids" or "children".

33 These defendants say that, even if the natural and ordinary meaning of the words employed in the April 18 broadcasts was that the police suspected Grassi of seeking the sexual services of a minor, communication of mere suspicion on the part of the police that he committed such an offence is not defamatory. In their submission, communication of a mere suspicion without anything more is not defamatory, as a "right thinking" person would not impute guilt.

34 In support of that proposition, these defendants cite *Griffin v. Corcoran* (1998), 175 N.S.R. (2d) 1 (S.C.) at para. 188. In that case, an employee sought damages from his former employer for wrongful dismissal and defamation. The alleged defamation took the form of utterances by the em-

ployer to the effect that he suspected the employee had committed theft. The claim in defamation was rejected by Hood J. on the basis that a "right thinking" person would not impute from this voiced suspicion that the employee was a thief. However, this decision does not firmly support the broad proposition that publication of a suspicion that one is guilty of criminal conduct is never defamatory. It may be noted that Hood J.'s conclusion followed reference to authority for the proposition that slander (unlike libel) is normally actionable only on proof of damages and that the exception to this general rule for slander which imputes the commission of a crime is limited to an allegation of guilt, not mere suspicion, of a crime. On this point, see, e.g., *Brown*, supra, Vol. 1 at 423 ff. and *Gatley*, supra, at 108, para 4.9. For present purposes, this distinction drawn by the common law between libel and slander has been eliminated in British Columbia by s. 2 of the Libel and Slander Act, R.S.B.C. 1996, c. 263, which reads:

2. Defamatory words in a broadcast are deemed to be published and to constitute libel.

35 Thus, in *Gatley*, supra, it is stated that: "It is undoubtedly defamatory to say of a person that he is suspected of wrongdoing (though less so than if he is said to be guilty)...", although a slanderous statement of suspicion of crime is not actionable per se: at 171, text accompanying note 77. In support of the primary proposition that stating someone is suspected of wrongdoing is undoubtedly defamatory, *Gatley* cites the leading English decision of *Lewis v. Daily Telegraph*, [1964] A.C. 234 (H.L.).

36 In *Lewis*, the words complained of were contained in newspaper articles which stated in substance that the police were inquiring into the affairs of a limited company, and also named the company's chairman. The plaintiffs pleaded that those words, in their ordinary and natural meaning, were defamatory, carrying the meaning that the plaintiffs were guilty of, or were suspected by the police of being guilty of, fraud or dishonesty. The defendants admitted that the published words in their ordinary meaning, namely that the police were inquiring into the affairs of the company, were defamatory, but pleaded justification (truth). The defendants denied that the words meant or were capable of meaning that the plaintiffs were either guilty of or suspected of fraud. The House of Lords concluded that the newspaper accounts of the inquiry, while capable of meaning that the plaintiffs were suspected of fraud, were not capable of carrying the further imputation that they were guilty of fraud. What is clearly recognized, however, is that a statement that someone is suspected of criminal behaviour may in itself be defamatory. Lord Devlin addresses the point in the following passage at 284-85:

The real point, I think, that Mr. Milmo [the plaintiff's counsel] makes is that whether the libel is looked at as a statement or as a rumour, there is no difference between saying that a man is suspected of fraud and saying that he is guilty of it. It is undoubtedly defamatory, he submits, to say of a man that he is suspected of fraud, but it is defamatory only because it suggests that he is guilty of fraud: so there is no distinction between the two. This is to me an attractive way of putting the point. On analysis I think that the reason for its attraction is that as a maxim for practical application, though not as a proposition of law, it is about three-quarters true. When an imputation is made in a general way, the ordinary man is not likely to distinguish between hints and allegations, suspicion and guilt. It is the broad effect that counts and it is no use submitting to a judge that he ought to dissect the

statement before he submits it to the jury. But if on the other hand the distinction clearly emerges from the words used it cannot be ignored. If it is said of a man - "I do not believe that he is guilty of fraud but I cannot deny that he has given grounds for suspicion," it seems to be to be wrong to say that in no circumstances can they be justified except by the speaker proving the truth of that which he has expressly said he did not believe. It must depend on whether the impression conveyed by the speaker is one of frankness or one of insinuation.

...

It is not, therefore, correct to say as a matter of law that a statement of suspicion imputes guilt. It can be said as a matter of practice that it very often does so, because although suspicion of guilt is something different from proof of guilt, it is the broad impression conveyed by the libel that has to be considered and not the meaning of each word under analysis. A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire; but it can be done. One always gets back to the fundamental question: what is the meaning that the words convey to the ordinary man: you cannot make a rule about that. They can convey a meaning of suspicion short of guilt; but loose talk about suspicion can very easily convey the impression that it is a suspicion that is well founded.

In the libel that the House has to consider there is, however, no mention of suspicion at all. What is said is simply that the plaintiff's affairs are being inquired into. That is defamatory, as is admitted, because a man's reputation may in fact be injured by such a statement even though it is quite consistent with innocence. I dare say that it would not be injured if everybody bore in mind, as they ought to, that no man is guilty until he is proved so, but unfortunately they do not. It can be defamatory without it being necessary to suggest that the words contained a hidden allegation that there were good grounds for inquiry.

The facts of the present case are stronger in that here, unlike Lewis, there is mention of suspicion. Grassi is stated in the broadcasts to be among those suspected of having sought the services of a child prostitute.

37 In a recent decision in this jurisdiction, *Pressler v. Lethbridge*, [1998] B.C.J. No. 1195 (B.C.S.C.) at para. 49, Owen-Flood J., addressing the issue of defamatory meaning, cited with approval the following passage from *MacDonald v. Mail Printing Co.* (1901), 2 O.L.R. 278 (C.A.) at 282, per Ferguson J.A. for the court:

Any written words published are defamatory which impute to the plaintiff that he has been guilty of any crime, fraud, dishonesty, immorality, vice or dishonourable conduct, or has been accused or suspected of such misconduct, and so too are all words which hold the plaintiff up to contempt, hatred, scorn or ridicule, and which, by thus engendering an evil opinion of him in the minds of right-thinking men, tend to deprive him of friendly intercourse and society. (emphasis added)

38 It is important not to confuse two quite distinct propositions, each of which finds support in the authorities. The first is that to say that a person is suspected of an offence does not necessarily convey the imputation that he is guilty of that offence. The second proposition is that to say that a person is suspected of an offence may, and usually will, itself be defamatory even if it does not carry the further imputation of guilt. An analogous issue arose for consideration in *Lenox Hewitt v. Queensland Newspapers Pty Limited* (5 June 1995), No. SC283 of 1993 (Aust. S.C.). In issue was the defamatory nature of a newspaper article which stated that the plaintiff faced trial on "charges" that he owed a substantial sum of money to a credit card company. In fact, the proceedings were civil in nature. The court concluded at para. 39 that the average reasonable reader would gain the impression that the plaintiff faced trial on criminal charges, and this was in itself defamatory. Higgins J. later stated:

[Para48] Of course, if it was true that a charge had been laid, justification would be a simple matter for a defendant to establish. Where, as in this case, the statement is untrue that defence is not available. If the arresting officer had reasonable grounds for suspicion the imputation could be similarly justified by that officer detailing the grounds for suspicion in evidence.

[Para49] It follows that a statement that a person has been charged with an offence will be defamatory without more, provided the offence would, if proved, establish conduct on the part of the plaintiff which would lower his or her reputation in the eyes of the average reasonable reader. It is also defamatory further to impute that reasonable grounds for that suspicion existed. It is also and more seriously defamatory actually to impute guilt of such an offence.

Similarly, in the present case, if it were true that Grassi was under suspicion of seeking to purchase the sexual services of a minor, justification would not have been difficult to establish. But of course the defendants here do not seek to justify such an imputation.

39 It is an essential element of the cause of action that the words complained of were published "of the plaintiff." Grassi was named in two of the broadcasts of April 18, 1997. Further, in my view, the series of broadcasts on that date may be treated as a unit for purposes of determining the meaning to be given to what was said in any of them: see *Gatley*, supra, at 99-100.

40 I conclude that Grassi was defamed by these defendants in the radio broadcasts in question.

Hunter and The Province: did the newspaper articles defame Grassi?

41 These defendants admit publication of the extracts from The Province newspaper that are set out in the amended statement of claim and quoted above in para. 13 of these reasons.

42 Entered as Exhibit 14 at trial was an Agreed Statement of Facts concerning these defendants. It reads as follows:

AGREED STATEMENT OF FACTS

The Defendant, Stuart Hunter, a general assignment news reporter employed by The Province newspaper, wrote the news story at Exhibit #2, Tab 24, entitled "Cops Name Johns as 'Stern Warning'".

The news story was written on April 18, 1997 and Stuart Hunter based it on information provided to him by Constable Anne Drennan in a telephone conversation that afternoon.

Constable Drennan made the statements attributed to her in that news story.

Stuart Hunter believed those statements by Anne Drennan to be true.

Stuart Hunter had no involvement whatsoever in the preparation of the news story at Exhibit #2, Tab 25, entitled "Teachers, coach on list of accused".

The news stories referred to in the first and last paragraphs are, respectively, those of April 20 and April 22, 1997.

43 The April 20, 1997 article appeared on p. A4 of The Province. The full text reads as follows:

COPS NAME JOHNS AS 'STERN WARNING'

By Stuart Hunter
Staff Reporter

Vancouver police are playing the name game again.

They've resumed releasing the names, ages, addresses and employers of men charged with soliciting prostitutes.

"We want this to be a very stern warning" Const. Anne Drennan said.

"We're not prepared to tolerate putting the children of our city at risk."

On Friday, police released information about 30 men arrested and charged since Jan. 1. They're aged from 20 to 71. The average age is 38.

Three of them are charged with soliciting hookers under the age of 18.

Some are unemployed. Others are professionals and blue-collar workers and include firefighters, male nurses and counsellors.

Drennan said the decision to release information about the men was made to warn others of the risks of hiring hookers.

"We think people have the right to know," said Drennan.

She said many female undercover officers are impersonating prostitutes to nab johns.

"We are out there seven days a week."

The Province has chosen not to publish the names of the men.

Drennan said no adult prostitutes have been arrested for soliciting since last August because police are focusing on johns and pimps.

"But we would if circumstances warrant it," she said.

Juvenile hookers are arrested whenever possible, to get them off the streets.

44 It may be noted at once that the April 20 article does not provide the names of any of the 30 men reported to have been arrested and charged. It accurately states that three of the 30 were charged with respect to soliciting minors. Nor is it suggested that this article is inaccurate in any other respect or that it could, standing alone, be brought home to Grassi. There is nothing in the April 20 article which,

if defamatory, could not be readily met by a plea of justification. To the extent that the claim against the defendant Hunter rests on his authorship of this article, I conclude that the claim cannot succeed.

45 Can the claim against Hunter succeed based on the content of the April 22 article, which he played no part in preparing? In certain circumstances, as noted in connection with the defendants Eamor and CKNW, a series of publications may be read together. On this point, see also *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, especially at para. 69; *Hayward v. Thompson*, [1981] 3 All E.R. 450 (C.A.); and *Misir v. Toronto Star Newspapers Ltd.* (1997), 105 O.A.C. 270 (C.A.), especially at paras. 16-20. But these authorities do not go so far as to visit personal liability upon the author of a legally blameless article solely on the basis of a later article authored by another person, albeit dealing with the same subject matter. The position of the newspaper which carried both articles is another matter.

46 I conclude that the action as against the defendant Hunter must be dismissed.

47 The full text of the April 22, 1997 article, which also appeared on p. A4, reads as follows:

TEACHERS, COACH ON LIST OF ACCUSED

'We've had absolutely no complaints . . .'
-Minor-hockey official

Staff Reporter

Two schoolteachers and a minor-hockey coach have been arrested by the Vancouver police vice squad.

They're among 30 men charged with various criminal offences and whose names were released by police yesterday.

Lionel Henry Brown, a 52-year old Delta elementary school teacher, has been suspended with pay after being charged with obtaining or attempting to obtain for consideration the sexual services of a person under 18 years of age.

Brown, a longtime instructor for the Delta school district, is to appear in court in August.

Police say the alleged offence took place last summer at Pandora and Victoria in east Vancouver.

A second teacher, Michael McWhinnie of Osoyoos, was charged with communicating for the purposes of engaging in prostitution.

Osoyoos schools superintendent Hart Doerksen said the 51-year-old teacher is "not at work" but refused to discuss the matter.

Police say the alleged offence happened at Franklin and Woodland on March 19 during the spring break. McWhinnie is scheduled to appear in court tomorrow.

Charged with communicating for the purposes of engaging in prostitution was Philip Eugene Grassi, 49, a North Vancouver minor-hockey-league coach and firefighter.

Police say the alleged offence occurred April 2 at Pandora and Victoria.

Grassi coached eight- and nine-year-old hockey players during the 1996-97 season that ended last month.

"We've had absolutely no complaints from either parents or children about Mr. Grassi's conduct throughout the year," said North Vancouver Minor Hockey Association president Robert Jamieson.

Grassi's court date is set at May 8.

The Province generally does not reprint police lists of those charged with prostitution offences. But exceptions may be made in cases where public-safety issues are involved.

48 The April 22 article differs from the earlier one in at least two important respects. The first is that this article names three persons, of whom Grassi is one. Second, both the headline and text are capable of meaning that those three named persons raise a public safety issue because of their involvement with minors.

49 The defamatory meanings alleged by Grassi, listed in para. 15 of the amended statement of claim, are set out above in para. 13 of these reasons. Would an ordinary, reasonable person draw one or more of those meanings from the April 22 article?

50 Having read the article through to its two italicized concluding sentences, the reader might well ask what it is the three named individuals have in common that led the newspaper to single them out, from among the 30 who were charged with prostitution offences, as posing a threat to "public safety." Two are teachers, whose profession obviously involves working with children. Grassi's profession as a firefighter is mentioned, but what the headline and the story pay more attention to is his involvement as a "coach" and, more specifically, a "minor-hockey-league coach" who "coached eight- and nine-year-old hockey players." The statement attributed to the President of the North Vancouver Minor Hockey Association that there had been "absolutely no complaints" about Grassi could be taken as a double-edged sword: the suggestion is that the circumstances called for an inquiry.

51 Mr. Fabian Dawson, the sole witness called by The Province, was the City Editor of that newspaper in April 1997. He testified that the April 22 article was authored by a reporter named Keith Fraser, except for the last two italicized sentences, which Dawson composed and dictated to Fraser. Dawson testified that Fraser had been assigned to the story on the preceding day, April 21, at which time Fraser was directed to find out which persons listed in the Vancouver Police Media Release had involvement with children. In the case of the two school teachers, such involvement was clear. Asked in examination-in-chief whether the fact that Grassi was a firefighter was of importance, Dawson replied that it was of no importance. What was considered important was Grassi's role as a minor hockey league coach since it supplied the element of involvement with children. This testimony is consistent with the following exchange from Dawson's examination for discovery, which became evidence at trial:

129 Q. And your concern with the public safety aspects was that children were at risk, is that correct?

A. Most of it, yes.

52 Under cross-examination at trial, Dawson stated that, while he knew that the prostitutes on the kiddie stroll were a mix of adults and minors, he did not know that the majority of them were adults. Nor did he know that the police officer acting as a decoy and to whom Grassi spoke was obviously an adult.

53 One of the defamatory meanings pleaded by Grassi is that he could not be trusted in the company of children. That is apparently what the article was intended to convey as the "public safety issue" Dawson had in mind. The ordinary, reasonable person reading the April 22 article would probably draw such an inference.

54 I conclude that the words published in the April 22, 1997 article in *The Province* are defamatory. However, for the reasons stated, I conclude that the defendant Hunter cannot be held responsible for the publication of defamatory material and the action against him is accordingly dismissed.

Doern and the City of Vancouver: did Doern defame Grassi?

55 Liability on the part of the City of Vancouver, if any, flows from s. 20 of the Police Act, R.S.B.C. 1996, c. 367, which provides that a municipality is jointly and severally liable for torts committed by its municipal police officers. As it is only on this basis that the City may be found liable, the focus is necessarily upon statements made by Doern to others.

56 Inspector Doern put together the Media Release listing the names of the 30 males charged with prostitution offences. He provided the Media Release, attaching briefing notes that he prepared, to Constable Anne Drennan, the Vancouver Police Media Liaison Officer, for purposes of her news conference with media representatives on the morning of April 18, 1997. Grassi does not assert that the Media Release or briefing notes are factually inaccurate.

57 Doern was interviewed by Ms. Eamor in the morning of April 18. As noted in para. 10 of these reasons, her CKNW broadcasts that day included voice clips from the tape-recorded interview and attributed certain other comments to him.

58 The portions of the amended statement of claim setting out the comments alleged to have been made by Doern and to be defamatory of Grassi are reproduced above: see paras. 11 and 14. Doern admits to making some, but not all, of these statements, as noted in para. 16 of these reasons.

59 Thus, Doern admits making the statements attributed to him in para. 17 of the amended statement of claim, which are voice clips. But he denies making the statements attributed to him in para 17A of that pleading and which were attributed to him by Eamor in the impugned broadcasts.

60 In submissions, counsel for Grassi invited the court to find that Doern told Eamor that all of the men named in the Media Release were suspected of seeking the sexual services of child prostitutes. Counsel for the City of Vancouver argued that such a finding ought not to be made, firstly, because it had not been pleaded and, secondly, because it is not supported by the evidence. It is the case that Grassi's pleadings on this point are imprecise. Assuming without deciding that the plaintiff's pleadings are adequate, I turn to the question of whether the evidence supports the finding of fact which he seeks.

61 As noted above in para. 30 of these reasons, Ms. Eamor testified at trial that she believed the police suspected all 30 men of seeking "child sex". The question is whether Inspector Doern told her this. Asked that question in the course of her cross-examination, Ms. Eamor responded to the effect that this was an understanding she had gained based on information given to her by two police officers that day, one of whom was Inspector Doern. The other officer was not identified. She had also

attended the news conference conducted by Cst. Drennan. Ms. Eamor was aware that all of the men listed in the Media Release had been arrested in the "kiddie stroll" area. She did not believe the element of employer notification distinguished between those individuals who were and those who were not thought to have been seeking sex with minors. Ultimately, Ms. Eamor was unable to say that Doern was the source of information which left her with the understanding or impression that all or most of the 30 men listed in the Media Release were suspected by police of looking for "child prostitutes". Accordingly, she could not relate her understanding of this point to anything that Doern himself had told her.

62 Inspector Doern was questioned closely, both at his examination for discovery and at trial, as to whether he had told Ms. Eamor that the police suspected all 30 of those named in the Media Release to have been seeking the sexual services of prostitutes who were minors. In examination for discovery, he initially denied telling Eamor this but indicated that, given the state of his recollection, he could not with certainty exclude the possibility that he might have said something along those lines to her. At trial, he stated that, after much reflection, he firmly believed that he had not expressed this view about all of the men, and that he had not held such a view. Further, he testified, he would not have used a term such as "suspect" in this context because of the inadequacy of information available to the police at the time. Under cross-examination, Doern agreed with the suggestion that one of the things he did say to Eamor was "words to the effect that in all likelihood more than just the three who got charged with [section] 212 were, in fact, looking for kids".

63 Doern also acknowledged that, prior to April 18, 1997, he knew that there was nothing in police documentation to suggest that Grassi was looking for sex with children at the time or that he was a paedophile or child molester. It is not contended that Doern told Eamor (or anyone else) that he or the police suspected or believed that Grassi was seeking to obtain sex with a minor on the night of his arrest.

64 I conclude that the evidence as a whole does not support a finding on a balance of probabilities that Doern told Eamor that all of the persons named in the Media Release were suspected of having sought sex with minors.

65 A suggestion that some members of the group who had been charged with adult prostitution were likely seeking "child prostitutes" raises for consideration the requirement that the defamatory imputation be "of and concerning" the plaintiff. As to this issue of identification of a person within a group or part of a group who alleges to have been defamed, see, e.g., Brown, supra, Vol. 1, at 323-331. The point is not free of difficulty. Having regard to the whole of the circumstances, however, I conclude that any such suggestion by Doern to Eamor concerning "some" of the men was not sufficiently brought home to Grassi so as to defame him. In other words, the plaintiff has not proven that these words were "of and concerning" him.

66 In short, the evidence does not establish that Doern either asserted or implied in discussion with Eamor that he or the police suspected Grassi of seeking sex with minors.

67 Were Doern's comments to Eamor otherwise defamatory? It is common ground that Doern played no part in the preparation of the impugned CKNW broadcasts. The information contained in the Media Release and in the accompanying briefing notes which he prepared is conceded to be accurate. Standing alone, the voice clips from his interview by Ms. Eamor that were incorporated into the CKNW broadcasts, viewed objectively, do not defame Grassi.

68 What remains are comments attributed to, but not all of which are admitted by, Doern, and submissions based on juxtaposition in the radio broadcasts, for which he was not responsible. For example, para. 11 of the amended statement of claim, set out above, concludes with an exchange taken from the CKNW 5:35 p.m. broadcast, as follows:

McComb: I suppose one can ask the question about privacy issues here. Do police alert employers in other offences besides prostitution?

Eamor: I asked him [Doern] exactly the same question - we don't do this if someone's charged with armed robbery, we don't do it if someone is charged with theft over 5000-dollars, and Ken Doern said he thinks that it's in the public interest for the public to know that there are these types of people out there who could be your next door neighbour, who could be people you work with, who are trying to buy sex from children.

Doern testified that the first part of this comment attributed to him is incorrect and that he would not have made this comment because the police would in fact advise the employer of someone in a position of trust that the latter had been charged with armed robbery or a major theft. Further, he testified, the latter part of the comment attributed to him has been taken out of the context of his discussion of persons charged with respect to minors under s. 212(4) of the Criminal Code, and the transcript of the 1:00 p.m. broadcast provides some support for his position on this point.

69 Having regard to the context and the whole of the circumstances, I conclude that the evidence falls short of establishing that Inspector Doern defamed Grassi. Nor does the evidence support the Charter-based claim referred to in para. 21 of these reasons. It follows that the action against him and the City of Vancouver must be dismissed.

The defence of justification

70 Counsel for the remaining defendants made it clear at trial that none of them maintains or suggests that defamatory imputations arising from the words published are based on truth. As noted, the defendants Eamor and CKNW do not seek to justify as true the imputation that Grassi was suspected by police of seeking to purchase the sexual services of a minor. The Province does not seek to justify as true the imputation that Grassi cannot be trusted in the company of children. Nor did I understand any of these defendants to suggest that the defence of justification could prevail against any of the other pleaded defamatory meanings that might be found to arise from the words published.

The defence of qualified privilege

71 The defendants Eamor, CKNW and The Province say that any defamatory statement was published in good faith and without malice on an occasion of qualified privilege. Grassi's position is that the occasion was not such as to give rise to qualified privilege and that, in any event, publication through the newspaper and radio broadcasts exceeded any qualified privilege that might have protected more limited publication.

72 In *Moises v. Canadian Newspaper Co.*, supra, Williams J.A. (as he then was), delivering the judgment of the Court, undertook a thorough analysis of the authorities on qualified privilege, including the recent decision of the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*, supra. In *Moises*, the defendant newspaper had referred to the plaintiff as a "terrorist official". The trial judge had dismissed the action on the basis that the article was published on an occa-

sion of qualified privilege. Allowing the appeal, the Court of Appeal held that the defence of qualified privilege could not succeed.

73 In *Moises*, Williams J.A. commenced his analysis in the following way (para. 15 at 217):

The defence of qualified privilege is simple enough to define, but difficult in its application. This is particularly so when it is advanced by a newspaper since it clearly pits freedom of expression and freedom of the press, on the one hand, against the right of an individual to protect his good reputation on the other.

Application of the defence in respect of radio broadcasts is, of course, equally difficult.

74 The defence of qualified privilege recognizes that, on certain limited occasions, untrue defamatory statements may be published with impunity. Such an occasion arises only when it is established that the publisher had an interest or a duty in communicating the statement to someone who had a corresponding interest in receiving it. The duty may be legal, social or moral. The categories of reciprocal duty and interest are not closed. In *Moises*, supra, it was held at para. 32 that the defendant newspaper was not under a duty to publish the impugned material because the plaintiff did not present a threat to Canada or to anyone in the city in which he resided.

75 In *Reynolds v. Times Newspapers Ltd.*, [1999] H.L.J. No. 45 (H.L.), Lord Nicholls noted that the court is to have regard to all of the circumstances when deciding whether the publication of particular material was privileged because of its value to the public, and that the value to the public depends upon the quality as well as the subject matter of that material. He observed at paras. 48 and 49 that this approach has the merit of elasticity, and the corresponding disadvantage of an element of unpredictability. In elaboration later in his reasons, he stated the following at para. 54:

Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only.

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 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 defendant. He may have information others do not possess or have not disclosed. An approach to the defendant 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.

76 The untrue defamatory allegations or imputations of which Grassi complains have been discussed at some length earlier in these reasons. On the part of Ms. Eamor and CKNW, there is the implicit statement that Grassi, along with everyone else named in the Media Release, was suspected by the police of having sought the sexual services of a minor. On the part of The Province, there is the imputation that Grassi could not be trusted in the company of children. The seriousness of such allegations is self-evident. There is no evidence of steps being taken to verify the information. None of the defendants sought comment from the plaintiff.

77 The nature of the reciprocal public duty and interest relied upon by the defendants is not obvious. Certainly, there was no legal duty. As to a social or moral duty, the defendants presumably considered that publication of the material in question could not or ought not to await the outcome at trial which, in Grassi's case, was an acquittal. For what it is worth, the evidence is that, apart from the defendants CKNW and The Province, no other media outlet felt compelled by public duty to publish the names of those listed in the Media Release as having been charged with prostitution offences.

78 Even if the circumstances otherwise warranted a finding that the defamatory material was published on a privileged occasion, these defendants must contend with the general rule that, with rare exceptions, publication "to the world" through public communications media, including newspapers and radio broadcasts, will be in excess of the privilege. Case law relating to the general rule and exceptions to it is reviewed in *Moises*, supra, at paras. 23-29. *Brown*, supra, states (Vol. 1 at 866):

With the exception of exchanges between parties who have both chosen a newspaper to air their differences, seldom will communications through the press or other public communications media satisfy the requirement that there be reciprocal duties and interests between the parties who disclose the information and those who receive it.

See, also, *Gatley*, supra, at 391-394. The exceptions include matters in the political sphere which concern the electorate as a whole and matters of an urgent nature.

79 On the basis of *Moises*, supra, and other authorities binding on this court, I conclude that the defence of qualified privilege cannot succeed.

The defence of fair comment

80 The requirements that must be met for the defence of fair comment are that the words must be shown to be (1) comment (as opposed to a statement of fact); (2) based upon facts that are true; (3) on a matter of public interest. To be successful, the defendant must establish all of these requirements. In my view, it is doubtful whether these defendants have established any of them.

81 Again, the allegations or imputations are, by Ms. Eamor and CKNW, that the police suspected Grassi of having sought the sexual services of a minor and, by The Province, that he could not be trusted in the company of children. These appear as statements of fact, not comment or opinion. To the extent they purport to be based on facts, those facts are not true. Further, it may well be, as counsel for The Province argued, that prostitution is a subject of public interest and that media comment on that subject is therefore appropriate. But of course the words complained of are not confined to comment on prostitution as such. The sting is in the association of Grassi with child prostitutes, or at least the imputation that he represents a threat to children.

82 In any event, even if an element of public interest is identified, the first two criteria have not been met. The defence must fail because the defamatory words are neither comment nor based upon true facts.

Conclusions as to liability

83 The action is dismissed as against the defendants Hunter, Doern and the City of Vancouver. Liability is established against the defendants Eamor, CKNW and The Province.

Damages

84 With respect to the three defendants found liable, it was sufficient to find, as I have, that each of them published words that bear at least one of the defamatory meanings relied upon by the plaintiff. The portions of the amended statement of claim containing all of the pleaded defamatory meanings as against these defendants, are set out in paras. 12 and 13 of these reasons. Those pleadings list eight such meanings as against Eamor and CKNW and, with considerable repetition, eleven as against The Province. Many of the pleaded meanings are closely related and amount to expressing the same sort of allegation or imputation in different ways. Applying the objective test, it may well be that an ordinary reasonable and right-thinking member of society would conclude that the published words carry several, if not all, of the pleaded meanings. In the circumstances of this case, however, I am of the view that no useful purpose relating to assessment of damages would be served by isolating each of the pleaded meanings for separate consideration.

85 Damages may be either compensatory or punitive (exemplary). As to the latter, in *Hill*, supra, Cory J. stated at 1208:

Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

In that decision, a jury award of \$800,000 in punitive damages was sustained. Having regard to the governing principles, however, I conclude that the circumstances of the present case do not warrant an award of punitive damages against any of the defendants.

86 Compensatory damages may include special damages for pecuniary loss. However, Grassi does not claim special damages.

87 Compensatory damages embrace general damages and, if aggravating circumstances exist, aggravated damages. Thus, in *Hill*, supra, the Court sustained jury awards in the amount of \$300,000 for general damages against the two defendant/appellants jointly and in the amount of \$500,000 for aggravated damages against Scientology alone.

88 In *Brown v. Cole* (1998), 61 B.C.L.R. (3d) 1 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 614 (S.C.C.), Southin J.A., delivering the judgment of the Court, posed the question of whether the trial judge had erred in law in breaking the assessment into "general damages" and "aggravated damages". She observed at paras. 79-80 that there was no obligation upon him to do so. After tracing the development of the law in this area, Southin J.A. stated at paras. 95-100 that, while she was not prepared to say that it constitutes an error in law to break compensatory damages into the two "apparent categories" of general and aggravated damages, it is necessary to avoid the danger of "double counting". In the result, the Court concluded that appropriate awards of compensatory damages were, in the case of one of the two individual defendants, a total of \$60,000, which included \$30,000 attributable to aggravating circumstances, and, against the other individual defendant, a total of \$100,000, which included \$50,000 attributable to aggravating circumstances.

89 In *Hill*, *supra*, where the categories of general damages and aggravated damages were employed, Cory J., addressing the latter, stated the following general principles at 1205-1206:

Aggravated damages may be awarded in circumstances where the defendants' conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous statement.

. . .

These damages take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct. Like general or special damages, they are compensatory in nature. Their assessment requires consideration by the jury of the entire conduct of the defendant prior to the publication of the libel and continuing through to the conclusion of the trial. They represent the expression of natural indignation of right-thinking people arising from the malicious conduct of the defendant.

If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff...

90 Whatever terminology is employed, a key difference between "general damages" and "aggravated damages" relates to the element of malice. As pointed out in the passage quoted in the paragraph next above, an award of aggravated damages hinges on a finding that the defendant was motivated by "actual malice". As to actual or express malice, see *Horrocks v. Lowe*, [1974] 1 All E.R. 662 at 669 (H.L.), per Lord Diplock. In the present case, I am of the view that the evidence does not support a finding of actual malice on the part of any of the defendants. Accordingly, I turn to an assessment of that category of compensatory damages which, in *Hill*, *supra*, is referred to as "general damages".

91 In *Hill*, *supra*, Cory J. commences his analysis in this way, at 1196:

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.

Earlier in his reasons, in discussing the appropriateness of a cap on damages in defamation cases, he rejected a comparison between libel and personal injury cases. He concluded his discussion of general damages at 1205 with the following observations about the limited usefulness of reference to awards in other libel cases:

(d) Comparison with Other Libel Cases

At the outset, I should state that I agree completely with the Court of Appeal that each libel case is unique and that this particular case is in a "class by itself". The assessment of damages in a libel case flows from a particular confluence of the following elements: the nature and circumstances of the publication of the libel, the nature and position of the victim of the libel, the possible effects of the libel statement upon the life of the plaintiff, and the actions and motivations of the defendants. It follows that there is little to be gained from a detailed comparison of libel awards.

In brief, there is no formula for determining general compensatory damages: see also, *Myers v. Canadian Broadcasting Corporation*, [1999] O.J. No. 4380 at para. 157 (Ont. Sup. Ct. J.).

92 With respect to the factors to be considered, Cory J. stated, at paras. 1203-1204:

The factors which should be taken into account in assessing general damages are clearly and concisely set out in *Gatley on Libel and Slander* (8th ed.), *supra*, at pp. 592-93, in these words:

SECTION 1. ASSESSMENT OF DAMAGES

1451. Province of the jury. 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.

There will of necessity be some overlapping of the factors to be considered when aggravated damages are assessed. This can be seen from a further reference to the Gatley text at pp. 593-94 ...

As to the last paragraph of this passage, neither the overlapping of factors nor the "double counting" referred to in *Brown v. Cole*, supra, is a concern here because I have found that only the single category of general damages is applicable.

93 Earlier in these reasons, I dealt to some extent with the conduct of the plaintiff, his personal situation and the nature of the libel. As to the mode and extent of publication, Cory J. noted in *Hill*, supra, at 1204, that the reports in the press were widely circulated and the television broadcast had wide coverage. Similarly, *The Province* has wide circulation and CKNW broadcasts have wide coverage within British Columbia.

94 The above-quoted passage from *Gatley*, supra, that is cited with approval by Cory J. in *Hill*, supra, includes reference to "the absence or refusal of any retraction or apology". This may no doubt be viewed as one of the overlapping factors alluded to by Cory J. at 1206, in that he mentions withdrawal of a libellous statement and apology in the context of aggravated damages. Here, it is the case that both CKNW and *The Province* gave coverage to Grassi's acquittal roughly equivalent to that given to the defamatory words published some four months earlier. Publicity given to the acquittal is material but, in itself, hardly provides a basis for congratulation. The evidence is that Grassi's acquittal was also covered by media outlets that had not defamed him.

95 As to the tendering of an apology, there is a significant difference between CKNW and *The Province*. Although Grassi did not seek a retraction or an apology from either of these defendants, CKNW did broadcast an apology and retraction four times on September 3, 1997. *The Province* chose not to publish an apology then or at any time up to or during the trial. This is a factor appropriately reflected in the assessment of damages as between these defendants.

96 Reference was made at para. 24 of these reasons to the evidence concerning the impact of the defamatory statements upon Grassi. That impact was substantial. Testimony on this subject, in addition to his own testimony, came from two witnesses called on his behalf: his wife, Judy Kindrachuk, and Patricia Woods. Ms. Woods is a friend of the Grassis who lives in the neighbourhood and sees them frequently.

97 Grassi testified that he first learned of the CKNW reports through a telephone call from a friend on Friday, April 18, 1997. He testified that the telephone call did not supply context or detail and it was only later that day, when he heard a CKNW broadcast on his car radio, that he realized his name had been linked with children. According to his testimony, the effect upon him was devastating, to the point of causing him to contemplate suicide. He testified to the effect that that Friday was one of the most distressing days of his life and that the subsequent news reports in *The Province* had a comparable impact. Among his concerns then and afterward, according to his testimony, were: the health of his wife, whose recent medical history involved a panic disorder; relationships within the family and with others, including those of their two school-age children; his relationships in the workplace and possible loss of his job; and the placing in jeopardy of his hockey coaching and related activities involving young people.

98 Grassi's wife testified about the extreme distress she observed in her husband after the initial news coverage and the depressive mode that manifested itself afterward. She and Ms. Woods contrasted his previously relaxed and easy-going manner with his subsequent guarded and withdrawn attitude.

99 On the other hand, and operating as a mitigating factor, is the fact that Grassi would have suffered a degree of embarrassment and distress from an accurate published report that he had been charged with the offence of communicating with an adult for purposes of prostitution. He admitted as much in cross-examination, and that is not surprising. However, a defamatory accusation cannot be justified merely by evidence that the plaintiff engaged in another type of conduct equally or more reprehensible in character: *Brown, supra, Vol. 1, at 516*. Here the defamatory imputations relate to a more serious crime than the summary conviction offence with which Grassi was charged and, in due course, acquitted. Having said that, his reputation had no doubt been tarnished to some extent by the mere fact of the charge and this, in my view, is properly taken into account in diminution of damages that would otherwise be payable. So, too, is the acknowledged fact that some of the stress he experienced resulted from anxiety about the outcome of his trial.

100 Having regard to the whole of the circumstances, I assess compensatory damages as follows. As against Eamor and CKNW, damages will be in the amount of \$35,000. Their liability is joint and several: see *Hill, supra, at 1199-1200*. As noted, the position of The Province differs, apart from any other factors, in that it failed to tender an apology. I assess damages against the Province in the amount of \$45,000.

Result

101 The action against Doern, the City of Vancouver and Hunter is dismissed. Eamor and CKNW are jointly and severally liable for compensatory damages in the amount of \$35,000. The Province is liable for compensatory damages in the amount of \$45,000. If necessary, the parties may speak to costs.

LYSYK J.

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