One should not lose sight of the basic principle that libel damage awards, like damage awards for other wrongs, should be based upon a rational attempt to measure in money terms the loss and injury the plaintiff has suffered.¹

Defamation law has not generally taken proper account of the obvious differences between corporate plaintiffs and human plaintiffs.²

Introduction

The California Highway Patrol recently fined Jonathan Frieman $478 for driving in the car pool lane without any passengers. Frieman claimed that the articles of incorporation for his business, which had been placed on the passenger seat of the car, were a legal person, such that the traffic laws weren’t violated.³ The argument was widely ridiculed and so far has not succeeded in court.⁴ We all know that corporations, although legal persons, are not very person-like, and

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³ Kravets D, Motorist Claims Corporation Papers are Carpool Passengers (Wired), www.wired.com/threatlevel/2013/01/corporation-carpool-flap/.
although there are good reasons for the legal fiction of corporate personality, the law should not always treat corporations like natural persons.

When it comes to defamation, the law treats corporations almost identically to natural persons. Both have valuable reputations worthy of legal protection. However, given the significantly different effect of reputational injury on humans versus corporations, the law of defamation should treat their reputations differently, and rely on different rules for corporations than for human beings. This article considers one facet of defamation law – the quantification of damages – and argues that aggravating factors relating to emotional injuries should not apply to corporations, because corporations cannot suffer such injuries. Specifically, I focus on the relevance to the quantification of damages of: a) the defendant’s failure to apologize; b) the defendant’s malice; and c) the aim of vindicating reputation.

I begin by setting out the current law with regard to quantifying defamation damages in Canada and in other common law countries. Next, I argue against treating a defendant’s failure to apologize to a corporation as a factor aggravating damages. Whereas individuals may suffer more or less depending on whether the defendant apologizes for her defamatory statement, the only relevance to a corporation of an apology is as a form of setting the record straight. Thus, an apology may mitigate damages but a failure to apologize will often have no effect on damages. Yet the law treats a failure to apologize as aggravating damages. By unthinkingly applying this rule to corporate plaintiffs, corporations are overcompensated.

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5 The article focuses on Canadian law, excluding Quebec. In addition, where relevant, it refers to American, British and Australian law. My arguments have little relevance for Australia, which has eliminated most corporate defamation actions. However, my arguments will generally apply to the United Kingdom as well as to Canada. The article will have some relevance to American defamation law, but corporate plaintiffs will less often succeed in their defamation actions in the US given the New York Times v Sullivan (1964), 84 S Ct 710, actual malice rule and the fact that corporations are often considered public figures for the purposes of that rule. My arguments may also apply to commonwealth countries such as New Zealand, South Africa and Singapore, but I do not examine their laws in this article.
Similarly, the defendant’s malice is a factor aggravating damages, but since corporations cannot be upset, embarrassed or insulted, it is not clear that malice should be relevant to calculating their compensatory damages. Instead, increasing damages awards on the basis of malice toward a corporation seems to have an inappropriate punitive purpose.

My final argument is that courts should no longer award damages in order to vindicate corporate reputation. Historically, the importance of honour justified vindicating a defamed person’s reputation. Today, the interest in human dignity may justify the vindicatory goal. However, given that corporations have no dignity to protect, and given a number of problems associated with attempting to award damages to vindicate reputation (such as uncertainty as to whether damages awards vindicate at all and the lack of evidence of what quantum of damages would signal to the world that the defamation was false), it is not justifiable to award corporations damages to vindicate their reputations.

My arguments for treating corporations differently when quantifying defamation damages apply equally to all corporations. There are many facets of corporations that could justify their differential treatment in law (their focus on profit and their tendency to have significant resources, for example).6 Not all of these factors apply to all corporations. However, since I focus on awarding corporations damages for what are essentially emotional injuries, which no corporation can suffer, it is not necessary to distinguish between different kinds of corporations, such as not-for-profit versus for-profit or large versus small. My arguments would also apply to other non-human legal entities, such as unions.

1. Damages in Defamation

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6 See Young H, “Rethinking Canadian Defamation Law as Applied to Corporate Plaintiffs” (2013) 46 UBC L Rev (forthcoming) [Young 2013] regarding how and why these and other factors suggest that corporations should not be allowed to bring defamation actions.
a) General Principles

In defamation law, if the plaintiff proves publication of a defamatory statement, injury is presumed and, in the absence of a defence, the plaintiff is entitled to greater than nominal damages.

In Canada, the leading case on quantifying damages in defamation is *Hill v Church of Scientology*, [1995] 2 SCR 1130. In that case the Supreme Court of Canada confirmed that damages are at large, meaning that they “cannot be assessed by reference to any mechanical, arithmetical or objective formula”. This is because the value of injury to reputation is hard to quantify. Not only is there no market of exchange for reputation (although there is a market for corporate reputation in the form of goodwill), but the extent of the loss is affected by numerous variables, such as the extent to which a person is known, how good her reputation was to begin with, how many (and which) people now think less of her, and how the plaintiff feels about being defamed.

Although damages are at large, they are intended to be compensatory: compensatory damages should reflect the extent of harm to reputation as well as any specific damages and pain and suffering. The court should “give to the defamation plaintiff fair and reasonable compensation, nothing more, and

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*If, however, the defamation consists of slander not actionable per se, damages are not presumed. Brown R, *The Law of Defamation in Canada* (2d ed, loose-leaf, Carswell, Toronto, 1999) (consulted on 24 May 2013) ch 25 pp 15-16. I assume throughout that the defamation at issue is either libel or slander actionable per se.*


*Hill*, n 8 at para 164.


nothing less.” In warning against “escalating and excessive awards”, Sharpe JA stated:

One should not lose sight of the basic principle that libel damage awards, like damage awards for other wrongs, should be based upon a rational attempt to measure in money terms the loss and injury the plaintiff has suffered.

Although damages are at large, the courts have provided some guidance. In Hill, the Supreme Court set out factors that may be considered in determining the quantum of damages. They include:

- 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”

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Under that doctrine, presumed damages is "an estimate, however rough, of the probable extent of actual loss a person had suffered and would suffer in the future, even though the loss could not be identified in terms of advantageous relationships lost, either from a monetary or enjoyment-of-life standpoint.


14 Hill, n 8 at para 182, citing Gatley, n 10, pp 592-93.
I refer to these as the *Hill* factors.

The Supreme Court noted that many of the *Hill* factors overlap with factors relevant to assessing aggravated damages: “[t]here will of necessity be some overlapping of the factors to be considered when aggravated damages are assessed”.\(^{15}\) The significance of this includes the potential for overcompensation\(^{16}\) and that these overlapping factors can be understood as relating to pain and suffering, as well as, perhaps, to injury to reputation. For example, the mode and extent of publication can influence the number of people to whom the defamation is published, but it may also affect the degree of the plaintiff’s distress.

The *Hill* factors are common sense considerations in assessing the scope of the injury: if the defamatory statement is published widely, that suggests a greater loss to reputation than if a statement is published only to one person. If the defendant behaves badly and refuses to apologize, that may increase the plaintiff’s embarrassment and upset. If the plaintiff has a high standing and excellent reputation, he has more to lose by being defamed than someone with a more dubious reputation.

That said, it will not always be the case that each of the factors is relevant to the extent of the injury. I believe that the Supreme Court in *Hill* intended these factors (and others) to be applied in a common sense manner, depending on the facts of a particular case. This follows, after all, from the compensatory goal of a general damages award. Thus, the proper approach to the *Hill* factors would be to consider the possibility that each of them has affected the scope of the loss, and to assess the loss accordingly. On this approach, we should sometimes reject the relevance of certain *Hill* factors. For example, if there is no relevant evidence of the defendant’s conduct following the defamation, or if there is evidence of neutral conduct, that factor should not affect the quantum of damages.

\(^{15}\) *Hill*, n 8 at para 183.

\(^{16}\) Brown has argued that the factors to consider in quantifying general and aggravated damages should be distinct. He also noted that the requirement of malice for aggravated damages creates overlap between the factors to consider for aggravated and punitive damages. See Brown 1999, n 7, ch 25 p 70.
Although the *Hill* factors guide the quantification of damages, awards are still highly discretionary.\(^{17}\) This follows inevitably from the lack of inherent or commercial value attached to reputation, just as pain and suffering damages are ultimately discretionary and somewhat arbitrary. Courts also refuse to provide guidance to juries regarding appropriate ranges for damages awards in defamation.\(^{18}\) Further, whereas general damages have been capped in personal injury cases,\(^{19}\) the same is not true of defamation damages: the Supreme Court of Canada has explicitly rejected such a cap.\(^{20}\) As a result, general damages in defamation sometimes exceed the cap on general damages for personal injury – a result which some have sharply criticized.\(^{21}\)

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\(^{18}\) *Hill*, n 8 at paras 160-61.


\(^{20}\) *Hill*, n 8 at paras 167-170.

\(^{21}\) See e.g. Lord Diplock in *McCarey*, n 13 at 109:

> I am convinced that it is not just ... that in equating incommensurables when... reputation has been injured the scale of value to be applied bears no relation whatever to the scale of values to be applied when equating those other incommensurables, money and physical injuries. I do not believe that the law today is more jealous of ... reputation than of... life or limb.

Note also that the UK courts have set a cap of about £200,000 on general damages in defamation actions. *Campbell-James v Guardian Media Group Plc*, [2005] EMLR 24, [2005] EWHC 893 (QDB). See also Brown 1999, n 7, ch 29 p 498. Kirby J of the New South Wales Court of Appeal has also expressed frustration at the possibility of defamation damages in excess of the cap for personal injury:

> It is simply impossible to suggest that compensation for the harm done to the reputation of Mr Ettingshausen required or permitted general damages greater in magnitude than those awarded to persons suffering profound quadriplegia.

b) Vindication

An important aspect of compensatory damages in defamation law is that they aim not only to compensate for a loss of reputation but also to vindicate the plaintiff:

Properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways-as a vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.22

Kit Barker describes five different senses of the term ‘vindication’ in private law: (i) Preventing infringement; (ii) Declaring or ‘marking’ the right; (iii) Specifically enforcing the right; (iv) Reversing the effects of infringement; and (v) punishing infringement.23 Of these, defamation law seeks to vindicate reputation in the sense of (iv) reversing the effects of infringement.

[Vindication in defamation law] means cleaning the plaintiff’s name of its tarnish. Since reputational damage actually consists in a deleterious change in the public perception of a person, its remediation entails an equivalent change for the better in that perception and monetary sums are calculated symbolically with this objective in mind.24

There are at least two ways in which an award of damages could reverse the effects of infringement. The award could provide the plaintiff with an amount

22 Fairfax, n 12 at 150.
of money that would allow it to take out advertising and hire public relations professionals to restore the corporation’s reputation. Alternately, the quantum of damages could itself signal to the public that the defamation was false, with a higher quantum presumably indicating a more egregious defamation than a lower quantum. It is this latter goal that in part guides the quantification of damages in defamation. Juries should settle on an amount that will “convince a bystander of the baselessness of the charge”.\textsuperscript{25} Expressed another way, damages should “provide the plaintiff with a sum of money that clearly demonstrates to the community the vindication of the plaintiff’s reputation.”\textsuperscript{26}

Although courts sometimes cite the goal of vindication in assessing the quantum of damages,\textsuperscript{27} it is rare for a court to explicitly address what portion of the damages relates to vindication as opposed to solatium or special damages. The closest I could find was a case in which damages were assessed at $10,000 on the basis that that amount was sufficient to vindicate the corporate plaintiff’s reputation.\textsuperscript{28} Even in that case, however, the judge also relied on several of the Hill factors in quantifying damages.\textsuperscript{29} Another case, however, suggests that the finding of liability itself vindicates and that damages represent compensation for solatium.\textsuperscript{30}

c) Damages in the Corporate Context

The rules and principles described above apply equally to human and corporate plaintiffs. Thus, where the plaintiff is a corporation, damages are

\textsuperscript{25} Cassell, n 12.  
\textsuperscript{26} Hill, n 8 at para 166. See also Gatley, n 10, ch 9 p 263.  
\textsuperscript{27} A quick LexisNexis search for Canadian cases with the keyword “defamation” as well as “quantum” or “amount” in the same paragraph as “vindication” (defam! & quantum or amount /p vindic!) resulted in 84 hits.  
\textsuperscript{28} Townhouses of Hogg’s Hollow Inc v Jenkins, [2007] OJ No 796 at para 21, 155 ACWS (3d) 1050 [Townhouses].  
\textsuperscript{29} Townhouses at para 14.  
presumed, they are at large, and they are compensatory in nature. In addition, the Hill factors should be considered: courts have consistently applied the Hill factors to corporate defamation plaintiffs. In the United States and United Kingdom, similar factors are applied to both human and corporate defamation plaintiffs. The goal of vindicating the plaintiff’s reputation also applies to corporations.

There are, however, a few differences between damages awarded to corporate plaintiffs and those awarded to human ones. First, corporations are not entitled to damages for pain and suffering for the obvious reason that they are not capable of suffering such injuries. “A company cannot be injured in its feelings, it can only be injured in its pocket.”

Relatedly, corporations may not be awarded aggravated damages – in defamation or otherwise. Aggravated damages are awarded to compensate for intangible injuries such as “distress and humiliation” caused by malicious or

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33 For the US, see Langvardt, n 2 at 512-13. For the UK see *Gatley*, n 10, pp 269-270.

34 For Canada, see e.g. *Barrick Gold CA*, n 32 at para 49. For the UK, *McDonald’s Corporation*, *McDonald’s Restaurants Limited v Helen Marie Steel and David Morris*, [1997] EWHC QB 366.

offensive conduct.36 Because corporations cannot suffer such intangible injuries, they cannot be awarded aggravated damages.37

Although defamation law applies in a similar way to individuals and corporations, and although common law countries share similar defamation laws, it is safe to say that Canada is now the most friendly jurisdiction for corporate defamation plaintiffs. The United States has less plaintiff-friendly defamation laws generally and often treats corporations like public figures (thereby requiring actual malice for liability).38 Australia eliminated most corporations’ standing to bring defamation actions entirely.39 Further, the United Kingdom recently amended its defamation laws to make proof of actual or likely “serious financial loss” necessary for liability where the plaintiff is a corporation.40 Canada has none of these restrictions and, as we shall see, seems to be making it easier for corporations to recover significant damages awards in defamation – even where there is no proof of actual harm to reputation.

37 Thomas Management Ltd v Alberta (Minister of Environmental Protection) 2006 ABCA 303 at para 27, [2006] AJ No 1332, and Pinewood Recording Studios Ltd v City Tower Development Corp, [1998] BCJ No 1977 at para 72 (BC CA) Southin JA [Pinewood]. For UK law see Collins Stewart Ltd v Financial Times Ltd [2006] EMLR 5 at 11. Note, however, that this was not always clearly the case and corporations are still sometimes awarded aggravated damages – erroneously, in my view. See Greek Community of Metropolitan Toronto Inc. v Gegios, [2006] OJ No 1461 and Credit Valley (Conservation Authority) v Burko, 2004 CanLII 12274 (ON SC).
39 In Australia, not-for-profits maintain a right to sue, while for-profits with ten or more employees do not. Individual corporate officers retain their right to sue in defamation. Civil Law (Wrongs) Act 2002 (ACT), s 121; Defamation Act (NT), s 8; Defamation Act (NSW), s 9; Defamation Act (Qld), s 9; Defamation Act (SA), s 9; Defamation Act (Tas), s 9; Defamation Act (Vic), s 9; Defamation Act (WA), s 9 [Australia Defamation Acts].
40 Defamation Act 2013 (UK), c 26, s 1(2) [UK Defamation Act].
2. Compensating Corporations for Injuries They Do Not Suffer

It has long been recognized that the presumption of damages means that plaintiffs will sometimes be overcompensated: either because they have suffered no loss at all or because they have suffered less of a loss than their damages award would suggest.\textsuperscript{41} The fact that damages are at large also creates a risk of overcompensation.\textsuperscript{42} The risk is especially problematic in the case of corporations: given that pain, suffering and dignitary interests are not at stake, there is arguably less reason to protect corporate reputation by presuming damages. I have argued elsewhere that the presumption of damages is unjustifiable when applied to corporations\textsuperscript{43} and I will not repeat these arguments here.

Instead, I identify three less obvious ways in which defamation law, as applied to corporate plaintiffs, compensates for injuries that do not (or may not) actually exist. Each relates to the application to corporations of factors to be considered in assessing the quantum of damages when such factors are not necessarily relevant to the injury to corporate reputation. I begin with the \textit{Hill} factor related to the failure to apologize. I then consider the relevance of the defendant’s malice and conclude with damages to vindicate corporate reputation.

a) Apology

Recall that \textit{Hill} cites the defendant’s failure to apologize to the plaintiff as a relevant factor in quantifying general damages. There are two ways in which this could be relevant to damages. First, the plaintiff may feel that common

\begin{footnotes}
\item[41] According to Langvardt, n 2 at 529, the doctrine of presumed damages results in “artificially high damages for a relatively minor harm to corporate reputation, and damages for a reputational injury the corporation simply did not suffer”.
\item[42] Because there are no formulas and there is little guidance in quantifying damages, the quantum of damages is highly discretionary and, essentially arbitrary. As a result, it is unlikely to reflect, in any meaningful sense, the actual extent of injury. This creates both a risk of over and undercompensation.
\item[43] Young 2013, n 6.
\end{footnotes}
decency and morality require the defendant to express regret and contrition. If an apology is not forthcoming, she may feel worse about the libel than she may otherwise have. The literature on the effect of apologies on litigation confirms that apologies, or a lack of them, can have a significant effect on the way the plaintiff feels about the injury she has suffered and her desire to pursue litigation. Particularly since defamation is a strict liability tort (in Canada, the UK and Australia, if not in the US), and could therefore be committed innocently, the defendant’s attitude, as reflected in an apology or lack thereof, could have an aggravating effect on the plaintiff’s injury and logically be considered in assessing the quantum of damages.

Second, a failure to apologize (or at least an express refusal to apologize) could affect how others view the plaintiff by repeating or drawing attention to the original defamatory statement.

These are, of course, distinct injuries. For corporate plaintiffs, a failure to apologize can only be relevant to damages awarded for injury to reputation, not for solatium, since corporations do not experience pain, humiliation or distress. In fact, the very concept of apologizing to a corporation is so different from the typical sense of apologizing that, in my opinion, it is somewhat misleading to speak of “apologizing” to a corporation at all. Apologizing is a “social and moral act”. It is expressing regret, responsibility or contrition and helps restore a “moral balance”. It is an act “rich in moral meaning”. Although philosophers

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44 See, for example, the following passage from Kleefeld J, “Thinking Like a Human: British Columbia’s Apology Act” (2007) 40 UBC L Rev 769 at 777:

The driver who struck her never apologized. Her father, a state senator, was angry that the driver had not expressed contrition. He was told that the driver dared not risk apologizing, because it could have constituted an admission in the litigation surrounding the girl’s death.


47 Taft, n 46 at 1138.
and other scholars may disagree about the precise scope, importance and effect of apologizing, its moral impact is unquestionably central to its meaning. Corporations, as artificial entities, cannot fully participate in the apology ritual as it is commonly understood.

This is not to suggest that corporations cannot give or receive apologies: of course they can and do: the question is what is achieved by a corporation apologizing or by apologizing to a corporation? If a corporation apologizes, it may take responsibility but cannot sincerely express regret or sorrow, which is part of most definitions of an effective apology. And yet, that may be enough since a corporation cannot be faulted for not feeling something it is incapable of feeling.

More relevant to the present discussion is the effect on corporations of receiving an apology. They obviously cannot feel vindicated or relieved or feel forgiveness. The relevance to a corporation of receiving an apology lies in how it affects its bottom line. Thus, to have an effect on the corporation it must have an effect that extends beyond the corporation itself. It can have a vindicatory effect by convincing others that the wronged corporation was, in fact, blameless. In the context of defamation, an apology can implicitly signal to others that the defamatory statement was false.

If we strip apologizing of its emotional significance to the wronged party, which we must if the wronged party is a corporation, what we are left with is apology as a form of setting the record straight. When given to a corporation, an apology is only relevant to damages to the extent that it functions as a retraction of the defamatory statement and is sufficiently publicized.

However, the Hill factor is not that an apology mitigates damages, it is that failing to apologize aggravates them. Failing to apologize is not obviously relevant to the corporate plaintiff’s injury at all. It is important to distinguish

50 Carroll, n 45 at 383.
51 Carroll, n 45 at 383.
between not apologizing and explicitly refusing to apologize. The defendant’s silence is presumably a neutral rather than an aggravating factor in assessing the extent of harm to reputation. It simply allows the original defamation to stand on its own. If I read a defamatory remark, I form an opinion based on it. If I later learn that the writer apologized, that may improve my opinion of the defamed person, but the lack of an apology or retraction presumably has no effect because I assume the writer meant what she wrote and is not sorry for having written it – otherwise why would the defamation affect my opinion of the plaintiff in the first place?

The High Court of Australia agrees that a mere failure to apologize is not aggravating – even of human beings’ injuries:

[W]e have difficulty in understanding how the mere absence of an apology can aggravate damages. Whereas publication of an apology may mitigate damage, thereby reducing the harm suffered by a plaintiff in a defamation case, and so reduce the damages awarded, the failure to publish an apology does not increase the plaintiff’s hurt or widen the area of publication. No doubt want of apology may be a relevant factor in establishing that a defendant is motivated by a desire to injure the plaintiff but that does not mean that want of apology itself aggravates the plaintiff’s injury.52

Whether a mere failure to apologize can, in fact, make a human plaintiff feel worse, need not be debated here. Arguably it could, especially regarding an unintentional defamation. However, it certainly cannot “widen the area of publication”. And only the latter type of injury is relevant to corporations.

An express refusal to apologize, on the other hand, could aggravate injury to corporate reputation, but only if the refusal were sufficiently publicized.

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52 Carson, n 13 at para 45. Note, however, that in New South Wales a failure to apologize is relevant to compensatory damages. The Court of Appeal in that state distinguished Carson on the basis that it was referring to aggravated damages only. Clark v Ainsworth (1996), 40 NSWLR 463 (CA).
Without communicating the refusal to apologize to someone other than the plaintiff, there can be no aggravating effect on the plaintiff’s reputation.53

Even if an express refusal is publicized, however, it may still be neutral or only slightly aggravating: the defendant is simply standing by her original statement, and this may not change people’s post-defamation opinion of the plaintiff. The effective repetition of the libel by refusing to apologize for it may have an aggravating effect, particularly where the audience for the refusal to apologize is broader than the original audience.54 In this case, however, it is the repetition that has the aggravating effect on reputation, rather than anything to do with (not) apologizing per se.

Whether or not a publicized refusal to apologize would, in fact, affect the audience’s perception of the plaintiff is a complicated question that would depend on a number of facts about the original defamation, the plaintiff, the defendant and the nature of the refusal to apologize. The point is simply that even an express refusal to apologize will not necessarily aggravate injury to corporate reputation. If it does, it is presumably because it functions as a repetition or endorsement, not because it is a failure to apologize as such.

Thus, continuing to treat a failure to apologize as an aggravating factor for corporate defamation allows corporations to be overcompensated: while a failure to apologize (to people) may be aggravating, because it makes people feel worse, a failure to retract is, in most cases, neutral. Where it is neutral, it should not be taken into account in quantifying damages.

One might think this analysis of the effect of not apologizing rather trivial if not for the fact that a failure to apologize is frequently used to justify significant general damages awards to corporate defamation plaintiffs, even in the absence of any evidence of harm to reputation.55

53 Some courts, especially in the US, refuse to consider repetition of the defamatory statements in aggravation of damages at all. See Brown 1999, n 7, ch 25 p 106.
54 See Brown 1999, n 7, ch 25 p 99 regarding the effect of repeating a libel.
55 In addition to the examples below, see Dover Investments Limited v Transpacific Petroleum Corp, 2009 BCSC 1620, [2009] BCJ No 2354 [Dover] citing BCJ (corporate plaintiff awarded $65,000 in general damages for
Consider the example of *Barrick Gold v Lopehandia*, [2003] OJ No 5837. The plaintiff gold mining company brought a defamation action against a man who posted on the internet rambling and extreme accusations of complicity in genocide, theft and fraud. In default proceedings, the plaintiff was awarded $15,000 in general damages, which was increased to $75,000 on appeal – in part because the trial judge failed to consider the defendant’s refusal to apologize.

I have argued elsewhere that these statements were arguably not credible and therefore not defamatory, but my point here relates to whether Mr. Lopehandia’s refusal to apologize or withdraw his statements would have had an aggravating effect on injury to Barrick Gold’s reputation. The allegations were extreme. Mr. Lopehandia appeared to believe everything he alleged and did everything he could to spread his message and convince others of Barrick Gold’s supposed wrongdoing.

Since the statements were held to be defamatory, we must proceed on the assumption that a right-thinking person would have thought less of Barrick Gold because of them. Given the nature of the impugned statements, would people think even less of Barrick Gold if they knew that Mr. Lopehandia refused to apologize? I think not. It would have come as no surprise to anyone reading Mr. Lopehandia’s statements that he stood by them, since he appeared to be wholeheartedly committed to his view of Barrick Gold’s actions. Nine volumes of

defamation plus $85,000 for another instance of defamation and interference with contractual relations); *WeGo Kayaking Ltd et al v Sewid, et al*, 2006 BCSC 334 at para 26, (although this award was subsequently set aside and a new trial followed: *WeGo*, n 31, in which the failure to apologize was not mentioned); *Trout Point Lodge Ltd v Handshoe*, 2012 NSSC 245, [2012] NSJ No 427 (corporate plaintiff awarded $75,000 in general damages); *Hunter Dickinson Inc v Butler*, 2010 BCSC 939, [2010] BCJ No 1332 [*Hunter*] citing BCJ ($75,000 in general damages awarded to each of two corporate plaintiffs); *Hiltz and Seamone Co Ltd v Nova Scotia (Attorney General)*, [1997] NSJ No 530, 1997 CanLII 542 (NS SC) [*Hiltz TD*] citing CanLII ($200,000 plus $100,000 punitive damages awarded).

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57 *Barrick Gold CA*, n 32 at paras 35; 49-51.

58 Young H, “But Names Won’t Necessarily Hurt Me” (2011) 37 Queen’s LJ 1 [Young 2011].
disparaging statements were entered into evidence. The express refusal to apologize is surely at most just one more repetition of Mr Lopehandia’s accusations against Barrick Gold. In fact, given the evidence, had he apologized, the apology may not have been credible, leading one to wonder whether Mr Lopehandia was simply attempting to avoid a harsh judicial outcome. The refusal to apologize, assuming this fact was even publicized, likely had no effect, or at most only a slight aggravating effect on Barrick Gold’s reputation by virtue of the repetition. In my opinion, it cannot help to justify increasing the general damages award by 400%.

That the Ontario Court of Appeal misunderstood the relevance of apologies to corporate reputation is evident from the fact that it considered the failure to apologize to be a factor distinct from repetition. Whereas the motions judge acknowledged that repeating the libel usually aggravates damages, she declined to award aggravated damages in respect of repetition because she found the statements not to be credible. The Court of Appeal increased the award of damages on the basis that repetition “is only one factor to be considered” – the failure to apologize must also be considered. According to the Court:

- Mr. Lopehandia’s clear refusal to retract his statements, or to apologize for them – and, indeed, his dogged pursuit of the libelous campaign even after commencement of the proceedings – is an aggravating factor in this case, and a different factor than the repetition of the libel.

However, it follows from the analysis above that where corporate plaintiffs are concerned, the only effect of a failure to apologize, assuming it is an express refusal (as it was in Barrick Gold) is to repeat the libel. Thus, where a corporation’s reputation is concerned, it is not true that the refusal to apologize is a meaningfully different factor than the repetition of the libel.

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60 See my analysis of why this conclusion should mean that the statements were not defamatory at all in Young 2011, n 58 at 14-15.
61 Barrick Gold CA, n 32 at para 51.
62 Barrick Gold CA, n 32 at para 51.
It would seem that the Ontario Court of Appeal unthinkingly applied the “refusal to apologize factor” without considering whether a refusal to apologize actually aggravated the injury in this case. It applied a factor that was presumably meant primarily to compensate for the emotional effect of a refusal to apologize, to an entity without the capacity for emotion. It added insult to injury where there was no capacity to be insulted.

In another Ontario case, *Second Cup v Eftoda*, [2006] OJ No 3155, the court justified a significant general damages award, in the absence of proof of actual injury to reputation, in part on the basis of the defendant’s failure to apologize. “Most notable in this sordid odyssey is the failure of the defendants to apologize or offer any form of retraction.” The court seemed to reason that because the defendant could have mitigated damages by apologizing, but did not, that this aggravated the injury. But surely the failure to apologize in the case, involving a dispute between the Second Cup coffee chain and man who sought to organize franchisees against their franchisor, was a neutral factor that simply allowed Mr. Eftoda’s comments to stand on their own.

In *New York Fries v Takacs*, 2012 ONSC 6338, the plaintiff was another franchisor and the defendants former franchisees and their officers. Following a dispute over whether the defendants breached their contract with the plaintiff, the defendants made numerous statements about New York Fries, including that it used adulterated or expired food, that it stole from franchisees and that it employed sexist marketing practices. In awarding $425,000 in general damages (plus $75,000 in punitive damages), the court cited *Barrick Gold* and stated:

63 *Second Cup Ltd v Eftoda*, [2006] OJ No 3155 (ON SC) [*Second Cup*].
64 *Second Cup*, n 63 at para 34.
65 “In this instance, Mr. Eftoda’s actions have severely harmed Second Cup and many Second Cup franchisees, and have dramatically aggravated the damages at a time when he could have mitigated the impact of his actions.” *Second Cup*, n 63 at para 38.
66 *New York Fries*, n 32.
“[t]he clear refusal to retract or apologize for the defamatory statements is an aggravating factor that supports a large damage award.”

Again, I suggest that the failure to apologize likely had no aggravating effect on the injury to New York Fries’ reputation. The court had already considered the seriousness of the statements, the defendants’ deliberate attempts to harm the plaintiff’s reputation and the extent to which the statements had been published. What further aggravating effect would a refusal to apologize have? Nothing in the court’s reasons suggests that the refusal to apologize was itself published to anyone other than the plaintiff. Even if it had been, this case is similar to the two above in that the contexts suggests that the defendants would likely stand by their deliberate attempts to harm the plaintiff. A refusal to apologize would only serve to repeat or endorse the original libel and even such a repetition would not necessarily have a significant effect on the plaintiff’s reputation (although more facts would be needed to adequately assess this). It therefore seems that a refusal to retract or apologize was not an aggravating factor in this case – or at least there was no evidence cited in the court’s reasons to suggest that it was. Instead, the court simply relies on Barrick Gold without considering the actual effect of a refusal to apologize.


At least one court has acknowledged the greater benefit to a corporate defamation plaintiff of having the defendant apologize in a forum in which it

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68 New York Fries, n 32 at para 22.
69 Dover, n 55 at paras 19, 22.
70 Hunter, n 55 at paras 38, 47, 65.
might be seen by those to whom the defamatory statement was originally published. In *Farallon Mining Ltd v Arnold*, 2011 BCSC 1532, Silverman J stated:

I am also satisfied that an apology of the sort provided in this case [namely in correspondence between counsel] is of qualitatively less significance than an apology which might have been, and could have been, written on the same website where the original defamatory statements were posted.  

I would go further and say that for a mining corporation such as Fallaron, an apology in a document protected by solicitor-client privilege has *no* significance when it comes to assessing damages for defamation.

The point is not that a failure to apologize is never aggravating of injury to reputation. Rather, it is that courts apply the apology factor to injury to corporate reputation without considering whether an apology is actually relevant to damages in the particular case. Where a plaintiff does not or cannot suffer any emotional upset, the apology factor should not be considered relevant to the quantum of damages unless there is reason to think that the failure to apologize affected people’s opinion of the plaintiff.

To avoid confusion and overcompensation, I suggest the following approach. When it comes to corporate plaintiffs, a failure to apologize *per se* should not be a relevant factor in quantifying damages. If the defendant published a statement to the effect that he refuses to apologize, this should be considered a repetition rather than a failure to apologize, or a separate defamatory statement, and damages should be awarded accordingly.

b) Malice

As Hill makes clear, “the whole conduct of the defendant from the time when the libel was published down to the very moment of their verdict” is relevant to quantifying damages. Brown divides this factor into the defendant’s

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73 *Farallon Mining Ltd v Arnold*, 2011 BCSC 1532 [*Farallon*] at para 92.
74 *Hill*, n 8 at para 182.
conduct and state of mind. State of mind in turn refers to the defendant’s intent and motives. Malicious intent and motives are aggravating factors in the quantification of damages: “the amount of damages should be governed or graduated by the degree of malice by which the defendant was actuated.”

Malice that will aggravate damages includes not only intent to injure, but publishing a defamatory statement known to be false, or showing reckless disregard as to its truth. Additional indicators of malice include:

[t]he defendant’s cavalier attitude, recklessness and lack of consideration for others, or personal ill will, bad faith and gross negligence or general bad motive or evil purpose, or lack of justification in making the remarks, or acting against the background of hatred, anger and ill will, or as a partisan with a grudge to gratify.

For present purposes, I ignore the difference between general and aggravated damages. It is clear that both are compensatory, not punitive, and that the nature of malicious conduct justifying each is similar if not the same. Brown and others have argued that aggravated damages should not be a separate

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75 Brown 1999, n 7, ch 25.3(2).
76 Knott v Telegram Printing Co, [1917] 1 WWR 974 (Man CA); Langton v Hagerty (1874), 35 Wis 150 at 159. See also Brown 1999, n 7, ch 25 pp 86-97. Note, however, that Australia rejected malice as a factor that aggravates damages unless it actually increases the harm to the plaintiff. See Australia Defamation Acts, n 39.
77 Massee v Williams (1913), 207 Fed 222 at 235 (6th Cir) Sater J.
80 Hill, n 8 at paras 188-190, 196.
81 See generally Brown 1999, n 7, ch 25.3(1.1) and 25.3(2)(b)(ii). One possible difference is that there is a threshold degree of emotional injury before aggravated damages can be awarded which seems not to be the case with pain and suffering injury outside an aggravated damages award. (Per Hill, n 8 at para 188, “[a]ggravated damages may be awarded in circumstances where the defendants' conduct has been particularly high-handed or oppressive [emphasis added]”). However, if this is a real distinction, it would seem to be difficult to justify, especially to those who would support eliminating aggravated damages as a separate head of damages (see n 82). Another possible difference relates to the few ways in which malice may be relevant to the scope of reputational injury, as opposed to the plaintiff’s pain and suffering.
head of damages from general damages. My argument applies equally whether corporations are awarded general damages in an amount that reflects malice, or whether they are awarded aggravated damages because of malice.

As with apologies, we must distinguish between the effect of the factor on the plaintiff’s emotional well-being and on the plaintiff’s reputation. The effect of malice on the plaintiff’s pain and suffering is evident: “[i]t is assumed that if the plaintiff is aware of the malicious purpose of the defamer, it may affect the amount and intensity of his or her mental suffering and injury to feelings.”

Further:

...where the defendant is guilty of insulting, high-handed, spiteful, malicious or oppressive conduct which increases the mental distress – the humiliation, indignation, anxiety, grief, fear and the like – suffered by the plaintiff as a result of being defamed, the plaintiff may be entitled to what has come to be known as “aggravated damages”

The effect of malice on the plaintiff’s reputation, as opposed to on pain and suffering, is less clear. Perhaps right thinking people would assume the plaintiff did something to deserve the defendant’s malice. That is, a person who elicited a malicious response must have done something to deserve it and must therefore be bad in some sense. But that will often be a weak argument: it isn’t clear that malice will reflect badly on the target of the malice rather than on the malicious person herself. Further, if the defendant’s intent or malicious motive is known to those to whom the defamation is published, they may be more likely to discount its credibility:

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83 Brown 1999, n 7, ch 25 pp 87-88
84 Walker, n 35 at para 130. That said, some courts hold that even for human plaintiffs, malice should only be relevant to punitive, not aggravated damages (Bond v Lotz (1932), 214 Iowa 683, 243 NW 586); “To increase an award of damages for malice is essentially punitive rather than compensatory in character” Chubb v Gsell (1859), 34 Pa (10 Casey) 114. See also Brown 1999, n 7, ch 25 pp 95-96.
It may be that the reputation will not suffer as much if the hearers and readers know the motive of the charge to be actual malice as when they believe the charge is made in good faith and without malice.”

Where that is so, malice actually mitigates rather than aggravates the injury to reputation.

Thus, although we can perhaps not entirely discount the possibility that the defendant’s malice suggests something negative about the plaintiff, it is a weak foundation for the proposition that malice aggravates injury to reputation.

Alternately, the Supreme Court suggested in *Hill* that malice could increase the injury to the plaintiff by “spreading further afield the damage to the reputation of the plaintiff”. It is not entirely clear what the court means by this. If it means that because of malice, the defendant publishes more broadly than she might otherwise have, the relevance to the reputational injury would seem to relate more to the fact of widespread publication (which can be dealt with under the *Hill* factor of “mode and extent of publication”) than to the defendant’s malice.

However, if the court means that because of malice, the statement is of more interest to the public, and is therefore republished by others, this would seem not simply to be an issue of the extent of publication, since it is no longer the defendant who is publishing. Defendants cannot usually be held responsible for republication of the original defamation, but they can if they knew or intended that their statement would be republished. This may be an example of malice affecting reputational injury. However, the issue is really one of which publications the defendant can be held liable for. Once this is established, the malice issue again becomes irrelevant. That is, if because of malice a defendant is held liable for republication, the focus of the quantum of damages inquiry should

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85 *Craney v Donovan* (1917), 102 A 640 at 642, 92 Conn 236 [*Craney*].
86 *Hill*, n 8 at para 190. See also Wheeler J. in *Craney*, n 85, who stated at 642 that malice could “spread the charge of the libel of slander”.
then be on the “mode and extent” of that republication, its effect on its audience, etc. There is no further need to consider malice as a factor aggravating damages.

If we acknowledge that corporations can only suffer injury to reputation, and not emotional harm, as a result of the defendant’s malice, it becomes at best unclear that malice should be an aggravating factor where corporations are defamation plaintiffs. Other than perhaps creating the impression that the plaintiff deserves such malice, or in cases where the defendant intended that the defamation be republished, malice is not relevant to the extent of the harm to reputation. At worst, this is another example of an irrelevant factor being used to compensate corporations for emotional injury they cannot suffer.

Consider a few examples in which corporations were awarded general or aggravated damages whose quantum reflected the aggravating effect of malice. Of course, corporations are not entitled to awards of aggravated damages, since such damages relate to injury to feelings.\(^88\) However, this was somewhat unclear – at least in Canada – until the end of the 20\(^{th}\) century. (In a 1998 case, the British Columbia Court of Appeal states that it is “doubtful” that a corporation can receive an award of aggravated damages.)\(^89\) Thus, it is not unusual to find cases in which aggravated damages are awarded to corporations. Note, however, that where the plaintiff is a corporation, it would seem equally absurd to award damages based on the defendant’s malice as to award aggravated damages. With the possible exceptions of malice reflecting badly on the plaintiff, or of an intent that others republish, in both cases the injury is one that relates to emotional injury rather than damage to reputation.

In *Colour Your World*, Somers, J. took malice into account in his award of general damages to the plaintiff paint company.

The many factors relied on by counsel for the plaintiff in making this submission … are mostly factors I have taken into account in making my finding of malice and have been reflected in my assessment of the general damages.\(^90\)

\(^{89}\) Pinewood, n 37 at para 72.
\(^{90}\) Colour Your World, n 71 at para 352.
The injury to reputation in this case resulted from false claims made on a television show about the dangerous nature of the plaintiff's paint. The paint company could suffer no emotional injury from the defamation, whether malicious or otherwise. In this case, the finding of malice rested not on deliberate intent to injure, but on the improper purpose of wanting to increase the show's dramatic impact, and on a failure to apologize. What relevance, then, could the plaintiff's malice have? If audience members knew of the defendant's malice in this case, they would surely think less of the defendant, not the plaintiff. And since the defendant was a large media corporation and there was no significant evidence of republication, malice cannot be relevant to inciting others to republish.

In *Colour Your World*, in my opinion, the defendant's malice could only be relevant to damages in terms of punishing or deterring similar conduct. Anderson recognizes the potential to punish rather than compensate when considering motive in relation to general damages:

> evidence of the defendant's good faith is admissible in mitigation. How the defendant's motivation could affect the amount of the plaintiff's damage is unclear. Perhaps the rule is a tacit admission that presumed damages actually may be awarded to punish the defendant.

However, the court explicitly held that the defendant's conduct, although legally malicious, did not rise to the level of conduct that should attract punitive damages. And although compensatory damages may appropriately be awarded in order to deter, it is not appropriate to award compensatory damages in relation to injury not actually suffered for the purpose of deterring.

*Creative Salmon Company Ltd v Staniford*, [2007] BCJ No 73, is a case in which a trial judge awarded aggravated damages due to malice. It involved

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91 *Colour Your World*, n 71 at paras 103, 104.
92 Anderson, n 13 at 754.
93 *Colour Your World*, n 71 at para 117.
94 *Creative Salmon Company Ltd v Staniford*, [2007] BCJ No 73 [Staniford TD].
press releases issued by Mr. Staniford, who was hired by the environmental activist group Friends of Clayoquot Sound (FOCS). The press releases criticized the plaintiff fish farming company’s claims of being organic and environmentally friendly. Gerow J. concluded that the defendant’s claims were motivated by “actual malice” in that he wanted to “create opposition” to the plaintiff company and its attempt to obtain an organic certification. The court therefore awarded $5000 in aggravated damages. This award was overturned on appeal, but because the British Columbia Court of Appeal overturned the finding of malice, not because it considered malice to be irrelevant to compensatory damages.96

Query whether either of the possible justifications for considering motive in quantifying general damages for corporations applies. The defendant’s malice, such as it was, consisted in trying to create opposition to a company that he believed was polluting the environment. To the extent the audience of the press releases was aware of this motivation (and it likely was, given that the press releases were issued by FOCS), that motivation is unlikely to make the audience think less of the plaintiff. The audience might think less of the plaintiff because it respects the defendant or the FOCS, or because the contents of the press releases were convincing. Alternately, it may not think less of the plaintiff because it considers the FOCS or the defendant not to be credible, or because the contents of the press releases were not convincing. The motivation itself seems irrelevant to harm to reputation.

As for whether the defendant’s motivation was connected to inducing republication of the press releases, by their nature press releases are meant to lead to republication. However, the court seems to have relied in part on the fact of widespread republication in awarding $10,000 in general damages.97 It attributed the republications to Mr. Staniford without discussion. The court nevertheless awarded an additional $5000 in aggravated damages because of Mr. Staniford’s malicious motive.98 If the court had been relying on the effect of

95 Staniford TD, n 94 at para 93.
97 Staniford TD, n 94 at paras 83-90.
98 Staniford TD, n 94 at para 93.
malice in inducing republication, then republication would surely have been addressed in the context of malice, and perhaps solely in the discussion of aggravated damages, rather than under the heading of general damages.

In *Hiltz and Seamone Co Ltd v Nova Scotia (Attorney General) et al*, 1999 CanLII 13144, the Nova Scotia Court of Appeal upheld a general damages award of $200,000 to the plaintiff firm of consulting engineers, in part because of the defendants’ malice. The nature of the malice in this case involved reckless disregard of the truth on the part of both defendants and deliberate lying on the part of one with regard to the contents of a letter criticizing the plaintiff’s competence and integrity. The injury to reputation consisted of eroding the public’s confidence in the plaintiff with consequential loss of business.

Reckless disregard of the truth and deliberate lying would seem to reflect more on the defendants than on the plaintiff (assuming the audience even knew about the defendants’ malice). The plaintiff’s reputational injury resulted from a letter the defendants wrote about the plaintiff’s work, and which was eventually made public. Without reason to connect the defendants’ malice to the plaintiff’s reputational injury, it makes no sense to consider the defendants’ malice in quantifying compensatory damages.

There is reason to think that the defendants intended their letter to be republished to public. It was initially sent to two people under circumstances that would have amounted to qualified privilege but for malice. That the letter was made public seems to have been considered a kind of republication for which the defendants could be held responsible. However, the court did not focus on this as an issue of malice. Rather, with regard to malice the court seemed offended by the defendants’ refusal to retract and their reliance on the defence of

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99 *Hiltz and Seamone Co Ltd v Nova Scotia (Attorney General) et al*, 1999 CanLII 13144 (NS CA) [*Hiltz CA*].

100 “[D]espite Vervaet’s disclaimer of surprise, the defendants intended Inch to re-publish it to the Municipality and/or it was the natural probable result of the original publication.” *Hiltz TD*, n 55.
justification. The court specifically referred to the defendants’ motivations as a distinct factor from the extent of publication (including republication). There is nothing in the court’s reasons to suggest that malice aggravated general damages because it led to more widespread publication.

Instead, the portion of compensatory damages in relation to malice appears to have a punitive aspect to it. And yet the trial court in Hiltz and Seamone also awarded $100,000 in punitive damages because of the defendants’ express malice, and the award was upheld on appeal. It seems the defendants were punished twice for their malice, and the plaintiff corporation was therefore overcompensated.

In Universal Weld Overlays, 2001 ABQB 1009, the defendants were found liable for defaming their competitor in the weld overlay business. The defendants sent a letter to their customers accusing the plaintiff of patent infringement and warning them not to rely on the plaintiff’s services. The court found malice on the basis of, among other things: continued publication after the plaintiff made its intention to sue in defamation known; repeating allegations of patent infringement after a court had found those allegations to be false; failing to retract or apologize; and persisting in a defence of justification.

Universal Weld Overlays was awarded $30,000 in aggravated damages (in addition to $100,000 in general damages) because of the defendants’ intent and malicious motive. Romaine J. declined to award punitive damages, and yet, as in Colour Your World and Hiltz, the aggravated damages award seems to have been punitive rather than compensatory in nature. The court did not discuss

101 Hiltz TD, n 55. (“The defendants persisted in maintaining these actions right into the courtroom”; “…the defence of justification was put forward at the eve of trial and never withdrawn”).
102 Hiltz TD, n 55. (“Taking account of all the circumstances, including the defamatory statements, the actions and motivations of the defendants, the extent of publication and the presumed and real effect on the plaintiff, I fix general damages at $200,000.00 and award them as against both defendants.)
103 Hiltz CA, n 99.
104 Universal Weld, n 32.
105 Universal Weld, n 32 at para 92.
106 Universal Weld, n 32 at para 107.
107 Universal Weld, n 32 at para 107.
the effect the defendants’ malice (as opposed to the content of the letter itself) would have had on people’s opinion of the plaintiff. It focused on intent but without addressing how intent might be relevant to actual loss.

Finally, in Trozzo Holdings v MVS Construction, 2002 BCSC 1202, the court awarded $5000 in compensatory damages, “[t]aking into account the aggravating feature of malice”\(^{108}\) The defendant’s malice consisted of posting a defamatory note in its hotel in order to gain support for its position in a contract dispute with the plaintiff. Again, there is no reason to think that malice, as distinct from the publication itself, aggravated the injury to the plaintiff’s reputation. The court declined to award punitive damages on the basis that the defendant’s conduct was not “so malicious, oppressive and high-handed that it offends the court’s sense of decency”.\(^{109}\) And yet, what purpose would there be in awarding damages to reflect malicious conduct toward the plaintiff other than to demonstrate the court’s disapproval of the conduct?

As with the discussion of apologies, the foregoing discussion of malice is not meant to demonstrate that the defendant’s malice can never be relevant to compensatory damages awarded to corporate defamation plaintiffs. Rather, it is intended to suggest that as a factor in quantifying compensatory, as opposed to punitive damages, malice is primarily relevant to injury in the form of hurt feelings or embarrassment. As a result, it is a relevant factor to consider when assessing injury to human plaintiffs, who may be upset by the malicious nature of the defamation. However, courts appear to apply this factor in quantifying damages to corporate plaintiffs without considering whether malice is actually relevant to the corporation’s injury in a particular case. If it is not, the only relevance of malice in determining damages should be to an award of punitive damages.\(^{110}\) Courts should be clear that what they are doing is expressing their

\(^{108}\) Trozzo Holdings Ltd v MVS Construction Ltd, 2002 BCSC 1202 at para 105 [Trozzo].

\(^{109}\) Trozzo, n 108 at para 108.

\(^{110}\) Some have argued that punitive damages should not be available in defamation actions. Cassel, n 12 (per Lord Reid: “I think that the objections to allowing juries to go beyond compensatory damages are overwhelming. To allow
disapproval of the defendant’s conduct, not trying to compensate for a loss actually suffered. One might argue that it matters little whether an award is made under the heading of general damages or under the heading of punitive damages. However, the risk with counting such awards as both compensatory and punitive is to punish twice, which is unfair to the defendant.

I therefore conclude that when quantifying compensatory damages for corporate defamation plaintiffs, courts should ignore malicious motive and intent unless they are actually relevant to the extent of the corporation’s reputational injury, just as they should ignore the defendant’s failure to apologize. One way to do this would be to abandon the Hill factors in assessing damages. Although it is worth considering effect of these factors on injury in any given case, courts have applied them mechanically in a manner that has resulted in compensating corporations for injuries they did not suffer. One way to prevent this outcome is to avoid the checklist approach entirely and for courts simply to focus on evidence of the scope of the corporation’s injury. Alternately, courts could at least reject malice as a relevant factor in quantifying compensatory damages to corporate defamation plaintiffs.

c) Vindication
A final way in which the law of damages in defamation may overcompensate corporations relates to damages for vindicating reputation. I noted above that in quantifying damages, the judge or jury should award an amount that will vindicate reputation by demonstrating to the world that the defamation was false or unfair. And yet general damages are meant to be compensatory, such that this amount should be as close as possible to the actual loss suffered.

Consider the link between quantum of damages and vindication. On the one hand, it is arguably the finding of liability and not a particular quantum of damages that vindicates reputation. As Andrew Kenyon notes: “[L]arge awards do

pure punishment in this way contravenes almost every principle which has been evolved for the protection of offenders.”)
not necessarily achieve vindication: the public perception does not match defamation's doctrine.”\textsuperscript{111} He goes on to suggest that the law could logically rely on the verdict to vindicate.\textsuperscript{112} Kit Barker makes similar points,\textsuperscript{113} as have I elsewhere.\textsuperscript{114} Further, the New South Wales (Australia) Law Reform Commission recommended reversing the onus of proof in defamation, such that plaintiffs would have to prove the falsity of the defamatory statement rather than defendants proving truth. It advocated this change because with the onus of proof as it now stands, liability does not necessarily signal that the defamation was false – it just signals that truth was not proven. If the onus changed, vindication would rest on a finding of falsity rather than an inference from the quantum of damages.\textsuperscript{115} Finally, some have argued that apologies should be encouraged as they have a greater potential to vindicate than an award of damages.\textsuperscript{116}

In addition to the possibility that it is the verdict rather than the quantum of damages that has the potential to vindicate reputation, publicity is also essential but rarely discussed in the case law. If the quantum is not sufficiently publicized, it is presumably irrelevant to vindication.\textsuperscript{117}

\begin{itemize}
\item \textsuperscript{111} Kenyon, n 21 at 73.
\item \textsuperscript{112} Kenyon, n 21 at 73. See also Milo D, \textit{Defamation and Freedom of Speech} (Oxford University Press, Oxford, 2008) pp 233 and 234.
\item \textsuperscript{113} Barker, n 23 at 16.
\item \textsuperscript{114} Young 2013, n 6.
\item \textsuperscript{115} New South Wales Law Reform Commission Report No 75, \textit{Defamation} at para 2.8 (not implemented), cited in Gatley, n 10, p 9.1-263, fn 12. See also Chan G, “Corporate defamation: reputation, rights and remedies” (2013) 33:2 Legal Studies 264 at 275 (a declaration of falsity would directly vindicate reputation, whereas the link between damages and vindication is “more tenuous”).
\item \textsuperscript{116} Brown 1999, n 7, ch 25 p 29. That said, Brown may mean ‘vindicate’ in a different sense than restoring reputation – he may mean it in the sense of making (human) plaintiffs feel better.
\item \textsuperscript{117} Barker, n 23 also makes this point at 16:
\end{itemize}

Whether a given award is successful in restoring a plaintiff’s name for the future depends entirely, of course, on the extent to which it reaches the public consciousness and scepticism can legitimately be expressed about this, particularly when awards are routinely granted so long after the original defamatory slur was made that little-to-no publicity attaches to them.
Even if one accepts that the quantum of damages can serve to vindicate reputation, there is an inherent risk that the sum needed to convince the public of the “baselessness of the charge” will bear no logical connection to the degree of injury to reputation and the degree to which the plaintiff has suffered or will suffer. Depending on one’s view of how much money it takes to convince the public of the falsity of the defamation, this could be more or less than the amount required to compensate for loss to reputation. It is a principle of the law of damages that the plaintiff should generally be compensated in the least expensive way that will achieve *restitutio in integrum*: cost of repair versus cost of replacement, for example. We should therefore at least question the practice of awarding a quantum that will vindicate without considering whether that amount is greater than the value of the loss actually suffered.

Further, the relationship between the *Hill* factors and the goal of vindication in quantifying damages is unclear. To the extent that the case law speaks rather imprecisely of “solatium, vindication and compensation”, there is at least the potential for double recovery. If a court assesses the quantum to reflect the degree of the injury to reputation per the *Hill* factors, then considers an amount to vindicate reputation, it is as if the court compensates both for the decrease in a negligently damaged chattel’s value and for the cost of its repair. Since few cases explicitly state which amounts relate to which kind of injury or remedy (perhaps understandably, given that damages are at large), it is hard to know whether plaintiffs are being compensated twice for the same loss. However, it is clearly a possibility. Dario Milo, for example, notes that: “it will be double-

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118 See Chan, n 115 at 274.
119 See Cassels J, *Remedies: The Law of Damages* (Irwin Law, Toronto, 2000) pp 86-88. Assuming it could be done precisely, awarding damages for the (past and future) loss of corporate reputation and vindicating the reputation would have exactly the same value to a corporation. If vindicating were more costly to the defendant, the plaintiff should instead receive compensation: to award vindicatory damages would be unfair to the defendant.
120 See e.g. *Best*, n 13, citing Brown 1999, n 7, ch 25 pp 7-11.
counting if any but a modest element of general damages goes to [vindicating reputation].”121

Given the importance of vindication to damages in defamation law, the possibility that the quantum may not be especially relevant to vindicating the plaintiff’s reputation, and the possibility that the focus on vindication results in overcompensation, it is worth considering why the law seeks to vindicate reputation. One reason is that vindication (in the sense of reversing the effects of infringement, as well as in other senses, perhaps)122 is an important function of tort law generally.123 The very purpose of compensatory damages in tort is to seek to restore the plaintiff to her pre-injury position to the extent that money can do so: *restitutio in integrum*. From this perspective, awarding damages to attempt to restore reputation makes perfect sense.

This perspective, however, ignores just how unusual defamation law is in its use of damages to vindicate rights. It is one thing to compensate for a proven loss with the understanding that that compensation will help to put the plaintiff back to her previous position. For example, if one’s house is tortiously damaged, compensatory damages can pay for the house’s repair, such that the plaintiff is theoretically no worse off than when she started.124 Such vindication is best achieved in relation to property damage or pure economic loss rather than personal injury. With the latter, the injury itself cannot adequately be compensated with money. The best that can be achieved is to award money for solatium, which the Supreme Court acknowledges is not strictly compensatory.125

121 Milo, n 112 at 234.
122 For example, as noted by Barker, n 23 at 10, nominal damages (for trespass, for example) or a simple declaration that the plaintiff was trespassed against, provide vindication in the sense of declaring or marking the right, but not in the sense of reversing the effects of infringement.
123 Barker, n 23 at 14 refers to reversing the effects of infringement as: “[t]he most common way in which private law ‘vindicates’ rights.”
124 Of course the reality is quite different. Even successful plaintiffs who recover costs suffer a loss of time and energy in pursuing an action, as well as, inevitably, costs that are uncompensated.
125 Andrews, n 19 at 262.
Vindication in the sense of restoring the plaintiff to her previous position cannot realistically be achieved in personal injury cases.

Even if compensation serves to vindicate rights in relation to a range of losses in tort, including those like pain and suffering that money can never adequately remedy, it is one thing to compensate for proven losses, but quite another thing to award damages to vindicate reputation in the absence of: a) any evidence of a loss; b) any evidence of what amount will send a signal to the public such that reputation will be vindicated; or c) any evidence of the cost of restoring reputation through other means.

This is not simply an issue of the presumption of damages, which goes to the existence of a compensable loss regardless of proof. Rather, it is also an issue of vindication specifically and of there being no evidence of what amount will send a signal sufficient to restore reputation. Courts cite the need to vindicate, then essentially award an arbitrary amount. Of course, if evidence need not be provided of the extent of reputational injury, it might be unfair to require evidence of the amount of damages needed to undo this injury by way of vindication. Nevertheless, it is worth noting how unique this approach is in tort law. The norm outside of defamation law is that (greater than nominal) compensatory damages are only awarded if the existence and extent of a loss are proven.

What reason could there be for the emphasis on returning the plaintiff to her previous position, not through compensation, but by using damages to send a signal to the world, even in the absence of evidence of a loss, or of the amount of damages that will undo the loss, if any, and even when this could result in double recovery? The answer is that vindicating reputation seems to persist in defamation law because of the importance, both historical and present, of reputation to *individuals*.

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126 See Chan, n 115 at 274.
127 “[D]efamation is the only tort that allows substantial recovery without proof of injury”, Anderson, n 13 at 748.
Historically, one of the main purposes of defamation law was to avoid duels and other violence that resulted from insults to a person’s honour. The medieval sense of honour demanded that insults be avenged, either by the injured individual or by his family. Defamation was therefore less about compensating for an injury to reputation than about restoring honour through non-violent means, including criminal sanctions. The focus was on the degree of insult rather than on an objective injury to reputation. The remedy/penalty, whether money damages or a criminal sanction, sought to vindicate the plaintiff’s sense of honour so that he would no longer seek revenge. Unlike property, honour was invaluable, such that mere compensation was a poor substitute for vindication.

Honour no longer plays as important a role in our society, or in defamation law, as it once did (although its influence remains in both). Instead, the focus today is often on the more egalitarian interest in dignity, which can also justify the goal of vindicating reputation (rather than merely

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128 Hill, n 8 at para 113.
129 Hill, n 8 at para 114 citing De Libellis Famosis (1605), 5 Co Rep 125a, 77 ER 250 at 251.
131 For example, truth was no defence. The law was less interested in whether reputation was deserved and more interested in avoiding breaches of the peace. See Lovell, n 130 at 1062.
132 For example, Proverbs 22:1 states: “[a] good name is rather to be chosen than great riches.” According to Langvardt, n 2 at 515: “[t]he common law of defamation... rests on the notion that a person’s reputation is priceless.”

From the perspective of an individual who has been dishonored by a libel or slander, the function of defamation law cannot be simply to provide compensation for injuries “capable of pecuniary admeasurement”. The loss of honor is a loss of status and personal identity; the value of a good name, which “ought to be more precious” than life, can scarcely be comprehended by pecuniary damages. Instead the essential objective of defamation law must be conceived as the restoration of honor.

134 Post, n 133 at 706-07.
compensating for its loss). In fact, Kenyon claims that the dignitary aspect of reputation may best explain the legal significance of reputation in defamation law. If defamation were just about reputation as property, he argues, we would not presume damages and, in fact, the tort of injurious falsehood (which requires evidence of loss and of malice) would be sufficient to protect the relevant interest.\textsuperscript{135}

“Dignity” is a problematic term. Scholars have debated what it means in the defamation context.\textsuperscript{136} It is beyond the scope of this article to examine the nature of dignity; instead I simply assert that both scholars\textsuperscript{137} and the courts have noted the role of defamation law in protecting dignitary aspects of reputation.\textsuperscript{138} For example, in \textit{Hill} the Supreme Court of Canada justified the \textit{status quo} of defamation, despite its effect on freedom of expression, in part because of the link between reputation and individuals’ innate “worthiness and dignity”.\textsuperscript{139} In \textit{WIC Radio Ltd v Simpson}, 2008 SCC 40, LeBel J (concurring) noted that: “[r]eputation is an important element of human dignity and must be protected”.\textsuperscript{140} More recently in \textit{Grant v Torstar}, 2009 SCC 61, the Supreme Court noted that the degree of injury to dignity is proportionate to the seriousness of

\textsuperscript{135} Kenyon, n 21 at 76-77.

\textsuperscript{136} See e.g. Post, n 133; Young 2013, n 6; Rolph D, “Reputation, Celebrity and Defamation Law” (Ashgate, Aldershot UK, 2008); Berryman J, “Reconceptualizing Aggravated Damages: Recognizing the Dignitary Interest and Referential Loss” (2004) 41 San Diego L Rev 1521 at 1535-36.

\textsuperscript{137} Post, n 133; Rolph, n 136, ch 7.

\textsuperscript{138} One gets the impression not only that defamation law protects dignity, but that dignity protects defamation law. In the face of endless criticism that defamation law is too plaintiff friendly given its effect on freedom of expression, it survives (although not without modification) in part of the basis that reputation implies dignity, as discussed above.

\textsuperscript{139} Hill, n 8 at para 86. See also para 118 in which the Supreme Court cites Stewart J in \textit{Rosenblatt v Baer} (1966), 383 US 75 at 92:

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty.

\textsuperscript{140} \textit{WIC Radio Ltd v Simpson}, 2008 SCC 40 at para 79, [2008] 2 SCR 420, [\textit{WIC Radio}].
the sting of the defamatory statement.\textsuperscript{141} Although in the criminal rather than civil context, the Hrabinsky J. stated in \textit{R v Lucas}: “[r]eputation is inherent in the dignity and worth of individuals.”\textsuperscript{142}

It is defamation law’s role in protecting human dignity and, at least historically honour, that justifies the goal of vindicating reputation as opposed to simply compensating for the loss itself.\textsuperscript{143} Post defines vindication in terms of restoring honour\textsuperscript{144} and argues that the presumption of damages in defamation law relates to the “noncompensatory” end of vindicating reputation as honor.\textsuperscript{145} He denies that vindication has a role in protecting reputation as dignity, but this is because he understands vindication to mean restoring honour, not restoring dignity.\textsuperscript{146} If we understand vindication in the sense described by Barker, (namely reversing the effects of infringement), it becomes clear that vindication restores dignity by restoring reputation.\textsuperscript{147}

Berrymann also argues that the goal of vindicating reputation is related to human dignity. He notes that where wrongs implicate human dignity, courts often try to remedy the injury in ways other than damages, such as undoing causes of harassment or making declarations that a right has been infringed. Damages for dignitary wrongs, he suggests, are a “last resort for pragmatic reasons” and often serve to vindicate rather than compensate.\textsuperscript{148} The implication is that vindication is more important or relevant where dignitary interests are at stake.

In other words, we allow damages to vindicate reputation, despite the questionable effect of damages in vindicating reputation, because of the

\textsuperscript{141} Grant \textit{v Torstar Corp}, 2009 SCC 61 at para 111, [2009] 3 SCR 640, [\textit{Grant}].
\textsuperscript{143} Langvardt, n 2 at 494 (the “major concern underlying the development of [defamation]” is “the protection and vindication of the plaintiff’s reputation.” ... “Defamation law thus is properly classified within the division of tort law concerned with notions of personal dignity.”)
\textsuperscript{144} Post, n 133 at 703-04.
\textsuperscript{145} Post, n 133 at 706.
\textsuperscript{146} Post, n 133 at 712.
\textsuperscript{147} See Post, n 133 at 723-13 on rehabilitating dignity.
\textsuperscript{148} Berryman, n 136 at 1541.
importance we place on dignity (and at least historically, on honour). I believe an analogy can be drawn to presumed damages. Langvardt states that the doctrine of presumed damages: “reflects a philosophical bias that reputational interests are so important as to justify an irrebuttable presumption of such harm.” Similarly, the reason to try to vindicate reputation, despite the difficulties associated with doing so, relates to the importance of human reputational interests. These reputational interests must relate to dignity and perhaps honour rather than property, since courts have long insisted on proof of the existence and extent of injury to property before compensating for it, and have not considered it appropriate to award damages, in the absence of evidence of harm to property, in order to vindicate the property right. Compare defamation to the law of injurious falsehood, which remedies damage to corporate reputation. No one questions the fact that damages are not awarded to vindicate reputation in injurious falsehood: vindicating reputation is simply not a goal of the tort of injurious falsehood – or at least not a sufficient one to justify vindicatory damages in the absence of proof of loss.150

Even taking into account the importance of dignity and honour in justifying vindication as a goal of defamation law (rather than cheaper forms of compensation or those that are more obviously compensatory in nature), it seems that the importance of vindication is waning relative to competing interests in freedom of expression. An excellent example of this is the emergence of fault-based defences such as Reynolds v Times Newspapers Ltd, [2001] 2 AC 127 privilege151 in the United Kingdom and the Canadian defence of Responsible Communication on Matters of Public Interest (RCPI). These complete defences apply even when the plaintiff’s reputation has been injured through false statements. Such injuries to reputation would seem to warrant vindication, but so long as the defendant acted reasonably in publishing, she will not be held liable.

149 Langvardt, n 2 at 284-85.
150 Post therefore concludes that where a claim can be framed either in terms of defamation or injurious falsehood, “the evidentiary explanation of the presumption of damages [namely the difficulty of proving actual injury] is revealed as the fiction that it is” (Post, n 133 at 699).
In the case that established RCPI in Canada, *Grant v Torstar*, the plaintiff argued that no such defence should be created, since it would “devalue” plaintiffs’ ability to vindicate their reputations.\(^{152}\) The Supreme Court was not persuaded: “the partial shift of focus involved in considering the responsibility of the publisher’s conduct is an ‘acceptable price to pay for free and open discussion.’”\(^ {153}\) In *WIC Radio* the Supreme Court also implied that less emphasis should be placed on vindicating reputation than was once the case because of the importance of freedom of expression.\(^ {154}\) Since *Hill* there has certainly been a shift away from protecting reputation toward protecting freedom of expression.\(^ {155}\)

Thus, the arguments in favour of damages to vindicate reputation rather than compensating for its loss may be less persuasive than they once were. Given the weakness of those arguments, that is saying something.

If the desire to vindicate, in the absence of evidence of the extent of the loss or of what it would cost to vindicate, can be traced to important interests in honour and dignity, then we must question whether vindication is an appropriate goal in compensating corporations for injury to reputation. For corporations, reputation is an economic asset akin to goodwill. It imports none of the emotional and dignitary concerns that have influenced the development of defamation law: “the corporate reputation simply suffers no injury when the statement giving rise to the suit does not produce an adverse economic effect”.\(^ {156}\)

Further, as Lord Hoffman (dissenting) stated in *Jameel v Wall Street Journal Europe Sprl*, [2006] UKHL 44, [2007] 1AC 359:

> In the case of an individual, his reputation is a part of his personality, the “immortal part” of himself and it is right that he should be entitled to vindicate his reputation and receive compensation for a slur upon it without proof of financial loss. But a commercial company has no soul and its reputation is no more

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\(^{152}\) *Grant*, n 141 at para 60.


\(^{154}\) *WIC Radio*, n 140 at para 15.


\(^{156}\) Langvardt, n 2 at 525.
than a commercial asset, something attached to its trading name which brings in customers.157

Thus, as Post notes, reputation as property has no greater claim to legal protection than other “private goods” do.158

I suggest that for reasons similar to why solatium and aggravated damages are not proper heads of damages where corporate reputation is injured, we should abandon the goal of vindicating corporate reputation entirely. Instead, the trend is in the opposite direction. Ironically, this seems to have started with *Walker v CFTO Ltd* (1987, 59 OR (2d) 104, an Ontario Court of Appeal case in which the court struck down a $883,000 general damages award in defamation as being too high, in part because the plaintiff was a corporation. Robins J.A. cited *Carter-Ruck on Libel and Slander*159 for the proposition that in the absence of proof of special damages, damages to corporate defamation plaintiffs should be relatively small: “in the absence of a general loss of business, a limited company is unlikely to be entitled to a really substantial award of damages”.160

The Carter & Ruck text suggests that this is largely because corporations cannot suffer pain and suffering. The implication is that general damages are made up predominantly of compensation for pain and suffering injury, which corporations cannot claim. This is consistent with Brown and others, who note that damages in defamation actions (involving human plaintiffs) are often awarded predominantly for pain and suffering rather than for the value of the loss of reputation itself, or for special damages.161

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158 Post, n 133 at 702.
160 *Walker*, n 35. See also Brown 1999, n 7, ch 25 p 50.
161 Brown 1999, n 7, 7 ch 25 pp 190-191. See also *Cassell*, n 12 at 1125 per Lord Diplock: The harm caused to the plaintiff by the publication of a libel upon him often lies more in his own feelings, what he thinks other people are thinking of him, than in any actual change made manifest in their attitude.
That modest (albeit greater than nominal) damages should be awarded to corporations in the absence of proof of special damages is a longstanding rule in Canada and the United Kingdom and is still cited as applicable.\textsuperscript{162} It is a rule that recognizes the importance of pain and suffering in the general damages award and that corporations should not benefit from the presumed damages rule to the same extent as people.

(In fact, even where people are concerned there is judicial recognition that the quantum of damages should generally be modest where the presumption of damages is relied on – as opposed to proving actual injury. “[T]he strict requirements of causation [of injury] are relaxed in return for moderation in the overall figure awarded”\textsuperscript{163} Further, \textit{Gatley on Libel and Slander} states that proving “factual causation” of damage is necessary for a substantial award of damages.\textsuperscript{164})

So far so good. But then, still citing Ruck & Carter, \textit{Walker} goes on to state an exception to the rule. Corporations are not entitled to really significant general damages awards:

\begin{quote}
unless the defendant’s refusal to retract or apologize makes it possible to argue that the only way in which the reputation of the company can be vindicated in the eyes of the world is by way of a really substantial award of damages.\textsuperscript{165}
\end{quote}

As we shall see, the phrase above has become quite important to assessing the quantum of damages for corporate defamation plaintiffs, so it is worth parsing it in some detail. First, recall that the context of the phrase is a discussion

\textsuperscript{162} In \textit{Jameel}, Lord Bingham maintained the presumed damages rule in part based on the rule that: “where a trading corporation has suffered no actual financial loss any damages awarded should be kept strictly within modest bounds.” \textit{Jameel}, n 157 at para 27. See also \textit{Walker}, n 35.


\textsuperscript{164} \textit{Gatley}, n 10 p 9.2-267, fn 36.

\textsuperscript{165} \textit{Walker}, n 35.
of the general rule that corporations are not entitled to significant damages awards without proof of special damages – the need to vindicate is an exception to this rule.

Second, the exception seems only to apply where the need for vindication is related to the defendant’s refusal to “retract or apologise”. This is puzzling. Why should the need for vindication arise from the refusal to retract or apologize rather than the defamation itself or from the absence of other potentially mitigating factors? One possibility is that the reference to a refusal to retract or apologize simply means that the plaintiff’s reputation has not already been vindicated through a retraction or apology: in other words, it may be another way of saying that substantial damages may be awarded where it is necessary to do so to vindicate reputation. This interpretation is supported by the reference to substantial damages being the “only way” to vindicate reputation, since retraction and apology are not available. (Query, however, whether it is ever the case that a damages award is the only way to vindicate reputation. What about public relations, for example? And what about the fact that damages awards arguably do not vindicate reputation at all?)

Alternately, it is possible that the reference to a lack of apology means something other than that the plaintiff’s reputation has not already been vindicated – it could suggest something particularly problematic about a failure to apologize. Recalling the discussion of apologies above, it is conceivable that the desire to vindicate, which itself relates to dignitary and honorary interests, is motivated by how the plaintiff feels about being defamed. If this is the basis of the exception to the rule stated in Walker, it is a problematic one. The Walker rule relates specifically to corporations, but corporations have no dignity or ability to suffer. Thus, I assume that the passage in Walker refers to vindication in the sense of restoring reputation, not of making the plaintiff feel better.

Third, the use of the term “only way” suggests that a substantial award of damages in the absence of proof of special damages should be a last resort – an extraordinary remedy. It’s the exception to the rule, reserved not only for those cases where there is no retraction or apology, but for those where vindication is not possible in any other way.
When examined closely, the exception essentially overtakes the rule. It requires a lack of apology, but this is not surprising since had there been an apology, it may have mitigated the injury to the point that significant damages would not be not required. The requirement that such an award be necessary to vindicate reputation is essentially meaningless, given that awards may not be able to vindicate at all, that there is no clear connection between the quantum and the degree of vindication, and that there is no tradition of considering other ways of vindicating, such as awarding the cost of public relations efforts. Given the fuzziness of the connection between quantum and vindication, it becomes possible to argue in any given case where the defendant did not apologize that significant damages are required to vindicate the plaintiff’s reputation. It is hard to see how this remains an exception to the rule against significant damages for corporate plaintiffs, rather than recasting the rule itself.

One might accuse me of reading too much into the wording of the Carter & Ruck text, but the importance of the exception cited in Walker for corporate damages plaintiffs should not be underestimated. Since Walker, courts have relied on the need to vindicate reputation to justify significant damages awards in the absence of proof of special damages.

Consider again the example of Barrick Gold. Not only was the defendant’s failure to apologize noted in the context of the Hill factors, but the Ontario Court of Appeal cited Walker for the proposition that Barrick Gold should be entitled to a significant award of damages to vindicate its reputation, since there was no apology. As I argued above, the failure to apologize likely had no aggravating effect on any loss Barrick Gold suffered. Further, as one of the largest companies in the world, Barrick Gold has many resources for vindicating its reputation. It presumably has public relations professionals, an advertising budget, and an open line of communication with shareholders and other stakeholders. How could it be that the “only” way to vindicate its reputation was through a significant award of general damages? I am not suggesting that no damages should have been awarded (although I do ultimately believe that Mr Lopehandia should not have been held liable), but rather that the court should have made
some attempt to assess the scope of Barrick Gold’s loss by relying on relevant factors rather than relying on the need to vindicate Barrick Gold’s reputation.

The Barrick Gold case has itself proved influential and has been cited by other courts in awarding significant damages to vindicate a corporate plaintiff’s reputation. In Second Cup, the court justified a $425,000 general damages award on the basis that: “[a] nominal award would not ‘clearly demonstrate to the community the vindication of the plaintiff’s reputation’”.166 The court also awarded $75,000 in punitive damages. It justified the quantum in part on the basis that in Barrick Gold, the Court of Appeal increased the plaintiff’s damages by “nearly tenfold”.167

In Farallon Mining Ltd v Arnold, 2011 BCSC 1532,168 the British Columbia Supreme Court cited Second Cup and Walker regarding the need for substantial damages to vindicate reputation. It awarded $40,000 in general damages despite no evidence of actual loss to the plaintiff in terms of goodwill or lost business.

In Hunter Dickinson Inc, the same court cited Second Cup and the need to vindicate reputation in awarding $75,000 in general damages and $25,000 in punitive damages to each of two corporate plaintiffs. Again there was no indication of any evidence of loss of goodwill or of special damages.169

Although some courts are still rejecting significant damages in the absence of evidence of special damages,170 the cases above, which all postdate Walker and Barrick Gold, suggest a disturbing trend away from a lower quantum of damages for corporations in the absence of proof of special damages.

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166 Second Cup, n 63 at para 43.
167 Second Cup, n 63 at para 43
168 Farallon, n 73.
169 Hunter, n 55 at para 41.
170 For example, in Townhouses, n 28 Pitt J stated at para 18:
...in the end I am not satisfied that the plaintiff has demonstrated that a substantial award is "the only way in which the reputation of the company can be vindicated in the eyes of the world". I come to this conclusion on two grounds: the plaintiff has failed to provide sufficient evidence demonstrating that (i) the letter was as widely distributed as it claims, and (ii) the letter caused actual business loss.
Given my conclusion that there is no good reason for courts to try to vindicate corporate reputations through an award of damages, I suggest the following changes to the law of defamation. When the plaintiff is a corporation, courts should assess general damages in defamation based solely on factors relevant to the scope of the corporation’s reputational injury. This will include some of the Hill factors. Courts should explicitly reject vindication as a purpose of the award of general damages to corporations (if not across the board), and therefore explicitly reject the exception provided for in Walker and taken up in Barrick Gold and subsequent cases. The overarching goal must, as Justice Sharpe suggests, be compensation. If so, there is little reason both to assess the extent of the loss by considering the Hill factors and to try to vindicate reputation. This is especially true in relation to corporate defamation plaintiffs, for whom dignity and honour are not implicated.

Conclusion

Criticizing defamation law is like shooting fish in a barrel. For centuries people have been arguing that defamation law is outdated, incoherent and unprincipled. The focus has often been on how plaintiff-friendly aspects of the tort (the onus of proof, strict liability, the presumed damages rule) cannot be justified given the tort’s effect on freedom of expression. Some jurisdictions have begun to bring defamation law into the modern era: with New York Times v Sullivan (1964), 84 S Ct 710, the United States constitutionalized defamation law, making it harder for plaintiffs to succeed. The United Kingdom has had numerous defamation law reform projects: the most recent amendments to the Defamation Act include requiring proof of serious harm for liability (and of

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171 A few examples will suffice. According to Dean Prosser, “there is a great deal about the law of defamation that makes no sense. It contains anomalies and absurdities for which no legal writer ever has had a kind word” (Keeton W, Dobbs D, Keeton R and Owen D, Prosser And Keeton On Torts, p 772 (5th ed, West Group, St. Paul MN, 1984); “damages in defamation cases are measurable by no standard which different men can use with like results.” (McCormick C, Handbook On The Law Of Damages (West Pub Co, St. Paul MN, 1935) § 120 cited by Anderson, note 13 at 749-50).

serious financial loss for liability where the plaintiff is a corporation).\(^{173}\) Australia has eliminated most corporate defamation actions as well as punitive damages in defamation.\(^{174}\)

Canada too has modified defamation law in recent years: it has created a responsible journalism defence\(^{175}\) and broadened the defence of fair comment.\(^{176}\) Yet when it comes to corporate defamation plaintiffs, Canada seems to have the most plaintiff-friendly laws of any common law country.\(^{177}\) Not only have its courts taken no steps to make it harder for corporations to obtain large judgments where there is no proof of harm, but in fact they have applied the law in such a way as to make it even easier. Especially given the trend toward greater recognition of the importance of freedom of expression relative to reputation, this is not defensible. Courts should begin to acknowledge the fundamental differences between human and corporate reputations, and award damages according to the scope of the actual loss suffered. They should stop adding insult to injury by compensating corporations for injury related to defendants’ failure to apologize and their malicious intent. They should also reject vindicating reputation as a goal of defamation law – at least where corporate plaintiffs are concerned. Although damages for harm to reputation will always be somewhat discretionary, such changes will help ensure defamation law better achieves its goal of compensating for reputational injuries.

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\(^{173}\) UK Defamation Act, n 40 at s. 1.

\(^{174}\) Australia Defamation Acts, n 39.

\(^{175}\) Grant, n 141.

\(^{176}\) WIC Radio, n 140.

\(^{177}\) I acknowledge the possibility that common law countries whose laws were not examined here, such as New Zealand, Singapore, and South Africa, have equally or more corporation-friendly defamation laws.