

SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2019] SC EDIN 32

EDI-A409-17

JUDGMENT OF SHERIFF N A ROSS

in the cause

STUART CAMPBELL

Pursuer

against

KEZIA DUGDALE

Defender

Act: Sandison QC  
Alt: Dunlop QC

Edinburgh 16 April 2019:

**Summary of judgment:**

- A. There are various definitions of homophobia, but most have as a central theme the fear, hatred or dislike of homosexuals, whether or not it involves discriminatory treatment as a result. The essence of homophobic speech or acts is that the mistreatment arises from core beliefs or feelings, not just the effects of the actings;
- B. By those definitions, Mr Campbell does not hold homophobic beliefs or feelings. He has demonstrated by his conduct over many years that he supports equality for homosexual people. He rejects, and is offended by, any suggestion that he is homophobic;
- C. This action centres around a newspaper article dated 7 March 2017 which commented on a tweet issued by Mr Campbell on 3 March 2017. The tweet said: *“Oliver Mundell is the sort of public speaker that makes you wish his dad had embraced his homosexuality sooner.”*
- Mr Campbell intended the tweet to be insulting about Oliver Mundell’s speaking

abilities, and the reference to his father's homosexuality was intended as a basis for a jibe directed at the son. The jibe was to the effect that a homosexual man would not father children and therefore his son would never have been born and have become a public speaker;

- D. By those definitions, the tweet was not motivated by homophobia and did not contain homophobic comments. The comments were intended as an insulting jibe about Oliver Mundell. The tweet was not motivated by fear, hatred or dislike of homosexuals. It did not express such fear, hatred or dislike;
- E. The law of defamation allows redress for damaging comments about character, but it also recognises that a balance must be struck with competing public values, such as free speech. It recognises that there is significant public interest in allowing people to freely express opinions without fear of legal penalty. Accordingly not every damaging comment about character will result in legal liability for harm or distress. There are several recognised types of defence. For example, if a statement is an allegation of fact, it is a defence to show that the fact is true. If the statement is an expression of opinion, there is a defence to show that it is fair comment. These defences are only available if certain legal requirements are satisfied. A comment can sometimes be fair even if it is wrong;
- F. In 2017 Ms Dugdale wrote a regular column for a newspaper. On 7 March 2017 she wrote about Mr Campbell's tweet. In the article she used phrases such as "*homophobic tweets*" and "*someone who spouts hatred and homophobia towards others*". That article contained defamatory statements about the pursuer's character. That is because, although he was not mentioned by name, the pursuer was clearly identifiable as the author. Although the article did not directly call the pursuer homophobic, it contained a

clear innuendo that he held homophobic beliefs. The article was widely circulated to the public;

- G. Ms Dugdale accordingly publicly expressed the opinion that the pursuer was homophobic. Her opinion was based on the fact that Mr Campbell had written the tweet. Her opinion was genuine and honestly held but is, in fact, not correct. The parts of the article complained about were comment or opinion, not statements of fact;
- H. Ms Dugdale's article contained the necessary elements for a defence of fair comment. It was based on true facts; the statements complained about were comments, not facts; it concerned a matter of public interest, and the comments were fair.
- I. Her comments were fair, even though incorrect. Mr Campbell's tweet contained a derogatory joke which was depended on a reference to homosexuality. The comments were fair because the content of the tweet formed a basis of fact for a rational belief that it was derogatory about homosexual people. Ms Dugdale honestly and rationally formed the view that it treated homosexual people as inferior because same-sex relationships do not directly result in pregnancy. As one witness said, homosexuality provided the punch line of the joke. Mr Campbell was not motivated to write the tweet by fear, hatred or dislike of homosexuals. His motivation is not relevant in assessing whether Ms Dugdale's comments were fair. Ms Dugdale formed a different but fair opinion that he did act out of such motives.
- J. Accordingly, despite Ms Dugdale incorrectly implying that Mr Campbell is homophobic, her article is protected under the principle of fair comment. She is not liable to pay damages to Mr Campbell.

**Formal findings and order**

The sheriff, having resumed consideration of the cause, finds the following facts admitted or proved:-

- [1] The pursuer is a pro-independence political commentator. He is widely known by the public to be the author of the web-site and twitter feed "Wings over Scotland", which have a following amongst both the general public and Scottish politicians. He has a reputation for robust political comment, to the point of being personally insulting about political figures. His twitter feed has approximately 60,000 followers.
- [2] On 3 March 2017 he tweeted the following message: "*Oliver Mundell is the sort of public speaker that makes you wish his dad had embraced his homosexuality sooner*" (the "tweet"). In the following days, various social media sources commented on the tweet. Amongst those commentators was David Mundell MP, Secretary of State for Scotland, who condemned the statement as homophobic. David Mundell was the "dad" referred to in that tweet.
- [3] The defender is a public figure and high-profile politician and was formerly the leader of the Scottish Labour Party. She is homosexual. She, like many other political figures, has been the subject for many years of abuse and insults on the pursuer's website and twitter feed. That abuse did not include abuse about her sexuality. She has been personally hurt by personal comments circulated by the pursuer.
- [4] The defender read the tweet on or shortly after 3 March 2017. She formed the belief that the tweet expressed homophobic sentiments. Her belief was sincere and honestly held. It was based on her perception that the message in the tweet was that homosexual people were inferior because they could not have children.

- [5] The defender at that time wrote a regular column in the Daily Record, a newspaper with a circulation in Scotland and beyond totalling approximately 160,000. She resolved to devote one part of her forthcoming column to criticising the tweet. She wrote her column and submitted it for publication.
- [6] On 7 March the Daily Record published the defender's regular column. One part of that column (the "article") was headed "Twitter tirade highlights divisions" and began with the words: "*I was shocked and appalled to see a pro-independence blogger's homophobic tweets during the Tory conference...*". An accurate copy of the full text of the column is lodged as a production.
- [7] The comments made by the defender in the article were not motivated by malice, but by a genuine perception that the tweet represented an insult to homosexual people, and was homophobic
- [8] The article did not contain the pursuer's name but would have been understood to the readership of the newspaper as referring to the pursuer. The article referred to the tweet as homophobic. The article would have been understood by a reasonable reader to be a description of the tweet as homophobic, and also as an innuendo that the pursuer held homophobic views.
- [9] The pursuer does not hold homophobic views. He has a history of supporting and promoting equal rights, including gay rights. He has written many tweets expressing such sentiments and support. Historically, a few of his tweets which referenced homosexuality are capable of being understood as derogatory but were not intended as such. They were intended as ironic comment and had no homophobic intent or motivation. These represent a small proportion of his social media comments.

- [10] In contemporary society, for a person to hold homophobic views is widely regarded as completely unacceptable. To be described as homophobic, or a homophobe, is significantly damaging to a person's character and reputation and would tend to lower that person in the estimation of right thinking members of society generally. Such a slur would be equally damaging to the reputation of a public figure and of a private citizen. It is potentially defamatory.
- [11] In writing the tweet the pursuer was not motivated by homophobic views. It does not, on a strict construction of the words used, express homophobic views. The article contains an innuendo that the pursuer is homophobic. The article is accordingly defamatory of the pursuer.
- [12] The pursuer has commented on transgender issues in a variety of tweets. The issue of transgender rights is a different issue from homosexual rights. Sexuality has no bearing on gender. The pursuer's comments on the latter refer to his open and honestly-held views and he is prepared to debate these views. The pursuer's views on transgender issues are separable from his views on homosexual rights, and no inference to the effect that he is homophobic can be derived from his views on transgender issues.
- [13] The defender formed a rational, if incorrect, belief based on the content of the tweet that the pursuer was expressing homophobic beliefs. She wrote the article in the belief that it contained a fair assessment of what the pursuer had written in his tweet. The comments in the article were, in her view, justified by and limited to the content of the tweet.
- [14] The defender's article was based on the true facts surrounding the writing of the tweet. The article concerned a matter of public interest, namely a public

disagreement between two high-profile public political figures about a subject of wider political interest, namely the treatment of homosexual people. The statements within the article which are complained of are comments, not statements of fact, and the comments are fair and represent a rational argument. The defender had no malicious intent, and the statements reflect her honestly held beliefs.

[15] The pursuer has suffered no quantifiable financial or other loss as a result of the article. He has suffered no loss of social media following, or influence. The value of any loss would have been quantified at £100.

[16] Any other facts contained in the summary of judgment set out above.

And makes the following findings in law or fact and law:-

[1] The defender's article contained statements which were incorrect and defamatory of the pursuer. It was not subject to qualified privilege.

[2] The article amounted to fair comment upon the pursuer's tweet and the defender is not liable to make reparation to the pursuer.

THEREFORE repels the pursuer's pleas-in-law; sustains the defender's pleas-in-law numbers 6 and 8; assoilzies the defender from the craves of the initial writ; fixes a hearing on expenses on a date to be afterwards fixed, subject to discharge if the parties agree expenses.

#### **Note**

[1] Unusually, much of the witness evidence in this case is background only, because the central questions in this case – is a statement defamatory? Is a comment fair? – require objective answers from a court, rather than subjective answers from a witness. They are

matters of law, not fact. Counsel adopted a sensible approach, which was to agree and move that all evidence be heard under reservation. That allowed the evidence to be heard without objection or interruption.

[2] **Stuart Campbell**, 51, runs a website and twitter feed under the name “Wings over Scotland”. He is solely responsible for the twitter feed and almost entirely responsible for the website blog. He began both of these in about 2011, to address an absence of political pro-independence comment on social media. The website and twitter feed have the same character but different purposes. The website is him “at work”; the twitter is a more relaxed social discourse about current issues. He featured in a recent BBC documentary about these activities. He believed that the public knew that he was the person behind Wings over Scotland, and that most SNP MSPs follow his twitter feed. He has between 200,000 and 300,000 website views per month, and approximately 60,000 twitter followers.

[3] Mr Campbell attended the Conservative Party conference in March 2017. One speaker he listened to on about 3 March 2017 was Oliver Mundell MSP, who he considered to be a “very, very poor speaker”. Oliver Mundell is the son of David Mundell MP, the Secretary of State for Scotland. David Mundell had by then recently described himself as homosexual, and that statement was within public knowledge. In a tweet dated 3 March 2017 Mr Campbell wrote: - *“Oliver Mundell is the sort of public speaker that makes you wish his dad had embraced his homosexuality sooner.”*

[4] David Mundell subsequently commented in the press and described the tweet as, amongst other things, homophobic. Ms Dugdale devoted part of her regular Daily Record column, published 7 March 2017, to commenting on the tweet. It started: *“I was shocked and appalled to see a pro-independence blogger’s homophobic tweets during the Tory conference...”*.

Mr Campbell was referred to the full column, a copy of which is lodged.



[5] Mr Campbell accepts that his style of writing is rude. He was referred to a number of previous articles and tweets he had written. A number of these referred to Ms Dugdale being a serial liar. In 2017 she came in for particular attention because she was leader of the Scottish Labour Party. Mr Campbell started a running jibe on his twitter feed and website that each article was merely the latest example of Ms Dugdale being discovered telling lies. He did not confine his comments to Ms Dugdale, but issued insulting tweets and blogs about a number of union-supporting politicians. Mr Campbell said that, in turn, the attitude of union-supporting politicians towards him was “extremely hostile”. He did not know Ms Dugdale personally, but imagined she disliked his website.

[6] However, Mr Campbell was offended by the article. He thought it ridiculous and absurd being described as homophobic. He remembers being “horrified”, and spoke to his solicitor fairly soon after reading the article. He considered that he had been defamed. He has never in his life been homophobic. He said “it was a very unpleasant sensation to find you have been discussed in this way and that people you know will see it.”

[7] His analysis of his own tweet was that no intelligent person could identify his tweet as homophobic. It was satirical, making the same basic joke about preventing birth as other commentators had used. He was referred to articles by other authors, including a gay activist George Takei, making similar jokes.

[8] He has written a significant number of articles which were pro-equality and supportive of the gay lifestyle. Copies of these are lodged in process. He had tweeted on one occasion in 2009 about a video game level being too easy and therefore suitable only for “*girls and homosexuals*”, but this in his view was self-evidently a satire of social attitudes. He was also referred to a series of tweets in which he had been described as “transphobic” for his refusal to identify a high profile transgender woman, Chelsea (formerly Bradley)

Manning, as female. He was referred to various articles he had written about that case.

Mr Campbell was resolute in his position, that he was not transphobic, and was happy to let people live as they wished, but that he in turn would not be dictated to by transgender people about what mode of address to adopt.

[9] As for homophobia, he “despised it in all its forms”. He considered that was “a disgraceful thing” to be homophobic. He said “I was hurt on every level you could name.”

Ms Dugdale had refused to back down on this description. He had raised this action because mud sticks, and a high percentage of people do not read an entire article, but assume a headline to be true. While he admitted he could be offensive, aggressive and his comments obscene, he absolutely believed that everyone should have the same rights. He was prepared to be regarded as offensive but not as homophobic, or indeed transphobic.

[10] He maintained this position in cross-examination. He was referred to a number of articles in which he was criticised for his views, including transphobia and homophobia. He maintained that anyone who understood the tweet to be homophobic was either dishonest or stupid. His tweet was not to be seen as criticising, or even commenting on, David Mundell’s homosexuality. The sole purpose of the tweet was to denigrate Oliver Mundell’s speaking prowess by utilising a joke about never having been born, a joke as old as language itself. To treat perceived discrimination as equivalent to actual discrimination leads, in his view, to a dangerous situation where people are at risk of being accused of hate crime. That, in his view, would be very disturbing for civil liberties or justice reasons.

[11] He explained why he had raised the action only against Ms Dugdale and not others. He did not have the funds to sue everybody. She was the sole author, and David Mundell’s comments were framed, in his assessment, so as to narrowly avoid being actionable.

[12] He was referred again to the “*girls and homosexuals*” comment in his tweet of 2009, and also to a tweet dated 27 December 2016 in which he made comments involving three gay people, namely George Michael (who had recently died), and two other politicians. He described these as satire and related to other subjects. He said that to have avoided the Oliver Mundell joke simply because it involved homosexual reference would itself be discriminatory. He was referred again to a thread involving an abusive exchange of views about transphobia, in the context of the Bradley/Chelsea Manning story. He maintained his earlier position, of respect for transgender people but resistance to demands made of him. In his view Chelsea Manning was a hero. There was no re-examination.

[13] **Paul Kavanagh** is a 56 year-old blogger who writes the “Wee Ginger Duck” blog. He has been openly gay since the early 1980s. He is not a friend of Mr Campbell, but has corresponded with him. Mr Kavanagh’s evidence was a calm but poignant testament to the hardship and abuse visited upon him as a result of his sexuality. Homophobia had blighted his life. Scotland in the 1980s was an intensely homophobic environment, and he wryly observed that in a West of Scotland working class environment homophobia had been “obligatory”. He had suffered beatings from strangers and alienation from his family. His choice of careers had been significantly curtailed. Those experiences had left him very attuned to homophobia.

[14] He did not regard the tweet as homophobic, although it was “crass, tasteless and insulting”. Mr Campbell’s actions showed he was not homophobic. Some years ago Mr Campbell had contacted him, never having met him, when he learned of Mr Kavanagh’s financial and personal difficulties in caring for his ill partner. Mr Campbell had offered support, and offered to hold a fund-raiser to alleviate Mr Kavanagh’s financial difficulties. He had never read anything homophobic published by Mr Campbell.

[15] Homophobia, in his view, was particularly serious slur, equivalent to “racist” or “holocaust denier”. It “puts you beyond the pale”. That would be particularly serious for a blogger, whose site or feed would be blocked and whose credibility would be destroyed. It would make it very difficult for a political website to persuade undecided voters and would damage any cause.

[16] When it came to homophobia a heterosexual was not, in his view, best placed to recognise it. He had dealt with homophobia his whole life and had a much better grasp of how it manifested. Homophobia was not just about being insulting. The tweet did not contain any sentiment that gay people were not entitled to equal rights.

[17] Mr Kavanagh noted that David Mundell MP was almost the same age as himself, and would have realised his sexuality in the 1980s. Whereas Mr Kavanagh had come out and had suffered for it, Mr Mundell had not until decades later. Mr Mundell had benefited from a tolerant environment which people like Mr Kavanagh had made a stand for, and had suffered abuse to bring about. Mr Kavanagh made plain, however, that he did not judge Mr Mundell or others for the choices they had made.

[18] Mr Kavanagh’s testimony was powerful and impressive in its dignity and restraint in the face of a lifetime of disadvantage and suffering.

[19] **Colin Macfarlane** is the director for Stonewall Scotland, part of the UK-wide Stonewall organisation and with a related management structure. He is aware, but not a follower, of Mr Campbell’s website. Stonewall has a UK website on which it has posted a “glossary of terms” of LGBT-related issues. It defines “homophobia” as follows: “*the fear or dislike of someone, based on prejudice or negative attitudes, beliefs or views about lesbian, gay or bi people. Homophobic bullying may be targeted at people who are, or are perceived to be, lesbian, gay or bi.*”. There is a separate and unrelated definition of “transphobia” as: “*The fear or dislike of*

*someone based on the fact they are trans, including the denial/refusal to accept their gender identity”.*

The two definitions are unrelated. He said that sexual orientation and gender identity are different things. Stonewall in Scotland has since 2001 promoted transgender rights, and there is an understanding of the “LGBT” community, but they nonetheless involve different issues. He confirmed that referring to a transgender woman as “he”, as Mr Campbell had done, would be regarded as transphobic.

[20] He was referred to the tweet. He had seen it in March 2017 and was “disappointed” by it. He thought it was homophobic. Although invited to express what made it homophobic, and in particular how it met the Stonewall definition of homophobia, he did not expand on his position. He thought the tweet was homophobic because it was “unnecessary” to reference David Mundell’s sexuality, and that homosexuality was the punchline of the tweet. He would not have to be stupid, as Mr Campbell would claim, to take such a view. I record it was somewhat frustrating that Mr Macfarlane could not directly describe how the tweet met his organisation’s definition of homophobia. That definition requires “dislike or fear”, and insults or jokes by themselves do not satisfy the definition. He did not explain in what manner the tweet showed dislike or fear. Being “unnecessary” or “disappointing” is not part of the definition. However, it was evident, and I accept, that Mr Macfarlane did honestly regard the tweet as homophobic, even though the reasons he gave did not fulfil the Stonewall definition of homophobia. I accept that view cannot be said to be irrational.

[21] **Kezia Dugdale** gave evidence in her own defence. She is an MSP for Lothian Region and formerly leader of the Scottish Labour Party between August 2015 and August 2017. She 37 years of age, and has a female partner.

[22] She described events surrounding the article. She had a column in the Daily Record which required five separate short articles of varying lengths. In March 2017 the main political topic was the forthcoming UK budget. She saw Mr Campbell's tweet and wrote the article in response, which was published on 7 March 2017. Hers was not the first public comment on the tweet. She recalled there had been "quite a negative reaction" to it by other newspapers and the Press Association, and lots of commentaries thought the tweet to be homophobic and offensive.

[23] Although she has in the past, she no longer follows, and has now blocked, the Wings over Scotland twitter feed. She chooses to remain in control of when she reads any of the content of the twitter feed or website. That is because of its insulting personal comment.

[24] She spoke about writing the article. She did so because "abuse and discrimination should not be part of a healthy discourse". She considered the article inferred that gay people were lesser because they can't have children, which is not the case. She commented on parts of the article individually. She had described the tweet as "symptomatic of our divided politics", as it should be possible to disagree without reference to sexuality, religion, colour or any other personal characteristic. The comment was "not unique to the man" because she had been introduced to the website by an SNP politician, and was aware that lots of MSPs promoted and shared his work as a reference. The article referred to "*someone who spouts hatred*" because MSPs are leaders in their own right, and set the tone for others, and had a responsibility not to share this material. She wrote the words "*call out abuse*" for the same reasons.

[25] She considered the tweet to be homophobic. It considered gay people to be lesser as they can't or don't have children, and that was what she found offensive. And to find David Mundell's sexuality mentioned at all, she did not understand why it was there. She could

not accept it was a joke, as she did not find homophobia funny in any form. She rejected Mr Campbell's description of someone taking that view having to be stupid or dishonest: as a gay woman she was entitled to say that she recognised what homophobia is. She understood that Mr Kavanagh had a different view, but she was entitled to her own. She had experienced homophobia in a number of forms. This type of material would encourage people to talk in prejudicial terms. This remained her honest view.

[26] In cross-examination she was referred to a lengthy but occasional series of tweets and blogs from Wings over Scotland and which were highly critical of her, frequently in abusive or rude terms. A particular theme was that she was a habitual liar, a charge she refutes. Early in her career jibes such as these had hurt, and she had taken them personally. She had since had to develop a thick skin on becoming leader, but there were still "some things that push my buttons". She received abuse on a daily basis. Her reaction to abuse might depend how she felt on any particular day. She spoke of one 2014 article by Mr Campbell about a political claim she had made, and which she afterwards recognised she probably had got wrong. She agreed the Wings over Scotland treatment "had not been gentle". The abuse included abuse of personal nature, about her competence and honesty. She agreed that it would cause her to have a negative attitude towards Mr Campbell. He was not her only abuser, but was in "the top 10".

[27] She did not know the extent of Mr Campbell's promotion of gay rights, and had not sought out any of his articles dealing with equality issues. She accepted that there were some retweets by him of campaigning articles, but that did not prove to her what his views were. Although Ms Dugdale stated that she had been describing the particular tweet, not Mr Campbell himself, she eventually accepted that the phrasing of the article meant it could be understood to refer to Mr Campbell personally, not just the tweet. She was referred to a

number of articles promoted by Mr Campbell, and accepted that they were all supportive of gay rights.

[28] She admitted that she did not know of any other homophobic tweets at the time of writing her article, but had referred to “tweets” in the plural. She considered the Mundell family were being abused due to David Mundell’s sexuality. The article was not designed to distract attention from other political matters. The purpose in writing the article, and in subsequently raising the issue in the Scottish Parliament, was to discuss the damage done by such material, that it is poisonous to political debate, and that the SNP should not encourage it.

[29] She had never asked Mr Campbell to say he was sorry. She did not know if he was, and had never spoken to him. Equally, he had never asked her for a retraction. She was asked about a change in her pleadings during the course of the action, but I was unable to give much significance to this.

[30] She was referred to the “*girls and homosexuals*” tweet of 2009. She considered it homophobic. It could not be a joke if it depended on a reference to sexuality, as it was then at the expense of gay people. She did not make any link with potentially transphobic tweets, as transgender issues were quite separate from sexuality.

[31] She was not re-examined. There were no other witnesses for the defence.

### **Assessment of the evidence**

[32] It was evident, and I accept, that both Mr Campbell and Ms Dugdale were presenting their respective positions in a principled and honest manner. I was able to accept that all of the witnesses were credible and reliable. There was no significant dispute about the facts of the case, but only the analysis and the legal consequences.



[33] Some issues can be sidelined at the outset. The first is the discussion of transphobia, and whether Mr Campbell was transphobic in continuing to refer to a transgender woman (under reference to his tweets about Bradley, now Chelsea Manning, a high profile story) as “he”. The purpose of this evidence was to attempt to link his views on homophobia with his views on transphobia. I do not accept that any link has either been proved or is relevant. The social acceptability of his views on transgender people is a debate for another time and place. Mr Campbell gave a robust explanation of his stance on gender issues, which broadly was respect for personal freedoms but resistance to being forced to change his own use of language. Both Ms Dugdale and Mr Macfarlane, themselves part of the LGBT community, were clear that transgender issues had no bearing on sexuality. In fact, Mr Campbell’s clear articulation of principle, whatever its propriety, on the topic of transphobia served to enhance his position on homophobia. In relation to each, he has his own views, stated without equivocation, based on what he regards as sound evidence and reason, heedless of whether they offend others. He was unwavering in his rejection of all forms of homophobia. I accept he is a man of principle, even if the tone and terms of his expression are difficult to endorse. I do not doubt him when he says he is horrified of being called homophobic. His views on transgender people are irrelevant in assessing that point.

[34] A second is the reference to changes in the written pleadings drawn up for this case. I do not regard this as a fair or safe basis to show that Ms Dugdale has changed her position or is anything other than straightforward in her personal stance. Legal pleadings are the domain of lawyers, and clients tend to take their lawyers’ advice, which remains private. I have treated the historic pleadings as not relevant.

[35] A third is the claim that Mr Campbell has deliberately selected only Ms Dugdale, and has not brought an action against the newspaper, David Mundell, or any of the people

who have disseminated the allegation. Not only is this irrelevant – a pursuer is entitled to select anybody against whom they have a genuine claim – but Mr Campbell gave rational reasons for his actions. He said that he could not sue everyone, that the appropriate person to sue was the person who wrote the article, that David Mundell’s comments had been assessed as being on the right side of actionability, and that convening multiple defenders would increase costs exposure significantly. He made a logical choice. He was entitled to. This feature is of no material significance.

[36] Turning to the evidence, I have recorded it because it was given. However, only some of it is relevant, because some issues are matters of law (for a court) and not of fact (for a witness). I discuss this below.

### **Submissions by topic**

[37] I refer to the summary at the start of this judgment for a short explanation of my findings. The following adds more detail:

#### ***Did the article have a defamatory meaning?***

[38] The article would not be defamatory if it simply criticised the content of the tweet without implying that Mr Campbell held homophobic views. It would not be defamatory if it was a statement of true facts. Ms Dugdale says that the article was not defamatory. She says that even if it contained potentially defamatory allegations, she is still not liable because the article is substantially true.

[39] For Mr Campbell’s case to succeed, he must prove the words complained of are defamatory. The test is set out in *Sim v Stretch* 1936 2 All ER 1237 (see *Kinley v Devine* [2014] CSOH 67):

“Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?”

[40] The article would need to bear a defamatory innuendo that he is homophobic (*Massie v McCaig* 2013 SC 343). The test for innuendo is set out in *Russell v Stubbs Ltd* 1913 SC(HL) 14 as follows:-

“Is the meaning sought to be attributed to the language alleged to be libellous one which is a reasonable, natural, or necessary interpretation of its terms?” (Lord Shaw at p23)

[41] That is a question of law for a court, and is based on a “reasonable reader” test. The process for assessing defamatory meaning is discussed in *Curran v Scottish Daily Record and another* 2010 SLT 377 and, on appeal, at 2012 SLT 359, under reference to *Macleod v Newsquest (Sunday Herald) Ltd* 2007 SCLR 555). The considerations include the following:

[42] The article must be interpreted as a whole, and not just on the basis of selected phrases. The interpretation must not be strained or based in mistrust. The innuendo must be of conduct or views which would lower the person in the estimation of right-thinking members of society. To assess whether this innuendo has been made and whether it is damaging, the test is what a reasonable person would take from a reading of the material complained of. It is matter of judgment (*Massie v McCaig*, above). The analysis should not be over-elaborate, and the court should not be too literal in its approach. The reasonable reader is not naïve, nor unduly suspicious, and is not to be treated as selecting a defamatory meaning when non-defamatory meanings are available.

[43] In this action, certain central elements are not disputed. These include: (i) that to be called homophobic in modern Scotland is a serious imputation on character and would lower a person in the estimation of society; (ii) that Mr Campbell has a public reputation on social media and in Scottish political life as the author of the Wings over Scotland twitter

feed and blog; (iii) the article was widely communicated to the public who would know it was Mr Campbell who was being criticised.

[44] Ms Dugdale denied that she intended to go beyond criticising the tweet itself. She said she did not intend to label the author. Her intentions, however, do not resolve matters. The test is not what the writer intended, but what the reasonable reader would think, and is an objective question of law.

[45] In my view the reasonable reader would inevitably conclude that the meaning of the article, as a reasonable, natural or necessary interpretation of its terms, was that Mr Campbell, and not just his tweet, was homophobic. That is unavoidable because of the language used, including: *“a pro-independence blogger’s homophobic tweets”*; *“twitter tirade against David Mundell”*; *“face abuse because of their sexuality”*; *“such comments are, of course, not unique to the man who tweets as Wings over Scotland”* and *“someone who spouts hatred and homophobia towards others”*. The “man” is clearly identifiable as Mr Campbell, and the reference is to more than one tweet, and to an apparent practice of spouting hatred and homophobia. It is not possible fairly to read this as referring only to a single tweet, restricted to a jibe about fatherhood. In sporting terms Ms Dugdale, whether intentionally or not, played the player, not just the ball. During her evidence she appeared eventually to accept that was so. The article did bear a defamatory meaning.

[46] It is therefore necessary to consider the defences. Different defences can apply depending on whether the defamatory material is fact, or whether it is comment. The first question is whether the defamatory parts of the article were fact or comment.

***Were the comments fact or opinion?***

[47] Mr Sandison submitted that the article made allegations of fact (“he is a homophobe”) rather than comment (“I consider his comments are homophobic”). He

identified the phrases complained of (“*a pro-independence blogger’s homophobic tweets during the Tory conference*”; “*abuse because of their sexuality*”; “*someone who spouts hatred and homophobia towards others*”). These could not, he submitted, be regarded as simply comment.

[48] I do not accept that submission. Whether or not a tweet is homophobic is a value judgement, or comment. It is a conclusion based on facts, on what has been written, said or done. Different people will conclude at different points, or maybe not at all, when the word “homophobic” represents an accurate assessment. It is not possible to conclude that somebody is a homophobe in the absence of supporting facts. It can be assessed only by what people say and do. Whether David Mundell was being abused because of his sexuality is a matter, also, of interpretation rather than fact. This point is amply illustrated in the honest disagreement between Mr Kavanagh and Mr Macfarlane as to whether the tweet was homophobic. It is a matter of opinion, not fact.

*If the article was factual, was it true?*

[49] This question is now irrelevant, because the defamatory parts of the article were not facts. However, I record this defence for completeness. Mr Dunlop advanced an alternative position, that if the article were properly to be regarded as factual, then the allegations were true. This is known as the defence of veritas, or truth.

[50] In the event that I were wrong, and the defamatory phrases were factual, I would not have held this defence to apply. There are three reasons:-

[51] First, Mr Dunlop relied on a few historic, trawled tweets which referenced homosexuals in order to demonstrate Mr Campbell’s innate bias. In my view Mr Campbell’s justification for these tweets is logical and stateable and do not involve homophobia. I accept these were meant, and properly understood, to be ironic. They are few in number. While

they might also be vulnerable to Mr Kavanagh's assessment of the tweet as "crass, tasteless and insulting", they fall well short of showing any homophobia.

[52] Second, this defence was advanced mainly under reference to some apparently transphobic sentiments which he published mainly around the Chelsea Manning story. As I have discussed, one cannot infer homophobia from (alleged) transphobia. These are different concepts. Whatever the propriety of Mr Campbell's views, he justifies them in different ways and based on different reasons. One does not prove the other.

[53] Third, and more positively, reference was made in evidence to a body of tweets and blogs, numbering around 120 or so, which show Mr Campbell's promotion and support over many years of gay rights. In my view they indicate clearly that he is not homophobic, but instead is a campaigner, or at least supporter, of equal rights including gay rights. Mr Kavanagh spoke of his generous assistance to him as a gay man. On the available evidence he cannot be described accurately as homophobic.

[54] Accordingly, there could be no defence that the innuendo about Mr Campbell is true.

***Does the fair comment defence apply?***

[55] Because the defamatory parts of the article amount to comment, there is a potential defence of "fair comment". This is based on the principle that:-

"The expression of an opinion as to a state of facts truly set forth is not actionable"  
(*Archer v John Ritchie & Co* (1891) 18R 719; *Massie v McCaig* 2013 SC 343 at [32]).

[56] There are several criteria for this defence:-

"[I]n fair comment the defender must show that each statement of fact is true, that the matter is one of public interest, and that the comment on the facts is fair."  
(*Fairbairn v Scottish National Party* 1979 SC 393, approved *Massie v McCaig*, above, at [30])

[57] This defence has several elements, and it is not enough to avoid liability simply to say "in my opinion it is true". The defence is only available for: (i) comment, not allegations

of fact; (ii) comment based on true statements of fact; (iii) matters of public interest; (iv) comments which are fair. If any of these elements is not present, the defence fails.

[58] It is not disputed that the present case involves matters of public interest, involving allegations of homophobia made by a prominent Scottish politician about a prominent political blogger. One element of the defence of fair comment is satisfied.

[59] I have already discussed the nature of the article. In my view the overall nature of article was comment or opinion, not just a narrative of fact. Accordingly, a second element of the defence is satisfied.

[60] Mr Sandison submitted that the supporting facts in the article, on which the comments were based, were untrue, at least in part. This was because (i) there was only one tweet, not "tweets", which might lead the reader to think there were other instances of homophobic comment; (ii) nobody "*faced abuse*" as the tweet did not abuse any homosexual person, and (iii) there was no "*spouting*" of homophobia.

[61] I do not accept this argument either. In my view the test envisages that there should be a sound factual basis for comment, not that minor inaccuracy is enough to remove the defence. Here, the plural reference to "*tweets*" is a small inaccuracy and, as the witnesses discussed, easily checked by any modern reader by a twitter search. The other facts, namely: that the tweet was made; that it set out the words complained of; that it was made by the pro-independence blogger Mr Campbell; that it was made during the Conservative Party conference; that it was directed against the Mundells (or at least Oliver), are factually correct. It is these correct facts which provided the platform from which comment was made. The reference to "*tweets*" in the plural is not a true fact. It is, however, a minor inaccuracy of limited effect, and easily corrected. It does not, reading the article as a whole

(as the case law requires), serve to undermine the fairness of the article. It does not materially affect the factually-correct basis of the tweet.

[62] The reference to "*facing abuse*" is not a fact, but a value judgment. Whether or not a comment amounts to abuse is a matter of opinion or judgement, itself based on facts. Equally, whether David Mundell, as opposed to his son, was facing abuse is a matter of opinion, or judgement. As a matter of strict construction of the words, he was not. However, as a matter of impression or opinion, his sexuality was the entire focus of the jibe, so it is not unreasonable or irrational to conclude he was facing abuse. Were it not for David Mundell's declaration of his sexuality, the joke would not make sense, or have a punchline. The phrase "*face abuse*" is therefore not a wrong fact, but a comment or opinion.

[63] The third allegedly wrong fact, the reference to "*spout*" cannot be literal, but a pejorative word to describe the manner of writing. "*Hatred*" (as distinct from homophobia) is equally a matter of opinion, and is in any event justified (as Mr Campbell agrees, being happy to be considered "*Toryphobic*") by the history of tweeting and blogging. And "*homophobia*", as discussed above, is a value judgment. It is therefore not a wrong fact, but an honest comment.

[64] These three points do not, either individually or collectively, serve to undermine the fairness of the article, or to show it was not based on a true basis of fact. A third element of the defence is therefore satisfied. The comment was based on supporting facts which were materially true.

[65] The fourth element of the defence is that the comment has to be fair. This last test was the primary focus of parties' submissions.



*Was the comment fair?*

[66] The most recent authoritative discussion in Scotland of fair comment is in *Massie v McCaig*, above. After discussion the origins of the defence, the court said:

“The issue of whether something is a fair inference from the true facts is...left to be decided upon the basis of what Cooper (*“Defamation and Verbal Injury”*, 1906) describes as “common sense”. The court proceeds on the basis that this is an accurate reflection of the current law.”

[67] Mr Sandison submitted that the comment was not fair because the tweet did not contain or show any homophobia, as defined by Stonewall or anyone else. The simple proposition on behalf of Mr Campbell was, that words have meanings. If a person uses a word, it is their responsibility to check that it correctly conveys the meaning they intend, and to take the consequences if it does not. In evidence, Mr Campbell put this more robustly, his view being that anybody who understood the tweet to be homophobic was either stupid or dishonest. As I have discussed already, on an ordinary understanding of words used, the tweet does not meet most of the dictionary definitions of homophobia. I have already recorded that neither Mr Macfarlane nor Ms Dugdale could explain why the tweet was homophobic, in the sense that it demonstrated fear, hatred or dislike of homosexuality, rather than simply being offensive to gay people.

[68] Mr Sandison submitted that for a comment to be fair, it was necessary to make clear the reason for the comment. It might be fair comment to call someone homophobic if the reader could make their own assessment. This would require the basis, such as details of what they had written or done, was given. It would not be fair simply to describe someone as homophobic and give no reason.

[69] Mr Dunlop submitted that to describe the tweet, and indeed Mr Campbell, as homophobic was no more than fair comment in the circumstances. He referred to a number

of English authorities, but recognised the stricture in *Massie*, above, that the present law of Scotland should be applied in priority to principles imported from other jurisdictions. The Inner House in *Massie* referred to the *Archer* test that “*The expression of an opinion as to a state of facts truly set forth is not actionable*”, and he was content to stand or fall by that definition.

[70] Mr Dunlop referred to English authority to give some comment to the limited guidance given by Lord Cooper, quoted in *Massie*, namely that what is a fair inference from true facts is left to be decided on the basis of common sense. He referred to *Joseph v Spiller* [2011] 1 AC, quoting *Tse Wai Chun v Cheng* [2001] EMLR 777, and submitted that the comment had to be firstly, pertinent to the question and secondly, objectively honest, namely an opinion which could be held by an honest person no matter how obstinate or prejudiced. This does not conflict with the law of Scotland (see Note of Reasons in *Massie v McCaig* [2013] CSIH 37).

[71] In my view, the comments in the article amounted to fair comment, for the following reasons:-

[72] A comment can be fair even though it is wrong (*British Chiropractic Association v Singh* [2011] 1 WLR). As long as it is a comment which can be rationally justified from the correct facts, the defence will apply. It is an objective test, but it is necessary to recognise that what is rational will differ from person to person. Depending on the facts, it may be possible to justify different and conflicting views arising out of the same facts. Conflicting comments, even though diametrically opposite, might be “fair”. The subjective approaches taken in this case serve as an illustration - Mr Kavanagh and Mr Macfarlane, for example, reached opposing views on the same facts.

[73] Mr Campbell takes a linguistic approach, and submits that words have defined meanings. Mr Campbell expressed the view, in characteristically robust terms, that a person would need to be either stupid or dishonest to interpret his tweet as showing homophobia.

[74] By contrast, Ms Dugdale takes a more impressionistic approach, and submits that the article fairly represented the meaning of the tweet. Her view is that, based on her experiences as a gay woman she was entitled to say that she recognised what homophobia was.

[75] Mr Campbell's view is a literal, and semantically-correct, understanding of the meaning of the words which he used. From that starting point, he discounts the validity of any other view. In my view his approach is, at best, incomplete. It does not take into account that other readers will have quite different thoughts. Readers of his tweet will differ not only by intellectual abilities ("stupid") or integrity ("dishonest"), but also in life experience, education, empathy, philosophy and attention to detail. Each of these, and other factors, may influence how the tweet was read. More than one rational view can be taken. This proposition was eloquently made (in the context of another defence, qualified privilege) in *Horrocks v Lowe* [1975] AC 135 at 150:-

"In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which belief is arrived at it may still be "honest", that is, a positive belief that the conclusions they have reached are true. The law demands no more." (Lord Diplock at page 150).

[76] That comment was made in relation to honesty but, being no more than a description of human behaviour, it appears equally apposite in considering subjective fairness.

[77] Was Ms Dugdale's view, and resulting comment, fair? Subjectively, she described how she felt David Mundell was being mocked for his sexuality, and that gay people were being considered as "lesser" because they can't or don't have children, which is not true. Subjectively, Mr Macfarlane described how the joke made unnecessary reference to David Mundell's sexuality, which was the "punchline" of the joke.

[78] Objectively, and applying the common sense approach enjoined by *Massie*, not everybody will take Mr Campbell's approach to a joke about homosexuality. It is common sense that the analysis applied by a heterosexual (a dispassionate application of logic based on the dictionary meaning of words) may be entirely different from the analysis applied by a homosexual person (a dismayed search for justification for an unnecessary joke at the apparent expense of a homosexual man). It is not possible to dismiss the latter as less worthy, or less rational, or less fair, than the former. It is the kind of subjective, rational and honest reading of the tweet, leading to a subjective, rational and honest public comment, which will be protected by the law as fair comment. Accordingly, the comment was fair, because it can be rationally justified from the underlying facts.

[79] Separately, even if I were wrong on the foregoing, the comment was fair because the reasonable reader was able to work out for themselves what Ms Dugdale's reasoning was, and therefore whether it was fair. This is an intrinsic part of the English law of fair comment, as discussed in *Joseph v Stiller* [2011] 1 AC to which Mr Dunlop referred. It is not a necessary component of the Scots law of fair comment. However, applying the flexible test of common sense, if a commentator has set out their train of thought, to the point where the reasonable reader is able to assess the justification, it would be nonsensical to exclude that in assessing fairness. There is a fundamental difference between "A is a homophobe" and "A is a homophobe for the following reasons". The former is no more than an insult, the latter is an

argument. If the commentator has shown their working, and that working is rationally supportable, the comment is likely to be fair for the purposes of this defence.

[80] I do not agree with Mr Sandison's submission that the means of assessment were not available. In my view the article made plain that the basis of the comment about Mr Campbell was that he had issued a tweet in the terms discussed. A reasonable reader would readily be able to understand from the article that this was the case, and to come to their own judgment on the fairness of Ms Dugdale's view. Ms Dugdale's stance was logically defensible, and the comment based on that logic was capable of being regarded as fair.

#### **Other points arising**

[81] Mr Dunlop prayed in aid several English cases, a course which Mr Sandison eschewed. I have followed the Scots approach (*Massie v McCaig*) that the principles of fair comment are not enumerated and that the matter is one of common sense. I have had regard to the English cases, and while I have applied some of the same logic I have not treated these as innovating on this more general standard. It is a moot point whether *Tse Wan Chung v Cheng* adds anything to the assessment of common sense. *Joseph v Spiller* introduces some further considerations, but I have dealt with this as described.

[82] Some reference was made to the standards to be expected of public figures. I was referred to the discussion of defamatory statements in *Curran v Scottish Daily Record and another* 2011 SLT 359, where it was recognised that more latitude was given to criticism of public interest figures. The Inner House noted, citing the European Court in *Dlugolecki v Poland*, that:

“The limits of critical comment are wider if a public figure is involved, as he inevitably and knowingly exposes himself to public scrutiny and must display a particularly high degree of tolerance...”

[83] I note, however, that this latitude did not apply to criticism made of personal, as opposed to political, characteristics. The criticism in the present case is of a personal nature, so I have not adjusted my findings to reflect the public nature of the parties. I note also that this discussion was had in the context of defamatory comment, not the defence of fair comment.

[84] Mr Dunlop submitted that the starting point for assessing defamation (i.e. assessing the article, not the tweet) could not be a dictionary. He referred to the case of *Greenstein v Campaign Against Antisemitism* [2019] EWHC 281 as authority for the proposition that it was not appropriate, where a court is considering the meaning of a statement, to start from the dictionary definition. That initially appeared to conflict with the Scots evidential approach that the ordinary meaning of words is within judicial knowledge and can be applied. That conflict is more perceived than real, however. As discussed above, understanding the ordinary meaning of a word is one thing. It is quite another thing to assume that every rational person understands the impression conveyed by that word in exactly the same way, or starts from a semantic dictionary analysis. This point does not affect matters here because (i) assessing the defamatory nature of the comment is straightforward in this case and does not depend on any semantic finesse; and (ii) in assessing whether the article amounted to fair comment I have in any event taken the same approach.

[85] Reference to English case law leads to a further point. *Greenstein* referred to and relied upon the Court of Appeal case of *Stocker v Stocker* [2018] EMLR 15. In the short time between the close of submissions and the preparation of this judgement, the Supreme Court delivered their judgment in *Stocker v Stocker* [2019] UKSC 17. I have read the judgment. Both

parties contacted me by email to bring it to my attention, but disagreeing whether I should have regard to it. *Stocker* does not purport to apply or decide Scots law, so is not central to this judgment. Parties are aware of the judgment and have not sought a hearing. In these circumstances I infer that neither party wishes to rely further on the Supreme Court judgment, and I therefore take it into account for a single purpose only, namely to ascertain that the English law in *Greenstein* to which I was referred remains good law and has not been disapproved. It has not. Beyond that I do not go. As I have explained, the English principles behind fair comment are somewhat different, and I have referred to them only in the course of applying the more flexible Scots law test.

[86] A further point relates to the seriousness of the defamation. The article used the term “*homophobic*” which has, as both Mr Campbell and Mr Kavanagh explained, a particularly toxic association. It bears comparison with “*racist*” or “*holocaust denier*”. After some discussion with counsel, I am satisfied that notwithstanding that it is a significantly harmful label to apply, there is no greater test for vigilance in using it, and that the ordinary requirements of the defence of fair comment apply. The circumstances in *Massie v McCaig*, above, and the English case of *Flood v Times Newspapers Ltd* [2012] 2 AC 273, where the pursuers/plaintiffs faced particularly serious allegations, are eloquent of this.

[87] I have discussed these points because they had a bearing on discussions at proof, but they do not affect this judgment.

[88] In my view, the defence of fair comment is available to Ms Dugdale’s article. Two further elements, namely qualified privilege and malice, were discussed in submission, so I will discuss these briefly:

### **Qualified privilege**

[89] This defence is available in certain circumstances in the public interest. It arises out of a similar policy to fair comment, but it is only available for facts, not comments. As the nature of the article was an opinion, or comment, it does not apply.

[90] In the event that the article were one of fact (which it is not), I would not have held this defence to apply. Mr Dunlop elected to rely on the *Reynolds* defence, a sub-category of qualified privilege, which is only available where publication is a matter of public concern, the disclosure is made in the public interest (defined by what people should know) and where the author or publisher was under a duty to tell the public (*Flood v Times Newspapers Ltd*, above). It could not apply in this case, because the article did not reveal anything not already in the public domain. It is simply a personal, if deeply felt, comment piece which contains only known facts, analysis and opinion. There was no public interest or requirement to obtain Ms Dugdale's views. There was no duty of disclosure and even if there were, no disclosure was made. The public was already aware of the tweet and was capable of forming its own view, and a "media storm" was already underway.

### **Malice**

[91] Malice does not feature in the pleadings and is not relevant to a defence of fair comment. It was mentioned in submission. Mr Sandison submitted that the article was motivated by malice, because Mr Campbell was in the "top 10" of Ms Dugdale's social medial tormentors. I do not accept that to be proved. While it was clear from Ms Dugdale's evidence that she did not enjoy the social media attentions of Mr Campbell, her position was that she had learned to deal with it, had developed a thick skin, and had assumed control of the situation by blocking Mr Campbell's twitter feed and only reading his blog if she



decided to. No doubt Ms Dugdale does not like Mr Campbell and what he does, but I accept her evidence that the article was motivated by genuine dismay at what she understood the tweet to mean and not by malice. Her dismay was shared by Mr Macfarlane and Mr Mundell.

### **Amount of damages, had they been awarded**

[92] It is evident that this case is not about money, although the remedy is traditionally stated in money damages. Mr Sandison recognised that there was little precedent or guidance on how to assess damages, and submitted that £25,000 was a reasonable sum by reference to two analogous cases, namely *Baigent v BBC* 2001 SC 281 and *Munro v Brown* 2011 SLT 947.

[93] Mr Dunlop submitted that Mr Campbell ought, if successful, to receive only a token award of £1 (*Grobbelaar v News Group Newspapers Ltd* [2002] 1 WLR 3024). He described Mr Campbell as having no reputation to protect, a master of calumny who was happy to be known as unpleasant, abusive and derogatory.

[94] Mr Sandison replied that this was nowhere near the *Grobbelaar* position, because Mr Campbell had a reputation for his political blogging and for his works for equal rights.

[95] In my view, the comparison with *Grobbelaar* is not a good one, because Mr Campbell cannot be described as someone who has lost all value in his public reputation. He is rude and abrasive, but not disgraced.

[96] However, there was little evidence that Mr Campbell has suffered any loss. There is no evidential basis to conclude that, in the two years since the article, he has lost any influence, reputation or credibility as either a social media commentator or as a campaigner for equal rights. There was no evidence of loss of followers, loss of opportunity, diminished

influence or of outrage amongst the public (other than the customary exchange of robust views on his twitter feed). There is no proven loss of reputation of any type. There is therefore no basis for an award for anything other than wounded feelings.

[97] When it comes to valuation of Mr Campbell's distress, I do not accept that he can hold others to a higher standard of respect than he is willing himself to adopt. He has chosen insult and condemnation as his style. He has received these in return. To use Mr Dunlop's analogy, having entered the political arena with a quiver of poisoned arrows, to receive an arrow in return might be seen as no more than collateral damage, not an unjust wound. I do not accept that he can dismiss the feelings or reputations of his opponents cheaply, but receive a high valuation of his own.

[98] Had I been awarding damages, those damages would have been assessed at £100.

### **Post script**

[99] Both parties to this action have been genuinely hurt by words written about them, either in the article or during a political career. Both misunderstood the impression their words might convey.

[100] A right to insult is part of free speech. It is better described as a freedom, because a right to insult is not specifically awarded by the law. A freedom is simply something that the law does not prevent.

[101] The law does not regulate every detail of life. A mature legal system interferes as little as possible, and sets bare minimum acceptable standards of behaviour. Relations between people tend to be left to be sorted out by people themselves. It is possible to obey the law, but still act unpleasantly and harmfully to others. That is a freedom. Some freedoms are better left unexercised. Persuasive arguments are not improved by insults. In a corrosive

environment, only the foolhardy will change their minds, apologise, compromise or cooperate. These are things successful debate requires.

[102] Parties should attempt to agree expenses. If they cannot, they should contact the clerk to arrange a hearing. I record my appreciation of the careful and thorough submissions by counsel.