Cusson v. Quan: The "Responsible Journalism" Defence Comes to Canada

By

Marko Vesely and Chris M. Dafoe

December 30, 2008
Reproduced with permission from *Canadian Corporate Counsel: A Practical Reference for Corporate, Municipal and Crown Counsel*, Volume 17, Number 7 June 2008, published by Canada Law Book www.canadalawbook.ca

This is a general overview of the subject matter and should not be relied upon as legal advice or opinion.
For specific legal advice on the information provided and related topics,
please contact the authors or any member of the Defamation and Media Law or Litigation Groups.

Copyright © 2008, Lawson Lundell LLP
All Rights Reserved

Cusson v. Quan: The "Responsible Journalism" Defence Comes to Canada

Celebrities (and those who aspire to the role) have long found comfort in the maxim "There's no such thing as bad press". For the rest of us – individuals and organizations – a negative story in the press can sting even when it is true. The sting goes deeper still when there are errors in a story, especially a story that reaches a large audience. Errors, however, are a fact of life in the mass media. Even the best journalists can make mistakes, in particular when the subject of the story is evasive or uncooperative, or when the story is reported under tight deadlines or involves complex subject matter. And yet stories that are difficult to get – and hence difficult to get exactly right – are often important; not only of interest to the public, but in the public interest.

In its 2007 decision in *Cusson v. Quan*, the Ontario Court of Appeal took note of these considerations in recognizing the "public interest responsible journalism" defence first articulated nearly ten years ago by the House of Lords. On April 3, 2008, the Supreme Court of Canada agreed to hear an appeal of that decision. How the SCC might rule on the existence of the defence could have a profound impact on the law of defamation, altering both the way the press reports controversial stories and the way individuals and organizations who find themselves the subjects of those stories deal with the press.

The recognition that certain subject matter and certain kinds of reporting engage the public interest has led courts in some jurisdictions to modify the common law of defamation, shifting the balance between the protection of reputation and freedom of the press. In the past, however, the Supreme Court of Canada has been reluctant to adopt radical changes to defamation law. In particular, it has declined to follow American decisions that require public figures who have been defamed to show that the defendant published the material with "actual malice".

The "actual malice" standard was established by the U.S. Supreme Court in its 1964 decision in *Sullivan v. New York Times*, 376 U.S. 254 (1964). In that case, the Court found that vigorous discussion of political issues was of such vital importance in a democratic society that the constitutional protection of free speech should protect statements about public officials, even if those statements may later turn out to be false. Accordingly, the Court found that the common law of defamation, which presumes that a defamatory statement is both false and malicious, was unconstitutional, at least as it applied to publications about public officials. (The protection was later

extended to statements about public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).) In its place, the Court imposed a requirement that the plaintiff demonstrate the defendant published with actual malice, i.e., that he either knew the defamatory statements to be false or was reckless as to whether they were or not.

In the leading Canadian defamation decision, *Hill v. Church of Scientology,* [1995] 2 S.C.R. 1130, the defendants urged the Supreme Court of Canada to adopt *Sullivan.* The Court discussed the case at length, noting that American judges and scholars have criticized the decision and identifying several problems that have resulted from the actual malice requirement (See *Hill* at paras. 122-133). In rejecting the *Sullivan* doctrine, Cory J. wrote at para. 137:

> I can see no reason for adopting [*Sullivan*] in Canada in an action between private litigants…. I simply cannot see that the law of defamation is unduly restrictive or inhibiting. Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish. The law of defamation provides for the defences of fair comment and of qualified privilege in appropriate cases. Those who publish statements should assume a reasonable level of responsibility.

Mr. Justice Cory's comments raise some interesting questions. What, after all, is a reasonable level of responsibility? Is the standard different for those, such as journalists, who have undertaken to report on matters of public interest? And what factors should a court take into account in determining whether a defendant has acted responsibly? In *Cusson v. Quan*, the Court will have the opportunity to answer those and other questions.

Cusson v. Quan arose from three stories published by the *Ottawa Citizen* about the exploits of Danno Cusson, an Ontario Provincial Police officer who, on his own initiative, headed to New York to help out with the rescue effort following the 2001 attack on the World Trade Center. Although Cusson was hailed as a hero in many quarters (and the OPP criticized for ordering him to return home), the *Citizen* stories, which were written by reporters Douglas Quan, Kelly Egan and Don Campbell, portrayed the officer in a largely negative light. Cusson filed suit, claiming in defamation against the reporters, the *Citizen* and its editors, as well as Penny Barrager, Cusson's superior officer at the OPP.

The *Citizen* defendants pleaded justification, fair comment and qualified privilege. Mr. Justice Maranger of the Ontario Superior Court declined to instruct the jury on the qualified privilege defence because he found that that there was no "compelling moral or social duty" to publish the impugned articles.

The jury found that the *Citizen* had proved the truth of some of the allegations and that others were fair comment, but that it had failed to prove other key facts, including allegations that the plaintiff had deliberately misrepresented himself to New York police as a trained RCMP K-9 officer, that he had no search and rescue training, and that he had compromised the rescue effort. The jury awarded $125,000 in damages, to which the court added about $250,000 in costs.

On appeal, the *Citizen* raised the defence of "responsible journalism" for the first time. After canvassing authorities from several countries, Mr. Justice Sharpe of the Ontario Court of Appeal found that the defence did exist in Canada, but that the *Citizen* could not rely on it on appeal because it had not raised and made out the defence at trial. The *Citizen* has appealed that decision, but one would expect that much of the argument before the SCC will focus on the existence and scope of the responsible journalism defence and whether it is the proper means by which to strike a balance between defamation law's protection of reputation and the Charter's guarantees of free speech and a free press.

The responsible journalism defence was first recognized by the House of Lords in 1999 in *Reynolds v. Times Newspaper Ltd,* [2001] 2. A.C. 127, and recently given a broader interpretation in *Jameel v. Wall Street Journal Europe Sprl.* [2007] 1 A.C. 359. In *Reynolds*, Lord Nicholls found that defamation law's rigorous defence of reputation must give way, in some circumstances, to the public interest and freedom of the press. Like the SCC, however, Lord Nicholls was not willing to go so far as to require a plaintiff to demonstrate malice in order to succeed. Instead, he found that a media outlet that made innocent errors should be able to rely on a form of qualified privilege if it could show that it had conducted itself in accordance with the standards of responsible journalism. At p. 205, he set out a non-exhaustive list of ten factors that a court might consider in deciding the whether the publisher had met that standard:

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.

2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.

3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.

4. The steps taken to verify the information.

5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.

6. The urgency of the matter. News is often a perishable commodity.

7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.

8. Whether the article contained the gist of the plaintiff's side of the story.

9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.

10. The circumstances of the publication, including the timing.

The decision had a significant impact on the way that some of the British media did business, according to a study published in 2004.[1] The authors of the study interviewed members of the English media – reporters, editors, media lawyers – and compared the responses to similar interviews they had conducted in the early 1990s. They found that *Reynolds* had a negligible impact on how skin-and-scandal papers like *The Sun* reported stories, largely because the defence precluded the sort of sensationalism that is the life-blood of tabloids. However, they found that many of the "quality" papers embraced the defence, going so far as to "Reynoldsize" potentially defamatory stories by making sure that they satisfied as many as possible of the factors set out above. This required some changes to previous practices: the tone of stories was more moderate;

[1] R. Weaver, A. Kenyon, D Partlett and C. Walker, "Defamation Law and Free Speech: *Reynolds v. Times Newspapers* and the English Media" (2004) 37 Vand. J.Transnat'l L. 1255.

accusations of wrongdoing were posed as questions rather than as statements; and editors took more care to get headlines right.

The editors of one quality paper, the *Guardian*, told the authors that the change required was "not a bad thing journalistically" because English media culture is highly aggressive. Post-*Reynolds*, the editors said, journalists were able to say the same things but in a slightly different way and in the end, the existence of the defence allowed them to report more aggressively in the public interest. In similar vein, a BBC solicitor estimated that the *Reynolds* defence allowed the broadcaster to air one additional story per week, stories that would otherwise have been spiked for defamation concerns.

The availability of the Reynolds defence also made plaintiffs more cautious. While the defence was not the only reason for the decline in defamation writs served on journalists, it did make a difference. One *Guardian* editor told an interviewer that "when the plaintiffs' lawyers see that the media have structured an article to take advantage of the *Reynolds* defense, the lawyers back off because they cannot guarantee victory to their clients."

While many in the media embraced *Reynolds*, English courts proceeded more cautiously. As Lord Bingham noted in his leading speech in *Jameel*, there was a tendency to treat the list of ten factors as a "a series of hurdles to be negotiated by a publisher" rather than mere indicia of whether a defendant had exercised responsible journalism. This rigid approach, Lord Bingham said, was not what Lord Nicholls intended at all; rather, "the standard of conduct required of the newspaper must be applied in a practical and flexible manner. It must have regard to practical realities."

In *Cusson v. Quan*, Mr. Justice Sharpe summarized the defence as follows:

> The defence rests upon the broad principle that where a media defendant can show that it acted in accordance with the standards of responsible journalism in publishing a story that the public was entitled to hear, it has a defence even if it got some of its facts wrong. That standard of responsible journalism is objective and legal, to be determined by the court with reference to the broader public interest. The non-exhaustive list of ten factors from *Reynolds*, applied in the manner directed in *Jameel*, provides a useful guide….
>
> To avail itself of the public interest responsible journalism test a media defendant must show that it took reasonable steps in the circumstances to ensure that the story

was fair and its contents were true and accurate. This is not too much to ask of the media.

If the Supreme Court of Canada recognizes the defence, it will remain to be seen what impact its availability will have on the way Canadian papers and broadcasters report the news. England boasts a dozen national newspapers, all competing for readers' attention, and it has a tradition of hyper-aggressive reporting. Absent such extreme commercial pressures, it may be that there is less incentive in Canada to take the extra time and expense to "Reynoldsize" a story that might otherwise be held back for defamation concerns. On the other hand, it does not take much time or money to get a comment from the subject of the story or to take a second look at a self-interested source. And while no one wants to read a bland paper, Lord Nicholls' warnings against sensationalism and the printing of allegations as fact might be a necessary corrective to investigative reporters with a prosecutorial bent.

If the Canadian media does embrace the defence, one can expect to see legal counsel play a greater role in the preparation of stories. The 2004 study of the English press found that in-house counsel became involved well in advance of publication, working with editors and reporters to ensure that the story met the *Reynolds* standard. Some papers, such as the *Guardian*, had five or six lawyers on staff, and while litigation costs declined, total legal bills actually increased.

If Canadian media follow their British counterparts in taking steps to bring themselves within the responsible journalism defence when publishing controversial stories, those individuals and organizations which are the subject of those stories would do well to consider changing the way they respond when the media comes calling. The following are a few things to keep in mind:

- If a journalist can establish the responsible journalism defence by seeking a response and further information from the subject of the story, then "no comment" or "if you print that, we'll sue" may no longer be appropriate responses.

- On the other hand, unless the matter is clearly urgent, don't be afraid to ask for time to prepare for an interview or to seek out further information.

- A journalist is only as good as his or her sources. If you suspect that the story is being driven by someone with an axe to grind or who is trafficking in idle gossip, it may be

possible to raise that issue and encourage the journalist to take a second look. Be aware, however, that no journalist is going to disclose the identity of an unnamed source. Moreover, there is a risk in guessing the identify of a source: if you're wrong, you will have given the reporter a whole new line of inquiry.

- The responsible journalism defence only applies if the publication of the information is in the public interest (which is quite different from information that is of interest to the public). In *Reynolds*, Lord Nicholls cautioned, "The court should be slow to conclude that a publication was not in the public interest", but there may be circumstances in which it will be possible to argue against publication on those grounds.

Vancouver
1600 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
Canada V6C 3L2
Telephone 604.685.3456
Facsimile 604.669.1620

Calgary
3700, 205-5th Avenue SW
Bow Valley Square 2
Calgary, Alberta
Canada T2P 2V7
Telephone 403.269.6900
Facsimile 403.269.9494

Yellowknife
P.O. Box 818
200, 4915 – 48 Street
YK Centre East
Yellowknife, Northwest Territories
Canada X1A 2N6
Telephone 867.669.5500
Toll Free 1.888.465.7608
Facsimile 867.920.2206

genmail@lawsonlundell.com
www.lawsonlundell.com