



Public Interest Responsible Journalism

Matthew A. Woodley

Can a newspaper publish defamatory facts about you and escape liability? Until recently, the answer was probably “no”. However, the law of defamation in Canada is changing, and media organizations have greater latitude in publishing about matters of public interest thanks to a recent decision from the Ontario Court of Appeal.

The traditional defences to a defamation action — truth, fair comment, qualified privilege — were of little use to media organizations. In Canada, there is a presumption that defamatory comments are false, and the onus is on a defendant to prove that they are true. Fair comment protects expressions of opinion based on provable fact and is generally reserved for editorial columns, not news articles. Qualified privilege protects the expression of information by a person who has a duty to communicate it to another person who has a corresponding duty to receive it. Most courts, especially in Canada, refuse to find that a newspaper or broadcaster has a “duty” to convey information to the world at large.

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luck. In 1996, the House of Lords in *Reynolds v. Times Newspapers Ltd.* hinted at a new defence, available only to media defendants. The *Reynolds* judgment was not strong, and the lower courts in the United Kingdom refused to give the new defence any real effect.

In 2007, the House of Lords issued the *Jameel v. Wall Street Journal Europe* decision which clarified the new defence and admonished the lower courts for their reluctance to follow *Reynolds*. The defence crystallized into a two-part test. A newspaper or broadcaster could avoid liability if it could show:

- that the article in question concerned a matter of *public interest*; and
- that the newspaper engaged in *responsible journalism* in creating and distributing the article.

For over ten years, editors and journalists in Canada waited for an appropriate case to see if *Reynolds–Jameel* would stick in Canada. In November of 2007, they got an exciting answer in the form of *Cusson v. Quan* a unanimous decision of the Ontario Court of Appeal.

Like the *Jameel* decision, the facts in *Cusson* began on September 11, 2001 when the World Trade Center in New York was destroyed by terrorists. The plaintiff, Danno Cusson, was a member of the Ontario Provincial Police (OPP). After learning of the destruction and rescue effort, Cusson left his post and drove to New York with his pet dog. The OPP was heavily criticized for demanding that Cusson return to Ontario, and Cusson was portrayed as a hero in local media for his efforts.

The *Ottawa Citizen* ran a number of stories which suggested that Cusson had misrepresented himself and his qualifications to American rescue officials. The *Citizen* alleged that Cusson had told the Americans that he was a member of the RCMP, that his dog was a trained K-9 police rescue dog, and that he had potentially compromised the legitimate search efforts by his untrained participation.

The plaintiff sued the *Ottawa Citizen* and others. In its defence, the *Citizen* called a number of witnesses in order to establish the truth of its comments. A New York State Police officer confirmed that Cusson presented himself as an RCMP officer, and that Cusson told him that his dog was trained for search and rescue. The *Citizen* also adduced evidence indicating that Cusson lied about finding two survivors in the rubble: customs information clearly showed that he did not enter the United States until after he alleged to have found the survivors.

Although the *Citizen* was able to establish that most of the allegations in the articles were true, the jury found that a few of the defamatory meanings were not proven. As

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a result, the *Citizen* was found liable for defaming Cusson. The *Citizen* also argued that the defence of qualified privilege ought to be expanded to include publication to the world at large. The trial Judge found that the *Citizen* had no “compelling, moral or social duty to publish” the articles, and that the defence of qualified privilege did not apply. The jury awarded the defendant over \$100,000 in damages as a result of the defamation, notwithstanding their findings that he had clearly lied and misled American officials about his qualifications.

The House of Lords decision in *Jameel* was released after the jury’s decision in *Cusson* and before the *Ottawa Citizen* argued its appeal before the Ontario Court of Appeal. With the law clarified in the United Kingdom, the *Ottawa Citizen* argued that the *Reynolds–Jameel* defence ought to be imported into Canada. The Ontario Court of Appeal agreed that the decision should be considered a part of the law in Ontario. Unfortunately, the Court also found that because the *Ottawa Citizen* did not argue the issue before the trial Judge, it could not rely on the defence in the Court of Appeal.

In adopting the *Jameel* defence, the Ontario Court of Appeal reviewed the law of defamation in Canada. It found that the traditional defence of qualified privilege, while restrictive, ought not to be expanded to include media defendants. Instead, the Court found that a *new* defence ought to be recognized which gives “appropriate weight to the public interest in the free flow of information” (para. 133). The Court stated: “The House of Lords adopted this new defence as an appropriate incremental change reflecting the importance of the free flow of information and ideas in a modern society committed to freedom of expression and the media, but at the same time requiring the media to conduct itself in a prudent and responsible manner. In my view, it is open to this court to modify Ontario’s common law of defamation by adopting this new and distinctive defence if that change would accomplish a more appropriate balance between the *Charter* values of protection of reputation and respect for freedom of expression” (para. 137).

While the Court clearly modified the common law in Ontario, it denied the *Citizen* the ability to rely on the defence, as it had not been argued at trial. Therefore, the judgment against the *Citizen* was upheld, and the plaintiff received over \$100,000 in compensatory damages.

It will take some time before decisions in Canada elaborate the nature of the new defence. Based on the Ontario Court of Appeal decision, we know that the focus will no longer be on the truth of the statements made by a media organization but rather on the conduct of the journalists and editors in ensuring that the information was correct and balanced.

First, a media organization must show that the article in question dealt with a matter of *public interest*. Courts in the United Kingdom have made it clear that this does not include simply matters that *interest the public*. One Judge indicated that this would not include stories about “footballers and their wives”, but rather must be about an issue that the public has a right to hear, such as political, social, or governmental matters.

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Journalists and editors must ensure that they keep notes of interviews and a diary of all of the steps they took to examine the issue before publication. Codes of journalistic conduct are now relevant in order to demonstrate whether the journalist followed proper procedures.

Second, a media organization must show that it acted responsibly in creating and publishing the story. There are a number of factors that a court will examine in determining whether a media defendant acted responsibly in creating a story. These include

- the kind of information published including the seriousness of the allegations against the plaintiff. The more serious the allegations, the higher the duty to act responsibly;
- the source of the information. If the journalist relied on a weak source or on a source with a bias against the plaintiff, it will be more difficult to show that the journalist acted responsibly;
- the steps taken by the journalist to verify the information. If the journalist didn't check his facts, it is less likely that he or she will have been *responsible* in writing the story;
- whether or not the journalist sought comment from the plaintiff, and if his or her side of the story was included. If the article does not contain the plaintiff's side of the story, it is less likely that the journalist acted responsibly in publishing the allegations.

These categories are not closed, but they do illustrate the focus of the inquiry. Journalists and editors must ensure that they keep notes of interviews and a diary of all of the steps they took to examine the issue before publication. Codes of journalistic conduct are now relevant in order to demonstrate whether the journalist followed proper procedures. If they acted responsibly, they will escape liability even where the information published turns out to be untrue.

Media organizations in Canada should be optimistic about the public interest responsible journalism defence. While it is currently only the law in Ontario, the *Ottawa Citizen* is seeking leave to appeal to the Supreme Court of Canada. If successful, these important principles might apply across the country. If so, it will provide media organizations with the ability to carry out their constitutionally-mandated task of keeping the public informed.

Matthew A. Woodley is a lawyer with the firm of Reynolds Mirth Richards & Farmer LLP in Edmonton, Alberta.