

FOCUS ON MEDIA LAW

Journalists shouldn't rely on new defamation defence

By Andrew Bernstein
and Afshan Ali

Defamation law, with its absolute liability, reverse onuses and presumed damages, has historically proven stubbornly resistant to change. However, at the end of 2007, the Ontario Court of Appeal released a decision that changed the landscape of defamation law for media in Ontario by recognizing a “public interest responsible journalism” defence.

Whatever its practical impact may be, the decision represents a significant departure from traditional common law thinking on defamation law. Instead of the court examining the effect of the statement, its truthfulness or the duties of the person making it, the public interest responsible journalism defence requires the court to focus on the conduct of the defendant before publishing the statement. The defence gives the media the right to be wrong, at least sometimes.

Although it is a much narrower defence than the media was hoping for, it clearly represents an attempt to find middle ground between giving the media a licence to defame and the strict liability that has plagued modern defamation law. However, the U.K.'s adoption of this defence, while raising high hopes, has had little practical impact on the way libel lawsuits are decided in that jurisdiction. Its effects in Ontario remain to be seen.

In *Cusson v. Quan*, [2007] O.J. No. 4348, Danno Cusson, an OPP constable, went to New York City on his own initiative to participate in the rescue operations following the attacks of Sept. 11, 2001. At the time, Cusson was portrayed in the media as a hero for his rescue efforts. However, a major local newspaper later published three articles about him, and some of his rescue efforts, in a more negative light.

Cusson brought a libel action against the newspaper and the authors of the articles. At trial, the defendants raised several defences, including qualified privilege, which had been the area of defamation law that was getting the most attention as a potential source of liberalization. In this instance, it failed.

The trial judge rejected the defence with respect to two of the three articles, finding that no privilege could apply to those articles (but found that qualified privilege did apply to the third article because it reported on possible disciplinary charges).

On appeal, the appellants argued that the trial judge erred in rejecting the defence of qualified privilege for the two articles, but that, in the alternative, the Court of Appeal should recognize the public interest responsible journalism defence and apply it in their favour.

Although the court did not allow the appellants to rely on this defence in this case (as they had not argued it at trial), it agreed that defamation ought to be subject to a public interest responsible journalism defence, and pointed to the 10 factors (see sidebar) set out by the House of Lords in *Reynolds v. Times Newspapers Ltd.* [2001] 2 A.C. 127 for applying that defence.

The question for media is how far this defence will take them. It is difficult to predict the outcome of any trial, and this will be exacerbated if the outcome depends on the application of a 10-factor balancing test. Moreover, the U.K. experience has not been uniformly positive for media.

As recently noted by the English Court of Appeal, “it is well known that ... the defence of qualified privilege based on responsible journalism has failed more often than it has succeeded.” It is not difficult to find examples of an adverse finding regarding one of the factors (for example, the defendant failed to take adequate steps to obtain the plaintiff's side of the story), that may be sufficient to deny the defence even if the defendant acted responsibly in other respects. Indeed, the House of Lords itself has admonished lower U.K. courts for using the *Reynolds* factors as more of a checklist than a guideline, making relying on the defence difficult.

Another unknown is who may seek the benefit of the public interest responsible journalism

defence in the Internet era. The line between who is and who is not a “journalist” has been fuzzy almost since the invention of the Gutenberg printing press — what are the courts to make of the posters, bloggers and do-it-yourself publishers that have multiplied in the 21st century?

The proliferation of these non-traditional media may well explain the court's reluctance to apply the type of qualified privilege (free from the constraints of the *Reynolds* factors) that the *Cusson* defendants argued for at trial.

While it is clear that the *Cusson* decision represents free expression's most substantive inroad yet into the common law of defamation, the extent to which any defendant can actually escape liability remains uncertain.

Andrew Bernstein is a litigation partner at Torys LLP in Toronto. He frequently defends both traditional and online media in defamation, copyright and other disputes. Afshan Ali, an associate at the same firm, focuses on civil litigation and has frequently acted for traditional media defendants in defamation matters.

10 factors

courts may consider for the public interest responsible journalism defence

1. the seriousness of the allegation
2. the nature of the information and the extent to which the subject matter is of public concern
3. the source of the information
4. the steps taken to verify the information
5. the status of the information
6. the urgency of the matter
7. whether comment was sought from the plaintiff
8. whether the article contained the gist of the plaintiff's side of the story
9. the tone of the article
10. the circumstances of publication, including the timing