CITATION: Cusson v. Quan, 2007 ONCA 771
DATE: 20071113
DOCKET: C45365

COURT OF APPEAL FOR ONTARIO

WEILER, SHARPE and BLAIR JJ.A.

BETWEEN:

DANNO CUSSON

Plaintiff (Respondent)

and

DOUGLAS QUAN, KELLY EGAN, DON CAMPBELL, OTTAWA CITIZEN, OTTAWA CITIZEN GROUP INC., SOUTHAM PUBLICATIONS (A CANWEST COMPANY) AND PENNY BARAGER

Defendants (Appellants)

Richard G. Dearden and Andrew Kidd for the appellants Douglas Quan, Kelly Egan, Don Campbell, Ottawa Citizen, Ottawa Citizen Group Inc., and Southam Publications (A CanWest Company)

Ronald F. Caza, Jeff Saikaley and Marie-France Chartrand for the respondent Danno Cusson

Peter Jacobsen, Brian Rogers and Adrienne Lee for the interveners The Globe and Mail, the Canadian Newspaper Association, and Ad IDEM/Canadian Media Lawyers Association

Heard: June 15, 2007

On appeal from the judgment of Justice Robert L. Maranger of the Superior Court of Justice, sitting with a jury, dated April 11, 2006.

SHARPE J.A.:

[1] This appeal raises important issues regarding the law of libel and the appropriate balance between protecting reputation on the one hand and respecting freedom of expression and freedom of the media on the other. Should the media have the benefit of the defence of qualified privilege when reporting on matters of public interest so as to limit libel claims to situations where the media acts maliciously, knowingly or recklessly misstating the facts? Should Ontario law follow the lead of the English courts and afford a defence where a media defendant can show that it followed the standards of responsible journalism when reporting on a matter of public importance?

OVERVIEW

[2] The plaintiff is an OPP constable who, on his own initiative, went to New York City to participate in the search and rescue operations immediately following the September 11, 2001 attack on the World Trade Center. The OPP was publicly assailed for ordering the plaintiff to return to his duties in Ottawa. The plaintiff gave a number of media interviews and was portrayed as a hero for his rescue efforts.

[3] The defendants, the *Ottawa Citizen*, the Ottawa Citizen Group Inc. and Southam Publications (A CanWest Company) (the "*Citizen*"), published three articles casting the plaintiff and his rescue activities in a negative light. Those articles suggested that the plaintiff had misrepresented himself to the New York police as being a member of the RCMP; that he might have compromised rescue operations by misrepresenting himself and his dog as being properly trained for K-9 rescue efforts; that he had been asked to leave Ground Zero by the New York police; and that he faced police disciplinary charges for his conduct.

[4] The plaintiff brought a defamation action against the *Citizen*, the authors of the *Citizen* articles, Douglas Quan, Kelly Egan and Don Campbell (the "*Citizen* defendants"), as well as the plaintiff's superior officer, OPP Staff Sergeant Penny Barager, the source for some of the information in the articles. The defendants attempted to prove the truth of the defamatory statements and relied on the defence of fair comment. At the conclusion of the evidence, counsel for the *Citizen* defendants asked the trial judge to instruct the jury that the publication of the three articles was an occasion of qualified privilege and that the claim should be dismissed unless the plaintiff satisfied the jury that the defendants were guilty of malice.

[5] The trial judge ruled that all three articles were of public interest but that as there was no "compelling, moral or social duty" to publish the Quan and Egan articles, those articles did not attract qualified privilege. As for those articles, only the defences of fair comment and justification were left with the jury. However, the trial judge ruled that the

Campbell article regarding the prospective disciplinary charges was protected by qualified privilege and the claim based on that article was dismissed.

[6] The jury was asked to answer a detailed list of 151 questions that itemized each of the allegedly defamatory passages from the two articles. The jury found that the defendants had established the truth of some but not all the defamatory statements contained in the articles and awarded the plaintiff $100,000 in general damages against the *Citizen* defendants and $25,000 against the defendant Barager. The jury found that there was no actual malice on the part of any of the defendants and rejected the claims for special, aggravated and punitive damages.

ISSUES

[7] The appellants, the *Citizen* defendants, raise two issues on this appeal:

1) Did the trial judge err by requiring the appellants to establish a compelling moral or social duty to publish and thereby err by rejecting the defence of qualified privilege in relation to the Quan and Egan articles?
2) Is there a public interest defence of responsible journalism available to the appellants?

FACTS

[8] The issues raised on this appeal are essentially legal in nature and relate only to the trial judge's ruling that the defence of qualified privilege did not apply to the Quan and Egan articles. Although the facts were hotly contested at trial, when arguing the appeal, the parties did not find it necessary to review the evidence in any detail and, given the nature of the issues raised, I do not intend to do otherwise in these reasons. To set the stage for the legal analysis that follows, it will suffice to review the content of the three articles that formed the basis for the claim and briefly review the evidence led with respect to the facts stated in those articles.

1. The Citizen articles

i) "Renegade OPP officer under fire"

[9] On September 25, 2001, the Citizen published substantially similar articles in both a first and final edition entitled "Renegade OPP officer under fire" written by Douglas Quan. The article, accompanied by a photograph of the plaintiff and his dog "Ranger", stated that shortly after the September 11 terrorist attack, the plaintiff had identified himself to the New York State Police Department as an RCMP officer trained in K-9 rescues and that although the plaintiff had been hailed as a hero, he "may have

compromised the search and rescue mission after he is alleged to have misled the New York State Police into thinking he was a fully trained K-9 handler with the RCMP."

[10] The article quoted a number of sources, including the plaintiff's supervisor, OPP Staff Sgt. Penny Barager, who said the plaintiff had never been an RCMP officer. The article said she was "concerned about [the plaintiff's] health and safety since neither he, nor his dog, had been formally trained in civilian search and rescue."

[11] The OPP had not processed the plaintiff's resignation, said Staff Sgt. Barager, since they wanted to talk to him when he returned home. She noted that the plaintiff was probably under extraordinary stress when he decided to resign and described the plaintiff's actions as "heroic". She noted, however, that the force could not afford to lose officers no matter how noble the cause and that the OPP had to "discourage officers from going on renegade missions". She said the plaintiff was needed to assist with patrols along the Canada-U.S. border and other officers had had to do overtime shifts to cover for him.

[12] Staff Sgt. Barager also told the *Citizen* that the New York State Police had declined the OPP's offer of help following September 11, saying that they had sufficient personnel. She stated: "We were specifically asked not to go."

[13] The K-9 co-ordinator of the New York State Police, Sgt. Tim Fischer, was also critical of the plaintiff. He was quoted in the article as stating that the plaintiff had identified himself as an RCMP officer; that he wore an RCMP patch; and that he had said that his dog was trained. Sgt. Fisher was quoted as saying that the next time he saw the plaintiff he would arrest him. Furthermore, while the plaintiff was working hard and coming off his shifts "sweaty and dirty", Sgt. Fisher said the plaintiff refused to provide the name of his supervisor in Ottawa and that he was working on his own as a "freelancer."

[14] The article also stated that Rick Scranton, a New York State trooper, was surprised at being asked by the plaintiff how to perform simple techniques with his dog about "basic stuff: how to hold a leash, how to put a harness on, different commands."

[15] The article indicated that the New York City police had alerted the K-9 unit "to strip [the plaintiff] of his pass [affording him access to the disaster area] because they were unsure of his standing with the OPP." The article said that the plaintiff had become angry and upset over the revocation of his pass.

[16] The article also indicated, however, that the plaintiff adamantly denied wearing an RCMP uniform or representing himself to be an RCMP officer. It reported that "[f]eeling he could be more useful searching for survivors than examining the 'trunks of cars'", the plaintiff had resigned from the OPP but his resignation had not been processed.

[17] The article in the first edition also stated that after the plaintiff began scouring the rubble for survivors, he lost track of the time and, when his dog began to bark excitedly,

he stepped aside to let the trained rescuers take over. The article concluded by referring to media reports that the plaintiff had rescued two men wearing business suits from the rubble.

[18] The article included quotations from the plaintiff regarding his twenty-year military experience: “I have army blood in me. I guess it took over my police responsibility”. He regretted “putting the force under media questioning” and hoped that he had not “tarnished the image of my force.”

[19] The article also described an outpouring of public support for the plaintiff. It stated that the OPP had been “inundated with calls from the public upset” about the lack of support for the plaintiff from his supervisors. The article reported that a local radio station had raised about $27,000 to support the plaintiff and that an Ottawa-area MPP had urged the OPP not to accept the plaintiff’s resignation, calling him a “hero”.

ii) “OPP apologizes for Cusson ‘fiasco’”

[20] The following day, September 26, 2001, the *Citizen* published in its first and final editions an article written by Kelly Egan entitled “OPP apologizes for Cusson ‘fiasco’.” The article reported that Staff Sgt. Barager had apologized to the New York State Police for the plaintiff’s behaviour. The article repeated the allegation that “U.S. authorities believe he [the plaintiff] misrepresented himself and may have hampered early rescue efforts”, that the plaintiff had misrepresented himself as a trained K-9 RCMP officer, and that his pass granting access to the disaster zone had been revoked. The article added that “American authorities have cast doubt on whether he rescued anyone from the tangled wreckage of the collapsed buildings.” Staff Sgt. Barager was quoted as stating that she had tried to convince the plaintiff to reconsider his resignation but added that his reinstatement would have to be reviewed by senior management.

iii) “OPP’s Cusson faces internal investigation”

[21] On October 11, 2001, the *Citizen* published an article written by Don Campbell indicating that Staff Sgt. Barager intended to file a complaint that would trigger an internal investigation by the Professional Standards Section of the OPP into the plaintiff’s conduct. The article repeated the essential allegations against the plaintiff, namely, that he left his job without authorization, that he had misrepresented himself and his dog as being qualified to assist in the rescue efforts, and that he had represented himself as an RCMP officer.

3. The evidence

[22] The plaintiff testified at length to explain his actions in New York. He testified that he went to New York initially because of concern for his sister who lived there but

then decided to volunteer his services to the rescue efforts. He insisted that he did so during his vacation period and he denied that he had been asked by his superiors to remain on "stand-by" for duty in Canada. He denied that he told the New York police that he was an RCMP K-9 officer and denied that he wore an RCMP uniform. He insisted that he told them that his dog was a pet that he had trained himself. There was evidence that while in the military, the plaintiff had received some emergency rescue and K-9 training. The plaintiff denied the suggestion that he claimed to have found two survivors. He testified that his dog did find two bodies that he thought might still be alive but that other volunteers undertook the task of digging them out. The plaintiff said that he returned to Canada when refused permission to remain in New York by his superiors and then resigned from the OPP when he was refused permission to return to the rescue effort. Upon his return to Ground Zero, his pass was removed because he was no longer a police officer. He said that he was surprised when the media contacted him at Ground Zero.

[23] The defendants called extensive evidence attempting to prove the truth of the defamatory statements contained in articles. They called the plaintiff's superior officers who testified that before he left for New York, he had been asked to come to work as he was needed for border patrol duties but that when the plaintiff (falsely) stated that his sister was hospitalized with injuries from the terrorist attack, he was given permission to go to New York. The defendants offered evidence that the plaintiff knowingly violated his OPP duties by taking his uniform and service weapon to New York. The defendants offered video, photographic and oral evidence that the plaintiff did wear a RCMP uniform in New York and evidence from the New York police that he had represented himself as a RCMP K-9 officer. The defendants offered evidence that an untrained K-9 team could compromise search and rescue operations. The defendants also offered evidence that the plaintiff had in fact claimed to find two survivors at a time when he could not have been in New York.

4. The trial judge's ruling on qualified privilege

[24] At the conclusion of evidence, the *Citizen* defendants asked the trial judge to instruct the jury that all three articles attracted the defence of qualified privilege. The *Citizen* defendants argued that the plaintiff's activities in New York were a matter of public interest, that the print media had a duty to report on those activities and that the public had a reciprocal interest in receiving that information. It followed, argued the *Citizen* defendants, that the jury should be instructed that the plaintiff could only succeed upon proof of malice.

[25] The trial judge cited the case law (which I will review in detail later in these reasons) dealing with the controversial issue of the extent to which publications by the media to the world at large can attract the defence of qualified privilege. The trial judge noted that while the older cases rejected the defence, more recent cases have accepted it

in some circumstances and concluded "that the state of the law in this province is in flux, but that there are occasions where the cloak of qualified privilege would apply to publications to the world at large." He ruled, however, that those occasions "are restricted" and that "there was not a compelling, moral or social duty to publish" the Quan and Egan articles of September 25 and 26, 2001:

> They were certainly of public interest, but I cannot say with sufficient confidence that they were in the public interest to the extent that they needed to be heard, consequently, I would not allow the defence to flow with respect to the Doug Quan and Kelly Egan articles.

[26] As for the Don Campbell article of October 11, 2001 reporting on the possible disciplinary charges, the trial judge ruled that the qualified privilege attaching to reports on intended court proceedings applied.

5. The Jury's findings

[27] After four days of deliberation, the jury found that the lead paragraph of the September 25 article was fair comment:

> A Kanata OPP officer who has been hailed as a 'hero' for his efforts to find survivors of the World Trade Centre disaster may have compromised the search and rescue mission after he is alleged to have misled New York State Police into thinking he was a fully trained K-9 handler with the RCMP, the *Citizen* has learned.

[28] The jury found that the defendants proved the truth of several key facts, including:

- the plaintiff had failed to carry out his duties and obligations as an OPP officer and had abandoned his responsibilities without justification or entitlement;
- the plaintiff wore a RCMP uniform at Ground Zero and misled the New York State Police into thinking he was an RCMP officer;
- the plaintiff had misled the New York police into thinking his dog had formal training in civilian search and rescue operations; and
- the New York State Police had removed the plaintiff's Ground Zero pass and intended to arrest the plaintiff if he came back.

However, the jury also found that the defendants had failed to prove other key facts, including:

- the plaintiff had compromised the rescue effort;

- the plaintiff had deliberately misled the New York police by representing himself as a trained RCMP K-9 officer;
- the plaintiff had no search and rescue training;
- the plaintiff had concealed his true identity; and
- the plaintiff was responsible for a supposed "fiasco";

[29] The jury also found that the suggestion that the plaintiff may have hindered efforts to find survivors was not fair comment.

ANALYSIS

1. Positions of the parties

[30] The appellants submit that the trial judge erred in rejecting the defence of qualified privilege with respect to the Quan and Egan articles. They submit that by requiring a "compelling" duty to publish, the trial judge set the standard too high.

[31] In the alternative, the appellants submit that, even if the traditional defence of qualified privilege is not available on the facts of this case, they are entitled to raise what I will call the *Reynolds-Jameel* public interest responsible journalism defence, first enunciated by the House of Lords in *Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127 ["*Reynolds*"], and further explained in *Jameel v. Wall Street Journal Europe Sprl*, [2007] 1A.C. 359 ["*Jameel*"]. Those cases expand the defence of qualified privilege to include what really amounts to a new defence, available where the media can show that it met the standards of responsible journalism when reporting on a matter of public interest. The appellants concede that while *Reynolds* was cited to the trial judge, they relied on the traditional qualified privilege defence, and that the distinct and different *Reynolds-Jameel* public interest responsible journalism defence was not argued and consequently not ruled on by the trial judge.

[32] The respondent plaintiff submits that traditional qualified privilege does not extend to publication to the world at large except in certain narrow categories not applicable here. The respondent submits that recognition of the *Reynolds-Jameel* public interest responsible journalism defence would represent a significant change in the law and that it is not open to this court to make that change. Even if we were to recognize the defence, the respondent says that as the appellants did not ask the trial judge to rule on the point, it is too late for them to raise it now.

[33] The media interveners, *The Globe and Mail*, the Canadian Newspaper Association and Ad IDEM/Canadian Media Lawyers Association, urge us to adopt the *Reynolds-Jameel* public interest responsible journalism defence in preference to an expanded application of the traditional qualified privilege defence.

2. The common law of defamation

[34] In its traditional formulation, the law of defamation rests upon a form of no-fault liability. The plaintiff need establish only three things to make out a *prima facie* cause of action, namely, that the words complained of (1) are reasonably capable of defamatory meaning; (2) refer to the plaintiff; and (3) have been published. Liability does not rest upon proof that the statement complained of was untrue or, subject to certain specific defences that I will mention below, that the defendant was at fault in publishing those words. Nor does the plaintiff have to prove damages. The common law presumes falsity, fault and damages.

[35] Justification, or truth, is a defence to a defamation action. However, as defamatory words are presumed to be false, the defendant bears the onus of proving the substantial truth of the "sting", or the main thrust, of the defamatory words. There are no special rules or exceptions for media defendants. The result is that unless a media defendant can prove the truth of the statement complained of according to the exacting standards of a court of law, the defendant will be liable. It is no defence for the defendant to show that it followed accepted standards of investigation and verification and formed an honest and reasonable belief in the truth of statements it published.

[36] A defence frequently invoked by media defendants, but equally available to all defendants, is that of fair comment. The defence rests upon the defendant establishing that the statement was (1) a comment, not a statement of fact; (2) based upon true facts; (3) on a matter of public interest; (4) made fairly; and (5) made without malice: see *Cherneskey v. Armdale Publishers Ltd.*, [1979] 1 S.C.R. 1067; Peter A. Downard, *Libel*, (Toronto: Lexis-Nexus Canada Inc., 2003) at 113; Roger D. McConchie & David A. Potts, *Canadian Libel and Slander Actions*, (Toronto: Irwin Law, 2004) at 337. While aptly described by Lord Denning M.R. in *Slim v. Daily Telegraph, Ltd.*, [1968] 1 All E.R. 497 at 503 as "one of the essential elements which go to make up our freedom of speech", in the end, the defence of fair comment offers limited protection to the media when reporting on matters of public importance as it does not apply to the expression of an opinion based upon a fact that the media defendant cannot prove to be true. As with the defence of justification, however thoroughly the media defendant may have researched the story and checked its sources, if the facts upon which the opinion is based cannot be proved to be true, the defence of fair comment will be of no avail.

[37] In its traditional formulation, the common law of defamation clearly favours the protection of reputation over freedom of expression. However, the common law does recognize that in certain situations, protection of reputation must yield to open and free discussion. These occasions attract the protection of either absolute or qualified privilege. Words spoken in Parliament and in the courts attract absolute privilege. However false and harmful to reputation, statements made in Parliament or in the courts simply cannot be sued upon; the public interest in unrestrained legislative debate and

unconstrained evidence and submissions in the courts trumps the interest of protecting reputation.

[38] Qualified privilege arises on occasions where the maker of the defamatory statement has an interest or duty to make it and the person to whom it is made has a corresponding interest or duty to receive it. The classic and frequently quoted formulation of qualified privilege is that of Lord Atkinson in *Adam v. Ward*, [1917] A.C. 309 at 334 (H.L.):

> an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential.

[39] Employment references, business and credit reports, and complaints to police, regulatory bodies or public authorities are classic examples of occasions of qualified privilege. The rationale for qualified privilege is that on such occasions, "no matter how harsh, hasty, untrue, or libellous the publication … the amount of public inconvenience from the restriction of freedom of speech or writing would far outbalance that arising from the infliction of private injury" (*Huntley v. Ward* (1859), 6 C.B. (N.S.) 514 at 517).

[40] The privilege is said to be qualified as it can be defeated upon proof of malice, that is spite or ill-will, ulterior purpose, or, more commonly, proof that the defendant either knew the statement was false or was reckless as to its falsity: see *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 at para. 145 ["*Hill v. Scientology*"]. The privilege can also be lost where the limits of the duty or interest are exceeded by the use of words not reasonably appropriate to the occasion.

[41] The categories for qualified privilege are never closed and "can never be catalogued and rendered exact" (*London Association for Protection of Trade v. Greenlands, Limited*, [1916] 2 A.C. 15 at 22 (H.L.), quoted in McConchie and Potts, *supra* at p. 370-71) and the question before us on this appeal is whether it is time to extend the reach of qualified privilege, either in its traditional form or in some modified form specifically tailored to the media.

[42] In urging us to accept a broad defence of qualified privilege for reports on matters of public interest or the defence of public interest responsible journalism, the appellants and the interveners rely not only on s. 2(b) of the *Charter of Rights and Freedoms* and the jurisprudence emphasising the importance of freedom of expression in a free and democratic society, but also on the striking changes that have occurred in other common law jurisdictions. The courts of the United Kingdom, Australia, New Zealand, South Africa, and the United States have all ruled that the traditional law of defamation unjustifiably limits freedom of expression and freedom of the media. In various ways,

the courts of those jurisdictions have reformulated the law to afford greater latitude to the media when reporting on matters of public interest. The appellants and the interveners urge us to follow these cases and make appropriate changes to the law of Ontario.

[43] The respondent plaintiff insists that the traditional common law rules strike a proper balance between freedom of expression and the protection of individual reputation. The respondent submits that binding decisions from the Supreme Court of Canada preclude the defence of qualified privilege where the publication is to the world at large and that this rule should be maintained in order to afford individuals adequate legal redress for injury to their reputation.

3. Qualified privilege and the media

[44] As I will attempt to explain, the availability of the defence of qualified privilege to the media in relation to publication to the world at large under current Canadian law is in a state of flux and evolution.

[45] It is well-established that qualified privilege protects fair and accurate media reports of public proceedings in Parliament, the legislatures, the courts and in quasi-judicial tribunals: see McConchie and Potts, *supra* at pp. 406-407. Aspects of this common law privilege have been codified and extended by statute: *Libel and Slander Act*, R.S.O. 1990 c. L-12, ss. 3, 4.

[46] In other areas, however, the availability to the media of the defence of qualified privilege is considerably limited by a series of decisions from the Supreme Court of Canada and from this court dating from the 1950s, 60s and 70s. These cases appear to stand for the proposition that newspapers are to be treated the same as any other defendant and that qualified privilege does not apply to statements published to the world at large. However, there is a significant line of more recent authority that accepts the proposition that in some cases the media do have a duty to publish matters of public interest and that there is a corresponding interest of the public to receive the information, giving rise to an occasion attracting the protection of qualified privilege. I review and discuss both lines of authority below.

[47] The issue raised squarely on this appeal is how best to resolve the apparent tension between these two existing lines of authority. Should the law of qualified privilege remain frozen in its 1950s, 60s and 70s state, or should it evolve to afford the media greater latitude when reporting on matters of public interest?

4. Decisions restricting the defence of qualified privilege

[48] In a series of decisions, all written by Cartwright J. in the 1950s and 1960s, the Supreme Court of Canada took a restrictive view of the availability of the defence of qualified privilege and accorded strong protection to reputation, even in the context of political speech.

[49] *Douglas v. Tucker*, [1952] 1 S.C.R. 275, involved an election speech by the defendant Premier of Saskatchewan who stated that the plaintiff, the leader of the opposition, faced charges of fraud that had been conveniently adjourned until after the election. The plaintiff had in fact been sued for fraud in a civil action and a motion to strike the pleading had been adjourned to allow for the filing of responding material. The defendant gave a copy of his speech to a reporter and the fraud allegation was published in a newspaper.

[50] At trial, the defendant pleaded a number of defences, including qualified privilege. The jury dismissed the action but Cartwright J., writing for a unanimous Supreme Court of Canada, affirmed the decision of the Saskatchewan Court of Appeal directing a new trial on the ground, *inter alia*, that the trial judge erred by ruling that the occasion was one of qualified privilege. While recognizing that qualified privilege attaches to communications made by an elector to fellow electors regarding a candidate as to facts the speaker honestly believes to be true and that are relevant to fitness for office, Cartwright J. held, at p. 287, that "whatever may be the extent of such a privilege it is lost if the publication is made in a newspaper." For the proposition that publication to the world at large defeated the privilege, Cartwright J. cited an early English decision, *Duncombe v. Daniell* (1838) 1 W.W. & H. 101 at 102:

> [H]owever large may be the privileges of electors, it would be extravagant to suppose, that they can justify the publication to all the world of facts injurious to the character of any person who happens to stand in the situation of a candidate.

[51] *Douglas v. Tucker* was followed in *The Globe and Mail Ltd. v. Boland*, [1960] S.C.R. 203, a case involving the claim of a candidate in a federal election against *The Globe and Mail* for an editorial accusing him of anti-Communist, McCarthy-style fear-mongering designed to mislead new Canadian voters. The defendant newspaper pleaded qualified privilege and the trial judge dismissed the action on the basis that the defence was made out.

[52] Again writing for a unanimous Supreme Court of Canada, Cartwright J. ruled that the defendant newspaper stood in no different position from that of an ordinary citizen and that it had no duty to report that would attract qualified privilege. Cartwright J. was not prepared to allow the press the defence of qualified privilege, as in his view (at p. 208) it would be contrary to the public interest

> …that every man who offers himself as a candidate must be prepared to risk the loss of his reputation without redress unless he be able to prove affirmatively that those who defamed him were actuated by express malice.

[53] Cartwright J. added, at p. 209, that he was satisfied that the interests of the press and the public were "sufficiently safeguarded by the availability of the defence of fair comment in appropriate circumstances."

[54] In *Banks v. The Globe and Mail Ltd*., [1961] S.C.R. 474, the plaintiff, a vice-president of the Seafarer's International Union, complained of an editorial alleging that his union activities had harmed the Canadian merchant fleet, that he had a criminal record, that he had gained his union office through favouritism, and that he should be denied Canadian citizenship. The trial judge ruled that the occasion was one of qualified privilege and left the issue of malice with the jury. The jury dismissed the claim.

[55] Cartwright J. held that the trial judge had erred by accepting the defence of qualified privilege, again insisting that a newspaper is in no different situation from that of any member of the public. While recognizing that newspapers could, by common law and by statute, claim qualified privilege in relation to reports of certain public proceedings, Cartwright J. was of the view that the fact that the story was of wide public interest was insufficient to attract the privilege (at p. 484):

> The decision of the learned trial judge … appears to involve the proposition of law, which in my opinion is untenable, that given proof of the existence of the subject-matter of wide public interest throughout Canada without proof of any other special circumstances any newspaper in Canada … which sees fit to publish to the public at large statements of fact relevant to that subject-matter is to be held to be doing so on an occasion of qualified privilege.

[56] In *Jones v. Bennett*, [1969] S.C.R. 277, the plaintiff was a senior public servant who had been removed from office by order-in-council. Related criminal charges against the plaintiff were subsequently dismissed but the defendant, the Premier of British Columbia, stated in a speech that "the position taken by the government [in relation to the plaintiff] is the right position." Cartwright C.J. reiterated, at pp. 284-5, his strongly held view that qualified privilege could not survive publication to the world at large:

> …it must be regarded as settled that a plea of qualified privilege based on a ground of the sort relied on in the case at bar cannot be upheld where the words complained of are published to the public generally or, as it is sometimes expressed, "to the world".

[57] This line of cases was applied by this court in *Littleton v. Hamilton* (1974), 47 D.L.R. (3rd) 663 (leave to appeal to S.C.C. refused, [1974] S.C.R. ix) where Dubin J.A. stated, at p. 665, that some "special duty" and "something more…than the mere fact that

the words are being addressed to a matter of public interest" is required to invoke qualified privilege:

> Although it has been stated that there is no confined catalogue of such occasions, it is clear that the mere fact that the publication relates to matters of public interest is not sufficient.

[58] Similarly, in *Doyle v. Sparrow* (1979), 27 O.R. (2d) 206, leave to appeal to S.C.C. refused, [1980] 1 S.C.R. xii, MacKinnon A.C.J.O. ruled, at p. 208:

> Newspapers are in no different position from any other citizen and their right to report and comment fairly does not give rise to a duty to report to the world such as is required to make the occasion one of qualified privilege.

5. Decisions allowing the defence of qualified privilege in relation to matters of public interest

[59] Despite this significant line of authority, recent cases have been considerably more receptive to the argument that, in certain circumstances, the media has a duty to report on matters of public interest, that there is a corresponding interest in the public at large to receive such information, and that in such cases, the defence of qualified privilege is available.

[60] *Stopforth v. Goyer* (1979), 23 O.R. (2d) 696 (C.A.), involved a statement made by the defendant Minister of Supply and Services outside the House of Commons alleging wrongdoing by the plaintiff, a dismissed senior public servant. In stark contrast to cases such as *Jones v. Bennett*, *supra*, Jessup J.A. reversed the trial judgment on the ground that the trial judge erred in refusing to allow the defendant the defence of qualified privilege (at pp. 699-700):

> In my opinion the electorate, as represented by the media, has a real and *bona fide* interest in the demotion of a senior civil servant for an alleged dereliction of duty. It would want to know if the reasons given in the House were the real and only reasons for the demotion. The appellant had a corresponding public duty and interest in satisfying that interest of the electorate.

[61] The Courts of Appeal of British Columbia and Saskatchewan have also recognized what McConchie and Potts, *supra* at p. 394, refer to as a "politician's duty to ventilate" even when the statement is broadcast to the world at large: see *Parlett v. Robinson*, (1986) 30 D.L.R. (4th) 247 (B.C.C.A.), leave to appeal to S.C.C. refused, [1986] 2 S.C.R.

viii; *Loos v. Robbins* (1987), 37 D.L.R. (4th) 418 (Sask. C.A.); *Baumann v. Turner* (1993), 105 D.L.R. (4th) 37.

[62] In *Grenier v. Southam Inc*., [1997] O.J. No. 2193, this court, in a brief endorsement, affirmed (at para. 7) the trial judge's ruling "that there was a social and moral duty on the respondent [newspaper] to publish the article in question and that the article was thus published on an occasion of qualified privilege." We were provided with a copy of the trial judge's unreported reasons (Houston J., January 22, 1993 and August 27, 1993) from which it appears that the gist of article related to "fundamental religion" and the help that could be offered to individuals who "had become obsessed with the gospel preachers". Although this court's reasons are brief, it is apparent from the trial judgment that the Supreme Court's decisions in *Boland* and *Banks*, *supra*, and this court's decision in *Littlejohn v. Hamilton*, *supra*, were all cited and argued.

[63] Several trial judges have interpreted *Grenier* and the House of Lords' decision in *Reynolds*, *supra*, to have opened the door to the defence of qualified privilege where the media reports on matters of public interest. In *Leenen v. Canadian Broadcasting Corp*. (2000), 48 O.R. (3d) 656 at 695, aff'd (2001), 54 O.R. (3d) 612, a case dealing with a television documentary involving a controversial drug, it was alleged that the plaintiff doctor was in a conflict of interest and had received a pay-off or kickback from the drug manufacturer. Cunningham J. ruled:

> The defendants say that the CBC… has a statutorily mandated duty to inform Canadians on matters of public importance such as the health and welfare of its citizens. Given this mandate the defendants say that this broadcast is but one example of the CBC fulfilling its mandate. Until recently, there was some doubt as to whether publication to the world at large could ever give rise to an occasion of qualified privilege. However, that issue was definitively resolved by the Court of Appeal in *Grenier v. Southam Inc.* [citation omitted]. In that case, the court upheld the finding at trial that qualified privilege can attach to communication by the media published to the world at large if it is published in the context of a social or moral duty to raise the underlying issue. This principle was enunciated further by the House of Lords in *Reynolds v. Times Newspapers, supra*.

[64] Cunningham J. proceeded to apply the *Reynolds* test for qualified privilege, the details of which I consider later in these reasons, but found that the defendant CBC had in fact acted contrary to the public interest by sensationalizing the issue, creating viewer interest through alarm and providing the show's producer with a platform for his personal views. He found that the story was not presented in a fair and balanced manner but rather

in a slanted and biased way known by the CBC to be inaccurate or untrue and the defence of qualified privilege "fail[ed] miserably" (at pg. 698).

[65] In dismissing an appeal to this court, Austin J.A. quoted, at para. 10, without adverse comment, the trial judge's statement that the defence of qualified privilege was available to the media defendant if it could "establish not only some public or private duty, but also that the recipient had a corresponding interest in receiving the information."

[66] Similarly, in *Young v. Toronto Star Newspapers Ltd.* (2003), 66 O.R. (3d) 170 (S.C.J.), aff'd (2005), 77 O.R. (3d) 680 (C.A.), Rouleau J., citing *Grenier*, *supra*, and *Reynolds*, *supra*, ruled at paras. 175-76: "Qualified privilege is available to newspapers where social or moral duty appears to have motivated the publication …. Qualified privilege is rooted in the concept of freedom of expression and the interest of the public to be informed."

[67] The defence of qualified privilege in relation to a publication to the world at large was accepted in *Silva v. Toronto Star Newspaper Ltd.* (1998), 167 D.L.R. (4th) 554 (Ont. Gen. Div.) (aff'd on other grounds: (2002), 215 D.L.R. (4th) 77 (C.A.)).

[68] In *Lee v. Globe & Mail* (2001), 6 C.P.C. (5th) 354 (S.C.J.), Swinton J. refused to strike out as untenable in law a paragraph in the statement of defence raising the defence of qualified privilege in an action brought by the former President of Singapore. She observed, at para. 19, that the law of qualified privilege in relation to the media "is clearly in a state of evolution" and cited *Reynolds*, *supra*, for the proposition that in some circumstances, to be determined on a case by case basis, "the public interest requires that publication to the world at large should be privileged."

[69] Similarly, in *Bennett Environmental Inc. v. Toronto Star Newspapers Ltd.*, [2004] O.J. No. 2456, Himel J. refused to strike a paragraph in the statement of defence raising qualified privilege in relation to a story regarding an environmental issue which alleged that the plaintiff had made repeated attempts to stifle public debate and intimidate its critics. Citing the cases I have just discussed, Himel J. observed, at para. 11, that while "[h]istorically, the defence of qualified privilege did not apply to a publication 'to the whole world'", more recent cases had allowed it. Citing *Reynolds*, *supra*, she concluded at para 13: "The law of qualified privilege as it relates to the news media is in a state of flux" and that availability of the defence depended "upon a review of all the circumstances of the case".

[70] In *Campbell v. Jones* (2002), 220 D.L.R. (4th) 201, leave to appeal to S.C.C. refused, [2002] S.C.C.A. 543, the Nova Scotia Court of Appeal held that comments made at a press conference by two lawyers complaining about how the police treated their clients attracted qualified privilege. Although the media defendants had settled before the appeal and hence the court did not address that aspect of qualified privilege, the comment of Roscoe J.A., at para. 69, as to the duty of the courts to shape the defence are

pertinent: “It has always been the task of judges to determine what constitutes an occasion of qualified privilege, and it is, therefore, within the power of the common law courts to modify the common law incrementally to ensure that it conforms with *Charter* values.”

[71] On this state of the authorities, one can hardly quarrel with the proposition that the law of qualified privilege is in a state of “evolution” and “flux” and considerably more nuanced than would appear from a literal reading of the *Douglas v. Tucker* line of cases. Before turning to the issue of what this court should make of this fluid situation in relation to qualified privilege, I propose to review the Supreme Court of Canada’s decision in *Hill v. Scientology* and then to explore how the law has evolved in other common law jurisdictions.

6. Hill v. Scientology

[72] *Hill v. Scientology* arose from unfounded allegations of contempt of court made against the plaintiff, a Crown attorney. At a press conference held on the courthouse steps, the defendant’s legal counsel read from and commented upon a yet to be filed notice of motion seeking an order of contempt of court against the plaintiff. The allegations were later dismissed as untrue and unfounded at the contempt proceeding and the plaintiff sued both the defendant Church of Scientology and its legal counsel for libel. The jury awarded substantial general, aggravated and punitive damages. An appeal to this court was dismissed: (1994), 18 O.R. (3d) 385.

[73] The Supreme Court of Canada rejected the defendants’ argument that the Canadian law of defamation was inconsistent with the *Charter* and that Canada should follow the decision of the Supreme Court of the United States in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and require proof of actual malice as a prerequisite to recovery for libel. The Supreme Court of Canada also refused to reduce or cap the jury’s award of damages. The court did, however, overrule one of its earlier decisions and hold that, in light of the *Charter* value of freedom of expression, the defence of qualified privilege should extend to the comments made in relation to intended legal proceedings but found that the privilege had been exceeded in this case.

[74] In his lengthy reasons, Cory J. found that the *Charter* does not apply directly as the suit was one between private parties governed by the common law. Cory J. recognized, however, at para. 100, that whatever is “added to the field of libel law is taken from the field of free debate” [citation omitted]. Following *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Dagenias v. Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835; *R. v. Salituro*, [1991] 3 S.C.R. 654; and *R. v. Swain*, [1991] 1 S.C.R. 933, he held, (at para. 91), that the common law of defamation “must be interpreted in a manner which is consistent with *Charter* principles” and, at para. 92, “that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the *Charter*.”

[75] Cory J. identified two competing *Charter* values, freedom of expression and protection of reputation. He reviewed the Court's freedom of expression jurisprudence but concluded, at para. 106, that "defamatory statements are very tenuously related to the core values which underlie s. 2(b)" and "are inimical to the search for the truth." Although protection of individual reputation is not mentioned in the *Charter*, Cory J. identified, at para. 120, individual reputation as reflecting "the innate dignity of the individual, a concept which underlies all the *Charter* rights" and is therefore "of fundamental importance to our democratic society."

[76] Cory J. rejected the contention that Canadian law should follow *New York Times v. Sullivan*, *supra*, do away with the presumptions of falsity and malice and require a "public figure" plaintiff to prove that the defendant either knew the statements to be false or was reckless as to the truth. He read *New York Times v. Sullivan* as being largely the product of the American anti-segregation, civil rights movement of the 1960s. Cory J. cited articles by critics of the decision who complained that the "public figure" category was uncertain, that the focus of libel suits shifted from the truth of impugned statements to the conduct of the defendant, that the malice requirement increased the cost and complexity of litigation, and that the value of truth in public discourse had been deprecated. He noted that while England and Australia had modified the law of defamation, neither had adopted the actual malice requirement. Cory J. wrote, at para. 137: "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*."[Emphasis added.]

[77] He concluded this portion of his judgment, at paras. 139-141:

> None of the factors which prompted the United States Supreme Court to rewrite the law of defamation in America are present in the case at bar. *First, this appeal does not involve the media or political commentary about government policies. Thus the issues considered by the High Court of Australia in Theophanous, supra, are also not raised in this case and need not be considered*.
>
> Second, a review of jury verdicts in Canada reveals that there is no danger of numerous large awards threatening the viability of media organizations. Finally, in Canada there is no broad privilege accorded to the public statements of government officials which needs to be counterbalanced by a similar right for private individuals.
>
> In conclusion, *in its application to the parties in this action*, the common law of defamation complies with the underlying

> values of the *Charter* and there is no need to amend or alter it. [Emphasis added.]

[78] Cory J. did, however, modify the law of qualified privilege in relation to court proceedings not yet filed. Before *Hill v. Scientology*, the common law extended qualified privilege to reports on documents relating to judicial proceedings, the rationale being (at para. 151) "that the public has a right to be informed about all aspects of proceedings to which it has the right of access." The privilege did not extend, however, to pleadings or other documents that had not been filed in open court: *Gazette Publishing Co. v. Shallow* (1909), 41 S.C.R. 339. Changes in social and legal standards regarding the openness of court proceedings and documents required an extension of the privilege to documents filed or about to be filed (at para. 154):

> The public interest in documents filed with the court is too important to be defeated by the kind of technicality which arose in this case….The fact that, by some misadventure, the strict procedural requirement of filing the documents had not been fulfilled at the time of the press conference should not defeat the qualified privilege which attached to this occasion.

[79] However, Cory J. found, at para. 155, that as the conduct of the defendant's legal counsel "far exceeded the legitimate purposes of the occasion", the privilege was defeated. He had failed to take reasonable steps to confirm the serious allegations against the professional integrity of the plaintiff or to await the results of a pending investigation being conducted by his client. His comments were intended for the widest possible dissemination and his language portrayed the plaintiff in the worst possible light.

[80] Finally, Cory J. considered and rejected the appellants' submission that some limit or cap should be imposed on damages awards in libel actions.

[81] I will return to the implications of *Hill v. Scientology* in relation to the issue before us on this appeal after considering the development of the law of defamation in other common law jurisdictions.

7. The Evolution of Qualified Privilege in England

(i) Reynolds v. Times Newspapers Ltd.

[82] In *Reynolds*, *supra*, the former Prime Minister of the Irish Republic sued *The Sunday Times* for libel in an article suggesting that he had deliberately misled the Irish Parliament and his cabinet. The trial judge heard and rejected submissions by the defendant for a wide common law qualified privilege for "political speech". The jury found that the allegations were defamatory, but awarded the plaintiff "zero damages", modified by the trial judge to an award of one pence. The Court of Appeal rejected the

argument that the defendants could rely on qualified privilege but ordered a new trial on other grounds. The House of Lords affirmed the decision but pronounced that a form of qualified privilege is available to a newspaper that follows the standards of responsible journalism when reporting on a matter of public interest.

[83] In the lead judgment, Lord Nicholls set out the competing values of protection of reputation and freedom of speech. He observed, at p. 192, that in its traditional formulation, "the common law has set much store by protection of reputation". However, the common law has also long recognized the "chilling" effect of its "rigorous, reputation protective principle" and that "[t]here must be exceptions" to protect the competing values of freedom of speech and the public interest in the free flow of information (at pp. 192-93):

> At times people must be able to speak and write freely, uninhibited by the prospect of being sued for damages should they be mistaken or misinformed. In the wider public interest, protection of reputation must then give way to a higher priority.

[84] Lord Nicholls observed, at p. 197, that while qualified privilege ordinarily applied to publication to a limited group, there were occasions (reports of the proceedings of Parliament and certain public meetings) where publication to the world at large does satisfy the duty-interest test. Applying the duty-interest test, a claim to privilege stands or falls according to "whether the public was entitled to know the particular information".

[85] Lord Nicholls rejected the argument that English law should recognize a new category of privileged subject matter such as "political information" as recognized in the Australian and New Zealand cases I will discuss below.

[86] Lord Nicholls emphasized the importance of freedom of expression, particularly in light of the *Human Rights Act 1998*, c. 42 (incorporating the *European Convention for the Protection of Human Rights and Fundamental Freedoms* into U.K. law), its relationship to the democratic process, and the essential role of the media and investigative journalism in realizing freedom of expression (at p. 200G-H):

> Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment.

[87] Adverting to the importance of protecting reputation as an element of the dignity of the individual, Lord Nicholls held, at p. 201D, that the proper analytical approach

would be to identify "the restrictions which are fairly and reasonably necessary for the protection of reputation."

[88] Lord Nicholls held that a malice standard would easily satisfy the need to respect freedom of expression. However, in view of the difficulty of proving malice, such a standard offered inadequate protection for reputation. He opted instead for a more flexible and malleable standard of "responsible journalism". While admitting that this approach imports some uncertainty which may result in some chilling effect, Lord Nicholls suggested that "[w]ith the enunciation of some guidelines by the court, any practical problems should be manageable." (at p. 202F).

[89] Emphasizing the "elasticity" of the common law principle of qualified privilege in relation to matters of public interest and the undesirability of developing a subject-specific qualified privilege, Lord Nicholls held that the "responsible journalism" standard "enable[d] the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern" (at p. 204H). He then provided a non-exhaustive list of ten factors to be taken into account in determining whether the defendant had conducted itself in accordance with the standards of responsible journalism:

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.

[90] Lord Nicholls concluded by cautioning that: “The court should be slow to conclude that a publication was not in the public interest, and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication” (at p. 205F).

[91] Lord Nicholls maintained the common law reverse onus of proof on the defendant to make out the defence. Noting that “[a] newspaper will know much more of the facts leading up to publication” and that “[t]he burden of proof will seldom, if ever, be decisive” (at p. 203E), he held that the burden of proof should remain on the party asserting the privilege. So too were the respective roles of judge and jury maintained. Disputes as to “primary fact[s]” are to be decided by the jury. “The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge” (at p. 205D).

[92] The House of Lords was divided on the question of whether or not the defendants should be permitted to raise the defence at the new trial - by a majority of three to two, the House decided that the answer was no. Lords Cooke, Hope and Hobhouse delivered separate speeches essentially agreeing with Lord Nicholls’ formulation of the responsible journalism defence, while Lord Steyn opted for recognition of “qualified privilege of political speech, based on a weighing of the particular circumstances of the case” (at p. 215E).

[93] Lord Steyn emphasized the “new legal landscape” arising from the adoption of the *Human Rights Act 1998* and the guarantees for freedom of expression therein. This “new landscape … provides the taxonomy against which the question … must be considered. The starting point is now the right of freedom of expression, a right based on a constitutional or higher legal order foundation. Exceptions to freedom of expression must be justified as being necessary in a democracy” (at p. 208A-B).

[94] Lord Cooke reiterated the House’s rejection of a generic privilege for political discussion and preference for a more general and contextual defence derived from the duty-interest test:

> It is undeniable that a privilege depending on particular circumstances may produce more uncertainty and require more editorial discretion than a rule-of-thumb one. But in other professions and callings the law is content with the standard of reasonable care and skill in all the circumstances. The fourth estate should be as capable of operating within general standards. (at p. 224G)

[95] Lord Hope also rejected a generic qualified privilege for political discussion as he was concerned about the difficulty of defining and limiting the privilege to political discussion and the ability of the defendant publisher to not disclose its sources. Lord

Hope noted that protection of the media's sources "has an essential part to play in the role of the media in a free and democratic society." However, the privilege required that the media "hav[e] to justify each claim to the benefit of qualified privilege should the statements of fact which are made by the media turn out to be defamatory" (at p. 235B).

(ii) Jameel v. Wall Street Journal

[96] The full impact of *Reynolds* was perhaps not felt until the House of Lords pronounced its decision in *Jameel.* In early 2002, *The Wall Street Journal Europe* published an article which asserted that, at the request of U.S. law enforcement agencies, the Saudi Arabian Monetary Authority was monitoring bank accounts associated with prominent businessmen to ensure that they would not be used to transmit funds to terrorist organizations. The article listed a number of companies and individuals, including the respondents, and stated that they could not be reached for comment on the allegations.

[97] The jury found the article defamatory of the respondents. The Court of Appeal affirmed the trial judge's denial of the *Reynolds* privilege on the basis that the paper had not waited a sufficient period of time before running the story without comment from the respondents. The House of Lords strongly criticized the trial judge and Court of Appeal for taking an unduly restrictive view of the scope of the *Reynolds* defence and reinforced the public interest responsible journalism defence as a distinct form of qualified privilege to be applied in a media-friendly manner.

[98] The leading speech was delivered by Lord Bingham who reiterated the *Reynolds* approach, describing the qualified privilege as "aris[ing] where a statement is defamatory and untrue", but is nevertheless in the public interest (at para. 32). The privilege assumes "that there is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify" (at para. 32). He underscored that the ten factors listed by Lord Nicholls amounted merely to indicia as to whether the defendant had exercised responsible journalism, and not to "a series of hurdles to be negotiated by a publisher" (at para. 33) and clarified that the appropriate locus or focus for the responsible journalism analysis related to "the thrust of the article" (at para. 34). That is, a publisher need not establish that it acted as a responsible journalist in relation to each defamatory statement if it can establish that it acted responsibly in relation to the story as a whole, assuming that "the thrust of the article is true, and the public interest condition is satisfied" (at para. 34).

[99] Lord Hoffman, quoting the Court of Appeal in *Loutchansky v. Times Newspapers Ltd.*, [2002] 1 All E.R. 652 at para. 35, described the *Reynolds* public interest responsible journalism defence as "a different jurisprudential creature from the traditional form of privilege from which it sprang" (at para. 46). He agreed with Lord Bingham that the question of public interest is to be determined in relation to the article as a whole and not by focussing narrowly on the specific defamatory statements (at para. 48). *Reynolds*

established that "in matters of public interest, there can be said to be a professional duty on the part of journalists to impart the information and an interest in the public in receiving it" (at para. 50). No *de novo* duty-interest inquiry should be undertaken by the judge; a finding of public interest is determinative of the availability of the privilege.

[100] If the article as a whole is in the public interest, said Lord Hoffman, the focus of the inquiry shifts to determining whether the defamatory statements were "part of the story" (at para. 51). "And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element of the article" (at para. 51). In making this determination, deference should be shown to "editorial judgment"(at para. 51). If both the publication as a whole and the defamatory statements were in the public interest, the question then becomes whether responsible journalism was practised in the "gather[ing] and publish[ing] of the information" (at para. 53). Such an inquiry should not treat Lord Nicholls's ten factors as ten distinctive hurdles (at para. 56).

[101] Lord Scott disagreed with Lord Hoffman's characterization of the *Reynolds* privilege as a "different jurisprudential creature" (at para. 135). However, Baroness Hale, like Lord Hoffman, viewed the *Reynolds* defence as a "'different jurisprudential creature' from the law of privilege, although it is a natural development of that law" (at para. 146). Undue focus on the duty-interest analysis would narrow the availability of the privilege, and this would be at odds with *Reynolds* (at para. 146): "In truth, it is a defence of publication in the public interest."

8. Australia

[102] In *Lange v. Australian Broadcasting Corporation* (1997), 145 A.L.R. 96, the High Court of Australia considered whether it should uphold, modify, or reject two of its previous decisions, *Theophanous v. Herald & Weekly Times Ltd.* (1994), 124 A.L.R. 1 and *Stephens v. West Australian Newspapers Ltd.* (1994), 124 A.L.R. 80, which held that the Constitution provided, by necessary implication, a defence to the publication of defamatory material relating to governmental and political matters provided the media could satisfy a reasonableness standard.

[103] The plaintiff Lange was a former New Zealand Prime Minister who asserted that the defendant had published defamatory material about him. He argued that *Theophanous* and *Stephens* were wrongly decided and that, even if they were upheld, were limited to *Australian* governmental and political issues.

[104] The *Lange* court described the *Theophanous – Stephens* defence as being derived from the provisions in the Australian Constitution relating to representative government that "necessarily protect that freedom of communication between the people concerning political or government matters which enables people to exercise a free and informed choice as electors" (at para. 33). Accordingly, neither statute nor common law can

abridge this right. The *Lange* court quoted the central holding of *Theophanous* (at para. 8):

> There is implied in the Commonwealth Constitution a freedom to publish material: (a) discussing government and political matters; (b) of and concerning members of the Parliament … which relates to the performance by such members of their duties as members of the Parliament or parliamentary committees; (c) in relation to the suitability of persons for office as members of the Parliament.

[105] It fell to the courts to develop this constitutional right "in response to changing conditions. The expansion of the franchise, the increase in literacy, the growth of modern political structures operating at both federal and State levels and the modern development of mass communications … now demand the striking of a different balance" between freedom of discussion and protection of reputation (at para. 46).

[106] *Theophanous*, noted the *Lange* court at para. 9, held that a "publication will not be actionable under the law relating to defamation if the defendant establishes that: (a) it was unaware of the falsity of the material published; (b) it did not publish the material recklessly … and (c) the publication was reasonable in the circumstances". *Theophanous* had described this as an occasion of qualified privilege but the *Lange* court characterized it is a discrete defence to defamation.

[107] The High Court found that the common law of defamation "must now be seen as imposing an unreasonable restraint on … freedom of communication" (at para. 60) and was incompatible with the constitutional right to freedom of communication in governmental or political matters (at para. 62):

> [E]ach member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it.

[108] The court reiterated the reasonableness requirement established in *Theophanous*. An inquiry into reasonableness will be contextual. "[A]s a general rule", said the court, reasonableness will require that the defendant establish that it "had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue" (at para. 71). It will also require the defendant to have "sought a response from the person defamed and published the response made (if any)" unless impracticable or unnecessary to do so (at para. 71). The plaintiff retains the ability to prove malice,

which defeats the privilege because the publication would then "not [be] made for the purpose of communicating government or political information or ideas" (at para. 69).

9. New Zealand

[109] The same former Prime Minister of New Zealand as in the Australian case launched a second libel suit in New Zealand against a magazine publisher and the author of an article and cartoon published in the magazine that critically reviewed the plaintiff's political performance.

[110] He brought an unsuccessful interlocutory motion to strike parts of the statement of defence that pleaded a defence of political expression and qualified privilege: [1997] 2 N.Z.L.R. 22 (H.C.). He was also unsuccessful at the New Zealand Court of Appeal: [1998] 3 N.Z.L.R. 424.

[111] After thoroughly canvassing the differing jurisprudential approaches of Canada, the U.S., the U.K., Australia, and the European Court of Human Rights, the Court of Appeal held, at p. 468, that:

> 1. The defence of qualified privilege may be available in respect of a statement which is published generally.
>
> 2. The nature of New Zealand's democracy means that the wider public may have a proper interest in respect of generally-published statements which directly concern the functioning of representative and responsible government, including statements about the performance or possible future performance of specific individuals in elected public office.
>
> 3. In particular, a proper interest does exist in respect of statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to such office, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities.
>
> 4. The determination of the matters which bear on that capacity will depend on a consideration of what is properly a matter of public concern rather than of private concern.
>
> 5. The width of the identified public concern justifies the extent of the publication.

[112] The court rejected a reasonableness requirement, reasoning, at pp. 469-470, that because "[t]he basis of qualified privilege is that the recipient has a legitimate interest to receive information assumed to be false … that interest [does not change] simply because the author has failed to take care to ensure that the information was true". Moreover, it noted that a reasonableness inquiry would undercut the malice requirement, which had recently been reaffirmed by statute (at p. 470).

[113] The plaintiff appealed to the Privy Council. The same Law Lords who decided *Reynolds* constituted themselves as the Judicial Committee of the Privy Council to hear the *Lange* appeal: [2000] 1 N.Z.L.R. 257. The Privy Council set aside the Court of Appeal's decision. Recognizing, at p. 261, that "striking a balance between freedom of expression and protection of reputation calls for a value judgment which depends on local and political conditions", the Privy Council invited the New Zealand Court of Appeal to reconsider its decision in light of *Reynolds*.

[114] The New Zealand Court of Appeal refused to alter its earlier holding: [2000] 3 N.Z.L.R. 385. At para. 8, the court stated:

> In the United Kingdom the subject matter is widely defined, but the focus is directed particularly to the position of a national newspaper. In Australia the subject matter relates essentially to the conduct of politicians, both in that country and elsewhere. In New Zealand the subject matter is tightly defined, but its application is to all manner of publications. It is primarily the definition of the controls governing the extension which has given rise to differences of approach.

[115] The court distinguished New Zealand's constitutional and political systems from those of the United Kingdom and Australia on the basis of differences in the electoral system (at para. 26); the wider access to information enjoyed by New Zealanders (at para. 27); the enactment of the *New Zealand Bill of Rights Act 1990*, which differs from the *Human Rights Act 1998* in its emphasis on "the protection of public processes, namely political processes", its omission of express protection of privacy, and the absence of a direction to consider freedom of expression when it is implicated in a court ruling (at paras. 28-30); and the repeal in New Zealand of certain criminal offences relating to "public debate on political matters" (at para. 31).

10. South Africa

[116] In *Bogoshi v. National Media Ltd.*, [1998] S.A.J. No. 25, the Supreme Court of Appeal of South Africa ruled that the common law of defamation provided insufficient protection for freedom of expression. Hefer J.A. concluded, at para. 21, that the balance struck in the previous case law, based upon what I have earlier described as the traditional

common law, provided insufficient protection for freedom of the press, particularly in light of "the right, and indeed … vital function … of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion" (at para. 26).

[117] The test adopted by the South African court, at para. 32, corresponds closely to *Reynolds*:

> [T]he publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time.

[118] Factors relevant to this analysis include: the subject matter of the article (a "greater latitude is usually allowed in respect of political discussion" (at para. 33)); its tone (at para. 33); the reliability of the information ("the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information" (at para. 33)); whether the plaintiff was given an opportunity to respond (at para. 34); and, whether circumstances of urgency in publishing existed so as to justify a failure to take more time in checking the validity of the information (at para. 34). The burden of proof rests on the defendant, because "the facts upon which the defendants rely … are peculiarly within their knowledge" (at para. 44). Accordingly, "it is for the defendant to prove all the facts on which he relies to show that the publication was reasonable and that he was not negligent. Proof of reasonableness will usually (if not inevitably) be proof of lack of negligence" (at para. 44).

11. United States

[119] *New York Times v. Sullivan*, *supra*, holds that a public official cannot recover damages for defamatory statements relating to his or her official conduct without proof of actual malice, namely, that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false. The plaintiff, an elected official from Alabama, sued in relation to an advertisement in the *New York Times* that did not name him but recited certain incidents from the anti-segregation campaign and solicited funds for its continuation.

[120] The Supreme Court of the United States held that the no-fault rule of libel law affording the defendant a defence only if it can persuade the jury that the facts stated were true imposed an unjustifiable constraint on freedom of expression. The rule had to be considered (at p. 270):

> against the background of a profound national commitment to the principle that debate on public issues should be

> uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

[121] The court found, at p. 272, "[t]hat erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive'." [citation omitted]. The inhibiting fear that flows from "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions - and to do so on pain of libel judgments virtually unlimited in amount - leads to…'self-censorship'" (at p. 279). Such a rule, said the court, does not only deter false speech. "[W]ould-be critics of official conduct may be deterred from voicing their criticism" although they believe it to be true or even where they know it to be true "because of doubt whether it can be proved in court or fear of the expense of having to do so." The chilling effect of the rule produces a tendency "to make only statements which 'steer far wider of the unlawful zone.' [citation omitted]. The rule thus dampens the vigour and limits the variety of public debate" (at p. 279).

12. Other Jurisdictions: Conclusion

[122] While evolution of the law of defamation has produced a variety of solutions in different jurisdictions, the evolution away from the common law's traditional bias in favour of the protection of reputation is strikingly uniform. The courts of England, Australia, New Zealand, South Africa, and the United States have all concluded that the traditional common law standard unduly burdens freedom of expression and have all made appropriate modifications to achieve a more appropriate balance between protecting reputation on the one hand and the public's right to know on the other.

13. The direction for Ontario's law of defamation

[123] The respondent submits that it is not open to this court to accept the submission that Ontario law should adopt either an expanded qualified privilege defence in relation to matters of public interest or the *Reynolds-Jameel* public interest responsible journalism defence. The respondent relies on the *Tucker v. Douglas* line of Supreme Court of Canada authority from the 1950s and 60s restricting the availability of qualified privilege where the publication is to the world at large as well as on the Supreme Court's decision in *Hill v. Scientology* finding the law of defamation consistent with the *Charter*.

[124] For the following reasons, I disagree with the respondent's submission and would hold that the appropriate way for this court to reconcile the authorities is to adopt a public interest defence for responsible journalism.

[125] It is hardly necessary to repeat here the importance of the rights protected by s. 2(b) of the *Charter*, namely "freedom of thought, belief, opinion and expression,

including freedom of the press and other media of communication". These rights are an inherent aspect of our system of government and have been generously interpreted by the courts. Democracy depends upon the free and open debate of public issues and the freedom to criticize the rich, the powerful and those, such as police officers, who exercise power and authority in our society. Freedom of expression extends beyond political debate to embrace the "core values" of "self-fulfilment", "the communal exchange of ideas", "human dignity and the right to think and reflect freely on one's circumstances and condition": *R.W.D.S.U. v. Pepsi-Cola*, [2002] 1 S.C.R. 156 at para. 32. Debate on matters of public interest will often be heated and criticism will often carry a sting and yet open discussion is the lifeblood of our democracy. This court recognized in *R. v. Kopyto* (1987), 62 O.R. (2d) 449 at 462 that "[i]f these exchanges are stifled, democratic government itself is threatened."

[126] On the other side of the scales, the Supreme Court of Canada has recognized and reaffirmed that the protection of reputation is also an important Charter-protected Canadian value: *Hill v. Scientology* at para. 120

[127] In its traditional form, the law of defamation is designed to have a "chilling effect" on freedom of expression where a speaker or publisher is about to make a statement that may affect an individual's reputation. The fact that "[t]he threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech" (*Derbyshire County Council v. Times Newspapers Ltd.*, [1993] 1 All E.R. 1011 at 1017 (H.L.)), and "the tendency of the law of defamation to inhibit the exercise of the freedom of communication – 'the chilling effect'" (*Theophanous*, *supra* at 19) has been recognized on high authority. The common law no-fault standard creates a powerful incentive to err on the side of caution and to avoid controversy. A judgment such as that in the case at bar sends a strong message: there is simply no margin for error or allowance for the expression of views honestly and reasonably held. A newspaper that has properly investigated the story and has every reason to believe it to be true still walks on thin ice. The fear or risk of being unable to prove the truth of controversial matters is bound to discourage the publication of information the public has a legitimate interest in hearing.

[128] There is a very real difference between what a speaker honestly and reasonably believes to be true and what can be proved to be true in a court of law. The threat of litigation under a legal regime that leaves no margin for error, even where the speaker took all reasonable steps to verify the facts, discourages free and open debate on matters of public importance.

[129] Under the traditional common law regime, society makes a clear choice to forego a certain level of exposure, scrutiny and criticism on matters of public interest in the name of protecting individual reputation. That choice sacrifices freedom of expression to the protection of reputation to a degree that today cannot be sustained as consistent with *Charter* values. I agree with the courts of England, Australia, New Zealand, South Africa and the United States, and with the Canadian judges who have gradually expanded the

defence of qualified privilege, that the inhibiting effect of traditional defamation law is incompatible with the climate of free and robust debate to which a democratic society aspires.

[130] As several recent decisions of this court and of the Superior Court of Justice have held, the Supreme Court's qualified privilege decisions from the 1950s and 60s cannot be taken as having frozen the law of defamation in a permanent state of hostility to any and all change to what Lord Nicholls described in *Reynolds* as the common law's "rigorous reputation-protection principle". The *Douglas v. Tucker* line of cases was decided some fifty years ago in a very different legal context, one that gave preponderant consideration to protection of reputation. These cases bear the mark of the pre-*Charter* past, an era less concerned about the right of free expression and the need for open, vibrant political debate. In my respectful view, it would be wrong to read these cases as standing for a proposition they could not possibly have decided, namely, that the law of defamation should not evolve in a manner more consistent with the *Charter* values of freedom of expression and freedom of the media.

[131] I do not find persuasive the contention that this is a change only the Supreme Court of Canada can make. We do not come to this issue with a clean slate inscribed only with the restrictive decisions from the 1950s and 60s. Those cases must be read not only in the light of the *Charter* guarantee of freedom of expression and the press, but also in light of the more recent decisions from this court, the Superior Court, and from the highest courts of England, Australia, New Zealand, South Africa and the United States, all of which abandon the rigidly reputation-protection stance of the earlier law in favour of the freer flow of information on matters of public interest. The existing case law is in a state of flux, evolution and, to some extent, confusion. In these circumstances, it is properly the duty of this court to clarify the law by resolving the apparent conflict in the authorities and to make appropriate incremental changes to the common law to ensure compliance with *Charter* values.

[132] That, of course, does not mean that we can or should simply ignore the *Douglas v. Tucker* line of decisions. Likewise, we must respect the Supreme Court's ruling in *Hill v. Scientology*. Individual reputation should not be unduly sacrificed or compromised. Protection of reputation is an essential part of the legal framework to ensure individual dignity in our society. Any adjustment to the common law to accommodate freedom of expression must be incremental in nature. Restrictions on expression that, as it was put it in *Reynolds* (at p. 201D), "are fairly and reasonably necessary for the protection of reputation" are justifiable.

[133] Our task, it seems to me, is to interpret and apply the earlier decisions in light of the *Charter* values at issue and in light of the evolving body of jurisprudence that is plainly moving steadily towards broadening common law defamation defences to give appropriate weight to the public interest in the free flow of information.

[134] In that spirit, I would reject the appellants' submission that we should extend qualified privilege in its traditional form to all media reports on matters of public interest. In my view, this would be contrary both to binding authority and to sound legal policy.

[135] The *Douglas v. Tucker* line of cases clearly holds that qualified privilege does not extend to all media reports on matters of public interest. *Hill v. Scientology* did not consider this aspect of qualified privilege, but we must take into account the fact that the Supreme Court flatly rejected the argument that Canadian law should adopt the *New York Times v. Sullivan* actual malice test. The effect of extending traditional qualified privilege in the manner submitted by the appellants would be to require all plaintiffs suing with regard to a report on a matter of public interest to prove malice. In my view, that would be contrary to the spirit, if not the letter, of *Hill*.

[136] Turning to the question of sound policy, recognizing the general availability of qualified privilege for reports on all matters of public interest and the consequent adoption of a malice requirement would represent a significant change to Ontario law. Malice is notoriously difficult to prove and the adoption of a malice standard would, as a practical matter, make recovery for most plaintiffs a remote possibility. In my view, the adoption of qualified privilege in its traditional form to all reports on matters of public interest would represent a dramatic and unwarranted shift in the law that would unduly minimize the protection of the important value of individual reputation.

[137] On the other hand, I do not agree that the *Douglas v. Tucker* line of cases precludes this court from adopting a public interest defence of responsible journalism along the lines of *Reynolds* and *Jameel*. I agree with the English Court of Appeal in *Loutchansky*, *supra*, and with Lord Hoffman and Baroness Hale in *Jameel* that this new defence is "a different jurisprudential creature from the traditional form of privilege from which it sprang". 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.

[138] Nor do I agree that *Hill v. Scientology* precludes us from taking this step. *Hill* was decided before *Reynolds* and must be read in the light of its facts and the jurisprudential issue it posed. As Cory J. expressly stated, the appeal did not involve the media. The court's decision that "the common law of defamation complies with the underlying values of the *Charter* and there is no need to amend or alter it" was explicitly made in relation to the application of the law "to the parties in this action", namely non-media defendants who had made an egregious and unwarranted attack upon the reputation of an innocent Crown attorney who had been completely vindicated at the contempt trial. The

defendants had made no attempt at a *bona fide* investigation and were acting in pursuit of private interests. There was absolutely no public interest in having such a vicious attack published to the community at large. Cory J.'s statement that "[s]urely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish" is, in my view, entirely consistent with what the *Reynolds-Jameel* defence aims to achieve: namely, requiring the media defendant to satisfy the onus of demonstrating that it did take reasonable steps to ascertain the truth of the story by following the standards of responsible journalism when investigating, writing and publishing the defamatory statement. The conclusions in *Hill* must be read in the context of the case that was before the Supreme Court and, when read in that light, fall well short of a categorical ruling that would preclude reconsideration of the law of defamation in light of *Charter* values.

[139] I conclude that the appropriate way for this court to resolve the clear tension between the *Douglas v. Tucker* line of cases and the more recent decisions of this and other courts favouring a more liberal availability of qualified privilege is to adopt, in its broad outline, the public interest responsible journalism defence. As I see it, this defence represents a natural extension of the law as it has been developing in recent years, an incremental change "necessary to keep the common law in step with the dynamic and evolving fabric of our society" (*R. v. Salituro*, *supra* at p. 670). It amounts to a sensible half-way house between the two extremes of the traditional common law no-fault liability on the one hand, and the traditional qualified privilege requirement for proof of malice on the other. The public interest responsible journalism defence recognizes that in relation to matters of public interest, the traditional common law unduly chills freedom of expression but, at the same time, rejects the notion that media defendants should be afforded a licence to defame unless the innocent plaintiffs can prove deliberate or reckless falsehood. It rights the common law imbalance in favour of protection of reputation and creates a proper balance between that value and freedom of expression. As Lord Nicholls put it in a subsequent decision of the Privy Council (*Bonnick v. Morris & Ors (Jamaica)*, [2002] U.K.P.C. 31 at para. 23):

> Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege. If they are to have the benefit of the privilege journalists must exercise due professional skill and care.

[140] The public interest responsible journalism defence gives appropriate recognition and weight to the *Charter* values of freedom of expression and freedom of the media without unduly minimizing the value of protecting individual reputation. It represents an

appropriate adjustment to the priority accorded by the common law to reputation over expression in keeping with the need to achieve, in accordance with *Charter* principles, "a balance…that fully respects the importance of both sets of rights" at issue: *Dagenais, supra*, at para. 72.

[141] I agree with the *Reynolds-Jameel* rejection of the specific categorical approach of Australia and New Zealand, restricting the defence to political speech. The antipodean approach is driven by constitutional limitations not present in Canada. It would introduce a potentially troublesome distinction between various types of expression that would unnecessarily complicate the law and that would be inconsistent with the *Charter's* broad protection of all forms of expression. The public interest responsible journalism defence is sufficiently supple to make appropriate allowances for the greater or lesser degrees of public interest that may exist in various forms of expression including expression that touches directly on the political or electoral process.

[142] I recognize that adopting this defence shifts the focus of defamation law away from the truth and towards the conduct of the defendant. In my view, this is an acceptable price to pay for free and open discussion. It has long been recognized that the public interest in affording the individual a way to "vindicate his reputation against calumny" has its limits and must be "accommodated to the competing public interest in permitting men to communicate frankly and freely with one another" on certain matters: *Horrocks v. Lowe*, [1974] 1 All E.R. 662 at 668 (H.L.).

[143] We should not, as the House of Lords cautioned, adopt the *Reynolds-Jameel* defence in a slavish or literal fashion, but rather accept it in a manner that best reflects Canada's legal values and culture. 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. The defence is plainly intended to shift the law of defamation away from its rigidly reputation-protection stance to freer and more open discussion on matters of public interest and should be interpreted accordingly.

[144] 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. What constitutes reasonable steps will depend of course upon the circumstances of the particular case. In assessing whether the media has met this standard the court will consider the ten factors outlined by the House of Lords in *Reynolds* (set out above at para. 89), or such of them – or any other factors - as may be relevant in the circumstances. As *Reynolds* and subsequent authorities have noted, these factors are not a

list of hurdles that media defendants must negotiate; rather, they are indicia of whether the media were truly acting in the public interest in the circumstances.

14. Does the Reynolds-Jameel defence apply in this case?

[145] The trial judge's finding that the Quan and Egan articles related to a matter of public interest is not seriously challenged. Public scrutiny of the conduct of police officers is plainly a matter of public interest and the appellants were exercising the media's watchdog role when publishing the articles in question. The *Reynolds-Jameel* defence does not require the defendant to prove what the trial judge described as "a compelling, moral or social duty to publish".

[146] However, as I have already mentioned, the appellants rested their case before the trial judge entirely on the submission that they were entitled to the benefit of the traditional qualified privilege defence and that unless the plaintiff could prove malice, his claim should fail. They did not argue the quite different *Reynolds-Jameel* defence at trial.

[147] Although I would recognize the *Reynolds-Jameel* defence as part of Ontario law, for the following reasons, I do not agree that the appellants are entitled to its benefit in this case.

[148] The responsible journalism defence is fundamentally different in nature from traditional qualified privilege. It imposes a burden on the defendant to demonstrate that it followed the standard of responsible journalism, while qualified privilege imposes a burden on the plaintiff to prove malice. It shifts the focus of analysis from the reciprocal duties to publish and receive the information, a test ill-suited to broader issues of public interest, to the standard of responsible journalism.

[149] The issue of whether the appellants followed the standard of responsible journalism was simply not litigated at this trial. The issue of malice was litigated, but that issue is very different. It certainly does not follow that because the appellant succeeded in refuting malice, they would have established that they complied with the standard of responsible journalism. It would be unfair to the plaintiff and wrong for this court to attempt to decide the case on the existing record developed to advance a very different defence. Nor, in my view, would it be appropriate to order a new trial to permit the appellant to litigate the question of responsible journalism. It is trite law that a party is not entitled to succeed on appeal by adopting a different position from that taken at trial: *Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 184 O.A.C. 84 at para. 102 (C.A.); *McNaught v. Toronto Transit Commission* (2005), 249 D.L.R. (4th) 334 (Ont. C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 133.

[150] I realize that *Jameel* was not decided until after the decision in this case and therefore, was not available to the appellants at trial. However, it was *Reynolds* that changed the law in England by enunciating the responsible journalism standard. The appellants opted at trial to advance traditional qualified privilege and, if established, that

defence would clearly have been more favourable to the appellant than the *Reynolds* defence. "The law rightly seeks a finality to litigation…[and] requires litigants to put their best foot forward….A litigant, to use the vernacular, is only entitled to one bite at the cherry": *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. at para. 18. To give the appellants another "bite at the cherry" would violate the finality principle.

CONCLUSION

[151] For these reasons, I conclude that while the public interest responsible journalism defence should be recognized as part of Ontario law, the appellants are not entitled to the benefit of that defence in the circumstances of this case. Accordingly, I would dismiss the appeal with costs to the respondent fixed at $40,000.

"Robert J. Sharpe J.A."
"I agree K.M. Weiler J.A."
"I agree R.A. Blair J.A."

RELEASED: November 13, 2007