

CITATION: Grant v. Torstar Corporation, 2008 ONCA 796
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COURT OF APPEAL FOR ONTARIO

Rosenberg, Feldman, Simmons JJ.A.

BETWEEN:

Peter Grant and Grant Forest Products Inc.

Respondents (Plaintiffs)

and

Torstar Corporation, Toronto Star Newspapers Limited, Bill Schiller, John Honderich
and Mary Deanne Shears

Appellants (Defendants)

Paul B. Schabas, D. Simon Heeney and D. Erin Hault, for the appellants

Peter A. Downard and Catherine M. Wiley, for the respondents

Heard: March 31, 2008

On appeal from the judgment of Justice P. Rivard of the Superior Court of Justice, sitting
with a jury, dated February 5, 2007.

Feldman J.A.:

[1] This appeal involves a libel action against a newspaper, and raises squarely the applicability of the newly recognized defence of “responsible journalism” when a newspaper publishes a defamatory article on a matter of public interest.

[2] The respondent personal plaintiff is a prominent citizen and businessman in northern Ontario. His home and business office were built on a large property on the shore of Twin Lakes near New Liskeard. In the late 1990s, the respondent acquired 2.787 hectares of Crown land adjacent to his home on which he built a private three-hole golf course. In 1998, he wanted to expand the golf course to nine holes and sought to acquire 23.5 hectares more land, including 10.5 hectares of Crown land to do so. The project also

required certain governmental approvals including respecting environmental issues involving the effect of a golf course on the lake and the adjacent environment. Local residents and cottagers had concerns about the project and had retained their own environmental consultant.

[3] The appellant newspaper published a front page article in its Saturday edition on the date of a public meeting regarding the proposed golf course expansion, which included the statement that “[e]veryone thinks it’s a done deal because of Grant’s influence – but most of all his Mike Harris ties.”

[4] The plaintiffs sued the newspaper for libel. They claimed that the sting of the article was that it suggested that Peter Grant used political influence gained by his friendship with the Premier and his donations to the Conservative Party to circumvent local citizens’ concerns and the normal approval process for a project that would affect the environment. The defendants’ position was that the article did not and could not have that meaning; rather, it documented local residents’ concerns that because of his influence and political ties, Mr. Grant’s project would be given special treatment by the government.

[5] The case was tried in Haileybury before Rivard J. with a jury. The newspaper argued both the traditional defence of qualified privilege and the emerging defence of responsible journalism that had been recognized in England at the time of the trial. The trial judge specifically rejected the defence of qualified privilege and sent the case to the jury. The jury found the newspaper liable and awarded general damages in the amount of \$400,000, aggravated damages in the amount of \$25,000 and punitive damages in the amount of \$1 million in favour of Mr. Grant and general damages of \$50,000 in favour of Grant Forest Products Inc. (GFP Inc.).

[6] The appellant appeals the verdict and the quantum of damages.

Facts

[7] The plaintiffs are Peter Grant and his wholly owned private corporation, GFP Inc. Together they own land on Twin Lakes near New Liskeard on which is built a large personal residence together with executive offices of GFP Inc. where approximately ten employees work. Mr. Grant is a major employer in the Temiskaming area as well as a significant local philanthropist.

[8] Twin Lakes is also a cottage area with numerous cottages neighbouring the Grant property on the lake. Many of the cottager families have been coming to the lake for decades.

[9] In 1993, Mr. Grant applied to purchase Crown land adjacent to his property. In 1997, the Ministry of Natural Resources agreed to sell him 2.787 hectares of Crown land

on which he proceeded to build a three-hole private golf course named Frog's Breath. There was no public consultation or prior approval process for that construction.

[10] Since 1998, Mr. Grant has held an annual charitable golf tournament on the course, with proceeds donated to local public projects. Mr Grant has been a long-time supporter of the provincial Progressive Conservative political party as well as a long-time friend and financial supporter of former premier Mike Harris who, it was widely known, had attended the golf tournament and been a guest at Mr. Grant's home.

[11] In 1998, Mr. Grant began to take steps to acquire more land in order to expand the golf course by a factor of ten to a "world class" nine-hole course. This required a further purchase of 13 hectares of private land as well 10.5 hectares of Crown land. It also involved an approval process that included addressing provincial environmental concerns as well as municipal zoning issues. Neighbouring cottagers objected to the proposed expansion. They wrote many letters to the municipality as well as to the MNR raising concerns for the lake and its surrounding environment, as well as for the users of the lake both during construction and after. Following reports from Mr. Grant's environmental consultants and planners, further letters of objection were sent, raising concerns including: the quantity of water needed to maintain the golf course, noise and erosion from the construction, the impact of run-off and chemicals on water quality and potability, preserving the character of the lake, the effect of Mr. Grant's economic and political power on government decision-making, the singular benefit of the development to Mr. Grant and that the proposal had been launched in the winter months when cottagers were not around. Eighteen cottagers retained their own environmental expert who confirmed that the development could detrimentally affect the lake and that Mr. Grant's reports were not fully responsive to the concerns.

[12] The Hudson Lakes Association held a public meeting on January 13, 2001 where representatives for Mr. Grant and GFP Inc. were invited to explain the proposal. On that same day, the defendant Toronto Star published a front page article written by the defendant Bill Schiller about another golf course development called Osprey Links near North Bay. The article reported that friends of Premier Harris were able to overcome environmental concerns of the MNR in order to obtain approval for their golf course resort development by complaining to "political levels" at Queens Park.

[13] The meeting was very well attended and everyone was talking about the Osprey Links article and a possible parallel with the Grant proposal. In response to a statement in the meeting notice that a decision would be made following a 30-day period, one resident expressed the concern that the application "seems like it's a done deal." The MNR representative responded that the decision had not been made, that the Ministry of the Environment had yet to do a technical review and that the timing of the decision was up to the district manager.

[14] Another resident asked the MNR representative whether, in light of the Osprey Links article, the final answer would come from North Bay or from Queens Park. The MNR representative responded that they could not “speak for what happens at Queen’s Park” but that on the Osprey Links file, MNR officials had done their job.

[15] On January 15, 2001 Dr. Lorrie Clark, a professor at Trent University, a cottager and secretary of the Hudson Lakes Association, e-mailed Bill Schiller congratulating him on his Osprey Links story and telling him about the coincidence with their issue. She explained the facts of their situation and the concerns of the cottagers and residents:

Basically, the situation is this: Peter Grant, multimillionaire owner of Grant Forest Products in Englehart and Mike Harris supporter and crony, is trying to buy 40 acres of Crown Land behind his “cottage” on Twin Lakes, just west of New Liskeard, for a private golf course...Everyone thinks it’s a done deal, because of Grant’s influence (he employs 10,000 people in Northern Ontario) but most of all his Mike Harris ties...There has been a constant sense from the beginning that this is, as one cottager put it last night, ‘a done deal,’ and that nothing we can do to stop a development that is NOT in the public interest – but obviously only a very private one – will make any difference. Everyone suspects – although I do grant that this is perhaps all unfounded – that there may be political pressure on the MNR people to give Mr. Grant what he wants.

[16] Other local residents also contacted Mr. Schiller expressing similar concerns. Mr. Schiller decided to pursue the story by doing research and conducting interviews. He first researched Mr. Grant’s political contributions. From Elections Ontario he learned that Mr. Grant and his companies had donated approximately \$95,000 between 1995 and 2000 to the Progressive Conservatives, \$58,534.30 of it in 1999. Mr. Grant and his companies had also donated \$14,000 to Mike Harris’ leadership campaign in 1990. Between 1999 and 2000 GFP Inc. donated \$5,000 to the Mississauga riding association of the Minister of Natural Resources, Mr. Snobelen. Mr. Schiller confirmed that Premier Harris had attended Mr. Grant’s charity golf tournament. He learned that Mr. Grant had hired as a lobbyist, Peter Birnie, a close friend of Premier Harris and a member of his North Bay riding executive.

[17] Later in January, Mr. Schiller went to New Liskeard where he met with several local residents, did extensive interviews where he took detailed notes, received numerous documents including letters and reports about the proposal and heard more about their fears that the proposal was a “done deal”. He also went to the local newspaper and the

registry office to obtain information. In Toronto, he looked at Mr. Grant's court divorce file to get financial information.

[18] Mr. Schiller also attempted to interview Mr. Grant and obtain his side of the story in February 2001. He first spoke with Bob Fleet, who was handling the application for Mr. Grant. Although Mr. Fleet originally agreed to a phone interview, he subsequently refused on Mr. Grant's instructions and instead asked Mr. Schiller to put his questions in writing. Mr. Schiller then wrote requesting an interview with Peter Grant. The letter was answered by Mr. Grant's lawyer who referred Mr. Schiller to the public record and said that Mr. Grant would consider answering questions put in writing. Mr. Schiller then wrote asking some questions, to which the lawyer responded that his client's business affairs were private and that he would not discuss his personal affairs.

[19] Mr. Schiller collected more information over the next few months from a cottager, the town's planning consultant and from MNR officials. He collected over 180 documents during his research. He tried to speak to Mr. Grant's golf course consultant but the consultant had been instructed by Mr. Fleet not to talk to him. On May 24, 2001, Mr. Schiller received a notice of a public meeting to be held on June 23, 2001 regarding a proposed amendment to the town's by-laws permitting the golf course expansion. He then drafted his story and worked on it with his editor. On June 1, 2001 he sent Mr. Grant a letter with 16 detailed questions about the proposal, seeking Mr. Grant's reaction to the cottagers' concerns and about his connections to the Conservative Party and to Mike Harris. Again, Mr. Grant's lawyer replied refusing to answer any questions. Mr. Schiller wrote one more letter with further questions. The response from Mr. Grant's lawyer was a threat of a libel action.

[20] In all of his research and interviews, Mr. Schiller never asked any MNR or any other government official to react to the suggestion that the proposal was a "done deal," nor did he seek to question Mike Harris or anyone connected to him to ask him the same question. In his cross-examination, Mr. Schiller stated that he never had any information that Mr. Grant had sought to use political influence or money to affect the approval process. He did not intend the article to suggest that Mr. Grant used his position of power to circumvent the approval process. Rather, his intent and understanding of the story was to question whether Mr. Grant's status and position of influence would impact the approval process. He testified that it never crossed his mind to call the Premier's office, because he did not think the issue was the Premier, but rather Peter Grant and the cottagers' concerns. However, he further testified that had he called the Premier's office and received a denial, he would have included it in the story. Similarly, as he viewed the story to be about the cottagers' perception of a "done deal" and not about any actual political or other influence being exerted, Mr. Schiller did not include in the article Lorrie Clark's reference in her e-mail to the fact that people suspected political pressure on the MNR but that those suspicions might be unfounded.

[21] Nor did Mr. Schiller ever put the “done deal” question to Mr. Grant in his letters or to Mr. Fleet or any Grant representative. In cross-examination, Mr. Schiller said that the “done deal” question did not seem to be something he should ask Mr. Grant about. Rather, he stated that he had sought an interview with Mr. Grant so that they could talk about “[e]verything under the sun”.

[22] In early June 2001 the Star sent a photographer, Mr. Slaughter, to take pictures of Mr. Grant’s property for the upcoming article. Mr. Slaughter drove to the property, parked his car and took a few steps onto the golf course to take pictures. He also took pictures from a canoe in the lake. Mr. Grant saw Mr. Slaughter, thought he might be from the Star, and instructed an employee, Mr. Webster, to find out who Mr. Slaughter was and to try to keep him there. In cross-examination, Mr. Webster said that Mr. Grant told him to block off the photographer’s car until the police arrived. Mr. Webster parked in front of Mr. Slaughter’s car on a narrow gravel road to try to block him. Mr. Slaughter then went around Mr. Webster and narrowly missed the ditch. Mr. Webster never asked Mr. Slaughter to wait, nor did he tell him that Mr. Grant had called the OPP. No charges were laid. Mr. Schiller spoke both with Mr. Slaughter and with the OPP after this incident. Mr. Grant’s lawyer wrote to the Star accusing Mr. Slaughter of illegal trespass and demanded that the Star give them the film which they refused. In the end, the Star published only an aerial photograph of the Grant property with the article.

[23] The Star published three articles. The first was a front page story in the Saturday Star on June 23, 2001, the day of the public meeting. Mr. Schiller attended the meeting and the Star published two follow-up articles the next day and the following day. The main focus of this action was the first article which read as follows:

Cottagers teed off over golf course

Long-time Harris backer awaits Tory nod on plan

Bill Schiller

FEATURE WRITER

Saturday Special

NEW LISKEARD – During the past decade, millionaire lumber magnate Peter Grant – one of the most powerful business people in northern Ontario – has been generous with Mike Harris and the Conservatives.

In 1990, Grant, through his companies, gave Harris more than \$14,000 to help him win the Conservative leadership.

In 1999, Grant poured \$45,000 into Conservative pockets to speed their re-election, followed by another \$21,000 last year.

Of this \$80,000, at least \$5,000 went to Natural Resources Minister John Snobelen and his Mississauga riding association.

But Peter Grant also wants something from the government.

Here, on a tiny peninsula on a cottage-speckled lake, where families have come for generations, Grant wants to take three small golf holes on his property and expand them into a 3,290-yard, nine-hole course.

To do so, he needs the Harris government – with the support of Snobelen’s ministry – to sell him 10.5 hectares of crown land and approve the project.

The planned course will be private, *so* private in fact, it will be for Grant’s own “personal use and enjoyment.”

But in the minds of many who own cottages here on Twin Lakes, about 500 kilometres north of Toronto, Grant’s dream of carving a course out of the northern wilderness for his own pleasure, is a nightmare.

“Herbicides, pesticides, fertilizers, will all wash into our lake,” insists Bonnie Taylor, who might be forgiven for sounding a little proprietary. Her pioneering family first built on this spring-fed lake nearly 60 years ago.

Last winter, she wrote the province to say she’s worried about the impact the course could have on lake and well water – especially, she said, “with Walkerton still fresh on everyone’s mind.”

For his part, Grant refuses to be interviewed.

“Our client ... does not intend to discuss his personal affairs with you,” his lawyers informed The Star by letter.

When a Star photographer went to take pictures at the site this month, men the OPP believe were Grant employees, accused the photographer of trespassing. They then tried to drive the photographer’s vehicle off a public road, and finally followed the photographer out of town for almost 20 kilometres.

But for concerned cottagers back at lakeside – the issue is water.

Grant already has provincial permission to draw as much as 300,000 litres per day from the lake to water his three golf holes.

According to environment ministry guidelines, the same amount of treated water could support a community of 750 to 1,500 people.

And ratepayers worry that if Grant’s plan goes ahead, his need for water will grow.

It’s a worry not without foundation: some 18-hole golf courses in the north have provincial permits to take as much as 2.2 million litres of water per day.

Grant’s expanded course would also clear trees from almost 23.5 hectares in total: 10.5 hectares of crown land, and another 13 hectares of privately held land he also intends to buy for the project.

Perhaps most worrisome from the cottagers’ perspective, planning documents show the course will use \$20,000 worth of pesticides annually, including small amounts of Daconil, a highly effective pesticide that is also highly toxic to fish and invertebrates.

But locals aren’t the only ones concerned about Grant’s plans. Officials from the Ministry of Natural Resources are too.

Currently conducting a limited environmental assessment, they've informed Grant of at least a dozen concerns they have about the project, from potential effects on water quality, to the impact on lake levels.

Grant's consultants are preparing a response.

But the ministry's concerns are small comfort to cottagers.

They know the expressed concerns of government officials don't always mean much when it comes to development projects led by supporters of the Premier.

"Everyone thinks it's a done deal because of Grant's influence – but most of all his Mike Harris ties," says Lorrie Clark, who owns a cottage on Twin Lakes.

Earlier this year, the local cottagers' association invited Grant's consultants, as well as ministry officials to a meeting to discuss Grant's proposal. A number of cottagers brought copies of a Toronto Star article detailing how the Premier's best friend Peter Minogue complained "at political levels" to try to get his North Bay golf course and subdivision approved in the face of opposition from the Ministry of Natural Resources.

Minogue's partners in that venture, known as Osprey Links, included the president of Harris' riding association and a veritable Who's Who of Harris' North Bay friends. Ministry objections were overruled just 12 days after a senior bureaucrat warned by memo that Minogue had begun complaining.

With that experience in mind, lawyer Peter Ramsay, a ratepayer and cottager rose at the public meeting here and put his concerns bluntly.

"Is this (Grant) project going to be decided by the Ministry of Natural Resources?" he asked officials present. "Or is it going to be decided by Queen's Park?"

A ministry official at the meeting, Greg Gillespie, said he couldn't speak for what happens at Queen's Park.

"But we did our job," he said of the Osprey experience.

Such suspicions and anxiety over the approval process have set the stage for a classic confrontation, which – in the cottagers' view – pits the public good of ordinary Ontarians, many of whom are senior citizens, against a single, powerful, private interest: Peter Grant.

"This is a development that is not in the public interest," cottage owner Clark emphasizes, "but only a very private one."

For an outsider, however, looking at the history of the lake, one might think Grant is fighting an uphill battle.

After all, in 1985 the Ontario Municipal Board shut down a proposal to build a small subdivision on Twin Lakes out of concerns about potential environmental damage.

The board – a kind of court of appeal for developers and citizens who disagree on a development – sided with a consultant who argued that the lake was too sensitive, teetering on overdevelopment with 200 cottages, and any additional building might constitute an environmental hazard.

Those arguments won the day.

But Grant is undaunted.

Today, the same consultant who convinced the board to block that development more than 15 years ago, now consults for Grant.

Michael Michalski argues that Grant's development can be built with minimum impact and that "everything feasible" will be done to keep contaminants on site.

Not to be outdone, local citizens have hired their own consultants, Gartner Lee. They say neither Michalski nor anyone else can guarantee the lake's safety.

And so the scientific lines have been drawn in the sand.

But if politics and power were to have any bearing on the matter, some feel Grant would have the upper hand.

In this rough and rugged stretch of northern Ontario, where local economies depend largely on timber and tourism, Grant is a powerful presence.

His company, Grant Forest Products, is an important local employer. The company's radio ads, which continually remind locals that Grant is "using our forests wisely," are part of public consciousness. And every autumn, a charity golf tournament Grant holds using two public courses – the tournament culminates at his mini-course – heralds the high point of this area's social season. It always makes front-page news.

So did the Premier's visit here last fall, when he attended a post-tournament reception for more than 600 at Grant's palatial home.

Grant, who has been running the event since 1998, proudly presented a cheque that day for \$300,000 to help build a local senior's home.

Press accounts note that he's raised about \$1 million for local causes, including area golf courses, over three years.

Up north, the charity event has distinguished him.

So has his selection of lobbyists down south at Queen's Park.

When it comes to looking after business interests there, Grant depends on North Bay lobbyist Peter Birnie. Records at

Elections Ontario show Birnie is vice-president of Harris' riding association.

Meanwhile, on the personal front, Grant maintains a reputation for living large.

His home and corporate compound in the bush dwarfs the dozens of cottages that surround it.

His 14,500 square-foot house on 4.5 hectares of lavishly landscaped property, was once appraised at \$1.9 million. Neighbours note the occasional helicopter coming and going through the bush.

The seven-bedroom main house has an indoor squash court with viewing gallery, a fully equipped gymnasium, and a Jacuzzi that can accommodate 15 people.

Outside, tennis courts are equipped with banks of lights that illuminate the night sky. And down on the water, there's a 1,500-square-foot boat house.

There is also his three-hole mini-course – that Grant calls Frog's Breath – which can be configured to play as a tiny five.

Records show these holes were built on almost three hectares of crown land, which the province sold to Grant in April, 1998 for \$20,000.

But records also show that two months earlier, in February, 1998, Grant had also applied to buy the 10.5 hectares he's still pursuing today.

These developments have residents up in arms.

"It's difficult living here and watching all this go on," says Nancy Kramp, a mother of four who, like Grant, lives permanently on Twin Lakes.

“It used to be dead silence out here. There was nothing but the sounds of wildlife. Now, there are always (golf course) machines running.”

Kramp can't comprehend how the provincial government can think of selling 10.5 hectares of land so that one man may build a golf course for his own enjoyment.

She remembers a run-in she had with the Ministry of Natural Resources not so long ago over a sandbox.

“Around 1994, the ministry told us to move a sandbox we'd erected for our son,” Kramp recalls, “four planks with sand in the middle, because it was on crown land. This sandbox seemed to be interfering with the natural habitat of the area. And now a nine-hole golf course is okay?”

It's not okay yet.

The Harris government has not sold the property to him.

Still, local politicians are preparing the way.

Today, five politicians who represent the people of Hudson Township here (population: 501), are scheduled to meet to discuss a motion to amend local zoning bylaws and, according to a published notice, “permit the construction of a personal golf course – for the personal use of the property owner.”

Local councillor Clinton Edwards says he doesn't really want to say whether he'll support it.

“I'm in a bit of a bind here,” he says, somewhat haltingly. “My wife works for him (Grant). Employment is very hard to get up here,” he adds.

News of impending zoning changes even before the government has sold Grant the land makes some cottagers distrustful about what might happen next.

“The people on this lake aren’t mega-millionaires,” says Alexandra Skindra, mother, grandmother and property owner.

“They’re just regular people. Hard-working people. This shouldn’t be happening.”

Skindra and her husband Arkadis, 68, a retired nuclear plant designer, were planning on spending their retirement on the lake.

“I grew up here,” explains Alexandra. “My kids grew up here. And I was hoping our five grandchildren could come here every summer.”

“We don’t have anything against Peter,” Arkadis offers, hammer in hand as he renovates the front room of their cottage overlooking the water.

“But I can’t see how this can go ahead and not damage the lake and the environment.”

Down the way, Ira and Marion Murphy have spent 56 years on a tiny stretch of land that joins Twin Lakes with neighbouring Frere Lake.

Looking trim at 75, Ira, a retired Hydro supervisor, can point to the shore where he built a two-storey tree house for his granddaughters 18 summers ago.

For him, lake life is a precious thing, something interwoven with family.

“You know, we’ve known Peter since he was 3 years old,” says Murphy, a handsome, gray-haired man with a taste for the outdoors.

“We’ve got nothing against him. We’re just concerned about the lake, that’s all.”

Rudi Ptok, 71, says he's worried about run-off, and not just with pesticides, he says, but with the 400 kilograms of fertilizers per year that will be needed to keep Grant's course green too.

"They're probably going to have to blast out rock to build too," he says.

Ptok says Grant's consultants have confirmed they may well have to dynamite.

Looking worriedly out at the lake, Ptok says, "I don't even want to think about it."

[24] The article as printed in the newspaper contained photocopies of political donation slips from GFP Inc., as well as a large aerial photo of the property on the lakeshore and two small maps of the area.

[25] The plaintiffs sued the newspaper, the writer and other employees as well as Dr. Lorrie Clark for libel. The plaintiffs settled with Dr. Clark before trial.

[26] At the trial, the defendants raised a number of defences including the traditional defence of qualified privilege as well as the defence of responsible journalism, a new form of the qualified privilege defence that had developed in English law. The defendants also pled that the meaning they attributed to the article was not defamatory. In the alternative, they pled that the article was true, and in the further alternative, it was fair comment on a matter of public interest.

[27] The trial judge made an initial ruling that the defence of qualified privilege did not apply. In so doing, he considered the criteria for the defence of responsible journalism. Having rejected these legal defences, the case went to the jury. The jury members were not asked to answer any specific questions stating their findings. Rather they were asked to find for either the plaintiffs or the defendants, and if for the plaintiffs, to quantify their general, aggravated and punitive damage awards. The jury found for the plaintiffs and awarded damages in the total amount of \$1.475 million.

Issues

[28] Following the verdict in this action, this court heard and decided the case of *Cusson v. Quan* (2007), 87 O.R. (3d) 241, where the court recognized "responsible journalism" as a new defence, separate from the defence of qualified privilege, where a newspaper publishes a defamatory article on a matter of public interest, if it does so in

accordance with responsible journalism standards. As a result, although the defendants originally sought to appeal the trial judge's rejection of the defence of qualified privilege, they abandoned that ground of appeal in oral argument.

[29] The issues raised by the defendants on the appeal therefore are:

- (1) Did the trial judge err by failing to properly address and apply the defence of responsible journalism?
- (2) Did the trial judge err in his charge to the jury by:
 - (i) failing to properly charge on fair comment;
 - (ii) making errors in his charge on how to determine the meaning of the impugned words;
 - (iii) making errors in his charge on the tests for justification, malice and damages;
 - (iv) failing to fairly summarize the evidence and to relate the evidence to the legal issues?

Analysis

Issue 1: The Defence of Public Interest Responsible Journalism

[30] The law of defamation, which seeks to protect the interest of individuals in their good name and reputation, has traditionally been in tension with the rights of freedom of expression of individuals and of the media, especially in respect of reports on matters of public interest. In such matters, if in the course of reporting on a matter that was alleged to be in the public interest, a newspaper published a defamatory statement about a person, the defence of qualified privilege was available if the newspaper could demonstrate that (1) there was a compelling moral or social duty to publish the article containing the statement and (2) a reciprocal interest on the part of the public to receive the information, as long as the report was published without malice. It has always been the role of the judge to determine if the defamatory material was published on an occasion of qualified privilege, as defined. If so, then it is the role of the jury to decide if the publication was made with malice as its dominant motive, that is, not for the purpose that attracted the privilege but for an ulterior purpose. If so, the defence would fail.

[31] In two seminal cases in the House of Lords, *Reynolds v. Times Newspapers*, [1999] 4 All E.R. 609, and *Jameel (Mohammed) v. Wall Street Journal Europe Sprl*, [2007] 1 A.C. 359, that court recognized that the traditional defence of qualified

privilege, which protected reports on matters of public interest published without malice, was not sufficient to adequately protect and foster freedom of expression and the public's right to know and debate freely matters of public interest. However, the Law Lords also recognized that defining political matters as matters of public interest would result in an overextension of the rights of the media by making it too difficult for people whose reputations were unfairly, but not maliciously impugned, to obtain redress. The House of Lords therefore developed in *Reynolds* and subsequently strengthened in *Jameel*, a new defence intended to strike a balance between the interests of individuals in protecting their reputations on the one hand, and the right of the public to access information on matters of legitimate public interest and the ability of the media to fairly and responsibly report on such matters on the other.

[32] In *Cusson*, this court followed the lead of the House of Lords and adopted the *Reynolds/Jameel* defence of "public interest responsible journalism" as a new defence, separate and distinct from qualified privilege. Sharpe J.A. described the test and its availability in the following manner at para. 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*..., 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.

[33] In *Jameel*, the House of Lords made it clear that the new defence was intended to be applied in a manner that promotes the publication of fair reports on matters of public interest. This new approach was developed in a context where, following *Reynolds* in 1999, trial judges, including in *Jameel*, had tended to treat the *Reynolds* factors in a very restrictive way, making it difficult for media defendants to meet all ten factors. An example of the approach intended by the House of Lords can be seen in the decision of the Privy Council in the case of *Bonnick v. Morris*, [2003] 1 A.C. 300, on appeal from the Court of Appeal of Jamaica. In *Bonnick*, the Privy Council considered the defence of responsible journalism in the context of an article reporting on the termination of the plaintiff's employment from the Jamaica Commodity Trading Company in possible

connection with some unusual contracts. The plaintiff argued that the article was libellous because it suggested that his employment had been terminated on account of his involvement with a particularly bad contract, and that the defendant reporter had not made sufficient inquiries or attempted to include the plaintiff's own explanation in the article. The Privy Council held that, although the failure to make further inquiries and include the plaintiff's explanation was unfortunate, the article overall was a piece of responsible journalism notwithstanding that it was "near the borderline" (paras. 27-28).

[34] In *Cusson*, Sharpe J.A. characterized this application of the responsible journalism defence by the House of Lords as "media-friendly" (para. 97). As to its application in Ontario, he stated at para. 143: "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."

[35] Sharpe J.A. set out the non-exhaustive list of ten factors that Lord Nicholls of Birkenhead, with whom the majority of the House of Lords agreed, identified in *Reynolds* for determining whether a defendant conducted itself in accordance with the standards of responsible journalism in reporting a story on a matter of public interest at para. 89:

- (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 story.
- (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.

[36] Two other conditions identified by the House of Lords were noted in *Cusson*. The first is that in *Reynolds*, Lord Nicholls of Birkenhead cautioned that “[t]he 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 A.C.)” (para. 90). The second condition, as explained by Lord Bingham of Cornhill in separate reasons in *Jameel*, is that the publisher must establish that it acted responsibly with respect to the story as a whole, and if it does so, then it need not pass the responsible journalism test for 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)” (para.98).

[37] In order to better understand the approach a court should take when considering the responsible journalism defence, it is useful to observe how Lord Hoffman applied the *Reynolds* test in *Jameel*. Although each of the Law Lords in *Jameel* wrote separate speeches, the majority concurred in principle with the reasons of Lord Hoffman on this issue.

[38] In *Jameel*, the newspaper had published an article about certain Saudi Arabian corporations whose bank accounts were being monitored at the request of the US Treasury, to ensure that they were not funding terrorists. The plaintiff was named as one of the monitored corporations. The newspaper tried to reach the plaintiff for comment, but was only able to speak to a representative who said he had no knowledge of being monitored, would not give permission to publish that response, and asked to delay publication for 24 hours. However, the newspaper went ahead and published the story before a representative could get back to them.

[39] Lord Hoffman first looked at whether the subject-matter of the article was a matter of public interest. This is a question of law for the judge. The test is not the traditional one of privileged occasion where the judge decides whether there is a duty to report the matter and a corresponding interest by the public in learning about it. Nor is it a question of categorizing the content. Rather, the judge decides, not whether the matter is one in which the public is interested, but whether it is, as a matter of law, a public matter. In making this determination, he said, it is important to look at the article as a whole and not to isolate the defamatory statement (para. 48). In that case, the thrust of the article was that the Saudi government was co-operating with the US in the fight against terrorism, clearly a matter of public interest.

[40] Lord Hoffman then considered whether the newspaper was justified in including the defamatory statement about the plaintiff. He noted that the more serious the defamatory allegation, “the more important it is that it should make a real contribution to the public interest element in the article” (para. 51). Additionally, inclusion of the defamatory statement may also be viewed as a matter of editorial judgment, which the courts are not to second-guess with the benefit of hindsight. Lord Hoffman concluded that in that case, including the names of the companies involved was an important part of the story.

[41] Once the article including the defamatory statement(s) passes the “public interest” criterion, then the inquiry turns to whether the steps the journalist took to gather and verify the story were fair and responsible. This is where the ten, and possibly other factors, are to be assessed, but in a practical and flexible manner depending on the facts and circumstances of each case. In that case, Lord Hoffman analysed the responsible journalism aspect by looking at three factors that arose in the case: (1) the steps taken to verify the story, (2) the opportunity given to Jameel to comment prior to publication, and (3) the propriety of publication in light of US policy at the time.

[42] In the context of verification of the story, Lord Hoffman pointed out that in most cases the responsible journalism defence requires that the journalist honestly and reasonably believed that the impugned statement was true. However, he pointed out that in some cases, referred to as “reportage,” the publisher need not subscribe to any belief in the truth of the statement if the public interest element “lies simply in the fact that the statement was made” (para. 62).¹ Honest belief also influences the defence of fair comment, which I will discuss later in these reasons.

¹ In England, reportage is seen as “a special kind of responsible journalism but with distinctive features of its own”: *Roberts & Anor v. Gable & Ors*, [2008] 2 WLR 129 (C.A.) at para. 60, and following. In concurring reasons in *Jameel*, Baroness Hale of Richmond described the relationship between reportage cases and the defence of responsible journalism at para. 149: “Secondly, the publisher must have taken the care that a responsible publisher would take to verify the information published. The actual steps taken will vary with the nature and sources of the information...The requirements in “reportage” cases, where the publisher is simply reporting what others have said,

[43] To summarize, the essence of the defence, is that the matter reported is of public interest, that it was appropriate in that context to include the defamatory statement as part of the story, and that the publisher took reasonable and fair steps, given the defamatory statement, to verify the story including giving the subject of the story a chance to respond before publishing it.

[44] The case at bar was tried following the *Reynolds* and *Jameel* decisions, but before this court had made the responsible journalism defence the law of Ontario in *Cusson*. The defendants argued both the qualified privilege and the *Reynolds/Jameel* defences, and in respect of the latter, the defendants made submissions to the trial judge with respect to the ten factors for assessing whether they were entitled to rely on the defence of responsible journalism.

[45] Counsel advised the trial judge that the applicability of the defence was a question of law for the judge, who has to weigh all the appropriate factors to decide both public interest and responsible acting. Counsel also acknowledged that in the English cases, there is often a role for the jury in deciding certain factual issues that will inform the judge's application of the test.² Where the judge is to make a ruling on the defence of responsible journalism or qualified privilege, the case may be put to the jury to answer relevant questions to determine the meaning of the words and whether they are defamatory, whether the defendant was motivated by malice, and to decide the quantum of damages. In this case, counsel advised the trial judge that there was no need to involve the jury before determining the applicability of the defence. In fact, if the defence succeeded, there would be no need to put the case to the jury at all.

[46] In my view, the approach taken in this case is not one that should normally be followed in a libel case tried with a jury. In fairness to the trial judge and to counsel, both very experienced and knowledgeable libel lawyers, they were all proceeding in new legal territory, as the courts still are with this defence.³ Generally speaking, in these cases, the jury, having heard all of the evidence, should have the opportunity to decide all relevant questions, regardless of the trial judge's decision on the availability of the defence of public interest responsible journalism. Done this way, if the trial judge's ruling is in error, the Court of Appeal will have the necessary information from the jury to properly substitute its decision if the circumstances warrant. Where the Court of Appeal does not

may be rather different, but if the publisher does not himself believe the information to be true, he would be well-advised to make this clear. In any case, the tone in which the information is conveyed will be relevant to whether or not the publisher has behaved responsibly in passing it on."

² In fact, in England, libel trials are sometimes bifurcated proceedings where matters are decided by the judge and sometimes by the jury, and may be appealed before proceeding with the rest of the trial: see for example *Geenty v. Channel Four Corp. and Another*, [1998] E.M.L.R. 524 (C.A.) and *Gillick v. Brook Advisory Centre & Another*, [2001] EWCA Civ. 1263 (C.A.). See also *Gatley on Libel and Slander*, 10 ed. (London: Sweet & Maxwell 2004) at paras. 30.7 and 30.44-45.

³ The *Cusson* case is to be argued in the Supreme Court of Canada, [2008] S.C.C.A. No. 11.

have the benefit of the jury's findings on such questions as meaning, other defences and damages, the court has no choice but to send the matter back for a new trial in the event of an error by the trial judge.

[47] More to the point in this case, the main issue to be decided was the meaning of the story and of the statements that were alleged to be defamatory. The plaintiff's position was that he was being accused of using improper influence and financial contributions to the governing political party in order to obtain government co-operation for the sale of Crown lands and approval of his golf course, despite environmental concerns and objections by cottagers. The newspaper and the writer denied that the article had or could have that meaning. Their position was that the article simply outlined cottagers' concerns that Mr. Grant's influential position in the community, his political ties flowing from his friendship with Mike Harris and his financial contributions to the Conservative Party would result in the project's approval, despite local citizens' objections and the fact that potential environmental impacts had been flagged. They had no information to suggest that Mr. Grant had sought to use political influence to circumvent the ordinary process, and therefore they did not write that in the story.

[48] Without first having the jury decide whether the article had either of these meanings (or some other meaning), the trial judge was not in a position to accurately and effectively weigh the factors for responsible journalism. An obvious example is the *Reynolds* factor of the seriousness of the defamatory charge. In this case, where the sting of the libel depends on the meaning, the meaning will drive the analysis of the adequacy of the steps taken by the journalist to investigate and verify the information. The more serious the defamatory charge, the heavier is the obligation on the journalist.

[49] The issue of which meaning should be considered by the trial judge when deciding whether the responsible journalism defence applies arose in *Bonnick*, also decided by Lord Nicholls of Birkenhead. His conclusion, on behalf of the Privy Council, was that "a journalist should not be penalised for making a wrong decision on a question of meaning on which different people might reasonably take different views" (para. 24). The court can take this into account when assessing whether the journalist has met the necessary criteria for the responsible journalism defence because, in his view, "the question being considered is one of conduct" (para. 22). However, Lord Nicholls of Birkenhead noted this caveat: that a journalist is expected to perceive the meaning an ordinary, reasonable reader would give to the impugned words, so that the more obvious the defamatory meaning, the less weight the court will attribute to other possible meanings (para. 24).

[50] A different approach on how to determine the meaning of the impugned words for the purpose of the responsible journalism defence was suggested by the Court of Appeal in *Jameel*, [2005] 4 All E.R. 356. The Court of Appeal expressed the view that had the *Reynolds* defence turned on whether the impugned words bore either the more or less

serious meaning as contended by each of the parties, then the jury should have been asked to choose the meaning. In that case, the two meanings were close enough that it was not necessary to involve the jury at that stage (para. 84). I note that in *Jameel*, although one of the Law Lords invited the court to adopt the *Bonnick* approach to this issue, the others did not address it (para. 136).

[51] It is clear that both substantively and procedurally, courts must be able to be flexible when dealing with the responsible journalism defence. I would not want to set down a hard and fast rule about how a trial court should proceed. Each case will necessarily turn on its own facts, and the issues that arise from those facts. However, in this case, it was necessary for counsel and the trial judge to address the major issue in dispute, the meaning of the impugned statements, and to have that issue decided by the jury.

[52] It is not sufficient for the trial judge to find that the impugned words are capable of bearing both meanings. That is merely the exercise of a gatekeeper function before the meaning issue goes to the jury. Fulfilling this gatekeeper function does not assist the judge to properly apply the responsible journalism factors in a case where the meaning is the key issue. The optimal procedure in this case would be to ask the jury to determine the meaning of the article as part of reaching its verdicts. With complete answers from the jury in hand, the trial judge could then make the legal ruling on the responsible journalism defence. If the jury accepted the defendants' meaning, that would inform the judge's analysis of whether the steps taken by the journalist to verify the story were reasonable and fair in the circumstances. If the jury accepted the plaintiffs' meaning, the analysis could be different. In this scenario, the trial judge could decide how much, if any weight, should be given to the meaning the defendants understood and intended, in light of the jury's conclusion.

[53] Following the pre-charge submissions of counsel, which included submissions on the traditional defence of qualified privilege as well as on the new *Reynolds/Jameel* defence, the trial judge gave his ruling on qualified privilege. He referred to it as such and began by setting out the traditional common law test for determining whether the publication was made on an occasion of qualified privilege: was the publication made fairly in furtherance of a legal, social or moral duty and communicated to persons who have an interest in receiving it? He noted that “[s]pecial circumstances must exist for qualified privilege to apply...because the law has recognized that in certain circumstances there exists a need in the public interest for a particular recipient to receive a frank and uninhibited account of certain information.”

[54] He then incorporated the *Reynolds* factors by saying that “[i]t has been decided that qualified privilege can attach to a communication by the media to the world at large provided it is published in a context of social or moral duty to report on the issues.” He

continued that to determine public interest one takes account of the ten *Reynolds* factors, which he listed, then proceeded to apply.

[55] He described the article as dealing with the acquisition of Crown lands by a large contributor to the political party in power, and with cottagers and environmental concerns. He stated that these were matters of public interest. However, applying the *Reynolds* factors, he concluded that the subject-matter was a local issue and of little concern to those outside the area.

[56] He found the tone of the article to be accusatory of the plaintiffs and favoured the cottagers' views. He noted that the article set a negative tone about the plaintiff by beginning with his political contributions and power, and then indicating that he wanted something from the government. With respect to the timing of the publication on the day of the public meeting, he concluded that it was probably meant to impact on the purchase of the Crown lands, and that there was no urgency to publish on that day.

[57] He said that the informants for the article were cottagers who had an interest in the issue and further noted that the allegations of buying favours had already been the subject of Mr. Schiller's investigation and report on Osprey Links.

[58] The trial judge found that the article did not contain the gist of the plaintiffs' side of the story: that Mr. Grant and his company were following the normal approval process, that they were not seeking political favours and that the golf course expansion would have a minimal effect on the environment.

[59] Finally, although Mr. Schiller took steps to verify some information, he made no effort to verify the "done deal" aspect of story from anyone.

[60] The trial judge concluded that "[h]aving regard to the limited public interest in a story such as this, in the *Reynolds* circumstantial factors I have discussed, I'm not prepared to conclude that the publication in this case was made on an occasion of qualified privilege."

[61] In fairness to the trial judge, he made this ruling at a time when the new defence was just developing in England and was not yet adopted as law in Ontario. In that context, the trial judge improperly tried to combine the two defences of qualified privilege and responsible journalism, rather than treat the new defence as a separate evaluation where the emphasis is on allowing more free and open reports on matters of public interest, as long as the reports are researched and published in a fair and responsible manner.

[62] There are three areas in particular where the trial judge's analysis fails to properly consider the test for public interest responsible journalism. The first is on the issue of the

public interest. The trial judge's finding was that the public interest was limited to the local residents and did not extend to the full readership of the Toronto Star. He did this by using the test for public interest for qualified privilege which focuses on the limitations on the category of those who have an interest in receiving information on an issue.

[63] With respect, the trial judge applied the wrong test. As Lord Hoffman indicated in *Jameel*, the public interest test for responsible journalism is not whether the subject matter is one in which the public is interested but whether the subject of the article is, as a matter of law, a public matter. In contrast to his finding on the qualified privilege ruling, the trial judge correctly instructed the jury in his charge on the defence of fair comment on a matter of public interest, that the story was on a matter of public interest. Although I agree that the story would be of personal interest to those who live in the Twin Lakes area and who know or know of Mr. Grant and GFP Inc., it is also on a matter of public interest generally because it deals, as the trial judge correctly said, both with the private acquisition of Crown lands by a person who had made large political contributions to the governing political party, as well as with cottagers' environmental concerns. The trial judge should have first found that the story was on a matter of public interest, and then turned to the *Reynolds* factors for the purpose of assessing whether the story, including the impugned statements, was researched and verified in a responsible and fair manner.

[64] The second error was in the trial judge's consideration of whether Mr. Schiller acted in a responsible and fair manner in the steps he took to research and verify the story. The trial judge acknowledged that Mr. Schiller "did take steps to verify some information." However, he found that Mr. Schiller "made no effort" to verify whether Mr. Grant actually did have a lot of influence and whether the project "was a done deal because of his Mike Harris ties." He based this finding on the evidence that Mr. Schiller did not put that question to the MNR officials and made no inquiries of government officials.

[65] However, this analysis overlooks several relevant facts disclosed in the evidence. First, at the public meeting in January, one of the local residents questioned MNR officials as to whether the decision would be made in North Bay or at Queen's Park. MNR officials indicated that they could not "speak to what happens at Queen's Park" but assured local residents that they had done their job properly on the Osprey Links development. This exchange was reported in the story. Second, Mr. Schiller conducted extensive research for the article, obtaining documents from many sources and conducting numerous interviews. Third, he tried to interview Mr. Grant and Mr. Fleet but was totally rebuffed. He put questions in writing, as requested by Mr. Grant, but was told by Mr. Grant's lawyer in response that he would not answer any of the questions. Although there was no specific question asking whether the approval was a "done deal," there were questions about Mr. Grant's political contributions to the Progressive Conservative Party and whether he had entertained Mike Harris at his home. It was

incumbent on the trial judge to consider this evidence when assessing what more Mr. Schiller could and should have done to try to verify how influential Mr. Grant was politically and whether his influence had or would affect the approval decision.

[66] Mr. Grant's refusal to respond to Mr. Schiller was also relevant to the trial judge's analysis of whether the article contained the gist of the plaintiff's side of the story. So too, on the other side, was the fact that Mr. Schiller did not include in the story the portion of Lorrie Clark's e-mail admitting that the cottagers could be wrong in assuming that Mr. Grant was using political influence to get his project approved. There was also Mr. Schiller's explanation for why he left out that comment. The trial judge should have weighed and balanced these aspects of the evidence when considering the important *Reynolds* factor of whether the article contained the gist of the plaintiff's side of the story.

[67] To conclude on this issue, the trial judge erred by not considering public interest responsible journalism as a separate defence from the defence of qualified privilege. By conflating the two defences, he wrongly concluded that the subject matter of the article was not of general public interest. He further erred in his application of the relevant *Reynolds* factors by failing to first have the jury determine the meaning of the impugned language. The extent of the sting of the libel will inform the application of the *Reynolds* factors to the issue of responsible journalism. The trial judge also failed to consider the full scope of the evidence in determining whether the defendants acted responsibly and fairly in researching, verifying and publishing the article. It was incumbent on the trial judge to apply the relevant factors in a way that sought to favour publication if the article was researched and published responsibly.

[68] As the defence of responsible journalism is a question of law for the judge to decide, in some cases the Court of Appeal will be able to apply the appropriate factors and substitute its own decision for that of the trial judge. However, for the reasons discussed above, the defence of responsible journalism cannot be properly evaluated in this case without regard to the meaning of the statements. That is a question that must be answered by a jury before Mr. Schiller's actions in researching, verifying and publishing the article could be properly evaluated in accordance with the *Reynolds* factors.

Issue 2: The Defence of Fair Comment on a Matter of Public Interest

[69] The trial judge left the defence of fair comment on a matter of public interest with the jury. He instructed the jury that the matter was one of public interest. They had to decide whether the statement was fact or comment and if it was comment, whether the defendants had met the legal test for the defence of fair comment.⁴

⁴ The defendants also pled justification of the article, but only on the meaning they attributed to it. They did not seek to justify as a fact that the approval was a "done deal."

[70] The defendants' position is that the claimed sting of the libel, the statement: "[e]veryone thinks it's a done deal because of Grant's influence – but most of all his Mike Harris ties," is a comment and not a statement of fact. The respondents' position is that the statement is an allegation of fact, dressed up to look like a comment by prefacing it with the phrase "everyone thinks".

[71] The defence of fair comment was the subject of a recent decision of the Supreme Court of Canada in *W.I.C. Radio Ltd and Raif Mair v. Simpson* (2008), 293 D.L.R. (4th) 513, released June 27, 2008. As the *WIC* case was released following the argument in this appeal, counsel were given the opportunity to make written submissions on its effect on the appeal.

[72] In *WIC*, Raif Mair, an outspoken and contentious radio talk show host, had commented on another outspoken public figure, Kari Simpson, who was known to hold homophobic views. Simpson claimed that Mair's comment about her on the radio suggested that she advocated violence against gay people. He contended that he neither said nor believed such a comment. The issue was whether he was entitled to rely on the defence of fair comment.

[73] The court in *WIC* first addressed how to assess whether a statement should be characterized as fact or comment. The court approved the statement of the New Brunswick Court of Appeal in *Ross v. New Brunswick Teachers' Association* (2001), 238 N.B.R. (2d) 112 at para. 56 that a comment includes a "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof," and that "what is comment and what is fact must be determined from the perspective of the reasonable viewer or reader" (*Ross*, para 62).

[74] In *WIC*, the Supreme Court endorsed the test for fair comment that was set out by Dickson J. in his dissenting reasons in *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067 as follows:

- a) the comment must be on a matter of public interest;
- b) the comment must be based on fact;
- c) the comment, though it can include inferences of fact, must be recognisable as comment;
- d) the comment must satisfy the following objective test: could any [person] honestly express that opinion on the proved facts? [Emphasis added by the SCC]

- e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice.

[75] Importantly, Binnie J. went on to note that the authors of *Duncan and Neill on Defamation* (2nd ed., Toronto: Butterworths, 1983 at p.63) had subsequently reformulated condition d) to say: “Could any fair-minded man honestly express that opinion on the proved facts?” Binnie J. rejected that reformulation. He observed that a qualitative standard such as fair-mindedness should not be included as an element of the test because what is considered fair-minded is inherently subjective. In the context of the fair comment defence, even stubborn or unreasonable people are entitled to state their honestly held views if their views are based on true facts (para. 28):

Trenchant criticism which otherwise meets the “honest belief” criterion ought not to be actionable because, in the opinion of a court, it crosses some ill-defined line of “fair-mindedness.” The trier of fact is not required to assess whether the comment is a reasonable and proportional response to the stated or understood facts.

[76] He also quoted at para. 49 from Gleeson C.J. in the High Court of Australia in *Channel Seven Adelaide Pty Ltd. v. Manock* (2007), 241 A.L.R. 468, who explained at para. 3 that:

The protection from actionability which the common law gives to fair and honest comment on matters of public interest is an important aspect of freedom of speech. In this context, “fair” does not mean objectively reasonable. The defence protects obstinate, or foolish, or offensive statements of opinion, or inference, or judgment, provided certain conditions are satisfied. The word “fair” refers to limits to what any honest person, however opinionated or prejudiced, would express upon the basis of the relevant facts. [Emphasis added by SCC.]

[77] In *Cherneskey*, Dickson J. had rejected the concept that the belief had to be fair in the sense of reasonable, rather than just honestly held. On the facts in *WIC*, Binnie J. found that the proper question was not necessarily what Raif Mair honestly believed but “whether the defamatory imputation that Kari Simpson ‘would condone violence toward gay people’ is an opinion that could be held by an honest person in the circumstances” (para. 61).

[78] In his charge to the jury in this case, the trial judge first explained that the defendants had to prove that the words complained of were recognizable by an ordinary reader as comment or opinion. The defendants object that the trial judge should have ruled that the impugned statement was a comment and not left that issue for the jury. In my view, although that is open to a trial judge, he made no error in explaining the test to the jury and leaving that issue, which was highly contested in the action, to the jury for its decision.

[79] He next told the jury that the article must be based on true facts set out or clearly indicated in the article and that it must be on a matter of public interest. As to component (d) of the test, as outlined by Binnie J. in *WIC*, the trial judge then explained that the defendant had to establish that the comment was one “which a person could honestly make on the facts proved.” He then said: “The comments must at least be fair in the sense that a fair-minded person could believe the comment. The comments must satisfy the following objective tests: Could any fair-minded person honestly express that opinion on a proved fact?” He went on to the final component of the test, telling the jury that the defence will fail if the plaintiff proves on the balance of probabilities that the defendant was actuated by express malice.

[80] The trial judge then discussed the impugned statements in the context of whether they were statements of fact or comment and told them that as a matter of law, this was a matter of public interest. On the issue of the objective honest belief test, he accurately repeated it twice, asking the jury whether the comment was one “which a person could honestly make on the facts proved?” However, he then repeated four further times the erroneous concepts of “fairness and fair-mindedness”. He said to the jury, “So ask yourselves a question: Could a fair-minded person honestly express that opinion? The comment must be fair in the sense that a fair-minded person would believe it. So was it a comment? Could a fair-minded person express that comment?” He then added at that point that “a statement of fact cannot be a comment for the purpose of fair comment if it is a new and independent fact. The plaintiffs submit that the statement ‘Everyone thinks it’s a done deal’ is a new and independent fact, and therefore ought not to be treated as comment.”

[81] The trial judge summarized the five components of the fair comment defence, with number four being: “A fair-minded person could honestly express that opinion on approved facts.”

[82] Finally, the trial judge properly charged the jury on s. 24 of the *Libel and Slander Act* as follows:

There’s also s. 24 of the *Libel and Slander Act* that says,

Where a defendant published defamatory matter that is an opinion expressed by another person, a defence of fair comment by the defendant shall not fail for the reason only that the defendant or the person who expressed the opinion or both, did not hold the opinion, if a person could honestly hold that opinion.

So in this case, Mr. Schiller relied on an opinion from Lorrie Clark when he wrote, “Everyone thinks it’s a done deal because of Grant’s influence but most of all his Mike Harris ties.” If you find that the quote is comment and not a statement of fact, s. 24 provides that the defence of fair comment will not fail only because one or both did not hold the opinion stated, provided a person could honestly hold that opinion.

[83] I set out the trial judge’s instructions on this issue in detail to show that although he properly set out the honest belief test in his first description to the jury and in the s. 24 instruction, he repeated many times the concept that when applying the test, jury members were to consider what a “fair-minded” person would believe. In my view this was an error that may have affected the jury’s verdicts.

[84] On the issue of malice, the plaintiffs presented the defendants as having acted unfairly toward Mr. Grant and as having been motivated by malice in the way they approached the story and its publication. On the basis of the very large punitive damages award, it appears that the jury accepted this characterization of the defendants’ behaviour.

[85] Given the jury’s apparent finding that the defendants were actuated by malice, it is arguable that the verdict was not impacted by the trial judge’s error in formulating the honest belief component of the fair comment test. However, reading the charge as a whole, one cannot say that this error, in combination with other errors that I will discuss below, did not contribute to the overall view reached by the jury.

[86] Because this case involved a media report relaying cottagers’ concerns about a proposed development, some confusion arose when the judge charged the jury on the role of honest belief when considering the issue of malice. When explaining the concept of malice in the context of fair comment, the trial judge informed the jury members that malice could not be found if they decided that the writer honestly believed the statement. Although he informed the jury of the application of s. 24 of the *Libel and Slander Act*, which provides that a writer may still be protected by the fair comment defence even where he or she may not honestly believe what is being reported as long as it could

honestly be believed, he did not explain to the jury how this proposition could impact the question of honest belief as it related to the determination of malice.

[87] The trial judge reinforced this potential confusion later in the malice charge after he instructed the jury, properly, that to find malice the dominant purpose must be to injure the plaintiff. He then told them:

You must start by presuming the good faith and honest belief of the defendant in the truth of the statement.... Juries should be very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of fair comment, unless they are satisfied that he did not believe what he said or wrote was true or that he was indifferent to its truth or falsity. The test of honest belief is subjective not objective. This means that the belief does not have to be reached on reasonable grounds. The test is whether the defendant honestly believed the words to be true and if you so find, there is no malice.

[88] Of course in this case, the defendants were reporting the concern expressed by Lorrie Clark and the cottagers and setting out the background for their concerns. Focusing on Mr. Schiller's honest belief in the truth of the statement to determine malice was misleading and potentially confusing to the jury in the context of this article. It was correct to charge the jury that intrinsic evidence, such as the use of language in the article that was excessive, disproportionate to the facts or containing gross irrelevancies, could be used to infer malice. It is also correct that if the jury believed that by embellishing the factual record to support the cottagers' concerns, the defendants had adopted the comment as their own, then their lack of honest belief could be relevant to malice, but not otherwise. The trial judge's failure to explain this was confusing and an error in the context of this charge.

[89] In his charge on malice, the trial judge referred to the ten reasons that plaintiffs' counsel had told the jury should make them find malice. Although he did not restate those reasons to the jury, the trial judge did not balance plaintiffs' counsel's submissions by referring to any of defendants' counsel's submissions on the evidence that the defendants said showed that they were not actuated by malice.

[90] Also, the first of the ten reasons for finding malice that plaintiffs' counsel had put to the jury was that Mr. Schiller did not honestly believe that Peter Grant had used political influence to affect the approval process. Again, Mr. Schiller's personal belief was not relevant if the purpose and effect of the story was to report the opinion of others. It could only be relevant if he was adopting the comment as his own view.

[91] The other important issue that arises out of this part of the charge relates to the intended meaning of the defamatory words. Mr. Schiller had explained that he did not believe the article said or meant that Mr. Grant had used direct political pressure.

[92] The relevance of what the publisher of the defamatory statement subjectively meant and honestly believed arose in the Supreme Court's consideration of the defence of fair comment in the *WIC* decision. In that case, Mr. Mair contended that his words had not suggested that Ms. Simpson advocated violence against gay people, nor did he honestly believe that she did. The issue was whether he could rely on the defence of fair comment if the words did have that meaning, when he had no honest belief in the statement if it had that meaning. Binnie J. disposed of the issue in favour of Mr. Mair, stating: "It seems to me that defamation proceedings will have reached a troubling level of technicality if the protection afforded by the defence of fair comment to freedom of expression ("the very lifeblood of our freedom") is made to depend on whether or not the speaker is prepared to swear to an honest belief in something he does not believe he ever said" (para. 35). However, as Lord Nicholls of Birkenhead pointed out in *Bonnick*, if the unintended meaning is a clear one that others would understand from the impugned words, the publisher of those words may not be able to avoid responsibility for the unintended meaning.

[93] The trial judge did not clarify at any stage that since Mr. Schiller was the conduit for the comment and not its maker, the fact that he did not honestly believe it could not be used as a foundation for finding malice unless in the context of the article, he had adopted the comment as his own. However, other evidence intrinsic to the article, such as the choice of language and the context in which it was used, could be used to infer malice on the part of Mr. Schiller.

[94] Of course, malice can only defeat the defence of fair comment if malice was shown to have been the dominant purpose for writing the article. Although the trial judge did mention this requirement in the course of his instruction on malice, he did not make it clear to the jury that even if they found some of the elements that could be construed as malice, if the defence of fair comment otherwise applied, malice would only defeat the defence if it was the dominant purpose of the defamatory article.

Issue 3: Other Errors in the Charge

[95] The defendants submit that the trial judge erred by failing to fairly summarize the evidence in his charge. Although he reviewed the evidence of each witness in examination in chief and in cross-examination, he did not review the cross-examination of the plaintiffs' witness, Mr. Webster, the employee whom Mr. Grant sent to detain the Star photographer, Mr. Slaughter, until the police arrived and who used his car to try to prevent Mr. Slaughter from leaving the area. The trial judge reviewed Mr. Webster's evidence in chief but did not mention his cross-examination in which he acknowledged

several important details: (1) that Mr. Grant told him to try to block Mr. Slaughter from leaving the area, (2) that he did not move over to the side of the road to let Mr. Slaughter pass, causing him to narrowly miss the ditch, and (3) that he did not see Mr. Slaughter on the golf course but saw him standing by the side of the public road on the swale taking pictures. This evidence was important to the defendants in the context of the second aspect of the libel claim relating to how this incident was conveyed in the article.

[96] Defendants' counsel asked the judge to correct this in a recharge but he declined to do so. Although this was not a fatal error, it is important that a trial judge fairly summarize the evidence, especially the evidence on significant issues in the action.

[97] The defendants submit that the trial judge erred in his instruction to the jury regarding defamatory meaning. He told the jury that he had decided as a matter of law, that the words complained of were capable of having a libellous meaning and it was now for them to decide whether the words actually libelled the plaintiff. He went on to say: "The result of my decision that the words are capable of a libellous meaning is that the words complained of are, in law, presumed to be false. The plaintiff does not have to prove they are false because they are presumed to be false."

[98] In the course of considering this submission, it came to my attention that this part of the charge, as well as several other aspects of the charge that included examples used by the trial judge to illustrate legal concepts, came from a standard form of charge used by trial judges in Ontario. This instruction, as well as the examples, appear to have been included in the standard form for several decades, which explains why the trial judge relied on them.

[99] However, this instruction is in error and misleading to the jury. It is the jury's role to determine whether the words complained of are defamatory. It is only once they decide that the words are defamatory that the words are presumed to be untrue and the plaintiff is presumed to have suffered damage from their publication. If the defendant wishes to justify the words, the defendant must prove they are true. The presumption of falsity does not arise from the ruling of the trial judge that the words are capable of being defamatory. That ruling is simply the result of the exercise of the gatekeeper function before the trial judge may leave the issue of whether the words are defamatory to the jury. The ruling has no other legal consequence. Telling the jury that the presumption of falsity arose from that ruling before they had decided if the words were defamatory may have given them a negative impression about the words and about the defendants' use of the words, before the jury began their job.

[100] Eady J., a very experienced libel judge in the High Court of Justice in England, gave the following instruction on the presumption of falsity in *Jameel* (cited by the Court of Appeal in its judgment at para. 41), which makes it clear that the presumption of falsity arises only if the jury decides that the words are defamatory:

Before I come to the evidence on these issues, which you have to consider, can I just say one or two more things about the general shape of this case. First, if you decide that it is defamatory of one or both claimants, we must all proceed on the basis that any such defamatory allegation is untrue. We take that as a given.

[101] In my view, the better practice is for trial judges not to tell juries about rulings they have made, unless it is necessary either to instruct them to follow a particular ruling or to tell them that a conclusion is unavailable because of a legal ruling.

[102] Similarly, examples used to illustrate points of law are best taken from the evidence itself, as this is very helpful to juries in understanding a point. Examples can be helpful when they are neutral in the context of the case, such as when trial judges explain the concept of circumstantial evidence by saying that a person who wakes up in the morning and sees it is wet outside may infer that it rained overnight. The standard libel charge, however, includes the example of Mr. X, a city's treasurer who overspent his budget and who became the subject of an article reporting that he had "liberated public money". The trial judge referred to this example several times in his charge to illustrate concepts of meaning. In my view, this is not a neutral example, but is clearly defamatory, suggesting that Mr. X stole the money. It can be diverting and unhelpful for the jury to have to focus on new fact situations when they are trying to understand and apply difficult and nuanced concepts in libel to the evidence they have heard.

[103] The defendants object to the decision of the trial judge to allow the plaintiffs to lead evidence and claim damages based on the allegation that the article caused the MNR to delay the approval of the golf course project. This issue was not pleaded but was raised just before trial. This was clearly a discretionary decision made by the trial judge on a matter of procedure that is to be accorded deference. I agree with the defendants, however, that the evidence on this issue was speculative at best and no evidence was called from the MNR, the only people with real knowledge on the issue. It would therefore have been preferable for the trial judge to explain this to the jury when leaving this aspect of damage with them.

[104] The defendants raise several objections to the charge on the issue of damages. The trial judge's discussion of damages was brief. He was entitled to conclude that aggravated and punitive damages could be available depending on the jury's view of the evidence and the meaning of the article, and to instruct them accordingly.

[105] The defendants also ask the court to reduce the amount of the compensatory damage awards and to vacate the punitive damage award. Because I would order a new

trial based on the errors already identified, it is unnecessary to further address these issues.

Conclusion

[106] As the public interest responsible journalism defence is a question of law for the judge to decide, in some cases where there is an error by the trial judge in applying the test, the Court of Appeal will be able to apply the appropriate factors and substitute its decision for that of the trial judge. However, in this case, for the reasons I have discussed above including the need for the jury to decide the meaning of the impugned statements for the purpose of assessing the defence, as well as because other errors in the charge may well have affected the jury's verdict, the proper remedy in this case is a new trial where all of the issues will be decided.

[107] I would therefore allow the appeal, set aside the verdict and order a new trial. The costs of the first trial shall be in the discretion of the trial judge who hears the new trial. The costs of the appeal shall be to the appellants, fixed at \$65,000 inclusive of disbursements and GST.

Signature: "K. Feldman J.A."

"I agree M. Rosenberg J.A."

"I agree Janet Simmons J.A."

RELEASED: "MR" November 28, 2008