Comment - *Cusson v. Quan et al*

Introduction

The case of *Cussonv. Quan et al.* is being touted as a new dawn of free speech for the media[1] - by media lawyers. If they're so happy, what should the rest of think?

In it an Ottawa police officer whose account of his attendance at ground zero in New York September 11 2001 was exposed and/or mocked by articles in the Ottawa Citizen was partially successful in a defamation action against the paper. (Quan was one of the reporters involved. Cusson won $100,000 from a jury, a not insignificant victory. He won because for some parts of the stories in question the defence of fair comment failed. In the appeal court the paper made what the court characterized a "fundamental different" argument. That fresh argument gave rise to the now celebrated reasons authorizing new press freedoms. But the Court of Appeal did not apply the new test to the trail verdict. So the officer got to keep the jury verdict. Given the nature of the Court of Appeal result and/or reasons which satisfy both parties for very different reasons, there will likely be no appeal from this decision.

So the police officer still emerged the winner and takes home his money. The paper 'wins' in the sense that the reasons explicitly set out a new privilege for the media which is thought to be very valuable. The reasons of the Court of Appeal which spell out the new test are entirely dicta which, in theory, means the reasons are not binding on lower courts. But the media hope and expect the reasons will be "persuasive" anyhow. Given the infrequency with which defamation matters climb the legal ladder for detailed consideration at the higher level, and given the general unfamiliarity of the bench with the intricacies of the law of defamation it indeed likely the reasons will be highly influential for years to come.

If this decision were to be appealed to the Supreme Court of Canada what would be the issues and result? More on that later. But first, let's take the new test at face value and explore what it might mean to the practice of defamation.

The New Defence – Public Interest and Responsible Journalism

At paragraph 144 Justice Sharpe summarizes the new media defence as follows: [2]

> 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 constitute reasonable steps will depend of course on the circumstances. In assessing whether the media has met the 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 circumstance.

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[1] *The Lawyers Weekly*, Nov. 30, 2007.
[2] Emphasis added.

> As *Reynolds* and subsequent authorities above noted, these factors are not a list of hurdles the media defendants must negotiate; rather they are indicia of whether the media were **truly acting in the public interest in the circumstances.**

This approach is to be compared to 'old' law whereby the media had no greater privilege than other individuals and no right to report as fact things they could not prove or no right to comment unless they could prove sufficient facts that the comment could be found fair. While there has been some erosion of these traditional principles in recent Canadian case law, well summarized by Justice Sharpe [3], this traditional approach is the subject of the perpetual complaint that that there is a 'libel chill' in the land.[4]

Justice Sharpe also does a good job outlining how the law has evolved in other common jurisdictions more favourably to big media.[5] His reasons boldly change the nature defamation law. He brushes aside the objection that such major changes require Supreme Court action.[6]

In summary the reasons abandon the requirement of a factual foundation to the 'news'. If you believe there is such a thing as factual truth and/or that factual truth should play some part in public discussion, and/or people believe what they read and rely on the media to make their political decisions, then the Reasons represent a monumental shift the law. The Reasons require of the courts to be the gatekeeper, to determine when the news need not be based on fact. This is an overtly political decisions, perhaps even more so than the *Charter of Rights and Freedoms,* has required of the courts. Let us consider the issues.

The Ten Part *Reynolds* test

At the highest level of abstraction the test of big media is whether the publication of unproveable allegations is the "public interest". That is further defined as a "responsible journalism" test meaning that the media must show they took "reasonable steps in the circumstances to ensure that the story was fair and its contents were true and accurate." And that test is further defined by adopting the famous *Reynolds*[7] test, set out in full at paragraph 89. But O.C.A., as quoted above, is careful to say this 'test' is a mere guideline, to be freely adapted according to the circumstances.

The *Reynolds* test[8] of "responsible journalism" is:

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[3] See paras 59 – 71. See also *Parsons v Windsor Star*, XXXXX and *Parlett v. Robinson*, (1986) 30 D.L.R. (4th) 247, (B.C.C.A.)

[4] Libel chill is feared most by freelancers of the investigative variety. For big media, defamation litigation is a cost of doing business. Big media often pass on the cost of defending defamation actions to the independent writers with whom they contract.

[5] See para 82 – 122, especially *New York Times v Sullivan*, 376 U.S. 254 (1964)

[6] See para. 137 – 138. It is noted in passing that the Province of Ontario sponsored a major review of the law of defamation which considered changes, *inter alia*, to favour the press. No formal amendments came out of this process. There was no consensus then about what changes might be appropriate.

[7] *Reynolds v Times Newspaper*, [2001] 2 A.C. 127

[8] Quoted from *Reynolds* at para. 89 of *Cusson.*

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 timing.

Who is a **"media defendant"?**

The wording of the Court of Appeal reasons suggests that the new defence is available only for the media. Is it the case that media have a defence that is not available to the rest of the citizenry? How can that be justified? The *Charter* grants 'freedom of expression' to everyone not 'freedom of the press' to the few?

Would a union or a ratepayers' newsletter qualify as a media defendant? How about a regular blogger commenting in the news? An irregular blogger? How about an individual who is mad about something they think is very important – a suspected drug dealer or sexual predator in Unit XXX down the hall who the police have failed to arrest and about whom they decide to distribute a flyer setting out their sincere belief in this factual allegation. Do they have a *Cusson* defence?[9]

Is the defence available to those who are quoted in the story or only the media who publish the material?[10] If someone speaks at a press conference 'in the public interest' in a 'responsible way' – have checked facts as best they able etc., would they have a *Cusson* defence?

The *Cusson* reasons struggle, as have all the common law court which have wrestled with this problem, with a test upon which to base great press freedom. The Americans have tried greater freedom for stories about public persons. (the person spoken about') The Australians have tried greater freedom for political stories. (the subject 'written about')

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[9] See *Grenier v Southam Inc.* [1997] O.J. #2193.

[10] This is a current issue in the law. Section 5 of the *Libel and Slander Act* provides:

Justice Sharp has adopted the very open-ended *Reynolds* test. But a key part this test seems to be that greater latitude is for certain kinds of writers. The cynics view that there is to be greater freedom for the rich and powerful has to be accepted as fair.

"In the public interest"

The overarching test in *Cusson* is "the public interest".

clear that the test to be applied is subtle, and ever evolving and that the ten part test from *Reynolds* is only a starting point for discussion. Before getting to the practical difficulties of such open-endedness, let us nevertheless consider the elements of test separately.

There is in the existing law of fair comment a test that might be thought similar but, ought not be confused. A fair comment defence is only available if the matter is one "of public interest". This part of the test is almost never referred to because judges almost never hold that the defamatory words in question are not on matters "of public interest".

Just about anything is "of public interest" and can be the subject of fair comment. This wide latitude is granted, I believe, the balance of the fair comment defence requires a factual basis to be presented and proved. Under the new rule, since there is no requirement of factual proof, then the court should be more sceptical. The words used are "*in* the public interest", not *of* public interest, which sounds like a stiffer test, not just what people are curious about but topics that are so important "the public interest" – whatever that is – requires their public discussion. So, what is "in the public interest"?

Differences of opinion on this are so profound, the court will writhe. Is it of public interest that the Prime Minister is accused of corruption by another member of Parliament? A foreign businessman? A foreign businessman in a sworn a affidavit? An unheard of prostitute? What about allegations against a foreign head of state? Move from the easy realm of senior politicians to business folk and questionable financial dealing, to policemen making arrests, to humane society officers using allegedly heavy handed methods to rescue pets? Closeted sexual orientation. Just about everything is important to somebody. And not surprisingly, their views tend to correlate to their politics. Are we looking to *topics* of public interest, to *people* of public interest?

On some subjects, or about some people, the courts will allow the circulation of unsubstantiated rumours and allegations, but not others. Perhaps the factual basis, or not, to public debate, really doesn't matter. But if you think it does then there is no evading the observation that courts will now assume an important role as a kind of censor, not a censor who prohibits certain kinds of publications but a censor who allows certain kinds of false publications.

"Responsible Journalism"

a) *Presenting the target's side of the story*

(Reynolds, Factor #7 - Was comment sought?,
Factor #8 - Giving the gist of the target's version)

One possible defence for the media will be that target's version of the story is presented. The threshold is low. All that is required is the "gist" of the other side be in the story.

A worst case scenario version of this in current practice is to write an inflammatory headline, cite a lurid allegation and then say in the last paragraph 'Smith denied the allegations.' Will something like this pass as the 'gist'.

If a full and fair presentation of the other side of the story is run contemporaneously so the reader is truly given a chance to chose, this would seem to be the best defence. I don't see why any other defence would be needed. But big media would not like this to be established as the bench mark or responsible journalism. An impartial presentation of the news, of both sides of the story, does not sell papers. A requirement of an impartial presentation of both sides would be said to encroach on press 'freedom'. And it would be most surprising if any expert evidence emerged that suggested that the standards of 'responsible journalism' as presently practiced, required, or even suggested such generosity.

We note there are practical problems from the point of view of the media of a high standard of fairness in reporting both sides. Can the paper edit the rebuttal copy presented by the target? What about photos and headlines? What about follow up stories?

The downside – for plaintiffs/targets - of entrenching this escape clause for big media is that it effectively forces them to give interviews to the media. If a target is given a full chance to give their side and declines, it is likely they are open season. 'Smith refused to speak to our reporters' And if the opportunity to comment is full and fair, why not stick to Mr Smith? The effect of all this will be that the press will seem to have more power to force people to talk than the police or the Crown. 'Give us your 'story' – now – which we will pick apart – or we'll make you seem as guilty as sin for clamming up.'

The right to say 'no comment' is still a right but it is not one the press is being called upon to respect.

The upside – for plaintiffs – is that it gives the new approach may yield some opportunities to modify, alter or stop a hostile story. At the first wind that the press is planning an attack, the target should go on the offensive, asserting the true version of the facts, contradicting the reporters hostile sources, complaining about the fairness of allegations, requiring more time to gather information, offering an alternate story to publish. Those who have been up close to the 'news' gathering juggernaut know these techniques well. If the media ignores this and proceeds with a hostile unfair story a well documented paper trail of the hapless victim of the smear, presented to a jury would be big trouble for the media defendant.

What should the media do to get the target's version? What about interview techniques? Is it fair to ask for the questions in advance? In writing? To tape an interview in order to be able to show an answer has been quoted out of context? To have a spokesperson pinch hit? Do reporters have an obligation to put all their cards on the table before asking questions? By the way, what are the standards of honesty for reporters asking questions? Is it ok to lie for a good story? How far down the road do who go – a road familiar to lawyers whose questions are judged by very rigorous standards?

Well advised targets, rich in resources to take up the cudgel at the earliest opportunity, will raise some, or all, of these questions at the first instances. Again, this is all familiar terrain for those in the business of media management.

It could well be said 'responsible journalism' doesn't require such high standards of fairness. For example, the rush, the urgency, to get the story out, may mean that 'unfairness', by legal standards, is quite acceptable. But if the supposed opportunity to rebut is the basis for the press claiming the right to present unverified facts, should target be short changed by sly and tricky interviews?

What are the standards of "responsible journalism"? We will soon learn that there are no consistent standards. We will soon witness editors and reporters drawn and quartered in cross-examination as lawyers challenge this new defence. The new defence has very little rigor or structure. The cross-examination will be far ranging. Will big media be so pleased once the invasion of the news room by the plaintiff bar is full swing? To anticipate a topic discussed below, who is to decide what are the standards of "responsible journalism", the courts and the juries, or will it become the preserve of "experts" who 'know best' how journalist should behave?

b) *The subject matter – "of public concern"* (*Reynolds* test - #2)

The language in *Reynolds* suggests the subject matter in question must be "of public concern." Does this mean the subject matter should have some minimal interest to the low brow prurient reader or viewer or is "of concern" to high brow serious reader. Just to state the problem is to recognize how open-ended is the discretion here.

Should we pause to contemplate the difference between the old fair comment test "of public interest" as discussed above, "in the public interest" which the over arching test from *Cusson* and "of public concern" as in *Reynolds,*#2? No, let's not. Well, at least note this – "of public concern" is as baldly a political question.as "what's in the public interest". And the former is contained as part of the latter? What could be more clear?

The Australian Courts took political "subject matter" as the boundary where they would recognized the right of the media to report without provable facts.[11] The American approach by comparison was to give the privilege to comment about "public persons".[12] [13]

Both approaches encountered problems at the boundaries, that is massive litigation on what fit within the scope of the protection. In the *Reynolds* and *Cusson* formulation there is no attempted at a focused test. But the subject matter test does find its way in as part of the discussion.

Is 'what's of public concern' a matter of "responsible journalism" that only a journalist can talk about? More on the role of experts below.

c) *Urgency*
(*Reynolds* test - #6)

As the *Reynolds* test notes, news is a commodity. So part of the test, it seems, will be the urgency of publishing the allegations before the competition. It seems odd to find the financial interests of big media on the same page as "the public interest", as an excuse to publish unproveable allegations, but there it is.

The colourful myth of the eager cub reporter racing to beat the competition to get the scope will be subjected to some serious investigative inquiries by some legal predators. . Often the so-called urgency is simply to need to fill the blank pages or that tomorrow the eager cub is to be reassigned to a different story and this one 'goes' today or it get scrubbed. The 'urgency' may well be about the newsroom budget, not the fear some other news organization will publish first. 'We don't have the staff to give this more time.' Really. Let's see the budget? Let's look at the last round of news room staff cuts. Why should reputations be sacrificed so senior editors can get a bigger bonus?

And what other news organization? Is there *really* another reporter breathing down your neck? Let's see the proof.

The news room ethos has it that once the opposition has even written about the subject matter, the story is supposedly dead, not news. Newspapers and television news are prepared and presented on the basis that the 'latest' twist, the latest new spin. That is 'the news'. An explanation, a comment, additional details, presented the next day, are not 'news' and do not make it to page one. But news magazines don't think like this. They can write about a current hot topic several days later and feel they have been 'scoped'. Buying into the 'urgency' test is to accept the dictates of daily news paper publishing should govern. Editors will say that the readers will not buy newspapers the next day, after a story has broken, to read a more reasoned, fair, account of the same topic. It will

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[11] Australia
[12] USA, *New York Times v Sullivan*, op. cit.
[13] British Columbia has its own variation, sometimes called the "ventilation test" whatever the politician feels compelled to talk about.

be an interesting cross-examination to test whether this is true. It will be an interesting cross-examination to test whether catering to the 'dumb' reader theory is "in the public interest".

Is it necessary "in the public interest' that we cater to this hysterical view of unfolding events? Will democracy crumble if the news comes at us more slowly and carefully? Weekly news magazines don't run on this hysterical basis.

How does reporting *first* on un-proveable allegation serve the public interest. It is now the case that the *Charter* protected interest in reputation[14] are subject to the financial dictates of daily newspapers to spin faster and cheaper?

d) *Reliability*
(*Reynolds* #3, the Source; #4 – Steps to Verify and #5 Status of Information)

Three elements of *Reynolds* test are referable to 'reliability'. The *Reynolds* case, in fact involved the easiest and most obvious example where the media should be able to refer to allegations without being forced to take on the burden of proving facts to back up those assertions. The Times published the results of a Royal Commission investigation into alleged corruption by the Prime Minister of Ireland. The reports of that Report were the subject matter of the alleged defamation where the House of Lords allowed the new privilege.

It should be noted Ontario (and all other provinces ???) already have a statutory protection for fair and accurate reports of reports of public bodies. The defamatory words in the *Cusson* case did not fall within the Ontario statutory test.

The statutory protection is as follows:

> Section 3[15] provides:
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> A fair and accurate report in a newspaper or a broadcast of any of the following proceedings that are open to the public is privileged, unless it is proved that the publication thereof was made maliciously:
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> 1. ... legislative bodies
> 2. ... administrative bodies constituted by any public authority
> 3. ... commission of inquiry constituted by any public authority
> 4. ... any organization whose members represent any public authority

[14] See *Hill v Church of Scientology*, op cit.
[15] *Libel and Slander Act,* sec. 3, Statutes of Ontario.

There are essentially two branches to the protection offered here. The first is for reports of bodies and reports a bout their proceedings, where the public body in question .....that The protected reports under the statute must be "fair and accurate". [16]

The effect of *Cusson*, in theory, is to give protection for reports of such tribunals where the reporting does not pass the test of being "fair and accurate". It seem unlikely Cusson will mean the standard falls any lower. More important is the possible privilege the protection will extended to reports of tribunals and public bodies where the procedural protections are not reliable, or where the 'decision' is not a trustworthy measure guilt. For example, a coroner's inquest might recommend laying charges but that recommendation is hardly a measure of possible criminal guilt.

The other branch of statutory protection is for a fair and accurate report of public meeting called to discuss the issue in question.It is interesting how seldom this protection is invoked. The premise of the protection rings true to the theory of democratic debate and fits exactly the core theory of those who champ at the restraints of the law of defamation. The core fact is that the 'allegations' from such public meetings, come from a forum where there is chance for rebuttal. If the invitation to rebut is not accepted, to bad for the target. The meeting is called to discuss the issue. The media is allowed to report all allegations if they do so fairly.

The question is, why is this not enough? Why and when should the protection be broader? One problem is that public meetings have gone out of style. Second, the media is anxious for the freedom to report allegations where there is no meeting, or before that meeting takes place. Is it the case that the media don't like this approach because it requires them to report fairly what the rebuttal might be. Tends to boring copy.

Another aspect of reliability is very familiar in the existing law of defamation and that is the question of the source. Journalist unanimously agree that they should be able to report allegations from anonymous sources and swear frequently they will go to jail rather than disclose. Here they are at odds with the fundamental principles of legal process which are equally firm that allegations require proof from witnesses with names, face and addresses. There is no doubt that the standards of responsible journalism as interpreted by the Fourth Estate are deeply at odds with legal values.

This issue here was not technically before the Court in *Cusson*. Did the Ontario Court of Appeal intend to decide this fundamental issue by its loose language.

The better kind of journalist will say that they wouldn't run with a story from an anonymous source unless they had satisfied themselves the source was trustworthy. When this issue arises in a specific way, what will the court do? Will it accept from the journalist experts that this – unnamed – source was indeed reliable? If the Court decides to scrutinize, because part of the test is still efforts to check out reliability, how will this be approached?

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[16] The very limited case law in this area suggests a very low threshold for "fair and accurate".

Under the current law a defendant who want to rely on fact provable only from an anonymous source, probably has to produce that source as a witness.[17] Under the new approach will a reporter who wants to prove the reliability of his story have to reveal the name of the source and the nature of the questioning etc. to demonstrate proper efforts to check on reliability? Will the Court step into the shoes of sceptical editor? And what are the standards of that sceptical editor? (Are they relative to the seriousness of the allegations etc.?)

(e) *Sensationalism*
(*Reynolds* test - # 9 - Tone, #10 – Timing)

What is "sensationalism" anyhow? Here is another slippery aspect of the new test and one where the standards of "responsible journalism" certainly nebulous and unreliable. What is 'sensationalistic' in the *Globe and Mail* might nevertheless be considered dreary and boring in a tabloid. *Chacun a gout.*

Generally speaking, sensationalism is something that fits under the test of 'fairness'. Based on proven facts are words 'fair'? There is strong case law to suggest that words with a sound factual substratum can be quite strong. Sensationalism can be 'fair'. The argument is generally presented in terms of whether the opinion in question is honest and fair not whether it is 'sensationalistic'.

However there are few cases where what is perceived as 'sensationalism' figures into the analysis of whether the comments are 'fair'. The case of *Globe vs. Hodgson* [18]is an interesting example where the trial judge criticized sensationalism as something adverse to the fairness of the story.

(f) - Seriousness of the Allegation
(*Reynolds*, #1 – seriousness)

'Serious' is a most excellent weasel word. In the context of the *Reynolds* test does it mean allegations originating from a source that is 'senior', respectable, reliable, in other words 'serious'? Or does 'serious' refer to the serious consequences to public safety or the 'health' of the public debate or the democratic process, if the matter is not disclosed for discussion. Which is to say, it is 'important'. The range of opinion about what it is truly important to discuss publicly is as broad and slippery as the political spectrum. Or does this refer to 'serious' damage to someone's reputation? If so, in whose eyes is it 'serious' – the punctilious, obsessive, self-absorbed prig or the jaundiced editor whose published the same kind of comment about others a hundred times before without trouble?. These broad and different approaches to meaning of 'serious' pose serious difficulties for the court. Seriously. A weasel word of the first rank.

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[17] The issue seldom ever gets to trial.
[18] *Hodgson v Globe and Mail*, para. XX

This category broadly matches the question part of the current law - whether the words complained of are 'defamatory' of the plaintiff. The traditional law is generally easy on would be plaintiffs. Anything that casts them into a bad light in the eyes of the ordinary citizen will do. Then the Defendant has to prove one of the defences – qualified privilege, fair comment or justification. There are some common issues in this envelop which the *Cusson/Reynolds* approach allows the court to review.

The Sensitive Plaintiff

Often plaintiffs are more sensitive to words published about them than journalists. Journalist may think the words are mild or not even critical There is probably a general expectation that we citizens ought to have thicker skins than our Victorian grandparents. But that abstract notion is difficult to implement in the law. For example to say that words that 'raise questions' about someone behaviour are not defamatory because 'raising questions' doesn't cast someone in bad light, is not a good approach. 'raising questions' probably does defame someone but framed in this language it probably is a good fair comment defence. *Cusson* allows the court to take a fresh look at the problem of the hyper-sensitive plaintiff in the context of media stories.

Person Not Named

Perhaps it is not clear that the words refer to the plaintiff. This type of problem is standard in the existing law and it is determined under the heading – 'are the words defamatory'. The trier of fact, judge or jury, will decide. It is not difficult to anticipate major media arguing that the allegation in question is not so 'serious' because the party is not named and that should be an aspect of the defence. Responsible journalists may disagree on this point. If the name is not used, so fewer people will know who is being attacked then it may be thought 'o.k.' to go further in the attack. How will the courts assess this looseness?

The Presumption of Innocence and reports of formal charges and investigations

What of reports that someone is being charged with an offence or even just that they are being investigated by the police or some other official body? Are such reports defamatory? This is contested terrain in the current law. Carefully worded reports of the fact of criminal charges are thought not to be defamatory because the average person, supposedly, would not think ill of a person just because there are charges brought by the police. The irony is that probably reports of charges, or even just an investigation by the police, probably do not carry much of a presumption of innocence, such is the prestige of the police. If the police are charging you, you're probably guilty! The presumption of innocence work best with unreliable sources. Police news releases of persons charged are careful never to assert the factual truth of the situation and the similarly the news reports. Note that prim and proper journalist ethics supposedly say that if a paper reports on the

fact charges have been brought, then it the newspaper is honour bound to follow the story and report the result of the trial.

Reports of an 'investigation' are even trickier. Police are careful most of the time not to discuss even the fact of an investigation because, such events are not even a charge. The laying of a charge is the event which crystallizes the official belief a party is guilty. But the press love to report the fact an 'investigation' is underway. Is this mere fact still protected by a presumption of innocence?

But if the allegations, 'charges' or 'investigation' are from some other 'unofficial' source then the media have a problem. Outside the sphere of traditional criminal charges when is the presumption of innocence at work effective? The range is broad – from an investigation by highly professional and official bodies such as the Securities and Exchange Commission, to reputable but unofficial bodies such as Amnesty International to opinionated individuals – 'Smith charged Jones with …"

A 'serious' source

The media wants to be able to report allegations without responsibility to prove facts. *Reynolds*, and now *Cusson*, suggest that the more official, and hence, supposedly, the more reliable, senior and supposedly trustworthy the body laying the charge, which is to say the more 'serious' the greater the protection afforded under *Reynolds I and Cusson*. Note, this is at odds with how the presumption of innocence actually works in the public mind. The more official the charging body, the less likely will be the public to wait for the trial to conclude something. But the more official the body the more likely that there are procedures that will be followed and at some point an official conclusion will be drawn. And this underlines the importance or the media following the story of the charges to their conclusion.

Stories about truly terrible risks based on truly flimsy evidence

'Seriousness' has a flip side. A matter be so 'serious' that it justifies taking greater risks with reputation, for example an allegation that safety procedures at the local nuclear reactor are lax or that John Smith who lives across from the school has a sexual attraction to little children. The risk of harm is so great that the danger of falsely harming someone's reputation takes second place. This is a card the media can play well.

MBA students will all be familiar with risk management techniques. Minor risks of major catastrophe should be treated very seriously. Will this kind of analysis now become stock in trade for editors and the experts in responsible journalism? The logic of the approach is compelling and the debasement of the approach is inevitable. 'Sure this single incident of apparent infidelity is minor all by itself, but think of the risk to our children who idolize this man and who may copy his example and ruin their future marriages.'

Serious Damages

Under the current law the 'serious' defamations attract serious damages. Minor defamations presumably will attract minor damages but nevertheless have to be defended. A lawyer accused of bad faith or a politician accused of corruption will supposedly get more damages because the defamation, if not successfully defended, will have more serious consequences to these folk. Here is the 'class' bias of the law of defamation is on display.[19]

Cusson will, in my view accentuate the historic 'class bias' of the law of defamation by deferring to the snobbery of those thought to be important – by the judiciary. We will see if the 'little people' whose reputations are attacked, will be thought to have a suffered a 'serious' defamation? *Reynolds* and *Cusson* raise the prospect that defamations against the 'little people' will be 'authorized' by the courts in the sense that since there will be thought to be no serious damage done, in the eyes of editors and judges.

Burden of Proof and Expert Evidence

There is nothing in *Reynolds* or *Cusson* that changes the existing law that the defamer has the burden of proof of their defence. Clearly this is a legal burden. What about the evidence? Presumably the press, wanting to rely on the new privilege, will lead evidence of 'responsible journalistic' practices through 'experts'. Here is a new profession. 'Experts' will emerge where none existed before.

One thing seems fairly obvious, the standards of "responsible journalism" vary depending on the budget of the news organization. What is the norm for one organization is beyond reach for another. No one will admit that their 'norm' is not "responsible". Will the standards of "responsible journalism" be relative to the local budget? Or will the standards of the *Globe and Mail* or *The Toronto Star* now be applied to *The Sleeze and Junk Daily Tabloid?*

Is it possible there can be any evaluation of "responsible journalism" when there is no expert evidence? Will the deliberations of the Press Council become the bench mark of "responsible journalism"? Can media critics give expert evidence?

Will the courts simply opt out of the extremely contentious task of defining those standards by saying 'it's all up to the experts'. Who can be an expert? Is expertise all about what usually happens in the newsroom? Is this a test akin to the "good neighbour" test which governs the law of negligence? Will the experts turn out to be folks from big media news rooms so that the effect of this will be the court simply defers to what the media wants to do? Will the standards of "responsible journalism" be left to the jury?

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[19] Recently this bias has broken down a little as the effect on the plaintiff 'feelings' has come to play a part in the assessment of damages.

It is inevitable that the focus of defamation litigation will shift dramatically from the facts of the story to questions about newsroom behaviour. There will be some unpleasant moments in Discovery and cross-examination. The editorial process will come under scrutiny as never before.

No matter how you slice it lawyers will spend more time in the news room. It will be interesting to see whether they bring 'legal values' of transparency with them. Will the lawyer's inherent instinct for fairness in debate and natural abhorrence of anonymous allegations have an impact in the newsroom?

Pulling It All Together

The most troubling aspects of the new test is its uncertainty. There is no priority or ranking among the factors to be considered. And there may be *other* factors than those discussed in *Reynolds*.

What we have been given is a truly excellent synopsis, a list of 'factors' to be considered, a fine an analysis of the problem but no actual rules. Vast discretion has been handed to the trial judges by the Court of Appeal, which, in any case, loves to defer to the wisdom of the trial judges who have heard the evidence. If you come to sit with real lawyers and their clients sometime in the next decade as they try to figure what the law actually means and what the result in their case might be – and how much money to spend on their litigation – you will understand how deeply unsatisfactory this new test is. And it is most unsatisfactory to the party with the least money. Laws of this sort accentuate the bitter truth of litigation – it's all about money. Big media is rich. The occasional plaintiff is just as rich. Let the games begin.

This is about the way I make scrambled eggs, different every time. But then I thought the famous 'good neighbour' test which revolutionized the law of negligence was impossibly vague.

Another very slippery problem to watch will be the effect of damages of the new defence. When the media argue 'responsible journalism' and lose will the jury pump up the damages to the plaintiff? Under the traditional law 'big' damages are usually beyond reach unless malice is proved. Now the exploration of 'irresponsible' journalism will be the occasion for criticism of the media that would fall short of the traditional malice.

I note that the wide-open nature the defence of 'responsible journalism' is an opportunity for the plaintiff. The flip side of the new defence means, in theory, the range of newsroom behaviour open to attack is without boundary. Plaintiffs will quickly develop a template pleading of 'irresponsible journalistic' practices. Affidavits of Documents required of media defendants will be a nightmare. There will no doubt be some interesting motions where it alleged the plaintiff is 'fishing'. And what a bountiful stream it stream it will be.

Supreme Court of Canada

We have presented all this as if *Cusson* is 'the law'. But there is a serious issue whether *Cusson* is in accord with the leading authority in Canada in the law of defamation, *Hill v. Church of Scientology.*[20] Given the confusion implicit in the *Cusson* reasons it seems likely the issues will arrive in Ottawa at some point. What then?

In his reasons in the Supreme Court Justice Cory is very explicit in his view, adopted by the full Court, that reputation is a *Charter* value every bit as worthy of defence as "freedom of expression". "A good reputation is closely related the innate worthiness and dignity of the individual. It is an attribute that must just as much as freedom of expression, be protected by society's laws."[21] Cory J. balances two fundamental values in his reasons. Freedom of expression does not have priority.

Justice Cory then goes on to consider the media arguments presented to the court that Canada move in the direction of the American law in *New York Times v. Sullivan.*[22] He concluded:

> [Para. 122] In *New York Times v. Sullivan* ... the United States Supreme Court ruled that the existing common law of defamation violated the guarantee of free speech under the First Amendment of the Constitution. It held that citizen's right to criticize government officials is of such tremendous importance in a democratic society that it can only be accommodated through the tolerance of speech which may eventually be determined to contain falsehoods. The solution adopted was to do away with the common law presumption of falsity and malice and to place the onus the plaintiff to prove that, at the time defamatory statements were made, the defendant either knew them to be false or was reckless as to whether they were or not.
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> ....
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> [para. 137] ... I can see no reason for adopting it Canada in an action between private litigants. The law of defamation is essentially aimed at the prohibition of the publication of injurious false statements. It is the means by which the individual may protect his or her reputation which may be the most distinguishing feature or his or her character, personality or, perhaps, identity. I simply cannot see that the law of defamation us unduly restrictive or inhibiting. Surely it is not requiring too much *of individuals* that they ascertain the truth of the allegations they publish. The law of defamation provides for the defence of fair comment or qualified privilege in appropriate cases. Those *who publish* statements should assume a reasonable level of responsibility. [italics added]

While it seems to be the case that at the highest level our courts are moving away from the traditional idea that the law needs to be consistently interpreted and applies, it is hard to imagine the contortion required that the court that spoke these words could now adopt

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[20] *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130.
[21] Para. 107. See also para. 117.
[22] *Hill*, paras 122 -142. And *New York Times v, Sullivan*, 376 U.S. 254 (1964)

the reasons set out in *Cusson*. The Court is emphatic that reputation is valued and a factual grounding is required, exactly what *Cusson* says is secondary to the media right to publish. Let us consider briefly what might be some of the rationalizations offered by media lawyers.

One argument is that *Hill* only applies for defamations between individuals and that there can be different rules for the press. This finds some support in some of the words used in paragraph 137 as italicized above, and is negated in others. Paragraph 137 poses the question whether there will be different rules for individuals who offer criticism as opposed to the media? What about media who report on the criticism of others? How could a Court that asserts that reputation is a fundamental *Charter* value the protection of which is to be entrenched at the most fundamental level, flip and say that only applied if the critic was an individual? The corporate defendant – with vastly more resources to "ascertain the truth" – is excused from any responsibility for factual accuracy?

Paragraph 139 perhaps opens another door for the media. It suggests that the Australian approach, which rejected the American *Sullivan* approach, might be distinguished because the *Hill* case did not "involve the media or political commentary about government policies". Does this suggest that for certain *topics*, political commentary about government policies, the Supreme Court would abandon the necessity of some factual basis as a protection of reputation? Again, it is difficult to fathom how this notion could be reconciled with the strong language of *Hill* in favour of reputation.

Justice Sharpe in his *Cusson* reasons adopts a different strategy to finesse the problem which the reasons in *Hill* present to the advocates of expanded freedom to the media.[23] He suggests that the Court adopt a new privilege for the press and denied that it is any kind of qualified privilege. *New York Times v Sullivan* is cast a qualified privilege for commentary about public officials by the Supreme Court in *Hill* and the court rejects that new privilege. Whatever you call it, could the Supreme Court now reverse itself and say that its concerns for the fundamental importance of protecting reputation did not apply?

If the new privilege is characterized as a qualified privilege then it can be defeat by proof of malice by the publisher. The English and Canadian law of malice is bog of subjective second-guessing about motive and recklessness.[24] The American law is on the other hand has veered in the direction of examining the behaviour of the reporters to see if in it there can be the basis of malice. The glib rule of thumb is that if there are two sources to a story then there is no malice.[25]

If you step back from all this and speculate on the effect of the *Cusson* in real life, how will it be different than what happened in the United States. To a large extent the focus of the defamation litigation shifts to scrutinizing the conduct of the press in news gathering.

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[23] Justice Sharpe was counsel to the Canadian Civil Liberties Union, an intervener in the *Hill* argument at the Supreme Court of Canada. He knows this terrain well.

[24] See *Horrocks v Lowe* [1975] A.C. 135.

[25] The film *Absence of Malice* is not bad as a crash course in lower depths of how this works in practice.

Cusson twists and turns to find a different footing for special privileges for the press and ends up with a test that in practice is very similar.

Observations

There is no doubt that Canada is somewhat out of step with other common jurisdictions in loosen the restraints on the media. *Sullivan, Reynold, Jameel,Lange*(Aust.), *Lange*, (N.Z.) and *Bogoshi* (South Africa)[26] all represent efforts to give media more scope. *Sullivan* bases that scope on whether the person commented about is a public figure. *Lange* is based on subject matter. New Zealand prefers a narrower subject matter test. South Africa throws caution to the wind and says the test is simply reasonableness.

And *Cusson* bases it simply on whether the reporting was 'responsible'. *Cusson* shifts the focus of defamation to the conduct of the news organization. For the rich plaintiff this may be a bonanza. We'll see whether the media are so pleased with *Cusson* after a few rounds of down and dirty Discoveries exploring the standards of 'responsible journalism', wherever that may lead?

My view is that the best approach is to allow wide open criticism on any subject of any person *if* they are given a full and generous right to butt in their own words. The inconvenience to the writers and publishers is tough. The fact they complain about a fulsome and contemporaneous right of rebuttal is proof to me they are not interested in fair debate. They want to take advantage of their monopoly control of the media. Commercial concerns about getting the 'scope' are not worthy of consideration.

Conclusion

The new test of 'responsible journalism' opens many, many, many doors. Let the games begin.

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[26] See paras. 82 – 122.