

# LITIGATION NOTES

Legal Decisions and Developments in Canada

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## Responsible Journalism Defence Comes to Canada

*The Supreme Court of Canada has confirmed that the “responsible journalism” defence in defamation actions should be recognized in Canadian law. To reflect its applicability to newer forms of communication, which are not considered journalism, the defence will be called “responsible communication on matters of public interest”.*

In the December 2007 edition of Litigation Notes we reported on the case of *Cusson v. Quan*, in which the Ontario Court of Appeal recognized the defence of “responsible journalism” in Canadian law. The case was appealed to the Supreme Court of Canada and was heard together with the companion case of *Grant v. Torstar Corp.*

The case of *Cusson v. Quan* involved an Ontario Provincial Police Officer who travelled to Ground Zero following the attacks on the World Trade Centre. Together with his pet dog, he engaged in rescue operations until it was discovered that he was not there in any official capacity and he was ordered to leave the site. While initially hailed as a hero, eventually the Ottawa Citizen published an article which suggested that he had in fact hindered the activities of the rescuers. He sued the Ottawa Citizen and a jury concluded that some, but not all, of the allegations were true and awarded him damages. The Ontario Court of Appeal upheld that decision and while stating the “responsible journalism” should be recognized as a defence in Canadian law, refused to grant a new trial because the defence had not been raised at trial.

The case of *Grant v. Torstar* involved Peter Grant, the owner of Grant Forest Products Inc., a company which employs 100,000 people in Northern Ontario. Mr. Grant wanted to build a private golf course on his lakefront estate, over the protests of various citizens’ groups who were concerned about the environmental impact. The Toronto Star

published an article which suggested that Mr. Grant had used his connections and influence, in particular with the then premier of Ontario, to secure the necessary approvals. A jury found that he had been defamed and awarded him damages totalling \$1.475 million dollars. The Ontario Court of Appeal ruled that the “responsible journalism” defence should have been put to the jury and ordered a new trial.

Both cases proceeded to the Supreme Court of Canada, which has now confirmed the existence of the “responsible journalism” defence in Canadian law although it has been assigned the new name of “responsible communication on matters of public interest”. The Reasons of the Court are given in the report of *Grant v. Torstar* and were written by the Chief Justice on behalf of a full and unanimous bench. Chief Justice McLachlin begins by reviewing the current law of defamation in Canada, which requires that the plaintiff prove (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff’s reputation in the eyes of a reasonable person (2) that the words in fact refer to the plaintiff and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. Once these elements are established, falsity and damages are presumed and the onus shifts to the defendant to advance a defence in order to escape liability. One of the defences available is fair comment, where the statement is a matter of opinion. Where the statement is one of fact, the

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defences available are justification, meaning that the statement is substantially true, or privilege. Privilege may be absolute as in the case of statements made in the context of parliamentary or legal proceedings, or qualified, as in the case of statements made in reference letters or credit reports. A claim of privilege, however, can be defeated by proof that the defendant acted with malice.

The Chief Justice points out that to succeed on a defence of justification a defendant must show that the statement was substantially true, which may be difficult to do. Even a journalist who has checked sources and is satisfied that a statement is substantially true may have difficulty proving it in court, often years after the event. If the defence of justification fails the only way for a journalist to escape liability is to invoke privilege. A defence of qualified privilege requires journalists to establish a “duty” to divulge the information and a corresponding “interest” on the part of the recipient in receiving it. This kind of special relationship can be difficult to establish, given that media outlets deal with the public at large. In addition, the courts in Canada have tended to prefer reputation over freedom of expression.

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## Responsible Journalism (continued)

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Chief Justice McLachlin goes on to state that there are two basic reasons for changing the law. One is an issue of principle. Freedom of expression is guaranteed in section 2(b) of the *Canadian Charter of Rights and Freedoms* which guarantees “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”. This guarantee of free expression has three main rationales: (1) Free expression is essential to the proper functioning of democratic governance; (2) The free exchange of ideas is an essential precondition of the search for the truth; and (3) Free expression has intrinsic value as an aspect of self-realization for both speakers and listeners. She quotes from her colleague, Justice Binnie, in another case, who stated that “an individual’s reputation is not to be treated as regrettable but unavoidable road kill on the highway of public controversy, but nor should an overly solicitous regard for personal reputation be permitted to ‘chill’ free-wheeling debate on matters of public interest”. She goes on to state that “Freedom does not negate responsibility. It is vital that the media act responsibly in reporting facts on matters of public concern, holding themselves to the highest journalistic standards. But to insist on court established certainty in reporting on matters of public interest may have the effect of preventing communication of facts which a reasonable person would accept as reliable and which are relevant and important to public debate. The existing common law rules mean, in effect, that the publisher must be certain before publication that it can prove the statement to be true in a court of law should a suit be filed... this in turn

may have a chilling effect on what is published. Information that is reliable and in the public’s interest to know may never see the light of day”.

The Court goes on to say that the second reason for re-calibrating the Canadian law of libel is based on the jurisprudence of other countries. Chief Justice McLachlin reviews the law of various jurisdictions and finds the United States at one end of the spectrum, where the U.S. Supreme Court has ruled that a “public official” cannot recover in defamation unless it can be proven that the defendant was motivated by “actual malice”, meaning “knowledge of falsity or reckless indifference to the truth”. At the other end of the spectrum is the current Canadian situation wherein the common law defence of qualified privilege offers very little protection in respect of publications to the world at large. Situated in the middle is the path chosen by the Courts in the United Kingdom, Australia, New Zealand and South Africa, where it is possible for publishers to escape liability “... if they can establish that they acted responsibly in attempting to verify the information on a matter of public interest”. The Chief Justice concludes that the middle course is the preferable one and that the “responsible journalism” defence should be recognized. However, it requires a new name because “...the traditional media are rapidly being complemented by new ways of communicating on matters of public interest, many of them online, which do not involve journalists. These new disseminators of news and information should, absent good reasons for exclusion, be subject to the same laws as established media outlets”. Consequently, she concludes that the defence should be referred

to as “responsible communication on matters of public interest”.

Furthermore, she concludes that the defence should be a defence, rather than a category of privilege. This is significant because it cannot be defeated by proof of malice which makes sense, because “absence of malice is effectively built into the defence of responsible journalism itself”.

The Chief Justice goes on to summarize the required elements of the defence as follows:

“A. The publication is on a matter of public interest and;

B. The publisher was diligent in trying to verify the allegation, having regard to:

- (a) the seriousness of the allegation;
- (b) the public importance of the matter;
- (c) the urgency of the matter;
- (d) the status and reliability of the source;
- (e) whether the plaintiff’s side of the story was sought and accurately reported;
- (f) whether the inclusion of the defamatory statement was justifiable;
- (g) whether the defamatory statement’s public interest lay in the fact that it was made rather than its truth (“reportage”); and
- (h) any other relevant circumstances.

Both cases were sent back for new trials.

*Grant v. Torstar Corp.*, 2009 SCC 61 (CanLII)

*Quan v. Cusson*, 2009 SCC 62 (CanLII)

## The Serbonian Bog

*The Supreme Court of Canada concludes that an individual who became paraplegic as a result of contracting genital herpes could not recover under an accident insurance policy*

The Supreme Court of Canada recently had to consider the meaning of “accident” in a claim for benefits under an accident insurance policy issued by Co-operators Life Insurance Co. to the Plaintiff, Mr. Gibbens. Mr. Gibbens was employed in high-pressure water blasting and the policy was a group policy obtained through his union.

As a result of having unprotected sex with

three women in January and February of 2003, Mr. Gibbens contracted genital herpes. This in turn caused inflammation of his spinal cord (transverse myelitis), which resulted in total paralysis from the waist down. The Co-operators policy provided coverage in the amount of \$200,000 if the insured suffered paraplegia as result of a “critical disease” or “resulting directly and independently of all other causes from bodily injuries occasioned

solely through external violent and accidental means without negligence on the [insured’s] part...”. Critical disease was a defined term and listed a number of diseases, which did not include transverse myelitis.

The Supreme Court of British Columbia found that there was coverage under the policy. The Court placed considerable reliance on the case of *Martin v. American Interna-*

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## Serbonian Bog (continued)

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*tional Assurance Life Co.*, 2003 S.C.C. 16 (CanLII) for the proposition that in determining whether an event is an “accident” one must consider whether the consequences were unexpected. Since Mr. Gibbens did not expect to become a paraplegic as a result of having unprotected sexual intercourse, there was an accident within the meaning of the policy. This decision was upheld by the British Columbia Court of Appeal.

In the Supreme Court of Canada, Justice Binnie begins by commenting that a century and a half of insurance litigation has “... failed to produce a bright line definition of the word ‘accident’ ” and that insurers have consistently declined to define the term in their policies, leaving it to the courts. Quoting from the text, *The Law Relating to Accident Insurance*, by A.W. Baker-Welford, the Court states that the word “accident”... “involves the idea of something fortuitous and unexpected, as opposed to something proceeding from natural causes; and injury caused by accident is to be regarded as the antithesis to bodily infirmity caused by disease in the ordinary course of events”. The Court goes on to point out that Welford argued that the element of accident may be manifested in the cause or in the result but that Justice Cardozo of the U.S. Supreme Court has famously invoked Milton’s *Paradise Lost* in warning that “the attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog”. However, Mr. Gibbens’ accident policy contained the “time honoured formula confining the risk to bodily injuries that are ‘occasioned solely through external, violent and accidental means’ ”.

Justice Binnie goes on to review the general principles of interpretation of insurance policies:

“1. Words like “accident” should be given their ordinary meaning.

2. Generous interpretation should be given to the term “accident” unless a policy clearly

restricts it.

3. The words of an insurance contract, when ambiguous, should be construed against the drafter (i.e. the insurer)(*contra proferentem*).

4. Where a policy is ambiguous, effect should be given to the reasonable expectations of the parties.

5. Continuity of interpretation: ‘Courts will normally be reluctant to depart from judicial precedent interpreting the policy in a particular way where the issue arises subsequently in a similar context and where the policies are similarly named. Certainty and predictability are in the interests of both the insurance industry and their customers.’ ”

The Court went on to consider whether or not Mr. Gibbens’ paraplegia was caused by external violent and accidental means. The insurer argued that the words “external” and “violent” in the definition should be given independent meaning. However, the Court considered that these words have “long since been subsumed into the concept of accident”. Quoting from *Couch on Insurance*, the term “violent” refers to “some act not occurring in the ordinary run of things and may be fulfilled by any force whatsoever, however slight. It has been said that unnatural death, the result of an accident of any kind, imports an external and violent agency as the cause.”.

However, the Court points out that diseases are transferred from person to person through natural processes such as coughing and sneezing in someone’s presence “in the ordinary course of events”. The viruses thus transmitted may in some situations prove to have calamitous and unexpected consequences yet if some transmissions are viewed with hindsight, to be classified as accidents, then the accident policy becomes a comprehensive health policy.

The Court considered the *Martin* case, supra, and distinguished it on the basis that the death in that case did not occur as the result of a disease. The case involved a doctor who was addicted to morphine and other drugs

and gave himself an accidental overdose. The issue related to whether the death was in fact accidental or whether the doctor had committed suicide and the fact that the outcome was “unexpected” was significant in that case. The Court concludes that the fact that a claimant “...can establish that death was unexpected does not thereby, without more, establish a valid accident. Otherwise, every bad happening, natural or unnatural, whether caused by disease in the ordinary course of events or otherwise, would be classified as an accident”. In the case of *Wang v. Metropolitan Life Insurance Co.*, 2004 CanLII 21269, the Ontario Court of Appeal rejected an attempt to apply a simple expectation test to a disease/natural causes situation. In that case a woman was undergoing a caesarean section and died of cardiac arrest brought on by an amniotic fluid embolism. While this was clearly an unexpected outcome, it was a death from natural causes and not “accidental” as that term would be normally understood.

Considering the expectations of the parties, the Court concludes that in Mr. Gibbens’ case the fact that the policy provided coverage for a certain list of critical diseases as well as for bodily injuries “occasioned solely through external, violent and accidental means” would have enabled the insured to understand that he was not purchasing comprehensive health or disability insurance. To conclude that Mr. Gibbens’ acquisition of herpes was an accident “despite the absence of any mishap or trauma other than the acquisition of a sexually transmitted disease in the ordinary way would simply serve to add sexually transmitted diseases to the list of critical diseases in the group policy contrary to the intent of the policy”. The appeal was allowed and the action dismissed.

*Co-operators Life Insurance Co.v. Gibbens*, 2009 SCC 59 (CanLII)

## Phaneuf (continued)

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required in order to determine if more resources can be allocated to the provision of beds in designated hospitals to deal with persons ordered to be assessed under section 672 of the *Code*. Absent this analysis, no

realistic perspective would be available to the judiciary to determine if behavioural modification is required. It is also unclear if behaviour modification is a relevant concern in the circumstances in this case as I have chosen to classify the decisions involved as policy and

not operational.”

*Her Majesty the Queen in Right of Ontario v. Sylvie Phaneuf*, Ontario Divisional Court, December 17, 2009

# Phaneuf Class Action Dismissed

*The Ontario Divisional Court has dismissed a class proceeding brought on behalf of persons detained in jail while awaiting psychiatric assessments pursuant to Section 672.11 of the Criminal Code of Canada.*

In the August 2007 edition of Litigation Notes we reported on the certification of a class action in the matter of *Sylvie Phaneuf v. Her Majesty the Queen in Right of Ontario*. In March of 2008 we reported that Leave to Appeal to the Divisional Court had been granted. The decision of the Divisional Court was released on December 17, 2009 and not only has the decision certifying the class been set aside but the claim has been dismissed in its entirety.

Ms. Phaneuf was arrested for criminal harassment on November 1, 2005. She was found fit to stand trial but was ordered to undergo a psychiatric assessment pursuant to section 672.11 of the *Criminal Code of Canada* to determine whether she should be held criminally responsible for her behaviour. The *Criminal Code* mandates that an assessment order shall be in force for a period of 30 days. Ms. Phaneuf was ordered to be assessed at the Royal Ottawa Hospital but after the order was made, it took 16 days before she was transferred from the detention centre to the hospital. Ms. Phaneuf sought to certify a class proceeding against Her Majesty the Queen in Right of Ontario ("Ontario") on behalf of all persons who claimed that they were unlawfully held in detention centres pending psychiatric assessments. The claim sought damages against Ontario for false imprisonment, breach of fiduciary duty,

breach of duty of care and breach of sections 7 and 9 of the *Canadian Charter of Rights and Freedoms*. The Motions Judge in the Ontario Superior Court of Justice certified the class proceeding and in doing so relied heavily on the case of *R. v. Hussein*. In that case two individuals had been detained for 32 and 29 days respectively awaiting assessment, so that the assessment period allowed by the *Code* had expired in one case and almost expired in the other. This was found to be unconstitutional, although the judge suspended his declaration for 6 months to allow Ontario to increase the number of beds available for the purpose. In fact a number of additional assessment beds were added throughout the Province but this failed to resolve the problem.

The Divisional Court found that it would be inappropriate to require that the Ministry of Health be required to provide a bed immediately for an accused ordered to be assessed: "If the legislature intended that a bed be provided immediately it would have said so. It did not. To make it mandatory to have the bed available would be unfair to the other members of society in the Province that need a bed for other equally important medical procedures or assessments". Section 672 of the *Criminal Code* provides for the accused to be "in custody" and does not specify whether that is in a designated hospital or a

jail. Since the legislation had not been challenged in an appropriate application, there was no question but that Ms. Phaneuf had been lawfully detained.

The Plaintiff had not pleaded a general duty of care on behalf of the Crown to take all reasonable steps to ensure that a bed is immediately available to comply with an assessment order. The Crown cannot attract liability for decisions that are policy-based and the decision as to how to provide the best mental health care services is a policy-based decision. The *Criminal Code* "... is centrally concerned with protection of the general public and not imposing a duty of care relationship between individual accused detainees and the Crown".

The Court went on to conclude that even if there had been a cause of action, it was not a case which was suitable for a class proceeding. There are many issues which could have an impact on why a particular individual was not transferred to a hospital in a timely manner and these individual issues outweigh the common issues. Furthermore "...no meaningful analysis was made concerning the allocation of resources by Ontario in the mental health sector measured against the spectrum of the needs in the whole health spectrum. This may well be the quintessential analysis

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