Ontario Court of Appeal Expands Freedom of the Press

Cusson v. Quan [1], a unanimous decision of the Ontario Court of Appeal dated November 13, 2007, has been heralded as a "milestone" for the freedom of the press in Canada [2].

The petitioner, Danno Cusson, launched a defamation lawsuit against the Ottawa Citizen after the newspaper published three articles criticizing Cusson's rescue activities in New York City following the events of September 11, 2001. The articles suggested that the petitioner "had misrepresented himself to the New York police as being a member of the RCMP; that he might have compromised rescue operations by misrepresenting himself and his dog as being properly trained for K-9 rescue efforts; that he had been asked to leave Ground Zero by the New York police; and that he faced police disciplinary charges for his conduct" [3].

In the decision, the Ontario Court of Appeal established a new "public interest responsible journalism defence." Under the defence, a media defendant could succeed in a defamation lawsuit even if the information published turns out to be defamatory or untrue if the journalist honestly believed the information to be true and took reasonable steps to ascertain the truth. The court defined "reasonable steps" according to ten indicia defined by the House of Lords in Reynolds v. Times Newspapers Ltd. [4].

The Court of Appeal departed from Supreme Court of Canada authority that favoured protection of individual reputation over freedom of media and freedom of expression. Decisions written by Justice Cartwright in the 1950s and 1960s rejected the argument that the media should be granted a defence of qualified privilege if they reported on matters of public interest [5]. The Court of Appeal distinguished these Supreme Court decisions on the basis that they were pre-Charter, holding that they should be interpreted in light of theCharter guarantee of freedom of expression under section 2(b).

The Court of Appeal also justified their decision based on case law from England, Australia, New Zealand, South Africa and the United States, "all of which abandon the rigidly reputation-protection stance of the earlier law in favour of the freer flow of information on matters of public interest" [6].

In sum, the Court of Appeal ruled that the defence "recognizes that in relation to matters of public interest, the traditional common law unduly chills freedom of expression, but, at the same time, rejects the notion that media defendants should be afforded a licence to defame unless the innocent plaintiffs can prove deliberate or reckless falsehood" [7].

The defendants, who included the Ottawa Citizen and media interveners the Globe and Mail, the Canadian Newspaper Association, and the Canadian Media Lawyers Association, could not take advantage of the newly established defence because they did not raise it at trial. As

a result, their appeal was dismissed with costs to them of $40 000.

Cases

Cusson v. Quan, 2007 ONCA 771.

Reynolds v. Times Newspapers Ltd., [2001] 2 A.C. 127.

Jameel v. Wall Street Journal Europe, [2007] 1 A.C. 359.

Sources

“Ontario Court of Appeal defines ‘responsible journalism defence’” Canadian Community Newspapers Association (19 November 2007).

[1] 2007 ONCA 771.
[2] “Ontario Court of Appeal defines ‘responsible journalism defence’” Canadian Community Newspapers Association (19 November 2007).
[3] Ibid., para. 3.
[4] [2001] 2 A.C. 127. These factors, found at paragraph 89 of the Cusson decision, include: (1) the seriousness of the allegation; (2) the nature of the information; (3) the source of the information; (4) the steps taken to verify the information; (5) the status of the information; (6) the urgency of the matter; (7) whether comment was sought from the plaintiff; (8) whether the article contained the gist of the plaintiff’s side of the story; (9) the tone of the article; and (10) the circumstances of the publication, including the timing.
[5] Douglas v. Tucker, [1952] 1 S.C.R. 275; The Globe and Mail Ltd. v. Boland, [1960] S.C.R. 203; Banks v. The Globe and Mail Ltd., [1961] S.C.R. 474; Jones and Bennett, [1969] S.C.R. 277.
[6] Supra note 1, para. 131.
[7] Ibid., para. 139.