

SCC to Decide on the Defence of Responsible Journalism

On February 17th, the Supreme Court of Canada heard the case *Douglas Quan, et al. v. Danno Cusson*, in which an Ontario police officer, Cusson, went to New York City to participate in search and rescue operations immediately following September 11, 2001. The Ottawa Citizen published three articles about his actions, which Cusson claimed were defamatory. At trial, one of the articles was found to be protected by the defence of qualified privilege, but Cusson was awarded \$125,000 in general damages for the other two articles. The Ontario Court of Appeal upheld the trial judge's ruling and also recognized the defence of responsible journalism as part of Ontario law, even though the defence was not available in the circumstances of the particular case in question.^[1]

Responsible journalism allows journalists to escape liability for defamation actions by showing that they took "reasonable steps" to verify the accuracy of their stories, as long as those stories were a matter of public interest. The defence was first enunciated by the United Kingdom's House of Lords in *Reynolds v. Times Newspapers Ltd.*,^[2] and was further explained in *Jameel v. Wall Street Journal Europe Sprl.*^[3] The Supreme Court of Canada had an opportunity to recognize this defense in *WIC Radio Ltd. v. Simpson*; however, the Court left the issue for a future appeal.^[4]

While the *Canadian Charter of Rights and Freedoms* ^[5] does not directly apply to common law, the Supreme Court of Canada has held that common law defamation is subject to Charter values and should be interpreted and applied in accordance with them.^[6] The Ontario Court of Appeal held that the defence of responsible journalism better balances the competing values of freedom of expression and protection of individual reputation, and therefore brings common law defamation in line with underlying *Charter* values.

The Ontario court concluded that the threat of litigation under a legal regime that leaves no margin for error, even where the speaker took all reasonable steps to verify the facts, discourages free and open debate on matters of public importance.^[7] And, while it is true that adopting this defence shifts the focus of defamation law away from the truth, and towards the conduct of the defendant, the court held this to be an "acceptable price to pay for free and open discussion."^[8] The defence was described as a "sensible half-way house between the two extremes of the traditional common law no-fault liability on the one hand, and the traditional qualified privilege requirement for proof of malice on the other."^[9]

^[1] *Cusson v. Quan*, 2007 ONCA 771 (CanLII). <<http://www.canlii.org/eliisa/highlight.do?language=en&searchTitle=Search+all+CanLII+Databases&path=/en/on/onca/doc/2007/2007onca771/2007onca771.html>>

- [2] *Reynolds v. Times Newspapers Ltd.*, [1999] UKHL 45 (BAILII).
<<http://www.bailii.org/uk/cases/UKHL/1999/45.html>>
- [3] *Jameel v. Wall Street Journal Europe Sprl.*, [2006] UKHL 44 (BAILII).
<<http://www.bailii.org/uk/cases/UKHL/2006/44.html>>
- [4] *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para. 19 (CanLII).
<<http://www.canlii.org/eliisa/highlight.do?language=en&searchTitle=Search+all+CanLII+Databases&path=/en/ca/scc/doc/2008/2008scc40/2008scc40.html>>
- [5] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 (CanLII).
<<http://www.canlii.org/en/ca/const/const1982.html#I>>
- [6] *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at paras. 139-141 (CanLII).
<<http://www.canlii.org/eliisa/highlight.do?language=en&searchTitle=Search+all+CanLII+Databases&path=/en/ca/scc/doc/1995/1995canlii59/1995canlii59.html>>
- [7] *Supra*, note 1 at para 128.
- [8] *Ibid*, at para. 142.
- [9] *Supra*, note 1 at para. 139.