SUPREME COURT OF CANADA

CITATION: Quan *v.* Cusson, 2009 SCC 62

DATE: 20091222
DOCKET: 32420

BETWEEN:

Douglas Quan, Kelly Egan, Don Campbell, Ottawa Citizen, Ottawa Citizen Group Inc. and Southam Publications (A CanWest Company)

Appellants

and

Danno Cusson

Respondent

- and -

Globe and Mail, Toronto Star Newspapers Limited, Canadian Broadcasting Corporation, Canadian Civil Liberties Association, Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers' Association, RTNDA Canada/Association of Electronic Journalists, Canadian Publishers' Council, Magazines Canada, Canadian Association of Journalists, Canadian Journalists for Free Expression, Writers' Union of Canada, Professional Writers Association of Canada, Book and Periodical Council, PEN Canada, Peter Grant and Grant Forest Products Inc.

Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 51)	McLachlin C.J. (Binnie, LeBel, Deschamps, Fish, Charron, Rothstein and Cromwell JJ. concurring)
CONCURRING REASONS: (para. 52)	Abella J.

Douglas Quan, Kelly Egan, Don Campbell,
Ottawa Citizen, Ottawa Citizen Group Inc.
and Southam Publications (A CanWest Company) *Appellants*

v.

Danno Cusson *Respondent*

and

Globe and Mail, Toronto Star Newspapers Limited,
Canadian Broadcasting Corporation, Canadian Civil
Liberties Association, Canadian Newspaper Association,
Ad IDEM/Canadian Media Lawyers' Association,
RTNDA Canada/Association of Electronic Journalists,
Canadian Publishers' Council, Magazines Canada,
Canadian Association of Journalists,
Canadian Journalists for Free Expression,
Writers' Union of Canada, Professional Writers
Association of Canada, Book and Periodical Council,
PEN Canada, Peter Grant and Grant Forest Products Inc. *Interveners*

Indexed as: Quan *v.* Cusson

Neutral citation: 2009 SCC 62.

File No.: 32420.

2009: February 17; 2009: December 22.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Torts — Defamation — Defences — Responsible communication on matters of public interest — Police constable suing newspaper and reporters for libel after articles were published alleging that he had misrepresented himself and possibly interfered with rescue operations at Ground Zero — Court of Appeal recognizing new responsible journalism defence but denying defendants its protection because they had not advanced it at trial — Whether common law of defamation should be modified to accord stronger protection to defamatory statements of fact published responsibly — If so, whether defendants should be able to avail themselves of new defence of responsible communication on matters of public interest at a new trial.

C was an Ontario police constable who, shortly after the events of September 11, 2001 and without permission from his employer, traveled to New York City to assist with the search and rescue effort at Ground Zero. A newspaper published articles alleging that C had misrepresented himself to the authorities in New York and possibly interfered with the rescue operation. C brought a libel action against the newspaper and the reporters. At trial, the defendants pleaded qualified privilege and did not rely on the defence known in England as "responsible journalism" which, at the time, had not yet been recognized as a distinct defence by any Canadian court. The trial judge rejected the defendants' claim of qualified privilege and put the case to the jury to decide whether

the defence of truth had been made out. The jury found that many but not all of the factual imputations in the articles had been proven true, and awarded C general damages. The Court of Appeal upheld that decision. The court took the opportunity to establish a responsible journalism defence in Ontario law, but held that the defendants were not entitled to a new trial and the protection of the new defence because they had not advanced the defence at trial.

Held: The appeal should be allowed and a new trial ordered.

Per **McLachlin** C.J. and Binnie, LeBel, Deschamps, Fish, Charron, Rothstein and Cromwell JJ.: The defence of responsible communication on matters of public interest recognized in *Grant v. Torstar Corp.* is applicable where the publication is on a matter of public interest and, having regard to the relevant factors, the publisher was diligent in trying to verify the allegations. The public interest test is clearly met here, as the Canadian public has a vital interest in knowing about the professional misdeeds of those who are entrusted by the state with protecting public safety. The defendants' liability therefore hinges on whether they were diligent in trying to verify the allegations prior to publication, and it will be for the jury at a new trial to decide whether the articles met this standard of responsibility. [28] [31-32]

An appellate court may depart from the general rule and entertain a new issue where the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to do so. In this case, it is open to question whether the issue argued on appeal was genuinely "new" in the sense of being legally and factually distinct from the issues litigated at trial. The arguments on qualified privilege and responsible journalism were both directed toward the same

fundamental question: whether the newspaper and its reporters enjoyed a privilege to publish the impugned material on grounds of public interest and due diligence. In any event, the deficiencies in the evidentiary foundation are largely immaterial in this case because the ultimate determination of responsibility is a matter for the jury, and a proper evidentiary record can be established at a new trial. [37] [39-41]

The interests of justice favour allowing the defendants the opportunity to avail themselves of the change in the law brought about by this litigation on a new trial. Under s. 134(6) of the Ontario *Courts of Justice Act*, a court hearing an appeal of a civil matter may only order a new trial if "some substantial wrong or miscarriage of justice has occurred". This test is met. The plaintiff will suffer no undue prejudice from a new trial other than costs. The defendants, on the other hand, would be seriously disadvantaged by being deprived of the opportunity to avail themselves of the responsible communication defence which their appeal was responsible for developing. If it turns out that the defence is found to apply to the articles in question, such a deprivation would amount to an injustice. Furthermore, the defendants' conduct did not exhibit the absence of due diligence that the "no new issues on appeal" rule is meant to discourage. At the time of trial, it was by no means clear that the new defence of responsible communication would emerge as a "different jurisprudential creature" in English or Canadian law. It was therefore not unreasonable for the defendants to argue qualified privilege at trial, and later, on appeal, to contend for a broader elaboration of a responsible communication defence. [42] [44] [47]

Per **Abella** J.: As stated in the concurring reasons in the companion case of *Grant v. Torstar Corp.*, both steps in the responsible communication defence should be determined by the

judge, with the jury determining factual disputes. Subject to those views, the Chief Justice's reasons and her decision to order a new trial were agreed with. [52]

Cases Cited

By McLachlin C.J.

Applied: *Grant v. Torstar Corp.*, 2009 SCC 61; **referred to:** *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *Reynolds v. Times Newspapers Ltd.*, [1999] 4 All E.R. 609; *Jameel v. Wall Street Journal Europe SPRL*, [2006] UKHL 44, [2007] 1 A.C. 359; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Lamb v. Kincaid* (1907), 38 S.C.R. 516; *R. v. Warsing*, [1998] 3 S.C.R. 579; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678; *Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 184 O.A.C. 84; *Pereira v. Hamilton Township Farmers' Mutual Fire Insurance Co.* (2006), 267 D.L.R. (4th) 690; *Loutchansky v. Times Newspapers Ltd.*, [2001] EWCA Civ 1805, [2002] 1 All E.R. 652.

Statutes and Regulations Cited

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 134(6).

Libel and Slander Act, R.S.O. 1990, c. L.12, s. 14.

APPEAL from a judgment of the Ontario Court of Appeal (Weiler, Sharpe and Blair

JJ.A.), 2007 ONCA 771, 87 O.R. (3d) 241, 231 O.A.C. 277, 286 D.L.R. (4th) 196, 53 C.C.L.T. (3d) 122, 164 C.R.R. (2d) 284, [2007] O.J. No. 4348 (QL), 2007 CarswellOnt 7310, upholding a decision of Maranger J. and the jury award, [2006] O.J. No. 3186 (QL), 2006 CarswellOnt 4838, 2006 CanLII 26586. Appeal allowed and new trial ordered.

Richard G. Dearden and *Wendy J. Wagner*, for the appellants.

Ronald F. Caza, *Jeff G. Saikaley* and *Mark C. Power*, for the respondent.

Peter M. Jacobsen and *Adrienne Lee*, for the intervener the Globe and Mail.

Paul B. Schabas, *Iris Fischer* and *Erin Hoult*, for the intervener the Toronto Star Newspapers Limited.

Daniel J. Henry, for the intervener the Canadian Broadcasting Corporation.

Patricia D. S. Jackson, *Andrew E. Bernstein* and *Jennifer A. Conroy*, for the intervener the Canadian Civil Liberties Association.

Brian MacLeod Rogers and *Blair Mackenzie*, for the interveners the Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers' Association, RTNDA Canada/Association of Electronic Journalists, the Canadian Publishers' Council, Magazines Canada, the Canadian Association of Journalists, the Canadian Journalists for Free Expression, the Writers'

Union of Canada, the Professional Writers Association of Canada, the Book and Periodical Council, and PEN Canada.

Peter A. Downard, *Catherine M. Wiley* and *Dawn K. Robertson*, for the interveners Peter Grant and Grant Forest Products Inc.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Charron, Rothstein and Cromwell JJ. was delivered by

THE CHIEF JUSTICE —

I. Overview

[1] This appeal, along with its companion case *Grant v. Torstar Corp.*, 2009 SCC 61 (released concurrently), requires the Court to consider whether the common law of defamation should be modified to accord stronger protection to defamatory statements of fact published responsibly.

[2] As explained in *Grant*, the time has come to recognize a new defence — the defence of responsible communication on matters of public interest. The question on this appeal is whether the defendants should be able to avail themselves of it.

[3] The respondent in this Court, Danno Cusson, was a constable with the Ontario

Provincial Police ("OPP") who, shortly after the events of September 11, 2001, and without permission from his employer, traveled to New York City to assist with the search and rescue effort at Ground Zero. Initially, he was portrayed in the press as a hero, while the OPP was pilloried for demanding that he return to his duties in Ottawa. The *Ottawa Citizen* subsequently published three articles alleging that Cst. Cusson had misrepresented himself to the authorities in New York and possibly interfered with the rescue operation. Cst. Cusson brought this libel action against the newspaper, the reporters (the "Citizen defendants"), and OPP Staff Sgt. Penny Barager, who was a quoted source of information for the articles.

[4] At trial, the defendants pleaded qualified privilege. They disclaimed any separate reliance on the defence known in England as "responsible journalism" or "*Reynolds* privilege" — which, at the time, had not yet been recognized as a distinct defence by any Canadian court. With respect to two of the articles, the trial judge rejected the claim of privilege and put the case to the jury to decide whether the defence of truth had been made out. Answering a long list of factual questions which parsed the allegedly defamatory statements in considerable detail, the jury found that many, but not all, of the factual imputations in the articles had been proven true. It awarded Cst. Cusson $100,000 in general damages against the Citizen defendants and $25,000 against Staff Sgt. Barager. However, the jury also found no malice on the part of any of the defendants and declined to award any special, aggravated or punitive damages.

[5] The Court of Appeal, *per* Sharpe J.A., took the opportunity to establish a responsible journalism defence in Ontario law. However, it denied the defendants the protection of the defence in this case because they had not advanced it at trial.

[6] For the reasons that follow, in my view, the Citizen defendants should have an opportunity to avail themselves of the new defence. I would allow the appeal and order a new trial.

II. Facts

[7] The facts of this case are unusual. In the course of two weeks in September, 2001, OPP Cst. Danno Cusson went from being lauded as a hero for his post-9/11 rescue efforts to being derided in the press as a dishonest attention-seeker. The accuracy of these competing characterizations was hotly contested at trial. In view of my disposition of this case, I will say no more than is necessary to provide context for the legal issues that arise.

[8] This much is uncontroversial. Following the attacks of September 11, the OPP had volunteered its assistance to New York authorities through official channels, but the offer had been declined. Nonetheless, Cst. Cusson made his way from Ottawa to Manhattan with his pet dog Ranger, presenting himself as a search and rescue volunteer to the police authorities at Ground Zero. When the OPP ordered him to return to his post near Ottawa, Cst. Cusson tendered his resignation to the force (he later withdrew his resignation and went on medical leave).

[9] Cst. Cusson gave a number of media interviews and was portrayed as a hero for his efforts. There were reports that he had helped find and rescue two businessmen from the rubble. However, as the Citizen would later report, at some point Cst. Cusson was barred from the World Trade Center site by the New York authorities. With this yet unknown, the OPP was widely

criticized for its apparent callousness in failing to support his initiative and insisting that he return to work. Cst. Cusson received public support from a variety of media outlets and at least one provincial politician.

[10] On September 25, the Citizen published an article by Douglas Quan headlined "'Renegade' OPP officer under fire". It began:

> A Kanata OPP officer who has been hailed as a "hero" for his efforts to find survivors of the World Trade Centre disaster may have compromised the search and rescue mission after he is alleged to have misled New York State police into thinking he was a fully trained K-9 handler with the RCMP, the *Citizen* has learned.

[11] In the article, Sgt. Tim Fischer of the New York State Police described how Cst. Cusson had identified himself as a member of the RCMP and tried to explain why his business card said OPP. Sgt. Fischer was quoted as saying, "The next time I see him, I'm going to arrest him". Other New York officials described how they had become suspicious of Cst. Cusson's qualifications and eventually banned him from the site. Cst. Cusson was reportedly angry at having his access revoked.

[12] The article also quoted Cst. Cusson's supervisor, Staff Sgt. Penny Barager, confirming that Cusson had never been a member of the RCMP nor had he been trained in K-9 rescue operations. She called his actions "heroic" but cautioned that officers cannot be permitted to go on "renegade missions". She said that Cusson had violated two OPP policies when he took his uniform and service pistol out of the country without prior authorization.

[13] Mr. Quan had contacted Cst. Cusson prior to publication to get his side of the story. In

the article, Cst. Cusson was quoted as denying that he had ever worn an RCMP uniform or otherwise misrepresented himself to the New York authorities. Referring to his military background, he said "I have army blood in me. I guess it took over my police responsibility". While admitting no wrongdoing, he expressed the hope that he had not "tarnished the image of my force".

[14] The article concluded by referring to media reports that Cst. Cusson and his dog Ranger had discovered two men in business suits alive in the debris.

[15] The following day, September 26, the Citizen published a follow-up article by Kelly Egan headlined "OPP apologizes for Cusson 'fiasco'". It revealed that Staff Sgt. Barager had spoken to Sgt. Fischer and apologized to New York police for Cst. Cusson's behaviour. The remainder of the piece covered much the same ground as the previous article — most importantly, that he had "misrepresented himself and may have hampered early rescue efforts".

[16] Finally, on October 11, the Citizen published an article by Don Campbell entitled "OPP's Cusson faces internal investigation". Besides repeating the earlier allegations, it reported that Staff Sgt. Barager planned to file a complaint over Cst. Cusson's conduct. Cusson, it said, was not available for further comment.

III. Judicial History

A. *Ontario Superior Court of Justice (Maranger J. sitting with a jury)* ([2006] O.J. No. 3186 (QL))

[17] After both sides had called their evidence at trial, the defendants asked the judge to rule that the three articles were protected by qualified privilege. Reviewing the Canadian and English authorities, the trial judge observed that the law in this area was in a state of flux and that the door had been opened to extending qualified privilege to media publications in limited circumstances. With respect to the Quan and Egan articles, he held that there was no "compelling, moral or social duty to publish" them. In the trial judge's view, they were "certainly of public interest", but not "to the extent that they needed to be heard". He therefore held that qualified privilege did not apply.

[18] The trial judge reached a different conclusion with respect to the Don Campbell article. Drawing an analogy to the qualified privilege for reports of pending court proceedings elaborated in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, he held that the privilege must also cover the Citizen's report of the pending disciplinary action against Cst. Cusson. The part of the action dealing with the Campbell article was therefore dismissed.

[19] The case went to the jury, primarily on the basis of fair comment and justification, with respect to the first two articles. The jury was provided with a detailed special verdict form comprising 151 questions. This questionnaire went through each impugned statement in the Quan and Egan articles, asking the jury to rule on their meaning, defamatory content, truth, and status as fact or opinion. The jury was also provided with a general verdict form, presumably in order to comply with s. 14 of the Ontario *Libel and Slander Act*, R.S.O. 1990, c. L.12, which provides that a jury in a defamation action "may give a general verdict upon the whole matter in issue in the action". The jury chose to render a special verdict, ruling on each of the identified statements.

[20] The jury found that the lead paragraph of the September 25 article, quoted above, was fair comment.

[21] Asked to rule on the truth of each of the impugned factual statements and imputations, the jury found that the defendants had proven the following facts:

- the plaintiff had failed in his duties as an OPP officer and abandoned his responsibilities without justification;
- neither the plaintiff nor his dog had received formal training in search and rescue operations;
- Sgt. Fischer or someone else intended to arrest the plaintiff;
- the plaintiff misled Sgt. Fischer into thinking he was an RCMP officer;
- the plaintiff was trying to give the impression that he was an RCMP officer.

[22] However, the jury also found that the following imputations had *not* been proven:

- the plaintiff may have compromised the World Trade Center rescue effort;
- the plaintiff deliberately misled the New York police by representing himself as a trained RCMP K-9 officer;
- the plaintiff had no search and rescue training;
- the plaintiff told Sgt. Fischer that he was an RCMP officer and his dog had received training;
- the plaintiff had concealed his true identity;

- the plaintiff asked to be told about the most elementary dog handling techniques and could not carry out even the simplest manoeuvres with his dog;
- the plaintiff was responsible for a supposed "fiasco";
- the plaintiff's actions embarrassed the OPP and may have harmed the force's reputation.

[23] As can be seen, these findings are somewhat difficult to reconcile with one another. On the one hand, the jury found that Cst. Cusson misled Sgt. Fischer into thinking he was an RCMP officer; on the other, it declined to find that Cst. Cusson told the New York authorities that he was an RCMP officer who had received the necessary training. Overall, the jury seems to have taken the view that Cst. Cusson misled the authorities in New York, but that he did not act as deliberately or mendaciously as the articles suggested.

[24] The jury found that there was no "actual malice" on the part of any of the defendants. It awarded the plaintiff $100,000 in general damages against the *Ottawa Citizen* and $25,000 against Penny Barager. It declined to award any special, aggravated or punitive damages.

B. *Court of Appeal for Ontario (Weiler, Sharpe and Blair JJ.A.)* (2007 ONCA 771, [2007] 231 O.A.C. 277)

[25] The Court of Appeal, *per* Sharpe J.A., undertook an extensive review of the Canadian law of qualified privilege as well as the more recent developments in other common law jurisdictions (its reasons for judgment are discussed more fully in *Grant*). The court concluded that the existing law should be developed in order to give "appropriate recognition and weight to the

Charter values of freedom of expression and freedom of the media without unduly minimizing the value of protecting individual reputation" (para. 140). Drawing particularly on the House of Lords' decisions in *Reynolds v. Times Newspapers Ltd.*, [1999] 4 All E.R. 609, and *Jameel v. Wall Street Journal Europe SPRL*, [2006] UKHL 44, [2007] 1 A.C. 359, it determined that a new defence of responsible journalism on matters of public interest should be recognized in Ontario.

[26] However, in light of the position taken by the defendants at trial, Sharpe J.A. considered it inappropriate either to apply the defence or to order a new trial. In his view, it would be unjust to allow the defendants a second "bite at the cherry", citing *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 18. The court therefore dismissed the appeal.

[27] The defendants (appellants in this Court) now appeal, asking this Court to enter judgment in their favour based on the new defence recognized below. The plaintiff Mr. Cusson, contends that the introduction of a new defence is unwarranted, but in the result asks this Court to dismiss the appeal and confirm the trial judgment in his favour.

IV. Analysis

A. *The Defence of Responsible Communication on Matters of Public Importance*

[28] In *Grant*, at para. 126, we hold that the defence of responsible communication on matters of public interest applies where:

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.

[29] The judge decides whether the publication was on a matter of public interest. If so, the jury then decides whether the standard of responsibility has been met.

[30] When determining responsibility, the jury must consider the broad thrust of the publication as a whole rather than minutely parsing individual statements. However, where, as here, the publication arguably includes statements of both fact and opinion, the trial judge may deem it necessary to isolate individual statements for the jury's consideration so it can decide in turn on the applicability of fair comment and responsible communication. While the special verdict form given to the jury in this case was arguably too long and complex, some itemization of individual statements in the judge's charge to the jury and (if there is one) the special verdict form may be the preferable course to follow in applying the different defences. That said, as was done here, an

Ontario libel jury must have the option of rendering a general verdict by virtue of the *Libel and Slander Act*, s. 14.

[31] In this case, the public interest test is clearly met. The Canadian public has a vital interest in knowing about the professional misdeeds of those who are entrusted by the state with protecting public safety. While the subject of the *Ottawa Citizen* articles was not political in the narrow sense, the articles touched on matters close to the core of the public's legitimate concern with the integrity of its public service. When Cst. Cusson represented himself to the New York authorities and the media as an OPP or RCMP officer, he sacrificed any claim to be engaged in a purely private matter. News of his heroism was already a matter of public record; there is no reason that legitimate questions about the validity of this impression should not have been publicized too.

[32] That being the case, the defendants' liability hinges on whether they were diligent in trying to verify the allegations prior to publication. As explained below, it will be for the jury at a new trial to decide whether the articles met the standard of responsibility articulated in *Grant*. Further evidence of the steps taken by Quan and Egan may have to be adduced in order to provide a satisfactory record upon which their conduct can be judged.

B. *Should the Defendants Have the Opportunity to Avail Themselves of the New Defence?*

[33] The Court of Appeal deemed the responsible journalism or responsible communication defence to be a "new issue" raised on appeal for the first time. Applying the jurisprudence on when such an argument should be entertained, it concluded that allowing the defendants to benefit from

the new defence would be to give them an impermissible second "bite at the cherry".

[34] I have some difficulty with how the Court of Appeal characterized the problem arising from the defendants' new argument on appeal. First, from a procedural point of view, it seems to me that the Court of Appeal *did* in fact allow the "new issue" of responsible journalism to be raised on appeal. Indeed, it broke new jurisprudential ground on precisely this issue. And, as will be explained, it is open to question how "new" this issue really was, considering the defences pleaded at trial.

[35] Second, from a substantive perspective, the new defence was properly before the Court of Appeal and, in principle, available to the defendants.

[36] The general rule, applied by the Court of Appeal, is that a new issue may not be raised on appeal. However, the authorities shed light on the circumstances in which appellate courts should make an exception to the rule. In *Lamb v. Kincaid* (1907), 38 S.C.R. 516, at p. 539, Duff J. (as he then was) observed:

> A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.

See also: *R. v. Warsing*, [1998] 3 S.C.R. 579, at para. 16, *per* L'Heureux-Dubé J. (dissenting in part); *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678, at paras. 32-33, *per* Binnie J.

[37] Further guidance as to the appropriate test is provided by *Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 184 O.A.C. 84, relied on by Sharpe J.A. below. There, the Ontario Court of Appeal explained the circumstances in which an exception will be made to the rule:

> An appellate court may depart from this ordinary rule and entertain a new issue where the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to do so. [para. 102]

[38] Applying this test, the preliminary question is whether the Citizen in fact raised a "new issue" in arguing responsible journalism on appeal. If so, then the question becomes whether the evidentiary record and the interests of justice support granting an exception to the general rule.

[39] In this case it was much less clear than in *Wasauksing First Nation* that the issue argued on appeal was genuinely "new" in the sense of being legally and factually distinct from the issues litigated at trial. Though Sharpe J.A. is right that the focus of the inquiry under the new defence is different from the focus under qualified privilege, there is considerable overlap. Much of the evidence adduced to demonstrate qualified privilege and malice would also be relevant to responsible communication. For example, in attempting to refute any suggestion of malice, the defendants led evidence from Douglas Quan which showed some of the steps he took to verify the allegations. Importantly, he talked to Cst. Cusson and gave him the opportunity to tell his side of the story. Cusson's denials were included in the article.

[40] All this is to say that the issue on appeal — responsible journalism — did not raise entirely new factual matters without any basis in the evidence. The arguments on qualified privilege and responsible journalism were both directed toward the same fundamental question: whether the

Citizen enjoyed a privilege to publish the impugned material on grounds of public interest and due diligence.

[41] In any event, the deficiencies in the evidentiary foundation are largely immaterial because, as held in *Grant*, the ultimate determination of responsibility is a matter for the jury. Since Sharpe J.A. took the view (following *Reynolds* and *Jameel*) that the new defence would be a matter for the judge, he did not consider ordering a new trial so that a jury could entertain the new defence. However, the gaps in the evidentiary record with respect to responsible communication are of less concern if the relevant option is a new trial rather than appellate application of the defence. A proper evidentiary record can be established at a new trial.

[42] The remaining question is whether the interests of justice favour allowing the defendants the opportunity to avail themselves of the change of the law brought about by this litigation on a new trial.

[43] In my opinion, they do. In Ontario, a court hearing an appeal of a civil matter may only order a new trial if "some substantial wrong or miscarriage of justice has occurred": *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(6). This is arguably a higher standard than that for raising a new issue on appeal, but similar considerations apply. The appellant must demonstrate that "the case was not fairly put to the jury, as, for example, where the charge leaves the jury with a misapprehension as to the applicable legal principles", that the jury charge was "materially deficient", or that "the law was not clearly stated on a critical issue": *Pereira v. Hamilton Township Farmers' Mutual Fire Insurance Co.* (2006), 267 D.L.R. (4th) 690 (C.A.), at paras. 75-76, *per*

Borins J.A.

[44] In this case, this test is met. The plaintiff will suffer no undue prejudice from a new trial other than costs, addressed below. The defendants, on the other hand, would be seriously disadvantaged by being deprived of the opportunity to avail themselves of the responsible communication defence which their appeal was responsible for developing. If it turns out that the defence is found to apply to the articles in question, such a deprivation would amount to an injustice.

[45] As background, it is necessary to recap the approach of the courts below. Applying earlier cases that were loathe to extend qualified privilege to the media, the trial judge applied a stringent duty/interest test that required the publisher to show a "compelling" public interest in publication amounting to a "moral or social duty" (C.A. reasons, at para. 5). Not surprisingly, he found that the Quan and Egan articles fell short of this standard. The jury returned its verdict in favour of the plaintiff on the basis that the defence of qualified privilege was not available. The defendants appealed, arguing that the trial judge's formulation of qualified privilege was too narrow and, in the alternative, arguing for a broad responsible journalism defence. The Court of Appeal affirmed the existence of a separate responsible journalism defence, but held that the defendants were not entitled to a new trial, given that they had not pleaded this defence initially.

[46] The plaintiff supports the Court of Appeal's conclusion, arguing that the defendants are not entitled to a new trial on the basis of the new defence of responsible communication on matters of public interest, because they did not raise that defence at the first trial. He argues that the defendants made a strategic decision to rely on traditional qualified privilege, declining to stake their

case on the riskier prospect that the trial judge might extend the law to provide a distinct responsible communication defence. Instead, they chose to remain on the more familiar terrain of qualified privilege. On appeal, the plaintiff contends, they should have to lie in the bed they made.

[47] While this argument is not without force, it does not, in my view, carry the day. First, at the time of trial, it was by no means clear that the new defence of responsible communication would emerge as a "different jurisprudential creature" (*Loutchansky v. Times Newspapaers Ltd.*, [2001] EWCA Civ. 1805, [2002] 1 All E.R. 652, at para. 35), in English or Canadian law, since *Jameel* had not yet been decided. It was therefore not unreasonable for the defendants to argue qualified privilege at trial, and later, on appeal, to contend for a broader elaboration of a responsible communication defence. A panel of the Court of Appeal was much more likely to undertake a thoroughgoing re-evaluation of the governing jurisprudence than was a single trial judge. It cannot therefore be said that the conduct of the defendants exhibited the absence of due diligence that the "no new issues on appeal" rule is meant to discourage.

[48] Second, had the Court of Appeal and this Court endorsed a broadened defence of qualified privilege as pleaded by the defendants, a new trial would have been required in any event, because the trial judge applied an extremely narrow conception of public interest. The defendants had argued for a broader privilege. That was the bed they sought to make; the trial judge, however, required them to lie in a narrower one. The problem was compounded when the Court of Appeal opted for a new and different defence than the broadened qualified privilege defence pleaded. The trial judge cannot be faulted for failing to undertake a development of the law that the defendants did not ask for — i.e. the establishment of a new responsible communication defence. However, in

my view, his restrictive approach to the pleaded defence of qualified privilege occasioned an injustice by effectively removing any realistic prospect that statements on matters of public interest to the world at large could be protected. The defendants deserve an opportunity to make their case to a jury properly instructed on the law as it now stands. A new trial is therefore warranted.

[49] Because the ultimate determination of responsibility is a matter for the jury, I make no comment on whether or not the defence should apply on the new trial.

V. Conclusion

[50] I would allow the appeal and order a new trial.

[51] Success on this appeal has been divided. In the circumstances, each side should bear its own costs in this Court. While the respondents deserve the opportunity to avail themselves of the new defence, they must also live with the consequences of their own strategic decisions at trial. I would therefore not disturb the costs orders made in the courts below.

The following are the reasons delivered by

ABELLA J. —

[52] As in the companion case of *Grant v. Torstar Corp.*, in my view both steps in the

responsible communication defence should be determined by the judge, with the jury determining factual disputes. Subject to those views I agree with the Chief Justice's reasons and with her decision to order a new trial.

Appeal allowed and new trial ordered.

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