
CASSES V CBC

EXTRACT FROM CBC DEFENDANTS' CLOSING ARGUMENT RESPONSIBLE COMMUNICATION

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Responsible Communication

1. Responsible Communication on a Matter of Public Interest is a relatively new and independent defence to a defamation claim. The Supreme Court of Canada articulated the defence in the companion cases of *Quan v. Cusson*, 2009 SCC 62 <http://canlii.ca/t/27432> and *Grant v. Torstar Corp*., *supra*.

2. In *Grant* and *Cusson*, the Supreme Court of Canada adopted principles from the English cases of *Reynolds v. Times Newspapers Ltd*., *supra*, and *Jameel and others v. Wall Street Journal Europe SPRL*, [2005] EWCA Civ 74, [2006] UKHL 44, [2007] 1 A.C. 359, which set out a similar public interest defence in England known as the "responsible journalism defence" or the "*Reynolds* privilege".

3. The Supreme Court of Canada, in *Grant v. Torstar Corp*., *supra*, confirmed a new defence which is an entirely different creature. It is one which does not require a distinction between fact and comment, and one which does not rely on proof to a court level of certainty.

4. Instead, it asks whether the matter was one of public interest, and whether there was reasonable diligence by the publishers to arrive at a reasonable level of confidence in the truth.

5. The responsible communication defence recognized that the prior law failed to adequately advance the public interest of searching journalism on matters of public interest, which may like all human endeavours, be imperfect despite its societal value. The rationale was explained in *Grant* as follows:

> [53] 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. Verification of the facts and reliability of the sources may lead a publisher to a reasonable certainty of their truth, but that is

> different from knowing that one will be able to prove their truth in a court of law, perhaps years later. 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.
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> [65] Having considered the arguments on both sides of the debate from the perspective of principle, I conclude that the current law with respect to statements that are reliable and important to public debate does not give adequate weight to the constitutional value of free expression. While the law must protect reputation, the level of protection currently accorded by the law — in effect a regime of strict liability — is not justifiable. The law of defamation currently accords no protection for statements on matters of public interest published to the world at large if they cannot, for whatever reason, be proven to be true. But such communications advance both free expression rationales mentioned above — democratic discourse and truth-finding — and therefore require some protection within the law of defamation. When proper weight is given to the constitutional value of free expression on matters of public interest, the balance tips in favour of broadening the defences available to those who communicate facts it is in the public's interest to know.

6. On that basis, the court developed the defence of responsible communication, rejecting a standard of perfection and granting a defence where the subject matter is of public interest and where it was handled responsibly, having regard to various factors, whose relevance may vary with circumstances, and none of which are determinative.

7. The Responsible Communication defence shifts the focus away from the traditional truth defence and towards the conduct of the defendant. It accepts that in some situations defendants should not be liable for defamatory statements of fact, even if the defendants got some of those facts wrong or are unable to prove those facts. They key is that the defendant was publishing a matter of public interest, and did so responsibly. This was first articulated in Canada by Justice Sharpe for the Ontario Court of Appeal in *Cusson v. Quan, supra,* (aff'd 2009 SCC 62) where he said:

> [140] The public interest responsible journalism defence gives 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. It [page 279] represents an appropriate adjustment to the priority accorded by the common law to reputation over expression in keeping with the need to achieve, in accordance with Charter principles, "a balance . . . that fully respects the importance of both sets of rights" at issue: Dagenais, supra, at para. 72.

8. The Supreme Court of Canada confirmed this underlying rational for the Responsible Communication Defence in *Grant v. Torstar Corp*, *supra*:

> {61] The answer to this argument lies in the fact that a balanced approach to libel law properly reflects both the interests of the plaintiff and the defendant. The law must take due account of the damage to the plaintiff's reputation. But this does not preclude consideration of whether the defendant acted responsibly, nor of the social value to a free society of debate on matters of public interest. I agree with Sharpe J.A. that the partial shift of focus involved in considering the responsibility of the publisher's conduct is an "acceptable price to pay for free and open discussion" (Quan, at para. 142).
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> [62] The protection offered by a new defence based on conduct is meaningful for both the publisher and those whose reputations are at stake. If the publisher fails to take appropriate steps having regard to all the circumstances, it will be liable. The press and others engaged in public communication on matters of public interest, like bloggers, must act carefully, having regard to the injury to reputation that a false statement can cause. A defence based on responsible conduct reflects the social concern that the media should be held accountable through the law of defamation. As Kirby P. stated in Ballina Shire Council v. Ringland (1994), 33 N.S.W.L.R. 680 (C.A.), at p. 700: "The law of defamation is one of the comparatively few checks upon [the media's] great power." The requirement that the publisher of defamatory material act responsibly provides accountability and comports with the reasonable expectations of those whose conduct brings them within the sphere of public interest. People in public life are entitled to expect that the media and other reporters will act responsibly in protecting them from false accusations and innuendo. They are not, however, entitled to demand perfection and the inevitable silencing of critical comment that a standard of perfection would impose.

Elements of the Responsible Communication Defence

9. The required elements to establish the Responsible Communication Defence are similar but not identical to the *Reynolds* privilege in England. They are at paragraph 126 of the *Grant* decision, 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:
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> a) the seriousness of the allegation;
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> b) the public importance of the matter;
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> c) the urgency of the matter;
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> d) the status and reliability of the source;
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> e) whether the plaintiff's side of the story was sought and accurately reported;
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> f) whether the inclusion of the defamatory statement was justifiable;
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> g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and
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> h) any other relevant circumstances.

Grant v. Torstar Corp., 2009 SCC 61, para 126

10. Unlike the defences of fair comment or qualified privilege, the Responsible Communication Defence does not include a separate inquiry in to malice because its very nature requires the exercise of due diligence. (*Grant v Torstar Group*, *supra*, para 25.)

An Application of the Defence: Flood v Times Newspapers

11. The highest appellate decision dealing with an application of the defence is the United Kingdom Supreme Court decision in *Flood v. Times Newspapers Limited,* [2012] UKSC 11. While recognizing that the formulation in *Grant*

12. is somewhat more generous than the UK "responsible journalism" or "*Reynolds*" defence as explained below, the *Flood* case assists in illustrating the defence in its application.

13. In *Flood,* an article reported allegations of corruption against a police constable. It began "Detective accused of taking bribes from Russian exiles…". Mr. Flood was later cleared

of wrongdoing by a police inquiry and the trial judge found he had committed no corruption. The trial judge held the newspaper was nevertheless protected by *Reynolds* privilege [2009] EWHC 2375 (QB), but the Court of appeal reversed, principally on a conclusion of inadequate steps to verify the allegations: [2010] EWCA Civ 804 [2011] 1WLR 153.

14. Some elements of the case, summarized at paras. 9-14 of the Court of Appeal judgment included that the journalist had initially been told of the bribery allegations by a source "A", and investigated over several months. He made a "botched attempt…to 'door step' DS Food" (para 11). The police then issued a statement that they were investigating. The article was published on June 2, 2006, and in December of 2006, the investigation concluded and cleared DS Flood.

15. The UK Supreme Court held that the Reynolds defence did apply and restored the trial decision. There were five separate concurring judgments, which concluded that the matter was of public interest, including naming DS Flood (paras 53, 68, 74, 147, 195); that journalistic judgment and editorial freedom should be given weight (para 170, 199).

16. Lord Brown wrote:

> [N]ot every anonymous denunciation to the police will attract Reynolds privilege. Far from it. That, as Mr Price QC for Sergeant Flood was at pains to point out, would indeed be a "charter for malice". But where, as here, the denunciation is of a public officer, relates to a matter of obvious public importance and interest, and may justifiably appear to the journalists to be supported by a strong circumstantial case, it seems to me properly open to the trial judge to find the defence made out. [119] .

17. Lord Phillips explained that as to verification, the responsible journalist has to satisfy himself that the allegation was true and his belief in the truth had to be the result of a reasonable investigation [79]. The hard and fast principles relating to the defence of justification do not apply when considering verification. The existence of grounds for suspicion can be based on information from reliable sources or may reasonably be inferred from the fact of a police investigation [80].

18. The following statement of Lord Mance (para 179) was explicitly concurred in by a majority including Lord Clarke (para. 184) and Lord Dyson (para. 190):

> …as covered by the public interest defence recognised in *Reynolds* and *Jameel*. The starting point is that the investigation into possible police corruption in the

> area of extradition of a Russian oligarch to Russia informed the public on a matter of great public interest and sensitivity. TNL journalists were motivated by a concern to ensure that the investigation was being or would be properly pursued. They had themselves investigated the sources and nature of the allegations exhaustively over a substantial period as far as they could. The article would have been unlikely to be publishable at all without details of the names and transactions involved in the alleged corruption. The facts regarding such transactions were accurately stated. [179]

19. Lord Mance noted that even though the publication damaged DS Flood's reputation, it was balanced, it did not assert the truth of the allegations and it gave DS Flood an opportunity to tell his side. (para 180). He concluded there was:

> …no good reason to depart from the judge's overall assessment that publication of the article was in the public interest, despite its immediate adverse effect on DS Flood's reputation [181].

Public Interest

20. The court should also be slow to conclude that a publication is not in the public interest. "[A]ny lingering doubts should be resolved in favour of publication": *Quan v. Cusson*, 2007 ONCA 771, para. 90 (aff'd 2009 SCC 62), citing *Reynolds v. Times Newspapers Ltd*.

21. When assessing public interest, the judge should consider the subject matter of the publication as a whole and whether that overall subject matter is one of public interest. The *Grant* decision includes the following:

> [105] To be of public interest, the subject matter "must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached": Brown, vol. 2, at pp. 15-137 and 15-138. The case law on fair comment "is replete with successful fair comment defences on matters ranging from politics to restaurant and book reviews": *Simpson v. Mair*, 2004 BCSC 754, 31 B.C.L.R. (4th) 285, at para. 63, per Koenigsberg J. Public interest may be a function of the prominence of the person referred to in the communication, but mere curiosity or prurient interest is not enough. Some segment of the public must have a genuine stake in knowing about the matter published.

22. In this case the public interest was a matter of the medical care of patients, placing it at the highest end of public interest. That importance will return when considering the diligence factor pertaining to "the importance of the matter".

Diligence in Verifying the Allegations

23. In *Grant, supra*, the question is whether the publisher "was diligent in trying to verify the allegation" (para 126). The list of factors set out above will assist in answering this question. Some aspects of the approach deserve emphasis.

24. Factors are not hurdles: The diligence factors should not be interpreted strictly or treated as hurdles that a publisher must overcome. This was discussed in *Jameel*, *supra*, where the House of Lords was critical of trial courts using the *Reynolds* factors as a strict list of tests that had to be met, rather than considerations to be applied flexibly:

> 33. Lord Nicholls (at p 205) listed certain matters which might be taken into account in deciding whether the test of responsible journalism was satisfied. He intended these as pointers which might be more or less indicative, depending on the circumstances of a particular case, and not, I feel sure, as a series of hurdles to be negotiated by a publisher before he could successfully rely on qualified privilege…
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> …
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> 56. …They are not tests which the publication has to pass. In the hands of a judge hostile to the spirit of Reynolds, they can become ten hurdles at any of which the defence may fail. That is how Eady J treated them. The defence, he said, can be sustained only after 'the closest and most rigorous scrutiny' by the application of what he called 'Lord Nicholls' ten tests'. But that, in my opinion, is not what Lord Nicholls meant. As he said in *Bonnick* (p 309) the standard of conduct required of the newspaper must be applied in a practical and flexible manner. It must have regard to practical realities.
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> *Jameel v. Wall Street Journal Europe SPRL*, [2006] UKHL 44 citing *Reynolds v. Times Newspapers Ltd*., [1999] UKHL 45

25. This reasoning was subsequently adopted in *Grant* at para 73. The court in *Grant* also emphasized at para 122 that the factors "serve as non-exhaustive but illustrative guides.

Ultimately, all matters relevant to whether the defendant communicated responsibly can be considered."

26. The Analysis Looks to the Intended Meaning: When evaluating the non-exhaustive list of factors, the focus of the analysis is the defendant's intended meaning in publishing the article, within a reasonable range of intended meanings. In other words, the plaintiff's characterization of the words is not the strict guide.

> [124] If the defamatory statement is capable of conveying more than one meaning, the jury should take into account the defendant's intended meaning, if reasonable, in determining whether the defence of responsible communication has been established. This follows from the focus of the inquiry on the conduct of the defendant. The weight to be placed on the defendant's intended meaning is a matter of degree: "The more obvious the defamatory meaning, and the more serious the defamation, the less weight will a court attach to other possible meanings when considering the conduct to be expected of a responsible journalist in the circumstances" (Bonnick v. Morris, [2002] UKPC 31, [2003] 1 A.C. 300 (P.C.), at para. 25, per Lord Nicholls). Under the defence of responsible communication, it is no longer necessary that the jury settle on a single meaning as a preliminary matter. Rather, it assesses the responsibility of the communication with a view to the range of meanings the words are reasonably capable of bearing.
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> [130] The defence of responsible communication does not require preliminary rulings from the jury on primary meaning, since it does not depend on the supposition of a single meaning. The jury should be instructed to assess the responsibility of the communication in light of the range of meanings the words are reasonably capable of bearing, including evidence as to the defendant's intended meaning.

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27. Overall assessment: In evaluating the above-noted factors, the court should look at the story as a whole. As articulated in *Reynolds*, *supra*, and recited by the Ontario Court of Appeal and Supreme Court in *Cusson*, *supra*:

> … a publisher need not establish that it acted as a responsible journalist in relation to each defamatory statement if it can establish that it acted responsibly in relation to the story as a whole, assuming that "the thrust of the article is true, and the public interest condition is satisfied" (ONCA para 98)
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> When determining responsibility, the jury must consider the broad thrust of the publication as a whole rather than minutely parsing individual statements. (SCC at para. 30)

28. The Court is Not a News Editor: Finally, these factors should not be employed by the fact finder to micro manage the editorial practices of a media organization, and make different editorial decisions with hindsight. Rather, the court should show a degree of deference to the editorial judgment of the players, especially in situations involving professional editors and journalists. This was emphasized in *Jameel* and later adopted by *Grant*, *supra*, as follows:

> [73]…The House of Lords [in Jameel] also emphasized that the assessment of responsible journalism is not an invitation for courts to micro-manage the editorial practices of media organizations. Rather, a degree of deference should be shown to the editorial judgment of the players, particularly professional editors and journalists. For instance, a court should be slow to conclude that the inclusion of a particular defamatory statement was "unnecessary" and therefore outside the scope of the defence. As Lord Hoffmann put it:
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> The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are, ex hypothesis, in the public interest, too risky and would discourage investigative reporting. [para. 51]
>
> *Grant v. Torstar Corp*., 2009 SCC 61

a) **The Seriousness of the Allegation**

29. The degree of diligence required of the defendant will increase in relation to the seriousness of the allegation and its potential effects on the person defamed.

> [111] The logic of proportionality dictates that the degree of diligence required in verifying the allegation should increase in proportion to the seriousness of its potential effects on the person defamed. This factor recognizes that not all defamatory imputations carry equal weight. The defamatory "sting" of a statement can range from a passing irritant to a blow that devastates the target's reputation and career. The apprehended harm to the plaintiff's dignity and reputation increases in relation to the seriousness of the defamatory sting.

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30. In this case, the CBC understood that criticisms of a doctor were serious and spent proportionate diligence in reviewing numerous cases, including second sources in the form of other family members privy to what happened. The plaintiff's exaggerated meanings leads the plaintiff to argue that there ought to have been even more months taken attempting to obtain full medical records and the hiring of an expert to review them. Not only is that excessive, as illustrated by the limited use of those records at this trial, but many of the key facts in this case were not in those records, often because Dr. Casses omitted them.

b) **The Public Importance of the Matter**

31. In *Grant,* the relationship between public importance of the matter and diligence was discussed as follows:

> [112] Inherent in the logic of proportionality is the degree of the public importance of the communication's subject matter. The subject matter will, however, already have been deemed by the trial judge to be a matter of public interest. However, not all matters of public interest are of equal importance. Communications on grave matters of national security, for example, invoke different concerns from those on the prosaic business of everyday politics. What constitutes reasonable diligence with respect to one may fall short with respect to the other. Where the public importance in a subject matter is especially high, the jury may conclude that this factor tends to

> show that publication was responsible in the circumstances. In many cases, the public importance of the matter may be inseparable from its urgency.

32. In *Vellacott*, the court pointed out that public importance increases the value of journalistic scrutiny. In that case, the expenditure of taxpayers' funds and issues arising during a federal leadership race fell in to such a category. In such a matter, the plaintiff "should expect, and even welcome, close scrutiny." (*Vellacott*, para 82.)

33. It is submitted that this consideration is equally applicable to the safety of patients of health care professionals, paid by the taxpayer. People in that position should expect and welcome close scrutiny. The public interest in oversight and accountability of doctors, all for the protection of public health and safety is of high importance, as illustrated by the entire College regime and procedures designed for just that purpose.

c) **The Urgency of the Matter**

34. When evaluating the urgency of a matter, consideration will be given to a journalist's need to file timely reports on important events. However, mistakes made in the rush to get a scoop will also be considered. In *Grant*, *supra*, the Supreme Court of Canada explained the considerations as follows:

> [113] As Lord Nicholls observed in Reynolds, news is often a perishable commodity. The legal requirement to verify accuracy should not unduly hamstring the timely reporting of important news. But nor should a journalist's (or blogger's) desire to get a "scoop" provide an excuse for irresponsible reporting of defamatory allegations. The question is whether the public's need to know required the defendant to publish when it did. As with the other factors, this is considered in light of what the defendant knew or ought to have known at the time of publication. If a reasonable delay could have assisted the defendant in finding out the truth and correcting any defamatory falsity without compromising the story's timeliness, this factor will weigh in the plaintiff's favour.

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35. In the present case, the plaintiff says the matter was not urgent. CBC was aware that it had time to research the story and did so over months, but the fact remained that Dr. Casses was engaging in surgery on a daily basis throughout and clearly was not going

to provide more information. Lack of immediate urgency does not mean a story never gets told. *In Vellacott v.* Saskatoon *Star Phoenix Group Inc., supra* (the MP Mail Case), the Saskatchewan Court of Queen's Bench confirmed the reasonable timing of the publication in a situation where the plaintiff argued that the story was not urgent, and more time would have afforded more accuracy in reporting. At paragraph 82(l), the court noted that while there may not have been a necessary rush to publish the story, there was no indication that anything would be different had the newspaper waited to do so. Also, given that news needed to be current and that best practices were to report on an event as close to its occurrence as possible, the timing of the stories did not cause any concern (para 82(l)).

d) **The Status and Reliability of the Source**

36. This relates to verifying allegations. It is often one of the courts' primary considerations when evaluating the Responsible Communication Defence. The jurisprudence indicates that the court should examine the reliability of the source of information and whether there was a particular need to use other sources to verify the allegations. This applies to both documentary sources, and to people. It was articulated in *Grant*, supra, as follows:

> [114] Some sources of information are more worthy of belief than others. The less trustworthy the source, the greater the need to use other sources to verify the allegations. This applies as much to documentary sources as to people; for example, an "interim progress report" of an internal inquiry has been found to be an insufficiently authoritative source in the circumstances: *Miller v. Associated Newspapers Ltd.*, [2005] EWHC 557 (QB) (BAILII). Consistent with the logic of the repetition rule, the fact that someone has already published a defamatory statement does not give another person licence to repeat it. As already explained, this principle is especially vital when defamatory statements can be reproduced electronically with the speed of a few keystrokes. At the same time, the fact that the defendant's source had an axe to grind does not necessarily deprive the defendant of protection, provided other reasonable steps were taken.
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> [115] It may be responsible to rely on confidential sources, depending on the circumstances; a defendant may properly be unwilling or unable to reveal a source in order to advance the defence. On the other hand, it is not difficult to see how

> publishing slurs from unidentified "sources" could, depending on the circumstances, be irresponsible.

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37. In *Reynolds*, supra, the defendants alleged that Mr. Reynolds had lied to his colleagues in the legislature. The source of the allegation was later identified as the program manager for Mr. Reynolds' political competitor. The court concluded that there was no evidence before the jury that the program manager had the approval to make the allegations. Further, the newspaper had no other source for the allegation. The Court concluded that "in the bitter aftermath of these events, a member of the staff of one of Mr. Reynolds' leading political opponents could scarcely be judged an authoritative source for so serious a factual allegation." (per Lord Cooke at UKHL p. 32) This worked against the responsible journalism defence since the journalist did not have another source for the information.

38. In *Vellacott,* the Saskatchewan court accepted the status and reliability of the sources because the newspaper received copies of documents in question, all but one source was identified and reported in the story, and there was "an appropriate level of canvassing of a variety of opinions from a variety of sources." The reporter had not only sought opinion from the plaintiff, but from the Board of Internal Economy (*Vellacott*, *supra*, para 82.)

39. In *Shavluk v. Green Party of Canada*, 2010 BCSC 804 <http://canlii.ca/t/2b2bf>aff'd 2011 BCCA 286 <http://canlii.ca/t/fm4p5>, the Green Party of Canada issued a press release and its leader participated in an interview announcing the removal of the plaintiff as a Green Party candidate. The trial judge found the imputation of the words in the press release and interview were that Mr. Shavluk held anti-Semitic views, that he was unsuitable to hold office as an MP, and that he made hate-filled statements in his blog postings. The Green Party was unable to prove that Mr. Shavluk held anti-Semitic views. the court emphasized that the defendants had sought a response directly from Mr. Shavluk (although unsuccessfully at the time of publication), and they had personally reviewed his Internet posting at issue before commenting (See *Shavluk*, para 99) as being adequate research in the circumstances.

e) **Whether the plaintiff's side of the story was sought and accurately reported**

40. This is often the key consideration to a Responsible Communication Defence. In *Grant*, it was described as the "core" factor (para 116). In the same paragraph, Chief Justice McLachlin said "in most cases, it is inherently unfair to publish defamatory allegations of fact without giving the target an opportunity to respond." However,

> [117] The importance of this factor varies with the degree to which fulfilling its dictates would actually have bolstered the fairness and accuracy of the report. For example, if the target of the allegations could have no special knowledge of them, this factor will be of little importance: see *Jameel*, at paras. 35, and 83-85, where the House of Lords held that the plaintiff (whose group of companies had been put on a terrorism monitoring list) could not realistically have added anything material to the story because the relevant actions of the Saudi and U.S. governments were secret and entirely beyond his control.

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41. Earlier, in *Reynolds*, *supra*, the House of Lords accepted the lower court's explanation of the importance of this factor as follows:

> …it is one thing to publish a statement which the person defamed has been given the opportunity to rebut, and quite another to publish a statement without any recourse to the person defamed where such recourse was possible; it is one thing to publish a statement which has been so far as possible checked, and quite another to publish it without such verification as was possible and as the significance of the statement was called for.

42. In *Reynolds*, the plaintiff would not give comment to the newspaper, but he had commented in the Dail (Irish legislature) about the allegations against him. The House of Lords indicated that it would have been appropriate for the newspaper to publish some of Mr. Reynolds' statements to the Dail:

> It goes without saying that a journalist is entitled and bound to reach his own conclusions and to express them honestly and fearlessly. He is entitled to disbelieve and refute explanations given. But this cannot be a good reason for omitting, from a hard-hitting article making serious allegations against a named individual, all mention of that person's own explanation. Particularly so, when the press offices had told Mr. Ruddock that

> Mr. Reynolds was not giving interviews but would be saying all he had to say in the Dail. His statement in the Dail was his answer to the allegations. An article omitting all reference to this statement could not be a fair and accurate report of proceedings in the Dail. Such an article would be misleading as a report. (UKHL p 14, per Lord Nichols)

43. However, it is not always necessary to publish a response, either directly obtained from the subject, or available elsewhere. For example, "when the victim's explanation is unintelligible or plain nonsense" (*Reynolds*, page 21 per Lord Steyn) or when the indirect response does not directly relate to the purpose of the publication (*Shavluk*, para. 100).

44. In this case, as we know, Ms. Tomlinson made repeated efforts to get Dr. Casses side, and when she finally got a letter (Ex. F pp. 1345-7) it did not answer most of the matters, but Dr. Casses side was reported to the extend he did respond.

f) **Whether the Inclusion of the Defamatory Statement was Justifiable**

45. In *Grant*, supra, the Court suggested at para 118 that in applying this factor, the fact-finder "should take into account that the decision to include a particular statement may involve a variety of considerations and engage editorial choice, which should be granted generous scope." In the present case, there is no claim of any particular words or literal meanings, and as such this factor may be of limited relevance.

46. In *Jameel*, *supra*, Lord Bingham also addressed this issue by emphasizing several considerations on the public interest analysis:

> [34] … If the thrust of the article is true, and the public interest condition is satisfied, the inclusion of an inaccurate fact may not have the same appearance as it might if the whole thrust of the article is untrue.
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> …
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> [51]…[T]he question of whether the defamatory statement should have been included is often a matter of how the story should have been presented. And on that question, allowance must be made for editorial judgment. If the article as a whole is in the public interest, opinions may reasonably differ over which details are needed to convey the general message. That fact that the judge, with the advantage of leisure and hindsight, might have made a

> different editorial decision should not destroy the defence. That would make the publication of articles which are, ex hypothesis, in the public interest, too risky and would discourage investigative reporting.

47. The following are cases where the court accepted the inclusion of a defamatory statement:

a) *Shavluk*, *supra,* where Mr. Shavluk argued that it was not necessary for the Green Party to have mentioned his alleged anti-Semitic statement in its press release revoking candidacy. However, the court decided at para 101 that "such a response would not be realistic in the circumstances. It was appropriate for the reasons to be given for the revocation of support for Mr. Shavluk's candidacy and it was also important to clarify that the Party distanced itself from anti-Semitic views.";

b) *Jameel, supra:* The court concluded that the inclusion of names of Saudi businesses was an important part of the story, notwithstanding the inability to obtain comments from all of these companies. By listing the names, the court concluded that it showed the extent of the cooperation between the two governments, and that the companies were "within the heartland of the Saudi business world." The court decided that inclusion of the names was necessary. "Generalisations such as 'prominent Saudi companies', which can mean anything or nothing, would not have served the same purpose." (para. 51.); and

c) *Vellacott, supra,* where the Court decided that inclusion of the defamatory statement was necessary to help explain the position of the Conservative Party that was withdrawing support for Mr. Vellacott (para. 101).

g) **Other Relevant Considerations**

48. In *Grant*, the Court suggested at para 122 that all other matters that are relevant to whether the defendant communicated responsibly can be considered.

49. In many cases, the plaintiff has argued the tone of the publication as part of other relevant circumstances. It is important to note, however, that the tone factor was specifically enumerated by the House of Lords in the *Jameel* case, and intentionally excluded by the Supreme Court of Canada in *Grant*. This is likely the result of the Supreme Court of Canada's conclusion that:

> [123] While distortion or sensationalism in the manner of presentation will undercut the extent to which a defendant can plausibly claim to have been communicating responsibly in the public interest, the defence of responsible communication ought not to hold writers to a standard of stylistic blandness: see Roberts, at para.

> 74, per Sedley L.J. Neither should the law encourage the fiction that fairness and responsibility lie in disavowing or concealing one's point of view. The best investigative reporting often takes a trenchant or adversarial position on pressing issues of the day. An otherwise responsible article should not be denied the protection of the defence simply because of its critical tone.

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50. In *Velacott*, following that mandate, the court said "the defendants did not have a legal obligation to write their articles in a manner that satisfied the plaintiff. . . They owed him some legal duties, but writing in the overall tone satisfactory to the plaintiff was not one of them." (para. 82(h).)

Application of the "Responsibility Factors" to the Present Case

51. The public importance of the matter cannot be seriously challenged. The diligence with which the research was carried out over several months was considerable, and across numerous patients, as illustrated in the notes and documents of Ms. Uda and Ms. Tomlinson.

52. Ms. Tomlinson's efforts are summarized earlier. She is an experienced, respected and dedicated investigative journalist who spent significant time researching the story, as had Enza Uda in the initial stages. The research in total spanned nearly 3-½ months. She sought guidance from her superior, Wayne Williams, over the stories generally and journalistic standards. She sought all documents she could obtain, and had numerous sources giving similar accounts. She pressed for Dr. Casses' side even though she was repeatedly rebuffed.

53. The story responsibly stayed away from the more inflammatory allegations in Arizona. It stuck to the matters that were either certain (for example the Arizona admissions, and the College decisions) or had strong hallmarks of reliability such as multiple sources (not just patients but family members to corroborate and explain, as well as officials from Arizona and BC) and corroborating documents.

54. The congruence of the information reported across the many patient cases (reported in most detail in the web story, Ex. 15) and the facts as they have played out in this trial, with 6 weeks of witnesses, full medical records and extensive other documentation, is a

testament to the diligence and resulting reliability of information obtained by the CBC for the publications.

55. It is respectfully submitted that a story about a group of patients, concerned about their treatment by one of two general surgeons in their small town, is of great public interest. Further, the significant due diligence employed by the CBC defendants before publishing, including speaking to multiple sources to satisfy themselves that there were legitimate concerns, and attempting to interview Dr. Casses through phone calls, visits to his office, visits to his home, communications with his lawyer, and publishing the critical points from that doctor's written response to queries, is the epitome of a story deserving of the Responsible Communication Defence.