The Defence of Responsible Communication – Supreme Court of Canada (2009)

Editor-in-Chief: Professor Michael A. Geist, Canada Research Chair in Internet and E-Commerce Law - University of Ottawa, Faculty of Law

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• GRANT v. TORSTAR: ***THE RIGHT TO BE (RESPONSIBLE AND) WRONG*** •

Keri Gammon, David Wotherspoon and Christian Leblanc

Fasken Martineau DuMoulin LLP

FACTS IN GRANT

The facts were straightforward and unsensational. Peter Grant, a Northern Ontario businessman, was the subject of a June 2001 article in the Toronto Star concerning his proposed expansion of his private golf course for which he needed to purchase 40 acres of Crown land and secure various governmental approvals. The development was strongly opposed by members of the local cottage community who expressed concern that, despite their opposition, "the fix was in" because of alleged ties between Grant and Premier Mike Harris and the provincial PC party. These concerns were detailed in the article which the Court described as "[giving] greater credence to the cottagers' side of the story … [and] did not paint Grant in a flattering light".

Prior to publication, Bill Schiller, the investigative journalist behind the article, had repeatedly approached Grant for comment but on each occasion Grant refused.

Following publication of the article, Grant and his company sued the Star, its affiliates, Schiller and one of the residents, Lorrie Clark, for libel.

Much of the trial focused on a single statement made by Clark and reported by Schiller:

"Everyone thinks it's a done deal because of Grant's influence — but most of all his Mike Harris ties, says Lorrie Clark, who owns a cottage on Twin Lakes."

The plaintiffs argued that the article was tantamount to an accusation that Grant had obtained government favours by improperly asserting his influence and connections. The defendants argued justification and fair comment, in that the article merely reported on the fact of residents' concerns. Alternatively, they sought an expansion of the defence of qualified privilege to cover instances of responsible journalism in the public interest.

The trial judge declined to leave the latter defence with the jury finding that it was not available in the circumstances, but left open the possibility that such a defence might be available on different facts.

The trial concluded with a jury verdict against the Star for $1.475 million in damages. The Ontario Court of Appeal overturned the verdict and ordered a new trial, finding that the trial judge erred in not leaving the defence of responsible journalism with the jury. The Plaintiffs appealed, and the Defendants cross-appealed asking the Supreme Court to dismiss the action outright on the defence of responsible journalism or alternatively, fair comment.

The Supreme Court of Canada dismissed the appeal and cross-appeal, and affirmed the order for a new trial which would include the defence of responsible communication. They did not adopt the vocabulary of responsible journalism specifically to widen the applicability of the defence to a "communication", even if it could be argued that the communication was not done by a "journalist".

Hence, the qualifications of the defence by the Supreme Court as responsible "communication".

INVOKING THE DEFENCE OF RESPONSIBLE COMMUNICATION

The defence of responsible communication will be satisfied where:

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

B. The publisher was diligent in trying to verify the allegation.

THE PUBLIC INTEREST

As yet there is no test for whether a publication is on a matter of public interest, but the question is essentially "whether the nature of the statement is such that protection may be warranted in the public interest".

The guidance from Grant includes:

> [T]he subject matter of the publication [must be considered] as a whole. The defamatory statement should not be scrutinized in isolation;
>
> [T]he public interest is not synonymous with what interests the public … An individual's reasonable expectation of privacy must be respected in this determination.

Conversely, the fact that much of the public would be less than riveted by a given subject matter does not remove the subject from the public interest. It is enough that some segment of the community would have a genuine interest in receiving information on the subject.

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' … but mere curiosity or prurient interest is not enough.

The Court in Grant gave no opinion on whether Mr. Schiller's article would pass this hurdle, as this will be a question for the trial judge. What is clear, however, is that the question will turn largely on how narrowly or broadly the subject matter is characterized.

RESPONSIBLE COMMUNICATION

At this step, the issue is whether the defamatory statement was nevertheless responsibly made. Was the author 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.

None of these factors will be determinative, and in a given case some will warrant more weight than others. The seriousness of the allegation and the public importance of the matter are concerned with proportionality, in that a more serious claim is likely to require further verification efforts, while a matter of widespread and immediate public concern might excuse a lower level of diligence.

Citizen journalists should take particular note of the factor in (e) above, that is whether they have sought the plaintiff's side of the story. In Grant the Court cautions that "[i]n most cases, it is inherently unfair to publish defamatory allegations of fact without giving the target an opportunity to respond".

This element may prove burdensome or even unworkable for “lay media” who publish through informal means and do not have access to the same resources as professional journalists and media outlets.

At this early stage, the guidance remains vague as to how these factors will apply at all, let alone in defamation claims concerning posts on social networking sites, blogs or other forms of non-traditional media. The Court did, however, note that “the applicable standards will necessarily evolve to keep pace with the norms of new communications media”.

CONCLUSION

With Grant, the Court has given journalists — of all types — the right to be responsibly wrong on matters of public interest. Inherent in this decision is the recognition that increasingly we use a wide variety of media for sharing and obtaining our information, and that there is value in doing so. The Court recognizes the importance of new forms of communication by extending to them the same protections now afforded to professional journalists and media outlets. However, implicit in this is that these new forms will be held to a similar standard as their professional counterparts.