Canadian Libel Law Enters the 21st Century: The Public Interest Responsible Communication Defence

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The Supreme Court of Canada's landmark decisions in *Grant v. Torstar Corp.* and *Quan v. Cusson* have advanced freedom of expression in Canada by giving libel defendants protection against liability for false and defamatory facts, where the publisher acted responsibly in attempting to verify information that is in the public interest. In the opinion of the authors, these decisions strengthen core values underlying freedom of expression, including the pursuit of truth and democratic discourse, by facilitating public access to information about matters of public interest. The authors describe the development of this defence. The authors observe that communications about the private lives of public officials can be expected to fall into a "grey zone" in establishing the "public interest" component of the defence. In regards to the "responsible communications" component, it is noted that the trial judge's charge to the jury will be critically important to ensure that juries do not eviscerate the defence by requiring libel defendants to satisfy each of the non-exhaustive list of factors to consider in assessing responsibility. It is the opinion of the authors that in most cases common sense, rather than expert opinion, will be required to decide whether the diligence component of the defence has been met, and that expert opinion on the very issue that the trier of fact has to decide will be disallowed if it usurps the jury's function.

Dans les deux arrêts-clés *Grant c. Torstar Corp.* et *Quan c. Cusson*, la Cour suprême du Canada a fait progresser la liberté d'expression au Canada en accordant aux défendeurs d'une poursuite en diffamation une protection contre toute responsabilité pour des actes mensongers et diffamatoires, alors que l'éditeur avait agi de façon responsable en essayant de vérifier les renseignements qui étaient dans l'intérêt public. De l'avis des auteurs, ces décisions renforcent les valeurs fondamentales qui sous-tendent la liberté d'expression, notamment la quête de la vérité et le discours démocratique, en facilitant l'accès du public aux renseignements sur des sujets d'intérêt public. Les auteurs décrivent l'élaboration de ce moyen de défense et font observer qu'il faut s'attendre à ce que les communications relatives à la vie privée d'agents publics tombent dans une « zone grise » lorsqu'il s'agit d'établir la composante « intérêt public » de la défense. Pour ce qui est de la composante « communications responsables », on note que les instructions du juge de première instance au jury seront capitales pour s'assurer que les jurés n'anéantissent pas ce moyen de défense en exigeant des défendeurs du libelle diffamatoire qu'ils satisfassent chacun des facteurs de la liste non exhaustive pour évaluer leur responsabilité. Les auteurs sont d'avis que, dans la plupart des cas, c'est la logique, plutôt que l'opinion d'un expert, qui permettra de décider si le critère de diligence, en tant que composante du moyen de défense, a été satisfait et que l'on refusera d'admettre l'opinion d'expert sur la question précise que le juge des faits est tenu de trancher si cette opinion usurpe les fonctions du jury.

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I. INTRODUCTION

All libel defendants in Canada can now rely upon a new defence—responsible communication on matters of public interest. The Supreme Court of Canada's landmark decisions in *Grant v. Torstar Corp.*[1] and *Quan v. Cusson*[2] modernized Canadian libel law in accordance with *Charter*[3] values by creating the responsible communication defence, which provides additional protection to publishers of false and defamatory facts. The Supreme Court ordered new trials in both the *Grant* and *Quan* cases, overturning jury libel damage awards of $1.4 million and $100,000 respectively; verdicts that represented chilling attacks on freedom of the press in this country.

The public interest responsible communication defence requires that two conditions be fulfilled: (i) the publication must be on a matter of public interest and (ii) the defendant must show that the publication by him or her was responsible, in that he or she was diligent in trying to verify the allegations having regard to all the relevant circumstances.[4] The responsible communication defence is "assessed with reference to the broad thrust of the publication in question"[5] and is available to any libel defendant—the traditional media (newspapers, television, radio) and new media such as bloggers. The burden of proof in establishing the defence lies with the defendant.

The decisions in *Grant* and *Quan* represent an important advancement of freedom of speech in Canada and a major change in the law of defamation. Publishers of matters of public interest now have a new defence available that will encourage

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1. *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] S.C.J. No. 61 (QL) [*Grant*].
2. *Quan v. Cusson*, 2009 SCC 62, [2009] S.C.J. No. 62 (QL) [*Quan*].
3. *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 [*Charter*].
4. *Grant*, *supra* note 1 at para. 126.
5. *Ibid.*

responsible journalism and the dissemination of more information to the public without the fear of being sued and fending off staggering damage awards. Libel plaintiffs may view the decisions as an invitation to destroy reputations because the new defence protects false statements of fact. However, the framework that the Court has built around the defence is designed so that the defence does not become a licence to defame. As the Court stated in *Grant*: "The 'bald retailing of libels' is not in the public interest."[6]

This case comment sets out the state of Canadian defamation law prior to the Supreme Court's creation of the public interest responsible communication defence and explains the Court's "libel chill" rationale underlying its adoption of the new defence. The case comment then looks at how the new defence is to be proven by reviewing the carefully crafted guideposts the Court has set down for determining whether a communication is about a matter of public interest and whether the publisher acted diligently.

II. The State of Canadian Defamation Law Prior to the Creation of the Responsible Communication Defence

Libel is a strict liability tort. Libel plaintiffs in the common law provinces need only prove that the words complained of are: (i) capable of being defamatory, (ii) were published and (iii) refer to the plaintiff.[7] The law then presumes that the words complained of are false and the plaintiff suffered damages. A libel defendant has to meet this reverse onus in cases alleging false facts by proving the words are true, or that the occasion of the publication is one that attracts an absolute or qualified privilege.

The defence of truth applies to factual statements and the defence of fair comment applies to "comments" or "opinions" based on true facts. At the time of publication, the publisher never knows with certainty whether the words complained of are "facts" or "comments" and whether the facts in issue in those defences can be proven with court-established certainty.

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6. *Ibid.* at para. 119.

7. This case comment does not deal with Quebec civil law governing defamation. An action in Quebec is grounded in Article 1457 of the *Civil Code of Quebec*. Like any other action in civil liability, the plaintiff must establish, on a balance of probabilities, the existence of injury, a wrongful act and a causal connection between the two. In order to demonstrate injury, the plaintiff must demonstrate that the impugned remarks were defamatory. The guiding principle of liability for defamation in Quebec is that there will not be fault until it has been shown that the journalist or media outlet has fallen below professional standards—the conduct of the reasonable journalist becomes the all-important guidepost (*C.B.C. v. Gilles Neron et al.*, 2004 SCC 53, [2004] 3 S.C.R. 95). The decisions of Quebec trial judges dealing with the conduct of journalists may provide assistance to common law trial judges on the issue of responsibility. Common law trial judges can also be expected to look for guidance on responsibility from decisions dealing with actual malice.

The Supreme Court in *WIC Radio Ltd. v. Simpson* modified the common law of fair comment to develop the defence in a manner consistent with the *Charter* values underlying freedom of expression, including freedom of the press.[8] The Court has once again modified the common law of defamation in accordance with *Charter* values in *Grant* and *Quan* by creating a *sui generis* defence regarding false and defamatory facts.

The traditional defence of qualified privilege applies to factual statements that are made on a "privileged occasion." A privileged occasion exists where the defendant has either an interest or a legal, social or moral duty to communicate the defamatory statement of fact, and its recipients have a corresponding duty or interest to receive that communication.[9] This reciprocity is essential.[10]

In a series of decisions in the 1950s and 1960s, the Supreme Court refused to allow the traditional defence of qualified privilege for publications to the world at large. These decisions were based on the rationale that newspaper publishers are in no different position from any other citizen, with the effect that their right to report and comment fairly did not give rise to a "duty" to report to the world at large.[11]

This jurisprudence of the Supreme Court conflicted with post-*Charter* decisions of Canadian and Commonwealth courts that allowed the media to rely on some form of a qualified privilege defence for publications to the world at large. These decisions recognized that there are occasions giving rise to a duty on the media to report on matters of public interest and that there is a corresponding interest in the public at large to receive such information.

In *Grenier v. Southam Inc.*, the Court of Appeal for Ontario upheld the decision of the trial judge that an *Ottawa Citizen* article was published on an occasion of qualified privilege.[12] The *Ottawa Citizen* article reported on a self-help group called "Fundamentalists Anonymous" that assisted Alice Grenier's husband in dealing with her obsession with television evangelists. In its endorsement, the Court of Appeal held: "[T]he trial judge specifically found on the evidence before him that there was

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8. *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, 293 D.L.R. (4th) 513 [*WIC Radio* cited to S.C.R.] (the Court modified the "honest belief" element of the fair comment defence so that the test, as modified, consists of the following elements: (a) the comment must be on a matter of public interest; (b) the comment must be based on fact; (c) the comment, though it can include inferences of fact, must be recognizable as comment; (d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts? Prior to the modification, the honest belief requirement was framed in subjective terms, i.e. the comment must express an opinion honestly held by the speaker).
9. See *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at para. 78, 126 D.L.R. (4th) 609.
10. *Ibid.*
11. *Jones v. Bennett* (1968), [1969] S.C.R. 277 at 284–285, 2 D.L.R. (3d) 291 at 296–98. See also *Douglas v. Tucker* (1951), [1952] 1 S.C.R. 275, [1952] 1 D.L.R. 657; *The Globe and Mail Limited v. Boland*, [1960] S.C.R. 203, 22 D.L.R. (2d) 277; *Banks v. The Globe and Mail Limited*, [1961] S.C.R. 474, 28 D.L.R. (2d) 343.
12. [1997] O.J. No. 2193 (C.A.) (QL) [*Grenier*].

a social and moral duty on the respondent [*Ottawa Citizen*] to publish the article in question and that the article was thus published on an occasion of qualified privilege. In our view, he made no error in so finding."[13]

The decision in *Grenier v. Southam* was cited with approval in *Leenen v. Canadian Broadcasting Corp.*[14] Associate Chief Justice Cunningham noted in *Leenen* that the principle established in *Grenier* (i.e., that qualified privilege can attach to a communication by the media published to the world at large if it is published in the context of a social or moral duty to raise the underlying issue) "was enunciated further by the House of Lords in *Reynolds v. Times Newspapers.*"[15]

The House of Lords decision in *Reynolds v. Times Newspapers,* and in particular the reasons enunciated by Lord Nicholls, was the genesis of the evolution of the law of qualified privilege for publications to the world at large.[16] In his reasons, Lord Nicholls observed that while qualified privilege ordinarily applied to publication to a limited group, there are occasions "when the public interest requires that publication to the world at large should be privileged" and that "[w]hether the public interest so requires depends upon an evaluation of the particular information in the circumstances of its publication."[17]

In *Reynolds,* Lord Nicholls rejected the appellants' submission that a new category of privileged occasion should be created for political information and held instead that the solution to balance the interests of freedom of expression and the protection of reputation lie in a common law solution that would permit the court to "have regard to all the circumstances when deciding whether the publication of particular material was privileged because of its value to the public."[18] In assessing the value of the material to the public, Lord Nicholls noted, "[t]he common law does not seek to set a higher standard than that of responsible journalism, a standard the media themselves espouse."[19] Accordingly, depending on the particular circumstances, the matters to be taken into account might include the following (the "*Reynolds* factors"):

> 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
> 2. The nature of the information, and the extent to which the subject matter is a matter of public concern.
> 3. The source of the information. Some informants have no direct knowledge of the

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13. *Ibid.* at para. 7.
14. (2000), 48 O.R. (3d) 656 at para. 114, 50 C.C.L.T. (2d) 213 at para. 114, aff'd (2001), 54 O.R. (3d) 612 (C.A.), 6 C.C.L.T. (3d) 97, leave to appeal to SCC refused, 28774 (February 7, 2002) [*Leenen* cited to O.R.].
15. *Ibid.*
16. [1999] UKHL 45, [2001] 2 A.C. 127, [1999] 4 All E.R. 609 [*Reynolds* cited to All E.R.].
17. *Ibid.* at 617.
18. *Ibid.* at 623.
19. *Ibid.*

> events. Some have their own axes to grind, or are being paid for their stories.
> 4. The steps taken to verify the information.
> 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
> 6. The urgency of the matter. News is often a perishable commodity.
> 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
> 8. Whether the article contained the gist of the plaintiff's side of the story.
> 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
> 10. The circumstances of the publication, including the timing. [20]

Lord Nicholls was careful to emphasize that the above factors were "illustrative only," and "not exhaustive" and that the "weight to be given to these and any other relevant factors will vary from case to case."[21] Notwithstanding this admonition, it was recognized by the House of Lords subsequently in *Jameel v. Wall Street Journal* that the "*Reynolds* Privilege," as it had become to be known in the UK, had been applied too rigidly by the lower courts.[22] Regarding the *Reynolds* factors, Lord Hoffmann observed: "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."[23]

Lord Hoffmann in *Jameel* restated the *Reynolds* privilege as a *sui generis* defence to be applied with reference to a three part test. "The first question is whether the subject matter of the article was a matter of public interest."[24] In answering this question, the court must "consider the article as a whole and not isolate the defamatory statement."[25] The second question is "whether the inclusion of the defamatory statement was justifiable."[26] "[A]llowance must be made for editorial judgment."[27] "The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence."[28] The third question is "whether the steps taken to gather and publish the information were responsible and fair," having regard to the *Reynolds* factors.[29]

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20. *Ibid.* at 626.
21. *Ibid.*
22. [2006] UKHL 44, [2007] 1 A.C. 359, [2006] 4 All ER 1279 [*Jameel* cited to A.C.].
23. *Ibid.* at para. 56.
24. *Ibid.* at para. 48.
25. *Ibid.*
26. *Ibid.* at para. 51.
27. *Ibid.*
28. *Ibid.*
29. *Ibid.* at paras. 53, 56.

The adoption by Canadian courts of the UK approach to qualified privilege for publications to the world at large was not preordained. In *Canadian Libel and Slander Actions,* the authors, writing prior to the House of Lords' decision in *Jameel,* raised numerous issues that would need to be considered by the Canadian courts in modernizing the common law of privilege to apply more readily to defamatory words published to the world at large in newspapers, broadcasts or other media.[30] The first question asked by the authors was: "Is it appropriate, in the context of Canada's social and political environment, to import into Canadian common law the new form of qualified privilege represented by: a. *Reynolds* privilege, b. Australia *Lange v. Australian Broadcasting Corp.* privilege, or c. New Zealand *Lange v. Atkinson* privilege?"[31]

In *Quan v. Cusson,* the Court of Appeal for Ontario adopted the "*Reynolds-Jameel* public interest responsible journalism defence" as the law of Ontario only after an exhaustive review of the approach to the issue of the availability of qualified privilege to the world at large in common law jurisdictions, including the UK, Australia, New Zealand, South Africa and the United States.[32] The Court of Appeal preferred the *Reynolds-Jameel* approach to the "categorical approach of Australia and New Zealand, restricting the defence to political speech" which would "introduce a potentially troublesome distinction between various types of expression that would unnecessarily complicate the law and that would be inconsistent with the *Charter's* broad protection of all forms of expression."[33] The Court of Appeal also rejected the United States' approach in *New York Times v. Sullivan,*[34] stating that adoption of this approach would "be contrary to the spirit, if not the letter" of the Supreme Court's rejection in *Hill v. Scientology* of the *New York Times v. Sullivan* actual malice test, a standard which would require plaintiffs suing with regard to a report on a matter of public interest to prove malice.[35]

Not all Canadian commentators approved of the adoption by the Court of Appeal for Ontario of the *Reynolds-Jameel* approach. While acknowledging empirical studies and other academic commentary that characterized the *Reynolds* privilege as a positive development in defamation law, Professor Raymond E. Brown, in *The Law of Defamation in Canada,* opined that the law in Canada should not be premised on any one of the defences recognized in the UK, Australia or New Zealand. According to Professor Brown, "the preferable course is to bring defamation into line with the larger tort doctrine of negligence, recognize a narrower range of qualified privileges,

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30. Roger D. McConchie & David A. Potts, *Canadian Libel And Slander Actions* (Toronto: Irwin Law Inc., 2004).
31. *Ibid.* at 458–459.
32. 2007 ONCA 771, 87 O.R. (3d) 241, 286 D.L.R. (4th) 196 [*Quan ONCA*].
33. *Ibid.* at para. 141.
34. *New York Times Company. v. Sullivan,* 376 U.S. 254 (1964).
35. *Quan ONCA, supra* note 31 at para. 135.

including one for the media on matters of public interest and concern, defeasible only on a showing of knowing or reckless falsity."[36]

The Supreme Court's adoption in *Grant* and *Quan* of a new defence based on either UK, Australian or New Zealand precedent was foreshadowed by its decision in *WIC Radio*. In *WIC Radio*, the appellants had argued in the alternative that if the defamatory statement in issue were a "fact" versus a "comment," they were entitled to rely on a "responsible journalism" defence. Justice Binnie, writing for the majority of the Court, held that this issue did not need to be considered in that the statement in issue was a "comment." But Justice Binnie did review the UK, Australian and New Zealand precedents for recognition of a qualified privilege to the world at large, noting:

> While the legal position in both Australia and New Zealand was influenced by statutory provisions that have no direct counterpart in Canada, the Canadian law of qualified privilege will necessarily evolve in ways that are consistent with *Charter* values. At issue will be both the scope of the qualified privilege (*Reynolds* is broader) and whether the burden of proof of responsible journalism should lie on the defendant (*Reynolds*) or irresponsible journalism on the plaintiff (*Lange v. Atkinson*).[37]

The Court in *Grant* and *Quan* unanimously adopted the public interest responsible communication defence, joining other Commonwealth courts that modified the common law of defamation.

III. The Rationale Underlying the Public Interest Responsible Communication Defence—Libel Chill

The Supreme Court modified Canada's law of defamation to give more protection to libel defendants, in recognition of the fact that the traditional defamation rules inappropriately chill free speech. Freedom of expression guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms* is essential to the functioning of our democracy and to seeking out the truth. The core rationales for freedom of expression of democratic discourse and truth-finding squarely apply to communications on matters of public interest, even those which contain false imputations.[38] Productive debate is dependant on the free flow of information and "freewheeling debate on matters of public interest is to be encouraged."[39] Accordingly, the Supreme Court held "[i]t is simply beyond debate that the limited defences available to press-related defen-

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36. 2d ed., looseleaf (Toronto: Carswell, 1999) vol. 4 at 27–58, n. 155.
37. *WIC Radio*, *supra* note 8 at para. 24.
38. *Grant*, *supra* note 1 at paras. 50–52.
39. *Ibid.* at para. 52.

dants may have the effect of inhibiting political discourse and debate on matters of public importance, and impeding the cut and thrust of discussion necessary to discovery of the truth."[40]

The Court found that the prior common law defamation rules requiring court-established certainty had a chilling effect[41] on the publication of communications in the public interest:

> 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 light of day.[42]

"[I]f the defences available to a publisher are too narrowly defined, the result may be 'libel chill', undermining freedom of expression and of the press."[43] "Fear of being sued for libel may prevent the publication of information about matters of public interest" with the result that "[t]he public may never learn the full truth on the matter at hand."[44] The defence of justification (truth) provides inadequate protection to libel defendants:

> To succeed on the defence of justification, a defendant must adduce evidence showing that the statement was substantially true. This may be difficult to do. A journalist who has checked sources and is satisfied that a statement if substantially true may nevertheless have difficulty proving this in court, perhaps years after the event. The practical result of the gap between responsible verification and the ability to prove truth in a court of law on some date far in the future, is that the defence of justification is often of little utility to journalists and those who publish their stories.[45]

The jury's verdict in *Quan* aptly illustrates the Supreme Court's finding that the defence of justification is often of little utility to journalists and those who publish their stories. The Court found that the *Ottawa Citizen* stories were clearly in the

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40. *Ibid.* at para. 57.
41. The Supreme Court had no hesitation in finding that Canada's strict liability tort of defamation caused "libel chill" and made that finding without any special evidentiary record adduced on this issue in *Quan* or *Grant*.
42. *Grant*, *supra* note 1 at para. 53.
43. *Ibid.* at para. 2.
44. *Ibid.* at para. 54.
45. *Ibid.* at para. 33.

public interest. The Court noted that the jury found many, but not all, of the factual imputations in the *Ottawa Citizen* articles had been proven true and that the jury found no malice on the part of any of the defendants.[46] The Supreme Court also found that the jury's findings of truth and falsity "were somewhat difficult to reconcile with one another."[47] The statements in the *Ottawa Citizen* articles that the jury found to be false were sourced from police officers in New York and Ottawa who all testified at trial that they were accurately quoted and that they had an honest belief in the truth of the information they provided to *The Ottawa Citizen* journalists (the journalists also testified that they had an honest belief in the truth of what they were told by these police officers). Yet, the jury found that some of the statements sourced from police officers in authority in New York and in Ottawa were false. This verdict illustrates why the defence of truth that requires court-established certainty and perfection is of little utility or comfort to journalists who publish stories that are clearly in the public interest.

The new public interest responsible communication defence means that libel plaintiffs are no longer "entitled to demand perfection and the inevitable silencing of critical comment that a standard of perfection would impose."[48] The Supreme Court agreed with the Court of Appeal for Ontario's decision in *Quan v. Cusson* "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'."[49] The Supreme Court found that a defence that allows publishers to escape liability if they can establish that they acted responsibly in attempting to verify the information on a matter of public interest "represents a reasonable and proportionate response to the need to protect reputation while sustaining the public exchange of information that is vital to modern Canadian society."[50]

IV. The Public Interest

The first condition of the public interest responsible communication defence is that the publication must be on a matter of public interest.

The trial judge decides whether the publication is about a matter of public interest.[51] "[T]he determination of whether a statement relates to a matter of public

46. *Quan*, *supra* note 2 at para. 4.
47. *Ibid.* at para 23.
48. *Grant*, *supra* note 1 at para. 62.
49. *Ibid.* at para. 61.
50. *Ibid.* at para. 86.
51. *Quan*, *supra* note 2 at para 29.

interest focuses on the substance of the publication itself" (which is to be contrasted with the defence of qualified privilege where the focus is on whether a privileged "occasion" exists).[52]

In determining whether a publication is on a matter of public interest, the trial judge must consider the subject matter of the publication as a whole. The defamatory statement should not be scrutinized in isolation.[53]

How is "public interest" in the subject matter established? There is "no single test for public interest, nor a static list of topics falling within the public interest."[54] Guidance can be taken from fair comment cases where the public interest is established whenever a matter is to affect people at large. In these cases, people may be legitimately interested in, or concerned by, what is going on or what may happen to them or to others. "[C]ase law on fair comment 'is replete with successful fair comment defences on matters ranging from politics to restaurant and book reviews.'"[55]

The Supreme Court held that the "protection of personal privacy is 'intimately related' to the protection of reputation."[56] "[T]he right to free expression does not confer a licence to ruin reputations."[57] "People who enter public life cannot reasonably expect to be immune from criticism, some of it harsh and undeserved. But nor does participation in public life amount to open season on reputation."[58] Not everything that interests the public attracts the protection of the defence:

> First, and most fundamentally, the public interest is not synonymous with what interests the public. The public's appetite for information on a given subject—say, the private lives of well-known people—is not on its own sufficient to render an essentially private matter public for the purposes of defamation law. 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.[59]

The Court held that "[t]he 'bald retailing of libels' is not in the public interest:"[60]

> 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

52. *Grant*, *supra* note 1 at para. 100.
53. *Ibid.* at para. 101.
54. *Ibid.* at para. 103.
55. *Ibid.* at para. 105.
56. *Ibid.* at para. 59.
57. *Ibid.* at para. 58.
58. *Ibid.*
59. *Ibid.* at para. 102.
60. *Ibid.* at para. 119.

> attached". . . . 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.[61]

Although some segment of the community must have a "genuine" interest in receiving information on the subject or a "genuine" stake in knowing about the matter published (i.e. a real interest in having the information in the public domain) there are no limits on the range of matters that can be considered of public interest:

> Public interest is not confined to publications on government and political matters, as it is in Australia and New Zealand. Nor is it necessary that the plaintiff be a "public figure", as in the American jurisprudence. . . . Both qualifications cast the public interest too narrowly. The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence.[62]

In *Quan*, the Supreme Court found that the *Ottawa Citizen* articles "clearly met" the public interest condition. The Court held that:

> 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.[63]

In *Grant*, the Supreme Court found that *The Toronto Star* article was clearly on a matter of public interest because "[t]he communication related to issues of government conduct. . . ."[64]

Communications about the private lives of public officials or prominent people in the community will often fall into a grey zone—in some cases the public interest in the information will be a real or genuine interest, and in other cases merely prurient interest, thus failing the test. As Baroness Hale stated in *Jameel*, "the most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large sections of the public but no-one could claim any real public interest in our being told all about it."[65]

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61. *Ibid.* at para. 105 [citations omitted].
62. *Ibid.* at para. 106.
63. *Quan*, *supra* note 2 at para. 31.
64. *Grant*, *supra* note 1 at para. 140.
65. *Jameel*, *supra* note 22 at para. 147.

V. Responsible Communications—Diligence in Verifying the Defamatory Statements

A. Introduction

The second condition of the public interest responsible communication defence requires a determination by a trier of fact as to whether the publisher was diligent in trying to verify the allegations having regard to all the relevant circumstances. "When determining responsibility, the jury must consider the broad thrust of the publication as a whole rather than minutely parsing individual statements."[66]

The Supreme Court has planted guideposts to aid in determining whether "the publisher was diligent in trying to verify the allegations, 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.[67]

These factors are a non-exhaustive list. Not all factors are of equal value in assessing responsibility in a given case. Every libel action will differ and the availability of the public interest responsible communication defence will depend on the facts of each case.

Libel defendants need not prove they satisfied every factor to successfully rely on the defence. The factors must be considered cumulatively. Regard must be paid to practical realities in assessing diligence. Accordingly, the trial judge's charge to the jury will be critically important to ensure that juries do not eviscerate this defence by treating each factor as a hurdle that the publisher must get over to make out the defence (a practice that was condemned by Lord Hoffman in *Jameel*).[68]

In *Quan*, the Supreme Court noted that the special verdict form given to the jury was "arguably too long and complex."[69] In cases where the defence of public interest responsible communication is in issue, the special verdict form should not list specific questions dealing with each factor that will assist the jury in determining whether

66. *Quan*, *supra* note 2 at para. 30.
67. *Grant*, *supra* note 1 at para. 126.
68. *Jameel*, *supra* note 22 at para. 56.
69. *Quan*, *supra* note 2 at para. 30.

the publisher acted diligently. Accordingly, only one question should be put to the trier of fact: Did the defendants act diligently in publishing the communication in issue, taking into account the publisher's overall conduct in trying to verify the allegations?

B. The Seriousness of the Allegation

The more serious the allegation, the more diligence required. "[T]he degree of diligence required in verifying the allegation should increase in proportion to the seriousness of its potential effects on the person defamed."[70]

The Court has introduced "privacy" as a factor to be considered in measuring the seriousness of the "sting" against the diligence of the publisher of the defamatory communication. "The degree to which the defamatory communication intrudes upon the plaintiff's privacy is one way in which the seriousness of the sting may be measured."[71]

C. The Public Importance of the Matter

The greater the public importance of the publication, the more likely the communication was responsible. "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."[72]

D. The Urgency of the Matter

The timing of the communication is a factor to be considered in assessing whether the publisher acted responsibly. The Supreme Court has recognized the need for timely reporting of the news:

> [N]ews 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.[73]

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70. *Grant*, *supra* note 1 at para. 111.
71. *Ibid.*
72. *Ibid.* at para. 112.
73. *Ibid.* at para. 113.

E. The Status and Reliability of the Source

The status and reliability of sources relied upon by the publisher impact whether the publisher acted responsibly. "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."[74]

Of significance is the Supreme Court's finding that publishers may be able to rely on sources with axes to grind provided other reasonable steps were taken.[75] Publishers can also rely on confidential sources. However, publishing slurs from unidentified sources could, depending on the circumstances, be irresponsible.[76]

F. Whether the Plaintiff's Side of the Story was Sought and Accurately Reported

One of the core factors that will determine whether a publisher has acted diligently is the extent to which the publisher sought out the plaintiff's side of the story and accurately reported the plaintiff's response, "In most cases, it is inherently unfair to publish defamatory allegations of fact without giving the target an opportunity to respond . . . Failure to do so also heightens the risk of inaccuracy, since the target of the allegations may well be able to offer relevant information beyond a bare denial."[77]A plaintiff takes a risk in stating "no comment" or in simply ignoring the publisher's attempts to obtain a response to the allegations because the publisher will have fulfilled a key diligence requirement in attempting to obtain a response.

There may be circumstances where the publisher does not have to seek the plaintiff's side of the story: "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."There may be instances where this factor has "little importance" because the target of the allegations "could have no special knowledge of them" and "could not realistically have added anything material to the story."[78] An example of this circumstance occurred in *Jameel v. Wall Street Journal* where Lord Hoffman found that Mr. Jameel would have no knowledge of whether there was covert surveillance of his bank account with the result that the *Wall Street Journal* was found to be acting respon-

74. *Ibid.* at para. 114.
75. *Ibid.* at para. 114.
76. *Ibid.* at para. 115.
77. *Ibid.* at para. 116.
78. *Ibid.* at para. 117.

sibly, notwithstanding that it did not delay publication to give Mr. Jameel an opportunity to comment.[79]

G. Whether Inclusion of the Defamatory Statement was Justifiable

The Supreme Court did not make a condition of the responsible communication defence that the inclusion of the defamatory statement was justifiable as did Lord Hoffman in his three part test in *Jameel v. Wall Street Journal*: (i) whether the subject matter of the publication was a matter of public interest; (ii) whether the inclusion of the defamatory statement was justifiable; and (iii) whether the steps taken to gather and publish the information were responsible and fair.[80]

The Supreme Court's placement of this question into the list of factors to be assessed in determining whether the publisher acted responsibly reduces its importance in establishing the defence because this is only one of a number of factors to be cumulatively considered in assessing diligence:

> [T]he justifiability of including a defamatory statement may admit of many shades of gray. It is intimately bound up in the overall determination of responsibility. . . . It is for the jury to consider the need to include particular defamatory statements in determining whether the defendant acted responsibly in publishing what it did.[81]

Notably, the Court also recognized that "the decision to include a particular statement may involve a variety of considerations and engage editorial choice, which should be granted generous scope."[82] Trial judges must stress this direction of the Supreme Court in their charge to the jury to ensure that juries do not second-guess editors who did not have the benefit of hindsight at the time of publication.

H. Reportage—Whether the Defamatory Statement's Public Interest lay in the Fact it was Made Rather Than its Truth

Significantly, the Supreme Court has recognized the defence of "reportage" as an exception to the "repetition rule" (the repetition rule holds that repeating a libel has the same legal consequences as originating it):

> However, the repetition rule does not apply to fairly reported statements whose public interest lies in the fact that they were made rather than in their truth or falsity. This exception to the repetition rule is known as reportage. If a dispute is itself a matter of public interest and the allegations are fairly reported, the publisher should incur no liability even if some of the statements made may be defamatory and untrue, provided:

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79. *Jameel*, *supra* note 22 at paras. 79–85.
80. *Ibid.* at paras. 48, 51, 53.
81. *Grant*, *supra* note 1 at para. 109.
82. *Ibid.* at para. 118.

(1) the report attributes the statement to a person, preferably identified, thereby avoiding total unaccountability;
(2) the report indicates, expressly or implicitly, that its truth has not been verified;
(3) the report sets out both sides of the dispute fairly; and
(4) the report provides the context in which the statements were made.[83]

The reportage defence can be invoked for all or part of the publication in issue. The Supreme Court has provided the following direction to trial judges for their charge to the jury on the reportage defence:

> Where the defendant claims that the impugned publication (in whole or in part) constitutes reportage, i.e., that the dominant public interest lies in reporting what was said in the context of a dispute, the judge should instruct the jury on the repetition rule and the reportage exception to the rule. If the jury is satisfied that the statements in question are reportage, it may conclude that publication was responsible, having regard to the four criteria set out above. As always, the ultimate question is whether publication was responsible in the circumstances.[84]

I. Other Considerations

The above list of factors to be considered by a jury in determining diligence serve as non-exhaustive, illustrative guides. "Ultimately, all matters relevant to whether the defendant communicated responsibly can be considered."[85] Not all factors are of equal value in assessing responsibility in a given case.[86]

Further, "the defence of responsible communication obviates the need for a separate inquiry into malice. . . . A defendant who has acted with malice in publishing defamatory allegations has by definition not acted responsibly."[87] Sensationalism is an indication of irresponsibility. However, the tone of an article can be adversarial and critical, yet be a responsible communication:

> [T]he "tone" of the article . . . may not always be relevant to responsibility. 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. . . . 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.[88]

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83. *Ibid.* at para. 120.
84. *Ibid.* at para. 121.
85. *Ibid.* at para. 122.
86. *Ibid.* at para. 123.
87. *Ibid.* at para. 125.
88. *Ibid.* at para. 123 [citations omitted].

The jury must also take into account the publisher's intended meaning, if reasonable, in determining whether the defence of responsible communication has been established. "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."[89]

J. Experts

The Supreme Court did not deal with the issue of whether experts can or should assist in the determination of whether a publisher acted diligently. Journalism experts have been called as witnesses in libel trials in the common law provinces and Quebec.[90] Trial judges will continue to act as gatekeepers in deciding whether such expert opinion is admissible in a libel trial. A threshold question trial judges will have to decide in each case is whether the expert opinion is necessary because it provides information that lies outside the experience and knowledge of the jury. A review of the list of factors the Supreme Court has provided to determine diligence suggests that in many cases common sense, rather than expert opinion, is what is required to decide whether the diligence condition of the responsible communication defence has been fulfilled. Trial judges will also have to decide whether the proposed expert is providing an opinion on the very issue that the trier of fact has to decide and is therefore usurping the role of the jury in deciding whether the publisher acted responsibly. If the opinion proffered by the expert impinges on the role of the jury, the expert testimony will most likely not be admitted.

VI. Co-Existence of the Traditional Qualified Privilege Defence With the Public Interest Responsible Communication Defence

The Supreme Court created a new defence of public interest responsible journalism, "leaving the traditional defence of qualified privilege intact":[91]

> Both statements of opinion and statements of fact may attract the defence of privilege, depending on the "occasion" on which they were made. Some "occasions" like Parliamentary and legal proceedings, are absolutely privileged. Others, like reference let-

89. *Ibid.* at para. 124.
90. *Young v. Toronto Star* (2004), 66 O.R. (3d) 170 at paras. 51–53, [2003] O.J. No. 3100 (QL) (C.A.) [*Young*]; *La Croix brisée c. Le Réseau de télévision T.V.A.*, [2004] R.J.Q. 970 (C.S.) (QL).
91. *Grant*, *supra* note 1 at para. 95.

> ters or credit reports, enjoy "qualified" privilege, meaning that the privilege can be defeated by proof that the defendant acted with malice. . . . The defences of absolute and qualified privilege reflect the fact that the "common convenience and welfare of society" sometimes requires untrammelled communication. . . . The law acknowledges through recognition of privileged occasions that false and defamatory expression may sometimes contribute to desirable social ends.[92]

The Supreme Court noted that "the defence of qualified privilege has seldom assisted media organizations" in defending libel actions.[93] The Court found that "many forms of qualified privilege would not be well served by opening up the privilege to media publications. The duties and interests of people communicating and receiving job references or police reports are definable with some precision and involve a genuine reciprocity. The reciprocal duty and interest involved in a journalistic publication to the world at large, by contrast, is largely notional."[94]

"The traditional duty/interest framework works well in its established setting of qualified privilege. These familiar categories should not be compromised or obscured by the addition of a broad new privilege based on public interest. Further, qualified privilege as developed in the cases is grounded not in free expression values but in the social utility of protecting particular communicative occasions from civil liability."[95]

The Supreme Court recognized that although publishers can rely on the traditional defence of qualified privilege for publications to the world at large, the occasions will be limited. For instance, in actions against politicians expressing concerns to the electorate about the conduct of other public figures, a politician's "duty to ventilate" matters of concern to the public could give rise to qualified privilege.[96]

The Court also noted that in the last decade, the traditional defence of qualified privilege has sometimes been extended to media defendants provided that they can show a social or moral duty to publish the information and a corresponding public interest in receiving it. Citing *Grenier*, *Leenen* and *Young*,[97] the Court held that "[d]espite these tentative forays, the threshold for privilege remains high and the criteria for reciprocal duty and interest required to establish it unclear. It remains uncertain when, if ever, a media outlet can avail itself of the defence of qualified privilege."[98] In other words, the "occasions" available to the media to rely on the traditional defence of qualified privilege are limited but there are nevertheless occasions

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92. *Ibid.* at para. 30 [citations omitted].
93. *Ibid.* at para. 34.
94. *Ibid.* at para. 93.
95. *Ibid.* at para. 94.
96. *Ibid.* at para. 35.
97. *Ibid.* at para. 36.
98. *Ibid.* at para. 37.

when the media can invoke the traditional qualified privilege defence such as in *Grenier*, where the *Ottawa Citizen* reported upon a self-help group called Fundamentalists Anonymous that assisted the Plaintiff's husband in dealing with her alleged obsession with television evangelists. Another "occasion" where the media could rely on the traditional qualified privilege defence would include emergency situations such as a health or safety concern (eg. the alleged poisoned canning lids in *Camporese v. Parton*).[99]

VII. The Role of the Judge and Jury

The Supreme Court's decisions in *Grant* and *Quan* were unanimous on every issue except the role of the jury. Eight of the Justices decided that the trial judge decides whether the publication was a matter of public interest and, if so, the jury then decides whether the standard of responsibility has been met.

Justice Abella, in dissent on this issue, disagreed that the jury should have any role in deciding whether the public interest responsible communication defence has been made out. Justice Abella found little "conceptual difference between deciding whether a communication is in the public interest and whether it is responsibly made"—both issues are predominantly legal issues.[100] Justice Abella held that only the trial judge should decide the responsible communication defence because it involves weighing the competing constitutional interests of freedom of expression, the protection of reputation, privacy concerns and the public interest—complex values protected directly or indirectly by the *Charter*.[101] Noting that a jury has no role in deciding the defences of absolute privilege and qualified privilege, Justice Abella found that the responsible communication defence is a highly complex legal determination with constitutional dimensions, taking it beyond the jury's jurisdiction and squarely into judicial territory.[102]

The majority of the Supreme Court decided that the jury was to decide whether the publisher acted responsibly for three reasons:

1. Restricting the role of the jury may run afoul of statutory rights accorded by section 108 of the Ontario *Courts of Justice Act* (it is for the jury to decide questions of fact), and most certainly would violate section 14 of the Ontario *Libel and Slander Act* (the jury cannot be required to decide preliminary questions, and must be permitted to render a general verdict).[103]

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99. *Camporese v. Parton* (1983), 47 B.C.L.R. 78, 150 D.L.R. (3d) 208 (B.C.S.C.).
100. *Grant*, *supra* note 1 at para. 142.
101. *Ibid.* at para. 143.
102. *Ibid.* at para. 145.
103. *Ibid.* at para. 133.

2. Permitting the jury to have the ultimate say on whether the new defence applies is consistent with the jury's role with respect to the defence of fair comment.[104] The Supreme Court has rejected the English approach in deciding the *Reynolds* defence where primary facts are determined by the jury but the decision on responsible journalism is made by the judge, which entails a complex back and forth between judge and jury and may lead to interlocutory rulings and appeals.[105] The rejection of the English approach regarding primary facts is welcomed in that it is difficult to imagine how the trial judge and counsel would reach a consensus on what "primary facts" are in issue and the wording of the questions to be put to the jury. This finding of the Supreme Court is also a signal to trial judges that the jury are not to be given a series of questions about the diligence of the publishers but rather should simply be asked one question: "Did the defendants act diligently in publishing [the communication in issue], taking into account the [publisher's] overall conduct in trying to verify the allegations?"
3. It is not unusual for juries to render verdicts where constitutionally protected interests are at stake.[106]

The majority of the Supreme Court held that the trial judge exercises a gatekeeper function in legal issues and evidentiary sufficiency, and "instructs the jury on all relevant factors, including the nature and importance of the *Charter* values of free expression and protection of reputation."[107] The instructions given by trial judges in jury charges about the diligence condition of the responsible communication defence will be crucial in ensuring juries do not reject the defence regarding stories in the public interest simply because the defendants did not fulfill every one of the factors that are to be considered to determine diligence.

In *Quan*, the Supreme Court noted that the special verdict form given to the jury was arguably too long and complex. The Court made the following observations about special and general verdict forms in cases where both the fair comment defence and responsible communication defence are relied upon:

> 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

104. *Ibid.* at para. 134.
105. *Ibid.*
106. *Ibid.* at para. 135.
107. *Ibid.*

> 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.[108]

VIII. Conclusion

The Supreme Court's groundbreaking decisions in *Grant* and *Quan* represent a major advancement for freedom of speech in Canada by creating a public interest responsible communication defence and a reportage defence. In recognition of the fact that there are emerging and different modes of communication, the Supreme Court has made the defences available to anyone—the traditional media (newspapers, television, radio) and new media such as bloggers.

Canadians will now learn more information about matters of public interest compared to the era of strict liability that existed prior to these historic decisions. Publishers have been provided breathing space and no longer need to fear $1.4 million damage awards because their stories were not proven perfectly true in a court of law. The libel chill has been thawed and the core values of freedom of expression of the pursuit of the truth and democratic discourse are the beneficiaries.

Critics of the new public interest responsible communication defence are concerned that it moves the focus of the libel action away from the plaintiff's ability to prove the statements complained about were false (because the defence focuses on the conduct of the publisher and not on the truth of the defamatory statements). Apart from the fact that this concern was unanimously rejected by the Supreme Court, libel defendants can be expected to plead truth as an alternative to the responsible communication defence, thus providing a libel plaintiff an opportunity to prove the statements were false.

Another criticism of the responsible communication defence is that it would make libel actions more complex and costly by requiring an exhaustive analysis of the actions of the publisher. Again, this concern was rejected by the unanimous Supreme Court, and ignores the fact that plaintiffs' counsel inevitably conduct an exhaustive analysis of the conduct of libel defendants to obtain evidence of malice that can defeat defences such as fair comment, and to establish aggravated and punitive damages.

The parameters of the public interest responsible communication defence and the reportage defence will be developed over the years to establish a body of case law that will provide more guidance on the standard of diligence required to rely on

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108. *Quan*, *supra* note 2 at para. 30.

either defence. Issues to be decided will include the role of media or communications experts in assessing the conduct of libel defendants who rely on the new defence; the extent to which the common law courts will consider decisions of the Quebec courts in assessing the diligence of journalists; the rigour that juries will demand from media libel defendants in fulfilling the list of factors that establish they acted responsibility; and, whether juries are capable of weighing the competing constitutional interests of freedom of expression, the protection of reputation, privacy concerns and the public interest that are engaged. Only time will tell whether, in fact, this highly complex defence with constitutional dimensions is, as stated by Justice Abella, "beyond the jury's jurisdiction" and a determination that a trial judge should undertake.[109]

109. *Grant*, *supra* note 1 at para. 145.