Responsible Journalism and the dangers of "no comment"

BY PAUL SCHABAS
BLAKE, CASSELS & GRAYDON LLP, TORONTO

Journalists share with lawyers the ignominy of being disliked but indispensable. Shakespeare could just as well have said "kill all the journalists" instead of lawyers to make his point about how to destroy democracy and override the rule of law. But while indispensable, journalists are resented and feared by those who become the focus of their attention.

Often, the reaction of the target of a story is to be like an ostrich, bury one's head in the sand and either avoid saying anything or, to the same effect, say "no comment". Sometimes businesses and well- resourced individuals "lawyer up" upon sensing the predator and tell the media they'll sue over the story, in the hopes of chilling the story. If that fails they can complain and, yes, sometimes sue for libel over perceived errors or innuendo in the final story.

This may have been a sensible response a few years ago, but no longer. In 2008 and 2009 the Supreme Court of Canada released two important decisions that have shifted the balance in our law from favouring the protection of reputation to weigh more favourably towards the press. Previously, the media could only rely on the fairly narrow defences of truth and fair comment in its investigative reporting, but now the media can proceed with a story even when it can't prove the facts or allegations to be true. Nor does it need to prove, or justify, extreme statements of opinion, so long as there is some basis upon which someone – and not necessarily the media – could honestly hold that opinion.

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The media now has the right to be wrong – if it cannot prove the truth of certain defamatory statements of fact, the media may still have a defence so long as the article as a whole was on a matter of public interest and it was responsibly investigated and reported. The Supreme Court calls this the defence of "responsible communication in the public interest". It applies not just to professional journalists, but to bloggers and anyone else who may write or report on a matter in any context. This defence emerged in England in the early 2000s as "responsible journalism", and a variation of it was adopted by our Supreme Court in a case called Grant v Torstar Corp. in 2009.

In that case, the Toronto Star was sued by a wealthy and very private businessman over an investigative article relating to his proposal to buy Crown land next to a lake to build a private golf course for his personal use. The article reported on the opposition of neighbouring property owners (cottagers) to the project and their fear that Grant's economic power and political connections to the governing party made the approval of the project a "done deal". Despite numerous requests, Grant refused to speak to the Star during its investigation and instead asserted the issue was a private matter and that he would sue the paper if it published a story. He followed through on his threat and was successful at trial, where the trial judge did not accept the new defence; however the decision was overturned on appeal and in the Supreme Court the new defence of responsible communication in the public interest was recognized as being part of Canadian law.

In an earlier 2008 decision, the Court also confirmed that statements of opinion on matters of public interest can be extreme, obstinate, unreasonable and outrageous, so long as they could be honestly held based on facts. In that case, WIC Radio v. Simpson, the Court ruled that extreme comments likening a woman who spoke out against homosexuality to Hitler and others who promote violence against minorities was protected by the defence of fair comment – better described as the defence of opinion, or honest opinion. Free speech does not only protect opinions that are objectively reasonable, the Court said, as that would make all opinions subject to a standard that would chill speech, but also protects the crank and the extremist, so long as there is some factual basis upon which the opinion could be honestly held.

These decisions change the landscape in libel law, and must be considered when one is the subject of attention or involved in a matter of public interest. Businesses and individuals can no longer rely on not commenting and chilling reports by threatening legal action. This doesn't mean all media will carry on in the face of threats of litigation – simply defending a lawsuit is expensive – but as a result of these recent decisions the media will have the comfort of good defences so long as they have acted responsibly.

The new defence of responsible communication is the most dramatic change in our law, and will have the largest impact. It has two components. First, the article as a whole must be on a matter of "pubic interest". The concept of "public interest" is broad, and includes any matter which affects the public – e.g., political, commercial, social, environmental or on some other matter in which the public has a legitimate interest. The courts have not put limits on this other than to note that what interests the public is not always of public interest, citing, for example, Hollywood gossip or, as the English judges have put it, the "tittle tattle" of footballers' wives, but the exceptions are narrow. For articles on public companies, or on businesses or individuals who interact with the public, the "public interest" test will be easily met.

The second element of the new defence is that the journalist or writer must have acted "responsibly"

in researching and reporting the story. This puts a spotlight on the conduct of the publisher. There is a burden on the media to take steps to confirm the allegations they wish to report including, critically, seeking both or all sides of a story. However, if the media is unable to confirm the truth of allegations where, for example, the target of the story denies it or, as is often the case, is unavailable or refuses to comment, the story may still be published, so long as the media has acted responsibly in attempting to get all the information it can, and the story is written in a manner that reflects the unproven status of the information. Thus, the media may now publish defamatory statements of fact on matters of public interest and not fear liability because they cannot prove the truth of the allegations where they have every reason to believe the allegations to be correct or it is nevertheless in the public interest to report that such allegations have been made.

For a target of an investigation, therefore, refusing to comment can be a big mistake. It does not create a veto on a story, as it sometimes did in the past, but now will be part of the story – that the article is one-sided because the target refused to speak and tell their version of the events in issue. And if the one-sided story has some factual inaccuracies, the target will no longer have a cause of action so long as overall the article reflects the nature of the information being reported and does its best to be fair and balanced. Further, the complaint that the story is one-sided will carry little weight when the target could have corrected the errors or helped create a more balanced story by speaking. In short, a "no comment" response will often be the wrong response.

The power of the new defence has been illustrated by the ongoing coverage of Mayor Rob Ford and his brother Councillor Doug Ford, and allegations against them. For example, the media were able to report that Rob Ford smoked crack cocaine even though they did not have the video, because they had various facts linking Ford to cocaine dealers and users, had themselves viewed the video, and had confronted Ford with the allegations which he denied – all of which was reported in the stories. Similarly, a lengthy story about Doug Ford's youth allegedly spent drug dealing in Etobicoke, though based largely on confidential sources, was responsibly reported, conveying to readers the status of the information on which it was based, the degree of consistency among the sources, and of course Ford's denials and refusal to be interviewed. Both stories were clearly of public interest, and no lawsuits have followed.

These changes to libel law, while more favourable to the press, also subject them to more scrutiny. The responsible communication defence tells the media that the courts will hold them to high standards of fairness and responsible conduct, and the extent of that scrutiny will include assessment of their news gathering techniques, the quality of sources, the extent to which the media sought all sides, the balance in the story, and even post-publication conduct such as a willingness to publish new information that may put the story in a different light. At the same time, the expanded freedom to be wrong means that those who are subject of investigative reporting or in the public eye must be more responsive to the media's inquiries and more proactive in conveying their message.

BY PAUL SCHABAS
Blake, Cassels & Graydon LLP, Toronto
Paul Schabas represented Torstar and the Toronto Star in Grant v. Torstar.