

Internet Defamation & the Defence of Responsible Journalism: Protecting Professionals and Amateurs Alike?

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The Internet has created a new means of communication, and a new manner in which people are defamed. The ease and accessibility of the Internet potentially makes this a particularly potent medium to defame people. You could be anywhere in the world and say anything about anybody to an audience of millions. Users find a voice in a variety of Internet venues including blogs, chatrooms, personal or corporate websites, news websites, bulletin boards and so on. This seemingly limitless, global medium has posed unique problems for defamation law. For example, the geographic scope has created challenges in determining where the defamed person might sue. There have also been challenges to Internet Service providers who might inadvertently become defendants in defamation actions.

This paper looks at issues related to defamation on the Internet. It begins with a review of basic internet issues, such as the factors a plaintiff must establish and available defences. In this section we consider the relatively new defence of responsible journalism, considered for the first time by the Supreme Court of Canada in February of this year. The second section looks at issues that are unique to defamation on the Internet. These include determining which court should take jurisdiction, and ISP liability. The third section looks at Citizen Journalism on the Internet, sites in which members of the public contribute to news stories along with reporters. In the final section we look at whether the defence of responsible journalism (assuming it is endorsed by the Supreme Court of Canada) should be available for citizen journalists.

1. Defamation – Basic Issues

Hill v. Church of Scientology of Toronto, 1995 CanLII 59 (S.C.C.) illustrates a key challenge in defamation cases: balancing the competing values of freedom of expression and an individual's right to his or her reputation.

Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.¹

In a defamation action, the plaintiff must prove three things: that the statement at issue

- (a) referred to the plaintiff;

¹ *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 108.

- (b) was published; and
- (c) was defamatory.

Plaintiff is Referenced

The plaintiff must be referenced in the impugned statement, and identifiable by at least some people. So long as those receiving the statement, either the general public or an intimate acquaintance, can and do identify the statement as referring to the particular plaintiff, the burden is met.²

Publication

A statement is published where it is communicated to a third party. Where a statement is published in written form, it constitutes a libel. Where the defamatory statement is oral, it constitutes slander. A statement on the Internet, that is available without restriction, is published.

Statement Was Defamatory

Statements are defamatory where the “natural and ordinary meaning” of the words would tend to lower the reputation of the plaintiff in the estimation of right-thinking members of society.³ That is, the meaning conveyed in the mind of the reasonable reader who is, “a person who is reasonably thoughtful and informed, rather than someone with an overly fragile sensibility.”⁴ The ultimate concern is whether the statement would have a substantial negative impact on the plaintiff’s reputation in the mind of this reasonable person.

It is possible that not every viewer or reader will draw the appropriate impression from the material, but a reasonably informed one will. We must, I think, assume a certain level of thoughtful awareness on the part of the public in deciding how certain information will affect its thinking. If we tie the reasonableness of public perception in defamation cases to a “lowest common denominator”, we create too low a threshold.⁵

Context is important to consider in ascertaining the effect of the statement. The notion of context includes the factual background of the publication, the medium through which it is presented, and the manner in which it is communicated.⁶ Context may increase the sting of the defamation by the use of bolding or facial expression, or voice intonation, but it may also reduce the degree to which a statement may be considered defamatory.

² See *Rupic v. Toronto Star Newspapers Limited*, 2009 CanLII 500 (ON S.C.) para. 26 & 27.

³ *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at 24 per Cory J.

⁴ *Color Your World v. Canadian Broadcasting Corp.* (1998), 38 O.R. (3d) 97 at 107, per Abella.

⁵ *Elliot v. Canadian Broadcasting Corp.* (1995), 25 O.R. (3d) 302 at 308, per Abella J.A. (C.A.).

⁶ *Saunders v. Randolph Hotel Co., Ltd. And Pidutti*, [1945] O.R. 600 at 604 per Laidlaw J.A. (C.A.).

The court in *Vander Zalm v. Times Publishers* examined the defamatory nature of a political cartoon: a depiction of the then Premier of British Columbia picking the wings off flies.⁷ Given the context of the statement – a political cartoon – the court held that a reasonable reader would construe it as a criticism of his political policies, rather than as a statement that the Premier enjoyed torturing helpless creatures. Political cartoons are not intended to be interpreted literally. They traditionally use caricatures or visual metaphors to explain complicated political situations in a satirical way.

Defences

If the Plaintiff succeeds in proving that the impugned statements are defamatory, then the onus is on the Defendant to assert and prove a defence. The defences render otherwise defamatory publications immune from liability, and include:

- (a) Truth/Justification
- (b) Fair Comment
- (c) Jest
- (d) Statutory Immunity
- (e) Privilege - Absolute and Qualified
- (f) Responsible Journalism

Truth

In order to rely on the defence of truth, one must prove that the statement is true in substance. The truth of each and every statement need not be proven. A defendant only has to prove that the defamatory statements are substantially correct. The court will consider the setting, context, and circumstances of the statement. If the defendant proves the “sting”, or the main thrust of the statement, he doesn’t need to justify statements or comments which are incidental and do not add to the main point. If the factual basis of the statement is true in substance, then it is not actionable, even if motivated by malice. Truth or justification is an absolute defence to the tort of defamation.⁸

Fair Comment

The defence of fair comment was recently modified by the Supreme Court of Canada in the case of *WIC Radio Ltd. v. Simpson*⁹. The defence of fair comment is now as follows:

⁷ *Vander Zalm v. Times Publishers*, [1980] B.C.J. No. 1391 (C.A.), (1980), 18 B.C.L.R. 210

⁸ *Hall v. MacPherson Leslie and Tyerman LLP Barristers and Solicitors*, 2007 SKCA 1 at Para. 26

⁹ *WIC Radio Ltd and Rafe Mair. v. Kari Simpson*, 2007 CanLII 2769 (S.C.C.).

- (a) The Objective Test:
 - (i) The matter must be one of public interest;
 - (ii) The matter must be based on true facts;
 - (iii) The comment, though it can include inferences of fact, must be recognizable as comment;
 - (iv) The comment must reflect an opinion that could honestly be held by a person, even an unreasonable person, on the proved facts. It need not be held by the person making the statement; and
- (b) The Subjective Test:
 - (i) Notwithstanding that the objective test is satisfied, if the Defendant was motivated by malice in the publication of the statement the defence will fail.

WIC Radio represents a departure from *Vander Zalm*, the previous leading case on fair comment in British Columbia.¹⁰ *Vander Zalm* incorporated a subjective test – the so-called “honest belief” test. The comment must be “fair” in that it must “represent an honest expression of the real view of the person making the comment.”¹¹ *WIC Radio* favours an objective approach.

An important issue that arises with respect to the defence of fair comment is the distinction between a statement of fact and a comment. The statement in question may be “colourfully and even pungently expressed, its defining characteristic is that the words must appear as comment,” and not as a bare statement of facts.¹² However, the distinction can be often subtle, as highlighted in *Myerson v. Smith’s Weekly Publishing Col, Ltd.*,

To say that a man’s conduct was dishonourable is not comment, it is a statement of fact. To say that he did certain specific things and thus his conduct was dishonourable is a statement of fact coupled with a comment.¹³

Jest

The defence of jest is generally looked on unfavourably by the courts. The success of the defence is dependent on the meaning imported to those in receipt of the statement. A statement may be spoken in jest, and so understood by those who receive it. In that case, the statement is not defamatory. On the contrary, if the statement serves to lower the opinion of the right thinking listener, then it is indeed defamatory, regardless of the speaker’s intent.

¹⁰ *Vander Zalm*, *supra* note 7.

¹¹ *Ibid*, para. 44.

¹² *Ager v. Canjex Publishing Ltd.*, 2005 BCCA 467 (CanLII) at para. 45.

¹³ *Myerson v. Smith’s Weely Publishing Col. Ltd.*, 1923), 24 S.R. (N.S.W) as cited in *Barltrop v. Canadian Broadcasting Corp.* (1978), 86 D.L.R. (3d) 61 (N.S.C.A (A.D.). at 73.

The principle is clear, that a person shall not be allowed to murder another's reputation in jest. But if the words be so spoken that it is obvious to every bystander that only a jest is meant, no injury is done, and consequently no action would lie.¹⁴

Privilege

The defence of privilege does not attach to a statement itself, but rather to the occasion on which the statement was made.¹⁵ The defence of privilege – absolute and qualified – is premised on the statement at issue being false.

Absolute Privilege

The defence of absolute privilege or statutory immunity applies to statements made in the course of judicial, and quasi-judicial proceedings, and extends to statements made in the course of initiation of, investigation or preparation for such proceedings.¹⁶ Statutory immunity also applies to reports of various public meetings including municipal councils, the board of education, and select committees of the Legislative Assembly.¹⁷ The purpose of the defence is to ensure that those involved in the administration of justice or government can speak freely, without fear of retribution by way of accusations of defamation.¹⁸

Qualified Privilege

The classic formulation of qualified privilege involves the notion of reciprocity. A communication is privileged if the publisher has an interest or duty - legal, social, moral, or personal - to publish it to the receiving audience. However, the audience too, must have a corresponding duty to receive the communication.¹⁹ Evidence of over-publication would defeat this defence, as would malice.

The rationale behind the defence of qualified privilege was set out by the BC Supreme Court in *Masunda v. Johnson* (aff'd. BCCA).²⁰ This case dealt with a defamation action in the context of a union. The action arose after the plaintiff, the president of Local 100 of the Union of Psychiatric Nurses brought a complaint to the Union Council about one of the nurses. In response, the impugned nurse, Mr. Leong, wrote a letter to president of the Union, Mr. Johnson. Mr. Johnson then wrote a memorandum including background information on the dispute and the findings of his independent investigation to members of the Union Council. He also reproduced Mr. Leong's letter for the Council. The plaintiff alleged that the letter and the memorandum

¹⁴ *Donoghue v. Hayes* (1831), *Hayes Irish Ex.* 265, as referred to in *Johnston v. Ewart*, [1893] O.J. No. 19 (Ont. H.C.J.).

¹⁵ See *Hill*, *supra* note 1.

¹⁶ See *Hamouth v. Edwards & Angell*, 2005 BCCA 172 (CanLII).

¹⁷ *Libel and Slander Act*, [RSBC 1996] C.263, s. 4.

¹⁸ *Liboiron v. Majola*, 2007 ABCA 18 (CanLII) at para. 10.

¹⁹ See *Pressler v. Lethbridge and Westcom TV Group Ltd.*, 2000 BCCA 639 (CanLII) and *Smith v. Cross*, 2007 BCSC 1757 (CanLII).

²⁰ *Masunda v. Johnson*, 1999 BCSC 1744; aff'd 2001 BCCA 530 (CanLII).

contained statements defamatory of him. Ultimately, however, it was found that though the documents contained defamatory statements, qualified privilege attached. Mr. Leong wrote his letter in defence of himself against the complaints made by the plaintiff, and he appropriately addressed his letter to the president of the Union. Mr. Johnson wrote his memorandum and reproduced Mr. Leong's letter in support of a motion to remove the plaintiff as president of Local 100. Notwithstanding some issues of the overbreadth of such a motion, it was made pursuant to the Union Constitution to the appropriate body, and consequently was covered by qualified privilege. Qualified privilege enables persons to make honest but incorrect statements where they have a legitimate interest in how matters were conducted. The court cited an Alberta superior court case for the following proposition:

It would be difficult, if not impossible, to hold effective meetings of town councils, or school boards, or hospital boards, or other public bodies if the members of those bodies were precluded from honestly stating to the other members matters which might affect the administration of those bodies, even though such statements, if made elsewhere on other occasions, might be defamatory.²¹

Over-publication will defeat the defence of qualified privilege when it exceeds the limits of the duty or interest engaged. A British Columbia case dealt with the issue of over-publication in the context of the Internet. *Christian Labour Association of Canada v. Retail Wholesale Union et al.*, involved a defamatory statement made on a union website.²² The defendants relied on the defence of qualified privilege. The court noted that there was no precedent in the Internet context and applied *Jones v. Bennett*, a 1968 Supreme Court of Canada case, which held that where the information was unnecessarily accessible to uninterested parties, the defence of qualified privilege will fail. This is particularly relevant in the Internet context. At paragraphs 30-31 of *Christian Labour Association*:

[30] In my opinion the defendants' claim for qualified privilege on the materials before me must fail. I find that the likelihood of a significant exposure to persons not interested is there, and that it is excessive because it is not incidental and reasonably necessary to publish the messages on the defendants' website without restriction.

[31] It is not that the Internet and use of a website is to be discouraged, but if statements are to be made which are admittedly defamatory, and there is a risk of significant numbers of uninterested people seeing it, that can be excessive, and will be if restrictions are available but disregarded.

Qualified privilege is, therefore, likely unavailable for statements made on the Internet that are broadly available. However, this is not necessarily to say that the defendant is left without an

²¹ *Willows v. Williams* (1950), 2 W.W.R. (N.S.) 657 (Alta. S.C.), as cited in *Masunda, ibid.*

²² *Christian Labour Association of Canada v. Retail Wholesale Union et al.*, 2003 BCSC 2000 (CanLII).

affirmative defence in cases where publication is to the world or is unrestricted in some way. The defence of responsible journalism may fill this void.

Responsible Journalism

Since the decision of *Reynolds v. Times Newspapers*, the English courts have endorsed a defence of responsible journalism.²³ This defence was first articulated in *Reynolds*, and subsequently refined by the court in *Jameel (Mohammed) v. Wall Street Journal Europe*.²⁴ It has been imported into Canada in the case of *Cusson v. Quon*, a case that was recently considered by the Supreme Court of Canada.²⁵

Jameel concerned a report that the Saudi Arabian Monetary Authority was monitoring bank accounts associated with prominent businessmen to ensure that they would not be used to transmit funds to terrorist organizations. The plaintiffs were among those named as under observation²⁶.

In *Reynolds*, the plaintiff was a former prime minister of Ireland who sued over a newspaper article which he interpreted as accusing him of intentionally misleading the legislature, and lying to his colleagues. Lord Nicholls made the following comments with regard to the issue of unrestricted publication:

Frequently a privileged occasion encompasses publication to one person only or to a limited group of people. Publication more widely, to persons who lack the requisite interest in receiving the information, is not privileged. But the common law has recognized there are occasions when the public interest requires that publication to the world at large should be privileged.... Whether the public interest so requires depends upon an evaluation of the particular information in the circumstances of its publication. Through the cases runs the strain that, when determining whether the public at large had a right to know the particular information, the court has regard to all the circumstances. The court is concerned to assess whether the information was of sufficient value to the public that, in the public interest, it should be protected by privilege in the absence of malice.²⁷

The House of Lords, in *Reynolds*, considered the competing values of the right of the public to access information on matters of legitimate public interest, the ability of the press to report on such matters in a fair and responsible manner, and the protection of reputation. Out of that consideration, the defence of responsible journalism was borne.

²³ *Reynolds v. Times Newspapers*, [1999] 4 All E.R. 609 (“Reynolds”).

²⁴ *Jameel (Mohammed) v. Wall Street Journal Europe*, [2006] 3 W.L.R. 642 (“Jameel”).

²⁵ *Cusson v. Quon*, 2007 ONCA 771 (CanLII), leave to appeal to S.C.C. granted, 2008 CanLII 18972 (S.C.C.).

²⁶ *Ibid.*

²⁷ *Reynolds*, *supra* note 23 at para 195.

The defence of responsible journalism is only available if two conditions are met:

1. There must be a real public interest in communicating and receiving the information, an interest in ensuring that this information is in the public domain; and
2. The publisher must also take steps to ensure the accuracy of their pieces, to behave responsibly in passing the on the information (see *Jameel*).

Lord Nicholls, in *Reynolds*, identified ten factors to consider when evaluating if the second condition has been met.²⁸

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 events.
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 matters.** News is often a perishable commodity.
7. **Whether comment has been sought from the plaintiff.** He may have information others to 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.

The defence of responsible journalism has recently been imported into Canadian law. The Ontario Court of Appeal adopted this defence in *Cusson v. Quon*, however the defendant was ultimately unable to rely on it because it had not been pled.²⁹ At paragraph 139, Sharpe J. reasoned:

As I see it, this defence represents a natural extension of the law as it has been developing in recent years, an incremental change

²⁸ *Reynolds*, *supra* note 23 at para. 89.

²⁹ *Cusson*, *supra* note 25.

"necessary to keep the common law in step with the dynamic and evolving fabric of our society".... It amounts to a sensible halfway house between the two extremes of the traditional common-law no-fault liability on the one hand, and the traditional qualified privilege requirement for proof of malice on the other. The public interest responsible journalism defence recognizes that in relation to matters of public interest, the traditional common-law unduly chills freedom of expression but, at the same time, rejects the notion that media defendants should be afforded a licence to defame unless the innocent plaintiffs can prove deliberate or reckless falsehood. It rights the common-law imbalance in favour of protection of reputation and creates a proper balance between that value and freedom of expression.³⁰

Subsequently, the defence was pled by the defendants in *Grant v. Torstar Corp. et al.*, a case that dealt with allegedly defamatory statements suggesting that the Plaintiff used his relationships with important politicians to bypass the normal approval process for an environmentally problematic development project. The trial judge found in favour of the Plaintiff. At the appellate level, however, in light of the defence of responsible journalism, the appeal was allowed and a new trial was directed.³¹

Two other important aspects of the defence of responsible journalism were noted in the foundational English cases, and subsequently cited with approval in *Cusson* and *Grant*. From *Reynolds*: doubts as to whether the subject matter was in the public interest should be resolved in favour of publication. From *Jameel*: the crucial element for the defence of responsible journalism is the thrust of the article. 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 significance. The *Reynolds* factors were, "intended as pointers which might be more or less indicative, depending on the circumstances of the particular case."³² They were not intended to be, "a series of hurdles to be negotiated by a publisher before he could successfully rely on qualified privilege."³³

The defence of responsible journalism is currently before the Supreme Court of Canada. The hearing of *Cusson* was on February 17, 2009, and the court has reserved judgment. *Grant* has tentatively been scheduled for April 24th, 2009.

In British Columbia, the defence of responsible journalism was argued in *Reaburn v. Langen*,³⁴ a case involving a local community newspaper that published allegedly defamatory statements. Ultimately the court determined that the defence of responsible journalism would not apply on the facts, if it was, indeed, available. The court found that the defendant knew of his responsibility as a journalist to investigate the story, and verify facts. The reporter simply did

³⁰ *Ibid*, at para. 139, quoting *R. v. Salituro*, [1991] S.C.R. 654 at 21 (Iacobucci, J. addressed the issue of judicial adaptation and reform of the common law, and endorsed a conservative approach to such an exercise).

³¹ *Grant v. Torstar Corp et al*, 2008 ONCA 796 (CanLII) at para. 67.

³² *Jameel*, *supra* note 24 at para. 33.

³³ *Ibid* at para. 33

³⁴ *Reaburn v. Langen*, 2008 BCSC 1342 (CanLII).

not sufficiently discharge his responsibilities. In addition, he used inflammatory language and unnecessarily identified individuals.

The defence of responsible journalism has been contemplated in the context of traditional media and journalism: professional, paid, accredited journalists and official news agencies. Lord Bingham notes, for example, that when evaluating the availability of the defence, “Weight should ordinarily be given to the *professional* judgment of an editor or journalist in the absence of some indication that it was made in a casual, cavalier, slipshod or careless manner.” [emphasis added]³⁵ However, as the law of defamation is evolving, so too is the concept of journalism. The evolution of both is due, in large part, to the Internet.

2. Unique Issues in Internet Defamation

The Internet represents a communications revolution. It makes instantaneous global communication available cheaply to anyone with a computer and an Internet connection. It enables individuals, institutions, and companies to communicate with a potentially vast global audience. It is a medium which does not respect geographical boundaries. Concomitant with the utopian possibility of creating virtual communities, enabling aspects of identity to be explored, and heralding a new and global age of free speech and democracy, the Internet is also potentially a medium of virtually limitless international defamation.³⁶

The development of the Internet has influenced globalization, revolutionized communication, learning, business, human interaction, research and access to information. It has affected the development across the broad spectrum of the law including, but not limited to, the law of defamation.

There are competing values inherent in discussions of Internet publications and the law of defamation:

- (a) Characteristics of the Internet such as universality, anonymity, user friendliness and ease of access allow all sorts of people to voice opinions without fear of retaliation or discrimination.
- (b) The potential audience of an unrestricted website is vast and encompasses potentially every Internet user in the world – billions of people. Thus, the potential damage of a defamatory statement is enormous.

The Internet is a unique mode of communication that is resistant to our traditional methods of categorizing defamation as libel or slander on the basis of the form of publication. Though statements posted on the Internet share some characteristics with more traditional communications, there are other distinguishing characteristics about them.

³⁵ *Jameel*, *supra* note 24 at para. 33.

³⁶ Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 2001), at para. 24.02, as cited in *Barrick Gold Corporation v. Lopehandia*, 2004 CanLII 12938 (ON C.A.).

For example, the Ontario Court of Appeal, in the recent decision of *Toronto Star Newspapers Ltd. et al. v. Canada*, noted that the efficacy of and the ability to enforce publications bans in the context of criminal trials has been undermined by the Internet. Not only is it difficult to restrict the communication of information on the Internet, but once posted, it has a level of permanence and accessibility unique among media types.³⁷

In the article, *Silencing John Doe*, Lyrissa Barnett Lidsky identified the lack of formality in Internet discourse compared to traditional written communications, noting that, “In the real world, the author is separated from her audience by both space and time, and this separation interposes a formal distance between author and audience, a distance reinforced by the conventions of written communication.”³⁸ She hypothesizes that the lack of comparable formality in Internet communications is due to the priority of values such as speed and immediacy of information communication. The consequence of this prioritization affect the form, structure and content of Internet publications. This has created, according to some commentators, a sort of virtual Wild West, “a frontier society free from the conventions and constraints that limit discourse in the real world.”³⁹ The use of hyperbole and exaggeration, statements written entirely in capital letters, the lack of grammar, poor spelling, and the use of abbreviations are all examples of acceptable and common characteristics of Internet postings.

Lidsky also discussed the particular importance of protecting speech on the Internet, in that it enables a unique demographic.

The promise of the Internet is empowerment: it empowers ordinary individuals with limited financial resources to "publish" their views on matters of public concern. The Internet is therefore a powerful tool for equalizing imbalances of power by giving voice to the disenfranchised and by allowing more democratic participation in public discourse. In other words, the Internet allows ordinary John Does to participate as never before in public discourse, and hence, to shape public policy. ... {However}, defendants like John Doe typically lack the resources necessary to defend against a defamation action, much less the resources to satisfy a judgment. Thus, these Internet defamation actions threaten not only to deter the individual who is sued from speaking out, but also to encourage undue self-censorship among the other John Does who frequent Internet discussion fora.⁴⁰

However, this appears to be supposition without supporting evidence. There are many outspoken bloggers on the Internet that do not appear to be deterred. Lidsky’s supposition may well be wrong.

³⁷ *Toronto Star Newspapers Ltd. et al. v. Canada*, 2009 ONCA 59 (CanLII) at p 29; see also *Warman v. Grosvenor*, [2008] O.J. No. 4462 at para. 55.

³⁸ Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace* (2000) 49 Duke L.J. 855 at p 862.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

Another characteristic of Internet communication is its pervasiveness. Statements posted in cyberspace are potentially accessible to millions people worldwide, and once they have been published, the capacity of the Internet to replicate, forward, and republish statements, the power of penetration to anyone with a computer and a connection is unparalleled. “The extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that “the truth rarely catches up with a lie.”⁴¹ Therein lies the problem. Though the Internet is a wonderful means of transmitting a message, this becomes problematic when the message is defamatory. The nature of the Internet has precipitated a variety of unique issues in the context of defamation law. A brief review of some of these issues, and the treatment in Canadian courts follows.

Damages

The pervasive nature of Internet communications warranted special consideration in the evaluation of damages in *Barrick Gold Corporation v. Lopehandia*⁴². The motions judge had decided that that nature of the communications (ranting, capitalized, emotional diatribes) rendered the statements incapable of being taken seriously by the reasonable reader. However, the Court of Appeal, overturned the decision, noting the following:

The notion that Mr. Lopehandia’s Internet dialogue style – a style that may not be taken seriously in a traditional medium such as a newspaper – may undermine the credibility of his message has some appeal to those of us who are accustomed to the traditional media. However, as I have noted, the Internet is not a traditional medium of communication. Its nature and manner of presentation are evolving...⁴³

There was also evidence in this case that individuals had contacted the company to alert them to the allegedly defamatory postings, some expressing their outrage in emotionally charged emails. The Court of Appeal took this into account, and the “distinctive capacity of the Internet to cause instantaneous, and irreparable, damage to the business reputation of an individual or corporation by reason of its interactive and globally all-pervasive nature,” when they set aside the lower court’s decision on damages.

Jurisdiction

Though the matter is reasonably well settled, the issue of jurisdiction was a dynamic topic in the Internet jurisprudence. Application may still be vexing and at the heart of the matter will be the issue of connection to the forum.

⁴¹ *Ibid.*

⁴² *Barrick Gold Corporation v. Lopehandia*, 2004 CanLII 12938 (ON C.A.).

⁴³ *Ibid.*

Connection Established

Regardless of their jurisdiction of origin, statements are actionable in the jurisdiction of publication and damage to reputation. This point was made in the Australian case of *Dow Jones & Company Inc v. Gutnick*.⁴⁴ The Defendant hosted an online magazine that published an article containing allegedly defamatory references to the plaintiff. The court commented that traditionally defamation occurs at the place where damage to reputation occurs. Harm occurs where and when the material is read. Jurisdiction, therefore, can be established at that location in a defamation action.

In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed.⁴⁵

The Plaintiff narrowed the scope of his claim and alleged that the damage suffered to his reputation occurred in Australia as a consequence of publication of the defamatory article in Australia. The impugned article was downloaded and read in Australia, and therefore the tortious act alleged occurred in Australia. Australia was an appropriate jurisdiction in which to launch the action.

In *Burke v. NYP Holdings*, the plaintiff alleged that a column published in the New York Post, and that also appeared on a website (maintained by the newspaper and available globally), contained defamatory content.⁴⁶ Ultimately, the British Columbia court assumed jurisdiction over the matter. The tort occurred when the column was accessed from within British Columbia; publication, therefore, occurred at that time within British Columbia. The subject matter of the allegedly defamatory material was also significant. It was a matter that occurred in British Columbia, that was of interest to the people of British Columbia and that was about the plaintiff who had considerable notoriety in British Columbia (Brian Burke, former General Manager of the Vancouver Canucks). “While the Defendants [had] little or no business connection in British Columbia ... [b]y establishing a website which is available on the Internet worldwide, it is reasonably foreseeable that the story set out in the Column would follow Mr. Burke to where he resided. The concept of a “worldwide web” is aptly named.”⁴⁷

Connection Not Established

*Braintech, Inc. v. Kostiuk*⁴⁸ addressed the issue where the defendant’s only connection with the jurisdiction, in this case Texas, was a passive posting on an Internet bulletin board. As the

⁴⁴ *Dow Jones & Company Inc. v. Gutnick*, [2002] HCA 56 (10 December 2002).

⁴⁵ *Ibid.* at para 44.

⁴⁶ *Burke v. NYP Holdings*, 2005 BCSC 1287 (CanLII) at para. 18.

⁴⁷ *Ibid.* at para. 33.

⁴⁸ *Braintech, Inc. v. Kostiuk*, 1999 BCCA 169 (CanLII), leave to appeal to S.C.C. refused (2000), 182 D.L.R. (4th) vii.

defendant was a BC resident, this was not a substantial connection for the purposes of establishing jurisdiction of the Texas courts and the British Columbia courts would not enforce a Texas judgment that was based on such a tenuous connection.

The facts of the case involved an attempt by Braintech to enforce a default judgment obtained in Texas against Kostiuk for publication of defamatory information by way of a discussion group or bulletin board on the Internet. Notably, there was no evidence of publication to any person in Texas, nor was there any evidence that Kostiuk had a business interest of any kind, in Texas. The court held that:

The complainant must offer better proof that the defendant has entered Texas than the mere possibility that someone in that jurisdiction might have reached out to cyberspace to bring the defamatory material to a screen in Texas.

It would create a crippling effect on freedom of expression if, in every jurisdiction the world over in access to Internet could be achieved, a person who posts fair comment on a bulletin board could be haled before the courts of each of those countries where access to this bulletin board could be obtained.

...

The allegation of publication fails as it rests on the mere transitory, passive presence in cyberspace of the alleged defamatory material. Such a contact does not constitute a real and substantial presence.⁴⁹

Publication Issues: Assumed Publication, Over-publication and Republication

Publication is relevant to the issue of establishing jurisdiction. However, the issue of publication is also relevant to determining whether the limits of the defence of qualified privilege have been exceeded, or whether this element of defamation can be presumed.

The defence of qualified privilege cannot be relied upon where over-publication has been an issue. Where a defendant has exceeded the limits of the duty giving rise to the privilege, or where the communications were not appropriate or necessary, then the defence of qualified privilege may be defeated.⁵⁰ This has been an interesting issue in the context of the Internet because of its unique accessibility issues.

Internet sites can have various levels of accessibility. At one end of the spectrum, sites can allow open access: postings and comments from general members of the public with varying degrees of anonymity. At the other end of the spectrum, sites can allow restricted access, available only to specific authorized users. Other alternatives include subscription access, which requires

⁴⁹ *Ibid*, at para. 62-65.

⁵⁰ *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at 29, per Cory J.

registration to enable usage, and combination access, which restricts portions of a site to registered, subscribed, or otherwise authorized users.⁵¹

Secondly, it is a general principle in defamation law that where material is contained within a newspaper, book or broadcast to the general public, publication is presumed: *Taylor-Wright v. CHBC-TV*.⁵² The *Libel and Slander Act* in British Columbia has codified this proposition.⁵³ This general principle has been applied in the context of the Internet with some nuances.

Publication on the Internet occurs when the content of the communications is “downloaded” and comprehended by the user.⁵⁴ In some circumstances, it is appropriate to assume publication; for example, where publication is on an Internet site accessible by anyone with a computer and an Internet connection. This was the case in *Wiebe v. Bouchard*, where the defamatory content was posted on a website that was freely accessible to anyone with a computer and Internet access.⁵⁵ Contrarily, where access to the communication is restricted in one manner or another, publication may not be assumed. In *Crookes v. Holloway*, the website had restricted access and was not readily available to the general public. It was not, therefore, like a book or newspaper or public access website, and publication could not be assumed.⁵⁶

In the case of *Crookes v. Wikimedia Foundation Inc.*, the issue was whether publication could be presumed where a defendant posted hyperlinks to defamatory content.⁵⁷ Kelleher J., noted that, “the mere creation of a hyperlink in a website does not lead to a presumption that persons read the contents of the website and used the hyperlink to access the defamatory words.”⁵⁸ For publication to be found under those circumstances, evidence would be required that individuals, other than the plaintiff, read the defendant’s website, clicked on the hyperlinks and read the defamatory statements. For the same reasons, the presence of a hyperlink does not necessarily constitute a republication either. “Although a hyperlink provides immediate access to material published on another website, this does not amount to republication of the content on the originating site. This is especially so as a reader may or may not follow the hyperlinks provided.”⁵⁹

Republication

The issue of republication has also been considered in the context of archiving. Republication is approached differently in various common law jurisdictions. In the United States, many jurisdictions have adopted legislation which imposes a “single publication rule” to discourage

⁵¹ *Dow Jones*, *supra* note 44 at para. 83

⁵² *Taylor-Wright v. CHBC-TV*, 1999 CanLII 3634 (BC S.C.), *aff’d* 2000 BCCA 629 (CanLII).

⁵³ *Libel and Slander Act*, *supra* note 17 at ss. 7 and 12(2).

⁵⁴ See *Burke*, *supra* note 46.

⁵⁵ *Wiebe v. Bouchard*, 2005 BCSC 47 (CanLII).

⁵⁶ *Crookes v. Holloway*, 2007 BCSC 1325 (CanLII) (“*Crookes 1*”).

⁵⁷ *Crookes v. Wikimedia Foundation Inc.*, 2008 BCSC 1424 (CanLII) (“*Crookes 2*”).

⁵⁸ *Ibid.*, at para. 24.

⁵⁹ *Ibid.*, para. 30.

repeated litigation arising from the same material.⁶⁰ England and Australia have rejected this approach, specifically in the context of Internet publications.⁶¹

The English case of *Loutchansky v. Times Newspapers Ltd.* addressed the issue of republication on the Internet.⁶² Commenting on the balance between the social utility of archiving material, and the protection of reputations under the circumstances, the court held that, “Archive material is stale news and its publication cannot rank in importance with the dissemination of contemporary material.”⁶³ Ultimately, to adopt a single publication rule, would necessitate a change in the law of defamation. The court was unwilling to engage in such a change on the circumstances of this case.

The future treatment of a single publication rule in Canada is uncertain. *Bahlieda v. Santa*, was an Ontario Superior Court of Justice case that interpreted the Ontario *Libel and Slander Act* to impose a “single publication rule” in the context of archived Internet material.⁶⁴ On appeal, the Court of Appeal ruled that the matter should not have been disposed of by way of summary judgment, and directed that the matter proceed to trial.

However, the decision in *Bahlieda* was a matter of statutory interpretation of notice and limitations periods in light of wording of the Ontario legislation, which indicates that the time period runs from the time the plaintiff had knowledge of the allegedly defamatory statement. Limitations periods in other provincial legislation contemplate a limitations period beginning with the “publication” of the defamatory matter.⁶⁵ In British Columbia, the Court of Appeal addressed the issue of republication in *Carter v. B.C. Federation of Foster Parents Association*.⁶⁶ It was significant in this case that, “the offending comment remained available on the Internet because the defendant respondent did not take effective steps to have the offensive material removed in a timely way.”⁶⁷ Under the circumstances, the court declined to adopt the American single publication rule, indicating that such a step would be the proper, and perhaps required role of the legislature, especially in light of the unique issues in widespread Internet publication.⁶⁸

Internet Service Providers

Plaintiffs have attempted to name Internet Service Providers (“ISPs”) as defendants in defamation actions. ISPs may have “deep pockets”, in excess of the resources of the average Internet user. This makes them an attractive target to would-be plaintiffs.

⁶⁰ See *Firth v. State of New York*, 775 N.E.2d 463 (Ct. App. 2002), as cited in *Carter v. B.C. Federation of Foster Parents Association*, 2005 BCCA 398 (CanLII) at para. 18.

⁶¹ See *Loutchansky v. Times Newspapers Ltd. (Nos. 2-5)*, [2002] Q.B. 783 at 813, per Lord Phillips M.R. (C.A.), and *Dow Jones & Company Inc. v. Gutnick*, [2002] HCA 56.

⁶² *Loutchansky v. Times Newspapers Ltd. (Nos. 2-5)*, [2002] Q.B. 783 at 813, per Lord Phillips M.R. (C.A.).

⁶³ *Ibid*, at para. 74.

⁶⁴ *Bahlieda v. Santa* (2003), 64 O.R. (3d) 599 (S.C.J.)

⁶⁵ See relevant notice periods in Alberta, Manitoba and Nova Scotia, amongst others.

⁶⁶ *Carter v. B.C. Federation of Foster Parents Association*, 2005 BCCA 398 (CanLII).

⁶⁷ *Ibid*, at para 20.

⁶⁸ *Ibid*, at para. 20

ISPs may share some characteristics with more traditional publishers, depending on the services provided. For example, the ability to edit content. It is important to note, however, that not all ISPs provide all of the same services. Indeed, some ISPs may act solely as an access provider, connecting subscribing users with the Internet. Others may offer a variety of additional services including the provision of email addresses, or may even host content or websites. Regardless of the services offered, however, ISPs are not likely to use their ability to edit content in the same way as the editor of a newspaper. The law of innocent dissemination, therefore, becomes relevant.

The state of the law in other jurisdictions – particularly, the United States and England – is inconsistent. In the United States, in order to avoid a plea of innocent dissemination, the plaintiff must prove that the publisher was not innocent. Conversely, under English law, innocent dissemination is not presumed. The defendant publisher must establish their innocence if they wish to stand on this defence.⁶⁹

To date, there is nothing in the Canadian jurisprudence which speaks directly to the liability of ISPs, however, on the basis of the existing jurisprudence, ISPs may also become liable for publication where, for example, they become aware of defamatory material and decline to interfere with its communication to third parties

The English judgment of *Godfrey v. Demon Internet Ltd.*, dealt with an interlocutory motion to strike portions of the defence dealing with whether an ISP was a publisher, and the defence of innocent dissemination. The case was eventually settled out of court. The facts involved an ISP that carried a forum to discuss information relevant to Thailand, Thai people and their culture. The Plaintiff discovered the defamatory content on the Usenet discussion forum soc.culture.thai. The Plaintiff alerted the defendant ISP to the impugned content but it was not removed until some time later when the posting expired and was automatically deleted. The Court noted that the defendants were not, “merely owners of an electronic device through which postings were transmitted,” and that they did indeed publish the content whenever information was transmitted from their servers.⁷⁰ In this case, however, the defendants were notified of the defamation, and it was the knowledge of the defamatory content that prevented the ISP from relying on the defence of innocent dissemination. The motion to strike was successful.

The defence of innocent dissemination has been recognized in Canadian law and applied in circumstances where the defendant was not the originator of the alleged defamatory material, but simply facilitated its public dissemination without being aware of the content. In *Minear v. Miguna*, the issue was whether the University of Toronto Press, which contracted to print and bind a book that turned out to contain defamatory statements, was liable for publication.⁷¹ The key factor in this case was that the function of the University Press was not to provide editorial services, merely to reproduce the documents. They established that they were innocent of any knowledge of the defamatory material, and as such could rely on the defence of innocent dissemination.

⁶⁹ *Godfrey v. Demon Internet Ltd.*, [2001] Q.B. 201.

⁷⁰ *Ibid* at p 209.

⁷¹ *Minear v. Miguna*, 1996 CanLII 8214 (ON S.C.).

The plaintiff in *Hemming v. Newton* attempted to strike out a portion of the statement of defence which pled innocent dissemination⁷². The defendant pled that he did not see or authorize the impugned posting before it occurred, and removed it promptly once it had been brought to his attention. On this basis, Gerow, J., accepted that the defence may succeed and denied the motion to strike.⁷³

3. Citizen Journalism

The Internet has become an incredible and indispensable resource of data, news, trivia, and all manner of information. With the advent of Web 2.0 users can participate in the creation of the information as well as receive information. Equipped with user-friendly Web publishing software, powerful web-equipped mobile devices, and ubiquitous remote, wireless and satellite data connections, Internet users have the ability to play an active and important role in the creation and dissemination of news and information. This puts the average Internet user in a position where they can perform similar functions as traditional journalists and media outlets. Indeed, individual users around the globe may be uniquely positioned to scoop the most cutting edge, newsworthy stories as they happen, without waiting for the trickle down to the media outlets.

As the Internet has developed and defined itself as a mode of communication, citizen journalists have developed and gathered momentum. This is a phenomenon that goes by many aliases: grassroots media, people's media, participatory media, participatory journalism, open source journalism, citizen media, bottom-up journalism, stand-alone journalism, distributed journalism, and do-it-yourself journalism. Regardless of title, the core features remain the same: non-professional, often unpaid, citizens publishing "news" items on the Internet.

The American Press Institute noted some of the features of participatory or citizen journalism, in the following statement:

Participatory journalism is a bottom-up, emergent phenomenon in which there is little or no editorial oversight or formal journalistic work-flow dictating the decisions of a staff. Instead, it is the result of many simultaneous, distributed conversations that either blossom or quickly atrophy in the Web's social network.⁷⁴

Citizen journalism occurs in a variety of manifestations on a broad continuum, and includes newsgroups, mailing lists, forums, chat rooms, collaborative publishing systems, instant messaging, blogs or weblogs. Also included in the definition of citizen journalism are websites that enable public comments or audience participation.

⁷² *Hemming v. Newton*, 2006 BCSC 1748 (CanLII).

⁷³ *Ibid*, at para. 63.

⁷⁴ Bowman, S. & Willis, C., We Media: How Audiences Are Shaping The Future Of News And Information, online: The Media Centre at the American Press Institute, July 2003: www.hypergene.net/wemedia/.

4. **Citizen Journalism and the Defence of Responsible Journalism**

Are “professional” journalists uniquely qualified to disseminate news, such that they, and not citizen journalists, can rely on a defence of responsible journalism? Is this a defence that is restricted for the use of traditional media and journalism parties?

Professional journalists, journalism professors and others have now waded into the blogosphere, to publish their own blogs in either a professional or a personal capacity. On the other hand, traditional news media have engaged citizens to provide them with reports, commentary or other content, sometimes for a fee. Additionally, there are hybrid news sites, such as OhMyNews.com, that utilize professional and citizen journalists equally, and for the same or similar purposes.⁷⁵ These examples serve to demonstrate that the distinction between professional journalists and citizen journalists, if there is one, becomes unclear.

Code of Conduct for Professional Journalists

Policies and codes of conduct are standard in many media outlets. The Canadian Broadcasting Corporation (the “CBC”), as one example, produces a handbook on journalistic standards and practices it expects its employees to uphold.⁷⁶ Of particular interest are the journalistic principles it identifies: accuracy and the importance of thorough research; integrity and the importance of impartial broadcasting; fairness and the importance of ethical dealing with persons, institutions, issues and events. The handbook also address some important considerations regarding some of the more sensitive areas of journalism: clandestine methods such as hidden cameras, coverage of potentially violent acts such as civil disorder, and investigative journalism.

The CBC policy also includes a section dealing with Internet and online publication issues.

CBC online journalistic material should reflect the general discourse of our society. This includes presenting the views of persons whose insights, experience or expertise merit individual expression. Care must be taken that these statements of opinion avoid a cumulative bias over a period of time. Online journalistic personnel should always be mindful of the CBC's responsibility to present the widest possible range of ideas and views.⁷⁷

All interactive activities on CBC hosted websites, such as posting and comment functions, are moderated by various CBC programmers, and are governed by a list of rules clearly posted on the web site. The rules cover issues such as legal requirements, appropriate language, civility and matters of taste. Registration and identification of participants in CBC discussions, for example, is required.⁷⁸ The handbook also addresses issues of archiving, hyperlinking and

⁷⁵ OhMyNews International, <http://english.ohmynews.com/index.asp>

⁷⁶ Canadian Broadcasting Corporation Journalistic Standards and Practices, September 2004, online: <http://cbc.radio-canada.ca/accountability/journalistic/index.shtml>.

⁷⁷ *Ibid*, Section IV(C)(1).

⁷⁸ *Ibid*, Section IV(C)(3).

sharing content with other media outlets. Ultimately the CBC position with regard to these things is that they will maintain editorial control over content.

Though a code of conduct, such as the one produced by the CBC, offers insight into elements of responsible journalism, it is important to note that the existence of such a document does not speak to the practices of the journalists in the employ of the CBC, or other such media outlets. There is no regulatory body of journalism with the teeth to censure media outlets, in a meaningful way, when they breach codes of conduct. Moreover, there appears to be nothing requiring media outlets to impose a code of conduct of any kind on their staff.

Citizen Journalism and Editorial Control

Editorial control is exerted on citizen journalism sites in different ways. Moderators may be appointed by community members or website owners to remove or edit postings that violate community rules or standards. In some discussion groups, participants may monitor each other or editing may be conducted by way of informal peer review. Alternatively, some websites use a more traditional approach: articles and other postings are vetted by an editor at the host site in accordance with the site's rules or mandate.

Some Internet news sources publish their own code of conduct. OhMyNews, a website that heavily relies on citizen journalists, and has been a leader in the development of citizen journalism, publishes the following code of conduct on their website:

1. The citizen reporter must work in the spirit that "all citizens are reporters," and plainly identify himself as a citizen reporter while covering stories.
2. The citizen reporter does not spread false information. He does not write articles based on groundless assumptions or predictions.
3. The citizen reporter does not use abusive, vulgar, or otherwise offensive language constituting a personal attack.
4. The citizen reporter does not damage the reputation of others by composing articles that infringe on personal privacy.
5. The citizen reporter uses legitimate methods to gather information, and clearly informs his sources of the intention to cover a story.
6. The citizen reporter does not use his position for unjust gain, or otherwise seek personal profit.
7. The citizen reporter does not exaggerate or distort facts on behalf of himself or any organization to which he belongs.

8. The citizen reporter apologizes fully and promptly for coverage that is wrong or otherwise inappropriate.⁷⁹

5. The Defence of Responsible Citizen Journalism?

The defence of responsible journalism is a recognition by the courts of the important role that the media plays in a democratic society and attempts to balance the public's right to know against damage to people's reputations. If the defence of responsible journalism is accepted by the Supreme Court of Canada and adopted into Canadian law, will it be available to citizen journalism?

The answer seems certain to be yes, so long as those journalist adhere to the requirements of the defence. The application of the defence was recently considered on facts relating to a non-professional student newspaper, *The Peak*, at Simon Fraser University⁸⁰. In that case Justice Blair had no difficulty concluding the defence was available at law, although not on the facts of that case. In giving reasons he noted, at para. 65:

...Given that the damage to a plaintiff's reputation can be the same whether sullied by either amateur or professional journalists, I find that no distinction should be made between differing types of publications at least insofar as determining whether the public interest responsible journalism defence applies to render a publication immune from a defamation action.

Thus the door is open for the defence to apply to citizen journalism, so long as the *Reynolds* factors have been satisfied.

The application of those factors should be flexible. Lord Hoffman, in *Jameel*, criticized the trial judge's rigid application of the *Reynolds* factors, noting, "the standard of conduct required of the newspaper must be applied in a practical and flexible manner. It must have regard to practical realities."⁸¹ However, it was also noted that, "what engages the interest of the public may not be material which engages the public interest."⁸² This is particularly relevant in the context of the Internet. Many problematic Internet postings are lengthy diatribes or incomprehensible rants that do not rise to the standards expected of responsible journalists.

In *Cusson*, Sharpe J.A. indicated that the defence of responsible journalism will be successfully pled where the defendant can show that they took reasonable steps to ensure the story was fair and accurate.

What constitutes reasonable steps will depend of course upon the circumstances of the particular case. In assessing whether the

⁷⁹ OhMyNews International Frequently Asked Questions, Online: http://english.ohmynews.com/reporter_room/qa_board/qaboard_list.asp?page=1&board=freeboard.

⁸⁰ *Hansen v. Tilley* 2009 BCSC 360

⁸¹ *Jameel supra* note 24 at para. 56.

⁸² *Ibid* at para. 31.

media has met this standard the court will consider the ten factors outlined by the House of Lords in *Reynolds*..., or such of them – or any other factors – as may be relevant in the circumstances.⁸³

There appears to be nothing, per se, that would preclude the elements of responsible journalism from applying to professional and citizen journalists alike. Perhaps, it is merely a matter of assessing what is reasonable for a given journalist in a given context. While it may be appropriate for an accredited journalist to exhaust all possible leads in order to satisfy the requirement for thorough research, the standard may not be quite so high for the average user.

6. Conclusion

As global communication changes and develops, so too must the laws that protect our rights of free speech and our rights to privacy and protection of reputation. These are fundamental values in our society, and defamation jurisprudence invariably requires a careful balancing of these rights. The British defence of responsible journalism is the latest development borne of this balancing act. With the defence now in front of the Supreme Court of Canada, the definitive answer on the adoption of this defence into Canadian law is imminent. However, responsible journalism has traditionally been contemplated in the context of professional journalists, publishers and broadcasters. Nevertheless, it seems on the basis of recent jurisprudence that responsible journalism is sufficiently flexible to apply in the context of non-professional journalism. This is significant in the context of Internet defamation, where the Citizen Journalism movement increasingly places non-professional individuals in the same position of vulnerability as their professional counterparts with regard to defamation actions.

This paper examined issues related to Internet defamation. Beginning with a review of basic internet issues, such as the factors a plaintiff must establish and available defences, we then considered the relatively new defence of responsible journalism. The second section looked at issues that are unique to defamation on the Internet, including jurisdiction and ISP liability. The third section considered Citizen Journalism on the Internet, sites that vary in form but all contain the core features of un-paid, non-professional individuals publishing “news” items on the Internet. Finally, we explored whether the defence of responsible journalism (assuming it is endorsed by the Supreme Court of Canada) should be available for citizen journalists.

⁸³ *Cusson, supra* note 25 at para. 141.