TORONTO STAR

Grant v TorStar (2009)

Defamation and Public Interest Journalism in the Internet Age

1

Facts + Background

Grant v. TorStar (2009)
Before we get started

Peter Grant and Grant Forest Products
Inc.   *Appellants/Respondents on cross-appeal*

v.

Torstar Corporation, Toronto Star
Newspapers Limited, Bill Schiller,
John Honderich and Mary Deanne
Shears   *Respondents/Appellants on cross-appeal*

and

Ottawa Citizen, Canadian Newspaper
Association, Ad IDEM/Canadian Media
Lawyers Association, RTNDA Canada/
Association of Electronic Journalists,
Magazines Canada, Canadian Association
of Journalists, Canadian Journalists for
Free Expression, Writers' Union of Canada,
Professional Writers Association of Canada,
Book and Periodical Council, PEN Canada,
Canadian Broadcasting Corporation,
Canadian Civil Liberties Association and
Danno Cusson   *Interveners*

INDEXED AS: GRANT *v.* TORSTAR CORP.

Neutral citation: 2009 SCC 61.

File No.: 32932.

2009: April 23; 2009: December 22.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps,
Fish, Abella, Charron, Rothstein and Cromwell JJ.

What this case is about:

An influential business person sued a newspaper for a story he argued defamed him

Why this case matters:

Establishes a new defence to defamation: *Responsible communication on matters of public interest*

Why this case is so often cited:

Concisely explains the elements that need to be proved in order to obtain damages for defamation.

A quick distinction:

Libel and slander are both types of defamation. Libel is an untrue defamatory statement that is made in writing. Slander is an untrue defamatory statement that is spoken orally. "Defamation" is sometimes used interchangeably with libel.

Background: Who is Peter Grant?

Sure, let's chat like friends.

Peter Grant was a big shot in Ontario. He was buddies with Premier Mike Harris and had a ton of cash. He wanted to build a super fancy mansion, but then the economy crashed and he had to bail. Now, the unfinished mansion is a tourist spot.

People talk about how he might have used his connections to get special deals, but it's hard to say for sure.

Background: What did TorStar do?

TorStar wrote an article published "Cottagers teed off over golf course: Long-time Harris backer awaits Tory nod on plan"

Although they briefly acknowledge some positives, this article, as the court acknowledges, "did not paint Grant in a flattering light." (para 16)

Quotes included...

- "The planned course will be private, so private in fact, it will be for Grant's own "personal use and enjoyment."
- "[For neighbours], Grant's dream of carving a course out of the northern wilderness for his own pleasure, is a nightmare."
- **"Everyone thinks it's a done deal because of Grant's influence — but most of all his Mike Harris ties," says Lorrie Clark, who owns a cottage on Twin Lakes."** <- What do you think? Opinion, or fact?

Background: Some drama involved

While gathering facts, TorStar sent a photographer to Grant's residence to gather photos from the water (by canoe) as well as by road.

Noticing and correctly suspecting that this was indeed a TorStar photographer, Grant instructed his employees to **attempt to detain the TorStar photographer.**

His employees then **allegedly engaged in a car chase** (on public roads) of the photographer, who "narrowly escaped" after **almost driving into a ditch**.

Both sides disputed the exact nature of how this all unfolded, but one thing is clear: they had **beef**.

Grant v. TorStar (2009)
Judicial History

So, Peter Grant sued TorStar for defamation

Trial Court: Sided with Grant

- Ordered $1.4 million in damages

Court of Appeal: Sided with TorStar

- Said the Trial Court "erred in failing to leave the new responsible journalism defence with the jury."
- Ordered retrial

Supreme Court: Sided with TorStar (8-1, concurring)

- Established new defence of *Responsible communication on matters of public interest*
- Ordered retrial

2 Context + Reasoning

Grant v TorStar (2009)

A definitive restatement of defamation liability in Canada.

A defamation plaintiff is required to **prove three things** about the impugned words:

1. the words were **defamatory,** in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;

2. the words in fact **referred to the plaintiff;** *and*

3. that the words were **published,** meaning that they were communicated to at least one person other than the plaintiff.

These three elements must be proved by the plaintiff on **balance of probabilities** in order to have a *prima facie* defamation claim and establish a presumption against the defendant.

Grant v. TorStar (2009)
A low threshold for establishing *prima facie* defamation liability.

The British & Canadian common law threshold for establishing a *prima facie* claim of defamation has been criticized as so low as to be too "pro-plaintiff" and stifling of free speech.

As McLachlin CJ talks about defamation as a **strict liability regime** in paras 28 - 29 of *Grant*, where she points out that:

- Once the three elements are made out on a balance of probabilities, **falsity and damage are presumed.**

- The plaintiff **need not establish intention to do harm, or even negligence,** which makes it a regime of strict liability.

- The **defendant must rebut the presumption of liability** established using the three factors through the use of an available defence.

As a result of this strict liability and low threshold, **the real analytical work in the law of defamation happens in the context of defenses.**

The defamation defences available before *Grant v. Torstar* (2009).

Defences are the focus of judges and lawyers in the law of defamation.

Pre-*Grant* defences examined in the case

Justification:
An absolute defence, wherein the defendant can prove that the impugned claim was **substantially true** based on evidence in a court of law.

Qualified Privilege:
Attaches to privileged situations wherein a party has a **duty to communicate** certain information to another party that has a **reciprocal interest** in receiving that communication (reference letters, credit reports, complaints to police or regulatory bodies). There are predetermined (open) lists of these privileged situations in common law and statute.

It is qualified insofar as (a) the privilege can be lost if the communication is not **reasonable** given the duty/interest at play in the occasion; and (b) the defence can be defeated by proving that the Defendant had malice.

Other Defenses

Fair Comment:
Protections for reasonable statements of opinion that are communicated in the public interest without malice.

Innocent Dissemination:
Protections for publishers that have a lack of knowledge and control over the things they share (eg. libraries) that did not know about or act negligently towards the defamatory communication at issue.

Absolute Privilege
Attached to court proceedings and parliament.

Limitations on key defences created a protection-gap for news-media. This gap was worse for media on the internet.

The outdated law of defamation was stifling free speech and innovation on the internet.

Justification

General: While a journalist and editor may be satisfied that something is substantially true, that does not mean they can prove it in court years later.

Internet: British papers adapted to the pro-plaintiff nature of defamation law by hiring 'night barristers', embracing complex approaches to proof verification, and refusing to litigate certain people.

This would not be an option for new media, stifling innovation and expression.

[gap in protection for journalists]

=

[the risk of libel chill]

Qualified Privilege

General: Canadian jurisprudence had repeatedly refused to broadly recognize privilege for public interest journalism to the world at large.

Internet: In cases like *Christian Labour Association of Canada v Retail Wholesale Union* (BCSC-2003) and *Angle v. LaPierre* (ACQB-2006), the court repeatedly held that communication on the internet was indiscriminate given the anyone's ability to access it—eliminating qualified privilege when it would've otherwise applied.

Given this gap, the court must consider two arguments for establishing a defence for those who report in the public interest.

1. Argument from *Principle*

Defamation law has to strike a delicate balance between **freedom of expression** and **reputation**, both *Charter values* that should shape the development of the common law's future.

The three rationales of freedom of expression are:
1. Advancing democratic discourse
2. Truth finding
3. Self-fulfillment

Journalism engaged two of the rationales quite deeply. As a result, the way the current law of defamation fails to protect public interest reporting is not sufficiently protective of the *Charter* value that is freedom of expression.

2. Argument from Relevant Jurisprudence

Other commonwealth countries had advanced their law of defamation in major ways to protect the expressive capabilities of the free press.

—**The United Kingdom & South Africa** had expanded the defence of qualified privilege to cover public interest journalism, when it was deemed reasonable using factors like those mentioned in *Reynolds v Times Newspaper* (HoL-1999).

—**Australia & New Zealand** had expanded qualified privilege to cover reasonable communications which related to matters of government and politics.

Grant v. TorStar (2009)

Canada embraces a new defence for responsible communications on matters of public interest.

Goal(s):
(a) strike a balance between *Charter* values; and
(b) find a middle way between *Sullivan* and current law

Formulation:

The defense has two essential elements:

1. the publication must be **on a matter of public interest**; and
2. the defendant must show that **the publication was responsible**, in that he or she was diligent in trying to verify the allegations, having regard to the relevant circumstances:

Other Key Considerations:

It will cover **responsible *communications*** as opposed to responsible journalism, in order to make space for new media outlets and the rapidly changing internet.

It will be **an independent defence** as opposed to an extension of qualified privilege because (a) it would upset the existing duty/interest framework for qualified privilege; and (b) qualified privilege is not concerned with free expression, but with social utility.

The question of whether a publication was in the public interest will be determined by the **judge**, while the question of whether a communication was responsible will be put to the **jury.**

The nature of the new defence
What should a new defence of responsible communication look like?

1. The publication must be on a matter of **public interest** (determined by judge)

Public interest is a broad concept, which can be interpreted with help from the history of 'fair comment' jurisprudence. The court said that it applies to subject matter:
  a.   that invites public attention
  b.   about which the public has some substantial concern because it affects the welfare of citizens; or
  c.   to which considerable public notoriety or controversy is attached.

A published piece must (a) be taken as a whole, ie. the impugned words cannot be scrutinized separately; and (b) have its subject matter defined carefully

2. The defendant must show that the publication was **responsible** (determined by jury)

The defendant must show the publication was **responsible**, in that they were diligent in trying to verify the allegations, having regard to the relevant circumstances. The jury can use the following eight factors to make this determination:
  1.   Seriousness of the allegation
  2.   Public important of the matter
  3.   Urgency of the matter
  4.   Status and reliability of the source
  5.   Was the plaintiff's side sought and reported?
  6.   Was the inclusion of the defamatory remark justifiable?
  7.   Reportage
  8.   Other considerations

A Note on Reportage

"The law will not protect a defendant who is willing to wound, yet afraid to strike."

The Repetition Rule:

Repeating libel (defamation) has the same legal consequences as being the first to say it.

Reportage:

An exception, which holds that 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" [para 120]. Where a defendant claims that the impugned communication is reportage, the repetition rule and reportage exception can then be put to the jury. If they are satisfied, they can determine that the communication was responsible.

The Four Factors for Reportage:

If a **dispute is itself a matter of public interest**, and the allegations are fairly reported, the publisher should incur no liability provided:

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
4. The report provides the context in which the statements were made

Grant v TorStar (2009)

New defence as applied to the case.

The evidence for the case revealed three defences that should be put to jury in a retrial:

1. Justification

2. Fair Comment

3. Responsible communications on matters of public interest

3

Impact +
Legacy

Grant v. TorStar was pretty forward-looking for a 2009 decision; it included several references to the role of the internet:

[114] … "Consistent with the logic of the **repetition rule**, the fact that someone has already published a defamatory statement does not give another person licence to repeat it. As already explained, **this principle is especially vital when defamatory statements can be reproduced electronically with the speed of a few keystrokes."**

[119] … "Maintaining **the repetition rule is particularly important in the age of the Internet**, when defamatory material can spread from one website to another at great speed."

Grant v. TorStar also seemed to predict the rise of quasi-journalism and the spread of disinformation:

[96] "[T]he traditional media are rapidly being complemented by new ways of communicating on matters of public interest, **many of them online, which do not involve journalists.** These new disseminators of news and information should, absent good reasons for exclusion, **be subject to the same laws as established media outlets.**"

[97] "A review of recent defamation case law suggests that **many actions now concern blog postings and other online media** which are potentially both more ephemeral and more ubiquitous than traditional print media."

So the new *Grant v. TorStar* defence, unlike similar defences available in other jurisdictions **at the time,** was pretty forward-looking.

Grant v. TorStar and the Reynolds Defence

Quick aside: this decision refers extensively to the UK's *Reynolds* defence, which **no longer exists**... officially, anyway.

In 2013, the UK passed the *Defamation Act 2013* which established 5 defences:

1. Truth
2. Honest opinion
3. **Publication on matter of public interest** <- (to replace the *Reynolds* defence)
4. **Operators of websites** <- (super interesting, worth a read!)
5. Peer-reviewed statement in scientific or academic journal etc
6. Reports etc protected by privilege
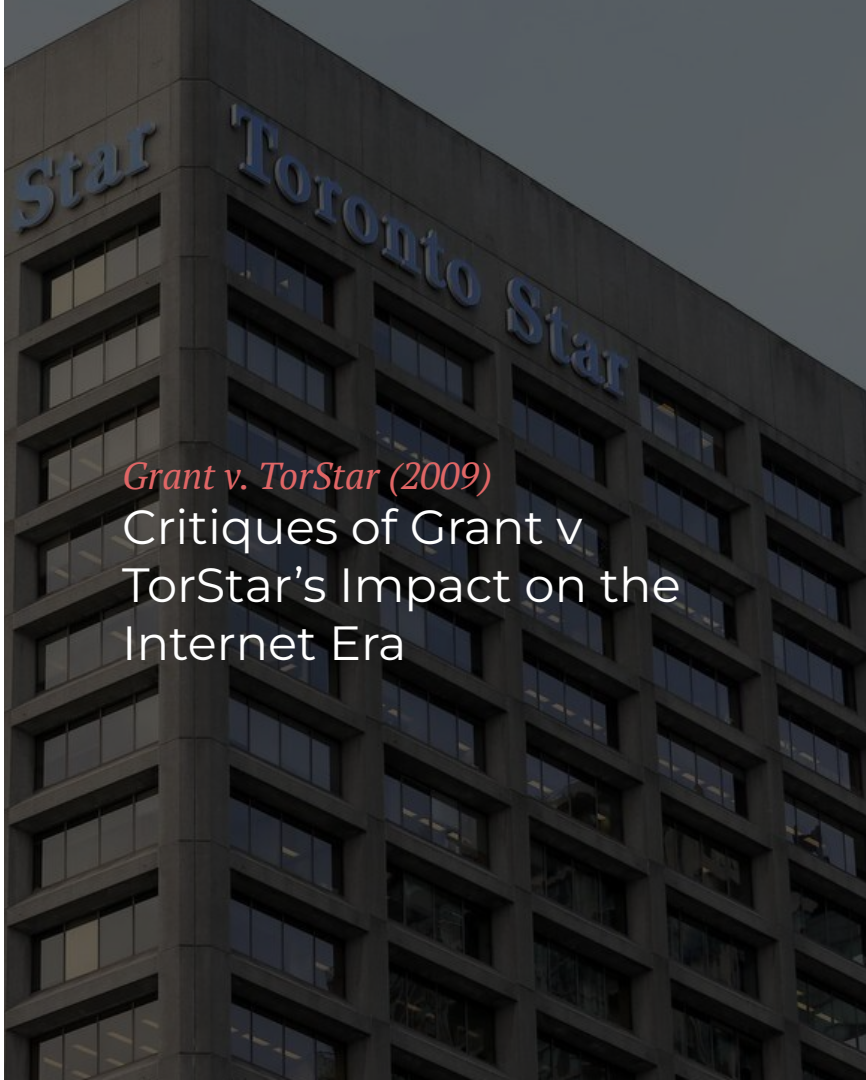
Grant v. TorStar (2009)
## Critiques of Grant v TorStar's Impact on the Internet Era

While positive in many ways, Grant v. TorStar was limited in achieving its goals:

1. The cost of litigation was a key contributor to "libel chill". *Grant* didn't fix this until it was complemented with **anti-SLAPP legislation.**

2. The focus on improvement through *defences* fails to account for the impact of keeping the *prima facie* threshold in **Norwich Orders.**

3. The continued to embrace the very broad common law conception of **publication**, which left many open questions as to the liability of media-technology companies.

These are part of pervasive academic critiques of defamation in the digital age, which people suggest should be changed at its core—not just through defences.

Grant v. TorStar in the AI Era

- Can AI commit libel?

- Specifically, is there a risk that large-language models can perpetuate defamatory comments?

- In our opinion: absolutely! This likely already happening, for a lot of reasons—notably bad data.
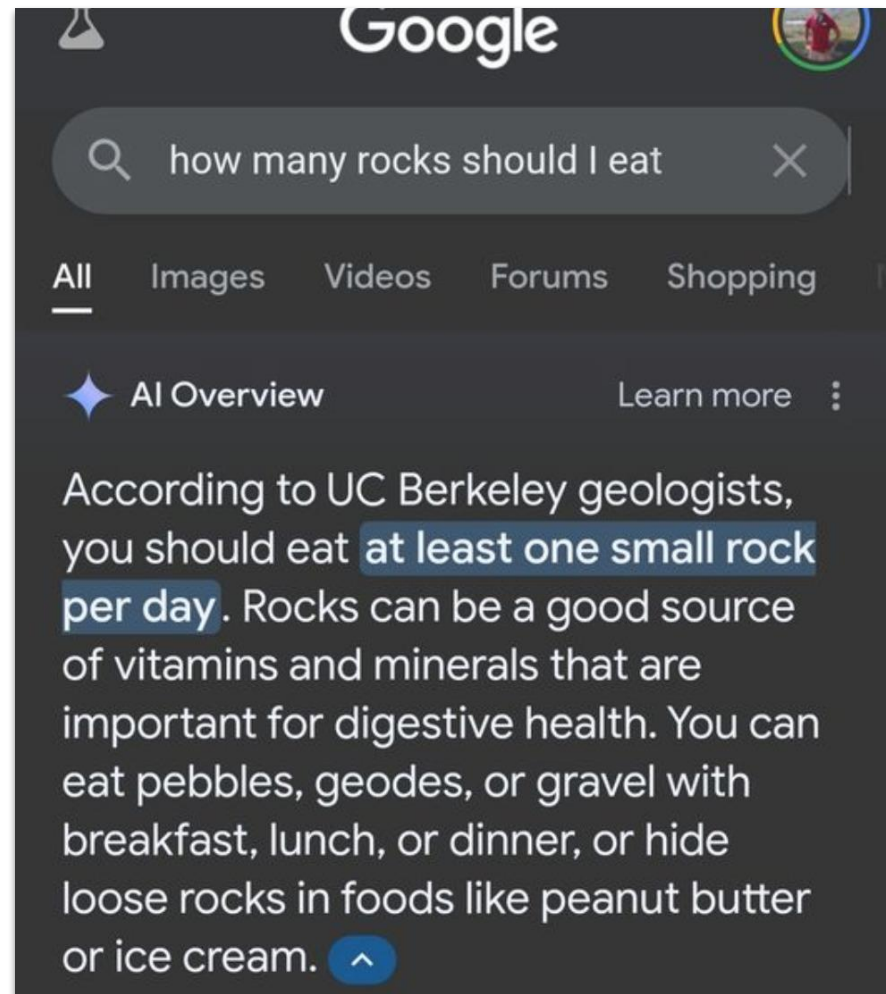
The Times Sues OpenAI and Microsoft Over A.I. Use of Copyrighted Work

Millions of articles from The New York Times were used to train chatbots that now compete with it, the lawsuit said.

Share full article · 1.3K

A lawsuit by The New York Times could test the emerging legal contours of generative A.I. technologies. Sasha Maslov for The New York Times

Legal questions at the intersection of news media and artificial intelligence:

- Are AI: (a) publishers; (b) innocent disseminators; or (c) mere conduits?

- If (a), should there be liability for AI companies that defame based on irresponsibly sourced data (like Reddit)? What about unlawful data?

- Does AI's business model pose a threat to media to the extent that it poses a threat to freedom of expression?

- Is the *Online News Act* a good framework for understanding these questions?

Grant v. TorStar - Legacy

- **Retrial:** Did not take place

- **Golf Course Expansion:** Never happened

- **House:** Never completed

BUT

- **TV Show:** *Mansion Impossible,* possibly releasing in 2025!

- **Jurisprudence:** We got some

Grant v. TorStar in the Internet Era
Key Takeaways

Lays out the Canadian common law test for defamation [28 - 29]

1. the words were **defamatory,** in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;

2. the words in fact **referred to the plaintiff;** *and*

3. that the words were **published,** meaning that they were communicated to at least one person other than the plaintiff.

These three elements must be proved by the plaintiff on **balance of probabilities** in order to have a *prima facie* defamation claim and establish a presumption against the defendant.

Establishes a defence for responsible communication on matters of public interest [98]

The defense has two essential elements:

1. the publication must be **on a matter of public interest**; and

2. the defendant must show that **the publication was responsible**, in that he or she was diligent in trying to verify the allegations, having regard to the relevant circumstances.