

TOP FIVE 2012

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

BAGLOW v SMITH, 2012 ONCA 407

Date released: June 14, 2012 <http://www.ontariocourts.ca/decisions/2012/2012ONCA0407.htm>

Facts

John Baglow, the plaintiff, was an active political blogger who frequently contributed postings that were left-wing in nature on a right-wing blog run by the defendants, Mark and Connie Fournier. The ensuing debates were often highly inflammatory and continued over a series of blogs and websites. Canada's role in the "war on terror" in the Middle East was a frequent topic of these debates. During the course of a particularly heated disagreement over Omar Khadr, a third party wrote that Mr. Baglow was "one of the Taliban's more vocal supporters." Although Mr. Baglow posted under a false name ("Dr. Dawg"), his true identity was well known to other political bloggers and easily available to the general public. Mr. Baglow was deeply offended by this characterization and demanded that the defendants remove the posting in question from their blog. When they refused, Mr. Baglow sued them for defamation.

Procedural History

The defendants sought to have the lawsuit dismissed by summary judgment – a simplified legal process in which a judge makes a decision based on the accepted facts rather than holding a full trial with testimony, expert witnesses and legal arguments. The trial judge found that in the context of a political blog, "insults were regularly treated as part of the give and take of debate", and subsequently ruled that summary judgment was appropriate and dismissed Mr. Baglow's claim. Mr. Baglow appealed.

Issues

Are defamatory comments made online acceptable in law?

Can a trial judge determine whether statements made online are likely to constitute defamation without hearing from experts or witnesses (i.e. through summary judgment)?

Decision

Lower court decision set aside. Appeal allowed; matter to be heard at trial.



Ratio

The Court of Appeal for Ontario (ONCA) determined that issues of online defamation are not suitable for summary judgment. As social media is an emerging area of law, a defamation claim in the context of political blogging – and other novel issues in law – should proceed to a full trial so that a determination can be based on a full body of evidence.

Reasons

The ONCA found that summary judgment has rarely been granted in defamation cases, in part because the question of whether a statement is defamatory has long been considered to be one that is better left for trial.

Previously, in *Grant v Torstar Corp.*, (2009 SCC 61), at para. 28, the Supreme Court of Canada held that in order to establish defamation, a plaintiff must establish that:

- (a) the impugned words are defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;
- b the words in fact refer to the plaintiff; and
- c) the words were published, i.e., that they were communicated to at least one person other than the plaintiff.

At issue here was whether the words were defamatory. The ONCA noted that the scenario in this case had received little attention by other Canadian courts: an allegedly defamatory statement made in the course of a “robust and free-wheeling exchange of political views in the internet blogging world.” A large question addressed was whether those same comments, which might be expected online, are acceptable in law. The Court held that this case raised important issues regarding defamation on the internet and in the political blogosphere and ruled that the lower court judge had erred in finding that he could properly determine whether defamation had, in fact, occurred without the benefit of witness and expert testimony. The panel of three judges unanimously set aside the trial judge's decision and ordered that the matter be allowed to proceed to a full trial.

DISCUSSION

1. What are some advantages and disadvantages of summary proceedings versus full trials?
2. Are the rules for communicating in person the same as those for communicating online? Should there be different rules?
3. The ONCA noted an SCC ruling that successful claims of defamation must show that the words in question would “lower the plaintiff’s reputation”. Should this be different for an online persona than for a person’s real, legal identity?
4. Think of a time when you were offended online. What course of action, if any, did you take? Were there other options available? Do you think that by doing so, you would gain something in a successful court case? Would it be just to prove a point?
5. In pairs, come up with ways in which Internet users can be informed about what is acceptable in online communication. Discuss any barriers there may be in educating users in Canada and around the world. Is it possible to have a single set of uniform guidelines?