This means war?

Baglow v. Smith and online defamation in the blogosphere

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Introduction: the decidedly undecided state of online defamation

To succeed in a defamation claim, a plaintiff must satisfy three requirements: first, show that the defendant's statements were published to a third person; second, that the statements refer to the plaintiff; and third, that they are actually legally “defamatory”. To prove this third element – that a statement is defamatory – the plaintiff must show that such statement would damage the plaintiff’s reputation in the eyes of a metaphorical “reasonable” or “right-thinking” person. This person is a creation of the law, somebody who takes words at their ordinary meaning and has no unique or special knowledge of the facts.²

However, with widespread media publications, Canadian courts generally apply a more practical and discernible standard. Given that different media outlets have their own unique reader/viewership, the Courts have responded by narrowing the question: “what would the ordinary reader of this publication think?”.³

The answer to this question has never been more prescient (or unclear) than it is today. The rise of online and social media or “new journalism” is transforming the industry. And yet, defamation law in Canada has been decidedly undecided in its response to the phenomenon, especially when attempting to figure out what is defamatory when bloggers and “citizen journalists” are reporting or commenting on hot-button political and social issues.

The importance of internet blogs as news outlets is growing by the day. Prominent figures and private citizens alike have mass followings amongst whom they wield massive influence. As

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blogging becomes a more vital component of Canada’s national social, political and economic debate, the stakes get raised and it’s not uncommon for the argument to get downright nasty. The Ontario Court of Appeal’s 2012 ruling in *Baglow v. Smith*\(^4\) has met this challenge by questioning who the “ordinary reader” is and what exactly he or she is willing to tolerate in the online gladiatorial arena that is blogging. In deciding to send the *Baglow* matter back down for a full trial, the Ontario Court of Appeal has set the stage for a possible realignment of defamation law in Canada. Depending on your viewpoint, this change is either a victory for free speech, or merely proof positive that the gloves are coming off in online discourse.

**Rule One is that there are no rules: *Baglow v. Smith* and blogger free-for-alls**

Hereby it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man.

Thomas Hobbes, *Leviathan*

*Baglow* concerns two ideologically opposed online bloggers. The plaintiff was a well-known “progressive” commentator who had repeatedly claimed that Canadian terror suspect Omar Khadr’s Guantanamo Bay detention was contrary to international law.\(^5\) Responding in August 2010, the defendant posted a long comment on his own successful political blog which stated that the plaintiff was “one of the Taliban’s more vocal supporters”. While the plaintiff accepted in his submissions that political blogs can at times be “caustic, strident or even vulgar and insulting”, he nonetheless objected to this comment, qualifying it as defamatory and asked the defendant to remove it. The defendant refused\(^6\) and the plaintiff alleged defamation. The defendant responded by bringing a motion for summary judgment before Justice Annis of the Ontario Superior Court of Justice (as he then was).\(^7\) The defendant argued that the statement was clearly not defamatory of the plaintiff, or if it was, that it was protected by the defence of fair comment.\(^8\) This paper will focus on the first element of the defence – whether or not the statement was defamatory.

The Court agreed with the defendant on this primary point and granted summary judgment. While Justice Annis accepted that the threshold test for defamation was a low one and that summary judgment has only rarely been granted in defamation cases, it nevertheless found that


\(^6\) *Baglow Motion* at para. 7.

\(^7\) Mr. Justice Annis has since been appointed to the Federal Court.

\(^8\) *Baglow Motion* at para. 3.
such a result was appropriate since the factual foundation of the case was conveniently confined to materials taken from the parties’ respective blogs. Justice Annis held that the impugned statement could not be seen as defamatory in the context of a political debate on an internet blog “where insults are regularly treated as part of the debate” and where “no reasonably informed Canadian” would conclude that the application of such a label was anything more than a strike by the defendant at the purported weakness of the plaintiff’s position. Therefore, the Court concluded that the plaintiff’s reputation could not have been damaged by the impugned statement.

Justice Annis elaborated upon the importance of context in determining whether or not a blog publication is defamatory. In addition to the impugned statement not being defamatory by virtue of the rough and tumble nature of internet debates, the Court added that since the statement was part of an ongoing debate, any reasonable viewer would “anticipate a rejoinder, which would eliminate the possible consequence of a statement lowering the reputation of the plaintiff in their eyes”.

The plaintiff challenged the summary judgment ruling and succeeded. The Ontario Court of Appeal characterized the issues of the case as “all important,” given that they arose “in the relatively novel milieu of internet defamation in the political blogosphere,” and emphasized the myriad of questions that the case posed for Canadian defamation law:

[Although it is suggested] that "anything goes" in these types of exchanges, is that the case in law? Do different legal considerations apply in determining whether a statement is or is not defamatory in these kinds of situations than apply to the publication of an article in a traditional media outlet? For that matter, do different considerations apply even within publications on the internet — to a publication on Facebook or in the "Twitterverse", say, compared to a publication on a blog?... These issues have not been addressed in the jurisprudence in any significant way....

With such important interests at issue, the Court of Appeal held that the matter deserved the benefit of a full record. Whatever the ultimate decision in the forthcoming Baglow trial (assuming that the matter is not settled out-of-court), it will likely be a game-changer for the future of Canadian media and the law of defamation.

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9 Baglow Motion at para. 20.
10 Baglow Motion at paras. 36, 56.
11 Baglow Motion at para 57.
12 Baglow Motion at para. 65.
13 Baglow Motion at para. 23.
14 Baglow Motion at paras. 28-29.
Individual mollycoddling vs. online Darwinism: balancing reputation with free speech in the online arena

No one will really notice if some [media] are silenced; others speaking on safer and more mundane subjects will fill the gap.

Factum for the Intervener Canadian Media Coalition in *WIC Radio Ltd. v. Simpson*

At its core, the law of defamation is about finding the right balance between freedom of speech on the one hand, and our desire to protect peoples’ reputations on the other. This principle of individual reputation was canvassed extensively by the Supreme Court of Canada in *Hill v. Church of Scientology*[^15^], with Justice Cory opining that the good reputation of the individual is reflective of their innate human dignity – a concept which underlies all the *Charter* rights. Protection of the individual’s reputation is of fundamental importance to Canada’s democratic society.[^16^]

Canadian courts initially saw the no-holds-barred character of online blogging as something to be feared and staunchly policed. Interactive message boards, with their speedy exchanges, threatened the possibility of “virtually limitless defamation”.[^17^] This approach was criticized by some observers who felt that the courts overestimated the internet’s power to defame and in so doing, “improperly favour plaintiffs in most cyber-libel cases to the detriment of vibrant online free expression, and devalue[d] individual dignity and reputation in cases involving other, less-feared media”.[^18^]

However, recent decisions appear to have shifted the balance away from protection of individual reputation and towards freedom of expression. This re-evaluation began with the Supreme Court of Canada’s decision in *WIC Radio Ltd. v. Simpson*.[^19^] In concurrence with Justice Binnie’s majority judgment, Justice LeBel wrote that just simply expressing an opinion does not mean that it will be believed and therefore affect its subject's reputation. He concluded that in certain instances, such as in the world of radio “shock jocks”, “the nature of the forum or the mode of expression... [is] such that the audience can reasonably be expected to... discount its "sting"


[^16^]: *Hill* at para. 123.

[^17^]: *Barrick Gold v. Lopehandia*, 2004 CanLII 12938 (Ont. C.A.) at paras. 1, 34 [*Barrick*].

[^18^]: Robert Danay, *The Medium is Not the Message: Reconciling Reputation and Free Expression in Cases of Internet Defamation*, 56 McGill L.J. 1 at 4 [*Danay*].

accordingly”, and added that the public must be presumed to evaluate comments in accordance with their own knowledge and opinions about the speaker and the subject-matter.

Most recently, Canadian courts’ embrace of the defence of “responsible communication” exemplifies this shift towards free expression. For decades, Canadian media outlets fought to fashion a workable defence that would allow journalists to report on matters of public importance without being held to a strict standard of proof. In Grant v. Torstar and Cusson v. Grant, the Supreme Court of Canada responded and held that false and therefore defamatory statements are permissible where the defendant has exercised due diligence in verification before making the statements and therefore exercised ‘responsible journalism’.

From this perspective, Justice Annis’s decision in Baglow proposed a welcome addition to the courts’ efforts to provide a deeper meaning to and tolerance of, free expression in Canada. The power and importance of this right should not be underestimated. A free press and vibrant marketplace of ideas is essential to the maintenance of a true and viable democracy. As the Supreme Court held in Simpson: “An individual's reputation is not to be treated as regrettable but unavoidable road kill on the highway of public controversy, but nor should an overly solicitous regard for personal reputation be permitted to "chill" freewheeling debate on matters of public interest”.

Justice Annis’s decision would have recognized this point in holding that, as we are more interconnected and media-savvy, our ability to discern defamation from mere hyperbole or jest is more developed. As the Court held in Martinek v. Dojc, the law of defamation is “a creature of its time and social context... [that] must be viewed with today’s eyes”.

Justice Annis’s reasoning in Baglow goes to the foundation of Canadian democracy and the principle that our body of constitutional law is a “living” tree that will change and evolve with each passing generation and that the judiciary’s ultimate goal is to develop the common law in accordance with the principles articulated in the Canadian Charter of Rights and Freedoms. The Supreme Court of Canada recently averted to this dictum in R. v. N.(S.) — popularly known as the ‘Niquab’ case — when it recognized “the rapid evolution of contemporary Canadian society and...the growing presence in Canada of new cultures, religions, traditions and social practices”. Another Supreme Court decision, Vriend v. Alberta, held that democracy is something more than the notion of majority rule. It is and must be guided by an accommodation of a wide variety of beliefs [and] respect for cultural and group identity. The Baglow motion

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20 Simpson at para. 48. See also per Binne J. at para. 27.
21 Simpson at paras. 72-73.
22 Simpson at para. 2.
suggests that online communities are no exception, and that free expression should be given
more breathing room in that context in order to overcome what the Supreme Court deemed
Canada’s “unjustifiable” stringency in the protection of personal reputation.27

But what then is the value of your online reputation in 2013? While some may see the Baglow
motion as heralding a brave new world of free expression, from another perspective, “new
journalism” might also harken back to the sordid and sensationalist “Yellow Journalism” of the
early 20th century. A more permissive Baglow motion-style mentality will have profound effects
on Canadian law and journalism if its reasoning is endorsed. Online media, and specifically
bloggers are quickly overtaking the so-called “mainstream” media in their ability to break
stories, gain readers and influence societal opinion. The distinction between staff writers for the
Globe and Mail and “citizen journalists” like the parties in Baglow has narrowed to such an
extent so as to make the distinction arguably redundant.28 At the same time, bloggers are also
increasingly partisan in an effort to gain readers and notoriety.29 In this climate, it is possible that
in distinguishing online media from its traditional/print counterpart, by making the former more
permissive, the Baglow motion’s reasoning may in fact hasten the decline of the latter’s
commitment to traditional journalistic practices at a time when they are more necessary than
ever.

Taking you down with us: sensationalist blogging and the decline of “traditional”
journalism?

There is no structure and therefore no sense, and the effect is of being in the
middle of a room full of loud, shouty and excitable people all yelling at once with
all the phones ringing, the fire alarm going off and a drunken old boy slurring in
your ear about “what it all means”.

Blogger commenting on The Guardian newspaper’s rolling
newsblog30

This increased emphasis on informality and partisanship in online blogging is having a clear
knock-on effect on traditional media outlets. CNN, a flagship of modern television news, now
stands on the brink of a rebranding that has seen a greater focus on entertainment at the expense

27 Grant at para. 65.
28 Melissa A. Troiano, The New Journalism? Why Traditional Defamation Laws Should Apply To Internet Blogs,
29 Troiano at 1449, footnote 9.
30 “The Guardian Newsblog and the death of Journalism” The Louse & the Flea (22 February 2011) online:
of politics\textsuperscript{31}, and may yet see the introduction of reality television programming and celebrities doubling as political pundits. This shift comes as ideologically-motivated American cable networks such as FOX News (conservative) and MSNBC (liberal), have assumed the mantle of industry ratings leaders.\textsuperscript{32} Similarly, as traditional news outlets find themselves competing with blogs, they are increasingly adopting their rivals’ rapid-fire, informal tone. While this new style may be convenient and entertaining for readers, it is arguable whether it raises the discourse and advances free speech in the positive way envisioned by the Supreme Court.

\textbf{Baglow’s rejoinder expectation: court-sponsored vigilante justice?}

They pull a knife, you pull a gun. He sends one of yours to the hospital, you send one of his to the morgue.

Officer Jim Malone, \textit{The Untouchables}

One aspect of the \textit{Baglow} motion’s reasoning that portends massive implications for defamation law is the broad-based approach to “context” that it employed when analyzing the ordinary reader’s expectations. Justice Annis wrote that blogging audiences expect and demand rejoinders when the online gauntlet is laid-down, holding that in the world of online blogging, “the parry and thrust of the debaters is appreciated as much as the substance of what they say”.\textsuperscript{33}

This dictum raises interesting questions about the courts’ traditional place in resolving defamation disputes. An expectations-based standard takes the very concept of defamation out of the courts’ hands and instead leaves the resolution mechanism to the bloggers themselves. By defining defamation in terms of community expectations, Justice Annis fundamentally shifted the nature of the inquiry by presupposing that a defamed blogger \textit{can and should} respond to online statements that may well harm his or her reputation. If a counter-punch is to be expected in the context of an internet debate, then at what point is the plaintiff allowed to “walk out” of an online debate and resort to the courts in order to preserve his or her reputation?

Justice Annis acknowledged that his dictum looked distinctly like a new defence of mitigation of a defamatory comment,\textsuperscript{34} though did not fully reconcile the issue. The Court appeared to be encouraging a hands-off approach to online defamation wherein the parties slug it out until one person simply gives up. While some might call this a victory for free speech, to others it might


\textsuperscript{33} Baglow Motion at para. 64.

\textsuperscript{34} Baglow Motion at para. 65.
just have the trappings of online Darwinism – emphasizing survival of the fittest – or at least, the most obnoxious. Taken to its extreme, Justice Annis’s reasoning in the Baglow motion resembles a blanket application of the seldom-used defamation defence of consent, which permits defamatory statements if it can be proven that the plaintiff either explicitly or implicitly consented to the publication.

The politics of Justin Bieber: Baglow’s troublesome attempt to define “political” speech

Well, everything is political. I will never be a politician or even think political. Me just deal with life and nature. That is the greatest thing to me.

Bob Marley

Another interesting feature of the Baglow series of cases is its focus on “political” debates on the blogosphere. At first blush, a distinction between political speech and the rest of the chatter on the blogosphere is intuitively appropriate, given the importance of robust political debate to Canadian society. The Supreme Court of Canada has opined on several occasions that “political expression lies at the very heart of the guarantee of free expression and underpins the very foundation of democracy”.

However, in an age when the internet allows anyone to bring their own unique perspective to an online debate, the line between political and apolitical debate becomes even harder to discern: a snide remark about Justin Trudeau’s haircut can quickly evolve into a referendum on the importance of substance versus style in an election; Justin Bieber’s personal dating habits and purported vices can suddenly morph into a vehicle for a national debate on the role of government in promoting moralism in the press – the list goes on and on.

Take for example Manson v. John Doe, a recent decision of the Ontario Superior Court. In that case, the Court found that blog postings by an anonymous defendant to the effect that the plaintiff lawyer was a “rapist” and “a morally repugnant imbecile of the most sanctimonious variety” were “shocking, disgusting, outrageous, racist, provocative. In a (legal) word: defamatory”.

While a lawyer’s intelligence or personal code might not have the same avowedly political ring as the debate over Omar Khadr seen in Baglow, it’s not a stretch to make it so. One wonders

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35 See Baglow Motion at para. 1; Baglow Appeal at para. 1.
37 2013 ONSC 628 at paras. 5, 8 [Manson].
38 Manson at para. 6.
what would happen if, for example, the defendant in *Manson* argued that his post was an incensed commentary on the poor quality of lawyers available to lower socio-economic communities, or a righteous attack inspired by the low moral standards of lawyers generally – the very profession that are entrusted to uphold the rule of law and, by extension, Canadian democracy. Seen from this perspective, the Superior Court and Court of Appeal’s attempt to limit themselves to so-called “political speech” in *Baglow* is problematic, and may require greater definition.

**Back and forth: defamation law’s traditional travails with technology**

In charting *Baglow’s* tussle with the scope and meaning of “online” defamation, a quick perusal of the history of defamation in the common law is instructive: the field has always struggled with new forms of media consumption. The telegraph, the radio, the television were all heralded as new and exceptional forms of transmission that demanded their own special application in defamation law in accordance with their speed, permanence or prospects for mass dissemination. Initially, the courts agreed and blazed judicial trails that characterized these newfangled mediums as unique, deserving of their own exceptional approaches in the law of defamation. However, as these modes of communication lost their futuristic aura, the courts retreated from their initial position and reapplied the law’s traditional dictums.³⁹

These historical pendulum swings beg the question as to how different the internet is as a communications tool from its technological forefathers.⁴⁰ How fast or interactive must the exchange between two online adversaries be before we can begin to “expect” the rejoinder that the *Baglow* motion asserts? Looking at the same question from the other side, how engaged must the reader be with a developing online debate before the law can hold that he or she understands the ground rules of the exchange or lack thereof? The reality is that new journalism, and specifically online blogging, may be universally accessible, but is not uniformly understood. Just because an average reader can and does *access* a wealth of news and opinions equally, it doesn’t necessarily mean that he or she is automatically an “ordinary reader” with an awareness of the specific ground rules.

³⁹ *Troiano* at 1463. See also *Danay* at 25-28.

Today, we are all “ordinary readers”

When we go online, we enter an environment that promotes cursory reading, hurried and distracted thinking, and superficial learning. Even as the Internet grants us easy access to vast amounts of information, it is turning us into shallower thinkers, literally changing the structure of our brain.

Nicholas G. Carr, *The Shallows: What the Internet is Doing to Our Brains*

The sheer pervasiveness of online media means that the “fringe” of public opinion is no longer, well, a fringe at all. Internet penetration means that “citizen journalists” are growing in influence at exactly the same time as they are ideologically fracturing. Published opinions that would have had to go through a thorough editorial vetting process in previous generations are now uploaded and disseminated with the click of a mouse – typos, capitals and all. Suddenly, all kinds of issues are part of a serious, online debate: The American President is called a radical-Jihadist-Socialist from Kenya, the September 11th Attacks were an inside-job and a political blogger from Canada is branded a “vocal supporter of the Taliban”. One online editorialist opined that, instead of raising the quality of intellectual debate, the internet has lowered it by allowing “like-minded fanatics” to coalesce, talk to each other and reinforce their own prejudices.41

And far from simply reinforcing their own viewpoints, the complete openness of the internet allows these views to be widely disseminated to new, fertile minds. This freedom of transmission means that many, if not most bloggers, are well-travelled without being all that wise. It also makes it difficult to compartmentalize visitors to any one blog as either “ordinary” or “uninitiated” as Baglow reasons.

*Barrick Gold v. Lopehandia: an “all-out war”*

Take for example *Barrick Gold v. Lopehandia*, a 2004 case that addressed the same issues as *Baglow*, albeit while online media was still developing. In *Barrick*, the defendant claimed that he was a beneficial owner of one of Barrick’s Chilean mining projects. Upon investigation, Barrick found the defendant’s claims were unfounded and told him so. True to his word, the defendant began an “all-out war”42 against Barrick, erratically posting on several online mining industry message boards that Barrick was guilty of, amongst other things, fraud, tax evasion, manipulation of world gold prices, obstruction of justice, pursuing organized crime,


42 *Barrick* at para. 10.
attempted murder, arson, and genocide. The trial judge held that the incoherent and emotive nature of the defendant’s posts meant that a reasonable reader of the internet message boards would be unlikely to take them seriously.

However, the Court of Appeal found “uncontradicted evidence” that suggested otherwise. The fact that several individuals contacted Barrick to voice their concern over the company’s purported conduct and tentative inquiries by the Toronto Stock Exchange proved that Mr. Lopehandia was indeed taken seriously. On this basis, the Ontario Court of Appeal overturned the lower decision, effectively ruling that even amongst knowledgeable and engaged investors, not everybody “gets” the internet. While an incoherent, belligerent dialogue style might not be taken seriously in a “traditional” medium such as a newspaper, wrote the Court, “the Internet” was not a traditional medium of communication.

The fact that several investors and the TSX in Barrick could be influenced by the defendant’s claims belies the notion that any one group of online readers is any more or less discerning and media-savvy than the next.

Even in 2013, now that the internet has emerged from its infancy, several courts have taken emotive language postings on internet message boards as defamatory publication. In Hunter Dickson v. Butler, the British Columbia Supreme Court ruled that the defendant’s postings on a reputable investor website to the effect that the plaintiffs were “crooks, liars and thieves”, “criminals”, “corrupt” and “slimeballs” were defamatory. Similarly, the Barrick approach was followed in a 2010 decision, Canadian National Railway v. Google Inc., where the Court ruled that a defendant’s emotive claims on his blog that the plaintiff corporation was a “hustler” comparable to Enron and engaged in bribery, were clearly defamatory.

“Rude, insulting and unfair”: small-town free speech in Best v. Weatherall

The British Columbia Court of Appeal confronted this problem in its 2010 decision Best v. Weatherall which addressed a purportedly defamatory email in the small community of Salt Spring Island, British Columbia (population: 10,500). In Best, the plaintiff placed an advertisement in a local newspaper calling for a town hall-style meeting to debate the construction of a new tennis complex. Sensing that the town hall could doom the project, the defendant – a supporter of the development – sent a scathing email to the meeting’s organizers

43 Barrick at para. 10.
44 Barrick at para. 38.
45 2010 BCSC 939, 2010 CarswellBC 1752 [Hunter].
wherein he made several comments about the plaintiff which the trial judge characterized as “rude, insulting and unfair” but ultimately, not defamatory. According to the lower Court, in the plaintiff’s community, such controversies were often debated in strident terms\(^{48}\), meaning that in this context it was merely the plaintiff’s feelings, and not his reputation, that were injured.

On appeal however, the Court of Appeal held that the plaintiff’s reputation had in fact, been harmed. While the Court accepted that “Salt Spring Island is a community in which public issues are robustly and passionately debated”, it concluded that there was “no evidence” it was normal for individuals to be personally attacked, impugned as dishonest or, more importantly, that disparaging comments made in the course of debating a contentious public issue would not affect an individuals’ reputation on the island.\(^{49}\)

What is interesting about the Appeal Court’s decision in \textit{Best} is that it overturned the trial judge’s ruling based on a misapprehension of the evidence regarding Salt Spring Island’s “community standards”. Cases like \textit{Best} are reminders that different courts can differ wildly in their view of how, in fact, a certain community of “ordinary readers” will interpret publications – even in a small, relatively homogenous town in rural British Columbia.

Moreover, if the \textit{Baglow} motion’s contextual approach to internet defamation stands, then the more challenging question is where does it end? Can the rapid-fire give-and-take of the comment section of an online blog where anyone can post be differentiated from an individual’s Facebook wall, where only pre-approved “friends” can post? And what about the “twitterverse”? Are expectations and rules the same when our deepest and most profound thoughts are confined to 140 characters? Blogs can target small social circles or worldwide audiences. If we view online defamation through an ordinary reader-based prism, then one wonders if a judge or jury will be able to properly determine who the “ordinary reader” is, and how exactly such reader thinks.

At its most extreme example, one wonders how the court’s approach in the \textit{Baglow} motion can be properly reconciled with the harms caused by an endemic problem such as cyber-bullying regarding politicized issues such as LGBTQ rights in schools and the abortion debate. Canadian law recognizes the inherent vulnerability of children and the undeniable trauma caused by bullying.\(^{50}\) \textit{Baglow} poses the question: at what point does schoolyard banter become defamatory? Are lines to be drawn between boys and girls, LGBTQ and straight communities, public and private schools? Drawing such distinctions is problematic to say the least and one wonders if judges or juries are even emotionally equipped to make these sorts of distinctions. In especially complex community contexts, a court may be prone to make overly-broad generalizations. These difficulties would tend to support the notion that online defamation, whatever its unique theoretical challenges, still requires the application of defamation law’s traditional dictums.

\(^{48}\) 2008 BCSC 608, [2008] B.C.W.L.D. 4172 at paras. 15-16. [\textit{Best Trial}].

\(^{49}\) 2010 BCCA 202, 2010 CarswellBC 979 at para. 37 [\textit{Best Appeal}].

Practically speaking therefore, while a blog-specific “ordinary reader” test might more appropriately reflect the complexity of contemporary Canadian society and our commitment to Charter values, we must also be aware that, without a principled approach, it may also prove to be the herald of significant legal uncertainty.

Do you get it? Satire and the “fake news” conundrum

The blurry line between news and satire online presents an interesting theoretical application of the wider debate as to whether Canadian courts are equipped to discern an “ordinary reader” on the internet. Traditionally, plaintiffs seeking damages for the publishing of satire faced an uphill battle in court to prove that the words were defamatory. Since satirical publications were comedic in tone, courts usually decided that any “reasonable person” would see the impugned articles for what they were, and therefore no defamation was attributable.51

Such faith in a broad concept of the “reasonable” or “ordinary” is tenuous, and rendered even more questionable as Canadian satire veers towards the Onion/Daily Show style of “fake news” (see Canadian websites The Smew and The Beaverton as examples of Canada’s foray into the field). While tongue-in-cheek “journalists” like Jon Stewart and Stephen Colbert are fairly well-known and understood amongst a certain age bracket, those sub-communities that aren’t familiar with “fake news” sometimes struggle to see the line between satirical comedy and established fact, and therefore are apt to confuse the line between news and caricature.

And yet, attempting to discern an “ordinary reader” of such publications is becoming increasingly problematic. Any internet user who has seen a hapless online commentator and their followers trying to rationalize how Kim Jong-un could beat out Clooney, Damon, Pitt et. al. to be awarded the official title of ‘Sexiest Man Alive’ by The Onion,52 should have pause for thought. In fact, the phenomenon of internet users accepting The Onion as a legitimate news source is now widespread enough that a website, Literally Unbelievable, is dedicated to cataloging it. Clearly, the assertion by The Onion’s head writer Carol Kolb that “The Onion has an established reputation for not being credible”53 is hardly bankable.


Fake news, defamation, Poe’s Law and the internet: only emoticons can save us now

This online uncertainty has morphed into an informal principle for internet bloggers and commentators regarding satirical religious commentary known as “Poe’s Law”. The rule was first articulated by one Nathan Poe, in response to internet users’ continuous misapprehension of satirical comments being made on a Christian chat forum. The principle has been formally articulated to mean that “[Online] parodies of religious views are indistinguishable from sincere expression of religious views,” and therefore, that without an emoticon such as a winky or smiley face, it is “utterly impossible.... that someone won’t mistake it for the genuine article”. 54 Author Scott Aiken for example, cites that responses to the satirical religious news site LandoverBaptist.com “hardly [reflect] public awareness that the site is parodic,” even when the site features, for example, “news reports” entitled “New Evidence Suggests Noah’s Sons Rode Flying Dinosaurs”. 55 Examples like The Onion and LandoverBaptist.com show how uneven proliferation of technology and variance in media consumption calls belie the notion that there is any real societal consensus on what constitutes truth, facts, or defamation.

Sacrificing certainty: the practical challenges of an online “ordinary reader”

Consider that any change in how we view the ordinary reader online could have profound practical effects at trial. Traditionally, the question as to whether a statement was defamatory was usually pretty clear, and based on a generalist view of newspaper readership. Practically speaking therefore, defamation litigation usually hinges on whether the defendant can prove that in spite of the publication’s defamatory character, he or she is entitled to one of several defences, such as honest comment or responsible journalism, noted above.

However, by raising the threshold of what is legally defamatory online, the Baglow motion approach could make many of these defences redundant and shift the onus and the financial cost of a court proceeding back upon the plaintiff to demonstrate that a specific publication was offside of a specific blog’s community rules, indeterminate as they may already be. From a policy perspective, this would seem to undercut the principled reasoning in much of the Supreme

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55 New Evidence Suggests Noah’s Sons Rode Flying Dinosaurs, Landover Baptist, online: <http://www.landoverbaptist.org/news0605/flyingdinos.html>. See also Aiken at 1-2.
Court’s recent jurisprudence like *Simpson, Grant* and *Cusson* which emphasized the need for journalistic responsibility in the new media landscape.

Practically speaking, this added cost is especially relevant when one considers the traditionally low awards for successful plaintiffs. Defamation actions have been described as “financial folly” for a plaintiff, who can generally expect a low award (if successful), and high costs caused by personal animosity between the parties and “the unique complexities of defamation law” surrounding the pleadings, discovery and research process.\(^{56}\) In the *Baglow* case for example, the defendants have already paid over $14,000 before the matter has even reached trial.\(^{57}\)

**Conclusions: defamation and the brave/vague new world of “new journalism”**

Hardly anything good has been said about the law of defamation.

Professor Raymond Brown, *The Law of Defamation*

The law of defamation was rooted, at least in part, in England’s attempts to allow members of the aristocracy to preserve their reputations without resorting to pistols at dawn.\(^{58}\) Based on the Superior Court’s approval of online duels in the blogosphere, the *Baglow* motion approach portends to take its cues from this more “classical” English form of dispute resolution. Whatever the courts ultimately decide, *Baglow* will be a bellwether of where Canada stands in its balance of individual reputation and freedom of expression online – a landscape that is fast becoming the dominant forum for the transmission of news, culture and opinion in Canada and across the globe.

*Baglow* poses questions that are inherently tied to notions of Canadian society and public policy, meaning that, however the courts decide, you can be sure that the decision will be a contentious one. Nevertheless, we should always bear in mind that areas of the law that most fundamentally inform our democracy, such as the concept of individual reputation and free expression are often inexact and difficult to apply. Such is the price of a vibrant and responsive concept of the Rule of Law. Perhaps more to the point, William Prosser, a tort scholar and former Dean of the law

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\(^{58}\) See *Hill* at para. 116.
faculty at UC Berkeley once remarked: “There is a great deal of the law of defamation which makes no sense”. 59

As we become more dependent on technology to communicate, learn and debate, it will be interesting to see how nuanced the courts will be in determining what an “ordinary” Canadian reader finds defamatory online. The general trend in Canadian law appears to be towards a more robust defence of free expression at the expense of individual reputation, although Baglow would also be an opportunity for Ontario to recalibrate the equation. What is clear is that Baglow will greatly influence the rules for free speech online, meaning that as media makers and consumers, the Baglow decision will affect all of us. For now at least, keep your helmets and knee-pads ready. Things could get ugly.