

August 14, 2006

ARTICLE

"The Band And Antidote Must Be Taken Together": A Recent British Columbia Court Of Appeal Decision Reassures Publishers And Journalists

Originally published in the September/October 2005 issue of Masthead: the Magazine about Magazines. Republished on this website with permission.

The recent British Columbia Court of Appeal decision in *P.G. Restaurant Ltd. v. Cariboo Press (1969) Ltd.* may upset the stomachs but assuage the minds of publishers and journalists.* P.G. Restaurant provides a strong legal precedent for the defamation law principle that a court must consider the overall affect of an article accused of defamatory meaning; a court is not to dissect an article minutely and view individual passages in isolation. The statements of the court, and the facts underlying the judgment offer useful guidance to publishers and journalists, those most at risk from potentially costly defamation actions brought by the subjects of their articles.

The plaintiff in P.G Restaurant ran a restaurant named Mama Panda's. The restaurant offered an "all you can eat" buffet-style dining facility. In June 1999 it had the misfortune to host a customer carrying the Norwalk virus. The customer suddenly vomited towards the centre of one of the serving tables. No vomitus landed on the food itself, but a spray of microscopic particles of the Norwalk virus was released. The virus infected other patrons, who contracted the virus through air particles, by eating replacement food on which the virus settled, or by touching the serving tables that remained contaminated despite the restaurant's efforts to clean the surfaces. Thirteen persons who had eaten or worked at Mama Panda's that day, including the vomiting customer, were later diagnosed with the virus.

The next month the defendant newspaper, *The Prince George Free Press*, published the article in question under the four-column headline "Vomit Serves Up Virus at Buffet". The article carried a quotation from the restaurant's owner stating that the illness was not caused by Mama Panda's food but was brought in by a patron. The article included a quotation from the Chief Environmental Health Officer stating that the outbreak was likely caused by contact with surfaces that were not adequately disinfected. The Health Officer was also quoted as saying

"This is a definitely an atypical event. In most food poisonings the food itself is contaminated with bacteria. This was a virus. As well, it may not have been the food was involved."

These four sentences were also highlighted in a quotation window smaller than the headline but larger than the article, extending over two columns of the article.

The restaurant understandably suffered an immediate downturn in business. Despite the restaurant's efforts to remedy its reputation – including a letter from the Health Board; an advertisement; and a printed clarification from the newspaper -- the restaurant's economic fortunes did not improve. It closed its doors 3 years later.

The restaurant sued the newspaper, the publisher, the owner, the editor, the reporter, and the Regional Health Board. It claimed damages for harm to reputation, as well as specific loss of business, and the value of the folded business itself.

The plaintiff corporation was successful at trial. The trial court found that the "sting", or defamatory essence of the article was that restaurant patrons had contracted the virus by eating food that had been vomited upon. Specifically, the prominent headline, coupled with a reference to "food poisoning" conveyed the impression that the restaurant had negligently failed to clean up the vomit, leading to restaurant patrons consuming vomit-laden food.

The trial court ordered that the newspaper and the reporter pay \$633,423 in damages to the restaurant. This damage award marks one of the highest defamation damage awards in Canadian history. The lawsuit against the editor, the owner, and the Health Board were dismissed.

The British Columbia Court of Appeal reversed the trial decision, and dismissed the claim. The essence of the Court of Appeal's decision is that the trial court erred in focusing excessively on individual passages of the original article, and failing to consider the overall impression made by the article. The Court of Appeal specifically found that the article could not reasonably lead to the defamatory meaning that the food had been vomited upon, as identified by the Trial Judge. The overall effect of the article was that clean-up had been inadequate, and that as a result other patrons were infected. Both of these statements were true. As true statements, they could not found liability in defamation.

In reaching its conclusion that the article was not defamatory, the Court of Appeal referred to the venerable defamation principle of "bane and antidote": if something disreputable is said about the plaintiff in one part of a publication, but is qualified or corrected in another part of the same publication, both passages must be considered in determining whether the plaintiff has been defamed. The phrase finds its origins in an 1835 case decided by Baron Alderson, *Chalmers v. Payne*.

The principle gained further prominence a decade ago in the colourful case of *Charleston v. News Group Newspapers Ltd.*[1995] 2 A.C. 65, decided by the House of Lords, Britain's highest court of appeal. In the facts leading to *Charleston*, the English tabloid *News of the World* profiled a video-game which inserted the faces of television actors and actresses onto the bodies of real pornographic models in salacious poses. The publication included a graphic display of the images. The article's captions and headlines gave the impression that the images were real, making teasing reference to the television characters played by the profiled actors: "Strewth! What's Harold up to with our Madge?" A reader looking beyond the sensation of the graphic and headline would learn from the article that the defamatory images were not real, but were computer compositions.

While decrying the "gutter journalism" of the *News of the World*, and its hypocrisy of simultaneously decrying and sensationalizing the images, the House of Lords found in the newspaper's favour and dismissed the plaintiffs' claim. The Lords concluded that the headline and images must not be taken out of context, but must be considered overall with the explanatory text of the article. It did not matter that some readers (especially *News of the World* readers) might only look at the pictures or only read the headlines and ignore the text, thus reaching the defamatory conclusion that the plaintiffs were engaged in pornographic activities. The publication was to be considered as a whole. The text of the article thus provided a neutralizing contextual antidote for the bane of the scandalous headline and images.

P.G. Restaurant reached a similar conclusion: even if the early part of the article might have led readers to think that patrons had suffered from food poisoning, the later quotation from the Health Officer indicating that "it may not have been the food that was involved", and that the illness was caused by the contact with the serving surfaces (i.e. and not by the food itself) served as the antidote to the article's earlier suggestion that patrons ate contaminated food.

The Court looked not only at the words themselves, but also the layout of the words, to conclude that there was adequate antidote. The highlighting of the Health Officer's quotation in a quotation box reinforced the finding of a sufficient antidote. The defendant publisher and reporter thus must be thankful to the copy editor who decided to extract and feature the Health Officer's quotation.

Although the defendants were relieved of having to pay a significant monetary judgment, they did not escape unscathed. The Court of Appeal noted that the reporter made an error in referring to the illness being caused by "food-poisoning". The Court also described the "Vomit Serves Up Virus" headline as "dramatic and offensive" if taken by itself.

Pronouncements on the law of defamation by Canadian appellate courts are relatively rare. As a Court of Appeal decision, P.G. Restaurant will have strong precedential value across Canada. This precedent will assist in protecting publishers, editors, and journalists from defamation liability based upon an overly technical interpretation of controversial passages in articles taken in isolation from the overall context of the words.

The case also offers strategic publication advice for publishers, editors, and journalists. These would-be defendants can better protect themselves by including quotations that serve as antidotes to controversial statements in other parts of the article. As an extra precaution, such quotations and statements should be prominently positioned or displayed in the article. The antidote information could be placed towards the beginning or the end of the article for maximum effect. It could also be featured in a quotation window, or incorporated in the primary or secondary headline, or referred to in a section heading of an article.

Note that the mere existence of antidote quotations or explanations will not render an article judgment-proof. It will certainly not protect the publisher or journalist from being sued by an aggrieved subject of a controversial article. Whether or not an "antidote" is sufficient to counteract the "bane" in an article will be determined through careful consideration by the trier of fact, be it the judge or jury. P.G. Restaurant reinforces that this consideration is to be broad and contextual, rather than narrow and artificial; it thus serves as solace to responsible and balanced journalists.

* 2005 BCCA 210. The full text of the decision is available on the British Columbia Court website: <http://www.courts.gov.bc.ca/jdb-txt/ca/05/02/2005bcc0210.htm>

By: David A. Crerar

Services: [Appellate Advocacy](#), [Defamation & Media Law](#), [Disputes](#)
