LIBEL AND CLASS

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The article attempts to present a social analysis of Canadian libel law. It argues that the law is expressly biased against poor and working-class plaintiffs. This is anomalous in terms of the central ideological postulate of bourgeois legal systems -- equality before the law.

L'article cherche à présenter une analyse sociale de la loi canadienne sur la diffamation. Il démontre que la loi est formellement prédisposée contre les plaignants appartenant aux classes laborieuses et indigentes. Ceci est une anomalie étant donnée l'idéologie centrale d'égalité devant la loi postulée par les systèmes légaux bourgeois.

Introduction

The law of libel contains a number of provisions, both substantive and procedural, which limit the ability of poor and working-class plaintiffs to obtain redress for injury to reputation. In what follows I will set out these provisions using the Ontario law as an illustration, and venture some analysis of them. My aim in doing so is not to expound legal doctrine in the fashion of the traditional article. Indeed, I assume a basic
familiarity with libel law on the part of the reader. The purpose rather is to take note of certain well-established principles and practices and then attempt to order them from a social perspective. My premise, to adopt the words of a research study prepared for the Royal Commission on Newspapers (Kent Commission), is that libel law "...is not very accessible to the average litigant" (Wright, 1981, 49).

Legal Representation

The Legal Aid Act (R.S.O. 1980, c.234) is an appropriate starting point. The Act provides in section 15 that:

A certificate shall not be issued to a person,

(a) in proceedings wholly or partly in respect of defamation or loss of service of a female in consequence of rape;

The effect of the section is that legal aid is expressly denied in two sorts of civil proceeding.

Prior to the 1980 revision of the Statutes of Ontario, three additional actions -- breach of promise of marriage, alienation of affections, and criminal conversation -- were mentioned in s.15 (R.S.O. 1970, c.239, s.15). The words "or seduction" also appeared after the word "rape". It is not clear why these five actions had been excluded, nor why defamation was lumped together with the others.

On the first point, the exclusion appeared initially in the voluntary legal aid scheme which the Law Society of Upper Canada established in 1951 (Joint Committee on Legal Aid, 1965). The Joint Committee on Legal Aid noted the exclusion
in its 1965 Report, but recommended that it be retained (111). The Report gave no reason for this recommendation. It was simply stated that "no representations at any time were made to the Committee that there should be any change in these exclusions under any extended legal aid plan" (Joint Committee, 1965, 59). No question was raised about the matter in the Ontario Legislature when the Bill arising from the Report was debated (Legislative Assembly, 1966, 5201).

Concerning the other point one can only speculate. It might have been thought that the four other actions were archaic or obsolete, or that they tended in practice to be frivolous and vexatious. The fact that the three actions which no longer appear in s.15 were statutorily abolished in 1977 and 1978 tends to support these views. I find it difficult, however, to see how either view could plausibly be advanced with respect to defamation proceedings. Whatever may have been the reasons for it, the provision quoted above first became law in 1966 (R.S.O. 1966, c.80, s.15).

Slightly more than a quarter of all legal aid expenditures in Ontario go towards fees and disbursements in civil actions (Law Society, 1981, 38-40). The most expensive category is divorce or other domestic matters, which in 1980-81 accounted for $ 9,185,678 out of $ 11,284,765 spent on civil actions. Given that a relatively small part of the legal aid budget goes for non-domestic matters anyway, it seems difficult on strictly financial grounds to justify the exclusion of defamation proceedings.

Since legal aid is denied, a potential plaintiff will have to finance the action out of his or her own pocket. Libel actions are expensive. Further, a plaintiff will have difficulty finding a lawyer who knows much about libel. Libel is usually not dealt with in Torts courses offered in
Ontario Law schools (Wright, 1981, 49 - 50) and does not receive specific treatment in the Bar Admission Course. A lawyer in a small general practice will seldom handle a libel action. A plaintiff will have to seek counsel from among those practitioners who specialize in libel action. Such practitioners are usually found in large firms. Their time is valuable. Of course, if the defendant is a newspaper in a chain or a network television station, it will be able to call on the services of a skilled and experienced libel lawyer. In addition, libel actions are normally tried by a jury. This tends to make libel actions even more costly.

Retraction and Apology

The ability which the law gives to defendants to mitigate damages by retraction or apology can place severe pressure on an impecunious plaintiff. Common law recognised that an apology could operate to mitigate the defendant's damages. The Libel and Slander Act (R.S.O. 1980, c.37) has retained this principle, but has both clarified and expanded it. A written apology, tendered at an early opportunity, may be pleaded in mitigation by defendants generally (s.22). Where the defendant is a newspaper or broadcaster, and the libel was originally published without malice or gross negligence, an apology made at the earliest opportunity will have a like effect (s.9). Section 5 of the Libel and Slander Act is significant. If the defendant is a newspaper or broadcaster and makes a "full and fair" retraction within three days of the plaintiff giving notice that he or she believes himself or herself to have been libelled, the amount recoverable in subsequent proceedings is reduced to "actual damages".

Now the law is in fact somewhat more compli-
cated than this brief recitation would suggest. Thus, there must be a real apology or retraction and not simply a repudiation of the libel (Brannigan v. S.I.U., 1964; Platt v. Time, 1964). There are also certain differences in effect between an apology and a retraction. For example, justification may be pleaded as a defense where there has been a retraction (New Era v. Toronto Star (1963), but not in conjunction with an apology (Williams, 1976, 108). The general result of an apology or retraction, however, is that the plaintiff will be unlikely to collect more than "actual" or "special" damages -- direct pecuniary loss attributable to the libel. The award of damages for injury to reputation is largely precluded. The plaintiff does have the satisfaction, for what it may be worth, of an apology. He or she will have to be very determined, or very rich, to continue to seek the added solace of a judgment by a court.

Payment Into Court

If the defendant has retracted or apologized and the plaintiff still persists, then the coup de grace, a payment into court, may be administered. This step should be sufficient to dissuade any but the wealthiest or most foolhardy of plaintiffs. The effect of payment in is well known. If the plaintiff refuses to accept the money paid into court and persists in pursuing his or her claim, she or he will be penalized by having to pay the costs of the action incurred subsequent to the date of the payment in, unless the amount of money which is eventually awarded as damages exceeds the amount of the payment in. This device is generally available to defendants in civil actions (Rules of Practice, 1980, Reg. 540, Rule 306), but there are special provisions applicable only to libel actions. First, in the case of a newspaper or a
broadcaster, the libel must have been published in good faith or without malice or gross negligence (Libel and Slander Act, s.11). Secondly, and more important, the fact that payment into court has been made may be brought to the attention of the judge or jury (Ontario Rule 317). The screws on the plaintiff are tightened another turn.

Security for Costs

The defendant in a libel action may ask that the plaintiff give security for costs (Libel and Slander Act, ss.13, 20. Also Ontario Rule 373). To obtain an order to this effect the defendant must show by affidavit:

a. the nature of the action and of the defence;

b. that the plaintiff is not possessed of property sufficient to answer the costs of the action in case judgment is given in favour of the defendant;

and

c. either (i) that the defendant has a good defence on the merits, or (ii) that the grounds of action are trivial or vexatious.4

If the plaintiff is unable to comply with such an order, the proceedings are to be stayed until the required security is given. There are, however, cases where an impecunious plaintiff with a bona fide cause of action has, at the discretion of the court, been required to post only a nominal sum as security of costs. This discretion has been exercised when the circumstances are such that to order the plaintiff to give full security
for costs would deprive him or her of a cause of action.  

Measure of Damages

Assuming that a plaintiff actually manages to have his or her libel action proceed to trial, he or she will discover that, when it comes to injury to reputation, some people are more equal than others. I do not propose here to discuss the general difficulties involved in quantifying, in an amount of money, injury to reputation; nor shall I consider the entire range of factors, in particular the conduct of the defendant, which are supposed to be considered in determining the amount to be awarded. I am concerned only with the way in which, and the extent to which, the social and economic status of the plaintiff will enter into the computation of damages.

In the first place, libel actions are usually tried by a jury (Judicature Act, R.S.O. 1980, c.223, s.57). Juries ordinarily give general verdicts and they never give reasons. The award of a particular sum of money is simply announced. Accepting this, it seems to me inconceivable that a jury would not be influenced by the various indicia of class -- dress, speech, mannerisms -- which the plaintiff exhibits. This speculative view is fortified by the statements of judges and commentators who assert that social status is definitely among the factors to be weighed when arriving at an assessment of damages.

The general approach has been expressed by Professor Jeremy Williams: "...the position of the plaintiff or his occupation may well affect the award of damages" (1976, 140). The cases use similar language, referring to such matters as "...the position of the parties in society and their standing in the community" (Stopforth v.
Goyer, 1978), the "position and standing" of the plaintiff (Paletta v. Lethbridge Herald, 1978; Baxter v. C.B.C., 1980; See also McKewen and Lewis, 1974, 177 - 178), "...the actual standing and reputation of the plaintiffs in the community" (Neeld v. Western Broadcasting Co. Ltd., 1976; Vogel v. C.B.C., 1982). The justification advanced for this view runs roughly as follows. The higher the plaintiff's position or standing in society, the greater the reputation the plaintiff will have. The greater the reputation, the more serious the injury caused to it be a libel. And it must be the case that the more serious the injury, the larger the amount awarded as damages (Neeld v. Western Broadcasting Co. Ltd., 1976). For example, Chief Justice Deschenes of the Quebec Superior Court stated the following in 1978 concerning the principles to be observed in assessing damages where the plaintiff was a politician.

If society wants, as it should, that its best citizens turn to public affairs, it must show the high esteem in which it holds them; and those who would imprudently risk, by a stroke of the pen, to destroy the reputation of such dedicated men ought to be prepared to pay the high price that such a misdeed deserves (Snyder v. Montreal Gazette, 1978).

The decision of the Nova Scotia Court of Appeal in Barltrop v. C.B.C. (see also Tataryn, 1981) is also illustrative. Briefly, Dr. Barltrop, an English physician, had appeared as an expert witness for two refining companies at a public hearing into allegations that the companies were causing lead pollution. Barltrop received $1,000 a day and expenses from these companies while appearing. In a subsequent documentary on the radio programme "As It Happens", the C.B.C. broadcast the following statement by an American pathologist:
Dr. Barltrop is a paid consultant to the lead industry. He is paid to say what he has just said.

The Court of Appeal held that this statement, and, indeed, the programme as a whole, was libellous and proceeded to assess damages against the C.B.C. While the court accepted that Barltrop had not proven the loss of any consulting business as a result of being libelled, it nonetheless awarded substantial damages. The major factor the court considered in arriving at this conclusion was Dr. Barltrop's "professional eminence".

The moral seems clear. A person who is socially significant is deemed to have a good reputation and one who libels another will pay heavily. An ordinary person cannot have much of a reputation and will be unlikely to collect much in the way of damages from someone who libels him or her.

Conclusion

Let me briefly recapitulate. If a poor or working-class person gets libelled and wants to sue, something roughly like this will happen. He or she will be denied legal aid and will retain a lawyer who is neither knowledgeable nor experienced in libel matters. Conversely, if the defendant is a large newspaper or a broadcaster, it will very likely have available the services of an experienced libel lawyer. After the libel notice is issued, the defendant may retract. At this point the plaintiff's lawyer will likely advise acceptance of the retraction. If the plaintiff is determined to proceed despite this advice, the defendant may make a payment into court. If that
is not sufficient, the defendant might ask that the plaintiff be ordered to give security for costs. Assume that the plaintiff is undeterred, presses on and receives judgment against the defendant. He or she will then discover that, contrary to whatever one may think about oneself, he or she has no reputation to speak of. He or she will be awarded a token sum as damages. This sum will be less than the amount paid into court and the plaintiff will be presented with an enormous bill for costs. Indeed, that may not be the end of the matter. The defendant may decide to appeal. The appellate court judges may not give the plaintiff even the courtesy which he or she received from the jury. If that which seemed reasonable to the jury does not appear in the same light to a bench of appellate judges they may set aside the trial court's judgment (See for example, the Supreme Court of Canada's decision in McLoughlin v. Kutasy, 1979).

Now it may well be objected that the foregoing is somewhat fanciful since poor or working-class people do not, in the existing scheme of things, get libelled very often. This, up to a point, is true. The media prefer to comment on the doings of the rich, the famous, and the powerful. But it is not the case that poor or working-class people are never libelled.

When this happens, the law is expressly biased against the plaintiff. This is anomalous. The central ideological feature of bourgeois legal systems is that, formally at least, they treat all people as equals. The law may affect people unequally, but each person confronts the legal system as the notional equal of all others. But not in the law of libel.
FOOTNOTES

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²The law in the other common law provinces is similar.

³Breach of promise of marriage was abolished by the Marriage Act, S.O. 1977, c.42, s.32, now R.S.O. 1980, c.256, s.32. The other actions fell victim to the Family Law Reform Act, S.O. 1978, c.2, ss. 65-72. See now R.S.O. 1980, c.152, ss. 65 - 72.

⁴Gunn v. North York Public Library Board (1977) 2 C.P.C. 368. This decision overruled Hill v. Creed Furs Limited (1972) 3 O.R. 827 and applied to s.20 of the Libel and Slander Act the same construction which had earlier been placed on s.13 of the Act, which is in essentially similar terms. Oshanek v. Toronto Daily Star (1966) 1 O.R. 492. See also, Nikolic v. Northern Life Publishing Company (1976) 1 C.P.C. 335.


⁶It must be admitted that there is no case which explicitly states this much. However, it is my opinion that this is an inference which can
legitimately be drawn from the case law. See also, Robertson (1976). Although not directly on point, Leonard v. Sun Publishing Co. Ltd. (1956) 4 D.L.R. (2d) 514 makes the point that a small reputation means a small award.

"One could make out a case that a great deal of journalistic commentary about the labour movement is libellous of union members generally. See Cosbey (1978), Solidarity (1980). See also Whitaker et. al. v. Huntington (1981) 15 C.C.L.T. 19, where an M.P. was successfully sued by a local union president after having publicly asserted that the union was undemocratic.


REFERENCES


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