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The Law of Defamation: Proposals for Reform

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The anomalous and haphazard history of the law of defamation has led to the survival until the present day of two torts—libel and slander—dealing with what is essentially an invasion of the same interest, namely, the interest in reputation and good name. The law of slander has undergone little substantive change since the close of the 17th century and the foundations for libel were laid in the late 18th and early 19th centuries. As early as 1812, Lord Mansfield deplored the distinction based upon mere form and proceeded to explode the reasons for its continuance but conceded that the schism was too well established to be repudiated. Many able legal scholars have broken lances with this branch of the law but with little success. Notwithstanding the fierce criticism of this enfant terrible of the law it has been the stepchild of reform, generally unwanted and unnoticed. Two recent events are of particular interest to students of this subject: (1) The Defamation Act prepared by the Canadian Conference of Commissioners on Uniformity of Legislation in 1944, which has been adopted in two provinces; and (2) the Report of the Committee on the Law of Defamation, “Presented by the Lord High Chancellor to Parliament by Command of His Majesty, October, 1948.” It is proposed in this article to examine some of the results of these two events, to compare the state of American law, and to make certain recommendations.

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2. Thorley v. Kerry, 4 Taunt. 355, 366, 128 Eng. Rep. 367, 371 (C.P. 1812), “If the matter were for the first time to be decided at this day, I should have no hesitation in saying, that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken.”


The methods and techniques of mass communications have been urged in support of the view that the distinction between libel and slander should be discarded. Modern inventions such as radio and television have made it increasingly difficult to draw the line between the two, yet drawing the line is of great practical importance for recovery frequently depends upon the classification adopted. Whereas all libels are actionable without proof of actual pecuniary loss, the plaintiff in an action for slander must prove that he has suffered special damage as a direct result of the slander unless the words fall within certain limited and somewhat arbitrarily defined categories of abuse that are slanderous per se.

The Committee on the Law of Defamation is opposed to general assimilation although it admits that the bifurcation is arbitrary and illogical. Slander is often trivial, frequently good-tempered, is normally not taken seriously by speaker or listener, and, in the great majority of cases, does little or no harm. If all slander were made actionable per se the opportunity for trivial but costly litigation would be enormously increased. The rule requiring proof of special damage, while resting upon no logical basis or principle, is a satisfactory compromise giving adequate protection in the common run of cases while avoiding the encouragement of petty complaints.

The Canadian Defamation Act, on the other hand, creates a

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8. Report, §§ 33-41. The Committee recognized that under the law of Scotland all statements which would be actionable in written form are equally actionable if spoken. It conceded that no serious disadvantages have resulted from this unity, nor any excessive litigation but concluded that the development and historical background of English law is so different from the Scots that the experience of the latter could not be translated. Two members of the Committee dissented, favoring the assimilation of the law of slander with that of libel. The dissenters thought that no adequate reason now exists for perpetuating a distinction which originated by an accident of English legal history. They point out that for more than 100 years there has been a substantial body of legal opinion in favor of assimilation. Report, §§ 40.

One writer has made the point that the difference between Scots and the English law on this score is due not so much to differences of source as to the fact that Scots courts steadily focused attention upon the nature of the injury sustained and did not become obsessed with drawing fine distinctions and juggling artificial principles and technical rules. Normand, Law of Defamation in Scotland, 6 Camb. L. J. 327 (1938). Also see Gloag and Henderson, Introduction to the Law of Scotland 412 (4th ed. Gibb & Walker, 1946).
new tort of "defamation" which includes both libel and slander and all defamatory publications are made actionable without proof of damage.9

In Louisiana, alone of our states, all defamation whether oral or written is actionable without proof of damage and the assimilation has apparently been administered without undue difficulty.10

At least four proposals11 have been made for the assimilation of libel and slander: (1) To merge libel into slander and require in all cases proof of actual damage as essential to the existence of a cause of action.12 This alternative has been popular with newspaper publishers because it would definitely limit the scope and availability of the action. (2) At the other end of the spectrum is the proposal that all defamation be actionable without proof of damage.13 As we have seen, this is the state of affairs in Scotland, Louisiana, and under the Canadian Uniform Act.14 Opponents of this solution argue that opportunities for extortionate suits are increased, that much slander is trivial, harmless, and unworthy of redress; and that the interest in freedom of speech requires that some safety-valve be left open for the expression of unflattering but volatile views. (3) Another proposal is to abandon the distinction based upon form but to distinguish between major and minor defamatory imputations. The English Press Union Bill, which was introduced in Parliament in 1938 but failed of passage, was of this tenor. It took the narrow law of slander as its model and would have made proof of actual damage an essential to recovery, even in the case of libel, save in a few specified cases.15 Libel would not have been actionable without proof of special damage unless the words complained of imputed sexual immorality, drunkenness or cruelty; charged the plaintiff with having committed an offense punishable by imprisonment; contained an imputation that the plaintiff was afflicted with an obnoxious contagious disease; or were published of the plaintiff in relation to his

14. See notes 9, 10, 11 supra.
15. Paton, supra note 6. For the full text of the Press Union Bill see Note, 85 L. J. 440 (1938).
office, profession or trade or in relation to his conduct in the performance of a public duty. But the fixed categories of slander per se now found in the law of slander have been far from successful and the substitution of new but similar classifications has questionable value. (4) A final proposal is to use the extent of publication as a basis of classification. Thus, defamation published in a newspaper or on the radio, because of its greater potentialities for harm, might well be actionable without proof of special damage while a private letter or conversation might not. This method seems more reasonable than the present attempt to draw a line between written and oral communication.

Radio broadcasting has been the form of communication that has rendered the distinction between libel and slander obsolete. Aural aggressions transmitted over the radio may reach an audience of many millions and will cause, much, if not more, damage than a newspaper article however large its circulation. A radio listener usually does not know whether the words he hears are read from a manuscript or spoken extemporaneously, and it is of little consequence to him whether they were written or oral in their inception. In this country, however, it is generally held that if the words are read from a manuscript they are classified as libel but if spoken extemporaneously they are slander.

The legislatures of a few states have attempted to deal with the problem but they have not followed a consistent pattern, some branding defamatory broadcasts libel and some slander.

The Committee on the Law of Defamation forthrightly recommends that all defamatory statements transmitted over the radio or by television be treated as libels and actionable without proof of special damage. Of course, the general assimilation of libel and slander under the Canadian Act includes radio broadcasting.

16. Prosser, Handbook on Torts 809 (1941)
17. The Canadian Act, for example, contains certain sections applying specially and exclusively to newspapers and broadcasting stations. Alta. c. 14, §§ 13-18 (1947), Man. c. 11, §§ 13-18 (1946)
18. Donnelly, supra note 6, at 14-18.
DEFAMATION

INADVERTENT LIBEL

The great weight of authority in England\(^2\) and the United States\(^2\) is to the effect that the publisher of a newspaper, book, or periodical is strictly liable for the defamatory matter he prints. Whether radio stations are to be held to the same liability is in a state of confusion and statutes have not been consistent.\(^2\) The effect of strict liability is to make the printing of words an ultrahazardous activity—the defendant publishes at his peril unless he can establish the narrow defense of privilege. This doctrine has not gone without criticism and a few successful attacks have been made upon it.\(^2\) While it is true that strict liability affords opportunities to the unscrupulous to bring extortionate suits it has been supported on the ground that the power of the press to destroy the reputation of an individual is so great as to make strict rules necessary;\(^2\) that the rule checks undesirable journalism;\(^2\) that sufficient protection is afforded by the rule that permits evidence of good faith in mitigation of damages;\(^2\) and that the press can protect itself through insurance or indemnity provisions in its con-

25. Paton, supra note 6, at 670.
Furthermore, the media of mass communications are usually large industrial enterprises organized for profit and are more strategically placed than their victims to absorb and distribute losses.

A common law palliative for a libel defendant is a full, fair, and unequivocal retraction which usually precludes the recovery of punitive damages and can be shown in mitigation of general damages. At least twenty states have enacted statutes providing


29. In a defamation action the jury may consider three kinds of damages: special, general, and punitive. Special damages refer to a specific and pecuniary loss which the plaintiff has sustained, such as the loss of a job. General damages include such elements of harm as injury to reputation, general loss of trade or business, wounded feelings, physical pain and illness resulting from injury to the feelings, and estimated future damages of the same sort. Where the defendant's conduct has been particularly outrageous or "malicious" the jury may award the plaintiff a windfall by way of "smart money" called "punitive" or "exemplary" damages. McCormick, Handbook on Damages 443-445 (1935)


A refusal to retract when requested to do so may be shown by the plaintiff as evidence of malevolence or improper purpose in publishing the original statement. Reid v. Nichols, 166 Ky. 423, 179 S. W. 440 (1915), Crane v. Bennett, 177 N. Y. 106, 59 N. E. 274 (1904), Wallace v. Jameson, 179 Pa. 98, 98 Atl. 142 (1897), Note, 35 Harv. L. Rev. 867 (1922).

A retraction is regarded as a complete repair as much as it may not reach the same people who read the offending article. Perrett v. New Orleans Times Newspaper, 23 La. Ann. 170 (1873) Consequently a jury must consider both the original article and the retraction in its determination of the net damage sustained by the plaintiff. Webb v. Call Pub. Co., 173 Wis. 45, 180 N. W. 263 (1920).

A retraction may also be used to show that the plaintiff has suffered less than he claims in the way of actual damage to his reputation. Webb v. Call Pub. Co., 173 Wis. 45, 180 N. W. 263 (1920), White v. Sun Pub. Co., 164 Ind. 426, 73 N. E. 890 (1905) And where privilege is in question it may be evidence of the defendant's good intentions and worthy motives from which the jury may conclude that the privilege has not been abused. Note, 35 Harv. L. Rev. 867, 870 (1922).

that a retraction may be introduced in evidence by the defendant in mitigation of damages. An evaluation of this type of legislation is made difficult by two factors (1) legislative vagueness and (2) judicial hostility. Instead of limiting recovery in the event of a retraction to "special" or "general" damages—the adjectives having a rather definite connotation—most statutes use the term "actual" damages. They fall into two general groups (1) Those where the term "actual" damages is defined or construed by the courts to mean non-punitive damages, and (2) those where the term is used or the courts have construed it to mean special damages only. If the statute falls within the first category it makes no change in the common law rule for the effect of a retraction is merely to preclude the recovery of punitive damages. If the statute is of the second type it is likely to encounter constitutional difficulties as depriving the plaintiff of a "property right" in his name, as depriving him of "due course of law and justice administered without delay", or as class legislation in favor of the

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"These damages to a person's reputation are in the nature of a property right; they have been said to constitute property." The court then held the statute constitutional insofar as it merely eliminated punitive damages. On the latter point, it is generally held that there is no constitutional objection to the elimination of punitive damages as they do not constitute a "property right." Comer v. Age Herald Pub. Co., 151 Ala. 613, 44 So. 673 (1907), Osborn v. Leach, 135 N. C. 628, 47 S. E. 811 (1904), Neafie v. Hoboken Printing & Publishing Co., 75 N. J. L. 564, 68 Atl. 146 (1907), Kelly v. Hall, 191 Ga. 470, 12 S. E. 2d 881 (1941).

34. The Kansas Bill of Rights (§ 18) provides that all "persons for injuries suffered in person, reputation or property shall have remedy by due course of law and justice administered without delay." The Kansas Supreme Court in Hanson v. Krehbiel, 68 Kan. 670, 75 Pac. 1041, said that "general damages" are not merely speculative but "are such injuries to the reputation as were contemplated in the bill of rights." The Court also held that a retraction is not an ample substitute for "due course of law." See also Park v. Detroit Free Press, 72 Mich. 560, 40 N. W 731 (1888).

A similar Minnesota statute was upheld in Allen v. Pioneer Press, 40 Minn. 117, 41 N. W. 936, but the Minnesota court in a later decision would seem to have practically emasculated the statute by applying it only to cases where the defendant was not negligent. Thorson v. Albert Lea Publishing Co., 190 Minn. 200, 251 N. W 177 (1933).
In fact, Professor Morris concludes, after an excellent and thorough analysis of retraction statutes,\textsuperscript{36} that "the important point is that in jurisdictions where this type of legislation is in effect and has been interpreted, the sum total of significant changes in the measure of damages when inadvertent libel has been retracted is zero." A few states have extended their retraction statutes to include radio and television\textsuperscript{37} but there is no reason for believing that these extensions will be received with greater favor by the courts than the ones limited to newspapers.

The Canadian Defamation Act\textsuperscript{38} limits the plaintiff to a recovery of special damages where the defamation was published in good faith and retracted by the newspaper or broadcasting station before the commencement of suit.

The Committee on the Law of Defamation has taken a drastic step in regard to inadvertent libel. The Committee refused to follow the suggestions of a number of witnesses that an unintentional and non-negligent defamatory publication not be actionable at all. It did recommend, however, that where the defendant takes reasonable precautions before publication to ascertain whether or not the statement is defamatory, the plaintiff should be restricted to demanding the publication of a correction and apology, and, if a correction and apology are published no damages at all should be recoverable.\textsuperscript{39} In the event the parties cannot agree upon the form and manner of publishing the correction and apology the Committee recommends that either party be authorized to apply to a High Court Judge sitting in chambers whose decision as to the form of the correction and apology and the manner in which it is to be published shall be final and not appealable.\textsuperscript{40} It should be noted that the defendant must have exercised reasonable care in ascertaining that the statement was not defamatory of the plaintiff. The Committee ducked the important question of whether the plaintiff or the defendant should have the onus of proof.\textsuperscript{41} Inasmuch as the facts upon which reasonable belief should be based and

\textsuperscript{35} Park v. Detroit Free Press, 72 Mich. 560, 40 N. W. 731 (1888).

"It is not competent for the legislature to give one class of citizens legal exemptions from liability for wrongs not granted to others." For the contrary view see Allen v. Pioneer Press, 41 Minn. 117, 41 N. W. 936 (1889), and Note, 43 Harv. L. Rev. 126, 130 (1929).

\textsuperscript{36} Morris, supra note 32, at 42.


\textsuperscript{38} Alta. c. 14, § 17 (1947), Man. c. 11, § 17 (1926).

\textsuperscript{39} Report, §§ 62-66.

\textsuperscript{40} Report, § 67.

\textsuperscript{41} Report, § 73.
the precautions that were in fact taken are peculiarly within the knowledge of the defendant it would appear that the burden should be upon him. The plaintiff should be permitted to salvage this much from the drastic change proposed.

In this country there would be considerable doubt as to the constitutionality of a statute incorporating the suggestions of the Committee.42

TRUTH

For a long period in English law truth was not a defense to a criminal action for libel. At the present time, however, in England and in the great majority of American jurisdictions it is a defense when published either for the public benefit or for good motives and justifiable ends. In civil actions for libel truth is a complete defense in England and in most states in this country although in eleven states it is a defense only if the libel be published for “justifiable ends.”43

An objection to making truth a complete defense to an action for libel is that the rule permits a defendant to publicize isolated youthful lapses on the part of a person who, having long ago repented and made amends, has properly acquired a good reputation in the eyes of his fellow men. A pertinent example is the case of a woman who, in her adolescence, bore an illegitimate child but has since become a highly respected member of the community. For this reason, some of the witnesses who appeared before the Committee on the Law of Defamation suggested that the rule of criminal libel be applied to a civil action and that truth should not be available as a defense unless the defendant satisfied the court not only that the statement alleged to be defamatory was true but that it was also in the public interest that it be published. The Committee rejected this suggestion44 on the ground that it would place too great a burden upon the press to guess—and to guess rightly—in advance whether a court would decide that the publication was in the public interest. This rationalization begs the question for the press must make such a guess insofar as criminal libel is concerned and even in civil actions if it plans to rely upon the defense of fair comment. The conclusion is also rather hard to reconcile with the Committee’s cavalier rejection of the “practical” criticism that the law of defamation is unpredictable and with

42. Cases cited notes 33, 34, 35, supra.
43. Ray, Truth: A Defense to Libel, 16 Minn. L. Rev. 43 (1931).
44. Report, ¶ 78.
45. Report, ¶¶ 7, 16.
its great faith in the ability of the courts to prescribe the bounds of permitted and proscribed speech.\textsuperscript{46}

Although in order to succeed in the defense of "justification" it is only necessary to prove that the substance or sting of the libel is true, this must be done in respect to each separate charge contained in the libel, otherwise the defense fails.\textsuperscript{46} It may well be that a libel contains a series of serious charges which the defendant succeeds in proving up to the hilt and one, quite minor, charge which he does not succeed in proving to be substantially true. In such a case the plaintiff is entitled to a verdict and damages even though the minor charge which is false can have caused no appreciable damage to the plaintiff's reputation. The Committee recommends\textsuperscript{47} that the law be changed so as to allow a defendant to succeed in a defense of truth if he is able to prove that so substantial a portion of the defamatory allegations are true as to lead the court to believe that any remaining allegations not proven to be true do not add "appreciably to the injury to the plaintiff's reputation."

\textbf{Qualified Privilege}

Section 4 of the Law of Libel Amendment Act of 1888\textsuperscript{48} grants a qualified privilege to a fair and accurate report of certain governmental proceedings. The privilege can be lost through malice and the Act also provides that the defense shall not be available if the defendant has refused or neglected to publish a reply requested by the plaintiff by way of contradiction or explanation. The Canadian Act\textsuperscript{49} contains a similar provision but it also includes reports that have been broadcast by radio and gives the plaintiff the right to broadcast "a reasonable statement of explanation or contradiction by or on behalf of the plaintiff on at least two occasions on different days and at the same time of day as the alleged defamatory matter was broadcast or as near as possible to that time."

The Committee recommends\textsuperscript{50} that the categories of reports entitled to the privilege of fair report be extended and that the right of reply apply to most of the extensions.

Both the Canadian Act and the Committee's recommendation constitute an endorsement in principle of the \textit{drott de r{\accentuatem}ponse} of

\begin{itemize}
\item \textsuperscript{46} White v. White, 129 Va. 621, 106 S. E. 350 (1921), Prosser, \textit{Handbook on Torts} 855 (1941), Report, \textsuperscript{52}79.
\item \textsuperscript{47} Report, \textsuperscript{98}82.
\item \textsuperscript{48} 51 & 52 Vict. c. 64 (1888)
\item \textsuperscript{49} Alta. c. 14, § 10 (4) (1947), Man. c. 11, § 10 (4) (1946)
\item \textsuperscript{50} Report, \textsuperscript{95}95-111.
\end{itemize}
DEFAMATION

French law, a device that might well be considered as an alternative to an action for defamation.51

MITIGATION OF DAMAGES

Inasmuch as injury to the plaintiff's reputation is an element of "general damage" and a good reputation is presumed, the defendant is allowed to meet the issue and prove, in mitigation of damages, that the plaintiff's name was already tarnished.52 There is no little dispute as to how far he can go in this endeavor. It is almost universally admitted that he can submit in the form of opinion evidence the plaintiff's general reputation in the community for the trait involved in the defamatory charge, e.g., honesty, chastity. About half of the states confine the evidence to reputation in respect to the particular trait; the others admit also evidence of general reputation.53 How far the defendant may go in showing particular incidents in the life of the plaintiff which are to his discredit raises a more difficult question. On this point it is generally accepted that on the issue of damages the plaintiff's record of particular indiscretions is not open to proof by the defendant.54 The reason for this view seems to be that evidence of particular misconduct is irrelevant for it merely shows, in the neat phrase of Mr. Justice Cave in Scott v. Sampson,55 "not that the plaintiff has not, but that he ought not to have, a good reputation."

The Committee feels56 that the doctrine of Scott v. Sampson leads, in practice, to inequitable results because, first, it is almost impossible to find witnesses prepared to testify that the plaintiff is of general bad reputation and as a consequence the rule may operate so as to enable a notorious rogue to recover damages for defamation. The Committee did not refer to any cases where this has happened, however. It is also pointed out that the doctrine has largely been nullified by the ordinary rule permitting a witness to be cross-examined as to credibility. If the plaintiff takes the stand he can be asked questions as to particular instances of mis-

55. 8 Q. B. D. 491, 505 (1882).
conduct, not for the purpose of mitigating damages but to question his credibility. The Committee thinks it inevitable that, if the jury believes the plaintiff to have been guilty of acts of imprudence disclosed as a result of cross-examination as to credibility, this belief will be reflected in the amount of damages which they award. It recommends, therefore, that the doctrine of Scott v. Sampson be abrogated and that a defendant, upon giving due notice to the plaintiff, be entitled to rely in mitigation of damages upon specific instances of misconduct on the part of the plaintiff other than those charged in the defamatory publication.

**Rolled-Up Plea**

Where a defamatory statement consists in part of allegations of fact and in part of expressions of opinion, it has become a common practice in England for defendants to utilize the so-called "rolled-up plea." An example of this type of pleading is as follows:

"Insofar as the words complained of consist of statements of fact, they are true in substance and in fact, and insofar as they consist of expressions of opinion, they are fair comment made in good faith and without malice upon the said facts, which are a matter of public interest."

In the annals of a profession placing a premium upon equivocation this gem of duplicity deserves a distinctive place. On its face it is impossible for a plaintiff to determine what defense or defenses will have to be met—a plea of justification, a plea of fair comment, or both. In Sutherland v. Stopes,\(^58\) however, the plea was treated as follows:

"It has been sometimes treated as containing two separate defenses rolled into one, but it in fact raises only one defense, that being the defense of fair comment on matters of public interest. The averment that the facts were truly stated is merely to lay the necessary basis for the defense on the ground of fair comment."

But granting that the plea is one of fair comment only, there is still considerable uncertainty as to the application of the defense for the defendant has not specified which statements he alleges to be factual and which are expressions of opinion. Consequently, the plea is used instead of an ordinary plea of fair comment or justification simply to avoid giving such particulars. Furthermore, where the plea is used it is for the jury to determine at the trial which of the words complained of are statements of fact and which

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57. Report, ¶ 156.
58. L. R. (1925) A. C. 47
are expression of opinion. Consequently, the defendant cannot be compelled to specify in his pleadings or by way of particulars which statements are which. The Committee recommends that the plaintiff be entitled to a bill of particulars when confronted with the "rolled-up plea."

The "rolled-up plea" has been used in this country, particularly in New York where it has been held that it is for the jury to distinguish between the statements of fact and those of opinion. A recent decision, however, has placed the whole question of the rolled-up plea in confusion. In \textit{Foerster v. Flynn}, the defendant had interposed a rolled-up plea and the plaintiff filed a motion to make more definite and certain. The court first pointed out the difficulty of ascertaining just what the defense was to be and then continued as follows:

"If this were an action in an English court the plaintiffs could safely prepare their case on the theory that only the defense of fair comment is involved. Since it is not, it would seem that good pleading would require the defendant to commit himself beyond question to the particular defense which he wishes to assert. It imposes no undue hardship to require the defendant, if he intends to present a defense of fair comment rather than a defense of justification, to make the choice in his pleadings."

The court then directed the defendant to serve a pleading

"(1) which separately states the defenses of justification and fair comment, if both defenses are sought to be availed of by the defendant; (2) with respect to the defense of fair comment, that he specify whether the matters contained in paragraphs 5 through 38 constitute the underlying facts on which the comment is based, (3) if he does not wish to confine himself to paragraphs 5 through 38 as constituting the underlying facts, he specify precisely what facts he intends to assert defensively."

\textbf{Defamation of the Dead}

Although nearly half of the states have statutes making it a crime to "blacken and vilify the memory of one who is dead," the criminal statutes are collected in Armstrong, \textit{Nothing But Good of the Dead?} 18 A. B. A. J. 229 (1932) and Wittenberg, \textit{Dangerous Words} 202 (1947). The quotation in the text is from the Kansas Statute which is representative. Kan. Gen. Stat. Ann. § 21-2401 (1935).

The conviction under the Washington statute of a biographer of George
The Committee on the Law of Defamation considered the advisability of making a civil remedy available but decided against it, giving both a legalistic and a policy reason for its decision. Inasmuch as the basis of a civil proceeding for defamation is the damage to the plaintiff’s reputation the Committee could see no logical basis for a proposal that the relatives of a deceased should be entitled to bring an action for statements defamatory of the deceased alone. Nor did it feel that there is any justification for making such a remedy available to the personal representative of the deceased since the estate is not normally damaged by defamatory statements. This latter observation seems to lose sight of the point that it is not necessary to show damage in a libel action or where the words are slanderous per se. Damage is presumed.

Washington was upheld in State v. Haffer, 94 Wash. 136, 162 Pac. 45 (1916) Note, 19 A. L. R. 1517, 1520 (1922)

The criminal statutes have not been interpreted as giving rise to a civil action for libel of the dead. Renfro Drug Co. v. Lawson, 138 Tex. 434, 160 S. W. 2d 246 (1942), Hughes v New England Newspaper Publishing Co., 312 Mass. 178, 43 N. E. 2d 657 (1942), Patterson v. Colgate, 129 Misc. 417, 220 N. Y. S. 677 (1926)


The Roman, French, and German codes all recognize libel of the dead as a legal wrong and permit recovery in a civil action. Note, 26 Corn. L. Q. 732 (1941)

Under the doctrine that the publication of a statement concerning A may be of such a character as to defame B, relatives of a deceased have attempted to bring suit in their own right. But mere relationship to the deceased is not enough and in order for the suit to be maintained it must appear that the defamatory statement “directly” reflects upon the deceased’s relatives who are suing in their own right. Rose v. Daily Mirror, 284 N. Y. 335, 31 N. E. 2d 182 (1940), noted in 26 Corn. L. Q. 732 (1941), 40 Col. L. Rev. 1267 (1940), and 19 Tex. L. Rev. 515 (1941), Wellman v. Sun Printing and Publishing Association, 66 Hun 331, 21 N. Y. Supp. 577 (1892), Saucier v. Giroux, 54 Cal. App. 732, 202 Pac. 887 (1921) See Note, 132 A. L. R. 891 (1941)


64. Report, ¶¶ 27-29.
From the standpoint of public policy the Committee thought that historical research would be unduly arrested if historians and biographers were put to strict proof of the statements contained in their writings. If those engaged in writing history were compelled, for fear of proceedings for libel, to limit themselves to events of which they could provide proof acceptable to a Court of law, records of the past would, we think, be unduly and undesirably curtailed. This argument is not only a reflection upon the quality of historical research but overlooks the fact that defenses of justification and fair comment can be preserved. Even if we agree with the cynic that history is but the "distillation of rumor" it is questionable whether history and biography are so much more vital than contemporary news reporting that defamation in the former case should be excused and not in the latter, particularly since some writers seem purposely to save their vitriol until the death of their antagonist. Furthermore, in contemporary society, family prestige and reputation unfortunately have considerable bearing on social, economic and political opportunities. It would seem that a carefully drawn statute limiting the right to maintain a civil action to those so closely related to the deceased as likely to be adversely affected by the defamation would be advisable providing wide latitude is given to the defenses of justification and fair comment.

Group Defamation

It has been convincingly demonstrated that defamation and the law of defamation were important factors in the struggle between democracy and fascism; that they were used by the Fascists and Nazis as major political weapons. Defamation of opponents is one of the standard devices of political propaganda, serving a two-fold purpose: (1) Providing scapegoats for all troubles and (2) serving to build and unify an anti-democratic group. If suits are brought against the defamers the court room is used as an arena for further vilification and abuse, the vilifiers cravenly hiding behind the cloak of privilege. Political defamation has been directed particularly against minority religious and racial groups which receive little protection against this type of abuse by the criminal
and a civil remedy for group defamation is usually denied for the reason that the defamation is not "of and concerning the plaintiff." Consequently an impersonal reproach of an indeterminate class is not actionable.

In 1935, New Jersey enacted a statute\(^7\) making guilty of a misdemeanor

"Any person who shall print, write, multigraph or in any manner whatever make or produce any book, speech, article, statement, circular or pamphlet which in any way, in any part thereof, incites, counsels, promotes, or advocates hatred, abuse, violence or hostility against any group or group of persons residing or being in this State, by reason of race, color, religious, or manner of worship."

The statute was promptly held unconstitutional on the ground that the terms "hatred, abuse, violence or hostility" are abstract, vague, indefinite and uncertain.\(^8\)

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\(^{8}\) In 1947, Indiana enacted an "Anti-Hate Law" whose policy was declared to be "prevent racketeering in hatred" by reason of race, color or religion. Ind. Ann. Stat. § 10-904-10-914 (Burns, Supp. 1947). For an excellent discussion of this far reaching statute see Wampler, The "Anti-Hate" Act, 22 Ind. L. J. 295 (1947).

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Another objection to statutes punishing group defamation is that they would curtail free and frank political discussion and it is for this reason that the Committee on the Law of Defamation opposes any change in the existing law of England. This threat to freedom of expression was admirably spelled out by Judge Wallace in a decision holding that a libel against "all persons of the Jewish religion" was not indictable:

"As is so well pointed out in the briefs submitted by amicus curiae, it is wiser to bear with this sort of scandal-mongering rather than to extend the criminal law so that in the future it might become an instrument of oppression. We must suffer the demagogue and the charlatan, in order to make certain that we do not limit or restrain the honest commentator on public affairs.

And when one realizes how many forms of religion might consider themselves libeled and seek legal redress, were our laws so extended, and when we reflect on how our courts might, in such event, find themselves forced into the position of arbiters of religious truth, it is apparent that more would be lost than could be gained by attempting to protect the good name of a religion by an appeal to the criminal law."

hostility is aroused in the mind of the listener as a result of what a speaker has said? Nothing in our criminal law can be invoked to justify so wide a discretion. The Criminal Code must be definite and informative so that there may be no doubt in the mind of the citizenry that the interdicted act or conduct is illicit."

73. Report, ¶¶ 30-32.
In this case the American Committee on Religious Rights and Minorities, the American Jewish Committee, the American Jewish Congress, the American Civil Liberties Union, and the Human Relations Committee of the National Council of Women, all filed briefs amicus curiae and, while denouncing the conduct of the defendant, nevertheless contended that the safeguarding of free speech, free press, and religious liberty made it desirable that the indictment be dismissed.

The American Jewish Congress has apparently reversed its position for it was instrumental in having introduced in the 81st Congress several bills which would make it a federal crime "knowingly to bring or cause to be brought into the United States . . . to send by common carrier or other agency, or to deposit or cause to be deposited in the United States mails for mailing and delivery . . . any publication or material . . . containing any statement concerning any person, persons or group of persons designating, identifying, or characterizing him or them directly or indirectly by reference to his or their race or religion, which exposes or tends to expose him or them to hatred, contempt, or obloquy or cause or tends to cause him or them to be shunned or avoided or to be injured in his or their business or occupation." See H. R. 2270, 81st Cong., 1st Sess. (1949), introduced by Representative Klein and H. R. 2272, 81st Cong., 1st Sess. (1949), introduced by Representative Keating. For the attitude of the American Jewish Congress see the letter to the editor of the New York Times from Mr. Joachim Prinz, Chairman of its Administrative Committee. N. Y. Times, Feb. 15, 1949, p. 22, col. 7, reprinted in 95 Cong. Rec. A 837 (Feb. 15, 1949).
For an acute criticism of a similar bill introduced in the 80th Congress by Representative Dickstein see Chaifee, Government and Mass Communications 117, 125 (1947).
In this country the Commission on Freedom of the Press is unanimously opposed to the enactment of group defamation legislation on the grounds that laws of this type would discourage free and open discussion, would probably be unconstitutional, would increase dissention between groups, and that group vilification is a symptom of evils whose cure must be sought outside the law.\textsuperscript{75}

In reply to the views of the Committee on the Law of Defamation and the Commission on Freedom of the Press it can be argued that the enactment of legislation is itself an educational process. Furthermore, the objective of group defamation is obviously the furtherance of anti-democratic ideas through attack on minority groups whose ability to defend themselves effectively is limited. It is this inequality in obtaining access to the channels of communication that prevents the free interplay of ideas and points of view so essential to the realization of the ideals enshrined in the First Amendment. The enactment of narrowly drawn statutes outlawing such an admitted social evil as group defamation of racial and religious minorities would not necessarily be attended by the danger of legislative curtailment of free expression for less desirable ends.\textsuperscript{76}

\textbf{The Chain Libel Suit}

The newspapers of the period during which many of the doctrines of libel law were being formulated had comparatively small circulations. The wide audience reached by the modern newspaper, the development of state, national, and international news coverage through the press associations and the furnishing of feature news articles, pictures, and interpretative articles by feature syndicates, have given a new aspect to the protection of reputation. On the other hand, it is no longer possible for the newspaper editor to supervise personally every news story, article, picture, cartoon, or comment used in the columns of his publication, and, if he could do so, it would hardly be possible for him to know, under all cir-

\textsuperscript{75} Chafee, Government and Mass Communications 129 (1947), Note, Freedom of Speech and Group Libel Statutes, 1 Bill of Rights Review 221 (1941).

\textsuperscript{76} See the suggested statute in the excellent note entitled Statutory Prohibition of Group Defamation, 47 Col L. Rev. 995 (1947).

While the Canadian Uniform Act is silent on the subject of group defamation, Manitoba law provides that the circulation of a libel against a race or creed may be enjoined at the suit of any member. Man. c. 11, § 19 (1946).
cumstances, whether libel is involved. Nonetheless, as we have seen, a defendant publishes a libel at his peril unless he can establish the narrow defense of privilege. The other media of communication such as radio and motion pictures with their vast and far-flung audiences make the dissemination of defamation as potentially harmful to the defamed person's reputation as a newspaper publication. 77

The development of mass methods of communication has made possible the chain libel suit with manifold liabilities for publishers. 78 The problems are raised by two recent cases. On December 23, 1941, the United Feature Syndicate distributed the column called "Washington Merry-Go-Round" to some three hundred newspapers having a readership of about twelve million persons. The article charged Representative Martin L. Sweeney with opposing the appointment of a Federal District Judge for the reason that the latter was a Jew. Congressman Sweeney brought some sixty-eight lawsuits, blanketing the United States, in which he demanded damages in an aggregate of approximately $7,500,000. 79 The other

77. The week-day circulation of the New York News in 1947 was 2,402,346, the Sunday circulation 4,716,807, that of the Chicago Tribune was 1,031,851 and 1,544,770; the New York Times, 543,000 and 1,092,054, the Los Angeles Examiner, 409,995 and 860,124. The best source of statistical information on the newspaper industry is Editor and Publisher, International Yearbook, Jan. 31, 1949.

78. Probably the first successful chain libel plaintiff was Annie Oakley who won 48 suits against 50 different newspapers, the damages awarded ranging from $500 to as high as $27,500, Ernst and Lindey, Hold Your Tongue 239 (1932), Butler v. Hoboken Printing and Pub. Co., 73 N. J. L. 45, 62 Atl. 272 (Sup. Ct. 1905).

situation is presented by the case of Hartmann v. Time, Inc., where Life magazine, in an issue of more than 3,900,000 copies, was alleged to have printed an article defamatory of the plaintiff. It should be noted that in the Sweeney cases the law suits were brought against different newspapers which carried the offending column while in the Hartmann case only one publication—Life—carried the article.

At common law every publication was said to give rise to a separate and distinct cause of action. Therefore, each time a newspaper or magazine containing libelous material was sold a new publication resulted and a fresh tort was committed. If this doctrine were applied in strictness to the Hartmann case, nearly four million separate causes of action arose, for Hartmann would have had, in theory, as many causes of action as there were issues of the publication containing the libelous matter in as many places as the publication occurred. This "multiple publication" rule had its origin in an era which hardly contemplated today's rapid dissemination of printed material to thousands of readers throughout the country by a single though complex mass distribution process, nor did its creators envisage the simultaneous publication to a vast radio audience by a single utterance. Some courts, to meet the needs created by modern methods of communication and believing the common law rule unsuitable, have evolved a "single publication" rule whereby all the congeries of acts involved in the economic process of getting the one issue of printed matter from the printer to the many readers are regarded as a single act of publication. Thus, if the economic process of "publica-


Drew Pearson's "Merry-Go-Round," which provoked the Sweeney suits, now appears in 600 newspapers which have a combined circulation of 20 million and his Sunday night broadcast over the American Broadcasting Company's network reaches an estimated 10 million people. Time, Dec. 13, 1948, p. 70, col. 2.

80. 166 F 2d 127 (3d Cir. 1948), cert. denied, 334 U. S. 838.
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In support of the "multiple publication" rule it can be argued that periodicals and newspapers should be held responsible for abuses of the right of free press, that the risk of libel is a calculated risk which defendants are better able to undertake than the average plaintiff. On the other hand, the "single publication" rule eliminates possible harassing suits and results in simplification of judicial administration.

Consistent with the multiple publication rule is the principle that the defendant is not permitted to apprise the jury that the plaintiff may have an opportunity to seek reimbursement from others who have participated in the wrong or that other suits have been or are being brought against him by the same plaintiff. It is said that the defendant is adequately protected by an instruction that the jury can assess damages only for the harm done by the defendant's particular publication. Nor do the decisions permit the defendant to show that the plaintiff has actually obtained a judgment against other circulators of the libel. This rule was changed in England by the Law of Libel Amendment Act in 1888 with respect to libels contained in "newspapers" and the Committee on the Law of Defamation recommends that in any


84. Sun Printing and Publishing Ass'n v. Schenck, 98 Fed. 925 (2d Cir. 1900), Vragg v. Hammack, 155 Va. 419, 155 S. E. 683 (1930); Norfolk Post Corp. v. Wright, 140 Va. 735, 125 S. E. 656 (1924), McCormick, Handbook on Damages 441 (1935).


86. 51 & 52 Vict. c. 64, § 6 (1888).

87 Report, 142-145.
action for defamation, whether or not the matter complained of was published in a newspaper, the defendant be entitled to give evidence in mitigation of damages that the plaintiff has recovered or brought other actions for damages or has recovered or agreed to accept compensation in respect to any defamatory statement "to the same purport or effect as the defamatory statement for which such action has been brought." The Canadian Act\textsuperscript{88} has a similar provision, but New York\textsuperscript{89} and Massachusetts\textsuperscript{90} appear to be the only states in this country having provisions of this type.

A defamatory communication which reaches more than one state raises an involved conflict of laws problem as to the choice-of-law\textsuperscript{91} Usually this issue is not considered by the court and only recently the Circuit Court of Appeals for the Seventh Circuit referred to it as a "novel problem."\textsuperscript{92} The problem becomes more complex when the communication reaches several states some of which follow the multiple publication rule and others the single publication rule.\textsuperscript{93} Judge Wyzanski, in a recent movie case,\textsuperscript{94} referred to the intricacies of the situation as follows

"It complaint had been made of showing not only in Massachusetts, but elsewhere, the Massachusetts court would have been clearly faced with the need of determining whether to regard the conduct complained of as a single tort or as multiple torts. If it took the single tort view the Massachusetts court would

\textsuperscript{88} Alta. c. 14, § 16(2) (1947), Man. c. 11, § 16(2) (1946)
\textsuperscript{89} N. Y. Civ. Prac. Act, § 338a
\textsuperscript{90} Mass. Ann. Laws c. 231, § 94 (1933), which provides "In an action for libel, the defendant may allege and prove in mitigation of damages that the plaintiff already has brought action for or recovered damages for, or has received or has agreed to receive compensation in respect of, substantially the same libel as that for which such action was brought."
\textsuperscript{91} Notes, 60 Harv. L. Rev. 941 (1947), 48 Col. L. Rev. 475 (1948), 61 Harv. L. Rev. 140 (1948), 16 U. of Chi. L. Rev. 164 (1948), 43 Ill. L. Rev. 556 (1948)
\textsuperscript{92} Christopher v American News Co., 171 F 2d 275, 281 (7th Cir. 1948)
\textsuperscript{93} This was the situation in Hartmann v. Time, Inc., 166 F 2d 127 (3d Cir. 1948), cert. denied, 334 U. S. 838 (1948). The suit was originally brought in the District Court for the Eastern District of Pennsylvania and the district court held that there was but a single cause of action—applying the single publication rule—which was barred by the Pennsylvania statute of limitations. Upon appeal to the Third Circuit Court of Appeals, the decision was affirmed in part and reversed in part. The circuit court determined that Pennsylvania follows the single publication rule and that the "single" cause of action arose in Illinois where the publication first took place. It therefore held that the Illinois cause of action "engrossed" the harm done in all states following the "single publication" rule and that this cause of action was barred by the statute of limitations. The court added, however, that the district court should have respected the laws of the states following the multiple publication rule and that the plaintiff could maintain an action in the district court based on publications in states following the multiple publication doctrine.
\textsuperscript{94} Kelly v. Loew's Inc., 76 F Supp. 473, 482, 484 (D. Mass. 1948)
presumably regard as 'the publication' not the circulation of the script (which admittedly differed from the movie), nor the circulation of the 'continuity' of the film, nor the first showing of the picture to producer's employees, but rather the first showing of the picture to the public. Then the Massachusetts court would have to determine whether the law to be applied to that 'publication' was the law of the place of production, or the law of the place of the first showing of the film to the general public, or the law of the place where plaintiff enjoyed his principal reputation, or some other law . . .

But decision on those implications should await an appropriate case. Before that case arises the problem may be dealt with by local or federal statute.”

There is an imperative need for uniformity in this field which might be achieved through federal legislation95 or by means of a Uniform Act.

**CONCLUSION**

It is not surprising that the Report of the Committee on the Law of Defamation has received a favorable press for its recommendations are, for the most part, to the advantage of prospective libel defendants of whom the press forms the great majority. The law of defamation has emerged from its trial, if not unscathed, at all events substantially vindicated as a just and reasonable body of judge-made rules, all founded upon principles which are not to be cast aside even though their precise application may be modified.96 When we criticize the law, consciously or unconsciously we adopt standards of value, for our conception of the purpose of any particular branch of the law determines the angle from which it is viewed. The failure of the committee to take a bolder line was perhaps due to several "inarticulate major premises." English libel plaintiffs probably win verdicts more often than they do in this country and it is certain that they obtain much higher verdicts.97 The Committee frankly admitted that most of the witnesses who appeared before it represented interests whose businesses were such as to expose them to the risk of libel and whose ex-

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95. Note, 60 Harv. L. Rev. 941, 951 (1948). As to the constitutionality of federal legislation on the subject of defamation consult, Donnelly, supra note 6, at 33-37


97. Chafee, Government and Mass Communications 103 (1947), Riesman, supra note 6, at 1117

Bills for the reform of the law of defamation to the advantage of the press were introduced in Parliament by Lord Brougham in 1816, by Lord Campbell in 1843; and by the Press Union in 1938. All failed of passage. Prosser, Handbook on Torts 808 (1941), Paton, supra note 6.
perience with the law of defamation had been almost exclusively in
the role of defendants.98

Except for an adumbrative solicitude for the press it does not
appear that the committee had any real frame of reference against
which the existing law of defamation was to be measured. Lacking
a philosophy its efforts were without direction. It paid lip-service to
the general criticisms of the law of defamation which it sum-
marized as follows: (1) unnecessarily complicated, (2) unduly
costly, (3) such as to make it difficult to forecast the result of
an action both as to liability and as to the measure of damages,
(4) liable to stifle discussion upon matters of public interest and
concern, (5) too severe upon a defendant who is innocent of any
intention to defame, and (6) too favorable to "gold-digging"
plaintiffs. It then dismissed them as "practical rather than sci-
entific", that, if true, they are not peculiar to the law of defamation
but represent the natural reaction of the layman when brought
into personal contact with the English legal procedure.99 Yet the
committee did not hesitate to resort to the "practical" in justify-
ing its recommendations that radio defamation be classified as
libel, that the doctrine of Scott v. Sampson be abolished, and that
the "rolled-up plea" be made vulnerable to a bill of particulars.
The Committee opposed general codification of the law of defama-
ton the ground that it is desirable to retain flexibility and
give wide latitude to judges and juries, within the framework of
judge-made rules, to deal with the varied and diverse problems
which claims for libel and slander provide.100 All in all the report
smacks of a rigid professionalism which shuns attempts to knife
through the facade of legal jargon on which pure professionalism
as a priestly cult thrives.

Every state in the United States and the District of Colum-
bia have legislated on the subject of libel and slander but the legis-
lation has not dealt with the field as a whole.101 It has been sporadic
and piecemeal.

Although the Commission on Freedom of the Press considered
the law of libel in the broad context of freedom of the press, there
appears to have been no thorough and exhaustive study of the
law of defamation in this country. The Restatement of Torts, not
being concerned with reform, has done little more than preserve

98. Report, § 5.
101. The statutes are collected in Arthur and Crosman, The Law of
Newspapers 500-578 (1940) and Angoff, Handbook of Libel (1946)
the existing befuddlement and, at least in one instance, has retarded further study and research. For example, in 1942 the Judicial Council of Massachusetts reported adversely to a suggestion that the law of libel be codified. Referring to the Restatement of Torts and its chapter on defamation, the report concluded that 102

"The law of Massachusetts except as modified by statute, is substantially in accord with the principles laid down in the 'Restatement', and with certain specific changes such as we recommend in this report, may be left for study in the 'Restatement'. It is a mistake to pile up 'codifications' at public expense where they are not needed. It simply means more printing of words for lawyers to disagree about, added to the present enormous volume of literature of the law."

The Committee on the Law of Defamation was appointed to "consider the Law of Defamation and to report on the changes in the existing law, practice and procedure relating to the matter which are desirable." 103 A similar study and report by a group of competent scholars would seem to be important in this country. The problems considered by the English committee would certainly need examination in the light of their operation here. But in addition to these such a group might properly consider the problem of the chain libel suit which is of particular importance in view of the modern methods of mass communication. Solution of this problem seems to require either a uniform act or federal legislation.

A study of the law of defamation need not limit itself to proposals for an internal renovation of the law, but should consider the advisability of new and supplementary remedies such as the "Right of Reply." 104

And finally, since the law of defamation is a form of government control over freedom of expression, a realistic study of this field should consider its relation to and effect upon the ideals of freedom of the press enshrined in the First Amendment for "whatever is added to the field of libel is taken from the field of free debate." 105

104. Consult, Donnelly, supra note 51, at 884.
105. Consult, Donnelly, supra note 51, at 884.
For provocative discussions of the relationship between defamation and freedom of expression, consult, Chafee, Government and Mass Communications 77 (1947); Dawson, Freedom of the Press (1924); Thayer, Legal Control of the Press 26-39 (1944); Hall, Preserving Liberty of the Press by the Defense of Privilege in Libel Actions, 26 Calif. L. Rev. 226 (1928); Veeder, Freedom of Public Discussion, 23 Harv. L. Rev. 413 (1910); Riesman, supra note 67, at 1282, 1285.