

Education and the Law of Defamation

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This paper summarizes Canadian law pertaining to defamation and looks at the educational cases in this area. The definition of defamation is explored generally, then the areas of defamation, libel, and slander are studied. Two related matters are examined: the importance of publication and the role of malice. Finally, the various defences available to a defendant in a suit of defamation are studied. Wherever educational cases are available, they are elaborated on and tied in to appropriate areas to explain the law of defamation as it relates to education.

Cette étude: résumé des lois canadiennes relatives à la diffamation et porte sur l'étude de cas en diffamation. La définition de diffamation est d'abord étudiée de façon générale, puis, disséquée: diffamation, libelle et calomnie. En outre, on étudie deux autres sujets: l'importance de la publication et celle de l'intention criminelle. Enfin, on traite des divers recours des personnes auxquelles on a intenté un procès en diffamation. Chaque fois qu'il existe des cas reliés à l'éducation, on les examine afin de mieux illustrer le lien entre la loi et l'éducation.

A recent British Columbia court case, *Haight v. Robb* (1975), awarding a teacher \$67,300 damages against a principal and six other defendants for libel and slander, created a nervous awareness in educators, and especially administrators, of possible involvement in a suit of defamation arising from acts or statements made in relation to their work. Superintendents and board members are obliged to pass judgment on the teaching performance of their employees; principals are increasingly expected to be involved in staff development, evaluation, and dismissal; parents and students are becoming more aware and concerned with their right to privacy, or, on the other hand, their right to information; and educators have a heightened awareness of their professional rights and obligations. All of these factors, coupled with an increasingly litigious society, make it mandatory that educators have a better knowledge of the law related to defamation, not only from the point of view of protecting themselves, but more so from the perspective of gaining confidence in the execution of their duties.

MEANING OF DEFAMATION

Essentially, the law of defamation is concerned with the preservation of a person's good name – the good name and reputation he or she actually enjoys rather than the good name and reputation which is felt to be deserved (Williams, 1976, p. 2). What then is a defamatory statement? In *Paul v. Van Hull* (1962), a case arising out of a situation where a journalist

and two former municipal councillors are accused of libelling six other municipal councillors by publishing in newspapers and other places accusations of disregard of duty in selling land, Maybank J. states:

the law, as I apprehend it, that governs cases of this kind [is], words that tend to expose one to odium (or hatred), ridicule and contempt (or any of them), have been held generally to be defamatory words. I am inclined to think a great many judgments have been given to plaintiffs whose reputations have been damaged but who were probably not in danger actually of being hated nor of being objects of ridicule and of whom people were not actually contemptuous. One may be lowered greatly in the estimation of his fellow men and yet his fellows will not hate him. (p. 644)

Scrutton L. J. in *Youssouppoff v. Metro-Goldwyn-Mayer* (1934), a case faced with problems of whether publication by the then recent invention of the talking movie picture was libellous or slanderous, defines a defamatory statement as: "A false statement about a man to his discredit" (p. 584). McEwen and Lewis (1974) write:

A defamatory imputation is one to a man's discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of right thinking persons generally. (p. 2)

Concisely, a defamatory statement is a communication which would cause one to be exposed to any or all of ridicule, contempt, discredit, lowering of reputation in one's office, financial discredit, or ostracism.

The question, however, embraces the following: In whose eyes are we concerned with this lowering of esteem, ridicule, contempt, et cetera? Lord Atkin in *Sim v. Stretch* (1936) states that the words complained of "would ... tend to lower the plaintiff in the estimation of right-thinking members of society generally" (p. 1240). Thus, the test in determining whether the imputation could be defamatory is not just by any person's standards, but by right-thinking members of society. "The question of what reasonable people should think is the standard against which the statement will be measured" (Williams, 1976, p. 11).

Defamation may also be had through innuendo. According to Williams (1976), "an innuendo may be said to exist where the plaintiff claims that the words complained of are defamatory in a sense other than their ordinary meaning" (p. 16). In a defamatory suit based on innuendo the plaintiff is faced with the responsibility of giving the particulars of the facts and matters on which he claims a defamatory inference may be associated with him, given that the receiver of the communication is aware of the offended party's circumstances (Williams, 1976, p. 16). Under innuendo, then, the law aims at defending a person's reputation from veiled defamatory references, these references being of such a nature that a sensible reader knowing the particular circumstances of the offended

party can draw inferences relating the defamatory statements with the party in question. Lord Reid in *Morgan v. Odhams Press Ltd.* (1971), a case dealing with alleged defamatory innuendo by a newspaper, put the test as follows: "What has to be decided is whether it would have been unreasonable for a hypothetical sensible reader who knew the special facts proved to infer that this article referred to the plaintiff" (p. 1163). Accordingly, one cannot plead nonliability in making a defamatory statement by saying "but I did not mention any names." When the statement is of such a nature that any reasonable person can make the association between the statement and the offended party, and the statement is defamatory, then liability will be held.

Here are some further facts regarding defamation. First, "defamation is a strict liability tort" (Williams, 1976, p. 4). Simply uttering the words, if found to be defamatory, will lead to a judgment for the plaintiff, regardless of the intention of the defendant, unless a specific defence is applicable.¹ The second point regarding defamation follows from the above statement, namely, that "the intention of the defendant is irrelevant" (Williams, 1976, p. 4), "the motive of the defendant is irrelevant in a defamation action" (Williams, 1976, p. 5), and "the defendant's state of mind will be relevant only to damages and not to liability" (Williams, 1976, p. 5). A third point is that one cannot claim as a defence that one is merely repeating a statement made by someone else. In repeating a statement one purportedly is creating the defamation anew, hence the repeater can be held liable for the repeated defamation. According to Williams (1976), "one who purports merely to repeat a statement made by another takes responsibility for the truth of the statement reported" (p. 7). It should be remembered, however, that the originator of the statement is not absolved from liability if the repeater should be found liable; both the originator and the repeater expose themselves to liability in uttering defamatory words (Williams, 1976, p. 7). Finally, one may under certain circumstances be found liable in defaming a corporation, in engaging in injurious falsehood, in invasion of privacy, and in breach of trust. The elaboration of these areas, however, is beyond the scope of this article.

TYPES OF DEFAMATORY STATEMENTS: LIBEL AND SLANDER

Defamatory imputations are usually conveyed in words, written or spoken. Other means of conveyance may be by statues, waxworks, pictures, photographs, cartoons, cinema or television pictures, marks on a pavement, burning a man in effigy, hanging a sign outside his house or hissing him or by signs or gestures (McEwen and Lewis, 1974, p. 41). Depending on the method of dissemination, defamatory imputation can be divided into two categories, libel and slander. Libel consists of some *permanent* form of defamatory statement or representation; slander, on the other hand, consists of statements, words, gestures or meanings

conveyed in a *nonpermanent* form (Rogers, 1975, p. 242). McEwen and Lewis (1974) write, "it is a libel to publish printed or written words, or an effigy, or any combination of these, if they convey a defamatory sense" (p. 73). Similarly, films, television pictures or images, if defamatory, are libelous, as it is to burn a man in effigy, or fix some disparaging object in front of his house (McEwen and Lewis, 1974, p. 73). On the other hand, there is a publication of slander where defamatory imputation is communicated "by spoken words or in some other transitory form, whether audible or visible, such as significant sounds, looks, signs or gestures" (McEwen and Lewis, 1974, p. 73). There is, in conjunction with these attempts at differentiation, a problem related to modern means of communication such as television, radio, and film. Are defamatory statements made on television et cetera nonpermanent or permanent, that is, slanderous or libelous? Jurisdictions which have defamation acts seem to have resolved this dilemma by providing that all defamation is actionable without proof of damage. In some instances the distinction between libel and slander has been eliminated completely (Williams, 1976, p. 56).²

Another important distinction between libel and slander is that libel, if it tends to provoke a breach of peace, is a crime as well as a tort (Rogers, 1976, p. 244); slander, as such, is not a criminal offence in Canada today. The Criminal Code of Canada makes provision regarding libel under the headings of seditious libel and defamatory libel. The provisions regarding seditious libel are as follows:

- 60(1) Seditious words are words that express a seditious intention.
 - (2) A seditious libel is a libel that expresses a seditious intention.
 - (3) A seditious conspiracy is an agreement between two or more persons to carry out a seditious intention.
 - (4) Without limiting the generality of the meaning of the expression "seditious intention," every one shall be presumed to have a seditious intention who
 - (a) teaches or advocates, or
 - (b) publishes or circulates any writing that advocates, the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada. (*Pocket Criminal Code*, 1977, s. 60)

Provisions regarding defamatory libel are:

- 262.(1) A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.
- 263 A person publishes a libel when he
 - (a) exhibits it in public
 - (b) causes it to be read or seen, or
 - (c) shows or delivers it, or causes it to be shown or delivered, with intent that it should be read by the person whom it defames or by any other person.
- 264 Everyone who publishes a defamatory libel that he knows is false is guilty of

an indictable offence and is liable to imprisonment for five years.

265 Everyone who publishes a defamatory libel is guilty of an indictable offence and is liable to imprisonment for two years. (*Pocket Criminal Code*, 1977, ss. 262–265)

The essential characteristics of defamatory libel as provided for in the Criminal Code are: that it is published in permanent form, that it is without lawful justification or excuse, and that it is likely to injure the reputation of a person by exposing him to hatred, contempt, ridicule, or insult. No mention is made of matter communicated in nonpermanent form, that is, slander.

Libel is considered to be the more serious form of defamation because of the permanency of publication, and consequently, its ability to cause harm indefinitely. In this respect, another important distinction between libel and slander is that in libel, if the plaintiff proves that a libel has been published of him, his cause of action is complete (McEwen and Rogers, 1974, p. 143). The seriousness with which defamatory libel is viewed can be deduced from the penalties attached thereto by the Canadian Criminal Code: (1) for publishing a defamatory libel which one knows is false (guilty of an indictable offence and is liable to imprisonment for five years) (*Pocket Criminal Code*, 1977, s. 264); and (2) for publishing a defamatory libel (guilty of an indictable offence and liable to imprisonment for two years) (*Pocket Criminal Code*, 1977, s. 265). Thus, whereas libel is actionable per se, that is, without proof of special damages, in slander special damages must be proved, except in special cases (McEwen and Rogers, 1974, p. 143).³ The special damages, which must arise as a natural and probable result of the slanderous publication, involve some

actual temporal loss – the loss of some material or temporal advantage which is pecuniary or capable of being estimated in money, that is, the loss or refusal of an office of employment, or the dismissal from a situation, or the loss of a client, or of a dealing, or the refusal of credit, even though there is no evidence that the plaintiff was given credit or would have been given credit, but for the words complained of. (McEwen and Lewis, 1974, p. 202)

Similarly, the loss by a husband of the consortium or conjugal society of his wife, or the loss of a wife of the consortium or conjugal society of her husband, or the loss of gratuitous entertainment or hospitality of friends, or the refusal of civil treatment at a hotel or tavern, if these result from the words complained of, constitute special damage (McEwen and Lewis, 1974, p. 202). Finally, the special damage must be the natural, reasonable, and direct result of the defendant's words (McEwen and Lewis, 1974, p. 202).

As stated, a slander is generally not actionable without proof of special damage. Special cases exist, however, where the slander is actionable per se, that is, without proof of special damages.⁴ The special cases are as follows:

1. an imputation of criminal offence;
2. an imputation of disease which is contagious or infectious, hence likely to prevent other persons from associating with the plaintiff;
3. an imputation of unfitness or incompetence, that is, where the words are calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication;
4. an imputation of unchastity or adultery to any woman or girl.

In Saskatchewan, section 25 of the Libel and Slander Act makes the following provision regarding the slanderous imputation of unchastity or adultery of women:

25 In an action of slander founded on words spoken of the plaintiff imputing unchastity or adultery to a female, whether married or unmarried, it is not necessary to allege or prove special damage but such words are actionable per se. (The Libel and Slander Act, 1965, s. 25)

PUBLICATION

An important element of defamation is publication, that is, the communication of the offending words to a third party.⁵ No action can be maintained for libel or slander unless the words complained of have been published. The term "publication" is taken to mean notification to people at large orally (slander) or by writing or print or some other permanent form (libel), or the communication of a defamation to a third person. No publication is had when the communication is made directly to the subject in question. According to McEwen and Lewis (1974), for defamatory purposes, it is not so much the words uttered that are important, as the fact that they were published, thus: "[the] material part of the cause of action is not the writing, but the publication of the libel" (p. 103).

Another aspect of publication is that "the publication should consist of some intentional and not merely accidental communication" (Williams, 1976, p. 62). Further, "where a person makes a comment which is accidentally overheard there is no publication" (Williams, 1976, p. 62).⁶ For a publication to take place, "the defendant must have intended that it should be published to those who received the communication" (Williams, 1976, p. 62). Where the defendant ought to have foreseen that there will be a receipt of the communication by a third party, publication will be had. However, no publication will occur if it is unexpectedly intercepted (Williams, 1976, p. 62). Moreover, every person who takes part in the preparation of the libel or distribution of it is responsible regardless of what part he played. The seller of printed matter, however, may escape liability if it can be shown the seller had no reason to suspect that the publication contained libel.⁷ Although a certain degree of intention is a requisite in publication, libel does not have to be intentional. Thus, "if a person intentionally publishes what he believes to be harmless material and it turns out to be libel, he is responsible even though he meant no

harm" (Spetz, 1974, p. 118). By the same token, if a person writes something defamatory, but does not intend publication, and it gets published or revealed to a third person through his own negligence or lack of care, it will be considered to have been published. Anglin C. F. C. in *McNichol v. Grandy* (1932) states:

where communication was not intended by him, and he neither had reason to know or to suspect that any other person was within hearing, when he addressed his slanderous statement to the plaintiff, with whom he thought he was alone at the time, he should not be held to have published to a third person who accidentally overhears, unless he can be charged with some fault leading to the communication to such third person. (p. 230)

An example of negligent behaviour is given in the same case where the defendant raised his voice in anger during a busy period of the business day when there was a high probability that someone would be around: "Nevertheless, in our opinion, there is here explicit, affirmative evidence of negligence of the defendant ... in fact that the defendant, being angry, raised his voice" (*McNichol v. Grandy*, 1932, p. 231).

In libel, then, publication means "the making known of the defamatory matter, after it has been written, to some person other than the person to whom it is written. If the statement is sent directly to the person of whom it is written, there is no publication of it" (McEwen and Lewis, 1974, p. 103). It is important to emphasize that the "uttering of a libel to the party libelled is clearly no publication for the purposes of civil action" (McEwen and Lewis, 1974, p. 103), since the communication of the defamatory matter cannot injure his reputation, though it may injure his ego and self-esteem. Clearly, then, a person's reputation is not constituted by a good self-opinion, but by the esteem held by others generally in the community. Again, if the libelled matter be delivered only to the plaintiff himself, no action will lie. This is similarly true where a third party delivers the communication but does not read it, becomes cognizant of it, or allows anyone else to read it. The same principle holds true for slander. Where the defamatory words are uttered to the person himself, without anyone hearing the words, there is no publication, and therefore no action will lie (McEwen and Lewis, 1974, p. 104).

Finally, where a received letter is opened by a private secretary, the defamatory material has been published and thus is actionable.

DEFENCES

The previous sections elaborating on the various aspects of defamation could leave the reader with the feeling that the law governing it is inflexible and harsh; this is not so. It does protect the good name of a citizen, but it also provides for occasions where a person may confidently communicate defamatory statements in the knowledge that the common

law recognizes that there are instances when this is necessary for the welfare of society. This section explores, under the various headings, the defences available to a defendant faced with a defamation suit: (1) nonpublication, nonreference; (2) no special damages, too remote a relationship, no disparagement of office, or uttered in heat; (3) consent; (4) justification; (5) absolute privilege; (6) qualified privilege; (7) fair comment; and (8) apology.

No Publication; No Reference

According to McEwen and Lewis (1974), one possible area of defence comprises the following:

1. That the defendant never published any of the words complained of.
2. That the words complained of did not refer and were not understood to refer (and were not capable of referring or of being understood to refer) to the plaintiff.
3. That the words complained of did not bear and were not understood to bear (and were not capable of bearing or of being understood to bear) the alleged or any defamatory meaning. (p. 51)⁸

No Special Damages; Too Remote; No Disparagement of Office; or Uttered in Heat

These defences refer to actions of slander only.

1. That the words are not actionable without proof of special damage and that none is alleged.⁹
2. That the special damage alleged is too remote in law.
3. That the words complained of were not calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the alleged publication.
4. That the words were words of heat or vulgar abuse.

A slander case in education related to this area is *Jones v. Jones* (1916), an English suit between a headmaster of a school and a cleaning lady (p. 481). The plaintiff was a certified teacher and headmaster of a school. The slander complained of was that one day the female defendant, who was the wife of the male defendant,

falsely and maliciously spoke and published of and concerning the plaintiff in relation to his profession as certified teacher and in relation to his office as headmaster of the said school words imputing that the plaintiff had been guilty of adultery with one Mrs. Roberts, a married woman, who was employed by the cleaner of the school. (*Jones v. Jones*, 1916, p. 481)

It appears that both the complaint and decision were based on the disparagement related to one's office rather than special damages. Viscount Haldane in his rationale held: "It is not in dispute that the imputation of such conduct, if believed, would be seriously prejudicial to a person in his position, and might lead to the loss of an appointment"

(*Jones v. Jones*, 1916, p. 488). He goes on, however, to state: "It is, however, clear that *there was no evidence that any words were used which referred to his office or his conduct in it*, and the first part of the finding cannot be relied on as anything more than an inference It was, moreover, not alleged that the appellant *had been dismissed or otherwise pecuniarily injured in his calling*" (*Jones v. Jones*, 1916, p. 488; writer's emphasis). Haldane, reviewing some earlier cases, gives examples where a clergyman failed to obtain redress for an imputation of adultery, and a school mistress was not permitted to lay a charge of prostitution. He says: "Such words were undeniably calculated to injure the success of the plaintiff in their several professions; *but not being applicable to their conduct therein, no action lay*" (*Jones v. Jones* 1916, p. 488; writer's emphasis). The appeal was dismissed with costs.

From the decision above it appears that a very narrow interpretation exists at common law concerning the meaning of "imputation against the plaintiff in way of his office, profession, or trade, or which will touch him in the way of his office, profession, or trade." It seems that if the words complained of imputed "either impropriety or misconduct in relation to or in connection with the profession or want of capacity to carry on the profession" (*Jones v. Jones*, 1916, p. 488), then the action probably would have been successful. In this case, counsel for the plaintiff did not establish that the allegations complained of by the headmaster included words which touched him in his office as headmaster and teacher by way of want of capacity to carry on his profession, or that he had suffered special damages through dismissal, or pecuniary loss. In consequence of this, no liability was found.

Consent

This is a good defence in a defamation suit where it can be shown that the publication was authorized by the plaintiff or made with his consent. In a Saskatchewan case, *Jones v. Brooks* (1974), Jones, suspecting certain unpleasant rumours about himself, hired private detectives to interview the defendants and obtain any slanderous material they could on tape recordings (p. 413). MacPherson J. in his judgment wrote: "But, I comment, too, that much of what was said of a defamatory nature by Brooks and Kondra to the detectives was provoked and cajoled and indeed invited by the words and manner of the detectives, particularly Poley" (*Jones v. Brooks*, 1974, p. 418). The judge, invoking the *volenti non fit injuria* principle, dismissed the case, stating at one point: "when *volenti* applies, the issues of privilege and malice become redundant. Because he had assumed the risk of being slandered the plaintiff cannot now be heard to say that a defendant exceeded his privilege or was malicious. The defendants have, as Justice Halpern said above, an absolute privilege" (*Jones v. Brooks*, 1974, p. 421).¹⁰

It must be remembered, however, that for the defence of consent to be acceptable "an ordinary person in the position of the plaintiff should be

able to appreciate that the publication of the comment is being consented to and the plaintiff must also do some overt act signifying consent” (Williams, 1976, p. 106).

Justification

The defence generally known as plea of justification (or truth), relies on the averment that the words published were true in substance and in fact. Since the chief ingredient of a suit for defamation is that the plaintiff has been injured by *false* statements about him, a complete defence in this situation is that the defamatory imputation is true. That the truth of an imputation is a good defence in a suit of libel or slander lies in the fact that one cannot claim right to a character he does not have; it simply brings him down to the level at which he is found.

There is, however, a proviso regarding truth being a complete defence in proceedings of defamation – this is that the publication was for the public benefit (Fleming, 1977, p. 545). In this regard, the courts hold no sympathy for an individual who may publish the truth, but where the motive for publication was vicious, without value to the public, and only for the purposes of ruining the defamed person.

In invoking the defence of justification one should be aware that truth is extremely difficult to prove. If one claims that a person is a “cheat, liar, thief, dope-pusher and pimp,” then he will be required to substantiate the veracity of every allegation. Proving just a few and not the remaining, say “pimp,” would not win a person his case. One must also prove the truth of every innuendo contained in the statement.

Finally, “unwittingly repeating a defamation affords no defence” (Spetz, 1974, p. 120). One cannot escape responsibility for repeating false defamatory statements because one believes them to be true. One should ascertain one’s facts before engaging in what smacks of defamation.

Absolute Privilege

The defence of absolute privilege rests on the belief that there are occasions on which public policy and convenience require that a person should be absolutely free from responsibility for the publication of defamatory statements. These occasions are:

1. Statements made in the course of judicial proceedings;
2. Statements made in the course of quasi-judicial proceedings;
3. Statements contained in documents made in judicial or quasi-judicial proceedings;
4. Statements made by one officer of state to another in the course of his official duty;
5. Statements made in the course of parliamentary proceedings;
6. Statements contained in reports published by order of either House of Parliament;

7. Statements contained in reports of the Parliamentary Commissioner and in communications between him and a member of the House of Commons for the purposes of the Parliamentary 1967 (British);
8. Fair and accurate reports in a "newspaper" of proceedings publicly heard before a court exercising judicial authority within Canada.

The above statements are instances of situations where it is considered by the courts and legislatures that the interests of society as a whole supersede those of a person or group to their right to privacy.

Qualified Privilege

The defence of qualified privilege is available when the allegedly defamatory statement is made on a privileged occasion. Such occasions are those where "statements are made in performance of a duty, in protection of an interest, are contained in privileged reports, or are professional communications" (Williams, 1976, p. 75). Lord Atkinson in *Adam v. Ward* (1916) established a privileged occasion as follows:

It was not disputed in this case on either side that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential. (p. 170)

McEwen and Lewis (1974), describing qualified privilege and privileged occasion, write:

On such occasions [privileged] a man, stating what he believes to be the truth about another, is protected in so doing, provided he makes the statements honestly and without any indirect or improper motive. These occasions are called occasions of qualified privilege, for the protection which the law, on grounds of public policy, affords is not absolute but depends on the honesty of purpose with which the defamatory statement is made. (p. 186)

"Qualified privilege" or "privileged statement," then, strictly speaking, mean the occasion on which the statement was made was privileged, namely, that there was an interest or a duty, moral, legal, or social, to make the statement, and that the person or persons receiving the statement had a corresponding interest or duty to receive the statement. Further, that the person, guided with proper motive, believed in the truth of the statement, that no malice was involved, and that the statement made was "pertinent to the discharge of the duty or the exercise of the right or the safe-guarding of the interest which creates the privilege" (*Adam v. Ward*, 1916–1917, p. 162). Breaches of any of these conditions will destroy the defence of qualified privilege.

Educators are frequently requested to write references or make comments on the competence of former students, employees, et cetera. Frequently there is doubt in the responder's mind as to his legal position

regarding making negative comments about the person in question. In this respect, Williams (1976) states: "Inquiries made about a person with whom the inquirer is contemplating a business relationship will be qualifiedly privileged" (p. 85). He quotes Lamont J. A. in support of his statement:

A good illustration of a privileged occasion is, where one is about to employ a servant inquires of his former master as to the servant's character and conduct. The answer of the master, although containing defamatory statements about his former servant, comes within the protection afforded by a privileged occasion, because it is so manifestly for the advantage of society that one about to employ a servant should learn what his previous conduct has been that it may well be deemed the moral duty of the former master to tell what he knows and believes without fear of being confronted with an action for libel. (p. 85)"

McEwen and Lewis (1974) write in more general terms regarding the protection accorded replies to confidential inquiries:

But where a person who is asked a question touching the character, financial position, or responsibility of another, bona fide believes that his inquirer is asking the question, not to gratify idle curiosity, but for some other purpose in which he has a legitimate interest of his own, it is not merely his right but his duty to answer, and if he does so in the honest belief that his answer is true and without any malice towards the person whose character or position is the subject-matter of the inquiry, his answer is a privileged communication. (p. 450)

Thus, bearing in mind the factors which will destroy qualified privilege, individuals responding to legitimate inquiries are in a strong position.

Newspaper reports, fairly and accurately made, and without malice, also are protected by qualified privilege. The Libel and Slander Act (1965) of Saskatchewan provides that the publishing of proceedings of parliament, legislatures, public meetings, school board meetings, municipal meetings, and meetings of boards struck under legislation shall be privileged unless it is proved that the publication was made maliciously (s. 10).¹²

The plea of qualified privilege will be defeated on the plaintiff showing that the defendant was motivated by malice in the publication. Malice may be one of various states of mind: "It may be spite, ill-will or a desire to do harm for its own sake" (Williams, 1976, p. 95). Rogers (1975) describes malice as (a) lack of belief in the truth of the statement or (b) use of the privileged occasion for an improper purpose (p. 295). He goes on to state that "lack of belief in the truth of the statement is generally conclusive as to malice" (Rogers, 1975, p. 295). Evidence of malice may be found in the publication itself; if the language used is utterly beyond or disproportionate to the facts, that may lead to an inference of malice. Malice may also be inferred from the relations between the parties before or after

publication or from the conduct of the defendant in the course of the proceedings themselves. Finally, evidence of malice may also be deduced from the mode of publication, for example, if there is wider dissemination of the statement than is necessary.

Sections 277 and 278 of the Canadian Criminal Code deal with matters germane to privileged information. Section 277, related to answers to inquiries, states that no person shall be deemed to publish a defamatory libel when he publishes in answer to inquiries made to him by a person who has an interest in knowing the truth, if (1) the matter is published, in good faith, for the purpose of giving information in answer to the inquiries; (2) the person who publishes the defamatory matter believes that it is true; (3) the defamatory matter is relevant to the inquiries; and (4) the defamatory matter does not in any respect exceed what is reasonably sufficient in the circumstances (*Pocket Criminal Code*, 1977, s. 277). Section 278, dealing with giving information to persons interested, states that no person shall be deemed to publish a defamatory libel to another who believes he has reasonable grounds for knowing the truth if the conduct of the person giving the information is reasonable, if the defamatory matter is relevant to the subject matter, and the defamatory matter is true, or if it is believed to be true.

The cases in education available in libel and slander seem to be primarily related to the area of qualifiedly privileged communication. The first one, *McIntire v. McBean* (1856), took place in 1885 in Ontario. Three of the defendants delivered to the superintendent a paper outlining reasons why they wanted to get rid of the plaintiff, a teacher and a minister of holy orders. One of the reasons stated, and the statement on which the schoolmaster brought an action of libel was "that the teacher is not a man of strictly temperate habits and good moral character, such as the law demands" (*McIntire v. McBean*, 1856, p. 535). Another point of action was that it was published to the school superintendent.

Robinson C. J., delivering the judgment of the court, stated that temperance (nondrunkenness) in a schoolmaster was very important. Second, that the defendants were free from prosecution in delivering the paper to the superintendent rather than to the school board (who only could dismiss a schoolmaster) because they had grounds for their action, and they acted "in sincerity and good faith, not maliciously and without just cause or excuse" (*McIntire v. McBean*, 1856, p. 541). Concerning the matter of malice it is stated

that where there is a fair occasion for making the statement complained of, it is not to be taken to be malicious (that is, done intentionally without just cause or excuse), and that one cannot sustain his action on malice alone, but that he must also show the statement to be false as well as malicious. (*McIntire v. McBean*, 1856, p. 543)

By way of summary,

where the libel complained of is clearly a privileged communication, the inference of malice cannot be raised upon the face of the libel itself ... but the plaintiff must give extrinsic evidence of actual express malice; he must also prove the statement to be false as well as malicious; and the defendant may still make out a good defense by showing that he has a good ground to believe the statement true, and acted honestly under the persuasion. (*McIntire v. McBean*, 1856, p. 534)

In the case, *Blagden v. Bennett* (1885), the matters of slander, privileged occasion, and malice vis-à-vis the office of school trustee are raised. The plaintiff, a school trustee, with another trustee, under the authority of the school board, purchased a quantity of firewood for use in the school house. The defendant, Bennett, in conversation with another trustee, made accusations that the trustees had paid too much for the wood, that the plaintiff had culled it, sold the best of it, and had drawn the culled wood to the schoolhouse. It was held that the words having been spoken by one interested person to another, the occasion was privileged; and in the absence of proof of express malice no action would lie. The plaintiff lost his case.

In the *Shannon v. King* (1932) case, an action in libel and slander was brought for false and malicious verbal statements, and libel contained in written reports published concerning the plaintiff by the defendant, principal of the Kitsilano Junior High School, and made to the superintendent of schools, chairman of the management committee of the Board of School Trustees, and to other members of the Board of School Trustees. The plaintiff was a teacher of good repute, and appeared to be doing a good job, but there came a time when "the school authorities take a stand against her and she is – without cause given – denied employment and that is the present-day position" (*Shannon v. King* 1932, p. 159). It appears that because of secret instructions or reports she was denied a position throughout the province. The problem was that although the plaintiff felt the reason she was unable to obtain a position was because of slanderous and libellous statements, she was not able to ascertain what these statements were. In order to obtain same she obtained an order for interrogatories (a formal set or series of questions) to defendant for the purpose of pleading. The interrogatories were not fully and sufficiently answered, hence she obtained an order that the defendant file a further affidavit to certain questions or alternatively that he be examined viva voce (orally). The defendant appealed against the order. The appeal was dismissed, apparently on the basis that the teacher was a lady of high character, who had apparently been doing a satisfactory job of teaching. Further, "everyone is entitled to be heard in his own cause. That is natural justice; here it apparently has been denied" (*Shannon v. King*, 1932, p. 159). This case establishes well the fact that the courts will not too readily

support the "black-list grapevine," but that one should be made aware of the allegations against him solely because of natural justice.

The next case, *Lacarte v. Board of Education of Toronto* (1959), illustrates the importance of correct procedure, the right frame of mind, and keeping a "clean house" in such matters as administrator-teacher relationships, dismissal and appeal procedures, disputes, and similar related matters. Lacarte, a high school teacher, claimed damages for libel arising from a letter of dismissal written to her by the defendant Board. The letter stated that her employment was being terminated at the end of the school year "on the ground of lack of cooperation with the principal and certain members of the staff" of the school. The statement of claim of Lacarte alleged that the letter of dismissal was malicious and unfair to her, that it wrongfully declared her guilty of not co-operating with the principal and members of the staff, and that it was written and circulated in such a manner as to make it impossible for her to secure the recommendation of a principal for future employment. Publication of the libel was alleged to have been made by the defendant to the principal and members of his staff, to other functionaries of the school board, to the provincial minister of education and his staff and to members of the attorney-general's staff. The defendant did not plead justification but alleged qualified privilege without malice, in that, according to the Teacher's Board of Reference Act (1946, Ont., c. 97) it was required that notice be given in writing, with the reasons being stated for the dismissal. Both the trial judge and the judges of the Court of Appeal held that the publication of the letter and the carbon copies of it were made upon occasions of qualified privilege and no malice was shown. Relying on the common law that "if a business communication is privilege, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of the communication which are in accordance with the reasonable and usual course of business" (*Lacarte v. Toronto*, 1959, p. 609)¹³ and on the fact that no evidence was adduced that the members of the advisory board who recommended dismissal were actuated by malice; the Supreme Court, in a three to two majority decision, upheld the decisions of the lower courts and dismissed the appeal.

Since the decision was made by a majority of one vote, it is useful to study the rationale underlying the dissent. Cartwright J. in writing it states that the words complained of were in their plain and ordinary meaning defamatory of the appellant and calculated to disparage her in her profession. He did not find it necessary to decide on the question of qualified privilege, but he did state that there was sufficient evidence adduced in the trial to infer from it that the principal, acting in the course of employment, was actuated by express malice, and hence a new trial should be held for a jury to decide the matter. Evidence indicated that the statement that Lacarte failed to co-operate with the principal was false,

that the principal was irritated with the fact that she complained repeatedly about various matters, and that the deteriorating relationship between the principal and Lacarte ripened into active dislike and resulted in a desire to get rid of her. The principle of law which Cartwright J. applied to this situation is the following:

where a corporation is under a duty to publish a statement about a person and in the preparation of that statement relies on information furnished by one of its employees whose employment extends to furnishing the information, the malice of the employee in furnishing defamatory information which is made part of the statement published by the corporation although members of the boards of directors or of trustees authorizing the publication are individually free of malice. (*Lacarte v. Toronto*, 1959, p. 618)

Justice Cartwright's argument is that although appropriate procedures were followed in the dismissal and no malice shown therein as proposed by the majority decision enough evidence was available to find the principal guilty of malice in a new trial, as he appeared to be motivated by malice in attempting to obtain the dismissal of the teacher.

The present case indicates, from the majority report, that the school board, directly or through its servants, has the right to evaluate teachers, to write evaluations, and to pass them on to the appropriate interested parties such as boards of reference. The dissent, however, tends to raise a flag of precaution, saying that all of these activities have to be done in fairness, without personal attempts to seek vengeance (malice), or without undue broadcasting of information in the official transmission of documents in order that the occasion of qualified communication and qualified privilege not be destroyed through malice, that is, spite, ill-will, or a desire to do harm for its own sake.

Fair Comment

The defence of fair comment is based on the premise that the comment made was fair, that it was on a matter of public interest, that it was a statement of opinion based on fact, that it was not malicious, and that it did not impugn the plaintiff's moral character or personal life.

Every person has a right to make a fair comment on a matter of public interest; this right is not restricted to the papers – they have no greater right to fair comment than the ordinary citizen.

Fair comment is distinguished from justification in that under justification the defendant must prove the truth of every defamatory fact alleged and every injurious imputation made, while under fair comment the defendant must prove that the facts on which the comments are founded are true and that the comment on these facts is fair (McEwen and Lewis, 1974, p. 292; Williams, 1976, pp. 113–121). McEwen and Lewis write that

the state of mind of the defendant at the time when he published the defamatory work is immaterial, and thus the presence of actual malice is irrelevant to the defence of justification. In the case of fair comment, however, the state of mind of the defendant at the time when he published the defamatory words is most material; in fact, proof of actual malice defeats the defense of fair comment (McEwen and Lewis, 1974, p. 292). This should be tempered, however, by recalling the discussion under "justification" where it was established that, on the Canadian scene, justification is no defence in libel where it is shown that the words were published with a vicious intent, with an intent to harm the plaintiff, and without any benefit to the public. Fair comment is distinguished from qualified privilege in that fair comment is available to every citizen, whereas qualified privilege is limited "to an individual who stands in such relation to the circumstances that he is entitled to say or write what would be libellous or slanderous on the part of anyone else" (McEwen and Lewis, 1974, p. 704). A privileged occasion is one on which the privileged person is entitled to make statements which might otherwise be defamatory.

In an action concerning fair comment the onus lies on the defendant to prove that the subject matter is one of public interest, and that the words are a fair comment on it. If facts are involved, the statement of facts must be true, with comments based on such facts also true (Rogers, 1975, pp. 294-296).

No educational cases related to this area were found.

Apology

Apology is in the anomalous position that it is not a defence in a suit of defamation at common law, but is an important factor in the mitigation of damages (Williams, 1976, p. 107). A mitigation of damages provision is usually incorporated in defamation acts, the one quoted from Saskatchewan being an example thereof:

In an action for libel or slander, where the defendant has pleaded a denial of the alleged libel or slander only or has suffered judgment by default or judgment has been given against him on motion for judgment on the pleadings, he may give in evidence in mitigation of damages that he made or offered a written or printed apology to the plaintiff before the commencement of the action; or, if the action was commenced before there was an opportunity of making or offering such apology, that he did so as soon afterwards as he had an opportunity. (Libel and Slander Act, R.S.S. 1965, s 4)

An apology must be made in the appropriate form. It must be genuine, "express regret for the original statement," and a "full and frank withdrawal of the charges or suggestions." Finally, "an 'apology' which reiterates the original statement will have the effect of aggravating damages" (Williams, 1976, p. 108).

APPLICATION TO EDUCATION

Effective delivery of education involves the participation of different groups and individuals allocated varied functions and duties. Depending, then, on the status of the role player, and the situation, a hierarchy of protections and defences is available to individuals in the freedom with which they may publish defamatory statements within the ambit of their jurisdiction. Accepting the definition, then, that defamation "is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally; or which tends to make them shun or avoid that person" (Rogers, 1975, p. 240), this section explores the hierarchy of defences and immunities available in defamation to the different levels of educational decision making, deliberations, and activities.

Occasions in education exist, as in other areas of public service, where complete freedom of communication is considered to be so important that absolute privilege will apply, that is, action for defamation cannot be entertained at all. According to Rogers (1975), "a person defamed on an occasion of absolute privilege has no legal redress, however outrageous the untrue statement which has been made about him and however malicious the motive of the maker of it" (p. 277). Instances germane to education where absolute privilege will apply are in the deliberations of legislatures and in quasi-judicial tribunals, such as boards of reference, struck under provisions of statutes. The basic principles underlying the extension of absolute privilege to these two areas is that, for the better interests of society, it is considered to be good that a person be able to speak his mind and express his thoughts without fear and hesitation. It should be remembered, however, that this protection extends only to those processes and materials of legislatures and quasi-judicial tribunals which are necessary to the proper execution of their business. It does not extend to defamatory statements made outside their proper scope, for example, to statements made outside the legislature.

In Williams (1976), making the statement that "[absolute privilege] extends to superior and inferior legislative tribunals and their committees" (p. 74), it could be wrongly concluded by extrapolation that absolute privilege extends to deliberations of all bodies, committees, and the like, arising out of provisions made by school acts and regulations, that is, to school board meetings, staff meetings, subcommittee meetings, and so on. This is not so. Absolute privilege extends only to legislatures, courts, and quasi-judicial tribunals which follow procedures which are almost similar to courts. At best, the privilege extended to deliberations of board meetings, and the like, when called officially and when following statutory procedures, will be qualified privilege. Statements made at these types of meetings can be candid, but they cannot be candid to the point where they are malicious and dishonest. To reiterate, it is only superior legislative

bodies, and superior judicial and quasi-judicial tribunals which have absolute privilege extended to them. Generally, most other bodies do not.

The defence of qualified privilege will cover most of the other “problematic” areas of communication in education. Again, working on grounds of public policy and convenience, and in the belief that “persons should be allowed to speak freely on occasions when it is their duty to speak, and to tell all they know or believe, or on occasions when it is necessary to speak in the protection of some (self or) common interest” (McEwen and Lewis, 1974, p. 187),¹⁴ the defence of qualified privilege will apply when a person in the proper circumstances states “what he believes to be truth (even though it may be defamatory) about another ... provided he makes the statement honestly and without any direct or improper motive” (McEwen and Lewis, 1974, p. 186). The occasions when the defence of qualified privilege will hold in education are when the defamatory statements are made (1) in the discharge of a public or a private duty, (2) on a subject matter in which both defendant and plaintiff have a common interest, and (3) in reply to inquiries by or on behalf of the plaintiff, or at his invitation (McEwen and Lewis, 1974, p. 187). It should be noted, however, that qualified privilege differs from absolute privilege in that the person making the statement, in addition to having a duty, legal, moral, or social to make it, must be guided with proper motive, believe in the truth of the statement, and not be motivated by malice, ill-will or a desire to do harm for its own sake.

Sensitive areas in education – teacher evaluation, report writing, commenting on someone’s competence at a duly constituted board meeting, filling out report and cumulative cards, frankly discussing a potential employee’s competence, and a myriad of other functions – all fall into the area of making statements or passing communications in the “discharge of a public or a private duty.” In this respect, then, statements made about another while believing in the truth of the statement, if made honestly and with proper motive, will be qualifiedly privileged. The *Lacarte* (1959) and *Haight* (1975) cases are especially applicable at this point. In the *Lacarte* case, the majority decision of the Supreme Court of Canada was in favour of the school board in that the board was following dismissal procedures as set out in statutes and hence there was no undue publication or impropriety shown in their procedures. The dissent, however, came forward with a very cogent argument in that malice could have been shown in the behaviour of the principal in his personal desire to dismiss the teacher, in the bad relations between himself and the teacher, and in the means used by him to obtain her dismissal. The *Haight* (1975) case goes one step further in underlining the great importance of proper motive and procedure in dismissals. Although the facts are not available to the writer to draw a scene, the substance can still be discerned from the following. In an allegation of slander re the plaintiff at a PTA meeting, the defamatory words were found by the jury to be false and malicious. In

an allegation of libel as contained in a report by the defendant, the jury found the report was false and that he was motivated by malice. In the publication of a letter it was found that the contents of the letter were false and that the publication of the letter was done in malice. And so on in a total of seven incidents. This case, then, underlines the importance of proper motive and lack of malice in the execution of one's duty in order for qualified privilege to hold.

Administrators' and teachers' functions which include responding to parents' inquiries concerning the child's progress, writing letters of reference, giving feedback to a teacher on her competence when the evaluation was requested by her, and commenting on a teacher's competence in response to a future employer's request will also fall under the protection of qualified privilege since they will concern statements made by the defendant "on a subject-matter in which both the defendant and the person to whom the statements are made have a legitimate common interest" (McEwen and Lewis, 1974, p. 187), or "in reply to inquiries by, or on behalf of, the plaintiff, or at his invitation" (McEwen and Lewis, 1974, p. 187). On this occasion, however, in addition to a firm belief in the truth of a statement, no malice involved and a duty to make the statement, there must be a concomitant duty on the part of the recipient to receive or solicit the information. The satisfaction of idle curiosity on the part of the recipient will not put a teacher or principal, the transmitters of the communication, under the umbrella of qualified privilege; there must be a mutuality of interest and duty.

At the level of staff-room chit-chat, school and community intrigue, idle gossip, and so on, the laws of slander generally will apply.¹⁵ In this respect, truth of a statement is a good and complete defence, provided it was not published in malice or with the intention to harm. Further, unless the slander is in the area where there is an ipso facto cause of action,¹⁶ liability will not be held unless the slander aims at the competence of a person in the performance of his office or unless special damages such as monetary loss, loss of respect in a community, or loss of a job can be shown by the plaintiff. In the final analysis, out-of-scope chit-chat, comments, intrigue, and so on, regarding students, colleagues, parents and others have no place in professional circles.

SUMMARY

Defamation is understood to be a publication to a third person of words or materials containing an untrue imputation against the reputation of another. Libel consists of publication in some permanent form whereas slander consists of statements made in nonpermanent form, usually orally. Libel in Canada is considered to be a criminal offence as well as tort; slander, on the other hand, is not considered to be a criminal offence.

Libel is actionable per se, whereas the only occasion where slander is

actionable per se is where there is imputation of (1) criminal offence, (2) disease which is contagious or infectious likely to prevent persons communicating with the plaintiff, (3) unfitness or incompetence in one's office, and (4) unchastity in women. For slander to be actionable otherwise, special damages have to be proved, usually of a monetary type. Defences in defamation usually lie in justification (truth), absolute privilege, qualified privilege, and fair comment.

One court case reviewed in this article lay in the area of slander; the others were under qualified privilege. The first case demonstrated the principle that in a suit of slander pertaining to a professional person, the slanderous words have to touch on one's performance in his office rather than being slanderous against the person. The other cases indicated that on occasions of privileged communication defamatory statements may be made where required in response to legitimate inquiries or as part of one's office. However, teachers and administrators are cautioned to be rather professional in their relations with, comments on and evaluation of one another.

NOTES

- ¹ Defences in suits of defamation will be discussed infra.
- ² Williams gives the following as some examples of jurisdictions with defamation legislation: Defamation Act, R.S.M. 1971, C.D. 20, s.3; Defamation Act, R.S.A. 1970, c. 87, s.3; and the various jurisdictions of Australia and New Zealand.
- ³ The special cases will be discussed infra.
- ⁴ Generally, for actionable cases of slander without proof of special damages, see McEwen and Lewis, 1974, pp. 73-93, or Williams, 1976, pp. 50-53.
- ⁵ For publication, generally, see McEwen and Lewis, 1976, pp. 103ff, and Williams, 1976, pp. 58-68.
- ⁶ Williams gives *McNichol v. Grandy*, [1932] 1 D.L.R. 225 (S.C.C.) as an example.
- ⁷ See *Thomson v. Lambert*, [1938] 2 D.L.R. 545 (S.C.C.).
- ⁸ Also see Williams, 1976, c.5 for an excellent treatment on Canadian law regarding defence.
- ⁹ See discussion supra on the distinction between libel and slander and the need for the plaintiff to prove special damages in slander for an action to be entertained. However, the reader should bear in mind also, see infra, that there are special cases where actions in slander will be entertained without the proof of special damages. Libel, on the other hand, is actionable per se.
- ¹⁰ MacPherson J. quoted from a leading American case, *Teichner v. Bellan* (1959), 181 N.Y.S. 2d 842, the following in his ratio: "Consent is a bar to a recovery for defamation under the general principle of *volenti no fit injuria* or, as it is sometimes put, the plaintiff's consent to the publication of the defamation confers an absolute immunity or an absolute privilege upon the defendant ..." (*Jones v. Brooks*, 419).
- ¹¹ Williams, 1976, p. 85, quoting from *Sapiro v. Leadership Publishing Co. Ltd.*, [1926] 3 D.L.R. 68, at 71 (Sask. C.A.).

¹² Williams, in Williams, 1976, p. 93, states that relevant statutory provisions are also promulgated in British Columbia, Ontario, Manitoba, New Brunswick, Alberta, Yukon Territories, and Nova Scotia.

¹³ Quoting *Edmondson v. Birch & Co.*, [1907] 1 K.B. 371 at 380.

¹⁴ This section follows closely (McEwen and Lewis, 1977, pp. 181–291).

¹⁵ It is assumed that communication at this level will be oral in the main, and hence the application of the laws of slander. Should the intrigue be of a permanent type, then the laws of libel take over.

¹⁶ See *supra* for a discussion of these instances.

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