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# An Expert's Reputation

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"Comment is free, but facts are sacred" is both a good working tale for journalists and a fairly accurate encapsulation of their obligations under the law of libel. The difficulty of course lies in sorting out fact from comment. It was this difficulty that faced the Nova Scotia courts in *Barltrop* v. *Canadian Broadcasting Corporation,*[1] and the appeal judges came up with a different answer from the trial judge.

The case was one of the legal reverberations of the controversy about lead poisoning in Toronto during 1974. The C.B.C.'s programme "As It Happens" broadcast a special feature on the dispute, though lawyers for the two smelting companies obtained an interim injunction that forced the producers to make substantial deletions from the programme before it was broadcast in central and western Canada.[2] The whole feature was heard in the Atlantic Provinces, however, and listeners in Nova Scotia were therefore able to hear doctors question the value of expert evidence about dangers to health given at hearings such as those held in Ontario on the threat of lead poisoning. After an extract from a press conference in which the plaintiff, Dr. Barltrop, cautioned against attributing high levels of lead in the blood to the activities of particular smelting plants, there was a contribution from a doctor in the United States who concluded that "it is possible to buy any information you want, to substantiate any viewpoint." He added, "Dr. Barltrop is a paid consultant to the lead industry. He is paid to say what he has just said." Then he (and later another speaker) reiterated the public's disillusion with expert testimony in the United States.

In their context, the words were plainly defamatory of Dr. Barltrop. The statement, that he was paid to say what he did, was in one sense true: he was paid $1,000 a day by the smelting companies whilst in Toronto to attend the hearings. But the innuendo was that he was prepared to tailor his evidence to fit the expectations of whoever was hiring him. It cast doubt on his integrity as a

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1. (1978), 25 N.S.R. (2d) 637

2. *Canada Metal Co.* v. *C.B.C.* (1974), 44 D.L.R. (3d) 329; aff'd 55 D.L.R. (3d) 42 (Div. Ct., Ont.)

physician. Counsel for the C.B.C. must have taken this as the meaning intended, for when Dr. Barltrop sued in Nova Scotia they pleaded the defence of fair comment on a matter of public interest, not justification.

Morrison J. decided that the defence succeeded.[3] The doctor voluntarily contributed to the discussion on lead poisoning and, he said, "having entered the ring" he had to "be prepared to accept the blows given him."[4] However, the Appeal Division (MacKeigan, C.J.N.S., Coffin and Cooper JJ.A) thought the words implied as a fact that the doctor gave "false or misleading evidence with unethical disregard for the health of the public," so the fair comment defence was inapplicable. They awarded general damages of $20,000.

This was apparently one of those cases in which reasonable judges could, and did, differ. Morrison J. thought it was fair comment; the appeal judges thought it was a statement of fact. To many, this writer included, it would appear that the plain meaning of the words (that Dr. Barltrop was paid in order that he might give evidence), was a matter of fact which was true, but that the innuendo meaning (that he was paid to give evidence favourable to his paymaster) was a statement of fact with an element of comment — the comment being on the credibility of expert evidence before tribunals. So neither the trial judge nor the appeal court was totally right or wrong in characterizing the words as, respectively, comment and fact. This view would not, however, dispute the outcome in the appeal division, for the defence of fair comment founders if the facts on which the comment is based are false.[5] Therefore the C.B.C. would still have been faced with the undischargeable burden of proving that the allegation was true. Ironically, they would have had a more readily defensible position if the language used had been more precisely libellous: if, instead of ambiguously asserting that Dr. Barltrop "is paid to say what he has just said," the contributor had elucidated what he found objectionable in specific testimony given by the doctor and had then added that he found such testimony unethical or dishonourable, the line between fact and opinion would have been clear and the plea of

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3. (1978), 25 N.S.R. (2d) 666
4. *Id.*, at 685-686
5. *London Artists* v. *Littler*, [1969] 2 Q.B. 375; *Lawson* v. *Burns*, [1975] 1 W.W.R. 171 (B.C.S.C.)

fair comment would have had a better chance of succeeding.[6] The words actually broadcast look uncomfortably like a 'smear'.

Even so, it does seem unjust that a man who willingly enters a public controversy should resort to the courts when others attack his views. As Morrison J. put it in his trial judgment:

> It is clear that the doctor accepted fees of his appearances to give testimony when called by the metal companies, and, as a matter of fact, did this on more than one occasion. What else then can be expected but that someone might very well allege that he was getting paid to say what he said?[7]

Moreover, as he pointed out later, lawyers well know the dubious value of expert evidence. Though the doctor's claim would be given short shift in the United States, where the sentiment that he who sticks his neck out must expect attempts to chop it off has found favour with judges,[8] in Canada and England the truth of the libel remains paramount.

There is however no rule against taking the plaintiff's embroilment in a public issue into consideration when setting damages. This the Appeal Division clearly did not do. $20,000 is a high price for a reputation, even that of an eminent paediatrician. It seems particularly excessive in the light of the doctor's willingness to present his views on a topical question.

Damages for libel have not caused the uneasiness in Canada that they have elsewhere, largely because there have been few of the inflated awards that have been made by juries in England and the United States. *Barltrop* and one or two other recent cases[9] may signal the end of this parsimonious (or sensible) approach to the value of reputation. How, then, did the appeal court reach its generous figure in this case? After telling us, as most judges with the task of setting a libel award have a habit of doing, that damages for lost reputation are not susceptible to exact calculation,

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6. Though the C.B.C. might have had difficulty with *Campbell* v. *Spottiswoode* (1863), 32 L.J.Q.B. 185, where it was said that suggestion of dishonourable conduct can never be defended as fair comment. This case was not considered at the trial.

7. *Supra*, note 3, at 686

8. See *New York Times* v. *Sullivan* (1964), 376 U.S. 254, and its progeny, the latest of which are *Gertz* v. *Robert Welch* (1974), 418 U.S. 323 and *Time* v. *Firestone* (1976), 424 U.S. 448

9. *Chernesky* v. *Arridale Publishers* (1978), 79 D.L.R. (3d) 180 (Sask. C.A.); *McCain Foods* v. *Agricultural Publishing Co., Chronicle-Herald*, Halifax, N.S., April 26, 1978

MacKeigan C.J.N.S. quotes without comment Professor Fleming's view that

> Reputation seems to be considered of much greater value than life or limb, dishonour an infinitely greater injury than agonizing and protracted physical suffering.[10]

This of course was meant by Fleming as criticism — in fact he makes the point bluntly in the phrase which precedes this, which the Chief Justice did not see fit to quote: "the tolerated level of awards is incongruously inflated in comparison with those in personal injury actions."[11] Yet the Chief Justice seems to use the quotation as justification for generosity, asserting that courts

> have frequently allowed very large sums as damages where widely published defamation has seriously slurred a fine reputation, even where no loss could actually have been suffered, financially or otherwise.[12]

He then examines some of the highest libel awards ever, including those in the *Yousoupoff* and *Platt* cases,[13] as if they provided an indication of the generality of defamation damages. In fact they are quite unrepresentative: successful libel plaintiffs, even those defamed on radio programmes, have in recent years collected between $5,000 and $10,000.[14]

But it was not just a comparison with previous cases that led the court to $20,000. The absence of an apology, the failure of the C.B.C.'s employees to act with the responsibility and objectivity expected of professional journalists, the credibility of the programme and the wide dissemination of the libel, all operated to aggravate damages, though the court did not think that they called for punitive damages.[15] These are recognized considerations, though the last should not have been given great weight, since most of the words complained of were broadcast in only the Atlantic region. The most potent factor, however, seems to have been the eminence of the plaintiff. The court was most impressed with Dr. Barltrop: half a page in the law report is devoted to a list of his

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10. Fleming, *Law of Torts* (4th ed.), at 521; in the 5th edition this is at page 584
11. *Id.*
12. *Supra*, note 1, at 662
13. Respectively (1934), T.L.R. 581 (C.A.) and (1964), 44 D.L.R. (2d) 17 (Ont.)
14. *E.g. Thomson* v. *N.L. Broadcasting* (1976-77), 1 C.C.L.T. 278 (B.C.S.C.); *Fritz* v. *Jim Patterson Broadcasting*, [1976] W.W.R. 180 (B.C.S.C.); *Lawson* v. *Burns*, [1975] 1 W.W.R. 171 (B.C.S.C.)
15. *Supra*, note 1, at 664-665

qualifications and achievements.[16] Although there was no evidence that he had been demeaned in the eyes of fellow specialists, who apparently do not listen to "As It Happens", the court was concerned about the harm done to his "international reputation" and the possibility that he would lose some work as a consultant.

But the injury seems to have been more to the doctor's pride than to his professional standing or his ability to attract lucrative consultancy contracts. Given the lack of demonstrable harm and the plaintiff's assuming the risk of criticism by entering the lead poisoning debate, a much smaller award would surely have indicated his good name. Moreover there is something unpalatable about the famous and the prominent enjoying higher damages because of their very fare and prominence and there is something offensive to one's sense of justice about $20,000 hanging on the impressionistic matter of whether words are fact or comment. *Barltrop* is surely one of those cases which should have no reflection upon the appropriateness of damages as a remedy for injury to reputation. A broadcast retraction would have been just as effective in putting right any wrong that was in fact done to the plaintiff; and giving him the right to respond to the innuendo of professional dishonesty would have had the advantage of allowing him to set the record straight irrespective of whether the words were found to be fact or comment, though perhaps the C.B.C.'s staff should have thought about that when they were putting the programme together.[17]

Even if we accept that the common law is right to give money as recompense for intangible harm, there remains the question of the relativity of libel and personal injury damages. When libel awards are discussed, lawyers are apt to blame the jury for having a warped idea of the value of a reputation. This is of course unfair, because jurors have no notion of what is usually given for a libel or any other wrong: that is precisely why they are chosen. Because there is no scientific method of measuring the worth of reputation, the matter is left to laymen, who are supposed to be in closer touch with community values than is a judge. Appeal judges will interfere with jury awards only in patently perverse cases, so juries take the blame when damages get out of hand. Yet the C.B.C. could hardly have

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16. *Supra*, note 1, at 642
17. For retraction and reply as remedies in defamation, see Fleming, (1978) 12 U.B.C.L.R. 15

fared worse with a jury than it did with three appellate judges.[18]

Neither is it altogether satisfactory to blame judges for the disparity between defamation and personal injury awards. They can do justice only in the case before them, not in relation to other causes of action. But it is reasonable to expect some rough proportionality between the injury and the compensation. The court that gave Dr. Barltrop $20,000 recently approved an award of $125,000 to a young workman who was grossly paralysed[19] and around $50,000 seems to be the accepted rate for the loss of a leg in Nova Scotia, as elsewhere in Canada.[20] No one would doubt that such grave physical damage requires greater compensation than the ephemeral pychological damage of a libel, though some may quarrel with the relative generosity of the awards.

The appeal court's affirmation of the $10,000 given to a farmer who was in hospital for two months and suffered permanent partial disability as a result of a gunshot wound[21] is more difficult to justify in the light of *Barltrop,* and the same may be said of the $10,000 and $8,500 given for multiple injuries from which a good recovery was made.[22] To do better than the doctor-expert one apparently has to suffer a fractured jaw, smashed teeth and a shattered thigh, resulting in permanent scars, one leg shorter than the other (probably leading to back problems), several weeks on crutches and an inability to work or enjoy sports as before the accident.[23]

The fault lies more with inflated libel damages than low personal injury awards. A few more cases like *Barltrop* will surely make defamation a topic for reform in Canada, as it has been in England, Australia and the United States. This may not be a bad thing; but it is disappointing to see a Nova Scotia court adopting what Lord Diplock once called "the scale of values of the duel."[24]

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18. The case was tried by judge alone because the C.B.C., a Crown Corporation, is not entitled to a jury: *Crown Liability Act,* R.S.C. 1970, c.C-38, and *Toronto Star* v. *C.B.C.* (1975), 11 O.R. (2d) 289 (S.C.)
19. *Barkhouse* v. *Vanderploet* (1976), 16 N.S.R. (2d) 445
20. See, *e.g., Williams* v. *Grant* (1975), 21 N.S.R. (2d) 530 and *Veinot* v. *Veinot,* S.H. No. 13269, Nov. 10, 1977 (N.S.S.C., A.D.)
21. *Curry* v. *Curry* (1977), 21 N.S.R. (2d) 454
22. *MacIssac* v. *Hickey* (1975), 18 N.S.R. (2d) 29; *Mercer* v. *MacGregor*
23. *Liffin* v. *Hamel* (1976), 23 N.S.R. (2d) 89: $25,000
24. *McCarey* v. *Associated Newspapers (No. 2),* [1965] 2 Q.B. 86, 109