NEWSPAPERS AND THE LAW OF LIBEL*

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It has long been the law that an author or publisher bears full liability for what he writes or publishes, regardless of his intentions or his innocence. This is only another way of saying what Chief Justice Mansfield said in England one hundred and fifty years ago in much better language, that "Whatever a man publishes, he publishes at his peril".[1] The result has been that just as long as there have been newspapers published there have been libel suits brought; and all that has changed is the increasing number and complexity of the actions launched and the claims made. The risk of libel actions is the risk that every publisher must assume. It is no more possible to operate a street railway in these days of heavy traffic without expecting to defend many negligence actions than it is possible to publish a metropolitan newspaper without offending, if not damaging, many people. Indeed, the only surprising feature is that more libel suits are not launched, when one thinks of the hundreds of assertions of fact and expressions of opinion contained in every edition of a newspaper. Human frailty being what it is, mistakes are inevitable and, quite frequently, costly. It is the purpose of this paper to consider, necessarily briefly and sketchily, some of the libel problems that newspapers have to face and some of the defences they may raise.

All of us, I presume, subscribe to the view that freedom of speech was rightly included as one of the basic four freedoms to be preserved at all costs. Indeed, one cannot conceive of a democracy, which is worth anything at all, that does not cherish and preserve the right of free speech. It was John Morley who wrote: "Democracy has come to mean government by public opinion." And the chief medium by which public opinion is expressed, is made known and exercises its influence, is the modern newspaper, which reflects the views and opinions of every stratum of society and of every varying ideology. We hear much these days of "Fascism", and "Communism" and the other "isms", and of the necessity to suppress them and the dangers to the State which may be found therein, but my own view has always been that these minority views are not new, and that as long as there have been poverty and social dissatisfaction, such views have been held by some; only now they have become more articulate. The

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[1] *R.* v. *Woodfall* (1774), Lofft. 781.

radio and the press have provided a sounding board by which the minority can speak a little louder, and can even shout at times. And I suggest to you that that is not necessarily a vast evil or a great menace. It is in the suppression of such views, not the exposition of them, that the danger lies. It was only a few weeks ago that Arthur Hays Sulzberger, publisher of the New York Times, speaking at Boston, reminded us that "the short and simple annals of the poor", about which Gray wrote, were probably just as long and just as complicated as those of any other economic group, and that "if they were short and simple in 1750, it was only because the underprivileged lacked the means of telling their woes and so found no one to listen". But in the space of 200 years since then we have all the inventions which permitted the flow of ideas and communication between those who were apart. And he added: "Can one be astonished that the masses are on the march to give expression to this new-found freedom which the age of communication and distribution has offered them? Is it strange that 'isms' and cults and economic groups have locked in fierce struggle to lead this freshly unbalanced society to a promised land?"

If freedom of speech is an integral part of democracy — and no one surely will gainsay that in this day and age — I suggest that the law of libel plays a useful role in guiding and curbing that freedom and preventing it from degenerating into mere licence. The modern publisher must steer his ship of public opinion with the greatest of care. On the one hand he must be bold, energetic, frank, at times ruthless, if his publication is to be alive and virile and effective. On the other hand, he must be careful of his facts and watchful of his opinions, or he will find himself wrecked on the shoals of libel.

There are always those who are distrustful of the free expression of opinion. The history of journalism has been marked, on this continent as elsewhere, by a continual fight on the part of the press to express its views freely. This fight is a never-ending one. Let me give you two examples. One of the very first of the American newspapers was the New York Weekly Journal, of which the first issue was published on November 15th, 1733, by John Peter Zenger, a young immigrant, with the barest of financial backing. He attacked the maladministration of the Colonial government of the day in such vigorous language that within the first year of publication he was charged with criminal libel and thrown into jail. He was unable to find bail of £800 and so for nine months he edited his paper from his cell. In the first issue

after his arrest Zenger apologized for having missed one edition, on the ground that not only had he been without pen, ink and paper, but that he had been held incommunicado. He promised his readers "By the liberty of speaking to my servants through the hole in the door of the prison, to entertain you with my weekly journal as formerly", and this he did until his trial. Though he had no funds, he was defended by Andrew Hamilton, the celebrated lawyer of Philadelphia, the ablest attorney in the Colonies and a warm personal friend of Benjamin Franklin. Hamilton was eighty years of age at that time, and in poor health. Moreover it was under the law as laid down by Lord Chief Justice Holt that Zenger was being tried, law which sounds strange in our ears today: "If persons should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is necessary for all governments that the people should have a good opinion of it."[2] Hamilton's peroration ended thus: "The question before the court, and you, gentlemen of the jury, is not of small or private concern; it is not the cause of a poor printer, nor of New York alone, which you are trying. No! It may in its consequences affect every freeman that lives under a British government on the main of America." The jury's verdict of "Not guilty" has always been hailed as the dawn of newspaper freedom on this continent. Zenger's principles were carried on by Benjamin Franklin and the long list of fighting newspapermen who followed in his wake.

I have said that this fight for the existence of a free press, even on this enlightened continent, is a never-ending one. Let me cite you a modern example. In 1921 the Mayor of Chicago, the famous (or infamous) Bill Thompson, was becoming restive under the attacks and criticisms launched almost daily against him and his administration by the Chicago Tribune. Among other interesting statements the Tribune had said, "The City is broke", "Bankruptcy is just around the corner for the City of Chicago", "The City government has run on the rocks", and much more in the same general tone. Mayor Thompson determined to put the Tribune out of circulation. He persuaded the City Corporation to issue a writ claiming the largest amount of damages for libel that has ever been claimed so far as I know in a single action. The claim was for ten million dollars, which by a strange coincidence was estimated to be the value of the entire undertaking and assets of the Chicago Tribune at that time. The City justified the amount of the claim by contending

[2] HOWELL'S STATE TRIALS, XIV, 1128.

that it was a corporate entity and that the statements in the Tribune had damaged its credit and prevented the sale of its bonds to the extent of the ten million dollars asked. The case is reported in 307 Illinois 595 and Judge Fisher of the Circuit Court of Cook County allowed a demurrer, in a judgment which has become widely quoted. He remarked that the suit was "an anomaly, without precedent in American law, and not in harmony with the genius, spirit and objects of our institutions. It does not belong in our day. It fits in rather with the genius of the rulers who conceived of law not in the purity of love for justice, but in the lustful passion for undisturbed power." He added: "Often a great part of the press is led to serve economic interests to the detriment of the public, but the harm it could do was limited by the fact that existence of a newspaper depends upon the public favour. It cannot long indulge in falsehoods without losing that confidence from which alone comes its power, its prestige and its reward. On the other hand the harm which would certainly result to the community from an officialdom unrestrained by fear of publicity is incalculable. . . . Stripped of all the elaborate argument, in the confusion of which the question for decision might look difficult, the fact remains that, if this action is maintainable, then public officials have in their power one of the most effective instruments with which to intimidate the press and to silence their enemies. It is a weapon to be held over the head of every one who dares print or speak unfavourably of the men in power. . . . . The press has become the eyes and ears of the world, and to a great extent humanity, in contact with all its parts. It is the spokesman of the weak and the appeal of the suffering. It holds up for review the acts of our officials and of those men in high places who have it in their power to advance peace or endanger it. It is the force which unifies public sentiment. But for it, the acts of public benefactors would go unnoticed, impostors would continue undismayed, and public office would be the rich reward of the unscrupulous demagogue." This case is usually cited as the authority for the proposition that a city or a municipal corporation or a government cannot itself sue for libel. The remedy for Thompson and the others, if they had been aggrieved, was clear — namely the bringing of a libel suit on their own behalf.

It is interesting to note that almost at the same time the Mayor of New York, Mayor Hylan, who was seeking re-election, was being opposed by five of the six leading daily newspapers. He tried a different method. He issued an amazing proclamation

calling upon all merchants, business men and shopkeepers to visit reprisals upon the newspapers for their attacks upon him, and to refrain from all advertising in them. Unfortunately the only way he could himself obtain suitable publicity for his proclamation was by advertising. Accordingly, the proclamation was submitted to all the papers in the form of an advertisement. They all gleefully ran it, charged the usual rates and, of course, the Mayor was defeated.

I have said that a newspaper publishes anything at its peril. There are many definitions of a libel. Dr. Gatley chooses this one: "Any written or printed words which tend to lower a person in the estimation of right-thinking men, or cause him to be shunned or avoided, or expose him to hatred, contempt or ridicule, constitute a libel." But I think the neatest and the briefest definition is the one that Mr. Justice Cave originated in *Scott* v. *Sampson*,[3] "A libel is a false statement about a man to his discredit". As you know, the judge decides whether the words are capable of constituting a libel and the jury decides whether there was a libel. Of course, the damaging statement may be contained in an editorial, a news item, an advertisement, a photograph, a cartoon or in any other form which the printer's ink may take. It may be accidental or unintentional; or it may be deliberate or malicious.

The decisions are sometimes confusing, though the principles may be clear. In 1929 the Countess of Erroll brought action against the Manchester News and other papers. It was an article to which, I think, most of our wives would not take offence, and some would covet. Here is what the Manchester News said, printed below a charming photograph of the Countess: "The Countess of Erroll will leave England in two or three weeks' time for Cannes, where she will act as mannequin for Captain Molyneux, the famous Paris dress designer. Lady Erroll, who has fair hair and blue eyes, has a natural and much envied gift for wearing clothes attractively. It has been remarked of her that the simplest gown becomes distinguished when she puts it on, and a Paris dressmaker once offered to dress her for nothing if she would only wear his creations." Sir Patrick Hastings for the Countess argued that the words meant that she was penniless and had to take up a subordinate position. Sir Patrick argued that a potman or a billiard marker might be a person of the highest character or reputation, but to suggest in a daily newspaper that a well-known peer had taken a place as a potman would be derogatory to him. Sir Norman Birkett said that surely the law was the same for a

[3] (1882), 8 Q.B.D. at p. 503.

countess as for a beggar; and the Judge rather drily remarked that of course it was but the jury must bear in mind that what was complained of was said of a countess. And the jury, without leaving the box, found for the plaintiff and awarded her the equivalent of $600. And yet, ten years later, the Court of Appeal dismissed the complaint of Miss Nydia Franceschini who complained that a newspaper had incorrectly described her as a west-end dressmaker's vendeuse and a furrier's model, whereas the furs she was wearing were, in fact, her own. Lord Justice MacKinnon said: "It was quite impossible for me to suppose that the words complained of would lower Miss Franceschini a single fraction of an inch in the estimation of any right-thinking person. They are therefore not defamatory."

Now since Lord Mansfield's rule is still the law, that the publisher publishes at his own risk, it follows of course that innocence is no defence to a libel action, though it may be urged in mitigation of the damages. It is always difficult to impress upon writers and reporters that they do not protect themselves in any way by such phrases as "it is alleged" or "the police claim" or "it is rumoured that". Nor is it an excuse that the article is copied from another paper, or from a press agency, or that a named person is quoted. Even mere typographical errors may prove costly. When a magistrate discharged an accused person with the words "There is no bit of evidence to warrant a conviction" and the printer ran it "There is one bit of evidence to warrant a conviction", the newspaper was held liable. The classic decision in this regard was the case of *Hulton* v. *Jones*.[4] The effect of this decision is not, however, quite as wide as is popularly supposed. The item complained of appeared in the Sunday Chronicle, written by the Paris correspondent of the paper, who had been describing a motor festival at Dieppe. He wrote: " 'Whist! There is Artemus Jones with a woman who is not his wife — who must be, you know, the other thing', whispers a fair neighbour of mine excitedly into her bosom friend's ear. Who would have supposed by his goings on that he was a churchwarden at Peckham? Here in the atmosphere of Dieppe on the French side of the Channel he is the life and soul of a gay little band that haunts the Casino and turns night into day, besides betraying a most unholy delight in the society of female butterflies." After this appeared, a man named Thomas Artemus Jones who was not a churchwarden and did not live in Peckham, but was a barrister practising on the Northern Circuit, felt himself

[4] [1909] 2 K.B. 444; affirmed [1910] A.C. 20.

damaged and asked redress. His friends entered the box and claimed that they had supposed the Artemus Jones of Dieppe was indeed their sober friend the barrister. The defence was that the incident was merely an amusing bit of fiction. But the significant feature, as the judge reminded the jury, was that the item was not offered as fiction but as fact. And Mr. Jones was awarded £1750. The test is: Will reasonable persons who know the plaintiff be led to believe that he is the person portrayed? Of course it is prima facie unreasonable to believe that a character portrayed in a work of pure fiction is that of an actual person and not a mere type. It is now standard practice for the author to state on the fly-leaf of his novel that the book is a work of fiction and that no reference is intended to any living person. In films, the language usually used is that any reference to any living person is not intended and that any resemblance is purely coincidental. This by itself is no defence, but it makes it more difficult for the plaintiff to contend that he has been attacked. It sets up in advance that the work is obviously and avowedly fiction. But merely calling the work fiction does not necessarily make it so and the real value of such a frontispiece description is, to say the least, doubtful.

In the *Chesterton* case, the *Jones* v. *Hulton* decision was carried to extreme lengths. The Chesterton in that case was not G. K. Chesterton but his sister-in-law, a Mrs. Cecil Chesterton, a writer of rather light, romantic tales. It is said of her that she was in the habit of writing three or four serials for newspapers at the same time, and that frequently she would lose sight of her sequences and even get her characters mixed. On one occasion, the newspaper editor wired her in desperation, "You have left your hero and heroine tied up in a cavern under the Thames for a week, and they are not married". However, in the *Chesterton* case, her story was running in a Sunday paper and Mrs. Chesterton had invented a character whom she called Arthur Mandeville, who engaged in certain unscrupulous undertakings. In the story, Mandeville was a theatrical producer. The real Mandeville proved to be engaged in the same type of business and the plaintiff succeeded in his suit. The literary profession became alarmed indeed at the implications of this case. Chesterton himself suggested that in the future novelists might have to leave out names of villains entirely and designate them by numbers. Then he followed this by the suggestion that the only safe way was to concoct impossible combinations; and he offered as examples the names "Spitcat Chintzibobs" and "Bunchusa Bulterspangle". However, the versatile Mrs. Cecil Chesterton had a better idea. She republished her book and this

time she gave each character the name of some well-known living person whose consent she had obtained in advance. One character was called Bernard Shaw, and to the original villain she gave her own name. Chesterton, always a foe of libel laws, claimed that the "law of libel has become a mere weapon to crush any criticism of the powers that now rule the State".

A more realistic result was achieved in the case of *Canning* v. *Ashton*. There, Miss Helen Ashton, the novelist, wrote a book of pure fiction entitled "People in Cages". The undesirable character was named Captain John Canning. The real John Canning sued unsuccessfully; the Lord Chief Justice ruled that the case had been conceived in an atmosphere of unreality and the jury agreed with him. In this case it was shown that Miss Ashton had chosen the name of Canning after the statesman, and that she had then checked with the London directory and found no John Canning listed.

The real difficulty arises where the work is obviously based on historical fact and where real persons are referred to. The largest verdict ever given in England in a libel action was in the case of *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures Limited.*[5] In this case Princess Youssoupoff obtained a verdict, sustained on appeal, of no less than $125,000 on the ground that she had been defamed in the sound film entitled "Rasputin, the Mad Monk". The allegation was that she herself was depicted in the film under the name Princess "Natasha" as having been seduced by Rasputin. Lord Justice Scrutton said that the court was bound by the view laid down by the Lord Chancellor in the *Jones* v. *Hulton* case. "We follow the law that though the person who writes and publishes the libel may not intend to libel a particular person, and, indeed, has never heard of that particular person, the plaintiff, yet, if evidence is produced that reasonable people knowing some of the circumstances, not necessarily all, would take the libel complained of to relate to the plaintiff, an action for libel will lie." The court held that it did not alter the result that other equally reasonable persons could see no connection between the persons in the play and the real Princess, as long as "a substantial and reasonable number of persons" had seen the resemblance.

There are three principal defences to an action for libel. One is justification, that is the plea of truth, the second is fair comment and the third is privilege. Let me add a few words about each of these pleas. The successful proof in court of the truth of the libel is always a complete defence. The old maxim

[5] (1934), 50 T.L.R. 581.

"The greater the truth the greater the libel" was a maxim of the old criminal law of defamation; it is no longer a correct statement of the law in that field and has no application whatever to the civil tort of libel, which we are discussing. Truth is a complete defence. Yet, even in the civil law, there is a germ of truth in the old maxim which is worth noticing. Robert Burns mocked the old law when he wrote the doggerel:

> "Dost not know that old Mansfield
> Who writes like the Bible
> Says the more 'tis the truth, sir,
> The more 'tis a libel?"

The fact is that the most serious form of libel is the statement that appears to possess at least some foundation of truth. Let me illustrate. Some fifteen years ago a Toronto newspaper published a brief news item from Tulsa, Oklahoma, which later turned out to be quite untrue and unwarranted, stating that a Mr. A was wanted by the police of that city on a charge of wife murder. The background of the story was this. Some years prior to the publishing of the false report, Mr. A had been resident in Kitchener, Ontario, and had been tried before the late Chief Justice Latchford and a jury and acquitted of a charge of wife murder. Public opinion compelled Mr. A to leave the Province and settle in the United States. The combination of the false report published concerning his second wife, and the rewriting of the first incident, gave rise to a very serious libel claim, which was settled by the Toronto newspaper on the eve of trial. Perhaps we could rewrite the old maxim to say "The greater the half-truth, the greater the libel".

In considering this plea of justification, may I tender a word of advice to the pleader? If your client has been libelled in language which is unmistakeably defamatory, do not use innuendoes in an effort to enlarge the meaning of the words. Far better to let the libel speak for itself, and far less dangerous. The moment you add the innuendoes — and I have frequently seen as many as twenty or thirty innuendoes in a statement of claim, where the libellous words themselves were clearly defamatory and needed no innuendoes — the moment you do this, you enable the newspaper to plead the truth of the innuendoes and, in justification, to drag in almost any bit of damaging fact they may have been able to discover. The classic example is the case of *Maisel* v. *Financial Times*[6] where the libel was the statement that the plaintiff, who was director of a company, had been arrested on a

[6] (1915), 84 L.J.K.B. 2145.

charge of fraud. This was clearly defamatory and needed no innuendo or extended meaning to support it. But the plaintiff's solicitor in an excess of zeal pleaded that the libel meant among other things that the plaintiff was an unfit person to be the director of any company. The House of Lords held that this plea enabled the defendant to bring forward any particulars they liked to show why he was unfit to be a director. That is always much easier than justifying the original charge. And the effect on the jury will be about the same, because they will not be sympathetic with a plaintiff whose character is not spotless. It is a safe rule then, when you act for the plaintiff, to avoid innuendoes if you possibly can. And again, if your client's character is not spotless, he had better consider well the advisability of bringing any libel action at all. For his character may suffer far more in the proving of the plea of justification than ever it did in the original libel.

One thinks in this connection of the unhappy fate of Oscar Wilde, who by a libel action brought about his own complete ruin. You will recall that the Marquis of Queensberry had long disliked Oscar Wilde and had some reason to suspect the propriety of the intimate friendship between Wilde and the Marquis' son. The incident is related by a recent biographer (Francis Winwar in "Oscar Wilde and the Yellow 'Nineties"): "According to his custom Wilde went in the late afternoon of February 28, 1895, to the Albemarle Club of which he was a member. On arriving there the hall porter, Sidney Wright, came over to him with an envelope. 'Lord Queensberry desired me, sir, to hand you this when you came back', he said. Wilde took the envelope and looked at it. On the back he read his name . . . . and inside he found a printed visiting card of Queensberry's with some words scrawled upon it. For a moment he could not believe his eyes. But there, at last in writing, was the terrible accusation in the Marquis' own spelling: 'To Oscar Wilde posing as a somdomite' [sic]. Had the porter read what was written on the card? Had anyone else seen it? He questioned the porter. Yes, he had looked at the card but did not understand it. Since the Marquis had given him the uncovered square, he put it into an envelope, wrote Mr. Wilde's name and the date upon it, and put it away against his coming. He had let no one else see it. Had the brilliant author shown the same discretion as the porter, no one else need have known about it and the story of Oscar Wilde might have been different." The rest of the story is history now. Wilde determined to prosecute for criminal libel. His solicitor, Charles Octavius Humphreys, point-blank asked Wilde on his solemn oath whether there was any truth in the libel. "I am absolutely innocent", Wilde swore. "If you are innocent",

said Mr. Humphreys, "you should succeed". The Marquis of Queensberry was arrested and the case came to trial. Lord Carson completely broke down Wilde in the box, on the basis of the damaging evidence which the Marquis had collected. Wilde withdrew the case before it was ended; but immediately afterwards was himself arrested, convicted of indecency and sentenced to jail. His reputation was completely gone and he died in disgrace. One of the interesting features of the case was the very limited publication. The only person who ever saw the libel, and he admitted he did not understand it, was the hall porter; but that was held sufficient.

The defence of fair comment is, in essence, simply a defence of no libel. If comment is fair, and if it is made upon some matter of public interest, then it does not constitute a libel. It must be distinguished from the defence of privilege, where the article is defamatory but owing to the privilege with which the law cloaks certain occasions in the public interest it is protected. A comment is a statement of opinion on facts. Of course the facts commented on must be true or, in certain exceptional cases, privileged, else you are unable to contend that the comment is fair. But once the truth of the facts is established, and once the public interest is shown, you may comment in the freest possible manner. This is a right enjoyed not by newspapers alone but by every subject. And the right of the journalist to comment is no higher than the right of the man in the street.

In this field of fair comment, the music critic, the literary reviewer, the editorial writer and the newspaper columnist have gone at times to amazing lengths, and still enjoyed the protection which the law gives. Take, for example, such a case as that of the Cherry sisters, brought against the Des Moines Leader in the State of Iowa in 1901.[7] At one time the Cherry sisters had been the toast of the vaudeville stage. But the years had crept upon them and the toast had become cold and uninteresting. Unwisely they planned a comeback, and the dramatic critic of the Des Moines paper had this to say about their appearance: "Effie is an old jade of fifty summers, Jess is a frisky filly of forty, and Addie, the flower of the family, a capering monstrosity of thirty-five. Their long skinny arms, equipped with talons at the extremities, swung mechanically, and anon waved frantically at the suffering audience. The mouths of their rancid features opened like caverns and sounds like the wailings of damned souls issued therefrom. They pranced around the stage with a motion

[7] *Cherry* v. *Des Moines Leader* (1901), 114 Iowa 298.

that suggested a cross between the danse du ventre and a fox trot—strange creatures with painted faces and hideous mien. Effie is spavined, Addie has stringhalt and Jessie, the only one who showed her stockings, has legs with calves as classic in their outline as the curves of a broom handle." But the court held that the statement was not libellous and said, "One who goes upon the stage to exhibit himself to the public, or who gives any kind of performance to which the public is invited, may be freely criticised". And it added further, "Surely, if one makes himself ridiculous in his public performances, he may be ridiculed by those whose duty or right it is to inform the public regarding the character of the performance".

In literary and musical reviews care must be taken that what is commented upon is the work of art. If personalities are introduced, and if the attack is directed not against the work of art but against its author or painter, then the field becomes more dangerous. In one New York case the law was laid down thus by the judge, "The critic can call a painting a daub and an abortion, but he cannot call the painter himself a low discreditable pretender and an abortion". A good illustration of this rule is presented by the action which the famous painter Whistler instituted against Ruskin. Whistler resented very much any criticism against any of his works by any critic. He was noted for his conceit. On one occasion Oscar Wilde wrote this about him in an English paper: "Whistler is indeed one of the very greatest masters of painting in my opinion. And I may add that in this opinion Mr. Whistler himself entirely concurs." At any rate Whistler disliked criticism and in Ruskin be found a formidable critic. At this time Sir Coutts Lindsay had just opened the new Grosvenor Art Gallery. The exhibition contained some paintings by Burne-Jones, whom Ruskin believed to be the only contemporary painter whose work would endure, but the place of honour in the gallery had been given to the latest of Whistler's paintings. Ruskin was infuriated. He wrote this gem in a critical magazine, and it was for this that Whistler sued him: "For Mr. Whistler's own sake, no less than for the protection of the purchaser, Sir Coutts Lindsay ought not to have admitted works into the gallery in which the ill-educated conceit of the artist so nearly approached the aspect of wilful imposture. I have seen and heard much of Cockney impudence before now; but never expected to hear a coxcomb ask two hundred guineas for flinging a pot of paint in the public's face." This was too much for Whistler to take. He sued Ruskin for libel and, the case coming

before Baron Huddleston and a special jury, was awarded a verdict of one farthing, each party to pay his own costs.

On the whole, however, actors and authors and public performers have become enured to the sharp pens of the critics and have come to realize that the public's censure as well as the public's applause must be taken in good part. They also realize that it is highly dangerous to cross swords with the literary expert. One of the most vitriolic of present-day critics is Irving Hoffman, the Broadway play reviewer. It was Hoffman who wrote of the Broadway production of "Sadie Thompson", which in novel form had appeared under the title "Rain": "There's more frizzle than there is drizzle in this production. . . . It never rains but it bores." Of another production he wrote: "I will say this for the play. I saw nothing wrong with the third act. Possibly that's because I left in the middle of the second."

The politician is a public personage, a fair matter for comment and he too must not always expect that the comment will be laudatory. You recall the classic statement in this regard: "A clergyman with his flock, an admiral with his fleet, a general with his army and a judge with his jury, are all subjects of public discussion. Whoever fills a public position renders himself open thereto. He must accept an attack as a necessary though unpleasant appendage to his office." Perhaps Lord Cockburn put it best of all: "Those who fill a public position must not be too thin-skinned in reference to comments made upon them. It would often happen that observations could be made upon public men which they know from the bottom of their hearts were undeserved and unjust; yet they must bear with them and submit to be misunderstood for a term because all knew that the criticism of the press was the best possible security for the proper discharge of public duties." And more recently we have our own Chief Justice in the *Dennison* v. *Sanderson* case[8] laying down the law thus, in a case that involved libels written during an election campaign: "It was plain upon the face of the pleadings that this whole matter was a by-product of a heated election campaign, in which party feeling was aroused. . . . . A jury is not necessarily perverse if it refuses to regard as seriously as the party assailed may do, the seemingly venomous attacks made upon such an occasion. No monetary loss is involved, and a jury is not likely to regard as serious the damage, if any, done by rough words applied to a political opponent, even though they may amount to gross abuse."

[8] [1946] O.R. 615.

Concerning the third defence, that of privilege, I must be brief. The law affords protection to statements made to certain particular groups and in certain particular circumstances. The privilege may be either absolute or qualified. In the case of absolute privilege the question as to whether the statement was made with malice is immaterial. In the case of qualified privilege, the protection is lost if the plaintiff can prove a malicious motive in making the statement. The following are the chief cases in which the law, deeming it wise that men should be free to speak what is in their minds without fear or favour, affords an absolute privilege:

(1) Judicial proceedings. Judges, counsel, witnesses and parties all share in this privilege, whether the proceedings are in open court or not, and whether the proceedings are of a final or preliminary nature. The privilege extends also to quasi-judicial proceedings and to statements in documents used in any of these proceedings, such as affidavits and pleadings.

(2) All statements made during Parliamentary proceedings and debates.

(3) Official statements such as communications made between government departments and reports published by order of Parliament.

These absolute privileges are very limited and none of them extend to newspapers. But there is one exception to this, one absolute privilege which does provide valuable protection to the press. A fair and accurate report without comment in a newspaper of proceedings publicly heard before a court of justice if published contemporaneously with such proceedings is absolutely privileged, unless the defendant has refused or neglected to insert in the paper a reasonable letter or statement of explanation or contradiction by the plaintiff.

The defence of qualified privilege, however, is open to newspapers in many different circumstances. Some of them are statutory and are contained in section 9 of the Ontario Libel and Slander Act.[9] This section provides a qualified privilege, which will be destroyed if malice is shown, or if the newspaper refuses to publish an explanation. Under the section protection is provided for the printing by newspapers of fair and accurate reports of any Parliamentary proceedings, of public meetings—that is an important protection—of meetings of municipal councils,

[9] R.S.O. 1927, c. 113.

boards of education, or of any notice or report issued by any government official for the information of the public. Thus, the newspapers are protected in the publication of such matter, often defamatory, as reports made by the Securities Commission regarding the cancellation of brokers' licences.

In addition to the statutory qualified privilege, there are many other forms of qualified privilege, useful to newspapers, to be found in the common law. Statements made by a person in discharging some moral, social or legal duty are protected. The early cases illustrate this by the example of a *bona fide* inquiry and reply as to the character of a servant. Again, statements made to a person who has a common interest in the subject matter with the person who makes the statement provide an occasion of qualified privilege. So, a letter from one shareholder to a group of shareholders, attacking the conduct of the directors of the company, would fall within this field. The common law is constantly extending these privileges. In Ontario, in the recent *Dennison* v. *Sanderson* decision, his Lordship Mr. Justice McKay ruled that advertisements published at the time of an election campaign, attacking candidates who had proffered themselves for election, fell within an occasion of qualified privilege; and, on appeal, the Chief Justice did not dissent from this view in his reasons for judgment. A third form of qualified privilege consists of statements made in self defence. If one man attacks another in the public press, the latter may make a reply and the reply may contain countercharges against his assailant, if they form a reasonably necessary part of his defence. In the libel action brought by the Toronto Star against the Globe and Mail a few years ago, the defendant successfully invoked this defence; and the jury declined to find any malice to destroy it.

I should mention also the special statutory defences provided to newspapers in sections 7 and 12 of the Libel and Slander Act. Under the former section the plaintiff, before suing, must serve a notice of complaint within six weeks after the alleged libel has come to his knowledge; and under the latter section the writ must be issued within three months after he has seen the libel. These sections are mandatory and have often saved a newspaper from an expensive suit. But to get their protection the newspaper must fall within the definition in the opening section of the act. One of the requirements is that it must be printed for sale. There is an interesting monthly periodical which comes to my office and which you may have read, called "The Printed Word". It is published by a well-known advertising agency and contains

frank, interesting comments about men and affairs. It recently decided that it needed the protection of the Libel and Slander Act, so it announced editorially that thereafter its price would be "5 cents per year, no single copies sold". And it added, "It is hoped that those readers who are foolish enough to pay will not feel overcharged".

There are many interesting matters in this field of libel law which time will not permit me even to touch. One of these is the growth of what is usually referred to as the "right of privacy". Has a normal, quiet, respectable person the right to be protected in his privacy and to prevent the publication of his picture in the press? Our law has not yet recognized this right, though it is creeping into the American law in some places. In the State of New York a limited protection is provided by statute, where it is forbidden to use the name, portrait or picture of any living person, without his consent, for advertising or trade purposes. But William James Siddis found this statute did not assist him, when he sued the New Yorker in 1938 for damages of $150,000, alleging breach of his right of privacy. Siddis at the age of eleven was a child prodigy. He had lectured to a group of Harvard Professors at that early age on the Fourth Dimension. The New Yorker thought it would be interesting to find out what had happened to Siddis and other child prodigies. The article was entitled, "Where Are They Now? April Fool"; and it described the career of Siddis who had dropped from the public eye during the twenty-year interim. The judge reviewed the cases in those States where a "right of privacy" seemed to be recognized and said, "No decision of the Courts in those States has been cited by counsel, nor have I found any which hold the 'right of privacy' to be violated by a newspaper or magazine publishing a correct account of one's life or doings or a picture, except under abnormal circumstances which do not exist in the case at bar".

Stanislaus Zbyszko, the former world's champion heavy weight wrestler, did not need to rely on any right of privacy when he sued the New York American for publishing his picture. In that case, in its magazine section, the streamer headline read, "How science proves its theory of evolution". On one page was the photograph of a huge gorilla and, on the other, a picture of Zbyszko in a wrestling pose. Underneath this photograph was the caption, "Stanislaus Zbyszko, the wrestler, not fundamentally different from the gorilla in physique". The evidence showed that as a result of this publication his wife when angry, and sport fans witnessing his matches, called him a gorilla, and the name

stuck. The evidence also showed that Zbyszko was a man of considerable culture and a graduate of the University of Vienna. In defence it was argued that the article was purely scientific and that the caption meant only that Zbyszko was as strong as a gorilla. The jury awarded a verdict of $25,000 damages.

You may be interested in an incident that occurred in Toronto some twenty-five years ago. At that time George S. Holmested, K.C., then eighty-two years of age, was superannuated from the post of Senior Registrar of the High Court. He was beloved of the profession and he set, as you know, a very high standard of practice and procedure. He was well known also as an author and a poet. At the time of his retirement it was natural that the papers should seek his picture for publication. But Mr. Holmested did not desire that any photograph should be used — he determined that there should be no invasion of his right to privacy. However, the Daily Star used in its columns a drawing which it had made. I have the drawing before me and it appears to be that of a handsome, scholarly appearing, elderly gentleman. Mr Holmested was furious. He boasted to his friends that he would make the paper apologize publicly; but his friends wondered how this could be done, since it was obvious that the publication had in no way libelled him. But Mr. Holmested had his revenge. A few weeks later the editor of the column entitled "A Little of Everything" was delighted to find in his mail an attractive little poem entitled "To the First Spring Flowers" and signed with the name "Lydia Strathe". The editor was so pleased that he published the poem at the top of his column. This is how it read:

D rear winter's past and gone,
E arth's labor has begun,
T he stream of life breaks forth
S o bravely in the north.
E' en through ice and snow
M ost tender flowerlets blow.
L ook, here's the snowdrop sweet
O ut, smiling at our feet,
H er modest garb of white

R obes her like bridal maid
M ost gracefully arrayed.

D ear harbinger of spring;
E arth hath no fairer thing.
L et each returning year

L eave me the mem'ry dear,
E 'en though another's eyes
B efore me found the prize,
I first did sing thy praise
L ike one who all his days

E nchanted by her grace
W oos some fair maid.

LYDIA STRATHE

Unfortunately the editor did not examine the form of the little poem with sufficient care. The name signed to the poem, "Lydia Strathe", readily becomes "The Daily Star" when the letters are transposed. And the initial letters of the lines, read from the bottom upwards, form the candid admission which was desired: "WE LIBELLED MR. HOLMESTED". So our good friend had the last word after all.

This has been, I am afraid, a very rambling talk on a subject which is necessarily technical in its nature and on which the decisions are frequently conflicting. The Court of Appeal in the State of New York is on record in one of its decisions as saying, "The law of libel is very simple". But this, I venture to say, is not the generally accepted view. There have been many reasons advanced to explain its complexity. I would like to leave you (not to be taken too seriously) this explanation for the confusion, which I found in an issue of Editor and Publisher, and which at least represents the newspaperman's idea: "Judges are seldom polished or workmanlike writers and libel law especially has been unnecessarily complicated by their use of loose English. For every Holmes and Cardozo, gifted with the ability to write lucidly and forcefully, there are dozens of judges whose decisions would benefit by thorough copy-reading."

I would close with this word. A leading New York counsel, regarded as an expert on the law of libel, was once asked to express in as few words as possible a rule of law that would enable newspaper publishers to avoid libel lawsuits. He told them he could do this very easily and that, if they would follow implicitly the injunction he was about to give them, they need never fear the consequences of the law or the penalties which follow defamation. His rule — and may I at this stage adopt it as my own and act upon it — his rule was simply this, "Hold your tongue".