

THE CANADIAN DEFAMATION ACTION: AN EMPIRICAL STUDY

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This article presents the results of a quantitative study of Canadian defamation law actions, focusing on reported decisions between 1973 and 1983 and between 2003 and 2013. It aims to contribute to debate about defamation law reform, to contribute to scholarly work in defamation law or in tort law and remedies more generally, and to inform lawyers who are involved in defamation litigation. Its findings include: that damages have almost doubled when adjusted for inflation between these two periods; that corporate defamation cases make up about a third of defamation cases; that plaintiffs established liability much less often between 2003 and 2013 than between 1973 and 1983; that punitive damages are awarded much more often to corporations than to human plaintiffs, and in higher amounts; that punitive damages were awarded in about a quarter of cases in both periods; and that the rate of liability is greater for publications on the internet (including email) than publications in other media.

Cet article présente les résultats d'une étude quantitative des actions en diffamation intentées au Canada, mettant plus particulièrement l'accent sur les décisions publiées entre 1973 et 1983 et entre 2003 et 2013. Il vise à contribuer au débat sur la réforme du droit de la diffamation, ainsi qu'aux travaux de recherche spécifiques sur le droit de la diffamation ou plus généralement sur le droit de la responsabilité délictuelle et le droit en matière de mesures de réparation. L'article cherche également à guider les avocats impliqués dans des litiges en diffamation. L'article conclut notamment : qu'après ajustement pour tenir compte de l'inflation, le montant des dommages-intérêts accordés a presque doublé entre les deux périodes étudiées; que la diffamation entre personnes morales constitue le tiers des poursuites en diffamation; que les demandeurs ont réussi à prouver la responsabilité des défendeurs moins souvent pendant la période de 2003 à 2013 que pendant celle de 1973 à 1983; que des dommages punitifs sont accordés plus souvent aux demandeurs qui sont des personnes morales qu'aux personnes physiques, et que leur montant est généralement plus élevé; que des dommages punitifs ont été accordés dans un quart des actions en diffamation pendant chacune des deux périodes

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étudiées; et que le taux de succès des demandeurs est plus élevé lorsqu'il s'agit de publications sur Internet (y compris dans des courriels) que lorsqu'il s'agit de publications sur d'autres médias.

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1. Introduction

This article presents the results of the first quantitative study of Canadian defamation actions. It examines the reported decisions between 1973 and 1983 and between 2003 and 2013, and includes a range of findings regarding rates of liability, quantum of damages, proportion of corporate versus human plaintiffs, proportion of libel versus slander actions, proportion of cases involving journalism, and proportion of cases involving new communications technologies. It aims to contribute to debate about defamation law reform and inform scholarly work in defamation law or tort law and remedies more generally. This study should also be of interest to practitioners who seek to be better informed about the risks and rewards of defamation litigation.

The law of defamation aims to protect reputation while not unduly inhibiting free speech.¹ It is an old tort that has changed relatively little over the centuries, despite changes in societal views about the importance of speech and despite radical changes in communications technology. A *prima facie* case is established if the defendant communicated about the plaintiff in a manner that would make a reasonable person think less of the plaintiff.² The elements are often straightforwardly established and much of the free speech-protecting work of defamation law happens through defences such as truth (justification), fair comment, and qualified privilege.³

Defamation is an unusual tort: it is strict liability⁴ (although the new defence of responsible communication is grounded in a lack of fault⁵). Malice is presumed.⁶ Falsity is presumed.⁷ “[D]amages are presumed.”⁸ That is, plaintiffs need not prove actual injury to their reputations in order to be entitled to damages. Damages are at large and are meant to both compensate

¹ See Raymond E Brown, *Defamation Law: A Primer*, 2nd ed (Toronto: Carswell, 2013) [Brown, *Primer*] at 9.

² *Ibid* at 27, 29–30.

³ *Ibid* at 28.

⁴ *Ibid* at 29. Intent is required for the publication element, but only intent to convey—knowledge of the contents is not required.

⁵ The defence applies where publishing on a matter of public interest was responsible or done with diligence. See *Grant v Torstar Corp*, 2009 SCC 61 at para 126, [2009] 3 SCR 640 [*Grant*]. Diligence and responsibility are fault standards. Thus, it is now possible to defend certain defamatory statements on the basis that the defendant acted without fault in publishing them.

⁶ Brown, *Primer*, *supra* note 1 at 293.

⁷ *Ibid* at 154.

⁸ *Ibid* at 321.

plaintiffs and vindicate their reputations.⁹ Unlike for personal injury claims, non-economic damages for defamation are not capped. Special damages are rarely sought or awarded.¹⁰ Defamation therefore differs from most torts, which require fault and proof of injury for compensatory damages beyond the nominal.

In recent years, common law countries have been reforming their defamation laws. Australia and the UK have undertaken legislative reforms.¹¹ In Canada, the Supreme Court has acknowledged that defamation law does not strike a proper balance between free speech and protecting reputation, and since 2008, it has been making incremental changes to defamation law to better protect expression.¹² Furthermore, the Law Commission of Ontario is currently conducting a defamation law reform project.¹³

The argument for change tends to be based on principle (we are undervaluing free speech) or on anecdotal evidence (important speech is being chilled due to fear of litigation). For the first time in Canada, through this article, a wide range of quantitative data about defamation actions is presented, and can inform the policy debate.

The study has several interesting results. It demonstrates that the average non-pecuniary damages award has almost doubled between the two periods studied—even when adjusted for inflation. It reveals that the percentage of corporate defamation cases (versus those brought only by human beings) is significant—about a third—but that the percentage has not increased greatly over the time periods examined. The study indicates that reported defamation cases resulted in liability significantly less often in

⁹ *Reaburn v Langen*, 2008 BCSC 1342, 61 CCLT (3d) 227, citing *Uren v John Fairfax & Sons Proprietary Ltd*, (1966) 117 CLR 118 at 150, [1966] HCA 40 (HCA) (“properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is, simply because he was publicly defamed. For this reason, compensation by damages operates in two ways—as a vindication of the plaintiff to the public, and as consolation to him for a wrong done” at para 80 [emphasis in original]). See also Raymond Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, 2nd ed (Toronto: Thomson Reuters Canada, 2017) (loose-leaf updated 2016, release 1), ch 25 at 36 [Brown, *On Defamation*].

¹⁰ *Hodgson v Canadian Newspapers Co* (2000), 189 DLR (4th) 241, 49 OR (3d) 161 (CA), Sharpe JA (“[s]ignificant awards for special damages in defamation cases are the exception rather than the rule” at para 67). See also *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 169, 126 DLR (4th) 129 [Hill].

¹¹ For the UK, see *Defamation Act 2013* (UK), c 26 [UK Act]; *Defamation Act 1996* (UK), c 31. For Australia, see e.g. the *Defamation Act 2005* (NSW) [NSW Act].

¹² See e.g. *Grant*, *supra* note 5; *Crookes v Newton*, 2011 SCC 47, [2011] 3 SCR 269 [Crookes]; *WIC Radio Ltd v Simpson*, 2008 SCC 40, [2008] 2 SCR 420 [WIC Radio].

¹³ “[Defamation Law in the Internet Age](http://www.lco-cdo.org/en/defamation-law)”, Law Commission of Ontario, online: <www.lco-cdo.org/en/defamation-law>.

the later period (in only 28% of cases) than in the earlier period. Moreover, rates of liability were higher in cases involving new media (internet and email) publications than those involving other forms of publication. The study shows that punitive damages were awarded to corporations more often than to human plaintiffs, and in higher amounts. It also shows that punitive damages were awarded in about a quarter of all defamation cases in both periods. These and other results are examined in detail below.

2. Methodology and Scope

The methodology is summarized here, and a more detailed methodology section is included in Appendix A.

Research assistants and I identified defamation decisions reported in Westlaw, CanLII, and Quicklaw between 1973 and 1983 and between 2003 and 2013. I refer to these cases as the “reported cases”, although cases published exclusively online are not technically considered reported. Cases from Quebec were excluded, since the civil law of defamation differs from the common law. Given this methodology, this study does not claim to have captured every defamation decision (there may be additional cases reported only in other sources, and many cases go unreported). However, it is generally not possible to access court records by cause of action, and in that way, identify all claims.¹⁴ Our methodology captures the vast majority of defamation decisions available to lawyers and the public. The reported decisions effectively represent the common law of defamation—the body of law that courts primarily rely on in instructing juries and in deciding defamation cases.¹⁵

The 2003–2013 timeframe was selected because it constituted the ten-year period containing the most recent data available when this research began. A ten-year period was chosen to ensure there were enough cases to permit drawing statistically significant conclusions. The 1973–1983 timeframe, a period 30 years before 2003–2013, was chosen because it was sufficiently long ago to observe differences, while not being so long ago that the law was significantly different or that availability of cases posed difficulties. One might expect to see differences in the cases from these two periods for several reasons: at the end of the first period, the *Canadian*

¹⁴ In the jurisdictions in which we made enquiries, one had to select specific cases by their style of cause and generally pay an access fee of \$4 or \$5 per case to access court records. Without being able to select only defamation actions, all civil court records for the relevant periods would have to have been examined. This would have been prohibitive both in terms of cost and time required to extract only defamation actions.

¹⁵ There are statutes relating to libel and slander (see e.g. Ontario’s *Libel and Slander Act*, RSO 1990, c L12) but these tend to modify specific aspects of the common law. They are by no means complete codes of defamation law.

Charter of Rights and Freedoms came into force;¹⁶ between the two periods, the important case of *Hill v Church of Scientology* was decided;¹⁷ and by the second period, communications technologies including the internet were becoming increasingly prevalent.

We coded for a range of variables, including whether the plaintiffs were human or corporate, whether liability was established, and the quantum of damages. All damages values were adjusted for inflation, based on the year the decision was published, to 2013 values using the Bank of Canada Inflation Calculator.¹⁸ The analyses of statistical significance were carried out by a graduate student in statistics.

3. Results

A) Number and Type of Proceedings

1) Number of actions

Between 1973 and 1983, 238 reported cases related to a defamation action were identified. Between 2003 and 2013, 762 were identified—over three times more than between 1973 and 1983.¹⁹

Despite the appearance that the number of reported cases had more than tripled in 30 years, this is probably not so. The significant difference between 238 and 762 is likely due, in large part, to the increase in the availability of decisions over time, although factors such as population growth may also contribute to the difference. The ease and low cost of publishing online means that a greater percentage of decisions is being made available than in previous decades. According to former CanLII Board member, Catherine

¹⁶ *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

¹⁷ *Supra* note 10.

¹⁸ [“Inflation Calculator”, Bank of Canada](http://www.bankofcanada.ca/rates/related/inflation-calculator/), online: <www.bankofcanada.ca/rates/related/inflation-calculator/> [Inflation Calculator]. I note for anyone trying to replicate the data a lesson I learned the hard way: the results from the inflation calculator take into effect the month of your search. So, if in May of 2017 I am searching for inflation rates between 1978 and 2013, the site reflects the difference between May 1978 and May 2013. If you enter the same search terms in June of 2017, it will measure the effect of inflation between June 1978 and June 2013, which will produce slightly different results than the search conducted in May. All my calculations were done in the month of March.

¹⁹ The difference in the total number of available decisions has led some to question whether these data sets can be reliably compared. Analyses of statistical significance were conducted to address this concern.

Best, “most Canadian court decisions” are now published electronically.²⁰ CanLII publishes 150,000 decisions each year and Daniel Poulin notes that in relation to Quebec, the number of available decisions has increased twentyfold in 20 years.²¹ Although information about the extent of the increase in availability is difficult to find, the fact of an increase in reported decisions (including those published on CanLII and other databases) is not controversial.²² So even if there were no more actions being brought, we would expect to find many more reported cases in the later period.

Unfortunately, it is impossible to draw conclusions about whether defamation is bucking the “vanishing trial” trend that is seen with other torts.²³ In Canada, there are no publicly available statistics of civil actions based on cause of action²⁴ that would permit us to answer the question of whether there are more or fewer defamation actions now—in total or per capita—than there used to be.

A final point related to the number of final decisions is that the numbers are significantly higher than suggested in *Hill*.²⁵ In the context of explaining why the Supreme Court rejected a cap on general damages in defamation, Cory J noted that there were only 27 reported libel judgments between 1987 and 1991, and 24 between 1992 and 1995.²⁶ Although the present study does not cover the period of 1987–1995, it found an average of approximately

²⁰ Catherine Best, “Everything Old is New Again: The Proliferation of Case Law and Whether There is a Remedy,” (Paper delivered at the Law Via the Internet Conference, Montreal, 25–26 October 2007) [unpublished] at 25 [Best].

²¹ Daniel Poulin, “[Fifteen Years of Free Access to Law](#)” (28 April 2008), *Lexum* (blog), online: <lexum.com/en/blog/fifteen-years-of-free-access-to-law/>.

²² See Best, *supra* note 20: Catherine Best refers to “the current explosion of legal information” (regarding the unreported cases now available) (at 3). She also refers to a significant growth of case reporters in the 1970s, such that, for example, “the number of accessible British Columbia cases [increased] from approximately 100 to 1,000 cases a year” (at 23). She notes that “in recent years [(the article having been published in 2007)], approximately 2,500 decisions from British Columbia are published electronically each year” (at 25), which suggests a significant increase from the 1970s figure of 1,000. Again, however, it is unclear how much of this increase is due to there being more cases, and how much is due to a greater percentage of decisions being made available.

²³ See e.g. Marc Galanter, “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts” (2004) 1:3 *J Empirical Leg Stud* 459 at 462, 463; John Twohig et al, “Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto 1973-1994” in Ontario Law Reform Commission, *Rethinking Civil Justice: Research Studies for the Civil Justice Review* (Toronto: Ontario Law Reform Commission, 1996) 79 at 83 [Twohig et al].

²⁴ The Twohig et al study draws some conclusions based on types of civil action, but not by cause of action. See Twohig et al, *supra* note 23 at 111–15.

²⁵ *Supra* note 10.

²⁶ *Ibid* at para 169.

14 (non-interlocutory) defamation judgments per year from 1973 to 1983 (145 total) and 48 per year from 2003 to 2013 (480 total).²⁷ The 1987–1995 period falls between the two studied periods and so a rough comparison can be made by taking the average of the number of reported cases from the two time periods—31 per year. Thus, we would expect to see approximately 155 cases (not 27) between 1987 and 1991 and 124 (not 24) between 1992 and 1995.²⁸ Even taking the 1973–1983 rate of 14 per year, we would expect approximately 70 reported cases between 1987 and 1991 and 56 between 1992 and 1995.

This does not necessarily mean that the methodology used by the Supreme Court was flawed: it could be that the years Cory J referenced had abnormally few reported cases. Alternatively, the present study's definition of "reported cases" may be broader than that used by Cory J, and it therefore captures more cases. Unfortunately, there is no indication of the methodology used to obtain the data provided in *Hill*. This is problematic when such figures are used to justify legal decisions (in that case, rejecting a cap on non-economic damages in defamation), since they cannot be tested.²⁹ In some cases, courts have even cited the range of damages in the cases cited in *Hill* to justify an award of damages.³⁰ Given this analysis, the most that can be said is that the numbers cited in *Hill* are lower than one would expect based on the present study.

²⁷ Given that the time periods span slightly more than ten years in some databases (see Methodology section), the averages are approximate.

²⁸ Justice Cory refers to libel (rather than libel and slander) actions, and that might therefore account for his lower numbers. However, it is demonstrated below that in the periods studied, 87% of defamation actions between 1973 and 1983 and 89% of defamation actions between 2003 and 2013 were libel actions. Given this, the numbers cited in *Hill* still seem surprisingly low.

²⁹ Note that although the issue of damages caps was resolved in *Hill*, *supra* note 10, there is renewed interest in the possibility of a cap, given that the UK and Australia have instituted caps. For the UK, the common law "ceiling" for non-economic damages in defamation is approximately £275,000: see *Cairns v Modi* (2012), [2012] EWCA Civ 1382 at para 25, [2013] 1 WLR 1015. For Australia, see e.g. *NSW Act*, *supra* note 11, s 35 (instituting a cap of \$250,000 in 2005 dollars). Further, the new privacy tort of intrusion upon seclusion has damages capped at \$20,000: *Jones v Tsige*, 2012 ONCA 32 at para 87, 346 DLR (4th) 34.

³⁰ *Uppal v Diler*, 2012 CarswellOnt 9909 (WL Can), [2012] OJ No 2713 (QL) (Sup Ct J) (the Court justified its quantum of \$45,000 (reduced to \$22,000 because it was the small claims court maximum) at para 53, partly with reference to the figures quoted in *Hill*, *supra* note 10: "Justice Cory observed that in 27 reported libel decisions from 1987 to 1991 the average award was \$30,000, and in 24 reported judgments from 1992 to 1995 the average award was under \$20,000" at para 48).

2) Final decisions versus interlocutory matters

Of the 238 reported cases between 1973 and 1983, 145 (61%) were final, as opposed to interlocutory, decisions. In the 2003–2013 period, 480 of 762 (63%) were final decisions. One might have expected to see a higher percentage of interlocutory decisions in the later period since others have observed a trend in civil litigation toward more interlocutory matters being litigated.³¹ This trend is not apparent in the defamation cases examined in this study.

B) The Parties

1) Type of plaintiff: corporate and human

Defamation law applies to corporate plaintiffs in an almost identical manner as to human plaintiffs.³² There is some debate as to whether this should be so, given: the problem of SLAPP suits;³³ the nature of corporate reputation; the availability of alternate causes of action for corporations (especially injurious falsehood); and the importance of speech about corporations. Scholars, including me, have argued that corporations should be treated differently for defamation purposes or not allowed standing to sue in defamation at all.³⁴ Australia denies corporations standing to sue in defamation where they have more than nine employees.³⁵ The UK changed

³¹ Twohig et al, *supra* note 23 at 124.

³² See Hilary Young, “Rethinking Canadian Defamation Law as Applied to Corporate Plaintiffs” (2013) 46 UBC L Rev 529 at 533–35 [Young, “Corporate Plaintiffs”] (discussing the differences between the application of defamation law between corporate and human plaintiffs).

³³ SLAPP (strategic lawsuit against public participation) suits are unmeritorious suits that silence public participation. They are often brought by corporate plaintiffs and are often defamation actions. Ontario recently enacted an anti-SLAPP law: *Protection of Public Participation Act, 2015*, SO 2015, c 23, following the recommendations of an Anti-SLAPP Advisory Panel created by the Attorney General of Ontario, which cited evidence that SLAPP suits are a problem in Ontario: [Ontario, Anti-SLAPP Advisory Panel, Report to the Attorney General](https://d3n8a8pro7vhmx.cloudfront.net/cjfe/pages/1385/attachments/original/1439683971/anti_slapp_final_report_en.pdf?1439683971) (Ontario: Anti-SLAPP Advisory Panel, 2010) at paras 6–8, online: <https://d3n8a8pro7vhmx.cloudfront.net/cjfe/pages/1385/attachments/original/1439683971/anti_slapp_final_report_en.pdf?1439683971>. See also D Mark Jackson, “The Corporate Defamation Plaintiff in the Era of SLAPPs: Revisiting *New York Times v. Sullivan*” (2001) 9:2 Wm & Mary Bill Rts J 491 [Jackson] (“[c]orporations have increasingly used defamation suits as an offensive weapon” at 491).

³⁴ See e.g. Jackson, *supra* note 33; Hilary Young, “Adding Insult to Injury in Assessing Damages for Corporate Defamation” (2013) 21 Tort L Rev 127.

³⁵ *Civil Law (Wrongs) Act 2002* (ACT), s 121; *Defamation Act 2006* (NT), s 8; *NSW Act, supra* note 11, s 9; *Defamation Act 2005* (Qld), s 9; *Defamation Act 2005* (SA), s 9; *Defamation Act 2005* (Tas), s 9; *Defamation Act 2005* (Vic), s 9; *Defamation Act 2005* (WA), s 9 [Australia Acts].

its laws in 2013 to require for-profit corporations to prove “serious financial loss” in order to succeed in defamation.³⁶ The scope of the Law Commission of Ontario’s defamation law reform project includes examining the law as applied to corporate plaintiffs.

Of the 238 reported decisions between 1973 and 1983, 179 (75%) involved only human plaintiffs; 31 (13%) involved only corporate plaintiffs (defined as all non-human plaintiffs); the remaining 28 (12%) involved both corporate and human plaintiffs. This means that 87% of cases had one or more human plaintiff and 25% (59/238) had one or more corporate plaintiff.

In the 2003–2013 period, of 762 reported decisions, 521 (68%) involved only human plaintiffs, while 117 (15%) involved only corporate plaintiffs. 124 (16%) involved both. Expressed differently, 85% (645/762) of reported decisions involved at least one human plaintiff and 32% (241/762) involved at least one corporate plaintiff.

This indicates that a majority of defamation actions involved only human plaintiffs, but that corporate plaintiffs are found in a significant portion of defamation actions as reflected in the case law (25% in 1973–1983 and 32% in 2003–2013). This difference between 25% and 32% is statistically significant at a five percent significance level but not at a one percent significance level ($p\text{-value} = 0.037 < \alpha = 0.05$).

Percent of reported cases with at least one corporate plaintiff

1973–1983	2003–2013
25%	32%

These data have implications for policy. Whether Canada should adopt rules specific to corporate defamation plaintiffs, as the UK and Australia have done, depends in part on the number of corporate actions and whether that number is increasing. I have written elsewhere that “there is reason to think that the number of defamation actions brought by corporations is increasing”, based on information from other jurisdictions.³⁷ For example, a British publisher reported a tripling of corporate defamation actions between 2008 and 2009.³⁸ But in Canada, assuming that the reported decisions

³⁶ *UK Act, supra* note 11, s 1(2).

³⁷ Young, “Corporate Plaintiffs”, *supra* note 32 at 538.

³⁸ Sweet & Maxwell, “[Defamation Cases Increase by a Third](http://www.google.ca/url?sa=t&rct=j&q=increasing%20trend%20defamation%20corporations&source=web&cd=2&sqi=2&ved=0CFEQFjAB&url=http%3A%2F%2Fwww.sweetandmaxwell.co.uk%2Fabout-us%2Fpress-releases%2FDefamation_Cases_annual%2520survey_0709.pdf&ei=NGXsT8q-EpCI6AGPmuXpBQ&usg=AFQjCNGNOzOD_Xg-Cyf6uTtnkdYIOOYGyw&cad=rja)” (July 2009) at 1, online: <http://www.google.ca/url?sa=t&rct=j&q=increasing%20trend%20defamation%20corporations&source=web&cd=2&sqi=2&ved=0CFEQFjAB&url=http%3A%2F%2Fwww.sweetandmaxwell.co.uk%2Fabout-us%2Fpress-releases%2FDefamation_Cases_annual%2520survey_0709.pdf&ei=NGXsT8q-EpCI6AGPmuXpBQ&usg=AFQjCNGNOzOD_Xg-Cyf6uTtnkdYIOOYGyw&cad=rja>.

are representative of all cases, the difference between the proportion of corporate and human plaintiffs is only a little higher between 2003 and 2013 than between 1973 and 1983.

On the one hand, this study's results could support the *status quo* in that the later cases do not involve a *much* greater proportion of corporate defamation actions than the earlier period. There might, therefore, be no reason for concern. On the other hand, if one *is* concerned about corporate defamation actions, the fact that they constitute almost a third of all defamation actions lends support to the view that the related issues are important: corporate plaintiff cases cannot be dismissed as exceptional.

2) Types of corporate plaintiff

Of the corporate plaintiffs in the 1973–1983 cases, most were for-profit corporations (42/59 or 71%). There were seven not-for-profit corporate plaintiffs (12%) and seven union plaintiffs (12%). A municipality was a corporate plaintiff in one case (three percent).³⁹ In two cases (three percent), the published facts contained insufficient information to determine whether the corporate plaintiff was a for-profit, not-for-profit, or other corporation.

Interestingly, four of the seven not-for-profit actions between 1973 and 1983 (seven percent of all corporate actions) were brought by the Church of Scientology or a related entity. The litigiousness of the Church of Scientology in a four-year period in the 1970s may distort the result regarding the number of not-for-profit defamation actions.

In the 2003–2013 data, 210 out of 241 corporate cases (87%) involved for-profit corporations. Eighteen of 241 cases (seven percent) involved one or more not-for-profit plaintiffs other than towns and unions. Four actions (two percent) were brought by union plaintiffs and three actions (one percent) were brought by towns. For six cases (two percent), there was not enough information in the decision to determine the corporation's categorization.

That most corporate plaintiffs are for-profit is not surprising: they outnumber not-for-profits.⁴⁰ Furthermore, for-profit entities often

Note that although the title refers to defamation cases increasing by a third, with regard specifically to defamation actions brought by corporations, the number tripled. Note also that the numbers involved were relatively small: the increase was from five to 16.

³⁹ *Montague (Township of) v Page* (2006), 79 OR (3d) 515, 139 CRR (2d) 82 (Sup Ct J) (clarifying that municipalities, like other governments, cannot sue in defamation); see also Hilary Young, "Public Institutions as Defamation Plaintiffs" (2016) 39:1 Dal LJ 249.

⁴⁰ Although it is uncontroversial that there are more for-profit than not-for-profit corporations in Canada, finding definitive figures is surprisingly difficult. The closest I could

have more resources than not-for-profits, although this is certainly a generalization.

One implication is that although not-for-profits do not figure prominently, they do avail themselves of the defamation action to a non-trivial degree. As a result, if Canadian defamation law were to change in relation to corporate plaintiffs, the situation of not-for-profits would need to be considered. In the UK and Australia, special rules for corporations apply only to for-profit corporations.⁴¹ Depending on the reasons for changing the law *vis-à-vis* corporate defamation plaintiffs, such changes could include or exclude not-for-profits. Some reasons for special rules for corporate defamation plaintiffs apply equally to for-profits and not-for-profits (e.g. their lack of any dignity to be injured; public interest) while other reasons might apply differently to for-profits (e.g. inequality of resources; tendency to bring SLAPPs).

C) Type of Publication

1) Libel versus slander

In the 1973–1983 data, there were 169 cases involving allegations of libel (that is, defamatory communications that are written or broadcast, or otherwise permanent), 27 involving slander (defamatory communications that are spoken or otherwise transitory),⁴² and seven that involved both. For the rest of the cases, it was unclear whether they alleged libel or slander. Given the greater potential reputational damage from libel, all things being equal, and perhaps the better availability of evidence of libel than of slander, it is unsurprising to find more libel than slander cases: 4.5 times as many.

find was data from the UK where the ratio of for-profit to not-for-profit corporations in 2015 was 69 to one—meaning there were 69 for-profit businesses for every one not-for-profit: UK, Department for Business Innovation & Skills, *Business Population Estimates for the UK and Regions 2015: Detailed Tables* (Sheffield: Crown, 2015), online: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/467445/bpe_2015_detailed_tables.xls>.

⁴¹ Australia denied standing to sue to for-profit corporations with ten or more employees (see Australia Acts, *supra* note 35) while the UK now requires “bod[ies] that [trade] for profit” to prove “serious financial loss” in order to succeed in defamation (*UK Act, supra* note 11, s 1(2)).

⁴² The distinction between libel and slander rests on the permanence of the form of communication. Communication in transitory form, such as spoken language, is slander while more lasting forms, such as writing, are libel. See Patrick Milmo et al, eds, *Gatley on Libel and Slander*, 11th ed (London, UK: Sweet & Maxwell, 2008), ch 3.6 at 102. See also Brown, *Primer, supra* note 1 at 12–15.

In the 2003–2013 timeframe, 473 cases involved allegations of libel, while 67 involved slander. 66 cases involved allegations of both. One involved an act of failing to deliver a product, causing reputational harm.⁴³ For the rest of the cases it was unclear whether they alleged libel or slander.

	1973–1983	2003–2013
% Libel	87%	89%
% Slander	17%	22% ⁴⁴

In both periods, then, the percentage of cases alleging libel versus slander is significantly higher.

2) Journalistic versus non-journalistic publications

Here the focus is on whether the impugned publication was journalistic, defined to mean publications in newspapers and magazines and on television and radio, but not in books or newsletters. The category is grounded in the concept of journalism rather than the medium of communication. And although journalism is hard to define, the intent was to reflect publications in relation to which there would have been truth-seeking, professional standards, and editorial oversight. Some communications were hard to categorize. Blogs, for example, raised difficulties. One blog was written by a journalist who may have been expected to apply professional standards, but there was no editorial oversight. Other blogs attempted to seek truth but there would be no expectation of professional standards or editorial oversight. Newsletters too proved difficult. In the end, I excluded newsletters from the journalism category and included blogs. Of course, different categorization decisions would have led to different results.

Of the 238 cases in the 1973–1983 period, 126 involved a journalistic publication (in whole or in part) and 103 did not. For nine, there was insufficient information in the decision to permit categorization. This means that of the 229 that were categorized, 55% involved a journalistic publication and 45% did not. Of the 229, 142 were final decisions, and of these, 71 involved a journalistic publication and 71 did not (50%).

For the 2003–2013 data, only final decisions were considered. Of 480 final decisions, 89 involved a journalistic publication and 384 did not. For seven, there was insufficient information in the decision to

⁴³ *Chem Tech Industries v Tetra-Chem Industries*, 2007 CanLII 80122, 2007 CarswellOnt 10118 (WL Can) (Sup Ct J).

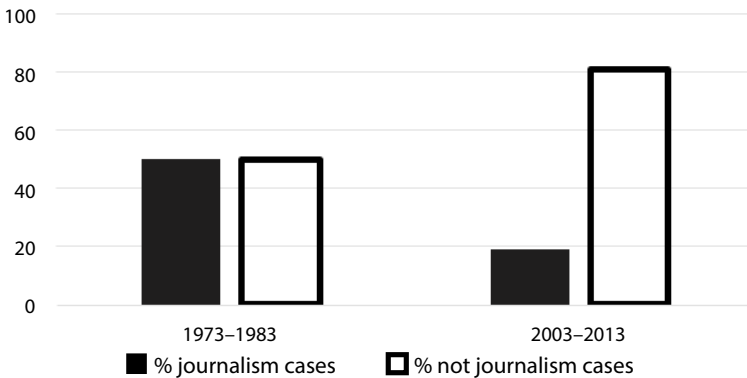
⁴⁴ Note that totals equal more than 100% because some cases were both libel and slander cases.

permit categorization. This means that of the 473 that were categorized, 19% involved a journalistic publication and 81% did not. The difference between 50% journalism in 1973–1983 and 19% in 2003–2013 is statistically significant ($p\text{-value} = 0.000 < \alpha = 0.01$).

	1973–1983	2003–2013
Journalism	50%	19%
Not journalism	50%	81%

The 2003–2013 figure of 19% of cases involving journalism is much lower than 50% in the 1973–1983 cases. One possible reason for this is the emergence of the internet between the two periods. Whereas the traditional media used to be one of the few ways in which a defamatory statement could be spread far and wide, to the significant detriment of the plaintiff, today there are many ways in which defamatory statements can be widely published. One might therefore expect a greater percentage of defamation actions involving non-journalistic publications, and one might expect to see a significant number of cases involving communications technology, which is the subject of the next section.

% Journalism Cases

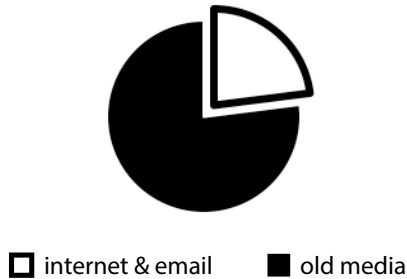


3) New technology versus old technology publications

New technologies are defined as e-mail and the internet, including social media, blogs, and chat rooms. Old technologies are everything else, such as print newspapers, television broadcasts, spoken communication, and, in one case, facsimile. Specifically, the issue is whether the impugned publication was in the form of an old technology or a new technology. New technologies were, of course, not found in the 1973–1983 data.

Of the 480 finally decided cases between 2003 and 2013, 458 could be classified as involving new or old technology publications. Forty of these 458 (9%) involved emails and 66 (14%) involved internet publications. Thus, 23% involved either of these new technologies and 77% involved neither.⁴⁵ Given how new these technologies were between 2003 and 2013, and given that these finally decided cases involve events that often happened many years before the case was decided, the percentage of new technology publications is noteworthy.

% Internet & Email Cases 2003–2013



D) How Often Liability was Established

1) General

In the reported decisions between 1973 and 1983, of the 145 cases for which there were final decisions (as opposed to ones for which there were only interlocutory decisions), liability was established in 75 and was not established in 70. Thus, in 52% of cases resolved by trial, liability was established. Of the 480 cases for which there were final decisions between 2003 and 2013, liability was established in 134 and not in 346. Thus, liability was established in only 28% of cases. This is a statistically significant difference ($p\text{-value} = 0.000 < \alpha = 0.01$).

	1973–1983	2003–2013
Finding of liability	52%	28%

The 28% figure for establishing liability is notable and puzzling, for both its low value and for the decrease it represents over time—especially given defamation’s plaintiff-friendly reputation. This unexpected result is discussed in detail.

⁴⁵ Note that the 40 and 66 figures both include two cases that involved both emails and the internet. Nevertheless, the total percentage of internet and email cases is 23% [(38+64+2)/458].

In comparing the 2003–2013 rate of liability identified in this study to rates of liability for civil actions generally, it is remarkably low. The Twohig et al study found that liability was established in Toronto civil actions 58% of the time in 1993/1994, down from 72% in 1973/1974.⁴⁶ For negligence actions, which place a much greater onus on the plaintiff than defamation does,⁴⁷ the rate of liability over the entire study period (using five-year intervals between 1973–1974 and 1993–1994) was 51%—the lowest rate of liability of all the types of civil actions examined.⁴⁸

I struggled to imagine factors related to the incomplete data set that could account for such a difference (e.g. whether cases in which there was liability are more likely to be reported, or whether jury decisions, which are underrepresented in the data, are more likely to result in liability). Nothing seemed plausible.⁴⁹

American scholars of Law and Economics have hypothesized that the rate of liability should approach 50% as the fraction of cases that goes to trial approaches zero.⁵⁰ Underlying the hypothesis is the idea that rational economic actors will not choose to litigate if it would be cheaper to settle. The cases that go to trial tend to be ones for which parties cannot successfully predict outcomes. These are cases that are close to the line, and in those cases, plaintiffs should win about as often as defendants. Ultimately, rational actors should not pursue to trial claims they are likely to lose. Given this line of thought, a 28% rate of liability is puzzling.

Yet scholars have noted that rates of liability are often significantly lower than 50%.⁵¹ For example, Kessler, Meites, and Miller demonstrate

⁴⁶ Twohig et al, *supra* note 23 at 128.

⁴⁷ For example, negligence requires the plaintiff to prove fault and injury, whereas defamation is largely strict liability and presumes injury.

⁴⁸ Twohig et al, *supra* note 23 at 128.

⁴⁹ Consider, for example, jury trials. Although I could find no evidence of the results of judge versus jury trials in Canadian defamation trials, studies of civil juries in the US generally suggest that there is no great difference between judges and juries in terms of findings of liability. See e.g. Valerie P Hans & Stephanie Albertson, “Empirical Research and Civil Jury Reform” (2003) 78:5 *Notre Dame L Rev* 1497 (“[d]ifferent strands of empirical evidence point to the conclusion that most civil jury verdicts are sound. First, judge-jury agreement studies show substantial rates of judicial agreement with jury verdicts” at 1509). In any event, jury trials are underrepresented in the data in both periods, and therefore that cannot account for the difference over time.

⁵⁰ See George Priest & Benjamin Klein, “The Selection of Disputes for Litigation” (1984) 13 *J Leg Stud* 1 at 19–20, n 45; George L Priest, “Reexamining the Selection Hypothesis: Learning from Wittman’s Mistakes” (1985) 14:1 *J Leg Stud* 215.

⁵¹ A range of studies, a majority showing liability rates below 50%, and some significantly lower, is discussed in Daniel Kessler, Thomas Meites & Geoffrey Miller, “[Explaining Deviations from the Fifty Percent Rule: A Multimodal Approach to the Selection](#)

that factors such as different sophistication of the parties, a legal standard favouring one side and high settlement costs relative to litigation costs correlate in predictable ways with liability rates of more or less than 50%.⁵² Interestingly, the Kessler et al article shows that in the “assault/libel/slander” category, there was liability in only 26% of cases,⁵³ although it must be noted that it is generally considerably harder to establish liability in a defamation action in the US than in Canada.⁵⁴

One possibility is that unlike the rational economic actors posited by Priest, Klein, and others, defamation litigants (plaintiffs in particular) are irrational in the sense that their litigation decisions are not primarily guided by the likelihood of obtaining more money than is offered in a settlement negotiation. Whereas a plaintiff suing for breach of contract will presumably only proceed if she expects to be better off *financially* at the end, defamation plaintiffs may not be motivated by financial considerations.⁵⁵ They sue to vindicate their reputation, and perhaps for emotional reasons. They might therefore sue even if they are relatively unlikely to come out of litigation financially ahead.

Even if the low liability rate can be explained by defamation plaintiffs’ “irrationality”, this would not account for the significant change in these rates over time. The Twohig et al study shows a decline over time in the rate of liability for Toronto civil cases, but the rates of liability are generally higher and the decrease over time less pronounced.

A possible explanation for the decrease over time in the rate of liability is the effect of the *Charter* or greater concern with freedom of expression generally. This may have made courts less likely to find defamation where they once might have. Beginning in 2008, Supreme Court decisions in *WIC*

[of Cases for Litigation](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1202&context=law_and_economics)” (1995) Coase-Sandor Institute for Law and Economics Working Paper No 31, online: <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1202&context=law_and_economics>.

⁵² *Ibid* at 257.

⁵³ *Ibid* at 250.

⁵⁴ In the US, fault is required for liability where the plaintiff is a public figure, whereas in Canada, defamation is a strict liability tort. See *New York Times Co v Sullivan*, 376 US 254 (1964). For more on the US approach, see Brown, *Primer, supra* note 1 at 385–86.

⁵⁵ Citing three American articles, Bob Tarantino states that: “plaintiffs launch defamation claims notwithstanding the low prospect of a favourable verdict”: Bob Tarantino, “Chasing Reputation: The Argument for Differential Treatment of ‘Public Figures’ in Canadian Defamation Law” (2010) 48:3 Osgoode Hall LJ 595 at 624, citing Randall P Bezanson, “The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get” (1986) 74 Cal L Rev 789; Marc A Franklin, “Winners and Losers and Why: A Study of Defamation Litigation” (1980) 5:3 American Bar Foundation Research J 455; Marc A Franklin, “Suing Media for Libel: A Litigation Study” (1981) 6:3 American Bar Foundation Research J 795 at 802–03.

Radio v Simpson, *Grant v Torstar Corp*, and *Crookes v Newton* all referenced the *Charter* and all made defamation law less plaintiff-friendly.⁵⁶ However, given the timeline for this study, it is unlikely that these cases had a significant effect on the 2003–2013 data.

To illustrate, for another project I examined the rate at which the defence of Responsible Communication on Matters of Public Interest was successfully argued between 2009, when the Supreme Court created the defence, and 2014.⁵⁷ The new defence allows defendants to succeed if the defamatory publication was on a matter of public interest and was published responsibly.⁵⁸ In only 18 cases was there a determination on the defence and in only three of those 18 cases was the defence successful.⁵⁹ So it seems unlikely that such a significant difference in the rate at which liability is established can be attributed to changes in Supreme Court case law alone. However, if the same trend toward greater protection of freedom of expression can be found in the lower courts, that might be a reason for the decrease in rates of liability between 1973–1983 and 2003–2013.

2) Rates of liability for corporate versus human plaintiffs

In the 1973–1983 data, human plaintiffs seem to have established liability about as often as corporate plaintiffs: 52% [69/132] of 1973–1983 finally decided cases involving human plaintiffs resulted in liability while 47% [15/32] of 1973–1983 finally decided cases involving corporate plaintiffs resulted in liability.⁶⁰ This is not a statistically significant difference ($p\text{-value} = 0.583 > \alpha = 0.1$). In the 2003–2013 cases, rates of liability were generally much lower, as discussed above, but corporate and human plaintiffs still fared similarly to each other: 28% [123/433] for human plaintiffs and 30% [36/121] for corporate ones.⁶¹ Again, this difference is not statistically

⁵⁶ *Supra* note 12.

⁵⁷ *Grant, supra* note 5.

⁵⁸ *Ibid* at para 126.

⁵⁹ Hilary Young, “Anyone ... in any medium??: The Scope of Canada’s Responsible Journalism Defence” in Andrew T Kenyon, ed, *Comparative Defamation and Privacy Law* (Cambridge, UK: Cambridge University Press, 2016) 17 at 25 [Young, *Responsible Communication*].

⁶⁰ Human plaintiffs established liability in 69 of the 132 cases (adding the cases involving both human and corporate plaintiffs to the totals), or 52%, while corporate plaintiffs established liability in 15 of 32 cases, or 47%.

⁶¹ This was obtained by counting the number of cases involving both humans and plaintiffs as both human and corporate cases. So, for example, I added 25 cases that had both human and corporate plaintiffs and in which liability was established to the 98 such cases for human plaintiffs alone for a total of 123 human plaintiff cases in which liability was established. I then added the total of all human plaintiff cases (433). $123/433 = 28\%$. I then did the same with the corporate plaintiff cases. This means that cases were counted twice if they had both a human and corporate plaintiff.

significant ($p\text{-value} = 0.774 > \alpha = 0.1$). Thus, in neither period is there a statistically significant difference between the rates at which human versus corporate plaintiffs established liability in defamation.

	1973–1983	2003–2013
Human π cases	52% liability	28% liability
Corporate π cases	47% liability	30% liability

This result is somewhat surprising. If liability rates are low in part because defamation plaintiffs are less likely to be economically rational actors, one would expect findings of liability more often when there are corporate plaintiffs than human plaintiffs, on the assumption that corporations are more likely to act rationally.⁶² (And yet, to the extent that vindicating reputation is one of the goals of defamation law,⁶³ an action might be worth pursuing even if the damages award alone would not seem to justify the expense.)

There is also evidence that liability rates are higher in civil actions generally where plaintiffs are corporations.⁶⁴ Yet that is not the case for defamation based on the present data.

3) Rates of liability in cases involving journalism

In the 1973–1983 data, of the 73 final decisions involving journalism, 47 (64%) resulted in liability and 26 (36%) did not. For non-journalistic publications, there was liability in 30 of 71 finally decided cases (42%). This difference between 64% and 42% is statistically significant ($p\text{-value} = 0.006 < \alpha = 0.01$).

Thus, in the 1973–1983 cases, there was liability significantly more often where the impugned publication was journalistic in nature than when it was not. Phrased differently, between 1973 and 1983, defendants were less successful in defending journalistic publications than non-journalistic ones.

With regard to the 2003–2013 cases, of the 89 final decisions involving journalism, 31 (35%) resulted in liability and 58 (65%) did not. The rate of liability where non-journalistic publications were involved was 25% [97/384]. Recall that the overall rate of liability in the 2003–2013 cases was

⁶² I am indebted to Norman Siebrasse for this observation.

⁶³ See n 9.

⁶⁴ Peter McCormick, *Canada's Courts* (Toronto: James Lorimer, 1994), especially at 157 (noting that corporate plaintiffs succeed more often than human plaintiffs, based on US and Canadian studies).

28%. The difference between 35% and 25% is statistically significant if $\alpha = 0.1$ but not if $\alpha = 0.5$ or 0.01 (p -value = 0.083).

Therefore between 1973 and 1983, plaintiffs established liability significantly more often in relation to journalistic publications, and the same appears to be the case in the period between 2003 and 2013. However, in the latter period, the statistical significance of the difference was less clear—only at a significance level of ten percent.

	1973–1983	2003–2013
Liability rate re: journalistic publications	64%	35%
Liability rate re: non-journalistic publications	42%	25%

It is interesting that even between 2003 and 2013, liability rates were higher where a journalistic publication was involved. Given the influence of *Charter* values on the law of defamation and specifically on expansions of the law of qualified privilege and the creation of a responsible communication defence, this was unexpected. It used to be that media defendants could not generally avail themselves of a qualified privilege defence,⁶⁵ which is one of the most frequently invoked (see “Reasons why Liability was not Established” in section F, below). By the 2003–2013 period, this was less obviously the case and in *Grant* in 2009, the Responsible Communication defence was created in part to make it easier for journalists to defend themselves. Yet, as noted above, in the first five years of the defence’s existence, it only succeeded three times, so perhaps its effect is not yet apparent in the 2003–2013 data.⁶⁶

The difference between rates of liability for journalistic publications is smaller in the later period, so it may be that there is a gradual trend toward greater protection of media speech, despite the fact that rates of liability are still higher for such speech than for other kinds of publications.

⁶⁵ Until *Grant*, it was widely, although not unanimously, accepted that the professional media had no duty to communicate to the world at large, and citizens had no reciprocal interest in receiving that communication, that could ground a qualified privilege (see *Grant*, *supra* note 5 at paras 34–35). *Grant* created a new defence of Responsible Communication on Matters of Public Interest, which is similar in some ways to qualified privilege. This new defence should allow media to succeed more often, but see Young, *Responsible Communication*, *supra* note 59 for evidence that the defence is being applied conservatively.

⁶⁶ Young, *Responsible Communication*, *supra* note 59 at 25.

4) Rates of liability for new technology v old technology publications

This section looks at rates of liability where the publication involved a new technology (email or internet). Again, there were no new media cases in the 1973–1983 data.

Between 2003 and 2013, there were 104 final decisions in internet and email cases. Of these, 40 were email and 66 were internet (two were both and were counted in each category). There was a finding of liability in 61% [40/66] of finally decided internet cases. For email publications, there was liability in 45% [18/40] of cases. (The difference between the liability rates for internet versus email is not statistically significant: $p\text{-value} = 0.115 > \alpha = 0.1$.) Overall for internet and email cases, the rate of liability was 54% [56/104].

2003–2013 cases, % cases with finding of liability

Internet publications	61%
Email publications	45%
All publications	28%

Given that the rate of liability for the 2003–2013 cases as a whole was only 28%, this is remarkable. These data suggest that where the medium of publication is a new communications technology, the plaintiff established liability more than twice as often as in cases in which publication was not on the internet or by email. The difference between the 61% liability rate for internet cases and the 28% overall liability rate is statistically significant ($p\text{-value} = 0.000 < \alpha = 0.01$).

Some possible reasons for this are that: (a) new media publications are perhaps less likely to be vetted and edited than publications in “old” media (although by no means are all “old” media publications vetted and edited); (b) there may be better evidence of online defamatory publications, relative to some “old” media publications, such as slander; and (c) the vast majority of instances of defamation do not result in litigation—perhaps because the scope of harm does not justify the cost of pursuing a claim. However, where defamatory statements are rendered permanent and widely accessible on the internet, the scope of injury may more often justify pursuing a claim. (The fact that new media publications persist and may be widespread is only relevant to damages, not to liability, but meritorious claims of this kind may be more likely to be pursued given the persistence online of such publications.) Regardless of *why* courts are finding liability more often for

new media publications, this is an important finding, worthy of further study.

E) Damages

Before beginning the discussion of damages, it should be noted that there is at least one commercial product that will assess the quantum of damages for Canadian defamation cases. I had intended to compare my results to those obtained in the WestlawNext Canada Defamation Quantum Service (“the Service”). For a number of reasons, however, I did not. First, the cases the Service relies on are different than those that I rely on—only Westlaw cases are included in the Service. As a result, the Service found only 22 damages awards for January 1, 1973 to December 31, 1982 (of which some were duplicates, as indicated below). My methodology uncovered 88 awards from 75 cases. Second, the methodology used to obtain data for the Service was sometimes difficult to discern (for example, what counts as a “telecommunications” case?). Third, and crucially, damages values are not adjusted for inflation.⁶⁷ Fourth, the Service often counts the same case multiple times, even where the case involves only one award to one plaintiff. For example, when I tested the Service, it counted the award in *Vigna v Levant*⁶⁸ six times (that is, it counted it as six awards) for the purpose of the number of awards, average damages awards, etc. There were many examples of such duplicates. Thus, although Westlaw is working to eliminate duplicates and adjust damages for inflation,⁶⁹ I consider the Service’s data for things like the number of awards and average and median damages awards to be unreliable at this time.

1) Total damages

One of the most interesting findings of this study is the large increase in damages awards over time. Each award was counted, so where there was more than one plaintiff, there was sometimes more than one damages award per case.

The average total damages award in the 2003–2013 cases, \$62,735, is almost double (1.9 times) the 1973–1983 average of \$32,466 *when adjusted for inflation*. This is a statistically significant difference ($p\text{-value} = 0.002 < \alpha = 0.01$).

It is easy to imagine how general damages in particular could have increased significantly, since they are at large and reflect the value of injuries

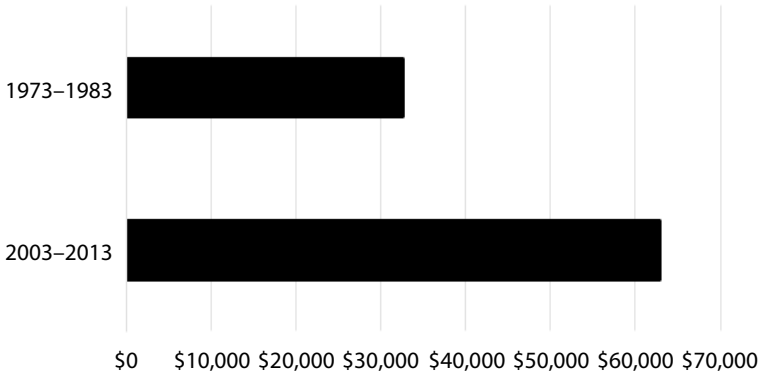
⁶⁷ Personal communication with Melissa Vieira, Thomson Reuters employee (14 June 2016) [Vieira].

⁶⁸ *Vigna v Levant*, 2010 ONSC 6308, 223 CRR (2d) 1.

⁶⁹ Vieira, *supra* note 67.

without a market value: loss of reputation and pain and suffering. (Although total rather than general damages are referred to here, as we shall see below, general damages make up the lion's share of total damages.) In *Andrews v Grand & Toy Alberta Ltd*, Dickson J referred to the quantification of non-pecuniary damages as “arbitrary”.⁷⁰ Without an objective economic measure to ground quantification, it is easier for the quantum to change over time.

Average Total Damages Award



An increase in defamation damages awards is also consistent with David Potts’ observation that awards were significantly higher after 1995,⁷¹ when the Supreme Court in *Hill v Church of Scientology* upheld a \$1.6 million award and rejected a general damages cap in defamation.

Interestingly, in a study of British Columbia cases, David Gooderham suggests that most defamation awards are still relatively low, but that there are a few cases in which there are large awards of damages.⁷² Such an uneven distribution would mean that the average damages award does not reflect the kind of damages most plaintiffs can expect if they establish liability.

This claim was tested by looking to median rather than average damages awards. The median total award in the 1973–1983 period was \$12,095, which is less than 40% of the average damages award of \$32,466. The median total award in 2003–2013 was \$29,294—less than half of the average award of \$62,735. In both periods, then, the median award is significantly less than

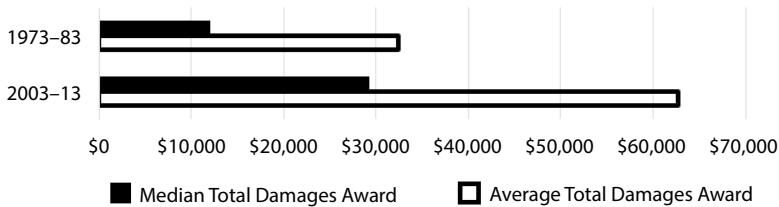
⁷⁰ [1978] 2 SCR 229 at 261, 83 DLR (3d) 452.

⁷¹ David A Potts, “[Damage Awards for Libel in Canada](http://www.cyberlibel.com/oldsite/damage.html)”, *Cyber Libel*, online: <<http://www.cyberlibel.com/oldsite/damage.html>>.

⁷² See David Gooderham, “[Defamation and Damages: Large Defamation Awards in Canada](http://defamationlawblog.ahbl.ca/files/2012/07/LARGE-DEFAMATION-AWARDS-IN-CANADA.pdf?utm_source=Mondaq&utm_medium=syndication&utm_campaign=inter-article-link)” (6 October 2011), online: <http://defamationlawblog.ahbl.ca/files/2012/07/LARGE-DEFAMATION-AWARDS-IN-CANADA.pdf?utm_source=Mondaq&utm_medium=syndication&utm_campaign=inter-article-link>.

the average, which means that most plaintiffs were awarded significantly less than the average. In fact, in the 2003–2013 cases, 75% of the awards were below the average. A few plaintiffs obtained much higher damages awards, which raised the average.⁷³

Average and Median Total Damages Awards Adjusted for Inflation



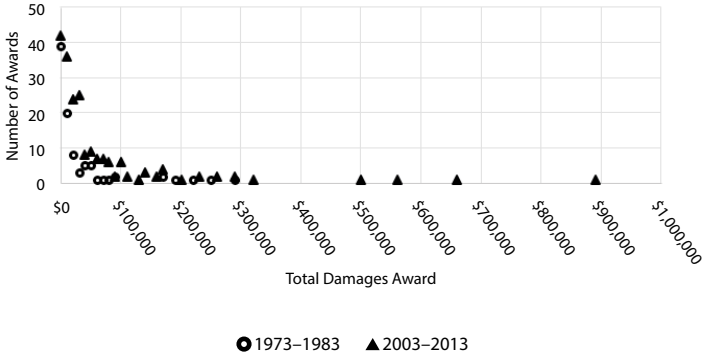
Note that the median in the later period is more than double that in the earlier period (142% higher). This means that it is not only the number of six-figure awards that is higher. Awards at the lower end of the scale are higher too.

The chart below shows the number of awards, in each time period, within a range of dollar values.⁷⁴ It demonstrates that there were many more (relatively) low value awards than high value ones in both periods.

⁷³ Examples of awards well above the average in the 1973–1983 data are: a \$174,282 award (\$75,000 adjusted for inflation) in *Munro v Toronto Sun Publishing Corp* (1982), 39 OR (2d) 100 at para 110, 21 CCLT 261 (SC); \$290,469 (\$125,000 adjusted for inflation) in *Vogel v Canadian Broadcasting Corp*, 35 BCLR 7 at para 289, [1982] 3 WWR 97 (SC). For the 2003–2013 period, large awards included: \$669,312 (\$650,000 adjusted for inflation) in *Astley v Verdun*, 2013 ONSC 2998 at para 1, 2013 CarswellOnt 6664 (WL Can); \$891,912 (\$750,000 adjusted for inflation) in *3 Pizzas 3 Wings Ltd v Iran Star Publishing*, 2003 CarswellOnt 6703 (WL Can) at para 3, [2003] OJ No 6157 (QL) (Sup Ct J).

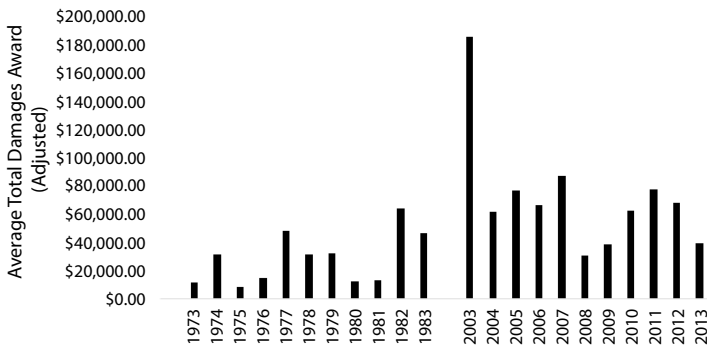
⁷⁴ The number of awards of \$9,999 or less was counted and represented at a point at the beginning of the range. Thus, awards between \$0 and \$9,999 are represented as \$0, awards of \$10,000 to \$19,999 are represented as \$10,000, etc.

Frequency of Damages Awards



To determine whether a gradual increase in damages awards was observable within the studied periods, or whether it occurred largely in between 1983 and 2003, I determined the annual average defamation award. Especially in the earlier period, there were often only a few cases from which to determine an annual average, which helps explain the significant variation over time. A single very large or very small award could have a large effect on the average. This is the reason for the spike in averages in 2003—the year in which there was a \$750,000 award, which is almost \$900,000 in 2013 dollars.

Average Total Defamation Award by Year (Adjusted)



Given the small number of cases per year and the large amount of variation within years and from year to year, no gradual increase is discernable. The average award is generally much higher in the years from 2003 to 2013 than from 1973 to 1983, but there are exceptions. Nevertheless, there can be no doubt that damages were significantly higher in the 2003–2013 period than the 1973–1983 period.

2) General damages

Thus far I have been considering only total damages awards, but some interesting trends are worth noting with regard to general, aggravated, punitive, and special damages.

In every case in which there was an award of damages, there was an award of general damages. This is expected given that general damages are presumed from a finding of liability. General damages constitute a majority of total damages. In 1973–1983 they were \$27,128 or 84% of total damages. In 2003–2013 they were \$47,003 or 75% of total damages. The average general damages award in 2003–2013 is 1.7 times as high as that in 1973–2013, which is similar to the size of the increase in total damages awards. The difference in the average general damages award between 1973–1983 and 2003–2013 is statistically significant if a five percent level of significance is used ($p\text{-value} = 0.015 < \alpha = 0.05$).

	1973–1983	2003–2013
Average general damages award	\$27,128	\$47,003
% Total damages ⁷⁵ award	84%	75%

3) Aggravated damages

Aggravated damages were seldom awarded in 1973–1983 (in two awards only, out of 91 damages awards), but when they were awarded, the amount tended to be high: \$58,094 and \$29,091. In the 2003–2013 cases, the average aggravated damages award (among cases in which aggravated damages were awarded) was \$30,986.

⁷⁵ General damages here exclude aggravated, punitive, and special damages. I debated whether to include aggravated damages in general damages. Reasons to do so include that aggravated damages “properly form part of the general damages award”: *Walker v CFTO Ltd* (1987), 37 DLR (4th) 224 at para 22, 59 OR (2d) 104 (CA) [*Walker*]. Like general damages, aggravated damages are non-pecuniary and compensatory. In addition, criteria for awarding aggravated damages overlap significantly with the criteria for awarding general damages: *Hill, supra* note 10 (“[t]here will of necessity be some overlapping of the factors to be considered when aggravated damages are assessed” at para 183). Finally, damages awards are sometimes referred to in such a way that it is difficult to tell whether aggravated damages are being awarded: see e.g. *Farrell v Canadian Broadcasting Corp* (1983), 44 Nfld & PEIR 182, 130 APR 182 (Nfld SC) (referring to “compensatory damages” at para 141). In the end, however, I decided to treat aggravated damages separately, since they are sometimes treated as a discrete head of damages and I wanted to be able to identify results specific to that head of damages.

Interestingly, however, in the later period there were many more aggravated damages awards relative to the total number of cases in which an award was made: 56/197 or 28% of cases. Only two percent of cases between 1973 and 1983 had an aggravated damages award. Caution is warranted given the small number of cases in the 1973–1983 data, but the difference is statistically significant ($p\text{-value} = 0.000 < \alpha = 0.01$). Thus, the data indicate that it was much more common for courts to award damages explicitly under the head of aggravated damages in defamation cases between 2003 and 2013 than between 1973 and 1983.

This is interesting not only because of the difference, but because of the relatively high percentage of cases in the later period that had an award of aggravated damages: 28%.

	1973–1983	2003–2013
Avg. aggr. damages award	\$43,593 (based on 2 cases)	\$30,986
% Awards with aggr. damages	2%	28%

The fact that aggravated damages were awarded in 28% of 2003–2013 cases is arguably problematic. First, aggravated damages are controversial. The Ontario Law Reform Commission recommended abolishing them in 1991, although that call was never taken up.⁷⁶ Raymond Brown also argues that aggravated damages should be eliminated in defamation actions.⁷⁷ The problem with aggravated damages relates to their tendency to overlap with general damages and punitive damages, creating the risk of overcompensation.⁷⁸

Second, the threshold for awarding aggravated damages is said to be quite high: actual malice.

If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff.⁷⁹

⁷⁶ Ontario, [Ontario Law Reform Commission, Report on Exemplary Damages](http://digitalcommons.osgoode.yorku.ca/library_olrc/140/) (Toronto: Ontario Law Reform Commission, 1991) at 103, online: <http://digitalcommons.osgoode.yorku.ca/library_olrc/140/>.

⁷⁷ Brown, *On Defamation*, *supra* note 9, ch 25 at 79: “A separate award of aggravated damages is a pernicious development in the law; it is absurd in theory and mischievous in practice”.

⁷⁸ See *ibid*, ch 25 at 79–85. See also Hill, *supra* note 10 at para 183.

⁷⁹ Hill, *supra* note 10 at para 190.

Conduct justifying aggravated damages must be “reprehensible or outrageous”,⁸⁰ “particularly high-handed or oppressive”,⁸¹ and “rub[bing] salt into the wound.”⁸² If aggravated damages are meant to involve such a high threshold of conduct, arguably we should not expect to see so many cases involving aggravated damages, especially given the availability of at large general damages awards and punitive damages awards. (The conclusion does not necessarily follow, however. It could be that people are more likely to sue where defendants behaved outrageously.)

Finally, although it has long been settled that corporations cannot be awarded aggravated damages,⁸³ there were two awards of aggravated damages to corporations in the 2003–2013 cases: a \$20,000 award in *Credit Valley Conservation Authority v Burko* (\$23,485 adjusted for inflation) and a \$20,000 award in *Greek Community of Metropolitan Toronto Inc v Gegios*.⁸⁴

4) Punitive damages

The average punitive damages award among cases in which punitive damages were awarded was lower in 2003–2013 (\$13,824) than in 1973–1983 (\$18,164), despite the fact that total damages awards were much higher in the later period. It may be that, given the greater aggravated damages awards in the later period, there was less need for additional punishment and deterrence. An anonymous peer reviewer suggested that the preference for aggravated over punitive damages may relate to the fact that aggravated damages fall within insurance coverage, whereas punitive damages do not, and this seems plausible. However, this would presumably not explain the decrease over time, nor would it account for the fact that a similar percentage of awards in the 2003–2013 cases included aggravated damages (28%) as contained punitive damages (27%).

⁸⁰ *Walker*, *supra* note 75 at para 22.

⁸¹ *Hill*, *supra* note 10 at para 188.

⁸² *Oriental Daily Publisher Ltd v Ming Pao Holdings Ltd*, [2012] HKCFA 59 at para 130, (2012) 15 HKCFAR 229.

⁸³ For this proposition, see *Thomas Management Ltd v Alberta (Minister of Environmental Protection)*, 2006 ABCA 303, 276 DLR (4th) 430, citing *Pinewood Recording Studios Ltd v City Tower Development Corp* (1998), 40 CLR (2d) 84 at para 72, 61 BCLR (3d) 110 (CA); *Lewis v Daily Telegraph Ltd*, [1963] 2 All ER 151 at 156, [1963] 2 WLR 1063 (HL); *Walker*, *supra* note 75 at para 26.

⁸⁴ *Credit Valley Conservation Authority v Burko*, 2004 CanLII 12274 at para 8, 2004 CarswellOnt 2614 (WL Can) (Sup Ct J); *Greek Community of Metropolitan Toronto Inc v Gegios*, 2006 CarswellOnt 3382 (WL Can) at para 96, [2006] OJ No 1461 (QL) (Sup Ct J). Note that both of these plaintiffs were not-for-profit corporations, but there was no suggestion in these decisions that aggravated damages should be available to not-for-profit corporations. Nor does the case law suggest the existence of such an exception.

The percentage of cases in which punitive damages were awarded was fairly constant: 22/91 (24%) in 1973–1983 and 53/197 (27%) in 2003–2013. However, given that defamation is strict liability and that punitive damages are relatively rare in tort, it is notable that a quarter of defamation damages awards in both periods include an award of punitive damages. Although no relevant Canadian data could be found, a Cornell study of US cases found that punitive damages were awarded in approximately three to five percent of civil cases (not just defamation cases) in which the plaintiff established liability.⁸⁵ This figure reflects the exceptional nature of punitive damages. As with aggravated damages, the threshold for awarding punitive damages is high. “Punitive damages may be awarded in situations where the defendant’s misconduct is so malicious, oppressive and highhanded that it offends the court’s sense of decency.”⁸⁶

	1973–1983	2003–2013
Avg. punitive damages award	\$18,164	\$13,824
% Awards with punitive damages	24%	27%

Yet Canadian courts awarded punitive damages in about a quarter of defamation cases in the periods studied. Either courts are awarding punitive damages in situations that do not warrant such an award, or else defamation actions often involve malicious and oppressive conduct. If the former is the case, this is problematic. Such awards in defamation actions affect free speech by both chilling and punishing it. This is why Australia has banned punitive/exemplary damages in defamation actions,⁸⁷ although the UK Law Commission argued against that approach.⁸⁸ Further study is warranted to see what kinds of conduct result in awards of punitive damages.

5) Special damages

For human beings, reputational injury need not result in economic loss, and even if it does, it is often difficult to establish a causal link between a defamatory statement and an economic loss. In addition, current defamation law, which presumes more than nominal damages from a finding of liability, provides plaintiffs with little incentive to try to prove special damages.

⁸⁵ Theodore Eisenberg et al, “The Decision to Award Punitive Damages: An Empirical Study” (2010) Cornell Law Faculty Publications Paper No 185, 577 at 578.

⁸⁶ *Supra* note 10 at para 196.

⁸⁷ See e.g. *NSW Act*, *supra* note 11, s 37.

⁸⁸ UK, Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Report 247) (London: Her Majesty’s Stationery Office, 1997) at 183, s 1.1.

Consequently, special damages are rarely sought or awarded.⁸⁹ In fact, in none of the 1973–1983 cases in the database was there an award of special damages.

In the 2003–2013 cases there were 11 special damages awards out of 197 awards. Thus, six percent of damages awards in this period included an award for special damages. The average award was \$56,475, but the range was considerable. The highest award of special damages was \$454,598 and the lowest award was \$101.

Miscellaneous

Before examining damages based on the type of plaintiff, there are a few other interesting things to note about damages awards generally. They are sometimes only nominal—one or two dollars (the two-dollar figure in the chart below is a one-dollar award adjusted for inflation) despite the presumption of damages. In the 1973–1983 cases, nine awards out of 91 (ten percent) were under \$1000 and 29 awards of the 91 (32%) were under \$5000. In the 2003–2013 cases, five of 197 awards (three percent) were of \$1000 or less, and 29 awards out of 197 (15%) were \$5000 or less. The percentage of awards under \$1000 was significantly lower in 2003–2013 than in 1973–1983 (five percent versus nine percent) and the same is true of awards under \$5000 (ten percent versus 33%). This is not surprising given the general trend upwards in the quantum of damages awards. (All figures are adjusted for inflation to 2013 dollars.)

	1973–1983	2003–2013
Minimum total award:	\$2	\$1
Maximum total award:	\$290,469	\$891,912
Number/% awards below \$1,000	9/91 = 10%	5/197 = 3%
Number/% awards below \$5,000	29/91 = 32%	29/197 = 15%
Number/% of awards of \$100,000+	6/91 = 7%	31/197 = 16%

The maximum award is much higher in the 2003–2013 cases than in the 1973–1983 cases (\$891,912 versus \$290,469). It should be recalled that \$891,912 is not the highest Canadian defamation award ever—just the highest in the 2003–2013 reported cases. The highest reported defamation damages award was the \$1.6M award in *Hill v Church of Scientology*, which

⁸⁹ See n 10.

would be worth \$2,241,109 in 2013 dollars.⁹⁰ Further, there is a much greater percentage of awards over \$100,000 in the later period than in the earlier—16% versus seven percent. This is a statistically significant difference if a five percent level of significance is selected ($p\text{-value} = 0.013 < \alpha = 0.05$).

6) Damages awards by type of plaintiff

Average damages awards appear higher for corporate than human plaintiffs in 1973–1983: \$31,365 for human plaintiffs and \$40,471 for corporate plaintiffs. However, that difference is not statistically significant ($p\text{-value} = 0.734 > \alpha = 0.1$). Similarly, damages awards appear to be higher for corporate than human plaintiffs between 2003 and 2013 (\$95,603 versus \$55,634), but again, the difference is not statistically significant ($p\text{-value} = 0.221 > \alpha = 0.1$). (The difference over time for corporate damages awards, \$40,471 versus \$95,603, is also not statistically significant: $p\text{-value} = 0.166 > \alpha = 0.1$.) Ultimately more cases are needed to be able to draw meaningful conclusions about differences between damages awards to human and corporate plaintiffs.

	1973–1983	2003–2013
Average total damages award to a human π	\$31,365	\$55,634
Average total damages award to a corporate π	\$40,471	\$95,603

The lack of a statistically significant difference is perhaps surprising, given that corporate reputations often have, at least in an economic sense, more value than human reputations. Then again, in defamation law, general damages for corporate plaintiffs should generally be low in the absence of proof of economic loss,⁹¹ and given that general damages are meant in

⁹⁰ There was apparently a larger (\$3,000,000) jury award in *Fennimore v Skyservice Airlines* (2008), but that case is not reported. See Jason Markusoff, “[Libel! Politicians Who Have Been Sued, and Canadian Defamation Award History](http://calgaryherald.com/news/local-news/libel-politicians-who-have-been-sued-and-canadian-defamation-award-history)”, *Calgary Herald* (20 November 2013), online: <<http://calgaryherald.com/news/local-news/libel-politicians-who-have-been-sued-and-canadian-defamation-award-history>>. The same source indicates that *Hill*, *supra* note 10, is the highest reported defamation award as of 2013.

⁹¹ “Limited companies, and other corporations, may also be awarded general damages for libel or slander, without adducing evidence of specific loss. However, it is submitted that in practice, in the absence of proof of special damages, or at least of a general loss of business, a limited company is unlikely to be entitled to a really substantial award of damages ... That there is an entitlement to general damages which are more than nominal damages is certain, but the amount likely to be awarded to a corporation may be small in commercial terms, unless the defendant’s refusal to retract or apologise makes it possible to argue that the only way in which the reputation of the company can be vindicated in the

large part to compensate for emotional and dignitary aspects of the injury to reputation, one might not expect the damages awarded to corporations to be high.

Another significant and surprising finding with regard to damages awarded to corporations is that in the 2003–2013 data, punitive damages were awarded to corporations in much higher amounts than to human plaintiffs. In the 2003–2013 data, punitive damages were awarded to human plaintiffs 24% of the time (in 39 of 162 awards) with an average award of \$9,066.⁹² But they were awarded to corporate plaintiffs 40% of the time (in 14 of 35 awards) with an average award of \$27,079.⁹³ The difference between 24% and 40% is not statistically significant unless a ten percent significance level is selected (p value = 0.075). However, the difference between \$9,066 and \$27,079 is statistically significant at a five percent level of significance (p value = 0.035).

In the 1973–1983 data, there were too few instances of punitive damages to draw meaningful comparisons. Punitive damages were awarded to human plaintiffs in 24% of cases and to corporate plaintiffs in nine percent of cases, but the latter represents a single award. The average punitive damages award from 1973 to 1983, adjusted for inflation, was \$18,164. (For 2003–2013 it was \$13,824. The difference is not statistically significant: p -value = 0.328 > α = 0.1.)

One possible reason for the greater quantum of punitive damages where the plaintiff is a corporation is the fact that corporations cannot receive aggravated damages.⁹⁴ Where the plaintiff is a corporation, the court's disapproval of the defendant's conduct must be reflected in the punitive damages award,⁹⁵ whereas it may be spread between aggravated and punitive damages where the plaintiff is human.

eyes of the world is by way of a really substantial award of damages": Peter F Carter-Ruck & Richard Walker, *Carter-Ruck on Libel and Slander*, 3rd ed (London, UK: Butterworths, 1985) at 156–57, cited by the Ontario Court of Appeal in *Walker*, *supra* note 75 at para 26.

⁹² The average award is \$9,066 among the cases in which punitive damages were awarded. If the cases in which no punitive damages were awarded, but the plaintiff established liability, the average award is \$2,183.

⁹³ The average award is \$27,079 among the cases in which punitive damages were awarded. If the cases in which no punitive damages were awarded, but the plaintiff established liability, the average award is \$10,831.

⁹⁴ See n 83.

⁹⁵ This is not strictly true in that the conduct of the defendant may be considered in assessing the quantum of general damages too. See *Hill*, *supra* note 10 at para 182.

7) Damages awards by type of publication: journalism

The average damages awards for cases involving journalistic publications (newspaper, magazine, television, radio, blogs) versus non-journalistic publications were compared. The average award for defamation involving journalism in the 1973–1983 cases was \$41,908 based on 52 awards. The average award in non-journalism cases was \$16,288 (based on 33 awards in 28 cases).

The number of data points was not large,⁹⁶ but the difference is statistically significant ($p\text{-value} = 0.008 < \alpha = 0.01$). Thus, in the 1973–1983 cases, the damages award was, on average, more than 2.5 times as high where the impugned publication was journalism than where it was not.

In the 2003–2013 data, the quantum of damages awarded in cases involving journalism appears to be similar to the quantum for non-journalism cases (\$58,884 versus \$65,231). The difference is not statistically significant ($p\text{-value} = 0.652 > \alpha = 0.1$).

	1973–1983	2003–2013
Avg. total damages awarded re: journalism	\$41,908	\$58,884
Avg. total damages awarded re: non-journalism	\$16,288	\$65,231

One possible reason for the existence of a difference in journalism versus non-journalism damages awards between 1973 and 1983, but not between 2003 and 2013, is that in the earlier period, journalistic publications often had broader reach than many non-journalistic publications (especially slanders) and there was, therefore, greater actual or potential reputational harm. Damages awards are meant to reflect the conduct of the defendant and the extent of reputational harm to the plaintiff.⁹⁷ If this were the case, it might make sense that the disparity diminishes in the later period, in which anyone can publish to the world at large.

⁹⁶ In 1973–1983, there were 47 damages awards against traditional media defendants and 33 damages awards against other defendants. In 2003–2013, there were 40 awards against traditional media defendants and 109 awards against other defendants.

⁹⁷ *Hill, supra* note 10 at para 182.

8) Damages awards by type of publication: new versus old technology

Damages awards in new technology (internet and email) cases appear slightly lower than average: the average total damages award for all cases in the 2003–2013 period was \$62,735, whereas the average damages award in internet and email cases was \$54,601. However, the difference is not statistically significant ($p\text{-value} = 0.437 > \alpha = 0.1$). I hypothesized that punitive damages would be higher in internet and email cases, but that seems not to be the case. The average internet/email punitive damages award was \$11,840 (considering only cases in which punitive damages were awarded). The average for all cases in 2003–2013 was \$13,824, considering only cases in which punitive damages were awarded. However, the difference is not statistically significant ($p\text{-value} = 0.564 > \alpha = 0.1$).

Type of damages	Average for internet/ email cases	Overall average
Total damages	\$54,601	\$62,735
Punitive	\$11,840	\$13,824

One might have expected higher damages in internet/email cases given that some courts treat internet publication as an aggravating factor in quantifying damages.⁹⁸ Yet the study shows no statistically significant difference.

I tried to determine whether there was a difference between awards for internet versus email, but there were too few awards to generate statistically significant results. The hypothesis, however, is that damages awards for internet publications should be higher than those for emails, given the often-wider dissemination on the internet than by email.⁹⁹

To summarize, the average defamation award in the 2003–2013 cases was almost double that in the 1973–1983 cases. The median, however, was much lower than the average in both time periods, meaning that most

⁹⁸ *Barrick Gold Corp v Lophandia* (2004), 239 DLR (4th) 577 at paras 28–34, 71 OR (3d) 416 (CA).

⁹⁹ *Ross v Holley*, 28 CCLT (3d) 83, [2004] OJ No 4643 (QL) (Sup Ct J) (“suffice it to say that there is a palpable difference between a posting on a popular website which may experience millions of “hits” on an ongoing basis and thus give rise to the existence of millions of publishees, and the sending of an e-mail to all of the publisher’s acquaintances, even with the exhortation to pass the e-mail on to others as was the case here. Clearly, the use of e-mail is far more powerful than the sending out of a multiple of hard copy letters defaming the plaintiff, but on the other hand, the e-mail medium is far less powerful than a posting on a website that has, as its initial audience, a substantially wider reach and therefore an exponentially greater potential for re-dissemination” at para 11).

plaintiffs who established liability were awarded less than the average. Total and general damages were not significantly higher for corporate plaintiffs than for human ones. However, the quantum of punitive damages awards was significantly higher in the 2003–2013 cases where the plaintiff was a corporation than where the plaintiff was a natural person. Between 1973 and 1983, total damages were much higher where a journalistic publication was involved, but that difference disappears in the 2003–2013 cases. Damages in new media cases were not meaningfully different than those in cases where the medium of publication was not a new communications technology.

F) Reasons why Liability was not Established

Where liability is established, it is of course because the elements were made out and no defences were made out, or because default judgment for the plaintiff was entered. The reasons why a defendant is found not liable are more varied.¹⁰⁰

In the 1973–1983 period, there were 70 cases for which liability was not made out and 79 reasons given for this (in some cases, more than one reason was given). The most common reason was that the defence of qualified privilege was made out (24/70 cases = 34% of cases). In eight cases, the defence of justification succeeded and in eight more, the statement was held not defamatory (8/70 = 11%). Absolute privilege applied in five cases, as did a lack of publication (5/70 = 7%). The remaining cases involved a range of reasons, such as lack of notice, lack of colloquium, and lack of standing.

In the 2003–2013 data, there were 346 cases in which liability was not made out and 474 reasons were given for this. The most common was that the defence of qualified privilege prevailed in 71 of 346 or 21% of cases. The second most common was that the pleadings disclosed no reasonable cause of action or were otherwise inadequate (63/346 = 18% of cases) and third was that the impugned statement was not defamatory (50/346 = 14% of cases). The next most common reasons were absolute privilege and justification (truth), each in 42 of 346 or 12% of cases.

¹⁰⁰ A word about methodology is warranted. In examining the reasons given for a lack of liability, I went beyond the strict ratio of the case and included *obiter* comments. For example, imagine a judge indicated that she found that the statement was not published but that even if she had found it was published, she would have found it was protected by qualified privilege. In such a scenario, I included both lack of publication and qualified privilege as reasons. In addition, there was some overlap between categories. If the pleadings were deficient and disclosed no reasonable cause of action, I coded that as a problem with the pleadings. If, however, the judge indicated that the pleadings were deficient because they did not specify who published the statement, I coded that as a publication issue as well as a pleadings issue.

A few points are worth noting. First, the responsible communication defence was made out in only three cases.¹⁰¹ The defence was created in 2009 in *Grant*,¹⁰² and so only about four years of post-*Grant* cases are reflected in the data. However, the number nevertheless seems low. Time will reveal whether it simply took time for the defence to make its way into the case law or whether there is some other reason for the low number, such as that courts are interpreting the defence narrowly.¹⁰³

Second, limitations issues seem to arise much more frequently in the later period (26/346 cases (8%) versus 1/67 (1%) of cases). It is unclear why this might be. One might have predicted the opposite trend since limitations periods will rarely affect internet publications. The multiple publication rule means that every time someone accesses online content, a new publication, and therefore a new tort, has occurred, such that the clock is reset on limitations periods.¹⁰⁴ Perhaps there is a trend toward greater enforcement of limitations periods in 2003–2013 than in 1973–1983.

Third, in the 2003–2013 data there were 27 cases (27/346 = 8%) that failed at least in part because the claim was vexatious or an abuse of process. No actions failed for that reason in the 1973–1983 data. This may simply reflect the smaller number of failed cases in the 1973–1983 period, it may reflect courts' greater willingness in the later period to dismiss vexatious actions, or it may reflect a greater number of vexatious claims.

4. Conclusion

This quantitative study of Canadian defamation actions, the first of its kind, reveals a range of information that may be of interest to lawmakers, scholars, and lawyers. Some of the study's findings include: that the average damages award between 2003 and 2013 was almost double that between 1973 and 1983; that the rate of liability was only 28% between 2003 and 2013 and that this is a much lower rate than in the earlier period; and that between 1973 and 1983, damages awards were much higher where a journalistic

¹⁰¹ *Hadjor v Sault Ste Marie Chamber of Commerce*, 2011 ONCA 811, 2011 CarswellOnt 14472 (WL Can); *Shavluk v Green Party of Canada*, 2011 BCCA 286, [2011] BCWLD 5513; *Vellacott v Saskatoon Starphoenix Group Inc*, 2012 SKQB 359, 404 Sask R 160.

¹⁰² *Grant*, *supra* note 5 at para 7.

¹⁰³ See Young, *Responsible Communication*, *supra* note 59 at 25, noting that in only three of 18 finally decided cases where the defence was pleaded (up to 2014) did it succeed, and providing some reasons why this might be.

¹⁰⁴ For more on the multiple publication rule, see "The Single Publication Rule in Libel: A Fiction Misapplied" (1949) 62:6 Harv L Rev 1041; Itai Maytal, "Libel Lessons from Across the Pond: What British Courts Can Learn from the United States' Chilling Experience with the 'Multiple Publication Rule' in Traditional Media and the Internet" (2010) 3:1 Journal Intl Media & Entertainment L 121.

publication was involved, but that this difference is not evident in the 2003–2013 data. Each of these findings, as well as the study’s other findings, can inform the debate about defamation law reform and provides a benchmark against which future changes can be measured.

As much as I hope these results are of interest to bench and bar, I believe that this kind of research project should be obsolete. We should not have to extract information from individual cases in order to obtain information about matters such as average damages awards. Instead, courts should be gathering and making available this basic information about all proceedings, broken down by categories such as cause of action, how the case was resolved, and damages awards—ideally in a format that is the same in each jurisdiction. Lawyers, legislators, and researchers should be able to readily obtain information about rates of liability or damages by cause of action. This would be a major undertaking on the part of the provinces, and issues of privacy would need to be worked out, but this is a discussion we should be having so as to promote evidence-based lawmaking by courts and legislatures.

APPENDIX A: METHODOLOGY

Out of necessity, this study relies solely on reported decisions. As a result, certain types of decisions, especially jury decisions, are underrepresented (although the data include some reported decisions related to jury trials). It may also be that certain jurisdictions' or judges' cases are underrepresented if they are less likely to report their decisions. Further, as is always the case when relying on reported decisions, cases that settle may either not appear at all, or a decision on a motion may appear but the final outcome is unknown.

CanLII, Quicklaw, and Westlaw were searched. Searches were limited to two ten-year periods: 1973–1983 and 2003–2013. Depending on the database, the search period was either January 1 (1973 or 2003) to December 31 (1982 or 2012) or May 8 (1973 or 2003) to May 7 (1983 or 2013). This is because of different search parameters in different databases. Since this study makes no claims about the total number of cases in a ten-year period, it was not important that the period from which cases were taken be exactly ten years. In effect, the cases captured are most of those from January 1, 1973 to May 7, 1983 and from January 1, 2003 to May 7, 2013. That said, some cases between January 1, 1973 and May 7, 1973 and between January 1, 1983 and May 7, 1983 (and again for those days in 2003 and 2013) will have been missed if they only occur in one database.

The term “defam!” was searched on CanLII. (This syntax catches all cases containing any word that started with the letters d-e-f-a-m. The intent was to catch “defamation”, “defamatory”, “defame”, etc.) Board and tribunal decisions were excluded, as were federal cases. Quebec cases were also excluded.

The Quicklaw search was similar except that it included the terms “slander” and “libel”. Specifically, the search term was: “atleast5(defam!)” or “atleast3(slander)” or “atleast3(libel)”. This means that any case mentioning “defamation”, “defamatory”, or “defame” at least five times was found, as were cases mentioning “slander” at least three times or “libel” at least three times. Again, Quebec and the federal jurisdiction were excluded. Duplicate cases were excluded.

Finally, a Westlaw search was conducted using the same terms as with Quicklaw. Again, Quebec, federal, and duplicate cases were excluded.

This methodology has certain limitations. It would, for example, exclude a case that is in Quicklaw or Westlaw but not on CanLII and that only mentions “defamation”/“defamatory”/“defame” four times (so long as it

does not also mention “slander” or “libel” three times). It would also exclude a case that referred to “libel” or “slander” only once or twice. These seemed like reasonable concessions in order to limit the number of false hits—cases that were not defamation cases at all, but mentioned defamation, libel, or slander.

Each of the resulting cases was read to determine whether it actually involved a defamation action. If so, it was included in the study. Whenever there were multiple reported decisions involving the same case (motions and appeals, for example), these were treated as a single case. However, decisions, including appeals, that occurred after the relevant periods were not considered. For example, if a plaintiff established liability in 2012 and was awarded \$100,000 in damages, and the defendant successfully appealed on liability in 2014, the case was coded as resulting in liability and the \$100,000 damages award was counted.

For each set of data, a range of variables was coded for. These were:

- (a) whether the plaintiff was human or corporate;
- (b) whether there was a jury;
- (c) whether the publication was in the nature of libel or slander;
- (d) whether the publication was journalistic;
- (e) whether the publication involved new communications technology (internet or email);
- (f) whether liability was established;
- (g) if it was not established, the reason why (defences);
- (h) the quantum of damages (total, general, aggravated, punitive, special, total non-economic).

Where there was more than one plaintiff in a case who received an award, for the purposes of calculating average award amounts they were treated as different awards. So, if a case involved five plaintiffs who were each awarded \$100 in damages, that was counted as five separate awards of \$100. Where a global award was given to more than one plaintiff, the award was divided by the number of plaintiffs and treated as separate awards (e.g. a \$50,000 award to two plaintiffs was treated as two \$25,000 awards). Of course, this was not done where the judgment indicated that the award was not to be split evenly.

Similarly, if damages were awarded for more than one tort, and the court did not specify how those damages should be allocated between torts, the damages were divided by the number of torts. So, for example, in the cases culminating with *Dover Investments Ltd v Awad*, special damages of \$21,992.39 were awarded to two plaintiffs in relation to two torts, one of which was defamation.¹⁰⁵ I therefore counted the special damages award in defamation as \$5,498 to each of two plaintiffs (before adjusting for inflation).

All damages values were adjusted for inflation to 2013 values using the Bank of Canada Inflation Calculator.¹⁰⁶ Amounts were rounded to the nearest dollar.

Statistical significance was assessed using Fisher's exact test where two proportions were compared and using a t-test where average means were compared. Other tests were used as appropriate (e.g. Tukey's range test). These tests were conducted by a graduate student in statistics at the University of New Brunswick.

¹⁰⁵ *Dover Investments Ltd v Awad*, 2010 BCCA 114 at para 5, [2010] BCWLD 4077.

¹⁰⁶ Inflation Calculator, *supra* note 18.