

LIBEL CHILL

Libel chill is silencing our best critical voices by time consuming, soul destroying litigation and the threat of ruinous legal costs. It is eviscerating freedom of expression and protecting the evil rich from public scrutiny. (A) Right? (B) Wrong? (C) Not So Simple?

In the past few years, we have read a great deal in the mainstream press about Conrad Black, the Reichmans and Allan Gotlieb, among others, each of whom have brought hefty libel actions. The Reichman action, in particular, against Toronto Life and writer Elaine Dewer became the focus of spirited debate. The defendants reportedly went through a \$1 million insurance policy in legal and investigative fees before they were forced to either settle or go bankrupt. The case became the centrepiece of a counterattack mounted by angry writers such as Dewer, June Callwood, Clayton Ruby and others, demanding changes to the *Libel and Slander Act* to put a stop to "libel chill". PEN lent its name to the cause and helped lift it to the level of a Ministerial Taskforce and a blue ribbon committee of legal bigwigs.

However, the last official word from the Attorney General's office was no new legislation. So, the writers have returned to the sidelines for the moment and the games go on by the old rules.

But, sure as (some) journalists and publishers are courageous and the ruling class is rich, another big libel chill case will bring the issue back to the editorial pages and the cafes of Queen West.

The writers who suffer the most and cry the loudest are often the best we have. They are independent and write for small magazines and thus bear the burden of defending themselves personally, unlike their colleagues at the major media who can have the protection of their corporate lawyers. And it is no surprise that the progressive community is usually cheering on these writers in their attacks on the rich and powerful.

If that's all there is to it, why not fall in step with the PEN proposals -- whatever they are -- and unleash our allies at the inkpots to smite the ruling class without fear or trepidation?

But, alas, I have considerable difficulties with the PEN position. As much as I hate to break ranks, I believe several of the proposals are badly flawed. My reasons run from

ideological to strategic-political to legal-mechanical. Mercifully, there is space for but a few of my dissenting views.

The PEN proposals provide, in part, that there will be no damages for defamation except those that are actually proven, and that an apology wipes out the right to any damages. These two changes would effectively destroy the ability to get monetary damages in defamation because the provable actual damage to reputation arising from defamation is most ephemeral. Virtually every case turns on the speculation that others hearing the scurrilous comments must obviously think ill of the plaintiff. There are rarely provable damages. And without damages at the end of the road to help pay legal bills, the costs of suing are utterly prohibitive.

Advocates of the PEN proposals floated the theory that plaintiffs don't even want money; they just want to clear their name and an apology will do.

So the PEN position seeks indirectly to abolish libel as a legal remedy.

This is, in my view, unwise, short sighted and perhaps, to be frank, self-serving of the scribes. We must look beyond the good done by a few progressive and risk taking journalists who truly do suffer libel chill and consider the greater evils from the right also held in check by that same libel chill. In fact, most journalists and virtually all major media outlets tend to the opposite political pole. If libel law costs us some stories of progressive political import, how many stories devastating to left causes, do those same laws save us from?

Major media often reports verbatim police press releases that defame those who are accused by asserting, as fact, outrageous concoctions and paranoid police fantasies. This tendency would be far worse were it not for "libel chill" and the threat of substantial damages.

Major media smears progressive political leaders for their own political purposes. Sometimes this is the cut and thrust of politics, sometimes not. Left leaders need the defensive protection of libel chill as much as, if not more than, the right.

Major media largely controls the political agenda by making stories out of minor incidents that serve to illustrate supposed major social evils, eg. welfare fraud. "Little people" are canon fodder. Often they are falsely accused. They can't often use libel litigation effectively.

Things said by major media have great effect and credibility. People remember allegations. They presume there is at least some truth in them. Allegations are news. Apologies are not.

Allegations of sexual abuse are hot these days. They are rightly treated far more seriously than even just a few short years ago. Perpetrators are justly scorned. And parallel to this, not surprisingly, has been the near hysterical concern of the accused to keep their names out of the paper. Why? Even to be accused in the media is tantamount to being found guilty in the eyes of the public and ruined for life.

All of this is magnified because major media have become the main source of talk, topics and opinion in our society. The opinions of the grassroots have faded in relative importance to the all pervasive infiltration of the major media in everyday life. The traditional test of defamation is whether the plaintiff has been defamed in the eyes of "right thinking" citizens. Right-thinking citizens supposedly hold by the presumption of innocence until an accused is proven guilty. If ever these RTCs existed, they have now perished. Whether out of laziness or hypnotic deference or besiegement, we now largely defer to those opinions we read and see in the major media. What the media says about us is taking on greater and greater importance.

Classical fascism of the Nazi variety relied on media lies to smear its enemies. Media that is not accountable for telling lies is a tool waiting to be abused.

Major media is controlled by a narrow elite. Someone accused has no realistic chance of telling their side of a controversial story in a credible fashion. The market place of ideas is a myth because there is no broad and easy access to the major media. A chosen elite tell us what to think; they shut out everybody else.

So, we need libel laws. The PEN proposals that would eviscerate the action are wrongheaded. But there must be something better to protect legitimate "accusatory" stories. The PEN writers are correct that our political system desperately needs investigative journalism. And it is obviously true that these stories won't get written if the cost to the writer includes \$100,000+ for legal expenses.

A Proposal

I propose that the *Libel and Slander Act* be amended to create a "protected publication conditional on an effective right of reply".

The existing *Libel and Slander Act* provides that if an apology is published within six weeks of a complaint about an article then damages in the action are restricted to those damages that can actually be proven. The defence does not apply when the defamation alleges a crime, but otherwise, it allows publishers to shut down a potential lawsuit by a published apology. In my view, apologies never do the job of undoing the damage caused by the original article. Most are plainly comical in their snivelling obsequiousness.

Let's create an even broader protection, based not on an apology but on an effective right of reply. If the major media gives to the defamed individual an effective right of reply then the statute should provide that no defamation action is sustainable. A judge in motions court could, and should, strike out the claim.

By "effective right of reply", I mean that the accused person should be given virtually equal space in the accusing publication and, if not in the same issue, then shortly thereafter. The accused can then tell their own side of the story and get equal attention from the reader. If their "equal time/space" is delayed even one day after the original accusatory article, it would be necessary to prominently set out in close proximity to the original story, a statement that the accused party will publish their reply in a few days. A motions judge could be empowered to rule on the adequacy of reply space.

The effect of this proposal would be to allow investigative journalists to make factual allegations that they could not otherwise afford to defend. It would spice up public debate. The grandeur of allegations would be limited by the alternate account by the accused. Editors, left and right, will not like the proposal because it will cramp their style and give access to their newspapers to the sort of people they prefer to excoriate. Is this sharing of the public platform really a bad thing? What would be gained would be, in effect, an unrestricted right to challenge the powerful to answer difficult questions without fear of an expensive defamation action.

Note that there would be no obligation to give this effective right of reply, and thus no compulsory expropriation of editorial space. Rather, it is the option to protect a difficult investigative story by offering the right of reply.

In my view, this approach would generally favour the progressive community whose political arguments are, for the most part, more intelligent. Whether attacking or defending, we should win more arguments than we lose. And we will certainly gain more editorial space. If the right wing media want to take advantage of the broad privilege of

this statutory defence, they will have to give more space to their victims who have the right to tell their own stories.

The proposal leaves intact libel as a remedy for those attacked in the media. The financial remedy is lost but if the right of reply is effective -- immediate and prominent - - then the defamed are truly better served than by phoney apologies and expensive litigation.