Defamation Actions Determined by Summary Trial

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A defamation action is often an act of financial folly for an aggrieved plaintiff. Despite recent significant defamation awards,[1] Canadian courts continue to exercise restraint in compensating the plaintiff.[2] The cost of litigating a defamation action is high, aggravated by two distinct factors: first, personal animosity between the parties prompts interlocutory skirmishes and battles over discovery; second, the unique complexities of defamation law, described as "a mausoleum of antiquities peculiar to the common law and unknown elsewhere in the civilised world", creates pitfalls in pleadings and discovery and protracts research and preparation.[3]

An avenue which offers some respite is the summary trial mechanism, permitted under British Columbia Rule 18A. Other jurisdictions have analogous summary trial mechanisms: the Yukon (which where applicable uses the British Columbia Rules of Court, hence Rule 18A[4]), Alberta (Rule 158, generally modelled on the British Columbia rule[5]), and Manitoba (Rule 20, which has been interpreted to

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[1]See, for example, in British Columbia: *Southam Inc. v. Chelekis* (2000), 73 B.C.L.R. (3d) 161 (B.C. C.A.) at para. 25 ($675,000 in general damages, with $100,000 aggravated and $100,000 punitive damages), appl'n for leave to appeal dismissed (2000), 262 N.R. 394 (note) (S.C.C.); in Ontario: *Leenen v. Canadian Broadcasting Corp.* (2000), 48 O.R. (3d) 656 (Ont. S.C.J.) at paras. 209, 213, 214, affirmed (2001), 6 C.C.L.T. (3d) 97 (Ont. C.A.) ($400,000 general, $150,000 aggravated and $200,000 punitive damages); *Myers v. Canadian Broadcasting Corp.* (1999), 47 C.C.L.T. (2d) 272 (Ont. S.C.J.), affirmed (2001), 6 C.C.L.T. (3d) 112 (Ont. C.A.) ($200,000 general, with the addition of $150,000 aggravated damages awarded on appeal).

[2]See *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129 (S.C.C.) at paras. 169-170, where the Court noted that as Canadian awards in defamation are modest, that no cap is necessary ("*Hill v. Scientology*").

[3]*Leenen v. Canadian Broadcasting Corp.*, 2000 CarswellOnt 3327 (Ont. S.C.J.) at para. 2, affirmed (2001), 6 C.C.L.T. (3d) 97 (Ont. C.A.), quoting R.E. Brown, *The Law of Defamation in Canada*, 2d ed. (Toronto: Carswell, 1999 Release 2) at 12.

[4]*Judicature Act*, R.S.Y. 1986, c. 96, s. 37.

[5]*Court of Queen's Bench Act*, R.S.A. 1980, C-29, s. 18; A.R. 68/390.

import the British Columbia rule[6]). Under the summary trial procedure, one or both parties may apply to have all or part of an action determined on the basis of affidavits, along with other written evidence such as interrogatory answers, admissions, and evidence taken on examination for discovery. The court may also order *viva voce* cross-examination of witnesses, either before the court, or before a reporter. The appropriateness of resolving defamation actions on a summary trial has, however, never been fully canvassed by courts in these jurisdictions.

Rule 18A was enacted in part to address the limited judicial effect given to Rule 18, "Summary Judgment". In order to succeed under Rule 18, the applicant must demonstrate that the claim or defence has no merit; an application may be readily defeated by the respondent showing a *bona fide* triable issue.[7] Despite the remedial nature of Rule 18A, some early decisions showed hesitation in using the powers of the rule to grant judgment.[8] Much confusion in the jurisprudence was swept aside by the forceful judgment of Chief Justice McEachern in the leading case of *Inspiration Management v. McDermid St. Lawrence Ltd.* This decision urged future courts that if they are able to find the necessary facts on the whole of the evidence, they *must* render judgment unless it would be unjust to do so: "Chambers judges should be careful but not timid in using R. 18A for the purpose for which it was intended."[9]

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[6]*Court of Queen's Bench Rules*, Man. Reg. 553/88, Rule 20. Although Manitoba's Rule 20 does not provide the procedural apparatus of British Columbia's Rule 18A, *Tracy v. Atomic Energy of Canada Ltd.* (1997), [1998] 2 W.W.R. 757, 33 C.C.E.L. (2d) 144 (Man. Q.B.) at para. 33 imports the jurisprudence and procedure of the British Columbia rule into that jurisdiction. This article will not review the summary judgment rules, or the different and relatively new summary trial rules in other jurisdictions, although aspects of this article will apply to defamation applications under those rules as well. Ontario's new summary trial anticipates more of a mini-trial, with *viva voce* evidence being the norm rather than the exception: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 76.06(16). Summary trials have received relatively little judicial commentary in Ontario or Manitoba, and in neither jurisdiction have reasons concerning a defamation summary trial been published.

[7]See *Soni v. Malik* (1985), 61 B.C.L.R. 36, 1 C.P.C. (2d) 53 (B.C. S.C.) at 40-41 [B.C.L.R.] and *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, 36 C.P.C. (2d) 199 (B.C. C.A.) at 211 [B.C.L.R.] ("*Inspiration Management*") for useful comparisons of Rules 18 and 18A, and the limitations of the former.

[8]See, for example, *J.M. Stafford & Associates Ltd. v. Integrated Resources Photography Ltd.* (1985), 62 B.C.L.R. 60 (B.C. Co. Ct.) ("*Stafford*"); and *Royal Bank v. Stonehocker* (1985), 61 B.C.L.R. 265 (B.C. C.A.), where it was held that the court may not prefer one conflicting affidavit to another, but must remit the matter to full trial; *Inspiration Management*, *supra* at fn 7, effectively overrules this decision at 215.

[9]*Inspiration Management*, *supra* at fn 7, at 211, 214, 215. The Court of Appeal in the recent decision in *Foreman v. Foster* (2000), 196 D.L.R. (4th) 11 (B.C. C.A.) at para. 14 confirms the "robust nature" of Rule 18A.

The Limited Difficulty of Malice and Belief

The concept of express malice raises the primary difficulty in a summary trial for defamation. As an emotion or motivation, malice describes a state of mind not readily described or resolved on affidavits. Similarly, the defendant's deposition in support of the defence of fair comment, that a statement was based on an "honestly-held belief", is difficult to attack or support in affidavit form.

A plaintiff pleads express malice in reply to[10] the defendant's pleaded defences of qualified privilege (a duty or interest on the part of the defendant to communicate the information and a corresponding duty or interest on the part of the recipient to receive it)[11] or fair comment (the defendant claims expression of an honestly-held belief, based on true facts, concerning a matter of public interest).[12] These defences are not absolute and may be defeated if the plaintiff can show that the defendant made the statement maliciously. The plaintiff bears this onus of proving malice; if the plaintiff fails in that endeavour, the defences stand and the plaintiff's claim is defeated.

The amorphous nature of the concepts of malice and honest belief would appear to block most summary trials for defamation in which qualified privilege or fair comment on a matter of public interest is pleaded as a defence. To determine whether the statement was honestly-held or malicious appears to require an excavation into the psyche of the defendant only amenable through cross-examination. The jurisprudential use of the word "malice" in defamation cases is misleading, however, and the existence of certain forms of "malice" may be resolved on the basis of affidavit evidence. That is because "malice" is not limited to its ordinary meaning of animosity or hatred. Instead, a publication is deemed malicious and unprotected by the defences if it is published not to accomplish the societal good underlying the defence of privileged communication or fair comment, but instead predominantly to advance "any indirect motive or ulterior purpose."[13] Malice may also be shown by the defendant's reckless indifference to the truth of the statements. In addition to showing malice, the plaintiff may also defeat these defences by showing that the defendant exceeded the limits of the qualified privilege, either by publishing the statement beyond the interested group; or publishing a statement which was not reasonably appropriate to

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[10]As Southin J.A. noted in the recent decision of *Pressler v. Lethbridge* (2000), 86 B.C.L.R. (3d) 257 (B.C. C.A.) at paras. 34-36, malice should not be pleaded in a statement of claim, but rather as a reply to specific defences put forward in the defendant's pleadings.

[11]*Hill v. Scientology*, *supra*, at fn 2, at para. 143, applying *Adam v. Ward*, [1917] A.C. 309 (U.K. H.L.).

[12]*Vander Zalm v. Times Publishers* (1980), 109 D.L.R. (3d) 531 (B.C. C.A.) at para. 7.

[13]*Hill v. Scientology*, *supra*, at fn 2, at paras. 144-45.