

Non-pecuniary Damages in Defamation Cases

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* Of the Faculty of Law, McGill University. I would like to thank Dean Roderick Macdonald and Professor Stephen Toope for their helpful comments on earlier drafts of this paper. I would also like to thank my research assistant, Paula Rosen, who was hired under a research grant from the Wainwright Trust of the Faculty of Law, McGill University.

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INTRODUCTION

The evaluation of non-pecuniary or moral damages has always been a difficult issue for courts because there exists no clear monetary standard by which to measure such damages; judges have found it impossible to calculate them with any precision. As Casey J. stated in *Langlois v. Drapeau*, "any figure is of necessity no more than a well reasoned guess".¹ This lack of precision results from the very nature of the loss sought to be compensated by non-pecuniary damages. These damages seek to redress a victim's pain, suffering, anguish, humiliation, embarrassment and ridicule. While it is beyond doubt that such loss is very real to the victim, it is impossible to calculate its value with any certainty.

The problem of evaluating non-pecuniary damages in defamation cases was brought to a head in *Snyder v. The Montreal Gazette Ltd.*,² recently decided by the Supreme Court of Canada. In that case, Gerald Snyder, a prominent Montreal city official and Vice-President for Revenue of the Olympic Games Organizing Committee was held to have been defamed by the Montreal Gazette when it published a front-page article implying that Snyder was a member of the "Jewish mafia" with connections to organized crime. What stands out about the *Snyder* case is the uncharacteristically high value placed on the non-pecuniary damages Mr. Snyder was held to have suffered. Deschênes, C.J., in the 1978 Superior Court decision³ upheld the jury's unprecedented award of \$135,000. This award, which had been drastically slashed to \$13,500 by the Quebec Court of Appeal,⁴ was in turn upheld by the majority of the Supreme Court of Canada.⁵ Beetz, J., in a short opinion, upheld the jury's \$135,000 award on the ground that it was not so unreasonable as to warrant intervention. Lamer J., dissenting in part, held the award to be unreasonable and felt that it should be revised to \$35,000. Moreover, Lamer J. thought it wise to place a "reference level"⁶ on moral damages in defamation cases of \$50,000 in 1978 dollars (equivalent to \$100,000 in 1988 dollars) to be granted in the most serious case.

1. [1962] B.R. 277 at 290.

2. [1988] 1 S.C.R. 494, (1988) 49 D.L.R. (4th) 17 [cited to S.C.R.].

3. [1978] C.S. 628, 87 D.L.R. (3d) 5 [cited to C.S.].

4. [1983] C.A. 604, 5 D.L.R. (4th) 206 [cited to C.A.].

5. *Supra*, note 2.

6. Lamer J. preferred the terms "parameter" and "reference level" rather than "ceiling". See *supra*, note 2 at 506 and 511.

This paper, while prompted by the Supreme Court's pronouncement in the *Snyder* case, is not limited to an examination of the merits of that decision. Rather, the *Snyder* case provides an excellent opportunity to examine three issues crucial to any defamation action. First, should there be a ceiling placed on non-pecuniary damages in defamation cases or should they be unlimited? More particularly, should the "trilogy"⁷ in which the Supreme Court of Canada placed a limit of \$100,000 (in 1978 dollars) on the recovery of non-pecuniary damages in personal injury cases, apply to defamation actions?

Secondly, the *Snyder* decision leads us to examine the considerations that go into the construction of a moral damage award. While the evaluation of moral damages has always been an important issue for judges and commentators in a wide range of cases,⁸ it is particularly important to analyze the criteria applied by the courts in assessing non-pecuniary damages in defamation cases. This is so because in contrast to personal injury cases, non-pecuniary damages in a defamation action usually make up the bulk of the damage award. Furthermore, the question of evaluating non-pecuniary damages in defamation cases has become particularly relevant following the Supreme Court decision in *Snyder*, which indicates that our highest judicial authority is willing to accept quite substantial moral damage awards in this area. Historically, damage awards in Quebec defamation cases have been fairly moderate,⁹ but it is now possible to predict that Quebec courts will increase their moral damage awards in defamation cases following the *Snyder* decision.^{9a} As damage awards become more substantial, it will become more important to identify the processes by which the judges quantify these awards since a moral damage award exceeding \$100,000 will be hard to justify simply as a matter of "pick a number".¹⁰

7. *Andrews v. Grand and Toy Alberta Ltd.* [1978] 2 S.C.R. 229, (1978) 83 D.L.R. (3d) 452; *Arnold v. Teno* [1978] 2 S.C.R. 287, (1978) 83 D.L.R. (3d) 609; *Thorn-ton v. School District No. 57 Board of Trustees* [1978] 2 S.C.R. 267, (1978) 83 D.L.R. (3d) 480.

8. See M.G. Bridge, "Contractual Damages for Intangible Loss: A Comparative Analysis" (1984) 62 *Can. Bar Rev.* 323.

9. See cases cited in *Snyder*, *supra*, note 2 at 508-509.

9a. This has been borne out in the recently decided Superior Court decision of *Gravel v. Arthur*, [1988] R.J.Q. 2873, where a defamed politician was awarded \$20,000 of moral damages and \$10,000 of punitive damages. Of particular significance is Lebrun J.'s reference to the *Snyder* decision. In justifying his award of damages, Lebrun J. states at page 2882: "l'arrêt Snyder ne confirmant tout au plus que le souci de la majorité de ne pas intervenir dans la décision des jurés qui, par ailleurs, ont indiqué clairement la valeur inestimable qu'ils accordaient à la réputation des individus..."

10. *Falcko v. James McEwan & Co.* [1977] V.R. 447 at 449. See also Bridge, *supra*, note 8 at 364, footnote 205.

The third inquiry prompted by the *Snyder* decision is whether damages are always the most appropriate remedy for a defamation victim. In addition to damages, alternative remedies used to "compensate" defamation victims such as injunctions, orders to publish judgments, rights of reply and retraction will be examined in terms of their merits and their availability in Quebec law.

The focus of this paper will be on Quebec law, but illustrative examples will be drawn from the common law where particularly useful.

1. LIMITATIONS UPON NON-PECUNIARY DAMAGES IN DEFAMATION CASES

a. *Should there be a ceiling?*

One of the clearest disagreements between the holdings of the majority and the minority of the Supreme Court in *Snyder* centered on the ability of a court to award moral damages in a defamation action exceeding the \$100,000 upper limit set by the trilogy in 1978. While Beetz J. did not explore the merits of applying the ceiling on moral damages outside personal injury cases, he implicitly rejected its application to defamation cases by upholding a jury's 1978 award which exceeded the limit by \$35,000. Lamer J., on the other hand, held not only that a ceiling should apply to moral damages in defamation cases, but that the range of such awards should be lower than those set by the trilogy.¹¹

It is interesting to contrast the majority opinion in *Snyder* with the earlier Ontario decision in *Munro v. Toronto Sun Publishing Corp.*¹² In *Munro*, Holland J. stated explicitly that the ceiling placed on the recovery of moral damages in personal injury cases should be directly applicable to defamation cases:

I have come to the conclusion that it is proper for a court to consider, in assessing damages arising from libel, the strictures established by the trilogy and that a comparison between the trilogy upper level (now with inflation approximately \$160,000) and awards for physical injury may be made. I base this conclusion on my acceptance that the relevant principles are the same irrespective of the nature of the tort, that libel and personal injury actions each being based on tortious conduct attract compensatory (not punitive) awards, and that the policy considerations which led the Supreme Court of Canada to impose the upper limit as expressed in the trilogy apply equally to any non-pecuniary award including the "at large" award in a libel action.¹³

11. He therefore set a reference point of \$50,000 in 1978 dollars, equivalent to \$100,000 in 1988 dollars, *supra*, note 2 at 506 and 508.

12. (1983) 39 O.R. (2d) 100 (H.C.).

13. *Ibid.*, at 126.

The High Court decision in *Munro* has not gone without criticism. One commentator,¹⁴ Jerome Morse, has stated that Justice Holland's analogy between damage awards in personal injury and defamation cases is "untenable"¹⁵ and that moral damage awards in defamation actions should not be limited by any ceiling. The basic argument set forth against applying the trilogy's upper limit to defamation actions is that in personal injury cases, the award of non-pecuniary damages is predicated upon there being full compensation for pecuniary loss:

[T]here is no logical basis for the extension of the concept of the rough upper limit from personal injury awards for libel and slander. This is so because the total pecuniary compensation, upon which the rough upper limit is predicated in personal injury awards is not present in the context of awards for libel and slander.¹⁶

It is submitted that this criticism of *Munro* and of the analogy made between moral damage awards in personal injury and defamation cases is unfounded for two reasons. First, however true it may be that defamed plaintiffs suffer mainly non-pecuniary damages, there is no limit on pecuniary damages in defamation actions and nothing stops a defamation victim from recovering substantial pecuniary damages if they are a direct and immediate cause of the delict.¹⁷ In fact, Quebec courts often compensate defamation victims for their pecuniary losses. Of particular interest is *Desrosiers v. Publications Claude Daigneault Inc.*¹⁸ where the Superior Court granted a defamed mayor \$50,000 for his pecuniary loss and only \$20,000 in moral damages. Thus the mere fact that the bulk of defamation awards often consist largely of moral damages, does not undermine the applicability of the argument that full pecuniary compensation justifies the ceiling placed on the recovery of moral damages in all types of cases.

Secondly, there are personal injury cases in which the court has applied the trilogy's ceiling on moral damages and in which the victim was granted no pecuniary damages at all. The Quebec Court of Appeal in *Corriveau v. Pelletier*¹⁹ applied the trilogy and reduced the trial judge's assessment of non-pecuniary damages from \$200,000 to \$65,000. It should be noted that while the personal injury victim in that case suffered considerable non-pecuniary loss,²⁰ there was no recovery for pecuniary loss.²¹ If Morse's argument is carried to the extreme, the

14. J.R. Morse, "The Applicability of Personal Injury Damage Principles to Libel and Slander Cases - Case Comment on *Munro v. The Toronto Sun*", 23 C.C.L.T. 52.

15. *Ibid.*, at 58.

16. *Ibid.*, at 67-68.

17. Art. 1075 C.C. This same argument applies in Ontario law of damages.

18. [1982] C.S. 613. See also cases cited *infra* in footnotes 23-27.

19. [1981] C.A. 347.

20. *Ibid.*, at 353.

21. *Ibid.*, at 350.

Court of Appeal in *Corriveau* should not have applied the trilogy's ceiling, notwithstanding that it was a personal injury case, because no pecuniary compensation was effected.

The falacious nature of that proposition is of course obvious. Full pecuniary compensation will be made as long as the judge properly examines whether the victim suffered any real, tangible loss. It is submitted that full pecuniary compensation was made in *Corriveau* when Beauregard J. satisfied himself that

aucun élément de preuve ne suggère que ce préjudice aura des répercussions pécuniaires en ce sens que la victime serait éventuellement obligée de faire des déboursés pour améliorer son sort ou que les possibilités de gain de la victime seraient affectées à cause de ses cicatrices. Le préjudice est donc purement non pécuniaire.²²

Equally, full pecuniary compensation is made in a defamation action when a judge considers the existence or extent of economic loss suffered by the victim. Such pecuniary damage can take the form of loss of employment,²³ loss of clientele,²⁴ general business losses,²⁵ loss of income²⁶ and even potential loss of future income where the defamation diminished the plaintiff's future employment opportunities.²⁷

It is beyond the scope of this article to examine the merits of the trilogy and the appropriateness of placing an upper limit on the recovery of non-pecuniary damages in personal injury cases.²⁸ It is argued, however, that as long as a ceiling remains on moral damages in personal injury cases, it is unwarranted to allow non-pecuniary damages in defamation cases to soar above such ceiling. As Holland J. stated in *Munro*:

the policy considerations which led the Supreme Court of Canada to impose the upper limit as expressed in the trilogy apply equally to any non-pecuniary award including the «at large» award in a libel action.²⁹

22. *Ibid.*

23. *Desrosiers v. Publications Claude Daigneault Inc.*, *supra*, note 18; *Caya v. Dominion Structural Steel Ltd.* [1945] C.S. 175.

24. *La Presse Ltée v. Desmarais* [1977] C.A. 224.

25. *McGregor v. The Montreal Gazette Ltd.* [1982] C.S. 900. *De Lamirande v. Ville de Chambly* [1958] C.S. 184; *Robert v. Champlain Oil Products Ltd.* [1976] C.P. 517.

26. *Robbins v. Canadian Broadcasting Corporation* [1958] C.S. 152. See also *Flamand v. Bonneville* [1976] C.S. 1580 where the Superior Court granted \$8,000 of damages for reimbursement of electoral expenditures.

27. *De Varennes v. Aviles* (3 September 1985), Québec 200-02-008775-845 (C.P.), J.E. 85-891.

28. This issue has been discussed by S.M. Waddams in "Compensation for Non-Pecuniary Loss: Is There a Case for Legislative Intervention" (1985) 63 *Can. Bar Rev.* 734.

29. *Supra*, note 12 at 126.

One such policy consideration in the trilogy concerned the arbitrariness of a moral damage award. As Dickson J. stated in *Andrews v. Grand and Toy Alberta Ltd.*:

[t]he sheer fact is that there is no objective yard-stick for translating non-pecuniary losses, such as pain and suffering and loss of amenities into monetary terms. This area is open to widely extravagant claims.³⁰

The arbitrary nature of moral damages does not change with the nature of the delict. As Lamer J. points out in *Snyder*:

It is far from easy to do justice in this area. *The amount awarded is necessarily arbitrary*, in view of the difficulty of measuring objectively such loss in pecuniary terms, especially when it concerns someone else's reputation. It is precisely because this exercise is based on empirical considerations rather than on mathematical and scientific operation that extravagant claims for this type of loss should not be allowed by the courts.³¹

The similarity of language used by Dickson J. in *Andrews* and Lamer J. in *Snyder* is striking. It demonstrates that similar considerations are at play in all moral damage cases and that the solution is not to compartmentalize different civil wrongs and apply different considerations to them all. As Holland J. stated in *Munro*, the trilogy ought not to be restricted to personal injury cases but should apply "to the difficult issue of assessment of damages whenever non-pecuniary loss is at issue."³²

The similarities in the assessment of moral damages in personal injury and defamation cases justify, at the very least, the application of the trilogy to defamation cases. Moreover, there are several factors present only in defamation cases which may justify even lower non-pecuniary awards than in personal injury actions. As will be argued below, even a lower ceiling may be appropriate. The first factor justifying a lower award is the presence of two competing interests in defamation cases, absent in personal injury cases. Freedom of expression enshrined in s. 3 of the Quebec Charter of Human Rights and Freedoms³³ and ss. 2(b) of the Canadian Charter of Rights and Freedoms³⁴ must be weighed against the protection of the individual's reputation. As Deschênes J. stated in a recent Quebec defamation case:

Les récentes chartes de droit ont toutefois mis en évidence la liberté d'expression d'une façon qu'on ne saurait ignorer en appliquant l'article 1053.

30. *Supra*, note 7 at 260-261 (S.C.R.), 475-476 (D.L.R.).

31. *Supra*, note 2 at 505. [emphasis added].

32. *Supra*, note 12 at 126.

33. L.R.Q. c. C-12.

34. Constitution Act 1982 (U.K.) 1982, c. 11, Annex B, part I.

Il faut reconnaître à l'exercice de ces libertés la plus grande latitude compatible avec la vie en société et interpréter l'article 1053 en conséquence.³⁵

This echoes what Dickson J. stated in his dissenting opinion in *Cherneskey v. Armadale Publishers*: "The law of defamation must strike a fair balance between the protection of reputation and the protection of free speech ..."³⁶

Commentators in the United States, where there is no ceiling on damage awards, have repeatedly warned of the "chilling effect" on freedom of speech caused by high damage awards in defamation cases. As Charles Danzinger has pointed out:

the public suffers when its newspaper editors become reluctant to print controversial stories out of fear of libel suits — the so-called "chilling effect".³⁷

Shauer, in his book on Free Speech³⁸ canvasses the problem of "self-censorship" which occurs when a publisher, who desires to avoid the risk of liability for libel, refrains from publishing. Shauer states that:

the uncertainty and risk inherent in the legal process means that some impelled self-censorship exists as to statement that are true.³⁹

The lower the amount of damages that may be granted by a court, the less likely it is that publishers will impose self-censorship and the less likely it is that we will encounter the "chilling effect". This was recognized by Lamer J. in *Snyder* when he stated:

If information agencies [such as newspapers, press agencies and television stations] are ordered to pay large amounts as the result of a defamation the danger is that their operations will be paralyzed or indeed, in some cases, that their very existence may be endangered.⁴⁰

A second factor absent in personal injury cases that affects the value of damages a defamation victim may suffer is the temporary nature

35. *Fortin v. Syndicat National des Employés de l'Hôtel-Dieu de Montréal (C.S.N.)* [1988] R.J.Q. 526 at 534.

36. (1979) 1 S.C.R. 1067 at 1095, cited with approval by Mayrand J. dissenting in *Dubois v. La Société St-Jean-Baptiste de Montréal* [1983] C.A. 247 at 257. A contrary view was expressed by Croteau J. in *Trahan v. Imprimerie Gagné Ltée* [1987] R.J.Q. 2417 at 2425.

37. C. Danzinger, "The Right of Reply in the United States and Europe" (1986-87) 19 *New York University Journal of International Law and Politics* 171 at 174. See also J.G. Fleming, "Retraction and Reply: Alternative Remedies for Defamation" (1978) 12 *U.B.C. L. Rev.* 15 at 22.

38. F. Shauer, *Free Speech: A Philosophical Enquiry*, (Cambridge: Cambridge University Press, 1982).

39. *Ibid.*, at 170.

40. *Supra*, note 2 at 510.

of the loss. While the damages caused by defamation can be very serious and devastating, they rarely produce a life-long condition. As Goodridge C.J.N. stated in *Farrel v. Canadian Broadcasting Corporation*: "A man's damaged reputation may be restored; lost limbs cannot be replaced."⁴¹ Similarly, in *Munro*, Holland J., in assessing damages for a defamed politician, noted the restricted temporal character of the damages suffered by a defamation victim. He considered "the ability of Mr. Munro to successfully weather storms of this nature",⁴² pointing out that despite serious allegations and incidents in the past, the politician had continued to be re-elected. Thus, the harmful effects of the defamation had not lasted very long and this affected the amount of damage suffered. The temporary nature of damages resulting from the delict of defamation was acknowledged by Lamer J. in *Snyder* as a factor mitigating against a high award of moral damages:

Additionally, the non-pecuniary loss suffered by a victim of defamation is in general temporary, since the suffering he experiences diminishes with the passage of time. However serious the defamation, people eventually forget the humiliating remarks made or written about the victim and the pain he has suffered gradually loses its edge.⁴³

A third factor justifying lower awards of moral damages in defamation cases than in personal injury cases centres on the availability of alternative remedies at the disposal of the defamation victim, such remedies being unavailable to the victim in a personal injury case. According to Casey, J. in *Langlois v. Drapeau*:

[I]n most instances the general damages resulting from defamation of character are effaced by the judgment that condemns the defendant. For this reason the tendency to be generous has been resisted and the sums allowed have been kept at a nominal level.⁴⁴

As will be argued below⁴⁵, it is doubtful whether the judgment *per se* is an effective remedy, but the mitigation of damages by judicial declaration is enhanced when the court orders the defendant to publish the court's judgment. This remedy, ordered in *Snyder* is not unknown in Quebec law.⁴⁶ It is difficult to disagree with Lamer J. when he justified his award of damages in the following way:

41. (1987) 43 D.L.R. (4th) 667 (Nfld. C.A.).

42. *Supra*, note 12 at 127.

43. *Supra*, note 2 at 508.

44. *Supra*, note 1 at 289 [emphasis added]. See also *Simard v. Gagnon* [1980] C.S. 559 at 561 where Trotier J. granted a defamation victim only \$1,000 in damages stating that "le présent jugement constitue en lui-même une réhabilitation totale de la réputation de la demanderesse" and *Flamand v. Bonneville* [1976] C.S. 1580.

45. See *infra* at page 39.

46. See for example: *La Compagnie de Publication La Presse v. Simard* [1962] B.R. 697; *L'Imprimerie Populaire Ltée v. Taschereau* (1922) 34 C.B.R. 554 and cases cited *infra*, note 187.

I also took into account the remedial effect of publication in determining the reasonable compensation appellant should receive in the case at bar.⁴⁷

The victim in a personal injury case has no such additional remedies available to provide him with solace or relief.

Furthermore, the cost to the defendant of redressing the wrongdoing through such alternative remedies should not be considered to form any part of a moral damage award. Rather, the costs to the defendant associated with executing the alternative remedy, be it publishing the court's judgment or printing a retraction or reply, are part of the pecuniary damages awarded to put the parties back into the position they were in before the commission of the delict. For example, if a plaintiff has been defamed in a radio broadcast, his most effective remedy might be an order for the defendant to broadcast an apology or retraction, say, five times.⁴⁸ The substantial cost of such an order does not constitute moral damages. Because of this more generous conception of reparation of damage in defamation cases, through the availability of alternative remedies (the cost of such reparation being easily calculable as pecuniary damages) there is not such a great need for very high awards of non-pecuniary damages in defamation cases.

Given the foregoing, it seems reasonable to assert that

[t]here is something odd about a legal system which often awards more to defamation claimants than to claimants who are physically crippled.⁴⁹

b. Should the ceiling be lower than that established in the Trilogy

The preceding comments stress that as long as there remains a ceiling on moral damages in personal injury cases, there is no justification for moral damages to exceed that limit in defamation actions. The question which remains, however, is whether the ceiling should be the same as that in personal injury cases or whether it should be something lower, such as one-half of the upper limit expressed in the trilogy, the suggestion of Lamer J. in *Snyder*.

The answer to this question depends, in large part, on the approach taken by the courts in assessing the award of moral damages within the stated limit. There are three possible approaches a court may take: the personal approach in which the award reflects the personal happiness that has been lost to the victim, in view of his or her particular circumstances; the conceptual approach in which the plaintiff's life and faculties are treated as assets with an objective value and the award is based

47. *Supra*, note 2 at 512.

48. See, *infra*, section on retraction as an alternative remedy.

49. *Supra*, note 8 at 368.

on the seriousness of the plaintiff's condition; and the functional approach in which the sole purpose of the moral damage award is to provide the plaintiff with reasonable solace and consolation for his or her misfortune, the money to be used to substitute other enjoyments and pleasures for those that have been lost.⁵⁰

In the Supreme Court case of *Lindal v. Lindal*,⁵¹ Dickson J. specified that the correct approach to be taken in assessing the amount of moral damages within the upper limit is the functional one.

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular condition.⁵²

We award non-pecuniary damages because the money can be used to make the victim's life more bearable.⁵³

The theoretical attractiveness of the functional approach is undoubted. Ogus, who originally formulated the three possible approaches, has argued for its application in the United Kingdom and the most persuasive arguments in its favour may be summarized as follows. Non-pecuniary damages should not be calculated differently from pecuniary or property damage. In the latter type of damages, the courts do not consider the extent of the injury, but rather the losses which result from that injury.⁵⁴ Thus the non-pecuniary damage award should not be based on the seriousness of the injury, but on the cost to console the plaintiff for his or her misfortune. Furthermore, the functional approach is attractive because it adheres most closely to the notion of *restitutio in integrum*. Ogus argues that "[t]he award, though it falls short of restoring to the plaintiff the happiness he has actually lost, attempts the next best thing by supplying him with the means to obtain some alternative pleasure."⁵⁵

If this functional approach is indeed the one adopted by the courts, then the limit placed on moral damages should be the same in all cases, regardless of the delict and regardless of the seriousness of the injury. If solace is to be the key to the quantification of such damages, then a

50. For the formulation of the three approaches see A.I. Ogus, "Damages For Lost Amenities: For a Foot, a Feeling or a Function" (1972) 35 *Mod. L. Rev.* 1 at 2-3; *Lindal v. Lindal* [1981] 2 S.C.R. 629 at 636 and L. Klar, "The Assessment of Damages for Non-Pecuniary Losses" (1978) 5 *C.C.L.T.* 262 at 265 and "Developments in Tort Law: The 1981-82 Term" (1983) 5 *Sup. Ct L. Rev.* 273 at 275.

51. *Ibid.*

52. *Ibid.*, at 637.

53. *Ibid.*, at 643.

54. See Ogus, *supra*, note 50 at 11.

55. *Ibid.*, at 16.

defamed plaintiff may need as much money to console himself or to obtain some alternative pleasure as a quadriplegic.

However, as has already been noted by commentators,⁵⁶ while the functional approach is very attractive in theory, it is unrealistic to claim that in practice it is the only approach used by the courts in assessing moral damages. As Lewis Klar points out, the Supreme Court did not in fact apply the functional approach either in the trilogy or in *Lindal* because the Court never considered what things and activities would have made life more endurable for the victim.⁵⁷ Klar therefore asserts that "the sole basis for the award was consideration of the seriousness of the plaintiff's injuries".⁵⁸ He further states that "[a] survey of other damage assessment decisions reported since the trilogy reveals the same approach. Damage assessments have been made by comparing the seriousness of the claimants' injuries with those of the trilogy plaintiffs".⁵⁹

Examples of the application of a conceptual approach exist in both civil and common law decisions and in both personal injury and defamation cases. In the Quebec personal injury case of *Corriveau v. Pelletier*,⁶⁰ Justice Beauregard's language clearly evidences the application of a sliding scale approach to the quantification of moral damages based on the seriousness of the injuries:

[L]e préjudice non pécuniaire dans la présente cause est très considérable mais je dois noter qu'il n'y a aucune commune mesure entre ce préjudice et les préjudices en cause dans les trois arrêts auxquels je viens de référer [the trilogy] ...⁶¹

The conceptual approach is also evident in defamation cases. In *Munro v. Toronto Sun Publishing*, the Ontario High Court stated that:

This injury, while serious, falls far short of that suffered by the plaintiffs in the trilogy cases and in *Lindal*.⁶²

56. See L. Klar articles, *supra* note 50; G. Mew, "Damages - Personal Injuries - Non-Pecuniary Damages - Unaware Plaintiff and the Functional Approach" (1986) 64 *Can. Bar Rev.* 562; E. Veitch, "The Implications of *Lindal*" (1982) 28 *McGill L.J.* 116; A. Wéry, "L'évaluation judiciaire des dommages non-pécuniaires résultant de blessures corporelles: Du pragmatisme de l'arbitraire?" [1986] *R.R.A.* 355; J.-L. Baudouin, *La responsabilité civile délictuelle* (Montreal: Les Éditions Yvon Blais Inc., 1985) at 143-144.

57. See Klar, *C.C.L.T.* article, *supra*, note 50 at 266.

58. *Ibid.*, at 267.

59. Klar, *Sup. Ct L. Rev.* article, *supra*, note 50 at 279.

60. *Supra*, note 19.

61. *Ibid.*, at 355.

62. *Supra*, note 12 at 127. See also *Farrel v. Canadian Broadcasting Corporation*, *supra*, note 41, where Goodridge C.J.N. stated at 670: "There is no way to assess the damages at large by reference to the person and the libel only. There must be reference to and comparison with other decided cases. The circumstances of a case under consideration may be assessed as *more serious* than one, less so than another, and thereby a figure will be indicated" [emphasis added].

The clearest example of the sliding scale approach with the quadriplegic as the worst case scenario can be found in the Quebec Court of Appeal decision in *Snyder*. Owen J. held:

If the upper limit for non-pecuniary damages in the case of a young person rendered a quadriplegic is \$100,000, what should be the upper limit for total non-pecuniary damages in the case of a middle-aged person who has been defamed?⁶³

As can be seen from the above cited defamation cases, it is the severity of the injuries suffered rather than the amount required to console or obtain alternative pleasures that serves as the true basis for the award of damages. If the conceptual approach is the one in fact applied by the courts, then a strong argument can be made that defamation victims should, as a general rule, receive lower moral damages than personal injury victims. The conceptual approach applied by the courts in defamation actions combined with the temporary character of the damages, the alternative means of redress available to the defamed victim and the consideration of the chilling effect large damage awards can have on freedom of speech lend support to Lamer's dissenting opinion in *Snyder* wherein he argued for a lower ceiling (of \$50,000 in 1978 dollars) on moral damages in defamation cases.

2. EVALUATING NON-PECUNIARY DAMAGES IN DEFAMATION CASES

Almost every judgment which has dealt with the issue of granting moral damages and almost every author who has written about the subject has proclaimed the trite propositions that it is extremely difficult to assess such damages, that the process of awarding moral damages cannot be made scientific or precise and that any figure arrived at is only approximate because of the necessarily arbitrary nature of the award.

While the assessment of moral damages with any certitude is an impossible task, the problem of evaluating such damages is exacerbated by the limited guidance given by our courts. The values placed on pecuniary suffering differ widely and there is very often little explanation offered by the judges for arriving at such differing amounts. For example, in a recent Ontario case,⁶⁴ a Jehovah's witness received \$20,000 for mental distress she suffered following a blood transfusion administered contrary to her religious beliefs, a transfusion that "may well have been responsible for saving her life".⁶⁵ Donnelly J. did not motivate his decision to grant \$20,000 of damages, but simply stated that it was a "fair quantification of this loss".⁶⁶

63. *Supra*, note 4 at 622.

64. *Malette v. Shulman* (1987) 63 O.R. (2d) 243 (H.C.).

65. *Ibid.*, at 274.

66. *Ibid.* [emphasis added].

Similarly, in defamation cases, lump sum figures are granted by judges with little discussion as to why the plaintiff in question suffered that particular amount of damages. In *McGregor v. The Montreal Gazette Ltd.*,⁶⁷ the Superior Court granted \$50,000 to a defamed plaintiff, one of the highest moral damage awards in a Quebec defamation case apart from *Snyder*. Macerola J. stated that the newspaper article in question had caused the plaintiff considerable damages in that he had to take medication and be under doctor's care, he stopped wanting to see his relatives, his name became a burden to him, he could not adequately function intellectually for several months and he hid in his home, not wanting to be seen in a municipality where he was once well-known and respected. The above heads of damage suffered are undoubtedly well-founded. However, nowhere did the judge state why McGregor should receive \$50,000 in moral damages, when many other defamed plaintiffs receive considerably less for similar humiliation, scorn, shame and psychological trauma, most often in the \$5,000 to \$20,000 range.⁶⁸

The purpose of this section of the paper is to set out the various factors considered explicitly or implicitly by the courts and to assess their influence on moral damage awards in defamation cases.

a. The position of the defamed plaintiff

One is struck, upon reading Quebec defamation cases, by the emphasis placed on the social status of the defamed plaintiff. There is an almost unanimous consensus in the jurisprudence that public figures or people holding public office are entitled to recover higher damages when defamed. In *Dimanche-Matin Ltée v. Fabien*, the Court of Appeal stated:

Subjectivement, elles [les affirmations de l'article] sont d'autant *plus dévastatrices* qu'elles ont trait à la conduite d'un magistrat, *homme public* chargé de redresser les torts et de rendre une justice sans parti-pris ni favoritisme.⁶⁹

67. *Supra*, note 25.

68. See for example: *Blanchet v. Corneau* (\$4,500) [1985] C.S. 299; *Hudon v. CHLT-TV Inc.* (\$5,000) [1986] R.J.Q. 2651 (C.S.); *Poirier v. Leblanc* (\$10,000) [1983] C.S. 1214; *Côté v. Syndicat des Travailleuses et Travailleurs municipaux de la ville de Gaspé (C.S.N.)* (\$10,000) [1987] R.R.A. 575 (C.S.); *Flamand v. Bonneville* (\$12,000) *supra*, note 44; *Gingras v. Entreprises Télécapitale Ltée - Division C.H.R.C.* (\$14,000) (3 May 1985), Québec 200-05-002850-811 (C.S.), J.E. 85-620; *Goupil v. Publications Photo-Police Inc.* (\$15,000), [1983] C.S. 875; *Gravel v. Arthur* (\$20,000), *supra*, note 9a; and *Caisse d'Établissement Belle-Rive v. Forgues* (\$23,000) (31 July 1985), Québec 200-09-000452-828 (C.A.) J.E. 85-772. In the Court of Appeal case of *Dimanche-Matin v. Fabien* (13 September 1983) Montreal 500-09-001218-791 (C.A.) J.E. 83-971, damages of \$35,000, higher than the norm, were granted. Furthermore, the Court of Appeal had reduced the extremely high award of \$95,000 granted by the Superior Court in *Fabien* [1979] C.S. 928.

69. *Ibid.* at 10 [emphasis added].

The different treatment of public and private individuals is not a new trend in Quebec jurisprudence. As far back as 1928, Archambault J. stated in *Giguère v. Cie de Publication La Tribune*:

Le demandeur dans la présente cause n'est pas un homme public; il appartient à la classe moyenne, tout aussi honorable que s'il occupait une position élevée, mais *moins susceptible de souffrir* ...⁷⁰

Deschênes C.J., in the Superior Court decision in *Snyder*, justified granting defamed public officials higher damages on the ground that society should do nothing to dissuade capable people from entering public life:

If society wants, as it should, that its best citizens turn to public affairs, it must show the high esteem in which it holds them; and those who would imprudently risk, by a stroke of the pen, to destroy the reputation of such dedicated men ought to be prepared to pay the high price that such a misdeed deserves.⁷¹

While it is generally the holding of public office that generates higher damages,⁷² the same principle often applies to private individuals with a respected and influential social position. In *Côté v. Claveau*, it was emphasized that both the plaintiff and defendant were lawyers. Roberge J. explicitly took this fact into account stating that,

les paroles prononcées contre un avocat, *qui a affaire au public* et aux deniers du public, peuvent avoir plus de conséquences que ces mêmes paroles prononcées contre une autre personne ...⁷³

The courts, in this area, are not making an important distinction between the social status of the plaintiff and his prior reputation in the community. It is fairly easy to understand the emphasis placed on the reputation of the plaintiff. "The higher the reputation the greater the damages."⁷⁴ If a person enjoyed a high standing and good reputation in the community, he will generally suffer greater damages from being defamed than a person whose reputation was already doubtful. It is for that reason that Quebec cases have granted only \$1 of nominal damages to defamed plaintiffs whose prior reputations were already tainted.⁷⁵

70. (1928) 66 C.S. 525 at 529.

71. *Supra*, note 3 at 636.

72. See for example *Desrosiers v. Publications Claude Daigneault Inc.*, *supra*, note 18; *Flamand v. Bonneville*, *supra*, note 44; *L'Imprimerie Populaire v. Tasche-reau*, *supra*, note 46 and *DeLamirande v. Ville de Chambly*, *supra*, note 25.

73. (17 May 1982) Chicoutimi 150-05-000352-78 (C.S.) J.E. 82-701 [emphasis added].

74. *Neeld v. Western Broadcasting Co. Ltd.* (1976) 65 D.L.R. (3d) 574 (B.C.S.C.) at 576.

75. See *Cotroni v. MacLean-Hunter Publishing Co.* (12 September 1972) Montreal 500-05-615-205 (C.S.) and *Centre de Motivation Personnelle Laurentien Ltée v. Lavoie* [1974] C.S. 615.

While there is nothing wrong with considering the height of a plaintiff's prior reputation and the degree to which the defendant's faulty act of defamation lowered the plaintiff's reputation in the community,⁷⁶ it is not necessarily correct to translate that analysis into a dichotomy between the public and private spheres, where the status of the plaintiff is taken into consideration. Quebec jurisprudence has placed too much emphasis on whether or not the defamed plaintiff was a public official, assuming that those in the public eye automatically lose more from being defamed than private individuals. This is evident from Deschênes C.J.'s comment in the Superior Court decision in *Snyder*:

The answer [as to whether the jury's award of \$135,000 was unreasonable] must depend to a large extent upon the value which the community is prepared to put on the reputation of its members, *especially those in public life*.⁷⁷

It is true, as Bouck J. said in *Neeld v. Western Broadcasting Co. Ltd.*, that "the measure of damages must bear some relation to the actual standing and reputation of the plaintiffs in the community prior to the libel",⁷⁸ but it should not automatically be assumed that public officials, by their very position, deserve higher damages than private individuals whose prior reputations may be just as worthy of protection as the reputations of those who entered public life.

It is interesting, in this regard, to contrast the treatment of public figures in defamation cases in Quebec and common law Canada with that in the United States. Following the landmark U.S. Supreme Court decision of *New York Times v. Sullivan*,⁷⁹ public officials cannot recover damages for defamation unless they can prove "actual malice" *i.e.* that the defendant published the defamatory statement with the knowledge that it was false or with reckless disregard as to whether it was false or not. The much higher burden placed on public officials in the United States is justified firstly because such individuals have a much more realistic opportunity to publicly rebut any false statements, whereas effective rights of reply are severely limited to private individuals; and secondly because public officials, having voluntarily thrust themselves into the public eye, have exposed themselves to the increased risk of injury from defamatory statements. As Shauer points out:

One entering public life offers his qualifications and performance for evaluation by the public and invites public scrutiny of his actions. He has in effect assumed the risk.⁸⁰

76. *Fabien v. Dimanche-Matin Ltée* (C.S.), *supra*, note 68 cited with approval in *Poirier v. Leblanc*, *supra*, note 68.

77. *Supra*, note 3 at 634 [emphasis added].

78. *Supra*, note 74 at 576.

79. (1964) 376 U.S. 255.

80. *Supra*, note 38 at 173.

In accordance with the stricter test for defamation under *New York Times v. Sullivan*, it is much harder for public individuals in the United States to recover damages for defamation than private individuals, whereas in Canada, public officials bear no added burden of proof in a defamation action and yet are presumed to suffer greater damages by virtue of their public office.

There is a Quebec defamation case which lends some support to the American view that public officials must be more susceptible of attack than private individuals. In the Court of Appeal Case of *Radio Trois-Rivières Ltée C.H.L.N. v. Melasco*, Montgomery J. quoted the trial judge with approval to the effect that the plaintiff, being a civil servant whose actions were within the public interest, must

s'attendre, dans le système démocratique dans lequel nous vivons, à recevoir les critiques du public et de la presse, plus souvent que les simples citoyens.⁸¹

In the result, the Court held that the radio station had abused its freedom of expression and had defamed the plaintiff. However, the *Melasco* case may be still useful if further jurisprudence picks up on the notion that public officials should not automatically be granted greater damages in defamation cases by virtue only of their public office, but that in a democratic society, those in the public eye must be able to tolerate even greater scrutiny and attack without being compensated in damages for defamation.

The *Melasco* proposition was put to the test in the recent Superior Court decision of *Gravel v. Arthur*^{81a}. The defendant, a radio broadcaster, argued that the plaintiff, a politician who had been a member of the Quebec National Assembly, should not recover damages for defamation because he was a public figure and was thus susceptible to scrutiny and attack by reporters. While Lebrun J. seems, at first, to endorse this proposition stating that "cette position de principes est en soi inattaquable"^{81b}, he then goes on to award \$20,000 of moral damages and \$10,000 of punitive damages to the defamed politician.

In reality, Lebrun J. does not agree with the argument that public figures should be subject to a higher threshold of attack. He points out

81. (9 June 1981) Québec 200-09-000359-761 (C.A.) J.E. 81-709 at 3. Note, however, that in *Melasco*, the plaintiff was not a political figure or someone who had voluntarily thrust herself into the public arena. The plaintiff was merely a nun who worked in an old people's home and was classified as a civil servant whose actions were within the public interest by the Court.

81a. *Supra*, note 9a.

81b. *Ibid.*, at 2881.

that the Quebec legislator did not distinguish between public and private individuals in s. 4 of the Charter of Human Rights and Freedoms, a provision which guarantees the protection of reputation to "every person".^{81c} Lebrun J. goes on to state that:

[E]n optant pour une carrière dans la vie publique, les citoyens qui font ce choix soumis au vote démocratique, ne renoncent pas pour autant, à leur dignité et ont droit à un traitement équitable de la part de ceux qui font office de commentateurs de la scène publique.^{81d}

Rather than subjecting public officials to a higher threshold of attack and criticism, Lebrun J. awarded substantial moral and punitive damages to a politician who was merely inappropriately labelled "insignifiant" and "moppologiste".

The trend in Quebec defamation cases is not proceeding in the *New York Times v. Sullivan* direction. Rather, Quebec courts are continuing to grant some of the highest awards of damages to public officials.

b. Extent of the dissemination of the defamatory statements

Lord Esher M.R. in the English Court of Appeal decision of *Whitaker v. Scarborough Post Newspaper Co.* stated:

The amount of damages in such an action would not, in my opinion, generally speaking, depend on the number of copies of the newspaper that were published. If a libel were a serious one, a jury would give heavy damages, though it were only published once. On the other hand, if a libel were a trivial or ridiculous one, in respect of which the jury thought that an action ought not to have been brought, they would only give contemptuous damages, though many copies of the libel had been circulated.⁸²

Despite Lord Esher M.R.'s view, the extent and the duration of the publication of the defamatory statements remains a very central factor in the evaluation of non-pecuniary damages in Quebec cases. Most cases explicitly consider "l'ampleur de la diffusion et ... son degré de pénétration dans le milieu".⁸³ It is not unusual to see cited in the cases the circulation of a newspaper in terms of number of copies sold⁸⁴ or the number of people who listened to a broadcast.⁸⁵ If exact

81c. *Ibid.* Section 4 of the Charter of Human Rights and Freedoms is reproduced *infra* at page 35.

81d. *Ibid.*

82. [1896] 2 Q.B. 148 (C.A.) at 149.

83. *Côté v. Syndicat des Travailleuses et Travailleurs municipaux de la ville de Gaspé*, (C.S.N.), *supra*, note 68 at 585. See also *Gravel v. Arthur*, *supra*, note 9a at 2882.

84. *Goupil v. Publications Photo-Police Inc.*, *supra*, note 68; *Trahan v. Imprimerie Gagné Ltée*, *supra*, note 36.

85. *Neeld v. Western Broadcasting*, *supra*, note 74.

statistics of the extent of publication are not reproduced in the judgment, statements as to whether the circulation of a newspaper or the broadcast was extensive⁸⁶ or feeble⁸⁷ abound.

The importance of this factor ought not to be underestimated. Not only is it a factor often cited and considered by the courts, but it correlates directly with the amount of damages recovered. As stated in *Gatley on Libel and Slander*:

Surely the proprietor of a newspaper with a very large circulation, is to be visited with larger damages for a libel published in it than one of a more limited circulation.⁸⁸

It is not coincidental that in Quebec cases where the court considered the fact that the defamatory statements were surrounded by a great deal of publicity, in terms of duration, circulation and number of people reached by the publication or broadcast,⁸⁹ the damages awarded to the plaintiff ranged from \$10,000 to \$50,000.⁹⁰ On the other hand, where the court found there to be non-extensive publication, damages fell below \$5,000 and were generally in the \$500 to \$2,000 range.⁹¹

86. *Poirier v. Leblanc*, *supra*, note 68; *Côté v. Syndicat des Travailleuses et Travailleurs municipaux de la ville de Gaspé*, (C.S.N.), *supra*, note 68; *Gingras v. Entreprises Télécapi-tale Ltée, Division C.H.R.C.*, *supra*, note 68; *Lavigne v. La Presse Ltée* (7 November 1984) Montreal 500-05-009634-807; 500-05-009635-804; 500-05-009631-803; 500-05-009630-805 and 500-05-009632-801 (C.S.) J.E. 84-999; and *Gravel v. Arthur*, *supra*, note 9a.

87. *Camus v. Poirier* (3 May 1984) Montreal 500-05-005790-819 (C.S.) J.E. 84-502; *Lessard v. Gagné* [1955] C.S. 440; *Fortin v. Syndicat National des Employés de l'Hôtel-Dieu de Montréal*, *supra*, note 35.

88. P. Lewis, ed., *Gatley on Libel and Slander*, 8th ed. (London: Sweet & Maxwell, 1981) at 543, cited with approval in *Cherneskey v. Armadale Publishers Ltd.* (1974) 45 D.L.R. (3d) 433 (Sask. Q.B.).

89. As in *Poirier v. Leblanc*, *supra*, note 68; *Côté v. Syndicat des Travailleuses et Travailleurs municipaux de la ville de Gaspé*, (C.S.N.), *supra*, note 68; *Goupil v. Publications Photo-Police Inc.*, *supra*, note 68; *Gingras v. Entreprises Télécapi-tale Ltée*, *supra*, note 68; *McGregor v. The Montreal Gazette*, *supra*, note 25; and *Gravel v. Arthur*, *supra*, note 9a.

90. In *McGregor v. The Montreal Gazette Ltd.*, *supra*, note 25 where the high amount of \$50,000 in non-pecuniary damages was granted, the court did not explicitly take into account the extent of the publication of the defamatory newspaper article. However, it is no accident that such high damages were awarded following a defamatory article prominently featured on the front page of the widely circulated and read newspaper, *The Montreal Gazette*.

91. See *Trahan v. Imprimerie Gagné Ltée*, *supra*, note 36; *Simard v. Gagnon*, *supra*, note 44; *Camus v. Poirier*, *supra*, note 87; *Fortin v. Syndicat National des Employés de l'Hôtel-Dieu de Montréal*, *supra*, note 35; *Lessard v. Gagné*, *supra*, note 87 and *Lachapelle v. Véronneau* [1980] C.S. 1136. In *Hudon v. CHLT-TV Inc.*, *supra*, note 68, \$5,000 damages were granted because even though the defamatory film clip was shown repeatedly over a four and a half month period, it was only shown briefly, with little actual impact.

Furthermore, while both verbal and written defamation are equally actionable under article 1053 C.C., unless widely broadcast on television or radio, verbal defamatory statements are less likely to yield high damage awards for plaintiffs. As Péroquin J. stated in *Lachapelle v. Véronneau*:

Considérant que dans ces deux cas [*Snyder v. Montreal Gazette* and *Fabien v. Dimanche-Matin*] il s'agissait de libelle diffamatoire par la voie de journaux très répandus dans la province ... Il n'y a aucune commune mesure avec notre cas où il s'agit plutôt de *diffamation verbale* dans un milieu restreint.⁹²

There is no doubt that the extent and duration of publication of the defamation is a relevant factor. Generally speaking, the more people who receive the defamatory information, the greater the effect of the delict and the greater the damage. However, it is submitted that it is not sufficient to look at the extent of publication, in a statistical fashion, in isolation. It must be examined in the context of the whole case and, in particular, in function of three other related factors: i) the *actual* effect of the publication; ii) the *importance* of wide publicity to the particular plaintiff and iii) the *source* of the defamation.

i) *the actual effect of the publication*

A defamatory statement with a limited circulation may have just as much impact and cause just as much actual damage to a plaintiff as a widely circulated one if the statement is published in an area in which the person lived and worked. In *Côté v. Syndicat des Travailleuses et Travailleurs municipaux de la ville de Gaspé*,⁹³ the Superior Court awarded a defamed lawyer \$10,000 in non-pecuniary damages as a result of statements made at a local press conference by the defendant union to the effect that the plaintiff was prolonging negotiations solely in the interest of augmenting her fee. The statement was carried by two local weekly papers with circulations of 3,500 and 7,900 respectively, one union communiqué and one local radio station with a potential audience of 17,000 people. While the circulation was meagre compared to a newspaper like the *Gazette* in *Snyder*⁹⁴ or *McGregor*,⁹⁵ it was nonetheless considered by Goodwin J. to be an important factor in

92. *Ibid.*, at 1139 [emphasis added]. In this case, \$2,000 moral damages were awarded. See also *Simard v. Gagnon*, *supra*, note 44 where defamatory remarks were made verbally in a restaurant and only \$1,000 moral damages were granted.

93. *Supra*, note 68.

94. *Supra*, note 2.

95. *Supra*, note 25.

evaluating damages because the publicity penetrated the relevant market, namely, the Gaspé region, where the plaintiff lived and worked:

Le propos diffamant a été distribué dans tous les foyers du territoire de Gaspé. Il atteignait donc toutes les personnes habitant le milieu justement d'où Me Côté est susceptible de recruter sa clientèle.⁹⁶

Very often, a defamatory statement published less widely in a small town can have a large impact because such areas usually thrive on "grapevines". This fact was not sufficiently recognized in *Trahan v. Imprimerie Gagné Ltée*.⁹⁷ The court pointed out explicitly that the article, defamatory of the plaintiff fur merchants, appeared only once, on page 65 of a regional, weekly newspaper with a circulation of only 6,500 copies aimed principally at women, in the sports section. This was a factor taken into account by Croteau J. in awarding each plaintiff only \$2,000 of damages. While the judge did acknowledge that in a rural, as opposed to an urban, area "tout se sait et 'se parle'",⁹⁸ he did not take into account adequately the actual impact of the limited publication. According to the proof cited in the case report, the defamatory statements were known by everybody in the area, "ça se parlait dans les hôtels"⁹⁹ and that even in the season following the publication of the defamation, the plaintiffs still had to explain to trappers that the article contained false information. Therefore, a restrictively circulated publication in a small area may have a very large impact which ought to be considered seriously by courts.

The actual effect of a publication was taken into account in *Hudon v. CHLT-TV Inc.*¹⁰⁰ where, despite the fact that the film clip, defamatory of the plaintiff, was shown on television on many occasions over a four and a half month period, only \$5,000 of damages was granted because the actual effect of the defamatory film was not seriously damaging to the plaintiff.

Il [the plaintiff] n'a jamais été montré en gros plan. On le voit brièvement: emmenotté et sortant du fourgon cellulaire. Pour le grand public qui ne le connaît pas personnellement, la présence du demandeur dans ce film ne dit rien.¹⁰¹

ii) *the importance of wide publicity to the particular plaintiff*

Certain plaintiffs, depending on their line of work, will be affected more seriously by publicity of defamatory statements than other plain-

96. *Supra*, note 68 at 585.

97. *Supra*, note 36.

98. *Ibid.* at 2425.

99. *Ibid.* at 2421.

100. *Supra*, note 68.

101. *Ibid.* at 2655.

tiffs. Particularly susceptible plaintiffs are usually people whose reputations are important to their profession, employment or business. This factor has been recognized, for the most part, by Quebec jurisprudence. In *Trahan v. Imprimerie Gagné Ltée*, Croteau J. stated:

Dans le présent cas, la réputation de la demanderesse est importante parce que tout repose sur la confiance et l'honnêteté.¹⁰²

Similarly, in *Côté v. Syndicat des Travailleuses et Travailleurs municipaux de la ville de Gaspé*,¹⁰³ the defamed plaintiff was a self-employed lawyer whose livelihood and success in her chosen profession depended on confidence from her clients. When her professional integrity was attacked, it had a significant damaging impact.

It is in this regard only that the plaintiff's holding of a public office may be relevant. For example, in *Desrosiers v. Publications Claude Daigneault Inc.*,¹⁰⁴ the defamed plaintiff suffered considerable moral damages, set by the court at \$20,000, because as a mayor, with political aspirations at the federal level, the public's confidence in his integrity was essential to his political success. The publicized statements to the effect that he took bribes had more important consequences to Mayor Desrosiers than to many other plaintiffs and was a factor correctly considered by the Superior Court in assessing his damages.

iii) the source of the defamation

Regardless how wide is the publication of a defamatory statement, its actual impact will depend largely on the influence and credibility of the source of that statement. A widely publicized falsehood in a tabloid known for its sensationalism will have less damaging effect than a less publicized statement in a serious newspaper with a reputation for accuracy. In *Dimanche-Matin v. Fabien*,¹⁰⁵ Bélanger J. agreed with the trial judge that it is important to take into account the reputation of the journalist and of the newspaper:

le défendeur Poirier est reconnu comme un journaliste chevronné ... Pour le public, il s'agit donc d'un expert en semblable matière et ce qu'il écrit a plus de chance de passer la rampe, de pénétrer les cerveaux et d'être cru.¹⁰⁶

Considering the quality of the newspaper in which the defamatory article appeared, the Court of Appeal held that:

102. *Supra*, note 36 at 2424.

103. *Supra*, note 68.

104. *Supra*, note 18.

105. *Supra*, note 68.

106. *Ibid.* at 7.

Ce journal est de bonne tenue et d'excellente présentation et il ne fait pas de doute qu'il s'adresse à une clientèle généralement sérieuse et à un public qui veut se renseigner à des sources fiables. Ces constatations autorisent en conséquence à opiner que l'impact d'un article comme celui qui fait le sujet du présent débat est d'autant plus important et d'autant plus dommageable à l'égard du demandeur ...¹⁰⁷

Similarly, courts have considered the popularity and influence of radio show announcers in verbal defamation cases. In *Gingras v. Entreprises Télécapitale Ltée*, Bergeron J. explicitly took into account, in granting \$14,000 of moral damages, the fact that:

Le défendeur est un animateur extrêmement connu et écouté. L'émission qu'il anime jouit d'une grande popularité et d'une certaine crédibilité.¹⁰⁸

It is therefore very important to consider, in addition to the extent and duration of the publicity, the question from whom the defamatory statements emanate. It is not only the quality and popularity of the "traditional" publicists, such as journalists and radio and television personalities, that ought to be considered by the courts. It is also relevant to look more generally at the type of person that is issuing the defamatory remarks. The court in *Côté v. Claveau*¹⁰⁹ correctly recognized that damaging words spoken by a fellow professional, in that case a lawyer against another lawyer, are more damaging than words spoken by a layman or someone in a different field.

To return to Lord Esher M.R.'s statement in *Whittaker v. Scarborough Post Newspaper Co.*,¹¹⁰ it is true that the mere number of copies published of a newspaper should not, in itself, be a relevant factor for a court to consider in assessing moral damages in a defamation action. It is only relevant when considered in conjunction with other factors canvassed above such as the actual effect of the publication, the importance of publicity to the plaintiff at hand and the source of the defamation. The extent of the dissemination of the defamatory statements can only be a factor when considered in this broader context.

c. The presence of a retraction or apology

The presence or absence of a retraction or apology is a central factor in the evaluation of non-pecuniary damages in defamation cases.

107. *Ibid.* at 8 [emphasis added].

108. *Supra*, note 68 at 82. See also *Flamand v. Bonneville*, *supra*, note 44 at 1590 where the court considered the fact that the defendant was an "orateur haut en couleurs ... et qui est crédible" and *Bélair Carpet Corporation v. Maisonneuve Broadcasting Corporation Ltd.*, [1975] C.S. 645 where the court emphasized that the defendant radio announcer was "très versatile et engageant" with very convincing and serious views.

109. *Supra*, note 73 at 31.

110. *Supra*, note 82.

The majority of Quebec defamation cases state that the existence of a retraction or apology by the defendant, although never a total defense, can serve to diminish significantly the amount of damages to which a plaintiff is entitled. In *Côté v. Claveau*, Roberge J. stated:

Le Tribunal tient compte enfin de ses [the defendant's] efforts de rétraction, bien que ces efforts aient été refusés comme moyen de défense; cependant, ils peuvent être admis comme moyen de diminution des dommages à accorder.¹¹¹

The inverse is also true. If, instead of retracting a defamatory statement, the defendant reiterates it, the damages granted by the court may be augmented since the repetition of the defamatory remark is seen as a source of additional damage to the plaintiff. In *Flamand v. Bonneville*, Moisan J., in granting \$12,000 of moral damages held:

[I]l fait de maintenir et même dans certains cas de réitérer des propos diffamatoires dans les procédures et les témoignages est une source de dommages additionnels.¹¹²

But retraction, like any other factor, must not be considered out of context. It is only relevant when the court evaluates the time that the retraction was made and where the retraction was published. The date of retraction is important because the closer in time it is published to the original defamatory remark, the larger the mitigating impact will be upon the public. In *Camus v. Poirier*,¹¹³ damages of only \$500 were granted because, *inter alia*, the defamatory remarks were retracted by the defendant immediately upon the receipt of a *mise-en-demeure*.

It is also relevant to consider where the retraction was published because it should aim at the same audience that read or heard the original defamatory statement. As Brossard J. stated in *Lessard v. Gagné*:

La rétractation ..., à laquelle le journal a donné la même importance et publicité qu'il avait données à la nouvelle diffamatoire, sans peut-être atteindre tous ceux qui avaient eu connaissance de la nouvelle, a cependant été communiquée à tous les abonnés du journal.¹¹⁴

111. *Supra*, note 73 at 33. See also *Côté v. Syndicat des Travailleuses et Travailleurs municipaux de la ville de Gaspé*, *supra*, note 68 at 586; *Lavigne v. La Presse Ltée*, *supra*, note 86 at 18; *Lachapelle v. Véronneau*, *supra*, note 91 at 1139; *Camus v. Poirier*, *supra*, note 87 at 7; *L'imprimerie Populaire Ltée v. Tasche-reau*, *supra*, note 46, and *Auburn v. Berthiaume* (1903) 23 C.S. 476 at 481.

112. *Supra*, note 44 at 1592. See also *Trahan v. Imprimerie Gagné Ltée*, *supra*, note 36 at 2426; and *Gravel v. Arthur*, *supra*, note 9a, at 2882.

113. *Supra*, note 87 at 7. See, on the other hand, *Desaulniers v. L'Action Sociale* (1914) 46 C.S. 161 where the retraction was made too late to mitigate damages.

114. *Supra*, note 87 at 446 (C.S.) [emphasis added]. In *Snyder v. Montreal Gazette Ltd.*, *supra*, note 3 at 629, the Gazette had published a retraction but it was not published in as conspicuous a place as the original article.

It is also important that the retraction be genuine and be made in good faith. More specifically, it should not be a mere tactic used by the defendant as a last ditch effort to reduce his damages. An instructive example of such efforts is found in the British Columbia Supreme Court case of *Good v. North Delta-Surrey Sentinel*, where Wood J. refused to reduce damages as a result of the defendant's retraction because despite repeated requests to withdraw the defamatory remarks,

[i]t was not until 10th September 1984, when the trial of this action was just over three weeks away and inevitable, that a purported apology was published ... This qualified regret, published almost two years after the writ of summons herein was filed, leads to the irresistible inference that it was nothing more than a last minute effort by Elson to minimize his exposure to damages.¹¹⁵

Not only did Wood J. not reduce the damages awarded on the basis of this tardy and non genuine retraction, but he used it as a factor justifying higher damages. In a somewhat harsh statement he stated:

As such, it is a further *aggravating circumstance* to be taken into account when fixing general damages.¹¹⁶

The Quebec case of *Trahan v. Imprimerie Gagné Ltée* is analogous to *Good v. North Delta-Surrey Sentinel* in that, in *Trahan*, a refusal to retract was considered a relevant factor in awarding punitive or exemplary damages. Croteau J. states:

Le journal a refusé de se rétracter comme l'ont demandé les demandeurs. On a aussi omis de rectifier l'information fausse et inexacte et d'apporter certaines corrections. De plus, le défendeur Hogue à réaffirmer [sic] ses commentaires à l'égard des commerçants à l'audience. Cette façon d'agir justifie une certaine réprobation. Les demandeurs ont donc droit à des dommages exemplaires de \$1,000.00 chacun.¹¹⁷

Similarly, in *Côté v. Syndicat des Travailleuses et Travailleurs municipaux de la ville de Gaspé*, the Superior Court explicitly considered as a "fait aggravant"¹¹⁸ the absence of any retraction or apology. This factor was considered in the concluding section of the judgment under the heading of exemplary damages, after the Court had already fixed the amount of compensatory moral damages.

While the issue of punitive damages in defamation cases will be discussed in more detail later in the paper,¹¹⁹ it is appropriate, at this stage, to question whether the refusal to retract should be considered

115. [1985] 1 W.W.R. 166 at 173.

116. *Ibid.* [emphasis added].

117. *Supra*, note 36 at 2426.

118. *Supra*, note 66 at 586.

119. See *infra* at pages 35-38.

relevant in the evaluation of compensatory moral damages or punitive damages. Since by virtue of s. 49 of the Quebec Charter of Human Rights and Freedoms,¹²⁰ punitive damages are only available when the defendant defamed the plaintiff intentionally, the issue of retraction should only be relevant in assessing punitive damages if it goes to show bad faith and intent to ruin a person's reputation. The concept of good or bad faith has been linked to retraction in the case of *Lachapelle v. Véronneau*, where Péroquin J. held:

Considérant que le défendeur a tout de même démontré sa *bonne foi* en vue de dissiper partiellement les effets de ses propos imprudents en soumettant la *lettre d'excuses* ...¹²¹

The cases are, however, inconsistent. On the one hand, the presence of a retraction or apology serves to mitigate compensatory moral damages while, on the other hand, the refusal to retract can serve as a basis for punitive damages. Furthermore, while the refusal to retract may evidence the defendant's bad faith and intent to harm the plaintiff's reputation, it may just as plausibly be prompted by his honest belief in the truth of what he stated or because he legitimately felt he was making a fair comment.¹²² In the latter two instances, a refusal to retract should have no relevance to the assessment of punitive damages.

Although the presence of a retraction, especially one which follows the defamatory remarks close in time and which is given as much prominence as the original statement, can reverse some of the damaging effects to the reputation of the plaintiff, it puts the defendant in a strategically difficult position. The defendant confronts a dilemma: if he or she does not retract the statement and subsequently loses the defamation action on the merits, he or she will have to pay higher compensatory damages and even punitive damages. If the defendant chooses to retract the statement, he or she has, for all practical purposes, admitted defeat on the merits of the case before going to trial. The only defendant that is not subject to this dilemma and for whom a retraction can only be beneficial is a defendant who admits to having defamed the plaintiff, and who is only in court battling over the quantum of damages.

As a final note, there is one aspect to retraction that seems to be overlooked by the majority of judges as well as by many plaintiffs. By granting lower damages when there is a retraction, courts are acknowl-

120. *Supra*, note 33.

121. *Supra*, note 91 at 1139 [emphasis added].

122. In *Dubois v. La Société St-Jean-Baptiste de Montréal* decision, *supra*, note 36, the Court divided on the issue as to whether the defendant's publication came within the defense of "fair comment". Therefore, a defendant may be refusing to retract on the basis that he is making a "fair comment" even though the court ultimately finds this defense untenable.

edging that retraction minimizes the damages caused to a plaintiff by a defamatory statement. This may not always be the case. In some instances, the affair may have blown over quickly and the negative effects of the defamation may have had little or no lasting consequences. Retracting at a later date may only serve to remind the public of the original defamatory statement that may have been long-forgotten. This was recognized by Montgomery J. in *Radio Trois-Rivières Ltée C.H.L.N. v. Melasco* when he modified the trial judge's award:

Le Nouvelliste was condemned to publish it [the judgment], with a retraction, and the radio station was similarly condemned to broadcast the judgment and a retraction. *In my opinion, it could well do more harm than good again to publicize the affair at this time.*¹²³

What Montgomery J. emphasized in *Melasco* is that retraction may not always have the mitigating effect on damages that judges assume it does. While this is not to say that the presence or absence of a retraction or apology is irrelevant to the evaluation of moral damages in defamation cases, it does tell us that judges ought to look at the issue of retraction in the context of each case and not apply it, as an automatic reflex, to reduce or increase damages in every case.

d. Conduct of the parties

The conduct of both the plaintiff and the defendant can affect the amount of damages that a court awards in a defamation action.

i) Conduct of the defendant

Conduct of the defendant generally refers to the good or bad faith of that party and to the intentional or unintentional character of the defamatory statements that were published. Quebec jurisprudence is not entirely clear as to the effect the conduct of the defendant should have upon an award of damages. There are statements in Quebec defamation cases to the effect that the good faith and lack of malice on the part of the defendant can serve to lower the amount of damages awarded to the plaintiff. In *Ferland v. Larose*, Frenette J. stated:

En principe, la bonne foi à elle seule ne peut servir d'excuse ou de moyen de défense à une action en responsabilité pour diffamation, mais elle peut influencer sur le quantum des dommages accordés.¹²⁴

Similarly, as was seen in the preceding section on retraction or apology, in *Lachapelle v. Véronneau*,¹²⁵ Péroquin J. found as evidence of good

123. *Supra*, note 81 at 9 [emphasis added].

124. [1982] C.S. 616 at 619.

125. *Supra*, note 91.

faith that the defendant had submitted a letter of apology. This was one of the relevant factors he took into account in granting considerably lower damages.

Consistent with the proposition that good faith can lower the quantum of damages, there are Quebec cases in which bad faith on the part of the defendant was explicitly considered by the judge as a factor in granting damages. For example, in *Ferland v. Larose*, Frenette J. stated that “les défendeurs voulurent *intentionnellement nuire* aux demandeurs”¹²⁶ and that these “imputations nuisibles”¹²⁷ justified the award of \$3,000 in damages. It is to be noted that these damages were seemingly compensatory moral damages and not punitive damages as nowhere did the court discuss s. 49 of the Quebec Charter of Human Rights and Freedoms or mention the terms punitive or exemplary damages. Similarly, in *Goupil v. Publications Photo-Police Inc.*, Richard J. stated explicitly that punitive damages did not lie in the case but, in considering the effect of the defamatory publication, the judge stated that:

Les affirmations contenues au journal du 16 mai 1981 sont graves, honteuses, calomnieuses, injurieuses et *malveillantes*. Elles constituent une atteinte grave à la réputation posthume de Ginette Goupil et par ricochet à celle de sa famille ...¹²⁸

The court awarded \$15,000 in moral damages, a relatively high amount in Quebec at the time.

Quebec defamation cases also use the presence of bad faith and intentional wrongdoing to justify the award of punitive damages pursuant to s. 49 of the Quebec Charter of Human Rights and Freedoms. In *Poirier v. Leblanc*, Letarte J. stated that “[l]a Cour, dans de telles circonstances, ne peut que conclure à la mauvaise foi et à la malice des défendeurs”.¹²⁹ He therefore granted, in addition to \$10,000 of compensatory moral damages, \$2,000 in punitive damages “vu la conclusion retenue qu’il s’agissait pour partie d’une atteinte illicite et intentionnelle, voire même malicieuse, à la réputation des demandeurs”.¹³⁰

Quebec jurisprudence is in a somewhat confused state in this regard. Sometimes bad faith is a factor affecting compensatory moral damages, while at other times, it is a reason for granting punitive damages. Bis-

126. *Supra*, note 124 [emphasis added].

127. *Ibid.* at 620.

128. *Supra*, note 68 at 879 [emphasis added].

129. *Supra*, note 68 at 1218.

130. *Ibid.*, at 1220. See also *Blanchet v. Corneau*, *supra*, note 68 and *Côté v. Syndicat des travailleuses et travailleurs municipaux de la ville de Gaspé (C.S.N.)*, *supra*, note 68 and section on punitive damages, *infra*, at pages 35-38.

sonnette, in her thesis on defamation, has stated explicitly that s. 49 of the Charter of Human Rights and Freedoms should not be used to isolate the criterion of intention to punitive damages alone:

À première vue, cet article [s. 49] distinguerait entre le dommage moral et le dommage exemplaire en associant le critère d'intention seulement à ce deuxième type de dommages.

Nous ne partageons pas cette interprétation qui semble se dégager de l'article 49 de la Charte et de l'article 1053 du Code civil. *Quant à nous, l'intention doit participer comme élément important à l'évaluation du dommage dit moral.*¹³¹

It is submitted that the intention of the defendant to harm the reputation of the plaintiff should not be a factor relevant to the setting of *compensatory* moral damages. Non-pecuniary damages in defamation cases seek to compensate the plaintiff for being lowered in the "estimation of right-thinking members of society generally"¹³² and for the humiliation, contempt, embarrassment and ridicule he or she suffered as a result of the publication of a falsehood. These damages will be sustained by the plaintiff and his or her reputation will be equally ruined regardless of the good or bad faith of the defendant. The public, at whom the defamatory statement is directed, will likely not be aware of the intention of the defendant and will usually not be affected by it.

The defendant's good or bad faith should only be relevant to the question of compensatory damages to the extent that the intentional element is related to another factor which is properly considered in the evaluation of moral damages. For example, if, as in *Lachapelle v. Véronneau*,¹³³ the good faith of the defendant is demonstrated by an apology or retraction which diminishes the damaging effects of the original statement, that factor should be taken into account. If the defendant's bad faith causes an exaggeration of the falsehood and the use of particularly inflammatory language, which in turn, causes greater actual damage to the plaintiff, then again, it becomes a relevant factor. But in isolation, the defendant's intent has little impact on the public's view of the plaintiff and consequently little effect on the damages suffered.

Lamer J., in his dissenting opinion in *Snyder*, recognizes this punitive connotation in the use by Quebec courts of the good or bad faith of the defendant as a criterion in estimating non-pecuniary damages. He

131. C. Bissonnette, "La diffamation civile en droit québécois" (thèse de maîtrise en droit, Université de Montréal, 1985) at 403 [emphasis added].

132. Gatley, *supra*, note 88 at 42.

133. *Supra*, note 91.

disagrees with using the intention of the defendant as a relevant factor in the assessment of compensatory moral damages:

In my opinion, this aspect should disappear from our system, where the rule is to compensate the victim, not to punish the offending party.¹³⁴

Intention on the part of the defendant should be a factor relevant primarily to the issue of punitive damages under s. 49 of the Quebec Charter of Human Rights and Freedoms.

ii) *Conduct of the plaintiff*

The plaintiff's conduct can affect the damages awarded by a court either because the plaintiff contributed to his or her own damages or because he or she did not do what was possible to mitigate them. In the British Columbia case of *Neeld v. Western Broadcasting Co. Ltd.*,¹³⁵ Bouck J. granted very low damages to the defamed plaintiffs and explicitly considered the poor conduct of the plaintiffs. He pointed out that they were aggressive, hostile and used profanity. Although the Court found that the radio broadcast in question was defamatory, the damages granted were uncharacteristically low¹³⁶ since the judge obviously had little sympathy for these poorly-behaved individuals who caused a lot of their own adverse publicity.

In the Quebec case of *Phillips v. Mohawk Council of Kahnawake*, Durocher J. cut the amount of moral and material damages awarded to the plaintiff in half because "her own attitudes, behaviour, conduct and decisions [were] also the cause of the situation she found herself in".¹³⁷

The attitude of Quebec courts in considering the plaintiff's conduct when assessing damages in defamation cases is entirely reasonable. Defamation is, after all, a delict, actionable under article 1053 C.C., and the courts are merely applying the general principle of contributory negligence.

134. *Supra*, note 2 at 508. See also *Bertrand v. Mercier* [1975] C.S. 1083 and J.-L. Baudouin, *supra*, note 56 at 161: "La bonne foi ne saurait pas plus valoir une atténuation des dommages que la mauvaise foi une augmentation de ceux-ci."

135. *Supra*, note 74.

136. \$250 for the son and \$500 for his parents.

137. (19 December 1985) Montreal 500-05-019556-826 (C.S.), J.E. 86-162 at 29. This case concerned the defamation of a white woman who had married and subsequently divorced an Indian man. While the Indian Council had in fact published defamatory statements about the plaintiff, she had contributed to her own damages because a lot of the loss of respect she suffered was due to the fact that she had sold her house on the Indian reserve and had disregarded Indian traditions. See also *Simard v. Gagnon*, *supra*, note 44 at 561, where the Court found that "même si la conduite du défendeur est totalement inexcusable, la Cour est d'opinion que la demanderesse a amplifié les conséquences de l'incident".

The other manner in which the plaintiff's conduct becomes relevant concerns the ability to mitigate damages. In *Hudon v. CHLT-TV Inc.*,¹³⁸ the film clip, defamatory of the plaintiff, was shown repeatedly on television for four and a half months. In awarding damages of only \$5,000, Tôt J. explicitly took into account the fact that the plaintiff could have alerted the defendant earlier, insisted that the airing of the film clip be stopped and thus diminished the damages he suffered:

Le demandeur, en constatant que la défenderesse continuait de se servir du film d'archives en question, aurait pu facilement par lui-même ou par l'entremise de son avocat avertir la défenderesse. Avant d'agir ainsi, il a attendu quatre mois et a permis ainsi la répétition de la diffusion de l'image dont il se plaint.¹³⁹

It is sensible for courts to consider the plaintiff's conduct in terms of his or her ability to mitigate, because damages in defamation cases are subject to the same rules of limitation as in all other delictual cases where the principle of mitigation clearly applies.¹⁴⁰

e. Gravity of the defamatory statement

The more the libel gets away from the truth the greater is the effect on the award of damages. The closer the libel is to the truth the less the damages must be.¹⁴¹

This statement reflects the current judicial position in Quebec and Canada regarding the gravity of defamatory remarks. Where the court finds the statements to be of exceptional gravity, damages tend to be higher.¹⁴² There appears to be some confusion concerning the relationship between gravity and proximity to the truth. In most cases, they are treated as synonymous yet one could posit situations in which the accusation is very grave, but only slightly untrue. For example, the statement that a married politician is homosexual may be of exceptional gravity even if he is, in fact, bisexual.

While it is true that, in general, the gravity of the defamatory remark is a factor worth considering, it should be considered cautiously. In particular, one can imagine statements that are so exaggerated and are so far from the truth that the effect of the defamation results

138. *Supra*, note 68.

139. *Ibid.* at 2655.

140. See, for example, *Industrial Teletype Electronics Co. v. City of Montreal* [1977] 1 S.C.R. 629.

141. *Neeld v. Western Broadcasting Co. Ltd.*, *supra*, note 74 at 576.

142. See, for example, *Gravel v. Arthur*, *supra*, note 9a at 2882 and *Dimanche-Matin Ltée v. Fabien* (C.A.), *supra*, note 68 at 10. See also *Poirier v. Leblanc*, *supra*, note 68 and *Simard v. Gagnon*, *supra*, note 44.

in very little damage to the plaintiff. Such enormous and exaggerated attacks are often so incredible that no one believes them. Rather than the reputation of the plaintiff being ruined, it is the defendant that loses credibility.

f. Punitive damages

Quebec courts have been empowered to grant punitive or exemplary damages to defamation victims since the coming into force of s. 49 of the Quebec Charter of Human Rights and Freedoms in 1976.¹⁴³ Section 49 reads:

Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

In case of unlawful and *intentional interference*, the tribunal may, in addition, condemn the person guilty of it to exemplary damages.

The right or freedom interfered with in the case of defamation is found in s. 4 which states that "every person has a right to the safeguard of his dignity, honour and reputation".

Quebec courts have not hesitated to award punitive damages under s. 49(2) of the Charter although the amounts granted remain quite modest, in the range of \$1,000 to \$5,000.^{143a} It should be noted that while these amounts of punitive damages do not seem that high, they are significantly higher than the amounts of punitive damages that have been awarded under s. 49(2) of the Charter in discrimination cases¹⁴⁴ or under s. 272 of the Consumer Protection Act¹⁴⁵ for intentional breaches by merchants of their obligations under that Act.¹⁴⁶ No clear indication, however, is given by Quebec courts of the criteria used to set the amounts of punitive damages awarded in defamation cases. Rather, courts see themselves as enjoying a large degree of discretion in the setting of such damages,¹⁴⁷ but they generally award amounts of

143. L.R.Q., c. C-12, June 28, 1976, (1976) 108 G.O. II 3875.

143a. Although in the recent case of *Gravel v. Arthur*, *supra*, note 9a, \$10,000 of punitive damages were awarded to a defamed politician.

144. See *La Commission des droits de la personne du Québec v. Emergency Car Rental* [1980] C.P. 121 where only \$75 of punitive damages were granted.

145. L.R.Q. c. P-40.1.

146. See *Carrier v. Proulx* [1981] C.P. 189 where only \$100 of punitive damages were granted.

147. According to Goodwin J. in *Côté v. Syndicat des travailleuses et travailleurs municipaux de la ville de Gaspé (C.S.N.)*, *supra*, note 68 at 586 "les tribunaux jouissent d'une large discrétion pour déterminer le quantum des dommages-intérêts exemplaires".

punitive damages in conformity with what other Quebec courts have already granted.¹⁴⁸

Some indication is given, however, as to what is irrelevant in the setting of such damages. According to Goodwin J. in *Côté v. Syndicat des travailleuses et travailleurs municipaux de la ville de Gaspé* (C.S.N.), "les dommages exemplaires sont évalués indépendamment de la gravité du préjudice subi".¹⁴⁹ It follows that punitive damages are to be viewed independently from any moral or material damages awarded to a defamation victim and consequently ought not to be restricted by any ceiling set on moral damages. This is because the purpose behind punitive damages is completely different from the purpose behind compensatory pecuniary and non-pecuniary damages. According to Letarte J. in *Poirier v. Leblanc*, punitive damages illustrate the "réprobation du Tribunal pour le genre de procédés utilisés par les défendeurs"¹⁵⁰ and, like a fine in a criminal context, such damages seek to punish the defendant for intentionally maligning the reputation of the plaintiff. Moreover, they seek to prevent recurrence of such defamation by both the defendant and by others for whom the award constitutes a warning to think twice before intentionally defaming another.¹⁵¹ As was stated in the *Côté* decision, "le montant doit être suffisant pour dissuader le fautif de récidiver".¹⁵² In this context, the gravity of the fault committed by the defendant may be relevant in fixing the amount of punitive damages.¹⁵³

Section 49(2) of the Charter requires "unlawful and intentional interference" with a right or freedom before punitive damages may be awarded. In conformity with this requirement, most cases in which punitive damages have been assessed involve intentional and malicious acts of defamation by the defendant.¹⁵⁴ However, according to Perret¹⁵⁵

148. See *Blanchet v. Corneau*, *supra*, note 68 where Frenette, J. canvassed the amounts awarded by other courts and thus justified his award of \$2,500 in punitive damages.

149. *Supra*, note 68 at 586.

150. *Supra*, note 68 at 1220.

151. L. Perret, "De l'impact de la Charte des droits et libertés de la personne sur le droit civil des contrats et de la responsabilité au Québec" [1981] 12 *R.G.D.* 121 at 138-139.

152. *Supra*, note 68 at 586.

153. Perret, *supra*, note 151 at 141.

154. See, for example, *Poirier v. Leblanc*, *supra*, note 68, *Lavigne v. La Presse*, *supra*, note 86, *Gingras v. Entreprises Télécapitale Ltée - Division C.H.R.C.*, *supra*, note 68 and *Thompson v. Ste-Foy* (7 April 1982) Quebec 200-05-002622-798 (C.S.).

155. *Supra*, note 151 at 138, footnote 47.

and Rousseau-Houle,¹⁵⁶ intention to harm is not necessarily required. Perret states that “faute lourde dolosive”¹⁵⁷ which he defines as reckless carelessness in which the defendant knows of the immediate negative consequences of his act, is sufficient to trigger punitive damages under s. 49(2). Rousseau-Houle asserts that mere “négligence inexcusable”¹⁵⁸ an example of which arises when a media defendant does not proceed with simple and elementary verification of the truth, will suffice under s. 49(2). This has been borne out in some Quebec cases in which punitive damages have been granted, but where no malicious or intentional act was attributed to the defendant. For example, in *Trahan v. L’Imprimerie Gagné Ltée*, \$1,000 of punitive damages was awarded without a factual finding of malice or intent to harm because “les autorités du journal ont totalement *manqué de diligence* surtout en présence de propos aussi vexatoires ... Pour le défendeur, il a *manqué de discernement*. Il n’a fait aucune vérification des faits.”¹⁵⁹

Furthermore, in the recently decided Superior Court decision of *Gravel v. Arthur*^{159a}, \$10,000 of punitive damages were awarded to a defamed politician on the ground that the defamation had been deliberate. However, the only evidence of the intentional character of the attack was the fact that the defendant had been found guilty of intentional defamation on two previous occasions.^{159b}

It is submitted that mere lack of diligence or judgment on the part of the defendant, as in the *Trahan* case, ought not to be enough to trigger s. 49(2) of the Charter; the cases which have departed substantially from the requirement of bad faith as the touchstone for the award of punitive damages should not be followed. The purpose of punitive damages is to punish the defendant and to prevent recurrence of similar intentional acts of defamation. Punishing mere inadvertance fulfills neither of these functions. Courts should be wary of granting punitive damages where there is no intention to harm or at least no gross negligence.

The fact that Quebec courts at times confuse the factors that ought to be taken into account in awarding punitive damages with those rel-

156. T. Rousseau-Houle, “Les dommages exemplaires pour violation du contrat: la situation en droit québécois” (1986) 11 *Can. Bus L.J.* 291 at 298.

157. *Supra*, note 155.

158. *Supra*, note 156.

159. *Supra*, note 36 at 2425 [emphasis added]. See also *Côté v. Syndicat des travailleuses et travailleurs municipaux de la ville de Gaspé (C.S.N.)*, *supra*, note 68 at 586.

159a. *Supra*, note 9a.

159b. *Ibid.*, at 2883.

evant to compensatory moral damages has already been discussed earlier in the paper.¹⁶⁰ Just as bad faith on the part of the defendant is relevant only to the question of punitive damages and not to the amount of compensatory non-pecuniary damages (unless the intentional element translates into another factor which is properly considered in the evaluation of moral damages),¹⁶¹ factors such as the refusal to retract or apologize should be irrelevant to the assessment of punitive damages unless such refusal demonstrates the presence of intent to harm.¹⁶²

g. The proper role of various factors in evaluating non-pecuniary damages

The task of quantifying the non-pecuniary damages suffered by a defamation victim can never be made simple given the intangible nature of the loss sought to be compensated. The purpose behind the examination of the various criteria that Quebec courts consider explicitly or implicitly in the setting of such awards of damages was only partly to note their influence on the amounts of awards. The primary purpose was to examine the approach of our courts in a critical fashion and to determine whether the factors they take into account are truly relevant to the question of setting compensatory moral damages in defamation cases. In certain instances, the conclusion reached is that the factors considered are indeed inappropriate. For example, the mere fact of being a public official ought not automatically to augment the plaintiff's damages. Similarly, the bad faith of the defendant should be a consideration properly applied to the question of punitive damages and not, in most circumstances, to the setting of compensatory moral damages.

A further goal of examining the elements that go into the awarding of moral damages was to issue a warning. Even if the factors considered by the courts are relevant ones, they should never be applied blindly, as an automatic reflex, to influence the quantum of damages. This point is well borne out in the *Melasco* decision¹⁶³ where Montgomery J. recognized that retraction, normally a relevant factor used to reduce damages awarded, may in certain circumstances do more harm than good by reopening old wounds.

Finally, it is important to emphasize that any given factor, no matter how usefully considered by a court in the setting of moral dam-

160. See discussion on retraction or apology at pages 28-29 and on conduct of the defendant at pages 30-33.

161. See *supra*, at page 33 of this paper.

162. See *supra*, at page 28 of this paper.

163. *Supra*, note 81.

ages, cannot be treated in isolation, but must be considered in conjunction with other factors and with the factual circumstances of the case. This was demonstrated in the discussion of dissemination of the defamatory statements.

3. ALTERNATIVE REMEDIES

It has been argued throughout this paper that a substantial award of moral damages is not the appropriate solution in defamation cases. The discussion so far reveals that to grant considerable awards of moral damages is inconsistent with the principles laid down by the Supreme Court in personal injury cases and, in addition, exacerbates the tension between the two competing interests of protection of reputation and freedom of expression, as large awards of damages tend to have a "chilling effect" on free speech.¹⁶⁴

A further reason to discount damages as a remedy for defamed plaintiffs is that damages are largely an inadequate means of redressing the wrong caused by defamation. When a plaintiff is defamed, his or her primary goal is the restoration of the damaged reputation. Large damage awards may indeed provide solace to the plaintiff, but it is hardly the most effective way of restoring to the plaintiff what was lost, of effecting *restitutio in integrum*.

Far too often an award of damages does not really even the scales. Those who have heard or saw the broadcast or read the article may never know of the plaintiff's later success in a court of law.¹⁶⁵

It is, therefore, somewhat naive for judges to assert that the mere judgment which finds the defendant liable for defaming the plaintiff "constitue en lui-même une réhabilitation totale de la réputation de la demanderesse".¹⁶⁶ While court judgments are public documents, and are either published in court reports or made available to the public through the courthouse, the fact remains that very few non-lawyers are going to be aware of the outcome of a case and fewer still are going to read the actual judgment.

Consequently, the amounts awarded by the courts under the head of moral damages for loss of reputation, humiliation, embarrassment and the like could more effectively be imposed upon the defendant as the economic cost of performing an alternative remedy, one which would not be lost in an unpublished court judgment, but which would attempt

164. See *supra*, page 11.

165. *Neeld v. Western Broadcasting Co. Ltd.*, *supra*, note 74 at 574.

166. *Simard v. Gagnon*, *supra*, note 44 at 561; *Langlois v. Drapeau*, *supra*, note 1 at 289 and *Flamand v. Bonneville*, *supra*, note 44 at 1591.

to redress the wrong of defamation and to right the person's reputation in the public's eyes.

The concluding portion of this paper will address the issue of alternative remedies and will propose to law reformers options for the creation of more effective and adequate remedies for defamed plaintiffs.

a. Injunctions

The alternative remedy of injunction to stop publication of defamatory material is most controversial when the plaintiff petitions for it at the most effective time — before the defamatory material is even published. Once the material is made available to the public, the damage to the plaintiff is already done and an injunction would serve only to mitigate additional damages that may be suffered through repetition and further dissemination. An interlocutory injunction sought before the defamatory material is disseminated is classified as a "prior restraint" on speech. In the landmark United States case of *Near v. Minnesota*,¹⁶⁷ Chief Justice Hughes of the Supreme Court made it clear that such prior restraints come to court with a heavy presumption against their validity and that courts should approach them with the greatest of caution.¹⁶⁸

In determining the extent of the constitutional protection [of liberty of the press], it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication.¹⁶⁹

The notion that prior restraints amount to censorship and are thus particularly dangerous to the principle of freedom of expression is also well-established in English cases. As Lord Coleridge, C.J. stated in *Bonnard v. Perryman*:

[I]t is obvious that the subject-matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong ... the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions.¹⁷⁰

The application of a more stringent standard for the granting of interlocutory injunctions in defamation cases has, by and large, been the Canadian solution to the prior restraint issue in the common law

167. (1931) 283 U.S. 697.

168. See also *Freedman v. Maryland* (1965) 380 U.S. 51.

169. *Supra*, note 167 at 713.

170. [1891-4] All E.R. 965 at 968 (C.A.).

provinces. In *Canada Metal Co. Ltd. v. Canadian Broadcasting Corp.*, Stark J. stated that

[t]he granting of injunctions to restrain publication of alleged libels is an exceptional remedy granted only in the rarest and clearest of cases. That reluctance to restrict in advance publication of words spoken or written is founded, of course, on the necessity under our democratic system to protect free speech and unimpeded expression of opinion.¹⁷¹

Martin, in an article on interlocutory injunctions in libel actions,¹⁷² has stated that the special rules regarding the granting of injunctions in libel actions are 1) that the jurisdiction of the courts to make an interlocutory injunction should only be exercised in the clearest of cases; 2) the material must be evidently libellous; and 3) the defendant must not indicate his intention to raise a recognized defence.

There are not many Quebec cases in which an interlocutory injunction has been granted to suppress publication or dissemination of potentially defamatory material. However, the few cases that do exist are disturbing in that the courts in Quebec do not seem to apply a more rigorous standard for the granting of an injunction in defamation cases. This was not always the case. In the 1952 case of *Gagnon v. Compagnie France-Film*, the Superior Court refused to grant an injunction to suppress the presentation of an allegedly defamatory film and held that "ce n'est que dans un cas très clair que le Tribunal doit accueillir une injonction".¹⁷³ The Court cited common law authorities, such as Kerr on Injunctions¹⁷⁴ and *Bonnard v. Perryman*,¹⁷⁵ as support for that proposition. This trend has not continued in recent Quebec cases. Thirty years after *Gagnon*, in *Parent v. Harvey*,¹⁷⁶ the Superior Court granted an interlocutory injunction to suppress publication of a book in which the petitioner was allegedly defamed. Masson J. applied no special rules for the granting of the injunction, but rather proceeded to apply the regular two-step test pursuant to article 752 C.C.P., as interpreted by jurisprudence, as to whether an injunction should lie. He considered, first, whether the petitioner had an apparent right and, secondly, whether the injunction was necessary to prevent serious or irreparable harm.¹⁷⁷

171. (1975) 55 D.L.R. (3d) 42 (Ont. Div. Ct.).

172. R. Martin, "Interlocutory Injunctions in Libel Actions" (1982) 20 *U.W.O.L. Rev.* 129 at 131-132.

173. [1952] R.P. 234 at 236.

174. J.M. Paterson, ed., *Kerr on Injunctions*, 6th ed. (London: Sweet & Maxwell, 1927) at 6.

175. *Supra*, note 170.

176. (29 November 1982) Beauce 350-05-000604-825 (C.S.), J.E. 83-37.

177. He relied on the case of *Pérusse et Papa v. Les Commissaires d'Écoles de St-Léonard de Port Maurice* [1970] C.A. 324 for this two-step test. It should be noted that the *Pérusse* case did not concern defamation nor freedom of expression.

The usual balance of convenience test was applied to a defamation case. What seems to have influenced the Court in deciding to grant the injunction was the forceful language used by the respondent in the book and the fact that the respondent acted in bad faith. The only reference to freedom of expression was in Justice Masson's following statement:

Si le droit à la liberté d'expression existe, si le droit à l'information existe également, nul ne peut malicieusement, sous le couvert de ces droits, se permettre de diffamer son prochain, encore moins en utilisant des termes et des expressions d'une bassesse peu connue.¹⁷⁸

No one doubts that freedom of expression is limited in that it cannot be used to destroy someone's reputation through defamatory statements. However, as Martin has pointed out, what free speech means "is that one is to be free, *without prior restraint*, to speak as one chooses and then to accept whatever legal consequences may result".¹⁷⁹ The problem with Justice Masson's judgment in *Parent v. Harvey* is that he overlooked the potentially dire consequences of granting an interlocutory injunction to suppress speech before it was disseminated on a mere balance of convenience test, the same test that is applied in all other types of interlocutory injunction cases.

Another recent Quebec defamation case in which an interlocutory injunction was granted is the Court of Appeal decision in *Dubois v. La Société St-Jean-Baptiste de Montréal*.¹⁸⁰ The issue facing the Court was whether several federal members of Parliament were entitled to an interlocutory injunction to prevent publication of an allegedly defamatory poster which called these politicians "traitors" for their role in patriating the Canadian constitution. The majority of the Court granted the interlocutory injunction on the ground that the poster was clearly defamatory of the petitioners;¹⁸¹ the defamation was intentional;¹⁸² it constituted abusive speech;¹⁸³ and it went so far as to incite violence.¹⁸⁴

It is fortunate that we have Justice Mayrand's dissenting opinion with which to balance the extreme views of the majority. In refusing to grant the injunction, Mayrand J. adopted a view much more consistent with American constitutional cases and Canadian common law cases in defamation. He felt it would be inconsistent with principles of free speech to grant the injunction given that it was unclear whether a def-

178. *Supra*, note 176 at 7.

179. *Supra*, note 172 at 135.

180. *Supra*, note 36.

181. *Ibid.*, at 252.

182. *Ibid.*, at 253.

183. *Ibid.*, at 255.

184. *Ibid.*, at 253-254.

ence of fair comment was open to the respondents and because the poster did not incite violence, but rather incited people to not re-elect these federal politicians. It thus fell within the realm of political speech, essential to any democratic society.¹⁸⁵ Justice Mayrand's dissenting opinion echoes what Hughes C.J. stated in *Near v. Minnesota*:

Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals.¹⁸⁶

The approach of the dissent in *Dubois* is preferable to that of the majority. The majority seemed to hold that the mere possibility of incitement to violence, no matter how remote, was enough to provoke prior restraint. This is far too low a threshold for determining when it is appropriate to issue a judicial "gag order" which suppresses speech. It is odd that the mere use of the word "traitor" in the cut and thrust of free political debate was seen as capable of inciting violence and was sufficient to justify an interlocutory injunction under article 752 C.C.P.

Perhaps the only positive aspect of *Dubois* from the perspective of the future development of the law is that the decision may not actually relate to prior restraint. Unlike the situation in *Parent v. Harvey*, in *Dubois* the public previously had the opportunity to read the allegedly defamatory material when *Le Devoir*, a widely distributed French-language daily newspaper, reproduced the text of the poster in its entirety. While an apology was printed the following day by the editor of the newspaper, potentially mitigating the damaging effects of the publication, the fact remains that the public had access to the material at least once. The injunction granted by the Court of Appeal only prevented further dissemination of the text of the poster and prohibited the defendant from distributing and publishing them widely. *Dubois* should therefore be distinguished from any future cases involving requests for prior restraint of allegedly defamatory speech.

While an interlocutory injunction is an extremely effective remedy for the plaintiff who believes himself or herself defamed, it is too dangerous a remedy to be granted without a significantly higher threshold test than that applied generally to injunctions under article 752 C.C.P. Injunctions should be even more difficult to obtain in cases where the injunction would constitute a prior restraint on free speech.

185. *Ibid.*, at 259.

186. *Supra*, note 167 at 718-719.

b. Publication of judgment

An alternative remedy that has been used on several occasions by Quebec courts is an order to publish the judgment holding the defendant to have defamed the plaintiff.¹⁸⁷ While Quebec courts have been empowered to grant such an order by virtue of section 13 of the Press Act,¹⁸⁸ there are Quebec decisions in which the Press Act did not apply and judges, on their own authority and independently of that Act, have ordered defamation judgments to be published.¹⁸⁹ The judicial order should be specific as to the manner in which the judgment must be published for, if not, the defendant will be held to comply with the order even if he obeys it by publishing the judgment in very small print and in an obscure part of the newspaper.¹⁹⁰ Therefore, the judicial order more often takes the form set out in *Snyder*: "order respondent to publish the English version of the instant judgment in a place as conspicuous as the article which gave rise to the litigation."¹⁹¹

A more creative order was granted in the case of *L'Imprimerie Populaire Ltée v. Taschereau*.¹⁹² Following a finding of defamation, the Court of Appeal condemned the defendant either to pay \$1000 in damages or \$500 in damages if it printed the judgment in as prominent a place in the newspaper as the original defamatory article. This judicial order reflects the commonly held opinion that when a court orders the defendant to publish the judgment, it is automatically a reason to grant lower non-pecuniary damages to the plaintiff. As Lamer J. stated in *Snyder*:

I also took into account the remedial effect of publication in determining the reasonable compensation appellant should receive in the case at bar.¹⁹³

187. *L'Imprimerie Populaire Ltée v. Taschereau*, *supra*, note 46; *La Compagnie de Publication La Presse v. Simard*, *supra*, note 46; *Melasco v. Radio Trois-Rivières Ltée C.H.L.N.* (14 June 1976) Trois-Rivières 400-05-000679-74 (C.S.) reversed on appeal, *supra*, note 81; *Denault v. Restaurant Toni Sherbrooke* (11 July 1983) Montreal 500-09-000986-794 (C.A.); *Snyder v. The Montreal Gazette*, *supra*, note 2; and *Couture v. St. Pierre* (19 Jan. 1981) Mingan (Sept-Îles) 650-05-000256-793 (C.S.), J.E. 81-287.

188. L.R.Q. c. P-19.

189. See, for example, *L'Imprimerie Populaire Ltée v. Taschereau*, *supra*, note 46 (decided in 1922 before the coming into force of the Press Act in 1929, S.Q. 1929, c. 72, 1929 19 Geo. V.).

190. Such as the births and deaths column: *La Compagnie de Publication La Presse v. Simard*, *supra*, note 46.

191. *Supra*, note 2 at 512.

192. *Supra*, note 46.

193. *Supra*, note 2 at 512. See also the Court of Appeal decision in *Snyder*, *supra*, note 4 at 616 where Monet J. stated: "À mon sens, la publication est, en règle générale, un excellent mode de réparation, au moins partielle, du préjudice moral dans une affaire de cette nature."

There is no doubt that the publication of the judgment can be an important alternative remedy for the plaintiff in the quest to undo the effects of being defamed. However, one must question the effectiveness of this remedy in cases where there is a long delay between the time of publication of the original statement and the time of publication of the judgment. In the *Snyder* case, the defamatory statement appeared on March 13, 1975 and the order to print the judgment was granted by the Supreme Court of Canada thirteen years later on March 24, 1988. This is not to doubt the potential validity of the remedy of a judicial order to publish a judgment. It is merely a recognition that justice takes time and that the judge must consider, in the circumstances of every case, whether this remedy is effective enough to justify a drastic reduction in the plaintiff's damages.

c. Retraction and Reply

The issue of retraction and reply has been the subject of extensive commentary by American jurists,¹⁹⁴ and a mandatory right of reply statute has been the subject of a constitutional challenge before the United States Supreme Court. The Court held the statute to be unconstitutional as it violated First Amendment guarantees of free speech and a free press.¹⁹⁵ The subject has not prompted such wide discussion in Quebec, but one should not overlook the fact that the Quebec Press Act,¹⁹⁶ which has been in force since 1929,¹⁹⁷ provides for the limited use of the alternative remedies of retraction and reply.

By virtue of sections 4 and 5 of the Press Act, a newspaper is given the option of retracting a statement if notified by the affected person that he or she considers it defamatory. If the newspaper chooses to retract the statement following notification, and does so in as conspicuous a place as the original article, the only damages that may be recoverable are "actual and real damages", *i.e.* pecuniary damages. This approach is consistent with the courts' present attitude towards the effect of a retraction on the amount of damages that may be awarded to

194. C. Danzinger, "The Right of Reply in the United States and Europe", *supra*, note 37; J.G. Fleming, "Retraction and Reply: Alternative Remedies for Defamation", *supra*, note 37; G.E. Frasier, "An Alternative to the General-Damage Award for Defamation" (1968) 20 *Stan. L. Rev.* 504; J.H. Hulme, "Vindicating Reputation. An Alternative to Damages as a Remedy for Defamation", (1981) 30 *Am. Un. L.R.* 375; R.C. Donnelly, "The Right of Reply, An Alternative to an Action for Libel" (1948) 34 *Va. L. Rev.* 867; "Vindication of the Reputation of a Public Official", (1967) 80 *Harv. L. Rev.* 1730.

195. *Miami Herald Publishing Co. v. Tornillo* (1974) 418 U.S. 241.

196. *Supra*, note 188.

197. *Supra*, note 189.

a defamation victim. As was pointed out in the discussion of retraction and reply, a timely retraction made in good faith will generally have the effect of limiting the amount of compensatory moral damages that a plaintiff will recover.¹⁹⁸ The Press Act goes one step further. A retraction made pursuant to sections 4 and 5 precludes the recovery of all non-pecuniary damages as well as punitive damages. As non-pecuniary damages constitute the bulk of most damage awards in defamation cases, once a retraction has taken place pursuant to the Press Act, the plaintiff's interest in continuing the lawsuit is very limited.

If, in addition to a retraction, the newspaper gives the allegedly defamed person a right to a reply pursuant to section 7 of the Press Act, then section 8 provides that no prosecution may issue against the newspaper. This reflects the notion that a retraction coupled with a reply constitute such effective remedies that the wrong committed by the printing of the allegedly defamatory remarks has been wiped out and all has been done to restore the reputation of the defamed individual in the minds of the public who originally read the defamatory statement.

The advantage of the retraction and reply provisions of the Press Act lies in the rapidity with which such alternative remedies can be provided to a defamed individual. The defamation victim must sue within a three-month prescription period¹⁹⁹ and the retraction and reply must occur one or two days after notice of the lawsuit is given to the newspaper. The retraction or reply occurs at a very effective time — while the defamatory remarks are still fresh in the minds of the public. The problem alluded to by Montgomery J. in *Melasco*,²⁰⁰ that a retraction may in some instances do more harm than good by re-publicizing the affair at a much later date when the original defamatory statement may have been forgotten, is thus avoided. The alternative remedy can indeed be a “balm to [the victim's] pain and suffering”.²⁰¹

The disadvantages of the right of retraction and reply as they exist under the Press Act lie in the limited application and ambit of the Act. The Act applies only to “newspapers” as defined in section 1. The definition includes only periodical writings sold at successive and determined periods appearing at least once a month whose object is to give news, opinions, comments or advertisements. That means, for exam-

198. *Supra*, note 111.

199. Section 2 of the Press Act. The three-month period runs from the time of publication of the article or from the time of knowledge of such publication, but in the latter case, the action must be instituted within one-year of the publication. This prescription period is shorter than the one-year period provided for all other defamation actions in article 2262 C.C.

200. *Supra*, note 81 at 9.

201. Per Lamer J. in *Snyder*, *supra*, note 2 at 508.

ple, that the provisions of the Press Act do not apply to radio broadcasts²⁰² or television which seems odd given that the remedies of retraction and reply are just as well-suited to verbal means of mass communication as they are to printed means of communication. Section 9 of the Press Act contains two further limitations. The alternative remedies are not available when the newspaper accuses the individual of a criminal offence²⁰³ nor when the article refers to a political candidate within a short time before nomination or polling day.

The final limitation of the Press Act is that the alternative remedies of retraction and reply are *optional* on the part of the defendant. It is his or her choice whether to retract or accept to print a reply, or to take the chances of a lawsuit. Nowhere does the legislator require the defendant to perform one of these alternative remedies, nor is the power given to the judiciary to order a defendant to retract or allow a reply. The attempt, in a Florida statute, to force a defendant to print a reply was struck down as unconstitutional by the Supreme Court of the United States in *Miami Herald Publishing Co. v. Tornillo*,²⁰⁴ because "governmental direction *what* to print was as incompatible with the constitutionally guaranteed freedom of the press as a censor's direction of *what not* to print".²⁰⁵ In Quebec, the only instances in which a court has ordered a "retraction" have been limited to requiring the defendant to publish the judgment declaring him or her guilty of defamation under the title "Retraction of a libel".²⁰⁶ Effectively, of course, this "retraction" is nothing more than an order to publish the judgment.

There are two potential difficulties with mandatory retraction or reply remedies. The first is that legislation requiring these alternative

202. *Gingras v. Entreprises Télécapitale Ltée - Division C.H.R.C.*, *supra*, note 68.

203. See, for example, *Lavigne v. La Presse Ltée*, *supra*, note 86 and *Radio Trois-Rivières Ltée C.H.L.N. v. Melasco*, *supra*, note 81. It should be noted that the restriction in s. 9(a) regarding the accusation of a criminal offence has been interpreted fairly broadly. In *Coutou v. Boucher* (10 Nov. 1986) Montreal 500-05-011387-808 (C.S.), J.E. 86-1097, the Court held the Press Act to be inapplicable because the article in question, which had accused the plaintiff of breeding and selling dogs of poor quality, entailed an insinuation of fraud which could constitute either a civil or criminal offence.

204. *Supra*, note 195.

205. *Fleming*, *supra*, note 37 at 21.

206. *L'Imprimerie Populaire Ltée v. Taschereau*, *supra*, note 46. In *Boucher v. La Cie de l'Imprimerie et Comptabilité* (1933) 39 R. de J. 39 (C.S.) at 56 the Court held: "Considérant qu'il y a lieu ... à ordonner une *rétraction* sous la forme de la *publication* du présent jugement" [emphasis added]. In *Melasco*, *supra*, note 81, the Court of Appeal reversed the Superior Court decision, *supra*, note 187 which had condemned the defendant to publish the judgment with a retraction because, as Montgomery J. stated at 9: "it could well do more harm than good again to publicize the affair at this time."

remedies could be the subject of a constitutional challenge under ss. 2(b) of the Canadian Charter of Rights and Freedoms²⁰⁷ which protects freedom of expression and freedom of the press and other media of communication. Ordering a defendant to retract could amount to an infringement of his or her freedom of belief, opinion and expression by requiring the public espousal of views he or she may not in fact hold. Similarly, ordering the author of the statement to allow the allegedly defamed individual to reply could interfere with freedom of expression or freedom of the press for the reasons discussed in the *Miami Herald* case.²⁰⁸

The second difficulty with mandatory rights of retraction and reply is that these remedies may offend private law rules on specific performance. The remedy of specific performance traditionally has been limited by the maxim *nemo praecise cogi potest ad factum*, a principle which reflects an unwillingness to force a person to accomplish an act against his personal liberty if the only way to do so is by physical constraint.²⁰⁹

No one has ever challenged the ability of courts to order the publication of a judgment holding the defendant guilty of defamation whether the order was issued under the court's inherent jurisdiction or under s. 13 of the Press Act. This mandatory order entails some restriction on freedom of the press in that it interferes with editorial discretion as to what will appear on a given page in a given issue of the newspaper. It is also an order to specifically perform a positive act involving the personal participation of the debtor and thus potentially infringing individual liberty. Both of these problems could be overcome by using the innovative remedy given in *L'Imprimerie Populaire Ltée v. Taschereau*²¹⁰ where the Court gave the defendant a choice: pay higher damages or retract by publishing the court judgment and pay lower damages. Courts could, therefore, order a defendant to retract, or allow

207. *Supra*, note 34.

208. See, *supra*, note 195. The Legislator could enact a notwithstanding clause applicable to legislation containing mandatory rights of retraction and reply pursuant to s. 33 of the Charter of Rights and Freedoms. It should be noted that there was added to the Press Act section 14 which contained a notwithstanding clause by virtue of S.Q. 1982 c. 21, art. 1. This notwithstanding clause lapsed on April 17, 1987 since by virtue of ss. 33(3) of the Charter of Rights and Freedoms, such notwithstanding clauses cease to have effect after five years.

It may also be possible to argue that any such limitations on ss. 2(b) freedoms constitute "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" pursuant to s. 1 of the Charter of Rights and Freedoms.

209. See generally R. Jukier, "The Emergence of Specific Performance as a Major Remedy in Quebec Law" (1987) 47 *R. du B.* 47.

210. *Supra*, note 46.

a right of reply, in default of which the defendant would be liable in damages equivalent to the economic cost to the plaintiff of performing the alternative remedies.²¹¹

Despite the difficulties outlined above with respect to the remedies of retraction and reply, they can be very effective for a defamed individual because they seek actually to restore reputation, they do not involve the chilling effects on speech as can high damage awards, and they are quick and can avoid the extensive cost and time of litigation. Retraction is, of course, an even more effective remedy than reply because it is more persuasive when one's reputation is "vindicated out of the defendant's mouth rather than [one's] own".²¹² However, in most cases, both of these remedies are far more effective than a money judgment. As Frasier has said:

A retraction brings the court's determination of falsity to the attention of the public, and a reply brings the plaintiff's arguments to the attention of the public; but a defamation judgment rarely comes to the attention of the public.²¹³

The Quebec Press Act is a good starting point for the application of effective alternative remedies for a defamation victim. Its advantages lie in the rapidity of the remedy and the cost savings associated with not having to go through thirteen years of litigation as did Mr. Snyder. Its disadvantages lie in the limitations to the Act canvassed above. It is suggested that, at the very least, these remedies be broadened to include a wider range of defendants and a wider range of defamatory statements.

CONCLUSION

One's reputation is probably one's most valuable and cherished property; money does little good to a man of ill-fame in honest society.²¹⁴

Deschênes, C.J.

The moral value Deschênes C.J. evidently placed on an individual's right to an untarnished reputation was confirmed by his judgment which upheld a jury's unprecedented award of \$135,000 of non-pecuniary damages to a defamation victim. The intention underlying this paper has not been to dispute the intrinsic value of an individual's reputation.

211. For example, the cost to the plaintiff of buying air time on radio to broadcast his reply.

212. See Fleming, *supra*, note 37 at 25.

213. *Supra*, note 194 at 529.

214. *Supra*, note 3 at 636.

While acknowledging that defamation can cause real and substantial loss and suffering to an innocent victim, the thrust of this argument has been to criticize present trends in the remedial law of defamation.

The paper canvassed three distinct but interrelated issues concerning non-pecuniary damages in defamation cases. The first concerned the limitation, if any, that ought to be placed on the recovery of such damages. In light of the recent Supreme Court decision in *Snyder*,²¹⁵ it is now possible for a defamed plaintiff to be awarded an unlimited amount of non-pecuniary damages, even above the \$100,000 limit (in 1978 dollars) set by the Supreme Court with respect to non-pecuniary damages in personal injury cases.²¹⁶ It has been argued that this should not be the case and that as long as a ceiling remains on moral damages awarded to physically incapacitated victims, it is unwarranted to allow moral damages in defamation cases to soar above such a ceiling. The policy considerations which justified the Supreme Court's pronouncement in the trilogy apply equally to defamation cases. Moreover, lower awards are justifiable in defamation cases because: large damage awards can have an unwanted chilling effect on free speech; damages suffered, although potentially devastating to the victim, are largely temporary unlike the permanent incapacities often seen in personal injury cases; and there are effective alternative remedies, the costs of which are purely pecuniary, which serve to mitigate the plaintiff's moral damages. For the above reasons, the author disagrees strongly with the majority decision in *Snyder*.

Because non-pecuniary damages are so intangible and difficult to quantify, the second part of the paper examined the processes by which judges assess such damages and the considerations that go into the construction of a moral damage award. While the process can never be made scientific, it is hoped that the critical evaluation of the various factors applied by Quebec courts will aid lawyers and judges in properly evaluating the range of non-pecuniary damages that ought to be awarded to a defamation victim.

Finally, it is an opportune time to begin seriously contemplating the expansion of alternative remedies in the field of defamation. For the reasons canvassed in the third section of the paper, damages are largely an ineffective remedy for a defamed plaintiff. Although damages may provide solace, they do not effect true *restitutio in integrum* since they do not even attempt to undo the wrong of defamation and

215. *Supra*, note 2.

216. *Supra*, note 7.

right the individual's reputation. Although Deschênes C.J. in the Superior Court in *Snyder* sanctioned a high award of damages for a defamation victim, he acknowledged that "money does little good to a man of ill-fame in honest society".²¹⁷

Certain alternative remedies, while extremely effective, are too dangerous to be used widely as a replacement for damages. An example is the interlocutory injunction which, because of its harmful effects on free speech, must be used sparingly. However, it is suggested that the scope of other alternative remedies be extended to cover not only publication of judgment, already recognized by Quebec jurisprudence, but a notion of retraction and reply even broader than that in the Press Act. Such remedies are useful as they seek truly to undo the wrong committed by a defendant in a defamation case.

217. *Supra*, note 3 at 636.

