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Nicole Vallières, *La presse et la diffamation*, Montréal, Éditions Wilson & Lafleur, 1985, 138 pages

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Nicole VALLIÈRES, *La presse et la diffamation*, Montréal, Éditions Wilson & Lafleur, 1985, 138 pages.

Professor Florian Sauvageau, a journalist and a lawyer, writes in his preface to *La presse et la diffamation* that in Québec interest in research on the press and other media of communication has not existed for very long — that there are still enormous gaps.<sup>1</sup> He finds that astonishing, given the technical changes that presently shake the world of communication. That emphasizes the value of Nicole Vallières' study of the press and of the law of defamation which, as Professor Sauvageau points out, is the most thorough study of the subject yet published in Québec.<sup>2</sup>

In her introduction, Ms Vallières recognizes that in Canada and in Québec, freedom of the press is a fundamental liberty, essential to a parliamentary system founded on the free circulation and public discussion of ideas. Her definition of freedom of the press is very similar, if not identical, to the definition given by Sir William Blackstone over two hundred years ago. Blackstone wrote as follows in his *Commentaries* which were published in 1759:<sup>3</sup>

The liberty of the press is indeed essential to the nature of a free state, but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.

Ms Vallières defines freedom of the press as follows in her introduction:<sup>4</sup>

Chacun a le droit de dire, écrire et publier ce qui lui semble opportun. Cependant, les gens de la presse sont responsables, au même titre que les autres citoyens, de l'usage qu'ils font de cette liberté. La liberté de la presse doit s'accorder à l'exercice des autres droits fondamentaux. Les droits de la personne à l'intégrité de sa réputation et de sa vie privée sont particulièrement vulnérables aux empiètements des médias.

The problem with Blackstone's definition of freedom of the press is that, under it, a member of the British House of Commons could be tried and punished for publishing an attack on the King's message to Parliament in his newspaper.<sup>5</sup> Also, in 1792 Thomas Paine could be tried, convicted and punished for publishing his celebrated *The Rights of Man*.<sup>6</sup> Indeed, under the British system, as late as 1914 Dicey could assert that "Freedom of discussion is then, in England,

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1. Préface.

2. *Ibid.*

3. Sir William BLACKSTONE, *Commentaries on the Laws of England*, v. 4, pp. 151-152.

4. Introduction, p. 1.

5. See *Trial of John Wilkes*, (1770) 19 Howell's State Trials 1075.

6. (1792) 22 Howell's State Trials 374.

little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written".<sup>7</sup>

In Québec, the press apparently does not enjoy the "preferred" position that it is said to have in the United States.<sup>8</sup> The liberty that it has is no more or no less than that which belongs to anyone; the responsibility that it bears is determined by the rules that are applicable to the conduct of any other human activity. Also, since there is no special law applicable to defamation in Québec, the principles of the common law apply. These principles, which are said to be included within the general terms of article 1053 of the *Code civil*, are summarized by Ms Vallières as follows: "he who by his own fault causes harm to another must make amends for that harm".<sup>9</sup>

As the press fulfills its role and informs the public, it is susceptible to often prejudice the reputation of others. News is rarely good and often alarmist. Indeed, as Ms Vallières points out, those who mind their business and about whom there is no story to tell are not of interest to anyone.<sup>10</sup>

But, as information media carry out their role of informing the public, they cannot be held responsible every time they provide unfavorable information about someone. Were it otherwise, journalism would become an impossible task and the press rendered useless. Therefore, there must be a domain in which the journalist can freely work. Moreover, the limits of that domain must be defined. That is the task that Nicole Vallières undertook to perform in her little book *La presse et la diffamation*.

In addition to an introduction and a general conclusion, the book has three chapters. The first chapter is devoted to a discussion of the nature and essence of defamation; the second chapter, entitled *Le recours en diffamation*, discusses how one proceeds in an action for defamation; chapter three relates to means of defence. At the start of each chapter there is a four paragraph preface which serves as an introduction to the contents of the chapter.

The four prefatory paragraphs at the start of chapter one emphasize the importance of the right to protect one's reputation. It is pointed out that in Québec this right is considered important enough to be included in that Province's *Charter of Human Rights and Freedoms*.<sup>11</sup> In the body of the chapter, defamation is defined as any declaration or writing that has for its effect to humiliate someone, or to cause a loss of esteem or confidence in, or consideration for, someone. This definition is likened to Article 29 of the French Press Code<sup>12</sup> which defines defamation as any allegation or imputation of a fact that casts a slur on the honor or esteem of a person or group. Honor is said to englobe the dignity and moral

7. DICEY, *Introduction to the Study of the Law of the Constitution*, 10th ed., 1959, p. 246.

8. See *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), in which, because of this "preferred position", it was held that evangelism could not be made a commercial enterprise by ordinance because religious literature was sold rather than donated. In addition, see *New York Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny.

9. P. 1 (translation by the author of this review).

10. P. 1.

11. L.R.Q., chap. C-12, art. 4: "Every person has a right to the safeguard of his dignity, honour and reputation".

12. *Code français de la presse*, art. 29.

integrity of the individual. Consideration or esteem is said to consist of the respect that one must normally have for another.

Care is taken in this first chapter to point out that the English common law distinction between libel and slander does not exist in French and Québec civil law. This is true even though the expression *libelle diffamatoire* is not unknown to the *Criminal Code* which is of English origin.<sup>13</sup>

The elements that constitute a defamation are discussed in a section of the first chapter entitled *Éléments constitutifs*.<sup>14</sup> Here, the requirement that a defamation be communicated to someone is discussed, as well as are problems posed by the place of publication and where an action may be brought. The need that the person defamed be identified may pose problems, particularly when the person allegedly defamed is not named as when the matter published is directed at a group. This is discussed in sub-sections entitled *La désignation indirecte*,<sup>15</sup> *La diffamation d'un groupe*,<sup>16</sup> *Conditions liées à l'identification d'une personne à l'intérieur d'un groupe*,<sup>17</sup> and *La diffamation des personnes morales*.<sup>18</sup> Procedural problems that arise when more than one person wish to join in the same action are discussed in a sub-section entitled *Contributions procédurales*.<sup>19</sup>

The last two sections of chapter one of the book relate to forms of defamation,<sup>20</sup> and to the techniques that may be used to determine whether a particular text is defamatory or not.<sup>21</sup>

As the author points out, a defamation may take an infinite number of forms. It may be printed in a journal or periodical; it may be communicated orally over the radio or on television; it may be direct or indirect; by simple allusion, insinuation or irony, etc. By whatever means communicated, it is sufficient that the allegation or imputation be felt.

As for techniques of interpretation, these may be by intrinsic or extrinsic analysis of the text in question: intrinsic in the sense that a defamation becomes apparent from the literal or ordinary meaning of the words used; extrinsic in the sense that a defamation can be made by the circumstances in which words are used as by implication or innuendo.

One learns from the prefatory paragraphs to Chapter two that there is no particular way of proceeding in an action for defamation. Whatever form a defamation may take, one may proceed according to the provisions of Article 1053 of the *Code civil* which fixes the rules generally applicable to matters of civil responsibility. Further on it is asserted that freedom of the press is limited by the principle applicable generally that in all human activity one must act with diligence, and in a way to avoid causing harm to others. Failing this, there is responsibility.<sup>22</sup>

13. See pp. 8-10, 2.2 *Libelle ou diffamation*.

14. Pp. 10-33.

15. 3.4.1, p. 21.

16. 3.4.2, p. 24.

17. 3.4.2.1, p. 25.

18. 3.4.3, p. 30.

19. 3.4.2.2, p. 28.

20. 4. *Formes de diffamation*, p. 33.

21. 5. *Techniques d'interprétation*, p. 36.

22. 1. *Le fondement du recours en diffamation*, pp. 43, 44. See also 2. *La soumis-*

In this second chapter there is an interesting discussing of objective responsibility as applied to journalism.<sup>23</sup> According to this, all that needs to be proved is damage to someone and a link of causality between the damage and its author. But, as the author points out, the application of objective responsibility to information media is contrary to the social interest which is one of the functions of this theory. To rigorously apply this theory of objective responsibility to journalism would be to paralyze all initiative on the part of the journalist. It would cause him to hesitate to venture forth, regardless of how much care he might exercise, because of the responsibility imposed on him. Indeed, it might be a form of censorship.

As for fault, that can be either intentional or voluntary, or unintentional and involuntary. In the first instance, it is a question of a harm which is the certain consequence of an act; in the second instance, the act that causes the harm may be intended, but the harm itself not intended. In the case of defamation, there is the presumption that one has intended the natural consequences of his act. In this context, the author discusses fault from an objective and a subjective point of view — the presence or absence of the care that one would expect from « *un bon père de famille* » (in English: that care that one would expect of an ordinary, reasonably prudent man).

In this second chapter there are particularly interesting sub-sections that discuss the responsibilities that are imposed on the use of editorials, cartoons, news reports, radio and television talk shows, letters to the editor, photographs, and headlines.<sup>24</sup> The same is true of the sub-section in which the verification of sources of information is discussed.<sup>25</sup>

Chapter two ends with a discussion of means of reparation — damages.<sup>26</sup> Here it is pointed out that damages recoverable must be the immediate and direct result of the act complained of, that they must be real and certain, and that they must be the direct fault of the perpetrator of the act. To be recoverable, the damages must be material, and they may be moral, punitive, or exemplary. In addition to monetary damages, the perpetrator of a defamation may be required to publish the judgment against him which exposes his wrong.

Means of defence are the subject matter of Chapter three, the last chapter in the book. The defences discussed are the following: the truth, public interest, good faith, honest commentary, and other possible defences such as having repeated something that is already known to the public. But when one pleads the truth as a defense, that alone is said not to be sufficient. It must also be shown that the public interest requires the use of facts which, though verified, are potentially harmful to another's reputation.<sup>27</sup> In case of error, there is some authority to the effect that a mistake committed without malice, and with a compelling desire to alert the public, can be excused if one could reasonably have believed

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*sion de la liberté de presse en droit civil* which gives an historical account of proceedings under article 1053 of the *Code Civil*.

23. 3.1 *Critique de la responsabilité objective appliquée au journalisme*, p. 48. See also 3.2 *Influence de l'approche objective*, p. 50.

24. Pp. 60-66.

25. 3.4.2.8 *Vérification des sources d'information*, p. 66.

26. 5. *Les moyens de réparation*, p. 73.

27. See 1.1 *La véracité*, p. 84; 1.2 *L'intérêt public*, p. 90.

the truth of the information acted upon.<sup>28</sup> However, such a defence is not favored by Québec courts.

According to article 5 of the Quebec *Charter of Human Rights and Freedoms*, "Every person has a right to respect for his private life". In other words, one is protected from an unjustifiable violation of his right of privacy. However, problems arise once an individual becomes involved in matters of public interest such as legal proceedings, the use of public funds, etc. Often, there are borderline cases when a distinction must be made between public interest and public curiosity. Then there is the case of public figures. That poses two questions: 1. When does one become a public figure? 2. How far can one delve into the private life of a public figure? Perhaps the easy answer is that it is always "open season" on public figures. However, that does not seem fair or satisfactory.

Finally, there is the question of relative immunity for the press — the defences of public interest and good faith. If this were allowed, the press could invoke its duty to inform the public even when it transmits defamatory information which it honestly believes to be true or which, if true, would be pertinent to a matter of public interest. Québec courts have not favored such an immunity.

*Le presse et la diffamation* is written in French. That is why this review is written in English so that the book can be brought to the attention of those who do not have the advantage of being bilingual. It is an excellent and thorough study of the press and defamation. It is a book that could serve as a starting point for other scholars who might take an interest in the subject. Indeed, as Professor Sauvageau points out in his preface, it might serve as a reference source for courts of justice. It might be helpful when it is a question of the difficult task of finding a balance between the right of freedom of the press and other fundamental rights. The book should be translated into English so that it can be made available in both of Canada's official languages.

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28. 1.1.1 *Le cas de l'erreur*, p. 85.