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THE SILENT DOCTOR v. THE DUTY TO SPEAK

*A simple-minded dissertation on the law of libel and slander**

By S. G. M. GRANGE, Q.C.**

That silence is a virtue most of the time, few men will deny. It is golden in the famous aphorism, and we have all been brought up to admire or envy, depending on our sexual persuasion, the strong silent man; in fact the man's strength varies directly with his silence, for there is no greater shield of weakness or ignorance. And speaking of men, some Frenchman long ago, in a spirit of chauvinistic piggery, decreed that *le silence* would be the only noun ending in "ence" in his language that could not bear the feminine gender. The French have always been reputed to consider the feminine inferior in substance, though not, of course, in form.

Sometimes medical silence can be savagely eloquent, as John Gay pointed out 200 years or so ago:

'Is there no hope?' the sick man said,
The silent doctor shook his head.

But it is not that kind of silence I am complaining about. Nor is it the infernal silence that besets the medical profession when the clarion call goes out from plaintiff's Counsel in a malpractice action. For professionally selfish reasons, I cannot condone that silence, although I can well understand the doctor's reluctance to condemn a colleague based upon his own opinion in what is not yet an exact science.

What I can neither understand nor approve is the obdurate silence of a doctor when his duty to speak is clear. Whenever a doctor is asked his opinion of the professional competence of a colleague by a responsible person in the field of health, for responsible purposes, it is the duty of that doctor to reply. It is my view that he may in his reply decline to state his views only if he is unfamiliar with the subject or if he feels that by reason of friendly or unfriendly association, his response would be biased. Otherwise, he must state what he knows, and he must state it fully and completely without, as the saying goes, fear or favour.

I think this principle, even this obligation, is generally accepted. I also think that in many instances the principle is not followed because of fear of a defamation action. The purpose of this article is to show that such fear is very largely a phantom.

Let us examine the facts of one case where the problem arises. Under the *Public Hospitals Act*¹ a medical advisory committee is required to con-

*With much credit to my Research Assistant, Miss Jennifer Bankier, who is very charming indeed, and not the least bit simple-minded.

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¹ R.S.O. 1970, c. 378.

sider the merits of every applicant for appointment to a hospital. There is no way to do this better than to seek the opinion of medical colleagues. There is no way that the medical advisory board can reach any rational conclusion unless the doctor whose opinion is sought is prepared to give a full and honest answer. Please note that the material word is "honest" not "true". As we shall see, in these situations it is always good to have truth on your side, but you can win without it.

Which brings us to the problem. Doctors — some doctors — fear that if what they say is derogatory and untrue, or unproveable, they will be subject to large damages at the suit of their irate colleague. To show the hollowness of that fear, we must look at the law of defamation. That law — the law of defamation — is the despair of lawyers because of its procedural technicalities but its substance is simple enough, and I think in accord with common sense. Defamation is a statement, written or oral, derogatory of a person, and is actionable by the person defamed against the defamer unless he, the defamer, had the right to make the statement. If a statement is written, it is called libel; if it is oral it is called slander.

As I said before, if the statement is true, that is the end of the matter; the defamed is without remedy. But even if it is not, the defamer may escape liability. All he need establish is that he made the statement fairly and upon a privileged occasion. Privilege is two-fold. First of all there is Absolute Privilege which prevails in Parliament and in the Courts, which gives immunity to the defamers regardless of their motives or their fairness. The theory is that the business of Parliament and of the Courts could not be carried on without it, and over-rides the private interest of private citizens defamed. That privilege cannot, of course, help here, but there is also another privilege which is not absolute and is sometimes called "Qualified Privilege". In effect this latter privilege excuses a defamation whenever there is a duty upon the defamer to speak and when in speaking he speaks fairly. The duty is a moral one, not necessarily a duty enforceable at law, and to speak fairly means to speak honestly and in good faith, in other words, without malice. This is so, though the truth of the statement cannot be established, and even though the statement is manifestly established to be untrue.

The leading Canadian case on the subject is *Arnott v. The College of Physicians and Surgeons of Saskatchewan*.² The plaintiff Arnott was an Ontario doctor and also the licensee in Canada of a system of treating cancer known as the "Koch treatment" involving the injection by a hypodermic needle of a substance called "glyoxylyde". The defendant College published in its Medical Quarterly the substance of its Cancer Committee report, which stated among other things, "we know the Koch treatment is quackery but the Council cannot remove a license unless a patient voluntarily gives evidence of promise of cure by the doctor, and none of these patients will do that". Apparently the College did not attempt to establish the truth of the allegation — it was based upon consideration of articles and medical periodicals and public documents, but no deep study was made — but nevertheless, the Su-

² [1954] S.C.R. 538.

preme Court of Canada dismissed the plaintiff's claim, holding, in the words of Cartwright, J. that

"the report was published on an occasion of qualified privilege and the words used did not go beyond what was reasonably germane to the performance of the duty giving rise to the privilege".

Other statements of the Court are as follows:

Moreover, under the defence of qualified privilege, it is not whether the words are true in fact, but rather were they spoken honestly and made in the discharge of some public or private duty, and fairly warranted by some reasonable occasion.

* * *

While there is evidence on the part of the appellant (Arnott) to the effect that the conclusions in the publications are in error in respect to the Koch treatment there is nothing to reflect upon the ability of the authors nor the intent and purpose of these publications. There may be cases where the conduct of the party is such that the failure to make further investigation or inquiry might be evidence of lack of honesty or even of actual malice. This is not such a case. The available material supports the conviction entertained by the respondent's members and the evidence in this litigation does not suggest other than the respondent itself acted honestly and bona fide. The jury found it acted without malice.

It is, on behalf of the appellant, contented that even if the occasion were privileged the language used was unnecessarily severe and in excess of what was necessary to express the view held by the College and its Cancer Committee. The sentence particularly referred to is: 'We know the Koch treatment is quackery.' 'Quackery' is defined in the Oxford Dictionary to mean 'The characteristic practices or methods of a quack; charlatanry.' The same dictionary describes a quack as 'an ignorant pretender to medical skill; one who boasts to have a knowledge of wonderful remedies; an empiric or imposter in medicine.' While, therefore, no one could probably suggest the appellant is ignorant of medical skill, it is possible that he be in error and those who honestly believe him to be so may find some similarity in his practices and methods in respect to the Koch treatment and the characteristic practices or methods of a quack. However that may be, the sentence here complained of was used to describe the prescription or administration of the treatment. It was, therefore, not an expression unconnected with or irrelevant to the performance of the duty which gives rise to a qualified privilege. At the most it was an exaggeration, or an extreme statement, which could be evidence of malice, but, apart from an express finding that it did constitute malice, would not, of itself, remove the privilege.

The only legitimate fear of the doctor who responds to the call of duty is that a jury might find that he was actuated by malice. Therefore it is best, as I have said, to decline any comment when you and the subject of your report have suffered strained relationships, or you and he have been placed in a competitive social or professional position, particularly when he has come out of the competition better than you. So far as the substance of the comment is concerned, one should, of course, avoid reckless statements which one knows or ought to know are untrue; but one should do that in life at all times and no special injunction to doctors is necessary.

A certain committee officially entitled "The Minister's Committee of Inquiry into Hospital Privileges in Ontario" recently considered the problem, and while conceding that the danger of a successful action was very slight, suggested that:

. . . there be legislative protection against defamation actions for doctors, adminis-

trators, trustees, the College of Physicians and Surgeons, and others, with respect to information given hospitals relating to applicants.³

The Legislature did not see fit to follow precisely the recommendation but did expand the former section 10 of *The Public Hospitals Act* which read:

No member of a committee of the medical staff of a hospital is liable for anything done or made *bona fide* by him or the committee in the course of or arising out of a meeting, investigation, hearing or other business of the committee.

to its present form:

No member of a committee of the medical staff of a hospital or of the board or Appeal Board or of the staff thereof and no witness in a proceeding or investigation before such committee or Board is liable for anything done or said in good faith in the course of a meeting, proceeding, investigation or other business of the committee or board.

This section may not protect a doctor who makes an oral or written report to the medical advisory committee since he is not, strictly speaking, a witness; but it doesn't really matter. The sections, both old and new, are unnecessary, and are but partial codifications of the law. They are designed only to give comfort to the cautious and to temper this caution with courage and resolution.

That, of course, is the object of this exercise as well. To those who are already both brave and resolute, I can only apologize for trespassing upon their time.

³ Minister's Committee of Inquiry into Hospital Privileges in Ontario, Report (January 14, 1972) at 22.

⁴ R.S.O. 1970, c. 378.