

Freedom of speech no defence for defamation

By Albert S. Frank, LL.B.

The recent prosecution and convictions of Mr. Zundel and Mr. Keegstra have dramatically brought to public attention the laws concerning hate literature. In reaction to these events, Mr. Monopoli, in the May 1985 issue of *The National*, wrote an article suggesting that such prosecutions violate the principle of freedom of speech ("Zundel's conviction could be Pyrrhic Victory"). In his opinion, no matter how obnoxious and repugnant hate literature might be, people should have the freedom to create and spread such material. However, I wish to suggest that it is perfectly consistent with our respect for freedom of speech to prosecute hate propagandists.

It is inherent in the notion of human rights that the rights of an individual must be restricted for the sake of other individuals. Your right to freedom of action must be limited out of respect for my rights. If we allowed you a completely unfettered right of freedom of action, you could physically attack me or violate my rights in other ways. Surely a respect for your rights does not require an utter contempt for my rights.

If we take the contrary view, that your right to freedom of action is absolute, then we are saying that I have no rights, not even a right to live, since you could use your absolute freedom of action to murder me if you wished. A general respect for human rights therefore requires that rights be restricted, not absolute.

Like other rights, freedom of speech can be abused to harm others. A person who uses words to threaten physical violence to get money is

committing robbery, and thereby violating the rights of the victim, every bit as much as if he said nothing and, instead, waved a weapon and gestured at his victim's wallet. The criminal law makes this and other abuses of freedom of speech illegal.

Hate literature is another abuse of freedom of speech which violates the rights of its victims and can therefore properly be restricted. Hate literature violates a right which our common law has long recognized, a person's right in his reputation. According to the well-established law of defamation, a person has a right to legal protection from those who would attack his reputation, just as he has a right to legal protection from those who would attack his person.

According to Black's Law Dictionary (5th ed.), "Defamation is that which tends to injure reputation; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him ... unprivileged publication of false statements."

Thus, the common law recognizes that the right of freedom of speech does not extend to permitting a person to violate the rights of his victim by making false derogatory statements about him. Even politicians, who deliberately put themselves in the public eye and involve themselves in public controversy, are entitled to such protection, as is illustrated by the case of *Christie v. Geiger et al.* (Dec. 4, 1984, Alta. Q.B., Foisy J.).

If an individual is entitled to protection against defamation, surely a large group of individuals should be entitled to protection as well. Unfortunately our civil law is not presently a very useful tool for the protection of the rights of groups. In Canada there are severe restrictions on class

action lawsuits. Furthermore, the law of defamation itself is designed for the protection of the individual plaintiff, not the group of plaintiffs.

As was stated recently in the case of *Booth v. B.C.T.V. Broadcasting System*, 139 D.L.R. (3d) 88 at 92, in cases where the words complained of are clearly defamatory, the issue "is whether the words were published of and concerning the particular plaintiff who is claiming."

If the civil law cannot protect against a violation of the rights of groups of citizens, then it is appropriate for the criminal law to do so. It is especially important to do so since hate literature has the potential to cause much greater harm than an attack on a particular individual.

Few people in human history have faced death because of defamatory statements made particularly against them but millions of people have been killed because they happened to belong to an ethnic or religious group that had been the object of hate propaganda.

However, even leaving aside the most extreme results of hate literature, it would be absurd if a man could sue to protect his reputation from an accusation of selling shoddy merchandise, but he and his fellow victims could not obtain either civil or criminal protection against defamatory statements falsely accusing them of every evil act known to mankind and of being behind every disaster that has befallen the human race in the last few centuries.

Nor should we fear that hate literature laws will inhibit proper discussion of public issues. A true statement, however harsh, may always be stated. Furthermore, the discussion of public issues does not require personal attacks. A person could not be sued or prosecuted for a scathing and inaccurate

criticism of government policy. A citizen has the right to be wrong about a public issue.

However, if a person goes beyond saying that he thinks a policy is wrong, foolish, or appalling and makes personal attacks on the politicians promoting these policies, he may be sued and rightly so. Our devotion to democratic discussion does not require that we permit false *ad hominem* attacks on politicians or on anybody else.

The same principles justify the civil law of defamation and the criminal laws concerning hate literature; they stand or fall together. Those who are of the opinion that hate literature is an unacceptable restriction of freedom of speech must, to be consistent, urge that the tort of defamation be abolished for precisely the same reason.

It is possible to believe that our defamation and hate literature laws are acceptable in principle but unsatisfactory in practice. I have spoken to many people who think that it would be better to sue hate propagandists than to prosecute them, a view that I share. The civil law should be reformed to allow class action lawsuits against those who defame groups. Until or unless the civil law is reformed, it is good that the criminal law is available.

We must not forget the seriousness of group defamation. The fact that the hate propagandists use words in their attacks does not make their behaviour any less a violation of rights or any less serious than smashing synagogue windows or burning a cross on a lawn.

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POSTSCRIPT: The above article appeared in the September, 1985 issue of the National, a publication

of the Canadian Bar Association. Since then Mr. Keegstra has been dealt with by the Supreme Court of Canada, which ultimately upheld the finding of guilt against him. There have been additional legal cases involving Mr. Zundel from time to time.

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