An Introduction to the "Libel—Slander" Category of the Minnesota Legal History Project

By

Douglas A. Hedin
Editor, MLHP

From the early 1870s through the early 1900s a hailstorm of libel lawsuits pelted Minnesota newspapers, particularly metropolitan dailies. While rural weeklies were rarely struck, the spectre of litigation was always present. Editors reacted to the deluge by blaming the current state of libel law that not only failed to recognize the importance of newspapers in modern society but actually disfavored them and by condemning lawyers who filed frivolous cases against them. While the contours of this period of increased libel litigation are not exact there is no doubt that it existed.

In November 1875 the *Minneapolis Tribune* was hit with so many libel suits in such a brief period that it printed a "box score" of them. [1] In mid-December 1885, the *Tribune* commented about the *Creore* case:

> **Yesterday another of the Tribune's half-dozen libel suits was disposed of in the same way. The jury again awarded damages of one cent.[2]**

A year later the deluge had not subsided, and the *Tribune* continued to complain:

> **The Tribune Company has been compelled to defend some fifteen libel suits in two years, and not two of these suits were meritorious. Only two obtained damages, and**

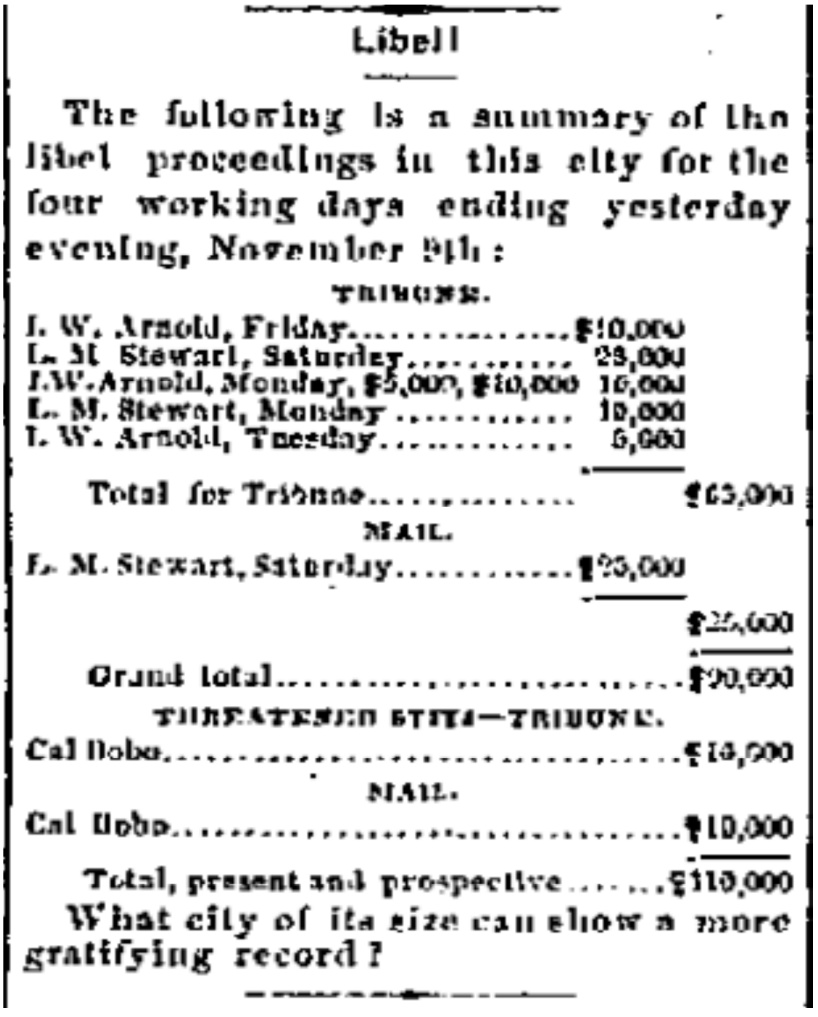
---

[1] *Minneapolis Tribune*, November 10, 1875, at 4
[2] *Minneapolis Tribune*, December 17, 1885, at 4.

these were obtained through technicalities and not through merit.[3]

In 1892 the *Pioneer Press* was locked in a dispute over the fees of the law firm that represented it in Ignatius Donnelly's libel suit. One of the trial exhibits was a letter written by Joseph A. Wheelock, the editor of the newspaper, decrying the costs of defending libel suits, adding it is "seldom that any daily newspaper of financial responsibility is without one or two, and the Pioneer Press had at one time 15 on hand."[4]

The *Tribune* Box Score, November 10, 1875:



Libel!

The following is a summary of the libel proceedings in this city for the four working days ending yesterday evening, November 9th:

TRIBUNE.

L. W. Arnold, Friday	$10,000	
L. M. Stewart, Saturday	23,000	
L.W. Arnold, Monday, $5,000, $10,000	16,000	
L. M. Stewart, Monday	10,000	
L. W. Arnold, Tuesday	5,000	
Total for Tribune		$63,000

MAIL.

L. M. Stewart, Saturday	$25,000	
		$25,600
Grand total		$90,600

THREATENED SUIT—TRIBUNE.

Cal Noble	$10,000

MAIL.

Cal Noble	$10,000
Total, present and prospective	$110,000

What city of its size can show a more gratifying record?

[3] *Minneapolis Tribune*, December 13, 1886, at 4.
[4] *Minneapolis Tribune*, November 24, 1892, at 3.

In response to pleas from newspaper editors, the 25th Legislature passed An Act to Regulate Actions for Libel in 1887. [5]

Newspaper accounts of libel suits against newspapers, picked at random, are posted in this category of the MLHP website. More will be added in coming years. These newspaper articles are "primary sources" because they are a first-hand, eye-witness accounts, albeit written later, of the trials. For most of these court proceedings there was no court reporter present. A few were appealed to the Supreme Court. Some suggestions on what to look for in these case studies follow.

Newspapers

In the territorial period, 1849-1858, the newspapers were partisan, one-man weeklies of a few pages. Their columns reprinted stories of Washington politics, carried items about local politics and the courts and tried to attract settlers by touting Minnesota's promising future. Twenty years later metropolitan newspapers were highly partisan dailies, had several reporters and editors, still reprinted stories from other papers and closely covered local politics and the courts. Most noticeably their self-image had changed. Now they portrayed themselves in editorials and in defense of libel law suits as important conveyors of accurate information to the public, which was jeopardized by these suits (rural weeklies held the same view). This was the very picture Justice Mitchell endorsed in the *Allen* case. Any history of libel litigation in the 19th century in this state will document newspapers' growing sense of self-importance.

Common Law

Excepting statutory intrusions such as the 1887 libel law and the 1891 criminal defamation act, the law of defamation is judge-made

---

[5] 1887 Laws, c. 191, at 308 (effective March 2, 1887). The constitutionality of this law was affirmed in *Dexter A. Allen vs. Pioneer Press Company*, 40 Minn. 117 (1889).

law or common law. Justice Mitchell recognized this state of flux in *McDermott v. Union Credit Co.*:[6]

> **Any discommendatory language used of and concerning a person is liable to do him injury, although such injury is often inappreciable in law. But nothing is better settled than that much discommendatory language, whether written or spoken, is not actionable per se, because not calculated to do the person of whom it is published any injury appreciable or cognizable by the law. The courts have, for practical reasons and considerations of public policy, to draw the line somewhere, and this has often been to be done by a gradual process of exclusion and inclusion, depending upon the particular facts of each case as it arises.**

Thus, in the *Hewitt* case, Chief Justice Gilfillan broke new ground though he rested his ruling on an 1866 law permitting the admission of evidence of "any mitigating circumstances to reduce the amount of damages" in libel suits.

The common law of libel during this period was administered by the trial courts and their conduct raises many difficult questions, as we shall see.

In future years articles about the evolution of the common law of defamation in the 20th century will be posted on this website. It may be noted, however, that decisions of the United States Supreme Court act as powerful magnets for legal historians of defamation law. Those rulings cannot be ignored. In many ways the common law of defamation has become federal constitutional law.

---

[6] ***McDermott v. Union Credit Co.*, 76 Minn. 84, 88-9, 78 N.W. 967, on rehearing, 79 N. W. 673 (1899). An unusual case. In his first opinion Mitchell held that a credit report that a lawyer who was late in paying his bills was libel per se. On re-argument he changed his mind.**

Criminal Libel Prosecutions

Minnesota's first criminal defamation law was enacted by the 24th Legislature in 1885.[7] Prosecutions of newspaper editors under this law were infrequent but the threat was always in the air. In 1903 Edwin Jaggard, a Hennepin County District Court Judge and Lecturer at the University of Minnesota College of Law, addressed the National Editorial Association on "anomalies" in the law of libel and slander.[8] He concluded that nation-wide court rulings in prosecutions for criminal libel were rarely published in case digests, a staple of lawyers' libraries at the time:

> **Criminal prosecutions for libels on individuals are relatively infrequent. The digest paragraph is the Unit of the Law. It is to legal literature what the dollar is to commerce. The reported American cases from the earliest time to 1896 show approximately that there are some three hundred units of decisions, in criminal prosecution for defamation, and over six thousand, in civil actions for recovery of damages for defamation. It is probable that the proportion during the last few years has exceeded 30 to 1 and that in actual trial of cases not officially reported the percentage is 50 to 1.[9]**

Criminal libel prosecutions of newspaper editors received considerable public notice; that was one reason why they were filed—to reap publicity for the complainant. Many were later dismissed before trial. In its early years the criminal libel law was misused by individuals to achieve personal or political ends.

---

[7] The Penal Code, containing the initial Criminal Libel provisions, was enacted by the 24th Legislature in 1885. Laws 1885, c. 240, §1, at 311 (effective March 9, 1885). It was printed as a separate Title in the 1888 Supplement. Statute, Title 9, c. 8, §§ 211-221, at 982-984 (1888 Supplement). It was re-codified in 1891. Statutes, c. 86, §§6165-6175, at 497-498 (1891). It was taken verbatim from the New York Penal Code.

The revised criminal libel law was declared unconstitutional in *State v. Turner*, 864 N.W.2d 204 (Minn. App. 2015). See Steven P. Aggergaard, "A Blind Spot in the Law," 72 *Bench and Bar of Minnesota* 24-27 (October 2015).

[8] Edwin A. Jaggard, *Historical Anomalies in the Law of Libel and Slander*. (delivered first 1903). His entire address is available on the MLHP website.

[9] Id. at 13-14.

Lawyers

One reason why there was so much libel litigation is that by the 1880s a new generation of lawyers had arrived in St. Paul and Minneapolis, and they were hungry for clients.[10] For the libel-weary press, they were easy targets.

In the late 19th century the legal profession did not have a high reputation (the nascent bar association movement aimed to change this).[11] It was inevitable that newspapers would blame lawyers for what the *Minneapolis Tribune* called "frivolous libel suits, instigated by shyster lawyers who undertake the case on shares as a speculative venture." Disregarding the name-calling, there may be some merit to this criticism—young plaintiffs' lawyers may not have exercised good judgment when agreeing to represent certain individuals in libel actions against newspapers.[12] In any event the dismissal of many libel suits via demurrers by the newspapers cannot be overlooked.

Calculating the Verdict

It was customary for reporters who covered a trial to stay for the jury verdict. They loitered near the jury room and sometimes overheard heated arguments inside. After the verdict was read (or unsealed), reporters polled jurors about the number of ballots that were taken, the breakdown on questions of liability or guilt and how they arrived at a dollar amount of damages. Reporters learned that the *Hewitt* jury devised a simple formula to determine damages:

---

[10] See Douglas A. Hedin, "Introduction" to Hiram F. Stevens, "The Bench and Bar of St. Paul" *in* Christopher Columbus Andrews, *History of St. Paul, Minn*. (1890). (MLHP, 2015).

[11] It seems that the Shyster & Pettifogger Law Firm was a chronic villain in press complaints of the profession at this time.

[12] Some lawyers may have disregarded the old adage, "the case you turn down is as important as the case you take."

5 libelous lines x $100/line = $500 verdict

A reporter for the *St. Paul Daily Globe* described the method the *Lind* jury used:

> **"Considerable speculation was rife as to the possible and probable ways and means whereby the jury agreed upon the sum finally awarded. Many surmised, from experiences of their own in a jury room, that each juror cast a written ballot, naming the amount of damages that he desired to award, and that the sum total that the twelve slips aggregated, was divided by twelve in order to obtain an average.**
>
> **"Such a method has been known to be employed when an agreement cannot be arrived at in any other manner. But this was not the way the Lind jury reached a unanimous decision. Instead, various sums would be proposed as the amount of the verdict to be given, and a separate vote was taken on each. Over twenty ballots were taken on this this plan before $600 received a unanimous vote.**
>
> **"The estimates of the jurors as to the actual damages sustained by Mr. Lind in consequence of the libel ranged from the mere nominal figure of $5 to the highly substantial sum of $10,000."**

Each of these methodologies has a semblance of rationality regardless of whether one agrees with the amount of the verdict. In some cases the trial judge held that the newspaper story was actionable or libelous per se or directed a verdict for the plaintiff and then instructed the jury it could award damages of a nominal sum up to the amount demanded in the complaint.[13] Juries thereupon returned verdicts of $.01 (but that nominal amount brought a bill for costs of several hundred dollars).

---

[13] In newspaper accounts, the paper was guilty of a "technical violation" if the trial judge ruled that the disputed story was libelous as a matter of law.

The jury's verdict was the climax of every newspaper story about a trial. But to lawyers that was not the end. This was a period when trial judges and appellate courts routinely remitted or reduced verdicts in tort cases they deemed "excessive." The methods those judges used to arrive at a reduced substitute verdict were subjective and discretionary.[14]

The Activist Trial Judge

If a survey was taken today (2021) of the views state and federal trial judges have of juries, the consensus would be that "juries get it right nearly all the time." This was not the prevailing belief of trial judges in the late 19th and early 20th centuries. Reading newspaper accounts of libel cases during this period one is struck by the frequency in which the trial judge settled an important fact question. In some the judge directed a verdict for one party and in others he ruled derogatory words were libelous as a matter of law, leaving the jury with the task of determining damages, not liability.[15] Why were directed verdicts issued in so many libel actions at this time? (or were they?) Only a tentative explanation is advanced here. Trial

---

[14] In *Pratt v. Pioneer Press*, 32 Minn. 217, 222 (1884), a famous libel case that was appealed to the state Supreme Court three times, Justice John Berry laid down the standard for determining excessive damages in the second appeal:

> It must be confessed that this expression of the principles upon which new trials should be granted for excessive damages is somewhat general and at large; but these are substantially the principles enunciated by text-writers and in the adjudged cases; and the subject is one which, from its very nature, hardly admits of more specific treatment. A motion for a new trial on this, as on some other grounds, appeals in a measure to the *discretion* of the trial court.

Needless to say a study of "excessive verdict" cases in this state has not been written.

[15] In criminal libel trials the jury was given the responsibility of determining both the facts and the law under Stat. c. 73, §5768, at 1564 (1894):

> §5768. Evidence in prosecutions for libel—Rights of jury.
> In all criminal prosecutions or indictments for libel, the truth may be given in evidence; and if it appears to the jury that the matter charged as libelous is true, and was published with good motives and justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

judges may have thought that juries needed their help, that they required expert guidance. The bench may have doubted the caliber of jurors.[16] There may have been a skepticism on the bench of the ability of a jury to reach a proper verdict. This distrust can be seen in other tort cases during these decades such as when judges routinely granted motions to reduce or remit jury awards in personal injury actions—they freely substituted their personal beliefs for the jury's verdict.

There are complex, difficult questions about how libel cases were administered by trial judges in Minnesota. An explanation of their conduct is a necessary feature of any history of libel litigation against newspapers during these decades. That history is yet to be written. The author of that history must leave the rarified atmosphere of the Minnesota Supreme Court for the frustrating but highly rewarding field work in the records and reports of the trial courts.[17]

While there is a wide audience for "true crime," there is a very small readership for a well-told story about a libel trial. A few follow.

---

[16] From 1878 to 1891 and 1895 to 1897, there were two types of juries in civil cases: the regular jury, made up of men who were not exempt from service, and a struck jury, which supposedly was composed of more astute and knowledgeable men. A trial judge may have had more respect for members of the latter. The struck jury law required the sheriff to select jurors "who were most indifferent between the parties and best qualified to try such issue." Stat. c. 71, §§15-19, at 785-786 (1878). The struck jury was abolished by 1891 Laws, c. 84, at 157-158 (effective March 20, 1891), and re-enacted by the 29th legislature in 1895 Laws c. 328, at 736-737 (effective April 24, 1895), and repealed again, 1897 Laws, c. 13, at 11 (effective February 20, 1897).

[17] These case studies are also intended to attract an independent scholar to research and write about the torrent of libel litigation against newspapers in these decades.

===*===

Posted MLHP: July 1, 2021;
Wheelock letter added, August 12, 2021.