

Canadian vs. U.S. Defamation Trials: What if Depp v. Heard Took Place in Canada?

July 15, 2022

By Emma Romano

The Depp-Heard trial, which dominated headlines for weeks, culminated in a decision awarding Johnny Depp \$15 million for his lawsuit and Amber Heard \$2 million for her countersuit.

The media sensation and social media commentary surrounding the trial has much to do with Depp and Heard's celebrity status. But with the public's elevated interest in defamation, the opportunity is ripe to compare what would be different about this defamation trial if it took place in Canada^[1]?

A good launch point for the discussion is Depp's unsuccessful libel claim in the U.K. since the principles informing Canadian defamation law are largely drawn from the U.K.

Depp sued The Sun, a U.K. paper for an April 2018 article in which Depp was described as a "wife-beater". Of central consideration was the meaning of the words and whether they were true in substance and fact. Defamation law in the U.K. requires that the defendant prove that the statements were true. In contrast, the U.S. places the onus on the plaintiff to prove the falsity of the statements. The U.K. judge found that most of the allegations of abuse were substantially true and dismissed Depp's libel claim.

Then, Depp brought a \$50 million defamation lawsuit in Virginia against his ex-wife Amber Heard relating to a December 2018 op-ed where she described herself as "a public figure representing domestic abuse" though she did not explicitly name Depp. Heard countersued for \$100 million claiming Depp's attorney defamed her by suggesting her allegations of abuse were a hoax.

At the heart of the Virginia trial were competing allegations of abuse. Heard alleged that Depp abused her before and during their marriage. Depp denied ever being violent and alleged Heard was the actual abuser. The seven-person jury was tasked with deliberating whether the words published in the op-ed were true. This required the jury to examine the allegations of abuse entered into the record in the Virginia courtroom. In the end, the jury found two passages and the headline of Heard's op-ed to be false and made with malicious intent. They also found that Depp, through his attorney Adam Waldman, defamed Heard by describing the allegations as a hoax in the Daily Mail.

Many commentators believed that Depp would face the same result in the U.S. given the added onus on plaintiffs to prove that the statements are false. The differences with regards to the burden of proof in the U.K. and U.S. make the U.S. decision in favour of Depp curious.

A closer comparison of defamation law in Canada and the U.S. with a focus on the role of juries and cameras in the courtroom offers insight into the differences between the U.K and U.S. cases and highlights what would be different if this trial was heard in Canada.

Defamation in Canada and the U.S.

The tort of defamation protects a person's reputation from defamatory statements. It includes libel and slander. In both Canada and the U.S., the distinction between libel and slander are the same, they both involve defamatory statements though libel is written, and slander is oral.

The legal test in Canada requires that the plaintiff show, on a balance of probabilities, that: (1) the words about which the plaintiff complains are defamatory, (2) that they referred to the plaintiff, and (3) that they were published to a third person (See: [Grant v. Torstar Corp.](#)). The legal test in the U.S. requires that the plaintiff show: (1) a false statement purporting to be fact, (2) publication or communication of the statement to a third person, (3) fault amounting to at least negligence and (4) damages or some harm caused to the person or entity who is the subject of the statement. The U.S. falsity requirement can pose an uphill battle for plaintiffs as it places an added burden not present in Canadian defamation law.

It has been said by some that defamation law is more "plaintiff-friendly" in Canada since plaintiffs are relieved from the requirement to prove falsity. Beyond the falsity requirement, defamation in Canada is a strict liability tort meaning that defendants are liable regardless of if they acted intentionally or negligently in making any statement. Although this is true in the U.S. as well, the First Amendment's freedom of expression protection limits the presumption of damages in cases relating to public officials, figures, and issues.

U.S. defamation law also requires that public officials prove that statements were published with "actual malice", defined as "knowledge that it was false or with reckless disregard of whether it was false or not" (See: [New York Times Co v Sullivan](#)). The Depp-Heard trial involved public figures and both Heard and Depp's statements were judged using the "actual malice" standard. Canada does not have a separate standard of proof for public figures.

Some provinces and states have "anti-SLAPP" legislation which can be used to dismiss proceedings that limit free expression on matters of public interest. Some commentators claim Depp strategically chose to bring a claim in Virginia given that State's looser "anti-SLAPP" laws as compared to other states like California, where Depp was at greater risk of having his case dismissed.

Judge vs. Jury

Depp's U.K. libel case was heard by one judge. In contrast, the Depp-Heard trial was decided by a jury. The United States Constitution provides for a right to a jury trial even in civil matters. No such right exists in Canada making jury trials in civil matters very rare. Although the jury was instructed to carry out their duties without bias or prejudice to any party, the different verdicts in the U.K. and U.S. cases may have to do with the fact that a jury rather than a single judge was deciding a case involving two high profile celebrities and an unprecedented volume of social media commentary.

Social Media in the Courtroom

Even if you weren't following the Depp-Heard trial in detail, at some point you likely came across a clip, meme or TikTok about the case. The large volume of content online was made available in part by the fact that the U.S. has a longstanding culture of permitting cameras in the courtroom.

Although media access to the courtroom is now rather entrenched in the U.S., this was not always the case. The media fought hard against an [American Bar Association Canon passed in the 1930's](#) that called for a blanket ban on courtroom photography and radio due to the media circus that often ensued.

In contrast, the use of cameras in Canadian courtrooms is far less prevalent. While the Supreme Court of Canada has consistently broadcast its proceedings on the Cable Public Affairs Channel,^[2] lower courts broadcast proceedings far less frequently (though live streaming of hearings has increased during the pandemic). For instance, in [Société Radio-Canada c. Québec \(Procureur général\)](#), the

Supreme Court of Canada held that restrictions on filming and photographing in public areas of courthouses in Quebec infringed s. 2(b) of Canadian *Charter of Rights and Freedoms*, which guarantees freedom of expression and freedom of the press. However, the Court held that the restrictions were reasonable limits prescribed by law under s. 1 of the *Charter* and that their objective was to “maintain the fair administration of justice by ensuring the serenity of hearing”.

In Ontario section 136 of the [Courts of Justice Act](#) explicitly prohibits and, in fact, makes it an offence to take audio and video recordings of hearings, preventing observers from sharing moments from proceedings as we saw in the Depp-Heard trial.

Damages

With regards to damages, Depp and Heard both received significantly less than the amount they claimed. Depp was awarded \$10 million in compensatory and \$5 million in punitive damages though his punitive damages were capped to the state’s legal limit at \$350,000 making his total damages award approximately \$10.5 million. Heard was awarded \$2 million in compensatory damages.^[3]

It is important to distinguish between *general damages* (those awarded for loss of reputation, hurt feelings, etc. not tied to specific monetary losses) and *actual damages* (specific monetary losses that can be tied to the defamation).

Both actors claimed they faced professional setbacks due to the defamatory statements. Depp claimed he lost earnings in the millions after he was dropped by Warner Bros from the *Fantastic Beasts* franchise. He also claimed he lost out on an estimated \$22.5 million for his removal from the sixth *Pirates of the Caribbean* film. Heard testified that she had lost earnings too, citing that her role was pared down in *Aquaman*.

General damages for defamation in Canada tend to be lower than the U.S. An exception is where a defamation claim involves ongoing statements or conduct deemed to be egregious. In such instances, the court will award higher damage awards. However, Canadian courts tend to be conservative in awarding general damages, slashing awards deemed to be disproportionately high (See: [Chartier v Bibeau](#)). Where actual damages can be proven damages awards may be higher.

Takeaways

Even though Depp faced a higher burden of proof in his U.S. trial as compared to the U.K., other distinctions like the presence of a jury and cameras in the courtroom are features that may explain the different outcomes in the U.K. and U.S.

Canadian defamation law is considered to be more plaintiff friendly since there is no falsity requirement. Courtrooms in Canada are also more shielded from cameras, which can minimize the risk of a “media circus” which is what ensued in the Depp-Heard case and may have influenced the jury. Although the media was equally invested in Depp’s U.K. claim, that matter was decided by a judge alone rather than jury. In Canada, jury trials for civil claims are rare. Lastly, general damage awards are typically higher in the U.S. than in Canada. Depp and Heard were awarded monetary sums in the millions, but presented evidence of loss of income tied to the alleged defamation. In Canada, awards in the millions for defamation are uncommon absent egregious or ongoing conduct, or where a plaintiff can show clear evidence of monetary damage tied to the defamation.

^[1] This article focuses on defamation law in Canadian common law jurisdictions.

^[2] The Supreme Court of Canada was a pioneer in broadcasting its proceedings starting in the 1990s around the time of the medical assistance in dying case [Rodriguez v British Columbia \(Attorney General\)](#).

^[3] Compensatory damages compensate the aggrieved party for damage to their reputation and for injuries like mental suffering, anguish, embarrassment, humiliation and other pecuniary loss or social disadvantage. Punitive damages, in contrast, punish the

wrongdoer for malicious, reckless and outrageous conduct. The awards are intended to put the injured party in the position they would have been had the wrong not occurred.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

For more information or inquiries:



Emma Romano

Toronto
416.619.6298

Email:
eromano@weirfoulds.com

Emma is a Partner in the firm's Commercial Litigation Practice Group.

WeirFoulds^{LLP}

www.weirfoulds.com

Toronto Office

4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office

1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035