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NOTES

LIBEL SUITS AGAINST NEWSPAPERS WHICH REPEAT DEFAMATIONS

Introduction

Normally, a newspaper story is not the result of first-hand information; newspaper reporters cannot be present at all times to see for themselves the events which they report. As a result, they rely upon sources of information—statements of others, press dispatches, other newspaper articles and rumors. Thus, when writing the story the reporter may use various styles: "John Doe said . . ."; "It is reported that . . ."; "It is rumored that . . ." In the law of libel, this may present a situation where a person, claiming that the story contained defamatory statements about himself, will want to know whether he can successfully sue a newspaper which merely reported, as an item of news, that *others* made these statements. The question may also arise as to the extent of the newspaper's liability where the story is credited to a news agency, or where the reporter, because of style technique or other reasons, does not mention the sources of his information.

The Liability

In the early slander actions it was the rule that a person was justified if he repeated a slander in good faith believing it to be true and naming its author.¹ The courts reasoned that the repeater gave the defamed person a cause of action against the author by revealing his name, and that listeners could better evaluate the slander if they knew who originated it.² To escape liability under this rule, the repeater had to mention the name of the author, not merely that he "heard someone say . . .";³ furthermore, the author's name had to be revealed at the time the repeater spoke the defamatory words and not at the trial.⁴ Later slander cases, however, have rejected this rule.⁵

¹ *Davis v. Lewis*, 7 T.R. 17, 101 Eng. Rep. 832 (K.B. 1796) (by implication); see *Tatlow v. Jaquett*, 1 Harr. 333, 334 (Del. 1834); *Skinner v. Grant*, 12 Vt. 456, 461 (1840); *Earl of Northampton's Case*, 12 Co. Rep. 132, 134, 77 Eng. Rep. 1407, 1409 (K.B. 1613).

² See *Earl of Northampton's Case*, *supra* note 1.

³ See *Davis v. Lewis*, *supra* note 1.

⁴ *Id.* at 19, 101 Eng. Rep. at 833.

⁵ *Mapes v. Weeks*, 4 Wend. 659 (N.Y. Sup. Ct. 1830); see *Amick v. Montross*, 206 Iowa 51, 220 N.W. 51, 53 (1928); *Stevens v. Hartwell*, 52 Mass.

This rule has never been applied to libel actions⁶ because of the distinctions between libel and slander. The libelous printer causes greater damage by spreading the news over a large area where people cannot evaluate the character and veracity of the author, and thus may more readily believe the repetition.⁷ Moreover, with regard to giving the defamed person a cause of action against the author, words not slanderous per se require special damages to be actionable, although they may be libelous if written. If the slandered person cannot establish these damages against the author, *a fortiori*, his only remedy must be against the one who made the spoken words libelous by repeating them in print.⁸

Since it is argued that it is impossible to make an accurate check concerning the authenticity of what is reported because of the pressure to furnish the public with up-to-the-minute news,⁹ the question arises as to whether the newspaper is exempt from a rule that holds the repeater of a defamation liable.

Several illustrations will show the answer of the courts. In *Rogers v. Courier Post Company*¹⁰ the defendant-newspaper quoted an assistant prosecutor who charged that the plaintiff, a politician, had "covered up" criminal cases handled by the police. Although the statements of the assistant prosecutor were accurately and fairly reported without malice, the court held the newspaper liable. In another case,¹¹ where the newspaper reported the poisoning of a family, the news story mentioned statements of neighbors and the existence of rumors which implicated the plaintiff. The court held that it was no defense to repeat the rumors or reports of the neighbors even though they actually existed. The same result was reached in *Cobbs v. Chicago Defender*,¹² where the defendant's news article reported the existence of rumors that the plaintiff was about to be investigated by a crime commission. Nor was it a justification where the defendant reprinted a story from another newspaper charging the plaintiff, the Chief of Police, with arranging a "special job" for his son, even though the defendant neither affirmed nor denied the charge but

(11 Metc.) 542, 550 (1846); *M'Pherson v. Daniels*, 10 B. & C. 263, 269-271, 109 Eng. Rep. 448, 450-451 (K.B. 1829); see RESTATEMENT, TORTS § 578, comment c, illustration 4 (1938).

⁶ *E.g.*, *De Crespigny v. Wellesley*, 5 Bing. 392, 130 Eng. Rep. 1112 (C.P. 1829); *M'Gregor v. Thwaites*, 3 B. & C. 24, 107 Eng. Rep. 643 (K.B. 1824); see *Sans v. Joerris*, 14 Wis. 663, 667 (1861); see 33 COL. L. REV. 373, 374 (1933).

⁷ See *De Crespigny v. Wellesley*, *supra* note 6 at 402, 130 Eng. Rep. at 1116.

⁸ See *M'Gregor v. Thwaites*, *supra* note 6.

⁹ See *Werner v. Southern California Assoc. Newspapers*, 206 P. 2d 952 (Cal. App. 1949), *rev'd*, 35 Cal. 2d 121, 216 P.2d 825 (1950) (wherein the same argument was discussed).

¹⁰ 2 N.J. 393, 66 A.2d 869 (1949).

¹¹ *Republican Pub. Co. v. Miner*, 3 Colo. App. 568, 34 Pac. 485 (1893).

¹² 308 Ill. App. 55, 31 N.E.2d 323 (1941).

printed it as a straight news story.¹³ However, if a newspaper merely referred to a defamatory article appearing in another newspaper or magazine, without mentioning the contents of the article, it would not be liable.¹⁴ Repeating defamations as opinions of third persons,¹⁵ using the form "it is reported,"¹⁶ or printing a paid advertisement,¹⁷ are all placed in the same category with the repetition of statements, rumors, and other newspaper articles—if untrue and not privileged, there is no defense.

The well established rule, formulated from these and other cases, is that newspapers are liable when accurately repeating what another has said,¹⁸ though the article is printed in good faith,¹⁹ naming the source,²⁰ or even where disbelief is expressed in the repeated statements.²¹ To constitute a defense, it is not sufficient that the person actually made the statement or that the rumor was in fact circulating; the repeating newspaper must prove the truth of the content of the statement or rumor.²²

In holding the repeater liable, the courts, unlike many early cases, recognize that more is involved than the problem of whether the repeater is giving the defamed person a cause of action against the author. Indeed, one court stated that "[t]he stereotyped formulas of slander, 'they say,' 'it is said,' 'it is generally believed,' are about as effectual modes of blasting reputation as distinctly and directly to charge the crime."²³ By circulating the libel, the repeater gives it currency and raises a suspicion of belief in its truth.²⁴ To free the

¹³ See *Houston Chronicle Pub. Co. v. Wegner*, 182 S.W. 45, 48 (Tex. Civ. App. 1916).

¹⁴ Cf. *MacFadden v. Anthony*, 117 N.Y.S.2d 520 (Sup. Ct. 1952).

¹⁵ See *Atkinson v. Detroit Free Press Co.*, 46 Mich. 341, 9 N.W. 501 (1881).

¹⁶ See *World Pub. Co. v. Mullen*, 43 Neb. 126, 61 N.W. 108 (1894).

¹⁷ Cf. *Dole v. Lyon*, 10 Johns. 447 (N.Y. Sup. Ct. 1813); see 2 COOLEY, CONSTITUTIONAL LIMITATIONS 940 (8th ed., Carrington, 1927).

¹⁸ *Walling v. Commercial Advertiser Ass'n*, 165 App. Div. 26, 150 N.Y. Supp. 906 (2d Dep't 1914); *Hegener v. Pulitzer Pub. Co.*, 172 Mo. App. 436, 158 S.W. 54 (1912); *Rogers v. Courier Post Co.*, 2 N.J. 393, 66 A.2d 869 (1949); see *Lubore v. Pittsburgh Courier Pub. Co.*, 101 F. Supp. 234 (D.D.C. 1951), *aff'd*, 200 F.2d 355 (D.C. Cir. 1952); *Crowe v. Constitution Pub. Co.*, 63 Ga. App. 497, 11 S.E.2d 513 (1940).

¹⁹ *Rogers v. Courier Post Co.*, *supra* note 18 (fair report without malice); see *Morse v. Times-Republican Printing Co.*, 124 Iowa 707, 100 N.W. 867, 871 (1904); see 2 COOLEY, *op. cit. supra* note 17 (without knowledge).

²⁰ *Dole v. Lyon*, *supra* note 17; see *Sans v. Joerris*, 14 Wis. 663, 667 (1861); see *Crowe v. Constitution Pub. Co.*, *supra* note 18; *Houston Chronicle Pub. Co. v. Wegner*, 182 S.W. 45 (Tex. Civ. App. 1916); PROSSER, TORTS 812 (1941).

²¹ Cf. *Hotchkiss v. Oliphant*, 2 Hill 510 (N.Y. Sup. Ct. 1842); see PROSSER, TORTS 812 (1941).

²² *Republican Pub. Co. v. Miner*, 3 Colo. App. 568, 34 Pac. 485 (1893); *Dement v. Houston Printing Co.*, 14 Tex. Civ. App. 391, 37 S.W. 985 (1896); see *Ropke v. Brooklyn Daily Eagle*, 9 N.Y. St. R. 709, 713 (B'klyn City Ct. 1887).

²³ *Johnson v. St. Louis Dispatch Co.*, 65 Mo. 539, 541 (1877).

²⁴ See *Cobbs v. Chicago Defender*, 308 Ill. App. 55, 31 N.E.2d 323, 325 (1941).

repeating newspaper from liability would be to license the reporting of all kinds of scandalous rumors and charges,²⁵ and would be repugnant to public policy.²⁶ Nor is this an unwarranted restriction on the freedom of the press, which, the United States Supreme Court has said, ". . . does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation. . . ." ²⁷ One court likened the repeating newspaper to the "receiver of stolen goods" and "the disturber of public peace."²⁸

A more recent problem, arising from the growth of news gathering agencies, is whether a newspaper should be liable when it repeats press-agency dispatches transmitted to it from distant parts of the country.²⁹ This was the question presented in *Layne v. Tribune Company*.³⁰ In that case a news dispatch, stating that the plaintiff was indicted for illegal possession of liquor, was sent from Washington, D. C., by a reliable news agency to the defendant-newspaper in Tampa, Florida. The court, reasoning that actual malice is essential to impose liability for a libel, held that the mere repetition of a news dispatch from a reliable source was not libelous in the absence of any indication of malice or reckless publication. Consequently, the court stated that when a newspaper merely repeats a news dispatch in good faith, not having notice of its defamatory nature, nor having the opportunity to verify the dispatch by its own research, there can be no malice and, hence, no libel.

The court in the *Layne* case was in error in assuming that actual malice is essential to a libel action. Although malice is implied in every libel, the implication arises from the falsity of the publication,³¹ not from any evidence of ill-will or desire to injure;³² the implication rests on the fiction that where a wrong is committed the tortfeasor is presumed to have intended it.³³ However, it is well established that liability attaches even though one, acting without intent to defame, negligently caused the publication of a libel.³⁴ Thus, the mere fact that malice is legally *implied* does not mean that actual malice is an essential element to maintain a libel action.

²⁵ See *Dole v. Lyon*, 10 Johns. 447, 450 (N.Y. Sup. Ct. 1813).

²⁶ *Ibid.*

²⁷ *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897).

²⁸ *Hotchkiss v. Oliphant*, 2 Hill 510, 513, 514 (N.Y. Sup. Ct. 1842).

²⁹ See 2 COOLEY, CONSTITUTIONAL LIMITATIONS 939-940 (8th ed., Carrington, 1927).

³⁰ 108 Fla. 177, 146 So. 234 (1933).

³¹ See *Lewis and Herrick v. Chapman*, 16 N.Y. 369, 372 (1857); see SEELMAN, LIBEL AND SLANDER 121 (1933).

³² See *King v. Root*, 4 Wend. 113, 136 (N.Y. 1829); see PROSSER, TORTS 815 (1941).

³³ See *Coleman v. MacLennan*, 78 Kan. 711, 98 Pac. 281, 291 (1908); see SEELMAN, *op. cit. supra* note 31, at 124.

³⁴ See *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 63, 126 N.E. 260, 262 (1920); *Coleman v. MacLennan*, *supra* note 33; see RESTATEMENT, TORTS § 580 (1938); Note, 26 A.L.R. 454 (1923).

Another basis for the holding in the *Layne* case is that newspaper practice necessitated the decision: a newspaper could not discharge its duty of reporting the news promptly if it were required to "... warrant the absolute authenticity of every item of its news. . . ." ³⁵ But this is a weak argument, since the newspapers could easily protect themselves by indemnity contracts whereby the press agencies would accept full responsibility for their dispatches, promising to defend and pay all damages for any libel suits arising therefrom. Such contracts would not be illegal provided they were entered into without any intent that a libel be published.³⁶ This solution would allow plaintiffs to avoid jurisdictional hurdles ³⁷ in suing the out-of-state press agency, would remove any fear in reprinting the dispatches, and would shift the liability to the press agency which originated the story.

Moreover, in *Wood v. Constitution Publishing Company*,³⁸ on facts similar to the *Layne* case, the court held that a newspaper was not privileged because it repeated a news-agency dispatch. The weight of authority, including New York, is in agreement with the *Wood* case in its opposition to the *Layne* decision.³⁹

An important aspect, in determining whether a newspaper is exonerated from liability for repeating defamations, is whether a privilege is extended to the newspaper in publishing the article. For example, at common law, full and fair reports of judicial or legislative proceedings were qualifiedly privileged.⁴⁰ In New York, by statute, no civil action can be maintained against a newspaper which fully and fairly reports defamatory statements made during the course of "any judicial, legislative or other public and official proceedings."⁴¹ This statutory privilege extends to investigations conducted by the district attorney⁴² and to proceedings before a committing magistrate.⁴³ To this extent, therefore, the area of liability for repetition is reduced.

³⁵ *Layne v. Tribune Co.*, 108 Fla. 177, 146 So. 234, 239 (1933).

³⁶ *Jewett Pub. Co. v. Butler*, 159 Mass. 517, 34 N.E. 1087 (1893).

³⁷ See Note, 18 CORNELL L.Q. 619, 621 (1933).

³⁸ 57 Ga. App. 123, 194 S.E. 760 (1937), *aff'd mem.*, 187 Ga. 377, 200 S.E. 131 (1938).

³⁹ See *Szalay v. New York American, Inc.*, 254 App. Div. 249, 4 N.Y.S.2d 620 (1st Dep't 1938) (repetition of news-agency dispatch considered only on question of punitive damages); *A.H. Bello & Co. v. Smith*, 40 S.W. 856 (Tex. Civ. App.), *aff'd*, 91 Tex. 221, 42 S.W. 850 (1897); *Carey v. Hearst Publications, Inc.*, 19 Wash. 2d 655, 143 P.2d 857 (1943); Note, 86 A.L.R. 475, 476 (1933).

⁴⁰ See *Lee v. Brooklyn Union Pub. Co.*, 209 N.Y. 245, 247, 103 N.E. 155 (1913) (judicial proceeding); see *Wason v. Walter*, L.R. 4 Q.B. 73 (1868) (legislative proceeding).

⁴¹ N.Y. CIV. PRAC. ACT § 337.

⁴² See *Baumann v. Newspaper Enterprises, Inc.*, 270 App. Div. 825, 60 N.Y.S.2d 185, 186 (2d Dep't 1946).

⁴³ *Bissell v. Press Pub. Co.*, 62 Hun 551, 17 N.Y. Supp. 393 (Sup. Ct. 1891) (Section 1907 of the Code of Civil Procedure, now in Section 337 of the Civil Practice Act, applies to a proceeding before a police magistrate.); see *Lee v. Brooklyn Union Pub. Co.*, *supra* note 40; *Bresslin v. Sun Printing & Pub. Ass'n*, 177 App. Div. 92, 163 N.Y. Supp. 915 (2d Dep't 1917).

There also exists the qualified privilege of comment and criticism on matters of public interest,⁴⁴ but this privilege affords little protection to the repeating newspaper. Though the subject matter of an article be unsanitary conditions in a slaughter house,⁴⁵ misconduct of a police officer⁴⁶ or of a public official,⁴⁷ or charging a publisher with forgery⁴⁸—all matters of public interest—this privilege does not extend to a misstatement of fact; it is restricted to comments on, and criticisms of, facts truly stated.⁴⁹ Hence, this privilege differs from that of reporting judicial or legislative proceedings where no civil action can be maintained even though the repeated statements are in fact false.⁵⁰

No special privilege is given newspapers because they print the article in good faith and as a matter of news.⁵¹ "Newspapers have no greater rights or privileges in this respect than ordinary citizens."⁵² The newsworthiness of the story is no justification for printing a defamation.⁵³ Moreover, the freedom of speech and press has been construed to mean ". . . freedom to tell the truth . . . and not a license to spread damaging falsehoods in the guise of news gathering and its dissemination."⁵⁴

⁴⁴ See *Washington Times Co. v. Bonner*, 86 F.2d 836, 843 (D.C. Cir. 1936); *Bingham v. Gaynor*, 203 N.Y. 27, 33, 96 N.E. 84, 85 (1911).

⁴⁵ *Schwarz Bros. Co. v. Evening News Pub. Co.*, 84 N.J.L. 486, 87 Atl. 148 (Sup. Ct. 1913).

⁴⁶ *Lubore v. Pittsburgh Courier Pub. Co.*, 101 F. Supp. 234 (D.D.C. 1951), *aff'd*, 200 F.2d 355 (D.C. Cir. 1952).

⁴⁷ *Rogers v. Courier Post Co.*, 2 N.J. 393, 66 A.2d 869 (1949); *Lindsey v. Evening Journal Ass'n*, 10 N.J. Misc. 1275, 163 Atl. 245 (Sup. Ct. 1932) (politician).

⁴⁸ *Hearst v. New Yorker Staats Zeitung*, 71 Misc. 7, 129 N.Y. Supp. 1089 (Sup. Ct.), *aff'd mem.*, 144 App. Div. 896, 129 N.Y. Supp. 1126 (1st Dep't 1911).

⁴⁹ This privilege is lost if the comment is not the expression of the writer's real opinion. See *Foley v. Press Pub. Co.*, 226 App. Div. 535, 544, 235 N.Y. Supp. 340, 351 (1st Dep't 1929). There is also a minority view that the privilege exists even though there be a misstatement of fact. *Coleman v. MacLennan*, 78 Kan. 711, 98 Pac. 281 (1908); see *Mulderig v. Wilkes-Barre Times*, 215 Pa. 470, 64 Atl. 636, 637 (1906); see Note, [1918E] L.R.A. 68.

⁵⁰ See RESTATEMENT, TORTS § 611, comment a (1938). The newspaper-defendant may have repeated statements false in fact, but the words of Section 337 of the New York Civil Practice Act clearly provide that *no civil action may be maintained* against one who reports a legislative or judicial proceeding. It is not clear whether the privilege granted under Section 337 is absolute, *i.e.*, exists even though the writing be malicious. See 28 ST. JOHN'S L. REV. 129, 135 (1953). There is a dictum that it is absolute. See *Farrell v. New York Evening Post, Inc.*, 167 Misc. 412, 415, 3 N.Y.S.2d 1018, 1021 (Sup. Ct. 1938).

⁵¹ See *Gilman v. McClatchy*, 111 Cal. 606, 44 Pac. 241, 242 (1896); *Louisville Times Co. v. Little*, 257 Ky. 132, 77 S.W.2d 432, 437 (1934); *Fenstermaker v. Tribune Pub. Co.*, 13 Utah 532, 45 Pac. 1097, 1098 (1896).

⁵² *Rogers v. Courier Post Co.*, 2 N.J. 393, 66 A.2d 869, 873 (1949); see *Fitch v. Daily News Pub. Co.*, 116 Neb. 474, 217 N.W. 947, 948 (1928).

⁵³ See *Mallory v. Pioneer Press Co.*, 34 Minn. 521, 26 N.W. 904, 905 (1886).

⁵⁴ *Sweeney v. Schenectady Union Pub. Co.*, 122 F.2d 288, 291 (2d Cir. 1941), *aff'd mem.*, 316 U.S. 642 (1942).

Furthermore, where a qualified privilege inures to the author of a defamation, because he has made a statement in discharge of some legal or moral duty to a person having a common interest in the subject matter of the communication,⁵⁵ there is a strong argument that this privilege does not extend to the newspaper which repeats the statement. The cases indicate that the privilege only encompasses communications between the *interested* parties;⁵⁶ it is lost when the communication is transmitted to those who do not share a common interest in its subject matter. Thus, statements made in a publication of a credit agency concerning the credit rating of the plaintiff were held not privileged since the publication was sent to businessmen who did not deal with the plaintiff.⁵⁷ Also, where a person, uttering defamatory statements in a pamphlet which expressed his views on proposed legislation, was protected by a qualified privilege, this privilege was lost when he distributed the pamphlet to persons not connected with the hearings on the legislation.⁵⁸ It is true that this privilege is extended to publication of alleged defamations in newspapers of restricted circulation, such as religious⁵⁹ and labor newspapers.⁶⁰ However, since the readers of these papers are church or union members, the privilege is given on the theory that information was being transmitted to interested parties. The *ratio decidendi* of these cases limits the privilege to communications between interested parties; consequently, a newspaper of general circulation, repeating the communication to a heterogeneous audience, would not be protected by the privilege.⁶¹ In fact, in *Kimball v. Post Publishing Company*,⁶² it was held that, although statements of a stockholder made at a stockholders' meeting were privileged, the privilege did not extend to the newspaper which repeated the statements.

Nevertheless, the meetings of certain groups, wherein the par-

⁵⁵ See *Bingham v. Gaynor*, 203 N.Y. 27, 30-31, 96 N.E. 84, 85 (1911); *Sunderlin v. Bradstreet*, 46 N.Y. 188, 193 (1871); see RESTATEMENT, TORTS §§ 594-598 (1938) (for areas of this privilege).

⁵⁶ See *Over v. Schiffling*, 102 Ind. 191, 26 N.E. 91 (1885); *Vail v. Pennsylvania R.R.*, 103 N.J.L. 213, 136 Atl. 425 (Sup. Ct. 1927); see *Bereman v. Power Pub. Co.*, 93 Colo. 581, 27 P.2d 749, 751 (1933); *Kimball v. Post Pub. Co.*, 199 Mass. 248, 85 N.E. 103, 105 (1908).

⁵⁷ *Sunderlin v. Bradstreet*, *supra* note 55.

⁵⁸ *Woods v. Wiman*, 122 N.Y. 445, 25 N.E. 919 (1890).

⁵⁹ *Redgate v. Roush*, 61 Kan. 480, 59 Pac. 1050 (1900) (The fact that the report in the church paper is incidentally brought to the attention of persons, other than members of the congregation, will not result in loss of the privilege.); *Shurtleff v. Stevens*, 51 Vt. 501 (1879); see *Moyle v. Franz*, 267 App. Div. 423, 425, 46 N.Y.S.2d 667, 669 (2d Dep't), *aff'd mem.*, 293 N.Y. 842, 59 N.E.2d 437 (1944); *Slocinski v. Radwan*, 83 N.H. 501, 144 Atl. 787, 789 (1929); see Note, 63 A.L.R. 649, 656 (1929).

⁶⁰ *Bereman v. Power Pub. Co.*, *supra* note 56.

⁶¹ However, where a person has a qualified privilege to reply to a defamation, this privilege may extend to the newspaper which prints the reply. *Preston v. Hobbs*, 161 App. Div. 363, 146 N.Y. Supp. 419 (1st Dep't 1914); *accord*, *Israel v. Portland News Pub. Co.*, 152 Ore. 225, 53 P.2d 529 (1936).

⁶² 199 Mass. 248, 85 N.E. 103 (1908).

ticipants share a common interest—such as church tribunals,⁶³ water boards⁶⁴ and medical societies⁶⁵—may be considered quasi-judicial or official proceedings, and newspaper reports of statements made at these meetings will be privileged. In New York, it is questionable whether the immunity afforded by Section 337 of the Civil Practice Act⁶⁶ extends to the reporting of *all* group meetings. In one case the court stated that Section 337 did not extend to the reporting of a speech given at a meeting of a philanthropic society.⁶⁷ The Court of Appeals, in construing the phrase of Section 337, “. . . or other public and official proceedings . . .,” said these words are to be read in conjunction with the words “judicial” and “legislative.”⁶⁸ It would appear, therefore, that in order for the newspaper to come under the protection of Section 337, the meeting it reports must be of a judicial or legislative nature.

A final consideration of the liability of the repeating newspaper is a determination of the effect of its repetition on the author of the libel or slander. A newspaper will not be held liable for the additional damage caused by the republication of its defamatory article, unless the newspaper induced or aided in the republication.⁶⁹ Likewise, the person whose slanderous words are reported by the newspapers will not be liable for the republication if he did not authorize or induce their republication in the newspaper.⁷⁰ Unless induced, the repetition of the slander is not deemed the natural consequence of the first publication, and is treated as an independent act of a third party.⁷¹ The difficulty in these cases arises as to the meaning of the words “authorize” and “induce.” Merely answering questions of reporters without more does not attach liability;⁷² but the author has been held liable for republication of his slander where the reporter told him he

⁶³ See *Warren v. Pulitzer Pub. Co.*, 336 Mo. 184, 78 S.W.2d 404 (1934); see *Shurtleff v. Stevens*, *supra* note 59 at 518.

⁶⁴ See *Briarcliff Lodge Hotel, Inc. v. Citizen-Sentinel Publishers, Inc.*, 260 N.Y. 106, 118, 183 N.E. 193, 197 (1932) (water board a “public official” and protected by Section 337 of the New York Civil Practice Act).

⁶⁵ See *Barrows v. Bell*, 73 Mass. (7 Gray) 301 (1856).

⁶⁶ “A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial, legislative or other public and official proceedings. . . .

“This section does not apply to a libel contained in any other matter added by any person concerned in the publication”

⁶⁷ See *Sarasohn v. Workingmen's Pub. Ass'n*, 44 App. Div. 302, 304, 60 N.Y. Supp. 640, 641 (1st Dep't 1899). This case, however, may be distinguished since the defendant added its own comments to the report of the meeting. Section 337 of the New York Civil Practice Act does not extend the privilege to added matter. See note 66 *supra*.

⁶⁸ See *Danziger v. Hearst Corp.*, 304 N.Y. 244, 249, 107 N.E.2d 62, 65 (1952).

⁶⁹ *Age-Herald Pub. Co. v. Waterman*, 188 Ala. 272, 66 So. 16 (1913).

⁷⁰ *Schoepflin v. Coffey*, 162 N.Y. 12, 56 N.E. 502 (1900); see Note, 16 A.L.R. 726 (1922).

⁷¹ See *Schoepflin v. Coffey*, *supra* note 70 at 17-18, 56 N.E. at 504.

⁷² *Schoepflin v. Coffey*, *supra* note 70.

would publish the information and the author later volunteered more information.⁷³

Damages and Evidence

Once liability is established, the repeating newspaper's only solace lies in the field of punitive damages. Since this is so, it is extremely important that plaintiffs' complaints in such libel actions contain no demand for punitive damages unless a clear case of actual malice can be established. The demand for punitive damages may lose a libel suit.

The term "compensatory damages" refers to the actual damages that result from a libel and may include loss of reputation and mental suffering.⁷⁴ To obtain "punitive damages," which are awarded as a punishment to the defendant and as a warning to others,⁷⁵ the plaintiff must show that the newspaper printed the article with actual malice,⁷⁶ as distinguished from that malice which is fictitiously implied in every libel. Actual malice is proven by showing that the defendant was actuated by personal ill will or published the article recklessly with "wanton disregard" for the plaintiff's rights.⁷⁷

In order to disprove actual malice, and thus to mitigate the punitive damages, decisional law⁷⁸ and the statutes of several states,⁷⁹ including Section 338 of the New York Civil Practice Act,⁸⁰ allow the defendant to introduce into evidence his sources of information and any circumstances which caused him to believe in the truth of the libel. Included in the category of evidence that demonstrates the lack

⁷³ *Valentine v. Gonzalez*, 190 App. Div. 490, 179 N.Y. Supp. 711 (1st Dep't 1920).

⁷⁴ *See Osterheld v. Star Co.*, 146 App. Div. 388, 393, 131 N.Y. Supp. 247, 250-251 (2d Dep't 1911).

⁷⁵ *See Rogers v. Courier Post Co.*, 2 N.J. 393, 66 A.2d 869, 875 (1949).

⁷⁶ *Hollien v. Tarrytown Daily News, Inc.*, 235 App. Div. 869, 257 N.Y. Supp. 543 (2d Dep't 1932); *see Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 65-66, 126 N.E. 260, 263 (1920).

⁷⁷ *See Corrigan v. Bobbs-Merrill Co.*, *supra* note 76 at 66-67, 126 N.E. at 263; *Gressman v. Morning Journal Ass'n*, 197 N.Y. 474, 90 N.E. 1131 (1910); *Bresslin v. Star Co.*, 166 App. Div. 89, 151 N.Y. Supp. 660 (2d Dep't 1915).

⁷⁸ *Varvaro v. American Agriculturist, Inc.*, 222 App. Div. 213, 225 N.Y. Supp. 564 (1st Dep't 1927); *Hains v. New York Evening Journal, Inc.*, 138 Misc. 504, 240 N.Y. Supp. 734 (Sup. Ct. 1930); *Scripps v. Foster*, 41 Mich. 742, 3 N.W. 216 (1879); *Hewitt v. Pioneer-Press Co.*, 23 Minn. 178 (1876); *Callahan v. Ingram*, 122 Mo. 355, 26 S.W. 1020 (1894).

⁷⁹ *See, e.g.*, MASS. LAWS ANN. c. 231, § 94 (Supp. 1953); MICH. COMP. LAWS § 620.19 (1948); N.H. REV. LAWS c. 391, § 6 (1942); VA. CODE ANN. tit. 8, § 8-632 (1950).

⁸⁰ "In an action for libel or slander, the defendant may prove mitigating circumstances, including the sources of his information and the grounds for his belief. . . ." In the law of defamation, evidence in "mitigation" applies only to punitive damages. *Young v. Fox*, 26 App. Div. 261, 49 N.Y. Supp. 634 (1st Dep't 1898). "Mitigation extends or relates only to punitive or exemplary damages." *Wuensch v. Morning Journal Ass'n*, 4 App. Div. 110, 115, 38 N.Y. Supp. 605, 607 (1st Dep't 1896).

of malice are rumors,⁸¹ common gossip,⁸² statements of others,⁸³ documents,⁸⁴ letters⁸⁵ and police blotters.⁸⁶ The newspaper may also disprove actual malice by showing that the information was received from a reliable press agency⁸⁷ or was copied from an article in another newspaper,⁸⁸ and that the dispatch or article was repeated in good faith.⁸⁹ These sources of information need not be mentioned in the news story,⁹⁰ although there is some authority to the contrary.⁹¹

The reason for admitting evidence of sources of information, rumors and statements of others is that such evidence, while not proving the truth of the libel, tends toward such proof and thus raises an inference that the defendant was not motivated by actual malice.⁹² But the issue of malice is irrelevant on the question of compensatory damages which are awarded regardless of the ill will or motives of the defendant;⁹³ no matter how much the defendant was misled by information derived from reliable sources, the plaintiff is entitled to his full compensatory damages.⁹⁴

The defendant can completely escape liability if he proves the truth of the alleged libel,⁹⁵ but in proving truth in a libel action the

⁸¹ See *Abell v. Cornwall Industrial Corp.*, 241 N.Y. 327, 338, 150 N.E. 132, 136 (1925); *Brown v. McArthur*, 106 App. Div. 366, 367, 94 N.Y. Supp. 537, 538 (3d Dep't 1905).

⁸² *Darling v. Mansfield*, 222 Mich. 278, 192 N.W. 595 (1923) (slander action); *Hoboken Printing & Pub. Co. v. Kahn*, 58 N.J.L. 359, 33 Atl. 382 (1895).

⁸³ *Kershaw v. Steurer*, 138 App. Div. 211, 123 N.Y. Supp. 77 (1st Dep't 1910); see RICHARDSON, EVIDENCE § 247 (7th ed. 1948).

⁸⁴ See *Callahan v. Jones*, 122 Mo. 355, 26 S.W. 1020 (1894) (certificates of completion on public construction projects admitted in slander case).

⁸⁵ *Collis v. Press Pub. Co.*, 68 App. Div. 38, 74 N.Y. Supp. 78 (1st Dep't 1902) (correspondence between commissioner of public works and comptroller).

⁸⁶ *Kershaw v. Steurer*, *supra* note 83.

⁸⁷ *Goodrow v. Malone Telegram, Inc.*, 235 App. Div. 3, 255 N.Y. Supp. 812 (3d Dep't 1932); see *Szalay v. New York American, Inc.*, 254 App. Div. 249, 251, 4 N.Y.S.2d 620, 622 (1st Dep't 1938) (good faith publication of news-agency dispatch only mitigates punitive damages).

⁸⁸ *Hewitt v. Pioneer-Press Co.*, 23 Minn. 178 (1876); see *Morse v. Times-Republican Printing Co.*, 124 Iowa 707, 100 N.W. 867, 870 (1904).

⁸⁹ See *Szalay v. New York American, Inc.*, *supra* note 87 (news dispatch); *Carpenter v. New York Evening Journal Pub. Co.*, 96 App. Div. 376, 382, 89 N.Y. Supp. 263, 267 (1st Dep't 1904) (news article).

⁹⁰ See *Fenstermaker v. Tribune Pub. Co.*, 13 Utah 532, 45 Pac. 1097, 1099 (1896).

⁹¹ Cf. *Wallace v. Homestead Co.*, 117 Iowa 348, 90 N.W. 835 (1902).

⁹² See *Mattice v. Wilcox*, 147 N.Y. 624, 634, 42 N.E. 270, 273 (1895); *Ellis v. Wood*, 108 Misc. 478, 480, 177 N.Y. Supp. 730, 732 (Sup. Ct. 1919).

⁹³ See *Remsen v. Bryant*, 24 Misc. 238, 240, 52 N.Y. Supp. 515, 516-517 (Sup. Ct. 1898), *aff'd*, 36 App. Div. 240, 56 N.Y. Supp. 728 (2d Dep't 1899); *Rogers v. Courier Post Co.*, 2 N.J. 393, 66 A.2d 869, 875 (1949).

⁹⁴ *Szalay v. New York American, Inc.*, 254 App. Div. 249, 4 N.Y.S.2d 620 (1st Dep't 1938); see *Osterheld v. Star Co.*, 146 App. Div. 388, 392, 131 N.Y. Supp. 247, 250 (2d Dep't 1911).

⁹⁵ See *Roeber v. New Yorker Staats Zeitung*, 1 App. Div. 427, 428, 37 N.Y. Supp. 255, 256 (1st Dep't 1896).

defendant must abide by the usual rules of evidence.⁹⁶ Hearsay evidence is, therefore, generally inadmissible. Thus, in *Meeke v. Post Printing & Publishing Company*,⁹⁷ the truth of a charge that plaintiff had mistreated her mother could not be proven by the testimony of witnesses (the plaintiff's brothers and neighbors) that the mother told them how the plaintiff mistreated her. In another case,⁹⁸ the defendant newspaper described the plaintiff as a fugitive charged with forgery. To prove the truth of the charge, the defendant introduced testimony of a witness who was in the district attorney's office at the time the plaintiff was being investigated. The witness was allowed to narrate what this investigation disclosed and his opinion of the plaintiff's guilt. The defendant's reporter then testified to a conversation between himself and a former lawyer of the plaintiff, in which the reporter referred to the plaintiff as a "jailbird" and the lawyer, by innuendo, said it was true. The Appellate Division held that such evidence was hearsay and inadmissible to prove the truth of the charge.

This same evidence, however, would not be inadmissible as hearsay if it were introduced to show, in mitigation of punitive damages, lack of actual malice. For example, in *Kershaw v. Steurer*,⁹⁹ the court held that it was proper, in mitigation of punitive damages, for the defendant's editor to testify as to any circumstances which caused him to believe the story true before he wrote it. It was competent, therefore, for the editor to testify that he checked his story with the police blotter, the defrauded persons and another reporter. Such testimony could include not only the statement that he did these things, but also what the results of the investigation disclosed.¹⁰⁰ The court stated that although such evidence would be hearsay on the question of truth, it was relevant and competent to disprove malice.¹⁰¹

Thus, in proving want of malice, the defendant could introduce the very testimony that would be inadmissible as hearsay on the issue of truth. The rule of the *Kershaw* case would allow a reporter to testify that the victims of a fraud told him that the plaintiff defrauded them, although the defendant was unable to get one of the victims to so testify. The reporter would also be permitted to relate the contents of the police blotter or what other police officers told him without bringing the blotter or the police officers into court.

In brief, any evidence admissible to show the absence of malice, such as statements and letters of third parties, rumors, and reports, will tend to lead the jury to believe in the truth of the alleged libel, even though they have been instructed by the judge to regard such evidence only to determine punitive damages.

⁹⁶ See *El Paso Times Co. v. Eicke*, 292 S.W. 594, 595 (Tex. Civ. App. 1927).

⁹⁷ 55 Colo. 355, 135 Pac. 457 (1913).

⁹⁸ *Carpenter v. New York Evening Journal Pub. Co.*, 96 App. Div. 376, 89 N.Y. Supp. 263 (1st Dep't 1904).

⁹⁹ 138 App. Div. 211, 123 N.Y. Supp. 77 (1st Dep't 1910).

¹⁰⁰ *Id.* at 213, 123 N.Y. Supp. at 78.

¹⁰¹ *Ibid.*

A similar situation occurs when the reputation of the plaintiff is in issue. Since a large element of the damages in a libel action is loss of reputation,¹⁰² a person with a bad reputation is deemed to have suffered less damages from a defamation than one who is respected in the community.¹⁰³ However, to show plaintiff's bad reputation, the defendant may not evidence the existence of reports or rumors concerning the plaintiff;¹⁰⁴ nor may a newspaper argue that other newspapers have so destroyed the plaintiff's reputation with the same libel that its own libelous publication could not have done much damage.¹⁰⁵ That others have defamed the plaintiff is no defense to a libel action.¹⁰⁶ The previous defamations may have been lightly regarded whereas their repetition may encourage belief.¹⁰⁷ Moreover, to hold otherwise would be to put the plaintiff in the position of either refraining from suit, and thus permitting the continuance of the rumors and reports, or of bringing an action wherein these very same rumors and reports will be used against him to minimize the damages.¹⁰⁸

To prove bad reputation the defendant is relegated to two procedures. He may cross-examine the plaintiff, and in so doing, question him about his reputation or cast doubt upon his veracity as a person or as a witness. Secondly, the defendant may introduce witnesses to testify regarding their opinions of the plaintiff's general reputation;¹⁰⁹ but such witnesses could not testify that the plaintiff "is reported to have done this" or "rumor says he did this."¹¹⁰ Yet the jury will hear of the existence of these rumors, reports and articles from other newspapers—evidence which the defendant could not use to show bad reputation—when the defendant is disproving lack of malice.

Conclusion

Many newspaper editors, aware of their newspapers' liability for the repetition of a defamation, nevertheless, when deciding to print an article, which is libelous on its face if untrue, are guided by a policy

¹⁰² See *Osterheld v. Star Co.*, 146 App. Div. 388, 393, 131 N.Y. Supp. 247, 250-251 (2d Dep't 1911).

¹⁰³ See *Sun Printing & Pub. Ass'n v. Schenck*, 98 Fed. 925, 928 (2d Cir. 1900); *Osterheld v. Star Co.*, *supra* note 102.

¹⁰⁴ *Wuensch v. Morning Journal Ass'n*, 4 App. Div. 110, 38 N.Y. Supp. 605 (1st Dep't 1896); *Mapes v. Weeks*, 4 Wend. 659 (N.Y. Sup. Ct. 1830) (slander action); *Hearne v. DeYoung*, 132 Cal. 357, 64 Pac. 576 (1901); *Bragg v. Hammack*, 155 Va. 419, 155 S.E. 683 (1930); see *Abell v. Cornwall Industrial Corp.*, 241 N.Y. 327, 338, 150 N.E. 132, 136 (1925); see RICHARDSON, EVIDENCE § 125 (7th ed. 1948). *But cf.* *Republican Pub. Co. v. Mosman*, 15 Colo. 399, 24 Pac. 1051 (1890).

¹⁰⁵ *Sun Printing & Pub. Ass'n v. Schenck*, *supra* note 103.

¹⁰⁶ See *Bragg v. Hammack*, *supra* note 104, 155 S.E. at 687.

¹⁰⁷ See *Sun Printing & Pub. Ass'n v. Schenck*, *supra* note 103 at 927.

¹⁰⁸ See *Mapes v. Weeks*, *supra* note 104 at 663 (slander action).

¹⁰⁹ See *Wuensch v. Morning Journal Ass'n*, 4 App. Div. 110, 115-116, 38 N.Y. Supp. 605, 607-608 (1st Dep't 1896).

¹¹⁰ See SEELMAN, LIBEL AND SLANDER § 306 (1933).

of "calculated risk." The editor,¹¹¹ after concluding that the article would appeal to his readers, considers whether there is any possibility of a libel suit resulting from its publication. This latter consideration is governed by the editor's awareness—developed from past experiences—of those people who are litigious. The editor knows, for example, that certain public figures, people of very limited means, or persons with unsavory pasts will usually not sue. Thus, if the potential plaintiff falls into the non-litigious category, the editor will risk a lawsuit and print the article.

However, the newspaper will be discouraged from printing articles on the basis of "calculated risk" if the risk becomes too expensive.¹¹² They will be less inclined to print potentially libelous articles if more people are aware that they have causes of action against the newspaper. An awareness of the newspaper's liability for repeating statements of others, reports, rumors and press dispatches, together with a realization of the hidden dangers involved in seeking punitive damages, should encourage libeled parties to bring suit when their rights to a good name have been violated by a newspaper.



PRIVILEGED TESTIMONY UNDER THE BANKRUPTCY ACT

Introduction

In its origin, bankruptcy law was penal in nature.¹ It was based upon the premise that all debtors are dishonest, and was designed as a means of retribution. As civilization developed, however, it was recognized that one might become insolvent through circumstances entirely beyond his control. Bankruptcy law gradually became an instrument of reorganization and rehabilitation rather than of punishment and revenge. As a result, modern legislation in this field is remedial in nature² and is advantageous to the unfortunate debtor as well as to his creditors. In general, the insolvent may begin anew financially, while those to whom he is indebted are satisfied as fully as possible out of the assets available upon the adjudication of bankruptcy. In this manner the principles of justice are preserved and the interests of all the parties are protected.

¹¹¹ Although many large newspaper companies have legal departments (often located in the same building), news stories are usually not pre-censored by the legal departments.

¹¹² See THOMAS, *LIBEL AND SLANDER* 54-57 (1949) (charts showing the amount of damages that have been awarded for various defamatory statements).

¹ See NADLER, *THE LAW OF BANKRUPTCY* § 1 (1948).

² *Ibid.*