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Torts - Libel and Slander - Effect of an Unsustained Plea of Truth

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TORTS—LIBEL AND SLANDER—EFFECT OF AN UNSUSTAINED PLEA OF TRUTH—Plaintiff, superintendent of a state training school for boys, was removed from that office by his superior in the state department of social welfare. The defendant corporation, publisher and owner of two newspapers in the state, published certain articles in its newspapers relating to plaintiff's conduct in office, his management of the school, and his removal from office. Plaintiff brought action of libel. Defendant, in addition to a plea of general issue, filed a plea of truth. The trial court instructed the jury that where truth is pleaded as a defense, but is not successful, such plea will sustain an award of punitive damages at the discretion of the jury. The jury found for the plaintiff, awarding $25,000 which included punitive damages. On appeal defendant contended that an unsuccessful plea of truth could be considered evidence of actual malice allowing assessment of punitive damages only if it appeared to the jury that the defense was made in bad faith, maliciously, or without proper motives. *Held,* reversed on other grounds. In an action of libel the plea of truth of itself constitutes a reaffirmation of the libel and may be regarded by the jury as showing actual malice and warranting an award of punitive damages. *Marley v. Providence Journal Co.,* (R.I. 1957) 134 A. (2d) 180.

In the field of defamation, malice in the real sense as distinguished from "legal malice" is not essential to liability;[1] however, malice in the real sense is important in connection with the measure of damages that may be recovered, especially punitive damages.[2] Such malice does not necessarily mean hatred or spite, but often can be inferred from improper motives, or recklessness as to the truth.[3] In most jurisdictions actual malice in

1 PROSSER, TORTS, 2d ed., 602 (1955).

2 Reynolds v. Pegler, (2d Cir. 1955) 223 F. (2d) 429, cert. den. 350 U.S. 846 (1955); Frechette v. Special Magazines, Inc., 285 App. Div. 174, 136 N.Y.S. (2d) 448 (1954).

3 Deckelman v. Lake, 149 Md. 533, 131 A. 762 (1926); Palmer v. Mahin, (8th Cir. 1903) 120 F. 737; PROSSER, TORTS, 2d ed., 601 (1955).

the sense of ill will, intent to injure, or absence of honest belief is a basis on which the jury may award punitive damages.[4] It is even held in some cases that the unprivileged publication of matter which is actionable per se will support a verdict of punitive damages.[5] Contrariwise, the truth of the charge made can be shown and is complete defense for the libel or slander in most jurisdictions;[6] in such circumstances the defendant's actual malice or spite adds no efficacy to the plaintiff's claim.[7] A defense of truth, however, in many states is hazardous, for if the defendant does not succeed in sustaining it, the unsuccessful plea may be considered in aggravation of damages.[8] The rationale of this view seems to be that since the defendant in setting up the inadequate defense of truth has further published the original defamatory matter, the jury can consider that as an aggravation of the wrong showing actual malice.[9] This view can be fairly attacked on several grounds. Although no action can be brought on the unsuccessful plea, this view indirectly subverts the almost universal rule that relevant statements, including testimony and the pleadings, made in the course of judicial proceedings, are absolutely privileged.[10] Such a holding also is open to attack as being unfair, since the defendant can advance a legally permissible defense only at the peril of subjecting himself to possible added damages if the jury finds against him.[11] Fortunately a number of courts follow the view contended for by the defendant in the principal case, holding that an unsuccessful plea of truth may be considered as evidence of actual malice warranting the assessment of punitive damages only when it appears that the defense was made maliciously or in bad

4 Conard v. Dillingham, 23 Ariz. 596, 206 P. 166 (1922); Cotton v. Fisheries Products Co., 181 N.C. 151, 106 S.E. 487 (1921).

5 Bergmann v. Jones, 94 N.Y. 51 (1883); Priest v. Central State Fire Ins. Co., 223 Mo. App. 122, 9 S.W. (2d) 543 (1928).

6 1 HARPER AND JAMES, TORTS 415 (1956); PROSSER, TORTS, 2d ed., 630 (1955).

7 A few states require justifiable ends or good motives. PROSSER, TORTS, 2d ed., 631 (1955).

8 Will v. Press Pub. Co., 309 Pa. 539, 164 A. 621 (1932); Coffin v. Brown, 94 Md. 190, 50 A. 567 (1901); Krulic v. Petcoff, 122 Minn. 517, 142 N.W. 897 (1913); Hall v. Edwards, 138 Me. 231, 23 A. (2d) 889 (1942); Domchick v. Greenbelt Consumer Services, Inc., 200 Md. 36, 87 A. (2d) 831 (1952); Updegrove v. Zimmerman, 13 Pa. 619 (1850); Gorman v. Sutton, 32 Pa. 247 (1858); Leevy v. North Carolina Mut. Life Ins. Co., 184 S.C. 111, 191 S.E. 811 (1937).

9 Some of the courts have further defined the theory, saying that the unsuccessful plea is evidence of malice in the original publication; in this way the courts avoided, in theory at least, giving the plaintiff damages for two causes of action in one. O'Malley v. Illinois Pub. & Printing Co., 194 Ill. App. 544 (1915); Coffin v. Brown, note 8 supra; Pfister v. Milwaukee Free Press Co., 139 Wis. 627, 121 N.W. 938 (1909); Krulic v. Petcoff, note 8 supra; 29 HARV. L. REV. 335 (1916); 43 HARV. L. REV. 323 (1929); 27 N.Y. UNIV. L. REV. 719 (1952).

10 PROSSER, TORTS, 2d ed., 609 (1955); 1 HARPER AND JAMES, TORTS 420 (1956). See generally Veeder, "Absolute Immunity in Defamation: Judicial Proceedings," 9 COL. L. REV. 463 (1909).

11 43 HARV. L. REV. 323 (1929).

faith or with improper motives.[12] A bad faith defense of truth would be clear where the defendant enters no evidence to support his plea or where he does it to harass or injure the plaintiff without just expectation of sustaining it by proof.[13] This "bad faith" theory seems sounder, and it has even been held that, although a good faith defense of truth is unsuccessful, the facts tending to show truth may be considered by the jury in mitigation of damages.[14] At present, however, probably the numerical majority of courts favor the holding of the principal case. Although the text writers,[15] who give the "bad faith" theory almost unanimous support, claim that it is the modern trend, this does not appear to be the case. On the other hand there is no evidence that the "bad faith" theory is losing favor. In view of its eminent justice and realism, it is not improbable that more courts will follow it in the future, either by virtue of statute or through judicial holding.

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[12] Webb v. Gray, 181 Ala. 408, 62 S. 194 (1913); Fodor v. Fuchs, 79 N.J. L. 529, 76 A. 1081 (1910); Upton v. Hume, 24 Ore. 420, 33 P. 810 (1893); Willard v. Press Pub. Co., 52 App. Div. 448, 65 N.Y.S. 73 (1900); Distin v. Rose, 69 N.Y. 122 (1877); Snyder v. Fatherly, 153 Va. 762, 151 S.E. 149 (1930); Scott-Burr Stores Corp. v. Edgar, 181 Miss. 486, 177 S. 766 (1938); Dauphiny v. Buhne, 153 Cal. 757, 96 P. 880 (1908); Schull v. Hopkins, 26 S.D. 21, 127 N.W. 550 (1910); Simpson v. Robinson, 12 Q.B. 511, 116 Eng. Rep. 959 (1858).

[13] Some of these cases reach this result pursuant to alternative pleading statutes which allow the defendant to plead both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages. Also some provide that the plea, though not sustained by the evidence, shall not in any case be of itself proof of the malice charged in the complaint. Myers v. Longstaff, 14 S.D. 98, 84 N.W. 233 (1900); Jastrzembski v. Marxhausen, 120 Mich. 677, 79 N.W. 935 (1899); Distin v. Rose, note 12 supra; Upton v. Hume, note 13 supra; Webb v. Gray, note 13 supra. But other courts still reach the same result as the principal case: Willard v. Press Pub. Co., note 12 supra; Pfister v. Milwaukee Free Press Co., note 9 supra (but only reluctantly).

[14] Snyder v. Fatherly, note 12 supra.

[15] PROSSER, TORTS, 2d ed., 632 (1955); 1 HARPER AND JAMES, TORTS 418 (1956); MCCORMICK, DAMAGES 436 (1935).