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Volume 13
Issue 1 *Group Defamation Symposium*

Article

1964

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Richard J. Quigg, Defenses to Group Defamation Actions, 13 Clev.-Marshall L. Rev. 102 (1964)

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Defenses to Group Defamation Actions

*Richard J. Quigg**

IN EXAMINING THE DEFENSES available in group defamation proceedings, it is first essential to review the defenses that apply to defamation of the individual. With this as background we can elaborate on the particular principles that apply to group defamation.

Basic Defenses in Individual Defamation

The defenses available in an action for defamation can be subdivided into three basic groupings, namely, truth, privilege, and consent.[1] These groupings will be discussed separately.

A. Truth

Truth in a defamation case has been generally held to be a complete defense in the absence of malice.[2] This has not always been the rule; in old common law it was held that truth alone was not a valid defense, but good motive must also be present. Thus, where it is said that Jones is "bald as a billiard ball," a libel may be found despite the fact that Jones has nary a hair on his head.

Early American jurisdictions gradually deviated from the English concepts, although in early criminal actions an absence of malice was an essential ingredient.[3] Thus, while Mr. Clap, after posting a sign to the effect that Caleb Hayward was a liar, a swindler, and a cheat, was willing to prove the truth of these statements, he was denied the privilege because of the obvious presence of malice. Much of this reasoning has carried over into modern criminal cases and is of importance in group defamation cases,[4] as is discussed below.

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[1] Gaffney v. Scott Pub. Co., 41 Wash. 2d 191, 248 P. 2d 390 (1952).

[2] Fairbanks Pub. Co. v. Pitka, 376 P. 2d 190 (Alaska 1962); Sather v. Natl. Dairy Prod. Co., 233 N. Y. S. 2d 43 (1962); Brinkley v. Fishbein, 110 F. 2d 62, cert. denied 61 S. Ct. 34, 311 U. S. 672, 85 L. Ed. 432 (1940); Fitscher v. Rollman & Sons, 31 Ohio App. 340, 167 N. E. 469 (1929); Jenkins v. D. X. Sunray Oil Co., 297 F. 2d 244 (5th Cir. 1962).

[3] Commonwealth v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214 (1825); Commonwealth v. Clap, 4 Mass. 163, 3 Am. Dec. 212 (1809).

[4] Beauharnais v. People, 72 S. Ct. 725, 343 U. S. 250 (1952).

Despite these stated limitations, the defense of truth is generally a complete one. It does not require proof of the literal truth of the precise statement made. Slight inaccuracies are immaterial, provided that the defamation charged is true in substance.[5] Thus, where it is published that a teacher has been fired, the fact that it was a forced resignation is academic and does not preclude the defense of truth.

On the other hand, a partial truth does not justify the entire libel.[6] Also, where truth is interposed as a defense and the publication is found to be false, legal malice is implied, and the plaintiff is entitled to punitive damages.[7] Nor does belief in the truth of a statement, nor anger or passion, constitute a justification or a defense.[8]

B. Privilege

Privilege is perhaps the most complex and controversial of the aspects of the defense to defamation proceedings. Most of the principles of privilege as applied to individual defamation also apply to group defamation. In general, privilege can be divided into two general areas; one the concise, closely defined concept of absolute privilege, and the second, the broad, somewhat nebulous branch of qualified privilege.

Absolute privilege has been largely restricted to proceedings of legislative bodies, judicial proceedings, and, to a limited extent, the communications of military and naval officers.[9] The absolute immunity of legislative bodies has been maintained in the public eye by the congressional committees of the late Senators McCarthy and Kefauver, as well as the present hearings of the committee headed by Senator McClellan. The immunity of judicial officers and courts has been upheld despite some flagrant abuses by lower courts.[10]

The subject of qualified privilege is considerably more flexible, and is one from which substantial litigation has resulted.

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[5] Sather v. Natl. Dairy Prod. Co., *supra* n. 2.

[6] Holden v. Amer. News Co., 52 F. Supp. 24 (D. C., D. C.), appeal dism. 144 F. 2d 249 (C. C. A. 9, 1943).

[7] Miller, Smith, and Champagne v. Capital City Press, 142 So. 2d 462 (La. 1962).

[8] McCuddin v. Dickenson, 226 Iowa 304, 283 N. W. 886 (1939); Stegemann v. Paulsen, 194 Iowa 1314, 190 N. W. 929 (1922).

[9] 53 C. J. S. 415-416 (1948); 33 Am. Jur. 123-124 (1941).

[10] Karelas v. Baldwin, 237 App. Div. 265, 261 N. Y. S. 518 (1937).

Several subjects lend themselves quite readily to the concepts of qualified privilege, including employer-employee relationships,[11] slanderous comments concerning the eligibility of a suitor of a close relative,[12] matters of mutual public or business interest, principal and agent duties, and the like.

What can be considered a qualified privilege for all Americans is the basic right of freedom of speech as guaranteed by the First Amendment of the Constitution, which states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and petition the Government for a redress of grievances.

The clash between literal interpretation of the First Amendment and its interpretation in relation to defamation of the individual or the group has provided the basis for a number of stimulating law review articles.[13] Viewpoints have varied from that of Justice Black, who advocates a concise and literal interpretation of the First Amendment even at the expense of toleration of occasional seditious libel, to that of Justice Holmes, who stated that the prohibition against legislation that might limit free speech was never intended to give immunity to every possible use or abuse of that freedom.[14]

A specific application of freedom of speech is involved in the concept of fair comment. In essence, this concept is based upon the hypothesis that it is a basic right (or qualified privilege) for one to project his honestly founded opinion. This opinion in some instances may libel the character or abilities of a public figure or group and still be a fair comment, defensible under this doctrine.[15] It is recognized, of course, that justifiable fair comment as related to an individual may be much narrower than when related to a large group.

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[11] Ramsey v. Cheek, 109 N. C. 270, 13 S. E. 775 (1891); McKenna v. Mansfield Leland Hotel Co., 55 Ohio App. 163, 9 N. E. 2d 166 (1936); Johnson v. Gerasimos, 247 Mich. 248, 225 N. W. 636 (1929).

[12] McBride v. LeDoux, 111 La. 398, 35 So. 615, 100 Am. St. R. 491 (1904).

[13] Note, Justice Black and the First Amendment "Absolute," A Public Interview, 37 N. Y. U. L. Rev. 549 (1962); Meiklejohn, The First Amendment is an Absolute, Sup. Ct. L. Rev. 245 (1961); Leflar, The Freeness of Free Speech, 15 Vand. L. Rev. 1073 (1961-1962).

[14] Frohwerk v. United States, 249 U. S. 204, 39 S. Ct. 249 (1919).

[15] Larrick v. Gilloon, 176 Cal. App. 2d 408, 1 Cal. Rptr. 360 (1959).

C. Consent

In general, a person consenting to, or authorizing, the publication complained of, in a libel action cannot recover for the injury sustained by reason of such publication.[16] But even though consent has been given, a significant deviation from what has been consented to, such as an inaccurate portrayal in a movie, may result in an actionable tort.[17]

Specific Aspects of Defense in Group Defamation

A valid defense to a group defamation action may be composed of any of the aforementioned elements of defense. Group defamation, however, is unique in a number of aspects, which may be summarized by three general words, semantics, statistics, and politics. In the following, each of these special aspects of group defamation is examined, considering both tort and criminal liability.

A. Semantics

In most cases over a period of years, it has been held that the word "all" or its equivalent must be included in the defamatory statement in order for an individual to successfully sustain an action for defamation. As stated in *Fowler v. Curtis,*[18] a defamatory statement, to be actionable, must apply to every member of a group without exception.[19] In certain cases it has been held that an imputation of gross immorality to some of a small group casts suspicion on all, where no attempt is made to exclude the innocent.[20] Thus, where it is stated that "most (of members of a group numbering twenty-five) * * * are fairies," an action is said to lie despite the lack of an encompassing word such as "all."

In general, the defamatory statement must refer to the plaintiff as an ascertainable person,[21] although in at least one instance the court permitted witnesses to testify that in their minds the

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16 Watwood v. Credit Bureau, 97 A. 2d 460 (Mun. App. D. C. 1953).

17 Kelly v. Loew's Inc., 76 F. Supp. 473 (D. C. Mass. 1948).

18 Fowler v. Curtis Pub. Co., D. C., 78 F. Supp. 303, 182 F. 2d 377 (App. D. C. 1950).

19 Louisville Times v. Stivers, 252 Ky. 843, 68 S. W. 2d 411, 97 A. L. R. 277 (1934).

20 Neiman-Marcus v. Lait, 13 F. 311 (S. D. N. Y. 1952).

21 Service Parking Corp. v. Washington Times, 67 App. D. C. 351, 92 F. 2d 502 (1937).

published matter definitely singled out the plaintiff.[22] In most jurisdictions words not clearly encompassing an entire group, nor specifically designating the plaintiff, do not result in a cause of action. A slight deviation was presented in *Gross v. Cantor*, where it was stated that all but one (out of twelve) of the radio editors in New York City were ——.[23] The exception was clearly identifiable; hence, the "all" rule could still be applied. In most instances innuendos, or indications that "one apple out of a barrel is rotten," have not been found to be actionable unless the plaintiff can clearly show that the public at large definitely associates the allegation with him.[24]

B. Statistics

In general, tort actions for defamation have been upheld where the group is small, and rejected where the group is large. Thus, in the famous *Neiman-Marcus* case, all members of groups of 9 and 25 persons were held to have an action for defamation; but a group of 382 was too large.[25] In other important cases defamation to a group of 8,[26] 11,[27] 12[28] and 12[29] were held to be actionable. On the other hand, groups of 23[30], 20-30 (or 10-12 depending on interpretation),[31] or 60[32] were held to be too large for the support of a tort action for defamation. Generally it appears that the group defamed must not be larger than twenty if defamation actions by its members are to be looked upon favorably by the courts.

The classic thinking of the courts over a period of years, with respect to semantics and statistics, was expressed well in *Ewell v. Boutwell* where it was stated: [33]

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[22] Marr v. Putnam, 196 Ore. 1, 246 P. 2d 509 (1952); Note, 41 Calif. L. Rev. 144 (1953).

[23] Gross v. Cantor, 270 N. Y. 93, 200 N. E. 592 (1936).

[24] Watts-Wagner Co. v. General Motors, 64 F. Supp. 506 (D. C. N. Y. 1945); Latimer v. Chicago Daily News, Inc., 330 Ill. App. 295, 71 N. E. 2d 553 (1947).

[25] Neiman-Marcus v. Lait, *supra* n. 20.

[26] Weston v. Commercial Advertiser Assn., 184 N. Y. 479, 77 N. E. 660 (1906).

[27] Bornmann v. Star Co., 174 N. Y. 212, 66 N. E. 723 (1903).

[28] Hardy v. Williamson, 86 Ga. 551, 12 S. E. 874 (1891).

[29] Gross v. Cantor, *supra* n. 23.

[30] Latimer v. Chicago Daily News, Inc., *supra* n. 24.

[31] Service Parking v. Washington Times, *supra* n. 21.

[32] Fowler v. Curtis Publ. Co., *supra* n. 18.

[33] Ewell v. Boutwell, 138 Va. 402, 121 S. E. 912 (1924).

1. If defamatory words are used broadly in respect to a general class of persons and there is nothing that points, or by colloquium or innuendo can be made to apply, to a particular member thereof, such member has no right of action.

2. But if language is employed toward a comparatively small group of persons, or a restricted or local portion of a general class and is so framed as to make defamatory imputations against all members of the small or restricted group, any member thereof may sue.

3. On the other hand, if the words used in respect to the small or restricted group expressly, but impersonally and indefinitely, refer to one or more of the several members thereof, one of the members in order to maintain his action, must establish the application of the language to himself.

Thus, as a defense to a group defamation action, where the language is vague and not inclusive, or in no way singles out the plaintiff, or where the group maligned is large (say, larger than twenty), a demurrer or a motion to dismiss the action is in order. It would not appear to be necessary, according to most past precedents, to utilize any of the basic defenses to individual defamation, such as truth, privilege, fair comment, or consent.

C. *Politics*

There has been a tendency of legislatures since World War II to enact "group hate" statutes, which make it a criminal offense to publish or distribute any literature which tends to expose any group or class of persons to ridicule or contempt. These statutes presumably are motivated by outrage at the tactics utilized by the Nazis in Germany toward minority groups, particularly the Jews, or out of sympathy with the drive of certain minority or ethnic groups to attain equality of treatment. In other words, these statutes appear to be largely sociological or political in motivation, although they may be guised as attempts to prevent riots or violence. Some states have enacted essentially toothless statutes incapable of any serious enforcement, largely to align their sympathy with the cause of the maligned minority group, as opposed to the hatemongers.[34] Other states, Illinois and Indiana, for example, have enacted laws which may be enforceable.[35]

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[34] Note, 61 Yale L. J. 252 (1952).

[35] *Ibid.*

The leading case on this subject, *People v. Beauharnais*,[36] is an outgrowth of an Illinois statute[37] which reads as follows:

> It shall be unlawful for any person, firm or corporation to manufacture, sell or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama, or sketch, which publication or exhibition portrays depravity, immorality, unchastity or lack of virtue of a class of citizens of any race, color, creed, or religion which said publication or exhibit exposes to contempt, derision, or obloquy or which produces breach of the peace or riots.

People v. Beauharnais does not present an entirely new concept in Illinois. A prior criminal case had held that, since libel of a class or group has as great a tendency to provoke breach of the peace or to disturb society as has libel of an individual, such libel is punishable even though its application to individual members of a class or group cannot be proved.[38] In general, other states have controverted this concept.[39]

The facts of the *People v. Beauharnais* case are as follows:

Beauharnais, a member of a "white citizens' group" designed to suppress the movements of Negroes into previously all-white neighborhoods, was arrested while peaceably passing out literature which labeled the Negro an inferior being, citing criminal statistics and other matter. Beauharnais was convicted and fined. On appeal to the Supreme Court, his conviction was upheld by a 5-4 vote.

Beauharnais' defenses were roughly as follows:

1. Truth,
2. Freedom of speech and fair comment,
3. Law too vague to support conviction.

Truth was held to be no defense unless it was shown that a valid motive for publication existed. The other defenses were also rejected by the majority of the court.

This verdict was criticized by a number of authorities, who, while obviously not sympathetic with the special cause of Beauharnais, felt that the enforcement of this statute in this manner was an infringement on the basic right of free speech as guaran-

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[36] Beauharnais v. People, *supra* n. 4.

[37] Ill. Crim. Code Sec. 224A Div., Ill. Rev. Stat. Ch. 38, Sec. 471 (1949).

[38] People v. Spielman, 318 Ill. 482, 149 N. E. 466 (1925).

[39] People v. Edmondson, 168 Misc. 142, 4 N. Y. S. 2d 257 (1938).

teed by the First Amendment to the Constitution[40] (the First Amendment being applicable to the states through the Fourteenth Amendment). Extrapolations of this decision could make statements pertaining to the functions of the Germans in the Nazi party, or of the Italians in the Mafia, while obviously true, actionable as criminal defamation, by zealous enforcement. The overall impact of such decisions could not help but ultimately infringe upon the constitutional guarantees of freedom of speech.

Further discussion of the defense of truth is warranted. Although truth has never been a complete defense, in itself, to a criminal charge of defamation, it nevertheless represents a valid defense in the absence of malice. Thus, if a basic defense of truth were to be accepted in a case such as this, where the group is extremely large, a defense counsel must resort to statistical concepts.

In statistical sampling the significance of a given sample size is directly related to the total population.[41] Thus, where a group of sixty people is to be examined, a sample size of thirty, if randomly selected, would provide a good measure of the distribution of the total population. However, with an infinitely large population, such as would be encountered in the defamation of an ethnic group, any standard deviation obtained on a random sample designed to prove truth as an affirmative defense must be multiplied by a factor to correct for the sample size. Thus, statistical significance in an infinitely large population is difficult to establish on anything but a large sample. Hence, in the absence of heavy financial backing, statistical significance cannot be employed to establish truth where a large segment of the population has been defamed.

Occasionally, truth can be established by using existing surveys. If, for example, it is stated, "College students of Russian background are drunks," a survey already run has indicated that some basic truth could be established in such a statement.[42]

The aforementioned examples are intended to show that even if truth is accepted as a defense, its application to group defamation of large groups is difficult. Thus, the best defense to such an action is to emphasize the basic tenets of the First

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[40] Note, 61 Yale L. J. 252 (1952); Note, 37 N. Y. U. L. Rev. 549 (1962).

[41] Wilks, Elementary Statistical Analysis, 179-185 (Princeton Univ. Press 1949).

[42] Straus and Bacon, Drinking in College, 53 (Yale Univ. Press 1953).

Amendment and the concepts of fair comment. It would appear that these defenses would be upheld in a less emotional issue than that presented by the *Beauharnais* case.

Summary

The basic defenses applicable to ordinary individual defamation, of truth, privilege (including fair comment), and consent, also apply to group defamation. Most past group defamation cases have held that language including *all* members of a given group, or positively identifying the plaintiff, must be used. Tort actions have been upheld when small groups are defamed; tort claims are generally disallowed in the defamation of large groups unless the public readily recognizes the defamation as being directed at one individual.

A number of "group-hate" statutes have been enacted by various states, making it a criminal offense to defame a class of citizens. Defenses based on truth are difficult to establish because of the statistical complications encountered in groups of large numbers. The best defense to these statutes appears to be based on fair comment and the constitutional guarantees of the First Amendment.