Cleveland State Law Review

Volume 5 | Issue 2 Article

1956

Newspaper Libel

Marcus D. Gleisser

Newspaper Libel

*Marcus D. Gleisser**

TO A GOOD NEWSPAPER REPORTER, having a big story and not being allowed to publish it is a crime akin to smothering a vigorous newborn baby before it has a chance to give forth its first healthy howl. To a responsible city editor, however, sitting alone with a meager handful of libel mores and facing the wrath of a senior editor if he incurs a lawsuit which could have been avoided, the torture of indecision over that big story can be wracking indeed. First of all, he is a good reporter whose training and personal inclination cry to get that big story into print before the competition hears of it. Secondly, at the same time, he must be cautious to sift out all elements of libel danger even to the extent of killing the story if necessary. The conflict is obvious, and often it comes just before an edition deadline that calls for a quick decision.

It must be understood from this that a good newspaperman rarely leaps recklessly into the whirlpool of libel. By the same token, it can also be understood that many times he is drawn into that whirlpool quite unwittingly and innocently, simply by not knowing what its ramifications are. Often, indeed, lawyers themselves are caught by surprise by decisions handed down by courts in various fact situations.

Cases to be cited below in this article will show that libel's line of danger in many instances is vague even to legal experts with specialized training and ample time for research and meditation. For journalists in their ceaseless race against time, and harried by competition, perforce relying on many sources for valuable information, the phantom of libel can be most troublesome.

Making this problem even more disheartening is the permanency of the printed word. True, as Justice Cardozo is reported to have said, what gives the sting to writing is its permanence of form. The spoken word dissolves, but the written one abides and

---

* Mr. Gleisser is a reporter on the Cleveland Plain Dealer. A senior, and Editor-In-Chief of the Cleveland-Marshall Law Review, he holds a Bachelor's degree in journalism and a Master's degree in economics, both from Western Reserve University.

perpetuates the scandal. True, too, that the honestly-written error cannot be waved away as a transitory thing that was "misunderstood" by the listener. Nor can it be denied. The day after the writing, when much of the momentary heat of inspiration has begun to fade, the printed word remains clear and bold to challenge the writer.

Small wonder, then, that many a writer who is convinced that he has a story which he feels must be brought to the public's attention to correct a wrong walks cautiously under this ever-present cloud of danger. Times without number he has received quotes in good faith from what he considered a reliable source, only to have that source retreat when the results of his words have been more than he anticipated. The unrecorded speech faded with the air, while the writer's words have remained to plague him. Sometimes, fear of this dilemma has left unwritten stories that should have been told; and wrongs that should have been corrected have gone unrevealed.

The Law

What then is this problem of libel, this tort with a double edge that can both protect the rights of the individual and, at the same time, bring about a situation in which that same individual stands to suffer a great loss? The definition of the law is deceptively simple. It concerns itself with the defamation of persons through printed words or signs and pictures. In general, a libel could be defined as a false written statement about a person which would tend to bring that person into public hatred, contempt or ridicule, or to injure him in his business or job.

That would seem to be a simple, clear definition. It is, in fact, so simple that law cannot leave it alone but goes on in an attempt to make it more specific. It divides libel into *per se* and *per quod.* Under libel *per se* are placed those statements which falsely accuse a person of suffering from some loathsome or contagious disease, or which falsely accuse a person of want of capacity or fitness to conduct his business or profession, or which falsely accuse a person of the commission of a crime involving moral turpitude or making such a person liable to a punishment infamous in character, or which upon their face bring disgrace or ridicule upon the party accused. Libel *per quod,* on the other hand, must be supplemented by allegation and proof of other

facts to identify the plaintiff if the printed matter does not itself do so, to prove the defamatory effect upon the plaintiff, to establish actual malice, and to show special damage.

With a more or less clear picture of libel before us, yet one which surely cannot be as clear and understandable to a newspaperman as it is to a lawyer with his background of case study, the next question is: What defense is available to the writer? The first defense in Ohio, as it is in most other states, would seem quite obvious—the truth. The fact that the truth is a complete defense is stated in the Ohio Constitution[1] and in the Ohio Revised Code.[2] The latter puts it this way: "In an action for a libel or a slander, the defendant may allege and prove the truth of the matter charged as defamatory. Proof of the truth thereof shall be a complete defense. In all such actions any mitigating circumstances may be proved to reduce damages . . ."

Pure proof of truth, again, is too simple and clear an answer to remain untouched. Other corollary theories have sprung up. For example, there is the theory of fair comment. Obviously, everyone has the right to criticize or comment, both by spoken and written word, on matters of public interest and general concern. However, it is apparent that these statements must be made fairly and honestly. They could not, for example, be used to accuse public officials or candidates of criminal acts nor to attack the private character of a public person falsely. An Ohio case which illustrates this is *Menger v. The News Printing Co.*,[3] in which it was held that:

> ". . . The essential elements of fair comment in order to be deemed not actionable are: (1) that the publication is an opinion; (2) that it relates not to an individual but to his acts; (3) that it is fair, namely, that the reader can see the factual basis for the comment and draw his own conclusion; and (4) that the publication relates to a matter of public interest."

There is yet a third defense to libel which is known as privileged communications or statements which contain matter which would be libelous were it not for the occasions on which they were made. This can best be illustrated by two sections of the Ohio Revised Code:

---

[1] Ohio Const., Article I, Sec. 11.

[2] Ohio R. C., Sec. 2739.02.

[3] Lewis C. Mengert v. The News Publishing Company, 16 Ohio Circ. Ct. (N. S.) 34 (1908).

Sec. 2317.04 holds that a fair and impartial report of the proceedings before state or municipal legislative bodies, or officers, or a fair synopsis of any bill, or other document presented, usually is privileged unless it can be proved that such publication was done maliciously.

Sec. 2317.05 holds that an impartial report of an indictment, warrant, affidavit, or arrest is privileged, unless it is proved that an element of maliciousness tinged that publication.

The third phase of the law of libel covers the problem of damages. Where it is a case of libel *per se,* the plaintiff usually does not have to prove any actual damages either to himself or his reputation, because the law presumes damages as a result of the mere publication of the statements. Actual damages can also be recovered on proper proof. Usually malice is presumed in such cases, but proof of the existence of actual and express malice can bring punitive damages in addition to compensatory. Where it is libel *per quod,* however, the plaintiff must prove actual money loss in order to recover. Here, too, the plaintiff can get punitive damages if he can prove actual malice or gross negligence in the publication.

This, then, is a general, albeit very brief, picture of the law of negligence in libel. Of necessity, lack of space prevents discussion of many fine points such as privileged communications among small, intimate groups or in family relationships. The purpose of this brief outline is to set the backdrop of the stage on which will be displayed the confusing nature of the court decisions.

The Problems

First let us take an instance where a matter would seem clearly libelous. Take the story in New York where a housewife appealed to a court when her husband beat her as punishment for taking their children to a late movie against his wishes. The husband, in turn, complained that his wife watched television so much that it interfered with her normal household duties. The *New York Mirror* saw fit to treat this story in a flippant manner under the headline: "Video Widower's Wife Shows Movie Mouse."

Seemingly this attempt to make light of a serious domestic

difficulty would appear to be grounds for a good libel action. The court, however, dismissed the libel action and said:[4]

> "The defense was privileged in that the paper was accurately reporting what had transpired in the Magistrate's Court. The complaint of the husband, the agreement to shut off the television at 11:30, the magistrate's efforts to patch up family differences and the wife's complaint against the husband for giving her a black eye, these were the essence of the story. The coloration of the facts, flippant though it was, was by way of fair comment."

The court added:

> "If any rule can be deduced from the cases in this area of libel, it appears to be that the imputation must carry with it a charge of serious vice, disgraceful behavior or scandalous misconduct of such dimensions as to make proof of special damages unnecessary."

Or take criticism by newspapers of men performing their jobs to the best of their capabilities, a criticism that can have an effect on livelihood. The Daytona Beach (Fla.) *News-Journal* charged that a practicing attorney had filed a petition which, in the newspaper's opinion, challenged the attention of all citizens who believed in law enforcement. The attorney, the newspaper said, "made grave accusations against some of our police officers in his zeal to save his client from going on trial on charges growing out of a fracas . . . Did the attorney have any right to accuse these policemen of dastardly behavior? For our police to be subject to criminal accusations for acting in the line of duty is revolting to decent citizens . . ."

At first glance, this would indeed seem a serious charge against an attorney whose obligation to the public is as significant as his obligations to his clients. It would seem apparent that with the emphasis upon moral fitness and public obligation which the legal profession demands, to ascribe unethical conduct to a lawyer is to impugn his fitness to practice the legal profession.

Here, however, is what the majority opinion of the court said:[5]

> "Our study of the article brings us to the view that it constituted a criticism of a system by which the attorney, acting within bounds, but within bounds the writer thought should be contracted, had succeeded in keeping a rascal from being tried.

---

[4] Dorothy Bedekovich v. Hearst Corporation, 141 N. Y. Supp. 2d 651 (1955).
[5] Isham W. Adams v. News Journal Corporation, 84 So. 2d 549 (Fla., 1955).

> "Although by use of our 'common mind' we can understand how irked the attorney may have become by the comment on the procedure that irked the editor, we do not find from the whole editorial and such of the circumstances of its publication as are apparent in the record, the qualifications which would stamp it as libelous in itself."

To see how elusive is this line of danger in libel, consider now another decision by the same court, where John Walsh, a policeman, sought to dismiss a libel action against the Miami (Fla.) *Herald.* His motion was set aside by the state's supreme court[6] with the comment that the offending story did "certainly impugn the creditability of the subject of the article in stating that he offered testimony before a justice of the peace 'exactly the opposite' to his own report (of a fatal auto accident), that he 'pushed forward in his zeal' to do it and that the justice acted as if he put little or no reliance in the testimony given."

The court said: "At least the matter contained in the publication tended to subject this man to distrust and since it is part of the official duty of a policeman to testify and ergo, to testify truthfully when called, a publication such as this tends to injure him in his trade."

A rather fine point in the vagaries of libel lies in the problem of indirect aspersion or an injury by innuendo. An example of this is a suit brought against the El Paso (Tex.) *Times* by Stanley Caufield, an attorney and member of the legislature. The action was based on a story about hearings on charges of alleged gambling payoffs. The offending part of the story read:

> "Caufield helped push the gambling probe which resulted from affidavits made by Mrs. Pearl Johnson. She charged that certain El Paso men were receiving payoff money. Mrs. Johnson now is serving a 15-year penitentiary sentence at Huntsville for the murder of her new-born child."

Caufield contended that, by innuendo, the story charged him with initiating and pushing an investigation against a judge, a prosecuting attorney and another attorney based solely upon the affidavit of a "self-confessed prostitute and convicted murderess."

In the ruling of the trial court, which was upheld by the Court of Civil Appeals of Texas, it was held:[7]

---

[6] John Walsh v. Miami Herald Publishing Co., 80 So. 2d 669 (Fla., 1955).

[7] Stanley Caufield v. El Paso Times, Inc., 280 S. W. 2d 766 (Tex., 1955).

> "We do not see any innuendo that this attorney solicited false affidavits from Pearl Johnson or that he consorted with her on any basis. Further we think that the ordinary reader would expect information as to gambling payoffs to come from persons other than a class that is the elite."

A good question in libel arises over the amount of latitude a newspaper may take upon itself in the criticism of public officials. Generally, this latitude is pretty wide and falls under the scope of fair comment and criticism discussed in the preceding section.

Two cases will exemplify this question of proper criticism. In one, the El Paso (Tex.) *Herald Post* was sued on a story headlined: "Mayor's Retirement Plan Aimed at One Employe." The part on which the libel suit was based read: "Mayor Hervey put his policy of forced retirement for employes at the age of 65 into effect to get rid of one employe, he said at a Pension Board meeting yesterday. During discussion of a request to allow a 68-year-old employe to work an additional 13 months so that he would be eligible for a city pension Mayor Hervey said, 'After all we only passed the 65-year-old rule to get rid of one employe.' "

In ruling on this, the Texas court said:[8]

> "We first wish to point out that publications about public officials are treated differently than publications about private individuals, in that even a rather vigorous and untrue condemnation of an official as an official is not libelous in itself unless it charges him with an offense for which he may be removed from office, whereas the same condemnation of a private individual might be libelous in itself."

The court added:

> "If one is accused of doing something or standing for something that he may legally or properly do, then such statement, not being defamatory, would not be the basis for libelous action even though it may be hurtful to him in some other way."

In the second case, the Gastonia (N. C.) *Gastonia Citizen* published an editorial headed: "Hardly A Bargain At $30 A Front Foot" and severely criticized the purchase of a piece of property by the city for $3,000. The editorial concluded: "We may be a lone voice speaking out against such wisdom and non-arbitrated use of the taxpayers' money but we still believe—with or without the sewage line—that this deal stinks."

---

[8] Herald-Post Publishing Company v. Fred Hervey, 282 S. W. 2d 410 (Tex., 1955).

The mayor brought suit in which he claimed that the editorial was malicious and false, that it charged him as well as the city councilmen with malfeasance and misconduct, humiliated and disgraced him and that the publisher, although requested to do so, refused to apologize.

In its decision that the newspaper's charge was not libelous, the court wrote:[9]

> "The article does not charge and the complaint does not allege that the mayor exerted or attempted to exert any influence, improper or otherwise, upon the council or did or intended to do anything more than give his verbal support to their decision. The article, when fairly and impartially construed, does not have the meaning the plaintiff seeks to give it. The editor of the paper charges the wasteful, not corrupt, use of public money. The expenditure of public money is a matter of judgment and to charge the council with bad judgment is not libelous. One of the functions of a newspaper is to give information about public affairs and how public officials are carrying on the public business. So long as that qualified privilege is not abused an action for libel cannot be maintained."

Headlines, Stories Are Not a Unit

An interesting facet of newspaper procedure with which the general public, and the legal profession, is often too little acquainted is the manner in which newspaper stories and their headlines come together. Too few persons know, for example, that while stories are written by one group of men, the headlines are written by a completely different group on the newspaper. Thus, for example, attempting to sue a reporter for libel that appears only in the headline over his story would, in effect, be naming an altogether innocent defendant. This is particularly true in attempting to sue a wire service, which provides only the text material, for libel in the headline which is written by each individual newspaper which purchases that story.

This was made clear in a recent suit of *Marteney v. United Press Association,* in Kansas,[10] where the charge of libel was based not only on the dispatches of the association but on the headlines of the stories carried by the newspapers.

---

[9] W. Harrelson Yancey v. David E. Gillespie and Spindle City Publishing Company, Inc., 87 S. E. 2d 210 (No. Car., 1955).

[10] Wayne S. Marteney v. United Press Association, 224 F. 2d 714 (C. A. 10, 1955).

The news dispatch to Kansas and Colorado papers said, in part:

> "Topeka Attorney General Harold Fatzer said today Wayne Marteney, president of a Garden City grain company, now in bankruptcy, has crossed the border into Mexico. Marteney, whose million-dollar grain empire fell apart, is charged with seven violations of the Kansas Warehouse Law and is free under $5,000 bond."

A number of newspapers based their headlines on this apparently libelous matter and the plaintiff sought to include these headlines in his allegations of libel.

The United States Court of Appeals,[11] however, said:

> "The press association should be held responsible only for its own acts and the defamation it disseminates. A press association has no control over the headlines which a newspaper uses in connection with its dispatches. The headline is an independent act of the newspaper publisher. We think it would be manifestly unfair to a press association to hold it accountable for the headlines."

It must be emphasized, however, that this blanket of immunity cannot be extended to cover the dispatch itself for, as the court concluded:

> "Considering the publication as a whole we think the plain and natural meaning it would convey to the average reader is that Marteney, having been charged with seven violations of the penal laws of Kansas and being free on bond, had fled to Mexico to avoid prosecution and that it was not fairly susceptible of any other meaning. We concluded therefore that the publication as a natural and immediate consequence would cause injury to Marteney and is therefore libelous in itself."

An Ohio View on Court Records

To this writer who, as a newspaper reporter, has been regularly assigned to cover the activities of the Cuyahoga County civil courts, a particularly disturbing question has been the extent to which a reporter can safely go in reporting the contents of a petition on file in a court.

These petitions seemingly become the domain of the general public when they are filed. Practically anyone having business with a case can walk into the courthouse and peruse its petitions.

[11] Ibid.

As a reporter, it has always been this writer's practice to examine these petitions carefully for any news value they might contain. Yet a Cleveland newspaper recently lost a directed verdict and a judgment of $2,500 for publishing accurately the contents of such a petition.

The case was that of *Mary Pringle Williams v. the P. W. Publishing Co., Inc.*, publisher of the Cleveland *Call & Post*. Mrs. Williams alleged that she had filed a divorce petition in the Cuyahoga County Common Pleas Court against her husband and that in his answer her husband set forth certain statements which were indecent and which the *Call & Post* published. She added that those statements were false and to the great damage of the plaintiff's character and reputation, for which she sought $50,000.

The defendant in its answer first set forth a general denial and then five affirmative defenses which, in effect, declared that the defendants in good faith published verbatim the answers contained in the answer of the defendant in the divorce case. They did not publish more than was contained in this answer, and they claimed the publication was privileged under section 2317.05 of the Ohio Revised Code.

In ordering a directed verdict for the plaintiff, Common Pleas Judge Benjamin D. Nicola cited Syllabus 2 of the Ohio Supreme Court in *Mauck v. Brundage*[12] which read:

> "In an action for libel the question whether the publication is or is not libelous per se is a question for the court and where the publication is claimed to be privileged the question whether or not the occasion gives the privilege, the controlling facts being conceded, is also for the court."

Judge Nicola told this writer that the action of the court necessitated the construction of Revised Code section 2317.05 cited by the defendants. This section reads:

> "The publication of a fair and impartial report of return of any indictment . . . or the filing of any pleading or other document in any criminal or civil cause in any court of common jurisdiction or of a fair and impartial report of the contents thereof, is privileged . . . this section . . . of the Revised Code does not authorize the publication of blasphemous or indecent matter."

Judge Nicola, under his construction of this section, held the allegations set forth in the petition to be indecent and ruled that

[12] Mauck vs. Brundage, 68 Ohio St. 89 (1903).

the acts set forth therein were libelous *per se*. He thereupon directed the jury to return a verdict for the plaintiff for compensatory damages only, which would include a reasonable attorney fee.

In supporting his opinion, Judge Nicola cited 15 Ohio Reports 320 in which it was held that:

> "Words spoken of a female and having a tendency to wound her feelings, bring her in contempt and prevent her from occupying such position in society as is her right as a woman, are actionable in themselves."

New York and Non-Public Proceedings[13]

An interesting development in the legal theory of privilege in the question of libel comes to light in a change made in New York State's libel law. It came into being with the approval of Gov. Averill Harriman.

Drafted as the aftermath to two successful libel suits against New York City newspapers, the statutory revision now provides for a pleading of privilege on matter in an official proceeding even though that proceeding may not be public. Previously, damages had been awarded by juries where newspapers published information contained in documents filed in closed proceedings.

Here is how the governor's memorandum explained the change, which the legislature apparently enacted with a push from newspaper interests:

> "The law presently affords the defense of privilege in an action for libel to one who publishes a true and fair report 'of any judicial, legislative, or other public and official proceedings.' This bill would amend the law by deleting the reference to 'public.' In other words, it would make it possible to publish, as in a newspaper, a report of a judicial, legislative or other official proceeding even though it is not public.
>
> "However, it should be noted that our statutes contain many provisions which preserve the secrecy of documents and testimony, such as in matrimonial actions, the secrecy of testimony before a grand jury, or statements made by a grand juror during the deliberations of the grand jury. There are other comparable safeguards in the Executive, Legislative and Tax Laws and in other laws.
>
> "My approval of this bill cannot and should not be construed as a modification or weakening of the justifiable protections embodied in the laws mentioned. In the light of all

[13] Editor & Publisher Mag., p. 52, col. 3 (May 5, 1956).

these circumstances the bill before me appears to be reasonable. Undue restrictions upon the freedom of the press are not advisable."

Invasion of Privacy

Still another problem facing journalism in its daily race for news in the public interest is that of invasion of privacy, a comparatively new idea in law which has not yet gained complete acceptance and which might be regarded as an offspring of the older tort of libel.

In theory, at least, this concept seeks to prevent the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, and the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.[14]

While this is a sound legal concept, this writer has seen it bandied about and hurled at news reporters by known hoodlums, racketeers and other unsavory characters rounded up as suspicious persons by the police, until the theory becomes very questionable in actual practice.

Actually, while much of the public may not know it, a certain degree of its privacy is protected by law. For example, there are strict rules about invading quarters and the tapping of telephone wires. The publication of pictures of a person's humiliating illness is generally frowned upon. Putting a person's signature to a letter or including his picture in a rogues' gallery can bring retaliation. And taking some elements of a person's personality for commercial use without his consent, such as advertising, can result in liability for damages.

But to ask newspapers to waive their constitutionally protected freedom to publish newsworthy items of public interest—or to stop newspapers from reporting the private life of a person who has achieved the status of a public figure—is certainly asking too much.

Let us look at what must be the roots of such a tort as "invasion of privacy." It would of necessity often be based on the ground of mental suffering, a ground to which courts should be exceedingly careful about giving general recognition. Up to now the courts have been most suspicious of an injury that is more mental than physical, and with good reason. Unless checked by restraining laws, suits based on unprovable "mental pain" can

[14] 138 A. L. R. 32.

rise in a mighty wave and not only engulf all the newspapers and other periodicals, but all the courts as well, and open a new and endless tide of litigation. In this writer's opinion, the invasion-of-privacy tort is indeed a Pandora's box which legislators and courts dare to throw wide open only with great peril to the public welfare.

Conclusion

The problem of the law of libel is not an easy one.[15] This article has attempted to show that the line of danger—the line beyond which a newspaper cannot step without facing time-consuming, costly and, often, embarrassing, law suits—is a nebulous thing. It is a thing that wavers and changes on minute details, and is a thing on which editors and writers, untrained in legal theories, find it hard to find secure footing.

Yet it is an elusive thing by necessity. This writer would surely not advocate a loosening of the laws to the point where the dignity of the individual can be trodden upon with impunity. The present scope of communications, and the widening area to be expected in the future, make journalism far too powerful an instrument to go completely unrestrained. In the hands of the irresponsible its potential for injury would be great.

On the other hand, however, its legal shackles must never be made tight and inflexible if the individual's dignity and freedom are to be upheld and protected. For a journalism timid and in fear of legal reprisals at every move would become a pallid thing. It would lack the vigor of criticism and the drive to bring to light matters not only of the public's domain but basic to the survival of our economic and social system. In such a situation, while some individuals might enjoy a measure of revenge or supremacy over a powerful instrument, they and untold millions of others may suddenly awaken one day to find that they have fettered *themselves,* and freed forces for evil a hundredfold more terrible than those they sought to suppress.

While general principles of protection may be set up as they have been in the past, they should not be as stern and uncompromising as a sword in the hand of the law. For this sword, as has here been shown, can be most terribly two-edged. It would hold as much peril for the wielder as for the intended victim.

---

[15] See, for detailed discussions, Gatley, Libel and Slander (4th ed., 1953); Odgers, Libel and Slander (5th ed., 1911); and for an excellent discussion with many late citations, Julian v. American Business Consultants, 2 N. Y. 2d 1, 137 N. E. 2d 1 (1956).