Marquette Law Review

Volume 48
Issue 1 *Summer 1964*

Article 14

Recent Decisions: Torts: Trial Court Difficulties in Applying the New Rule of Fair Mistake to Civil Libel

Robert A. Melin

Dean Prosser's indignation at the objection that recognizing the intentional infliction of mental distress as a separate tort would create a "Pandora's box" adequately portrays the opposition the majority of courts have given to each of the classic policy considerations. Prosser pointed out that

> it is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation,' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds.[32]

Recognition of the intentional infliction of severe emotional distress as a separate tort is a great stride in the modern development of the law. The legal profession has recognized the developments, both in medical science and the law, and relied thereon in extending the mantle of protection to an individual's right to enjoy peace of mind without intentional invasion. Whether this step marks but the midpoint in the eventual movement to allow recovery for mental distress resulting from negligent action has yet to be finally resolved.

FRANCIS J. PODVIN

Torts: Trial Court Difficulties in Applying the New Rule of Fair Mistake to Civil Libel: Defamation, comprising libel and slander, is one of the most complex areas of the law, replete with distinctions and qualifications.[1] The United States Supreme Court has recently added to the already existing constitutional restrictions by holding that the first amendment through the fourteenth "delimits a State's power to award damages for libel in actions brought by *public officials* against critics of their *official conduct*,"[2] (emphasis added) unless *actual malice* is shown. Before discussing the significance of this decision, it is necessary to review briefly the traditional law in this area.

Defamation involves the communication to others of matter which tends to lessen the goodwill, respect, esteem, or confidence in which a person is held or to encourage derogatory, adverse, or unpleasant feelings or opinions about him.[3] Originally, libel was defined as written defamation. This definition is no longer accurate. Libel, today, consists in the embodiment of defamation in some seemingly permanent physical

---

[32] PROSSER, *op. cit. supra* note 13, at 39. See also Kniesin v. Izzo, 22 Ill. 2d 73, 174 N.E. 2d 157 at 165: "Consequently, we must agree with those jurists and critics who find that the reasons advanced in the cases for denying an action for the intentional infliction of severe emotional distress have for the most part been added to support a predetermined conclusion dictated by history and the fear of extending liability . . ."

[1] WINFIELD, TORT 244 (5th ed. 1950); PROSSER, TORTS 572 (2d ed. 1955); 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 273 (1906).

[2] New York Times Co. v. Sullivan, 84 S. Ct. 710, 727 (1964).

[3] RESTATEMENT, TORTS § 559 (1938).

form[4] (*e.g.*, a motion picture,[5] statue,[6] sign,[7] or even trailing plaintiff in a conspicuous manner[8]).

Once matter is shown to be libelous "per se" (*i.e.*, defamatory on its face[9]), it is actionable without proof of damages unless privileged.[10] One type of qualified privilege is that which allows publication of matters of public interest or concern, even though defamatory in nature. This privilege is limited to matters which are of legitimate concern to the whole community. It is thought that the social value of such publication outweighs possible injury to a plaintiff's reputation. The chief subject of dispute with respect to the privilege of public interest turns upon misstatements of fact, as distinct from those which express mere opinion. The majority view is that statements of opinion, although otherwise libelous, so long as they are fair[11] and in the public interest are privileged, but misstatements of fact, even though accidental, are not. This is the so-called doctrine of fair comment.[12] A minority of courts, whose number has been increasing in recent years, extend the privilege not only to statements of opinion, but also to misstatements of fact otherwise libelous, if made in the public interest and without actual malice.[13]

The Supreme Court recently declared in *New York Times Co. v. Sullivan*[14] that the first amendment requires all courts to adopt the minority position in cases involving criticism of the official conduct of public officers. Respondent in the *Sullivan* case was Commissioner of Public Affairs and Supervisor of the Police Department of Montgomery, Alabama. Petitioner, the *New York Times,* ran an advertisement on

---

[4] PROSSER, *op. cit. supra* note 1, at 586.
[5] Merle v. Sociological Research Film Corp., 166 App. Div. 376, 152 N.Y.S. 829 (1915).
[6] Monson v. Tussauds, 1 Q.B. 671 (1894).
[7] Tarpley v. Blabey, 2 Bing. N.C. 437 (1936).
[8] Schultz v. Frankfort Marine, Acc. & Plate Glass Ins. Co., 151 Wis. 537, 139 N.W. 386 (1913).
[9] Lewis v. Hayes, 177 Cal. 587, 171 Pac. 293 (1918). A given action may also be libelous "per quod" (*i.e.*, defamatory in the light of surrounding circumstances). Some courts hold that where libel "per quod" is involved, special damages must be shown (except in certain instances). Chase v. New Mexico Publishing Co., 53 N.M. 145, 203 P. 2d 594 (1949).
[10] Some courts view the matter differently, holding, in substance, that where a privilege is applicable, the initial expression is not libelous. In either case, there is the same result (*i.e.*, no liability). There are two categories of privilege, absolute and qualified. Each category is broken down into types. Only that type of qualified privilege pertinent to the subject of this article is discussed in the text.
[11] "Would any fair man, however prejudiced he might be, or however exaggerated or obstinate his views, have written this criticism?" Merivale v. Carson, 20 Q.B.D. 275, 280 (1887).
[12] It has been adopted in more than three-fourths of the states, including Wisconsin. See Annot., 110 A.L.R. 412 (1937), supplemented in Annot., 150 A.L.R. 358 (1944).
[13] This rule, or a slight variation of it, has been adopted in about one-fourth of the states. *Id.*, 110 A.L.R. at 435, supplemented in 150 A.L.R. at 362.
[14] Note 2 *supra.*

behalf of a Negro group seeking donations for the civil rights movement which contained the following statement:

> In Montgomery, Alabama after students sang "My Country 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school and truckloads of police armed with shotguns and teargas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission. . . . They have arrested him [Dr. Martin Luther King] seven times for "speeding," "loitering" and similar offenses.[15]

Respondent claimed that the quoted excerpt was understood as referring to him, since he was Supervisor of Police (although his name was not mentioned), and that it diminished his reputation. There were several factual inaccuracies in the quoted excerpt. The students on the capital steps sang the national anthem, not "My Country, 'Tis of Thee." The nine students who were expelled by the Board of Education were expelled because they sought to integrate a lunch counter, and not because they led the demonstration on the capital steps. "Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on a single day."[16] The campus dining hall was never padlocked, and although police were deployed near the campus in large numbers, they did not "ring" the campus on the occasion in question. Dr. King was arrested four times, instead of seven as the article stated.[17]

Had the Court chosen to do so, it might have decided the case against respondent simply on its facts. Respondent, as the Court emphatically indicates,[18] had failed to prove his case. He did not show that the advertisement was understood as referring to him. Moreover, even if it were so understood, he did not show that it tended to diminish rather than enhance his reputation in the eyes of those who read it. The Court, however, chose rather to use this appeal as the basis upon which to enunciate a broad and sweeping constitutional mandate: "[T]he Constitution delimits a state's power to award damages for libel in actions brought by public officials against critics of their official conduct,"[19] unless actual malice is shown by the plaintiff. "We must recognize," said Mr. Justice Goldberg in a concurring opinion, "that we are writing upon a clean slate."[20]

---

[15] *Id.* at 714.
[16] *Id.* at 715.
[17] *Ibid.*
[18] *Id.* at 730-32.
[19] *Id.* at 727.
[20] *Id.* at 736. Justices Goldberg and Black wrote concurring opinions in this case. They felt that the press should be absolutely privileged when discussing the official conduct of public officials. In their view, therefore, even if actual malice could be proved, liability would not attach.

Mr. Justice Brennan, speaking for the Court, stated that this country is committed to a policy of free debate on public issues and that first amendment guarantees are not conditioned upon factual accuracy. He admitted that the precise issue involved here was presented to the Supreme Court in only one previous case and that, in that instance, the Court was equally divided; therefore, the question was not decided.[21] He cited but one federal court case supporting the minority view and placed heavy reliance upon it.[22] That case involved an article, published in a syndicated column, accusing one Congressman Sweeney of opposing a certain candidate for a federal judgeship because he was Jewish. The United States Court of Appeals for the District of Columbia dismissed the suit, holding that errors of *fact,* particularly where a man's mental processes are involved, are inevitable. As this column appeared in many different newspapers, Congressman Sweeney also brought suit for the same libel in various state courts. It is interesting to note that several state courts following the fair comment rule also dismissed Sweeney's suit, holding that the column in question constituted no more than fair comment.[23]

The decision of the Supreme Court, it seems, was governed less by constitutional precedent than by practical and pragmatic considerations. Its primary fear was that debate on public issues would be stifled by "self-censorship" in violation of the first amendment if critics of official conduct had to guarantee the factual accuracy of their assertions. There was a difference, in the mind of the Court, between what one knows to be true and what one can prove in court to be true.

> Would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.[24]

Another prime consideration in the Court's opinion was "the protection accorded a public official when he is sued for libel by a private citizen."[25] Public officials, federal and state, may make any statement within the outer perimeter of their duties and it is privileged, *at least* if it is shown to be without actual malice. The reason behind this privi-

---

[21] *Id.* at 720. The case was Schenectady Union Publishing Co. v. Sweeney, 316 U.S. 642 (1942).

[22] New York Times Co. v Sullivan, *supra* note 2, at 721. The case was Sweeney v. Patterson, 128 F. 2d 457 (D.C. Cir. 1942). It should be pointed out that the court in *Sullivan* did rely on state court cases advancing the minority "fair mistake" view. See note 2 *supra,* at 726 n. 20.

[23] Sweeney v. Beacon Journal Publishing Co., 66 Ohio App. 475, 35 N.E. 2d 471 & 764 (1941); Sweeney v. Newspaper Printing Corp., 177 Tenn. 196, 147 S.W. 2d 406 (1941); Sweeney v. Philadelphia Record Co., 126 F. 2d 53 (3d Cir. 1942). *But cf.* Sweeney v. Schenectady Union Publishing Co., 122 F. 2d 288 (2d Cir. 1941). This is the case cited in note 21 *supra* which equally divided the Supreme Court.

[24] New York Times Co. v. Sullivan, *supra* note 2, at 725.

[25] *Id.* at 727.

lege is that without it, a public official might be less vigorous and effective in administering the policies of his government.[26] The Court felt that a citizen should be accorded the same privilege with respect to public officials, for "it is as much his duty to criticize as it is the officials' duty to administer."[27]

It is not the purpose of this article to examine this opinion and analyze the various philosophical positions which underlie the several opinions of the Justices. What will be attempted is a rather careful exploration into the practical difficulties a trial lawyer and court might face in attempting to apply the black-letter rule.

To whom, then, do the benefits of this immunity extend? If limited to the facts in this case, immunity would extend to large scale newspapers. The Court, however, does not so limit itself. Perhaps, then, it extends to everyone within the ambit of the term "freedom of press." This term is, of course, not limited to newspapers and periodicals, but necessarily embraces pamphlets, leaflets, and every sort of publication affording a vehicle of information and opinion.[28] Still, the Court nowhere uses the term "freedom of the press." It does, however, use the term "libel" in its statement of the rule, and this, it seems, must be regarded as the limiting factor. Libel does not apply merely to defamation in the press, but to the embodiment of defamation in any more or less permanent physical form. It thus appears that immunity extends to anyone who criticizes official conduct of a public official and in so doing uses a vehicle which embodies the criticism in some sort of permanent physical form.[29] It is likely, however, that the Court will soon extend this immunity to one who uses any vehicle of expression, including speech. The court in *Sullivan* continually speaks of "First Amendment freedoms and guarantees,"[30] which include, of course, freedom of speech. More specifically, it speaks of defamation, which comprises both libel and slander.

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct. . . .[31]

---

[26] Barr v. Matteo, 360 U.S. 564, 571 (1959).

[27] New York Times Co. v. Sullivan, *supra* note 2, at 727. The Court noted further (at p. 724) that the penalty for criminal libel is often less than the damages awarded for civil libel (particularly as civil libel is often actionable without proof of damage). Yet, the defendant in a suit for criminal libel, unlike a civil libel suit, is accorded the benefits of indictment and proof beyond a reasonable doubt.

[28] Lovell v. City of Griffin, 303 U.S. 444 (1938); Cole v. City of Fort Smith, 202 Ark. 614, 151 S.W. 2d 1000 (1941); Knapp v. Post Printing & Publishing Co., 111 Col. 492, 144 P. 2d 981 (1943).

[29] One who, for example, without actual malice makes and displays a statue of a local politician lifting money from the city treasury would be privileged.

[30] New York Times Co. v. Sullivan, *supra* note 2, at 725 ("First Amendment Freedoms"), 721 ("First Amendment guarantees"), and 720 ("standards that satisfy the First Amendment").

[31] *Id.* at 726.

It appears that the scope of this immunity will be broadened to include speech when an appropriate factual situation arises.

Who, then, may be criticized with unintentional factual error? The answer, it appears, is a public official. But who is a public official? Is the local dogcatcher a public official? The Court gives no answer to this, except to state in a footnote that it has "no occasion . . . to specify categories of persons who would or would not be included."[32] This wording at least implies that there is some limitation other than the broad grouping, "public official." Such a construction would appear wise, for among the more minor officials, at least, private life looms larger than public. The result is that a factually erroneous statement would do more injury to such a man's private life than to his public life. It is not clear whether to be a public official one must actually hold an office. In the first presidential race between Governor Stevenson and General Eisenhower, could one misstate facts in criticizing Stevenson who was then Governor of Illinois, but not Eisenhower who held no public office? The Court gives no direct answer, except to cite several cases in a footnote which apply the same rule to candidates for public office.[33] It is suggested that the term *public figure* is more in accord with the Court's intent than "public official." Must this public figure be a person somehow connected with political or governmental activities? This does not seem to be the case. The broader privilege of comment on matters of public interest,[34] of which this privilege as to public figures is but an offshoot, *applies* to any matter of concern to the whole community. Thus, it appears, a religious leader might be as much a public figure as a political leader.

What, then, may be criticized? The answer, it appears, is the official conduct of a public figure. But what is official conduct in a given case? The answer to this question would seem to be of critical importance to a trial lawyer faced with a client seeking to know if he has a cause of action, or to a trial court faced with a case of this sort. Still, the Court expressly refuses to define this term in any way.[35] In *Bar v. Matteo,*[36] the Court held that the comments of a federal official are absolutely privileged if made "within the outer perimeter"[37] of his duties. Correlating the two cases, it is suggested that the trial court is to decide from the facts of a given case whether the activity commented upon

[32] *Id.* at 727 n. 23.
[33] *Id.* at 726 n. 20. Cases cited are: Phoenix Newspapers v. Choiser, 82 Ariz. 271, 276-77, 312 P. 2d 150 (1957); Friedell v. Blakely Printing Co., 163 Minn. 226, 230, 203 N.W. 974 (1925); Chagnon v. Union Leader Corp., 103 N.H. 426, 438, 174 A. 2d 825 (1961).
[34] See p. 129 *supra* as to the privilege of comment on matters of public interest. It is universally agreed that the rule of fair comment applies to public figures, not simply political figures.
[35] New York Times Co. v. Sullivan, *supra* note 2, at 727 n. 23.
[36] Note 26 *supra.*
[37] *Id.* at 575.

is within the outer perimeter of the public figure's duties. This, if correct, is a most vague standard.

Are there any limits to this privilege? The only limit is that the factually erroneous criticism may not be made with actual malice. Traditionally, when a document has been found both libelous and unprivileged, malice has been implied. Actual or express malice, however, may not be implied from the document itself or even from suspicious extrinsic circumstances.[38]

> Within libel and slander law "Actual Malice" frequently called "express malice" or malice in fact means personal spite, hatred or ill will and is not merely malice in law, that is, the intentional doing of a wrongful act without just cause or excuse.[39]

The Court itself asserts that to find actual malice, the statement must be made "with knowledge that it was false or with reckless disregard of whether it was false or not."[40]

As a practical matter, actual malice is difficult to prove in a courtroom. Mr. Justice Black, in a concurring opinion, quite aptly comments: " 'Malice,' even as defined by the court, is an elusive, abstract concept hard to prove and hard to disprove."[41] Editorial comment in some newspapers indicates a belief that they have now been given a free rein. The import of this decision, in their opinion, is that a newspaper printing factual matter on the official conduct of public figures need do little checking as to the accuracy of its assertions.[42] Yet courts have expressed willingness to find actual malice if the defendant did not have reasonable grounds or probable cause to believe in the truth of his charges,[43] or if he did not make such investigation as to the truth of the charge as the nature of the charge and all surrounding circumstances demanded.[44] Certainly, the facts in *Sullivan* indicate that the *Times* had reasonable cause to believe in the truth of its advertisement, and that it did not print it with "reckless disregard of whether it was false or not." Thus, while this rule protects inadvertent factual error,[45] it may well require such investigation into the truth of reported facts on the part of a newspaper as is consistent with the term "responsible journal-

[38] Phoenix Newspapers v. Choisser, 82 Ariz. 271, 312 P. 2d 150 (1957); Pulvermann v. A. S. Abell Co., 131 F. Supp. 617 (1955).
[39] Robinson v. Home Fire Marine Ins. Co., 244 Iowa 1084, 59 N.W. 2d 776 (1953).
[40] New York Times Co. v. Sullivan, *supra* note 2, at 726.
[41] *Id.* at 733.
[42] See, *e.g.*, Milwaukee Journal, Mar. 13, 1964, pt. 1, p. 18, col. 1.
[43] Williams v. Standard Examiner Publishing Co. 83 Utah, 31, 27 P. 2d 1 (1933); Good v. Higgins, 99 Kan. 315, 161 Pac. 673 (1916); Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 (1908); Mulderig v. Wilkes-Barre Times, 215 Pa. 470, 64 Atl. 636 (1906).
[44] Egan v. Dotson, 36 S.D. 459, 155 N.W. 783 (1915).
[45] Many writers have urged some extension of immunity to protect against inadvertent factual error. PROSSER, *op. cit. supra* note 1, at 603; Note, 25 MINN. L. REV. 495 (1941); Note, 38 HARV. L. REV. 1100 (1925).

ism," as determined by general practice among newspapers and periodicals of average caliber.[46] The rule of fair comment with respect to the official conduct of a public official has been replaced (in the author's view) by a *rule of fair mistake.*[47] This implies that while the requirement that the assertion be "comment" has been abrogated, the requirement that it be *fair* is still very much existent.

The burden of proof as to the matter of *malice in fact* is expressly placed upon the plaintiff.[48] The problem thus arises as to the nature and quantity of proof a plaintiff must produce before a defendant must come forward with rebuttal evidence and show proper and responsible journalistic techniques, when such defendant has pleaded "fair mistake." The Court did not deal with this evidentiary question. If, on the one hand, this means that the plaintiff (to reach the jury) must show that internal newspaper procedure (reporting, data checking, etc.) was not what it should have been, his burden may be difficult, practically, to sustain. If, on the other hand, it simply means that he must show that the true facts were readily available or that a simple check would have shown the error, the requirement would not appear too stringent. This latter alternative, it seems, would make the rule practically workable.

From the point of view of the trial court and the trial lawyer, therefore, what at first appears to be a clearly defined black letter rule leaves many questions unanswered. Whether this rule will be interpreted liberally, as has been suggested, or narrowly is a matter for future construction. It appears, nevertheless, that this test, like the *Roth*[49] test for obscenity, will involve judicial (trial and appellate) examination of individual cases on their facts rather than legal rules or syllogisms.

ROBERT A. MELIN

Federal Jurisdiction: The Abstention Doctrine—Two recent decisions illustrate the problems created in applying the abstention doctrine, which arose as a result of *Erie R.R. v. Tompkins.*[1] The doctrine is a self-limitation upon the jurisdiction of federal courts when they are presented with suits which deal with questions of unclear or undecided state law. In these cases, the federal courts, acting in matters

[46] The same sort of standard would apply, of course, to individuals and organizations other than newspapers seeking to invoke the privilege (*i.e.,* probable cause to believe in the truth of the charges and/or such investigation into their accuracy as all the circumstances indicate is necessary). It should be noted, however, that more than mere negligence or lack of reasonable care is required to hold a statement, otherwise meeting the requirements, to be unprivileged.

[47] The term "fair mistake" has been coined by the author in the belief that it succintly expresses the new rule, as the term "fair comment" did the old rule.

[48] New York Times Co. v. Sullivan, *supra* note 2, at 726.

[49] Roth v. United States, 354 U.S. 476 (1957).

[1] 304 U.S. 64 (1937).