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Torts - Defamation - Constitutional Standard

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TORTS—DEFAMATION—CONSTITUTIONAL STANDARD—The United States Supreme Court has held that in a libel action by a private individual against a radio station for a defamatory falsehood in a newscast relating to his involvement in an event of public concern, the individual can recover only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false.

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

A licensed radio station broadcast news stories of the arrest of George Rosenbloom, an obscure distributor of nudist magazines, for possession of obscene literature. The broadcasts used the terms "smut literature racket" and "girlie-book peddler," to denote that the police in Philadelphia had "hit" the main distributor of obscene material. Rosenbloom was acquitted of the criminal obscenity charges because the state court held as a matter of law the magazines were not obscene. Subsequently, he filed a diversity action in the federal district court for damages under Pennsylvania's libel law.[1]

The district court held that the holding of *New York Times Co. v. Sullivan*,[2] in which a public official was unable to recover for defamatory falsehoods relating to his official conduct unless he proves actual malice, could not be extended to the instant case because Rosenbloom was neither a public official nor a public figure. Consequently, the jury awarded compensatory and punitive damages. The Court of Appeals for the Third Circuit reversed, holding the *New York Times* standard was applicable to news broadcasts reporting "matters of public interest."[3]

The Supreme Court affirmed the court of appeals' decision. The Court recognized the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."[4]

Rosenbloom argued that the Constitution required only that a private individual prove that the publisher failed to exercise reasonable care in publishing defamatory falsehoods. First, the private in-

1. Rosenbloom v. Metromedia, Inc., 289 F. Supp. 737 (E.D. Pa. 1968), *rev'd*, 415 F.2d 892 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971).
2. 376 U.S. 254 (1964).
3. Rosenbloom v. Metromedia, Inc., 415 F.2d 892 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971).
4. 376 U.S. at 270-71.

dividual did not assume the risk of defamation by thrusting himself into the public limelight.[5] Secondly, the private individual does not have access to the media to rebut the falsehoods as a public figure would have. Thus, the common law action of defamation is a private individual's only redress.

The Court held that these arguments could not be reconciled with the purpose of the first amendment. Recognizing that when only a few well-known figures have access to the media, and that when the public official serves in a minor position,[6] or, as in *Rosenblatt v. Baer*,[7] when one is no longer in the limelight, the argument that public figures and/or officials need less protection than the private individual is without merit. The Court stated that the solution for protection of a private individual's reputation lies in state retraction or right of reply statutes, rather than in stifling public discussion of matters of public concern.[8]

The Court considered whether to apply a standard of reasonable care and concluded that it was an "elusive standard" which does not permit the necessary "breathing space" for the vital needs of the first amendment. Thus, an extension of the *New York Times* standard was needed to prevent self-censorship.

In the landmark *New York Times* case, an advertisement was placed in the *New York Times*. It was an inaccurate account of civil rights demonstations in Alabama and allegedly defamed a public official. The Supreme Court held that a state cannot award damages to a public official for defamatory falsehoods that relate to his official conduct unless he proves "actual malice"—that the statment was made with knowledge of its falsity or with reckless disregard of whether it was false or not. The Court based its decision on the premise that there is a profound commitment to debate on public issues and that the debate should be "uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."[9] "Breathing space" is afforded to the press and mass media because the Court realized that

5. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
6. Pickering v. Board of Education, 391 U.S. 563 (1968) (members of a local school board); St. Amant v. Thompson, 390 U.S. 727 (1968) (police officers); Lundstrom v. Winnebago Newspaper Inc., 58 Ill. App. 2d 33, 206 N.E.2d 525 (1965) (retired mayor).
7. 383 U.S. 75 (1966).
8. 403 U.S. at 47 n.15; *see generally* Donnelly, *The Right to Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867 (1948).
9. 376 U.S. at 270.

the importance of interchanging ideas necessitates even protecting some erroneous speech.[10]

In *Garrison v. Louisiana*,[11] the Supreme Court extended the *New York Times* standard to cases of criminal, as well as civil, libel when it held that the Constitution limits state power to impose sanctions[12] on individuals who criticize public officials. The Court noted that any relevant criticism of a public official was within the *New York Times* privilege, even if it reflects on the official's private character.[13] Again, the Court placed emphasis on the profound national commitment to open debate on public issues.[14]

The public event, rather than the individual's status, was recognized as the determinative factor in an action against the mass media for libel in the companion cases of *Curtis Publishing Co. v. Butts*[15] and *Associated Press v. Walker*.[16] In these cases, a football coach and a retired Army general were held to be "public figures," as both attracted a substantial amount of independent public interest. The Court reasoned that both men thrust their personalities into the "vortex" of public matters "and each had sufficient access to the means of counterargument to be able 'to expose through discussion the . . . fallacies' of the defamatory statements."[17]

The Court's next extension of the *New York Times* case was in *Time, Inc. v. Hill*.[18] In *Hill*, the plaintiffs sued *Life* magazine for invading their privacy. *Life* had published an article about a Broadway play which was a fictionalized account of the Hill family being held hostage by three escaped convicts. The Court held that the plaintiffs could not recover unless they proved actual malice. Since the Court did not consider the status of the plaintiff, it was predictable

10. *Id.* at 269-72.
11. 379 U.S. 64 (1964).
12. The sanction was a state law which punished false statements if made with ill-will without regard to the *New York Times* standard; if ill-will was not established, a false statement concerning public officials would be defamatory if not made in reasonable belief of its truth under Louisiana law. LA. REV. STAT. tit. 14 § 47 (1950).
13. 379 U.S. at 76-77.
14. This rationale was the impetus in the expansion of the *New York Times* holding to include all public officials who have or appear to have such substantial responsibility for control of government affairs that the employee's position invites scrutiny. Rosenblatt v. Baer, 383 U.S. 75 (1966) (county supervisor of recreation area).
15. 388 U.S. 130 (1967).
16. 388 U.S. 140 (1967).
17. 388 U.S. at 155. *See also* Greenbelt Publishing v. Bresler, 398 U.S. 6 (1970) (well-known real estate dealer).
18. 385 U.S. 374 (1967).

that the Court would make no distinction between an action for invasion of privacy and an action for libel.[19]

Meanwhile, lower federal courts expanded the *New York Times* standard to include any published news item in which the public has a valid interest, irrespective of the plaintiff's status.[20] The Court of Appeals for the Ninth Circuit in *United Medical Laboratories, Inc. v. Columbia Broadcasting System Inc.*[21] extended the *New York Times* standard because of the Supreme Court's continued emphasis on the first amendment. The Court stressed "the right of the public to have an interest in the matter involved, and its right therefore to know or be informed about it."[22] The rationale in *United Medical* was based on the belief that the field of public health was inherently subject to public scrutiny.

In the *New York Times* case the actual malice standard,[23] which required that the defendant knew the statements were false, or published them with reckless disregard of whether they were false or not, was of prime importance.[24] Although the Court did not clarify the meaning of actual malice, its later decisions interpreted it harshly. In *Garrison,* merely demonstrating that the utterances were motivated by ill-will or hostility was insufficient to establish liability. Instead, the plaintiff must prove a "high degree of awareness of their [the utterances'] probable falsity."[25] Later, in *St. Amant v. Thompson,*[26] the Court expanded the meaning of reckless disregard and said that there must be sufficient evidence to permit the conclusion that the defendant

19. The magazine article was published over two and one-half years after the incident. It is suggested that a news article itself may re-activate public interest in a prior event that was or was not newsworthy at that time. This indicates that the press may create its *own* constitutional protection by its ability to determine whether an event is newsworthy. *See* Nimmer, *The Right to Speak From Times to Time,* 56 CALIF. L. REV. 935 (1968). Nimmer contends that invasions of privacy should be without first amendment protection because a person's reputation can be "rehabilitated" if a libel has occurred while more speech cannot cure an invasion of privacy.

20. Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970) (accomodations at Atlanta, Ga., during the Masters Golf Tournament); Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir. 1970) (organized crime); United Medical Laboratories, Inc. v. Columbia Broadcasting System Inc., 404 F.2d 706 (9th Cir. 1968), *cert. denied,* 394 U.S. 921 (1969) (matters of public health); Rosenbloom v. Metromedia, Inc., 415 F.2d 892 (3d Cir. 1969), *aff'd,* 403 U.S. 29 (1971) (crime).

21. 404 F.2d 706 (9th Cir. 1968), *cert. denied,* 394 U.S. 921 (1969).

22. *Id.* at 710.

23. Actual malice as defined by the Supreme Court is not the traditional common law malice that was defined as ill-will, evil motive, or intent to injure. *See* W. PROSSER, THE LAW OF TORTS 821-22 (3d ed. 1964); 53 C.J.S. *Libel and Slander* § 2 (1968). *See also* Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167, 191 A.2d 662 (1963).

24. 376 U.S. at 279-80.

25. 379 U.S. at 74.

26. 390 U.S. 727 (1968).

had "serious doubts as to the truth of [his] publication."[27] The Court also held that the plaintiff must prove his case with "convincing clarity."[28] The Court interpreted Justice Harlan's opinion in *Curtis Publishing Co.* to mean that reckless conduct is not measured by the reasonable man standard. Thus, a plaintiff's burden of proof is almost insurmountable when a defamation action involves the mass media and the matter is of general or public concern.[29] Recovery is highly improbable.[30] In reality, it would seem that the Court accepted the absolutist view espoused by the late Justice Black in the *New York Times* case.[31] His concept of the first amendment does not permit recovery of libel judgments against the mass media, even when statements are broadcast with knowledge that they are false.[32]

It is suggested that the actual malice standard does not strike the desired balance between the need for full discussion and debate on public matters and the need for protection of personal reputations and privacy against harmful falsehoods. The Court should not only balance the individual's interest in protecting his reputation or privacy against society's need for a free flow of information,[33] rather, it should take into account a multitude of factors. The subject matter concerned, status of the plaintiff, "news-gathering ability" of the mass media, reliability of the source of information, deadlines for publication, and notice that the material was false are additional factors which should be considered. A one-facet test of whether the matter is of general or public concern does not adequately balance the interests involved.

Another problem which was not considered in *Rosenbloom* was the absence of the definition of what constitutes general or public interest. The Court held the public has a vital interest in a person's arrest for distributing obscene magazines.[34] The Court noted that the issues of

27. *Id.* at 731.
28. *See* St. Amant v. Thompson, 390 U.S. 727 (1968); Ragano v. Time, Inc., 302 F. Supp. 1005, 1010 (M.D. Fla. 1969).
29. *See* Note, *Public Official and Actual Malice Standards: The Evolution of New York Times Co. v. Sullivan*, 56 IOWA L. REV. 393 (1970), for a detailed analysis of the trial stages and what the plaintiff must prove at each stage to enable him to recover.
30. Only a few cases have allowed recovery, or summary judgment was denied on the basis that the plaintiff was able to show actual malice. Pape v. Time, Inc., 354 F.2d 558 (7th Cir. 1965); Ragano v. Time, Inc., 302 F. Supp. 1005 (M.D. Fla. 1969); *see also* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (modified form of actual malice found—highly unreasonable).
31. 376 U.S. at 293.
32. *Id.*
33. *See* Wright, *Defamation, Privacy, and the Public's Right to Know; A National Problem and a New Approach*, 46 TEXAS L. REV. 630 (1968).
34. 403 U.S. at 43.

public interest need not be of *importance* or *significance* but only of concern. However, it does not delineate what standard to apply nor suggest any rules. Its only attempt to clarify this murky area was a footnote explaining that there are some activities of an individual which are outside the realm of public or general interest.[35] State court decisions suggest that the scope of public or general interest is broad.[36]

The Court suggested that *the* solution to providing protection for a private individual's reputation lies in the enactment of right-of-reply and retraction statutes.[37] The statutes' purpose is that the person harmed may vindicate his reputation and thus make the mass media an open forum for conflicting viewpoints.[38]

A practical consideration for the acceptance of the right-of-reply statutes is judicial economy. The defamed person would not have to incur the expense and delay involved in litigation. He only would have to submit his reply to the newspaper.[39]

A retraction statute would perform a service for both the defamed individual and the truth-seeking public. If the retraction is given proper coverage, the person is vindicated through the same medium and the same general audience receives notice of the publisher's error. However, a publisher's refusal to retract a statement would raise the constitutional question of whether the mass media can be compelled to publish a retraction without a judicial determination of the truth or falsity of that statement.[40] It is suggested that the adoption of a uniform national system of remedies is necessary in order to avoid the burden which would be placed on multi-state publishers by the possibility of retraction in one state and reply in another.[41]

If the Court's analysis of the problem is correct, that "the public's primary interest is in the event, . . . not in the participant's prior anonymity or notoriety,"[42] it is suggested that the source of the information

35. *Id.* at 44 n.12.
36. *See* 85 HARV. L. REV. 222, 226 (1971).
37. 403 U.S. at 47 n.15.
38. Although there has been only limited American experience with a legally enforceable right-to-reply, France has enforced such a law since the early 1800's. *See* Donnelly, *The Right to Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867, 884 (1948). *See also* CAL. CIV. CODE § 48a (West 1941); MASS. ANN. LAWS ch. 231, § 93 (Supp. 1947).
39. Problems are created if the newspaper refuses to print a retraction but it would seem that a properly drafted statute could obviate these problems or provide an avenue for remedies.
40. *See* Note, *Vindication of the Reputation of a Public Official*, 80 HARV. L. REV. 1730, 1739 (1967), for other problems dealing with retraction statutes. *See also* 47 U.S.C. § 315 (1970), and the problems raised dealing with the Equal Time doctrine.
41. 80 HARV. L. REV. at 1755-56 (1967).
42. 403 U.S. at 43. A simple suggestion would be to delete the plaintiff's (or would be

is secondary. Although *Rosenbloom* extended the *New York Times* standard only to licensed radio stations and other mass media, a similar standard for private individuals would appear to be required by the Constitution's guarantee of equal protection.[43] If this is a valid deduction, the law of defamation is emasculated, if not destroyed.

In conclusion, the decision in *Rosenbloom* was predictable; however, the Court failed to discuss three vital issues: (1) whether the actual malice standard adequately provides relief for defamed individuals; (2) what constitutes a public or general interest; and (3) what are the solutions for these problems. Obviously, there is a fundamental and important need for open dissemination of ideas and information, however, it is not reasonable to satisfy that need at the expense of an individual's reputation.[44]

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plaintiff's) name from the news story if the court's belief, that the public's primary interest is in the event, is true; but somehow this has been left for editorial judgment, not judicial determination.

43. Lovell v. City of Griffin, 303 U.S. 444 (1938), where the Supreme Court held that the liberty of the press is not confined to newspapers *per se* but is a personal liberty.

44. Possibly the courts will follow the recent Pennsylvania Supreme Court decision in Matus v. Triangle Publications, Inc., 445 Pa. 384, 286 A.2d 357 (1971), by also narrowly defining what constitutes a matter of general or public interest.