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Torts—Libel—A Conditional Privilege to Make Non-Malicious Misstatements Concerning Participants in Public Discussion

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TORTS—LIBEL—A CONDITIONAL PRIVILEGE TO MAKE NON-MALICIOUS MISSTATEMENTS CONCERNING PARTICIPANTS IN PUBLIC DISCUSSION

Plaintiff, a Nobel Prize winning chemist, while appearing before the Senate Judiciary Committee's Subcommittee on Internal Security, refused to produce letters dealing with a nuclear test ban petition which he had submitted to the United Nations. Defendant published an editorial stating that plaintiff had refused to testify and that he had been cited for contempt of Congress. Plaintiff had not been so cited and sued for libel. From a verdict for the defendant, plaintiff appealed. The court *held* that the rule announced in *New York Times v. Sullivan*[1] allowing a privileged misstatement of fact concerning public officials in the absence of proof of actual malice applies to people such as plaintiff who project themselves into public discussion of matters of pressing public concern. *Pauling v. Globe-Democrat Publishing Co.*, 362 F.2d 188 (8th Cir. 1966), *petition for cert. filed*, 35 U.S.L. Week 3082 (U.S. Sept. 13, 1966) (No. 522).

Before 1964, there were two points of view in American jurisdictions concerning the libeling of public officials. The majority of states recognized a conditional privilege to make *fair comment or criticism* of public officials so long as these comments were not malicious.[2] Under the fair comment rule, malice was defined as "personal spite or ill will, or culpable recklessness or negligence."[3] But the publisher was not privileged to make *misstatements of fact* concerning public officials. The theory underlying the rule was that while it was important for the public to have the opportunity to fully discuss the qualifications and conduct of public officials, misstatements of fact were not necessary to that end and allowance of such misstatements would drive able men from seeking careers in government.[4] A minority of states accorded a conditional privilege to make *misstatements of fact* concerning public officials, absent actual malice.[5] Actual malice under the minority rule was defined as

1. 376 U.S. 254 (1964).

2. *E.g.*, Caldwell v. Crowell-Collier Publ. Co., 161 F.2d 333 (5th Cir. 1947) (applying Florida law); Lubore v. Pittsburgh Courier Publ. Co., 101 F. Supp. 234 (D.D.C. 1951); West Memphis News, Inc. v. Bond, 212 Ark. 514, 206 S.W.2d 449 (1947); Barwick v. Wind, 203 Ga. 827, 48 S.E.2d 523 (1948); Cook v. East Shore Newspapers, Inc., 327 Ill. App. 559, 64 N.E.2d 751 (1945); Smith v. Pure Oil Co., 278 Ky. 430, 128 S.W.2d 931 (1939); Martin v. Markley, 202 La. 291, 11 So. 2d 593 (1942); Kleinschmidt v. Bell, 353 Mo. 516, 183 S.W.2d 87 (1944); Rogers v. Courier Post Co., 2 N.J. 393, 66 A.2d 869 (1949); Rathkopf v. Walker, 190 Misc. 168, 73 N.Y.S.2d 111 (Sup. Ct. 1947); Murphy v. Farmers Educ. & Co-op. Union, 72 N.W.2d 636 (N.D. 1955); Thompson v. Newspaper Printing Corp., 325 P.2d 945 (Okla. 1958); Jackson v. Record Publ. Co., 175 S.C. 211, 178 S.E. 833 (1935); Davila v. Caller Times Publ. Co., 311 S.W.2d 945 (Tex. Civ. App. 1958); Owens v. Scott Publ. Co., 46 Wash. 2d 666, 284 P.2d 296 (1955); Annots., 110 A.L.R. 412 (1937), 150 A.L.R. 358 (1944).

3. Hoeppner v. Dunkirk Printing Co., 254 N.Y. 95, 106, 172 N.E. 139, 142 (1930).

4. Post Publ. Co. v. Hallam, 59 Fed. 530, 540 (6th Cir. 1893), the leading case for the fair comment rule.

5. Sweeney v. Patterson, 128 F.2d 457 (D.C. Cir. 1942); Connor v. Timothy, 43 Ariz. 517, 33 P.2d 293 (1934); Snively v. Record Publ. Co., 185 Cal. 565, 198 Pac. 1 (1921); Gough v. Tribune-Journal Co., 75 Idaho 502, 275 P.2d 663 (1954); Manasco v. Walley, 216 Miss. 614, 63 So. 2d 91 (1953); Williams v. Standard-Examiner Publ. Co., 83 Utah 31, 27 P.2d 1

publication of a fact with knowledge that it was false or without reasonable grounds for belief in the truth thereof.[6] The minority jurisdictions reasoned that the need for vigorous public discussion of public officers and candidates for public office outweighed the possible risk to private character.[7]

In 1964 the minority rule became the law of the land. The Supreme Court, in *New York Times v. Sullivan*,[8] held that it was a violation of the first amendment guarantees of free speech and press, made applicable to the states through the fourteenth amendment, to impose liability for *misstatements of fact* about a public official acting in his public capacity, in the absence of actual malice. The Court defined actual malice as the publication of factual misstatement with knowledge of its falsity or with reckless disregard of whether or not it was true.[9] The Court asserted that there is a profound national commitment to robust and uninhibited debate on public issues and that fear of libel judgments would cause inhibiting self-censorship. The Court further pointed out that public officials are immune from liability if they defame someone within the context of their duties, that citizens have a duty to criticize the government, and that if the citizen were not given a privilege similar to that of public officials, public officials would have an "unjustified preference" over their constituents.[10] The two concurring opinions in the *Times* case would have made the right to criticize public officials absolute, not limiting that right by allowing a public official to recover if he could prove actual malice.[11] In a later case the Court applied the *Times* rule to prevent prosecution for criminal libel of public officers without a showing of actual malice.[12] In 1966 in *Rosenblatt v. Baer*[13] the Supreme Court reiterated its stand that the *Times* rule was applicable only to public officials.

In *Rosenblatt*,[14] the Supreme Court declared that the motivating force in the *Times* decision was twofold—"first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues."[15] The Court went on to explain the rationale of the *Times* case:

(1933); Bailey v. Charleston Mail Ass'n, 126 W. Va. 292, 27 S.E.2d 837 (1943); Annots., 110 A.L.R. 412 (1937), 150 A.L.R. 358 (1944).

6. Gough v. Tribune-Journal Co., 75 Idaho 502, 275 P.2d 663, 667 (1954).

7. Coleman v. Maclennan, 78 Kan. 711, 98 Pac. 281 (1908), leading case for the minority view.

8. 376 U.S. 254 (1964).

9. *Id.* at 288. Note that the Supreme Court's requirement of reckless disregard was somewhat more stringent than the reasonableness test applied by the minority states prior to the *Times* case.

10. *Id.* at 282.

11. *Id.* at 293, 297.

12. Garrison v. Louisiana, 379 U.S. 64 (1964).

13. 383 U.S. 75 (1966) (where the Supreme Court reversed a libel judgment for an appointed supervisor of a public recreation area and remanded for determination as to whether the plaintiff was a public official so as to come under the *Times* rule).

14. *Ibid.*

15. *Id.* at 85.

> Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments. The thrust of *New York Times* is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation. Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in *New York Times* are present and the *New York Times* malice standards apply.[16]

Thus, the Supreme Court viewed the problem as a delicate balancing of interests: of the individual in a good reputation and of the public in uninhibited debate. Federal and state courts quickly applied the *Times* decision to numerous public officials,[17] but one court refused to apply the rule to a case in which the defamation of a public official was solely of his private character.[18]

Most of the federal and state courts which refused to apply the *Times* rule to private individuals viewed the rule as applying only to public officials and as being the result of the public official's privileged immunity against liability for defamation.[19] But two courts refused to extend the *Times* rule to private individuals who were participants in public discussion because it was concluded that the equities weighed more heavily for the protection of private reputation than public debate.[20] Those decisions extending the rule to

16. *Id.* at 86.

17. Rosenblatt v. Baer, 383 U.S. 75 (1966), (possibly applicable to appointed supervisor of county recreation area); Henry v. Collins, 380 U.S. 356 (1965) (county attorney and chief of police); Pape v. Time, Inc., 354 F.2d 558 (7th Cir. 1965), *cert. denied*, 384 U.S. 909 (1966) (police lieutenant); Eadie v. Pole, 91 N.J. Super. 504, 221 A.2d 547 (1966) (city assessor); Cabin v. Community Newspapers, Inc., 270 N.Y.S.2d 913 (Sup. Ct. 1966) (school board member); Gilligan v. King, 48 Misc. 2d 212, 264 N.Y.S.2d 309 (Sup. Ct. 1965); Clark v. Allen, 415 Pa. 484, 204 A.2d 42 (1964) (U.S. Senator); McNabb v. Tennessean Newspapers, Inc., 400 S.W.2d 871 (Tenn. 1965) (member of Democratic primary board). The *Times* rule was also applied to candidates for office: Noonan v. Rousselot, 239 A.C.A. 602, 48 Cal. Rptr. 817 (Dist. Ct. App. 1966); Kramer v. Ferguson, 230 Cal. App. 2d 237, 41 Cal. Rptr. 61 (Dist. Ct. App. 1964); Gilberg v. Goffi, 21 A.D.2d 517, 251 N.Y.S.2d 823 (2d Dep't 1964), *aff'd*, 15 N.Y.2d 1023, 207 N.E.2d 260, 260 N.Y.S.2d 29 (1965); Driscoll v. Block, 3 Ohio App. 2d 351, 210 N.E.2d 899 (1965).

18. Tucker v. Kilgore, 388 S.W.2d 112 (Ky. 1965). See also Butts v. Curtis Publ. Co., 242 F. Supp. 390 (N.D. Ga. 1964), *aff'd on other grounds*, 351 F.2d 702 (5th Cir. 1965), *cert. granted*, 35 U.S.L. Week 3124 (U.S. Oct. 11, 1966) (No. 37), where the court refused to extend the *Times* rule to include a college athletic director merely because he was employed at a state university.

19. Clark v. Pearson, 248 F. Supp. 188 (D.D.C. 1965); Fignole v. Curtis Publ. Co., 247 F. Supp. 595 (S.D.N.Y. 1965); Lorillard v. Field Enterprises, Inc., 65 Ill. App. 2d 65, 213 N.E.2d 1 (1965); Powell v. Monitor Publ. Co., 217 A.2d 193 (N.H. 1966); Faulk v. Aware, Inc., 14 N.Y.2d 954, 202 N.E.2d 372, 253 N.Y.S.2d 990 (1964); Youssoupoff v. Columbia Broadcasting System, Inc., 48 Misc. 2d 700, 265 N.Y.S.2d 754 (Sup. Ct. 1965); Dempsey v. Time, Inc., 43 Misc. 2d 754, 252 N.Y.S.2d 186 (Sup. Ct. 1964); Associated Press, Inc., v. Walker, 393 S.W.2d 671 (Tex. Civ. App. 1965), *cert. granted*, 35 U.S.L. Week 3124 (U.S. Oct. 11, 1966) (No. 150).

20. Afro-American Publ. Co. v. Jaffee, 33 U.S.L. Week 2634 (D.C. Cir. 1965); Harper v. National Review, Inc., 33 U.S.L. Week 2341, N.Y.L.J., Dec. 23, 1964, p. 11, col. 2. (N.Y. Sup. Ct. 1964), *aff'd*, 24 A.D.2d 1085, 263 N.Y.S.2d 292 (1st Dep't 1965).

include private individuals in public discussion found the opposite to be true.[21]

In the instant case the Eighth Circuit Court of Appeals, per Judge Blackmun, recognized the importance of the statements made by the Supreme Court that there was a profound national commitment to robust and uninhibited debate of public affairs and public officials. The court also took note of the reservations in certain footnotes to the *Times*[22] and *Rosenblatt*[23] decisions (in which the Supreme Court said it was making no decision whatever about possible extensions of the *Times* rule). The court in the instant case noted possible arguments against extension of the rule to private individuals,[24] but pointed out that no reasonable distinction can be based on the premise that criticism of a private individual who attempts to guide policy in public discussion will be less important to the public interest than will criticism of public officials. In some cases, a private individual may have more influence than some minor public official who is clearly subject to the *Times* rule. Thus, such a person should be entitled to no greater remedy than a person in public office. From the general thrust of the *Times* and *Rosenblatt* decisions and in light of the footnotes therein, the court in the instant case stated that the implications were clear that the *Times* rule was applicable to some private individuals who took active part in public debate. The court extensively chronicled Professor Pauling's past exploits and concluded that he was in fact a person who had thrust himself into the "vortex of the discussion of a question of pressing public concern"[25] and hence, under the above reasoning, the *Times* rule should apply to him.

The reliance of the court in the instant case upon the notes in the Supreme Court decisions seems misplaced. The court put primary emphasis on the *Rosenblatt* footnote[26] and apparently interpreted this note to be an indication by the Supreme Court of the direction it would take if such a case (a person thrusting himself into the vortex of public discussion) were properly before

21. Pauling v. News Syndicate Co., 335 F.2d 659 (2d Cir. 1964) (dictum), *cert. denied*, 379 U.S. 968 (1965); Walker v. Courier-Journal & Louisville Times, 246 F. Supp. 231 (W.D. Ky. 1965); Walker v. Associated Press, Inc., 417 P.2d 486 (Colo. 1966); Pauling v. National Review, Inc., 49 Misc. 2d 975, 269 N.Y.S.2d 11 (Sup. Ct. 1966).

22. New York Times v. Sullivan, 376 U.S. 254, 283 n.23 (1964), at which the Supreme Court said: "We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. . . . Nor need we here determine the boundaries of the 'official conduct' concept."

23. Rosenblatt v. Baer, 383 U.S. 75, 86 n.12 (1966):

> We are treating here only the element of public position, since that is all that has been argued and briefed. We intimate no view whatever whether there are other bases for applying the *New York Times* standards—for example, that in a particular case the interests in reputation are relatively insubstantial, because the subject of discussion has thrust himself into the vortex of the discussion of a question of pressing public concern.

24. The court admitted that it is possible to say that while public interest requires discussion of public officials, there is not a comparable need as to the qualifications of private citizens in public life. Instant case at 196. The court also noted the unjustified preference argument of the Supreme Court in the *Times* decision, but dismissed it as not being a significant part of the rationale of *Times*. *Ibid.*

25. Instant case at 195.

26. Rosenblatt v. Baer, 383 U.S. 75, 86 n.12 (1966).

it. But the plaintiff in *Rosenblatt* was an appointive official and it was not clear that the *Times* rule would apply to him. The Supreme Court, if it wished, could easily have extended the *Times* rule to private individuals in that case by looking past the technicality of the plaintiff's official position. Since the Court did not make such an extension, it would seem reasonable to take the words of the footnote merely to mean that the Court indeed was intimating no view whatever on the matter.

In another footnote in *Rosenblatt*, the Supreme Court said that the public interests protected by the *Times* rule are the interests in discussion, not retaliation,[27] and from this the court in the instant case contended that the unjustified preference argument was not a significant part of the *Times* rationale.[28] In the *Times* decision, the Supreme Court pointed out that failure to give private citizens a libel privilege similar to that of public officials would give public officials an unjustified preference over the citizens they serve.[29] It is submitted that by this the Supreme Court meant that the public official, through use of his absolute privilege is able to increase his personal power over the people and that the privilege of the *Times* decision was extended to citizens so that they could keep a check on an illegitimate extension of that power. This certainly does not seem to be an insignificant basis for the *Times* rule.

It was correctly pointed out by the court in the instant case that some people are able to guide public policy just as much, if not more, than public officials and hence, they should have no greater remedy than men in public office. But the court did not say that the rule would only be extended to people who have this type of influence. Beyond saying that Pauling was in a position to have "some influence"[30] and that Pauling "obviously deemed himself influential,"[31] the court failed to show that Pauling possessed influence equal to that of a public official in guiding public policy. Further, the court did not make clear whether the rule was being applied to Pauling because he had in the past thrust himself into public discussion, or because of his present subcommittee appearance, or a combination of both.

It has been pointed out that an irresponsible press with a privilege as broad as that announced in the *Times* case is not likely to produce an informed public, but rather will produce a misled or misinformed public.[32] In

27. *Id.* at 84 n.10.
28. Instant case at 196.
29. New York Times v. Sullivan, 376 U.S. 254, 282-83 (1964), where the Court said: Analogous considerations support the privilege for the citizen-critic of the government. It is as much his duty to criticize as it is the official's duty to administer. . . . As Madison said, . . . "The censorial power is in the people over the Government, and not in the Government over the people." It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.
30. Instant case at 196.
31. *Ibid.*
32. Note, 51 Va. L. Rev. 106 (1965).

addition, the extension of the *Times* decision may possibly have the effect of restraining free debate, because private individuals will not be willing to come into the public eye and to speak out for fear of being libeled in return.[33]

On the whole, it seems imprudent to extend the *Times* decision to all private individuals who take part in public discussion. People tend to "take with a grain of salt" defamatory statements about a public official, at least more so than when the same things are said about private citizens. In addition, it can be safely said that the responsible press will continue to attempt to print only the truth, and thus the yellow press will be the only true beneficiary of the extension of the rule by receiving a license to make character assassinations almost with impunity. The fact that the defamed party may still sue for libel if he can prove actual malice is of little protection since the decisions in this area tend to show that actual malice is a fairly elusive thing to find and prove.[34] As pointed out by Mr. Justice Stewart, concurring in *Rosenblatt:*

> [T]he preventive effect of liability for defamation serves an important public purpose. For the rights and values of private personality far transcend mere personal interests. Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society.[35]

A few suggestions have been made regarding the problem of whether or not to extend the *Times* rule to private individuals. One suggestion has been to determine in each case whether or not there exists a legitimate public interest in discussing the facts or events from which the alleged defamation arose.[36] Another suggestion has been enactment of a right of reply statute under which the injured party would be able to have his side of the story published in the offending publication.[37]

It is the opinion of the writer that if any extension of the *Times* rule is made to include private individuals, it should be along the lines which the court seemed to develop in its reasoning in the instant case, but which it did not express or apply precisely. That is, if the defendant wished to make use of the *Times* rule as a defense against a plaintiff who was not a public official he would have to show that the plaintiff had influence upon the formation of

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33. *Ibid.*

34. In the instant case, defendant's only excuse for publishing the false statement was: "We felt he was about to be cited, he wasn't." *Id.* at 198. New York Times v. Sullivan, 376 U.S. 254 (1964), failure to check newspaper's own files wherein lay the truth, held not to be actual malice. Pauling v. National Review, Inc., 49 Misc. 2d 975, 269 N.Y.S.2d 11 (Sup. Ct. 1966) (article mentioning plaintiff and others, asking if they were Communists and saying that some undoubtedly were but the proof was not at hand to prove it in court, was held not to constitute actual malice).

35. Rosenblatt v. Baer, 383 U.S. 75, 93 (1966).

36. Comment, 75 Yale L.J. 642 (1966); Bertelsman, *Libel and Public Men*, 52 A.B.A. J. 657 (1966).

37. Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 Cornell L.Q. 581 (1964); for an excellent exposition of the right of reply see Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 Va. L. Rev. 867 (1948).

public policy at least equal to that of a public official, that the present event was of public interest, and that the plaintiff had thrust himself into public discussion of the issue. If any of these elements were not shown to be present, the societal and individual interests in protection of reputation would outweigh the interests in public debate and plaintiff would be allowed to recover.

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TORTS—LIBEL—FALSE ANNOUNCEMENT OF BETROTHAL IS ACTIONABLE PER SE WHERE THE PARTIES ARE ALREADY MARRIED TO OTHERS

Defendant's newspaper published an announcement that plaintiffs Hinsdale and Reiber had become engaged to be married. In fact, they were already married to others, worked in the same office, and lived with their respective spouses and children in the same small community in which defendant's newspaper was published. Hinsdale and Reiber (joined by her husband) commenced actions in libel against defendant. No special damages[1] were alleged in either complaint. The Supreme Court in Special Term dismissed both complaints, holding that an allegation of special damage is necessary where the publication is defamatory only in view of extrinsic facts. The Appellate Division affirmed without opinion.[2] The Court of Appeals reversed. *Held*, where a publication falsely announces the betrothal of persons in fact already married to others, that publication is actionable without a showing of special damage albeit the facts making it defamatory (*i.e.*, that the parties are already married to others) do not appear therein. *Hinsdale v. Orange County Publications, Inc.*, 17 N.Y.2d 284, 217 N.E.2d 650, 270 N.Y.S.2d 592 (1966).

Libel has been described as writing that tends to hold plaintiff up to "ridicule, contempt, shame, disgrace or obloquy, to degrade him in the estimation of the community . . . to diminish his respectability. . . ."[3] Where such a tendency is apparent on the face of a writing, most courts agree that it is actionable per se (*i.e.*, without showing special damages).[4] If the publication becomes defamatory only in light of extrinsic facts (*i.e.*, facts not appearing in the publication itself), it is generally accepted that such *facts* must be specifically alleged,[5]

1. The term "special damage" refers to specific material or pecuniary damage that is a natural but not necessary result of the wrong. Thus, injury to reputation, humiliation, mental anguish, and physical sickness, are not sufficient. Special damages must be pleaded with particularity. See McCormick, Damages §§ 8, 114, 115 (1935).

2. 24 A.D.2d 704, 261 N.Y.S.2d 1005 (2d Dep't 1965).

3. 1 Seelman, Libel and Slander in New York ¶ 18, at 16 (rev. ed. 1964), cited with approval in Hinsdale v. Orange County Publ., Inc., 17 N.Y.2d at 287, 217 N.E.2d at 652, 270 N.Y.S.2d at 595 (1966) [hereinafter cited instant case].

4. The courts thus make a presumption that damage to reputation will inevitably result from the publication. See *e.g.*, Boyd v. Boyd, 116 Va. 326, 82 S.E. 110 (1914). See also Prosser, Torts § 107, at 780 (3d ed. 1964); 1 Seelman, *op. cit supra* note 3, ¶ 331, at 439 n.5 (compilation of New York cases so holding).

5. See Van Heusen v. Argenteau, 194 N.Y. 309, 87 N.E. 437 (1909); Lasky v. Kemp-