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## Torts—Defense to Libel Action

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one time been a union representative, and subsequently had become a labor relations consultant for various employers, in which capacity he had often opposed the defendant's proposals. The Court nevertheless found that the purposes of the union were not solely malicious, though no other possible reasons for the action of the union were given by either the Court of Appeals or the Appellate Division, so no recovery for the intentional injury to plaintiffs' property was possible; i.e., there was justification for the union's action. The dissenters believed that the jury's findings of fact as to motive should not be upset; the majority apparently believed that the jury's findings were completely unreasonable.

*Defense to Libel Action*

In *Crane v. Telegram Corp.*,<sup>54</sup> the plaintiff alleged that the defendant falsely published that he was "under indictment" and that this statement constituted a libel, for which he requested compensatory and punitive damages. Truth was pleaded as a complete and partial defense, in that the plaintiff was "indicted" in a moral or non-legal sense; various individuals had accused the plaintiff of certain crimes. The plaintiff challenged the legal sufficiency of the defenses under Rule 109 of the Rules of Civil Practice, and moved to strike them. Special Term granted the motion, which was reversed by the Appellate Division<sup>55</sup> but reinstated by the Court of Appeals. The Court unanimously held that the defense of truth of a charge different from that made in the publication is insufficient.

Truth may be a complete or partial defense to a libel action,<sup>56</sup> and must be pleaded and proved by the defendant.<sup>57</sup> In pleading justification the specific facts and circumstances constituting the alleged truth must be set forth; a mere allegation that the libellous matter is true is insufficient.<sup>58</sup> It is well established that to constitute a complete defense or justification, the truth must be co-extensive with the alleged defamatory words,<sup>59</sup> as construed in their ordinary and natural meaning.<sup>60</sup> A workable test is whether the libel as published would have a different effect on the mind of the reader from that of the pleaded truth.<sup>61</sup> A partial de-

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54. 308 N. Y. 470, 126 N. E. 2d 753 (1955).

55. 282 App. Div. 963, 126 N. Y. S. 2d 17 (2d Dep't 1953).

56. *Sydney v. MacFadden Newspaper Pub. Corp.*, 242 N. Y. 208, 151 N. E. 209 (1926), held that any matter written or printed is libelous "if it tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induces an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society."

57. *Bingham v. Gaynor*, 203 N. Y. 27, 96 N. E. 84 (1911); *Flickenstein v. Friedman*, 266 N. Y. 19, 193 N. E. 537 (1934).

58. *Wolf v. Wolf*, 198 Misc. 527, 101 N. Y. S. 2d 787 (1950); *Meyers v. Huschle Bros.*, 273 App. Div. 107, 75 N. Y. S. 2d 354 (1st Dep't 1947).

59. *White v. Barry*, 288 N. Y. 37, 41 N. E. 2d 448 (1942); *Flickenstein v. Friedman*, *supra*, note 57.

60. *Mencher v. Chesley*, 297 N. Y. 94, 75 N. E. 2d 257 (1947); *Cafferty v. Southern Tier Pub. Co.*, 226 N. Y. 87, 123 N. E. 76 (1919).

61. *White v. Barry*, *supra*, note 59.

fense<sup>62</sup> to mitigate punitive<sup>63</sup> or reduce compensatory damages<sup>64</sup> may be interposed where the facts tend but fail to prove the truth of the defamation.<sup>65</sup> It is to be noted that in pleading mitigation the particular circumstances must be stated, including the sources of the defendant's information and the grounds for his belief to show the absence of actual malice.<sup>66</sup>

The majority in the instant case reasoned that the defenses were insufficient, since they tended to establish the truth of a statement different from that made in the publication. The Court stated that "indictment" ordinarily refers to legal process rather than to condemnation in a moral sense; the defense of truth, based on the assumption that the jury could accept the broader meaning, must fall, since it is not even related to the libellous matter.

*Dismissal of Prima Facie Case Disallowed*

In *Flander v. City of Yonkers*,<sup>67</sup> plaintiff brought three causes of action<sup>68</sup> based on the wrongful shooting of plaintiff's intestate, allegedly in an effort by two police officers to effect an arrest. The present appeal concerns itself only with the cause of action based on negligence, which upon defendant's motion was dismissed in the lower court; this was affirmed in the Appellate Division.<sup>69</sup> The Court of Appeals reversed, on the ground that plaintiff need only establish a prima facie case of negligence to take the case to the jury.

The weight of authority in this jurisdiction supports the proposition that where there is a conflict of evidence, as in the present case, it is within the province of the jury to decide on the issue of credibility and give appropriate weight to the proffered evidence.<sup>70</sup> It is equally well established that upon defendant's motion to dismiss, the trial court should for the purposes of the motion accept plaintiff's evidence as true, and regard it in the most favorable light to determine

62. N. Y. CIV. PRAC. ACT § 262 defines a partial defense as "matter tending only to mitigate or reduce damages," and the section requires that it be designated as such in the answer.

63. Punitive damages are held to be available as to a libel published with actual malice; the term includes also a carelessly published libel even if published by an agent. *Crave v. Bennett*, 177 N. Y. 106, 69 N. E. 274 (1904).

64. *Gressman v. Morning Journal Ass'n*, 197 N. Y. 474, 90 N. E. 1131 (1910); *Langher v. Clark*, 149 N. Y. 472, 44 N. E. 182 (1896).

65. *Ibid.*

66. *Flickenstein v. Friedman*, *supra*, note 57.

67. 309 N. Y. 114, 127 N. E. 2d 838 (1955).

68. (a) action against the city for having knowingly and negligently employed unreliable police officers. (b) action for assault and battery. (c) action for negligence against the police officers.

69. 283 App. Div. 970, 130 N. Y. S. 2d 895 (2d Dep't 1954).

70. *Kraus v. Birnbaum*, 200 N. Y. 130, 93 N. E. 474 (1910); *Meiselman v. Crown Heights Hosp.*, 285 N. Y. 389, 34 N. E. 2d 367 (1941); *Sadowski v. Long Island R.R. Co.*, 292 N. Y. 448, 55 N. E. 2d 497 (1944).