Libel: The New York Times Standard in Reports of Judicial Proceedings

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force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals is to humiliate it and degrade it."[73]

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The plaintiff Jones was involved in a judicial proceeding both as a party and as an attorney.[1] The *Pine Bluff Commercial* covered the proceedings and published articles on three successive days concerning the progress of the case. The plaintiff sued the newspaper for libel, complaining that the articles were an attack upon his personal integrity, "had a natural tendency to degrade him, to expose him to public ridicule and disgrace and to deprive him of that public confidence necessary to the successful practice of his profession."[2] The trial court rendered judgment for the defendant. In his request for reversal the plaintiff argued that the trial court had erred in submitting defendant's tendered instructions which required a finding of actual malice as a prerequisite to plaintiff's recovery.[3] *Held, reversed*: The giving of the instructions requiring proof of actual malice as a basis of recovery constituted prejudicial error. *Jones v. Commercial Printing Co.*, 463 S.W.2d 92 (Ark. 1971).

I. The Development of Defamation Law

Defamation law dates back as far as the ancient law of Moses, in which it was expressly forbidden to slander a person, although no punishment for the wrong seems to have been specified.[4] Through subsequent development of the law punishments were established that were commonly of a penal rather than a remedial nature.[5] By the end of the seventeenth century, however, libel came

[73] *In re* Anastaplo, 366 U.S. 82, 115-16 (1961) (Black, J., dissenting).

[1] The plaintiff, a practicing attorney in Pine Bluff and an organizer of the Pine Bluff National Bank, joined with three other organizers in filing a petition seeking an order allowing them to inspect the bank's financial records.

[2] Jones v. Commercial Printing Co., 463 S.W.2d 92, 94 (Ark. 1971). The plaintiff further complained that the newspaper added comments and insinuations of its own and published all testimony, arguments, and rulings derogatory to plaintiff, but failed to publish the further testimony, arguments, and rulings vindicating him. *Id.*

[3] The defendant's instructions were based upon the holdings in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969). The plaintiff's tendered instructions, based upon the RESTATEMENT OF TORTS § 611 (1938), stated that "[t]he publication of a report of judicial proceedings . . . is privileged, although it contains matter which is false and defamatory, if it is (a) accurate and complete or a fair abridgment of such proceedings, and (b) not made solely for the purpose of causing harm to the person defamed." 463 S.W.2d at 94.

[4] 1 A. HANSON, LIBEL AND RELATED TORTS 1 (1969).

[5] The libel law of the Athenians provided for payment of a fine to both the injured person and the public treasury. Roman libel law, in certain instances, provided for a severe beating with a club. M. NEWELL, SLANDER AND LIBEL 5-7 (2d ed. 1898). The most oppressive punishments meted out in libel convictions were, however, those of the infamous Star Chamber. These included imprisonment, pillory (stocks), fines, whippings, loss of ears, and brands on the face. *Id.* at 24.

During the Tudor and Stuart regimes in England freedom of the press and speech was

to be viewed by the courts not only as a criminal action, but also as an action in tort.[6] In the tort action false or defamatory statements published without sufficient cause or excuse were presumed to be malicious. It was the defendant's burden to rebut this presumption by a showing of privilege. The privilege was considered to be either absolute or qualified, depending upon the situation.[7] If the court found that the statements made were absolutely privileged, a judgment for the defendant was given. However, if the statements were found to be only qualifiedly privileged, the plaintiff could recover only if he proved malice on the part of the defendant.[8]

Although a report of a legislative or judicial proceeding was generally considered to be qualifiedly privileged, the publisher in such a situation was held to a somewhat higher standard. The plaintiff in such a suit was not required to prove malice on the part of the defendant-publisher in order to recover for the alleged libel; he needed only to prove the report was not fair or accurate.[9] Thus, the reports, in order to remain privileged, could be neither prejudiced[10] nor partial,[11] but it was sufficient that they were substantially accurate summaries of the proceedings.[12] Some courts stated that the published report must be both fair and impartial and without malice in order to be privileged.[13] In such instances the primary question was still whether the report was fair and accurate, for if it were not, it would not be necessary to prove the malice element.

The courts continued to apply this higher standard to cases involving reports of judicial proceedings and in fact such a standard was adopted by the writers of the *Restatement of Torts*. Under this rule the accurate and fair report of a

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generally unheard of, and libel was punishable by death. In addition, the unfortunate who was tried for libel during this period was not allowed to assert the truth as a defense, an idea that found its way over to the original American colonies. 1 A. HANSON, *supra* note 4, at 6. It was not until the seditious libel trial of John Peter Zenger in 1735 that the American courts recognized that the truth was indeed a defense. M. NEWELL, *supra*, at 26.

[6] Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 41 L.Q. REV. 13, 14 (1925). It is difficult to place a precise time at which the courts recognized such distinction, for as one writer stated, the judges "decided the cases which arose as seemed to them most expedient, and for reasons which seemed sufficient to dispose of the case in hand." *Id.* However, it is generally conceded that such recognition came into being toward the latter half of the seventeenth century. *Id.* at 16.

[7] The theory behind the absolute privilege was that the occasion was one on which all persons should speak their minds fully and freely without fear of retribution via a libel suit. The absolute privilege applied to proceedings of legislative bodies, judicial proceedings, and utterances of military and naval officers. It did not extend to the reports of judicial proceedings, but only to the statements made during the proceedings. M. NEWELL, *supra* note 5, at 418. The qualified privilege category extended to situations in which the speaker or publisher was to be protected only so far as he was speaking honestly for the public good. *Id.* at 476.

[8] *Id.* at 478.

[9] Two separate questions were put before the jury in such actions. (1) Was the report fair and accurate? If so, it was *prima facie* privileged; if not, the verdict was for the plaintiff. (2) Was the report, even though fair and accurate, published maliciously? The second question arose only if the first was answered in the affirmative. *Id.* at 558.

[10] *See, e.g.*, Robinson v. Johnson, 239 F. 671 (8th Cir. 1917); Atlanta News Publishing Co. v. Medlock, 123 Ga. 714, 51 S.E. 756 (1905); Jones v. Pulitzer Publishing Co., 240 Mo. 200, 144 S.W. 441 (1912); Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167, 191 A.2d 662 (1963); Brown v. Providence Telegram Publishing Co., 25 R.I. 117, 54 A. 1061 (1903).

[11] *See, e.g.*, Brown v. Publishers: George Knapp & Co., 213 Mo. 655, 112 S.W. 474 (1908); Metcalf v. Times Publishing Co., 20 R.I. 674, 40 A. 864 (1898).

[12] *See, e.g.*, Boogher v. Knapp, 97 Mo. 122, 11 S.W. 45 (1889); Lehner v. Berlin Publishing Co., 209 Wis. 536, 245 N.W. 685 (1932).

[13] *See, e.g.*, Henderson v. Evansville Press, Inc., 127 Ind. App. 592, 142 N.E.2d 920 (1957); Bock v. Plainfield Courier-News, 45 N.J. Super. 302, 132 A.2d 523 (1957).

proceeding was privileged unless it was "made solely for the purpose of causing harm to the person defamed."[14] Thus, under the *Restatement*, as under the common-law rule, a plaintiff need prove no more than that the defendant did not publish a fair or accurate report in order to recover for libel.[15]

II. A CONSTITUTIONAL ISSUE: NEW YORK TIMES CO. V. SULLIVAN

The application of these tort principles to the law of defamation continued until 1964, when the United States Supreme Court decision of *New York Times Co. v. Sullivan*[16] thrust the constitutional issue into this area.[17] The Court, in reversing a decision for the plaintiff, announced the following principle: "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 unless he proves that the statement was made with 'actual malice'—that is, with the knowledge that it was false or with reckless disregard of whether it was false or not."[18]

The foremost issue in *New York Times* was whether the falsity of the allegedly libelous statement caused a forfeiture of the constitutional protection to which it otherwise would have been entitled. Answering this question in the negative, the Court stated that it was considering the case "against the background of a profound national commitment . . . that debate on public issues should be uninhibited, robust, and wide-open . . . ."[19] A rule which requires that the critics of official conduct guarantee the truth of their factual assertions "dampens the vigor and limits the variety of public debate."[20] Such a rule, the Court continued, "is inconsistent with the First and Fourteenth Amendments."[21]

The scope of the *New York Times* decision was subsequently expanded. In *Rosenblatt v. Baer*[22] the majority opinion stated that the *New York Times* malice standard applies when the public has an "independent interest" in the performance of the person who holds a government position, beyond the general public interest in all government employees.[23] In the consolidated cases of

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[14] RESTATEMENT OF TORTS § 611 (1938).

[15] The *Restatement* further states that it is not necessary that the report be exact in every detail, but "[i]t is enough that it convey . . . a substantially correct account." The report may not, the comment continues, "after reporting derogatory parts, fail to publish the further proceedings which vindicate the person defamed." *Id.*, comment *d* at 611.

[16] 376 U.S. 254 (1964).

[17] Prior to *New York Times* libelous utterances were not within the area of constitutionally protected speech. Beauharnais v. Illinois, 343 U.S. 250 (1952). *See also* Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 (1961); Times Film Corp. v. City of Chicago, 365 U.S. 43, 48 (1960); Roth v. United States, 354 U.S. 478, 486-87 (1957) (dictum); Pennekamp v. Florida, 328 U.S. 331, 348-49 (1946); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); Near v. Minnesota, 283 U.S. 697, 715 (1931) (dictum).

[18] 376 U.S. 254, 279 (1964). The term "official conduct" was recently expanded in Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971): "[A] charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness of office for purposes of application of the . . . rule of New York Times Co. v. Sullivan." *See also* Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971).

[19] 376 U.S. 254, 270 (1964).

[20] *Id.* at 279.

[21] *Id.*

[22] 383 U.S. 75 (1966).

[23] *Id.* at 86.

Curtis Publishing Co. v. Butts and *Associated Press v. Walker*[24] the application of the "actual malice" test was extended to public *figures* as well as public officials. A significant attempt to formulate a practical explanation of the "actual malice" standard was later made in *St. Amant v. Thompson* in which the Court set forth a subjective standard, saying that "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication, [and that] [p]ublishing with such doubts . . . demonstrates actual malice."[25]

Courts are split on the issue of whether the holding in *New York Times* applies to libel actions concerning reports of judicial proceedings. While some courts have specifically applied the *New York Times* standard[26] and required a showing of malice before the plaintiff could recover,[27] others have continued to apply the *Restatement* rule or state statutes and allow recovery if the alleged libel was merely unfair and inaccurate.[28] One court has even gone so far as to say that if the reports were fair and true, the privilege granted was an absolute one and could not be defeated by a showing of malice even if such a showing were possible.[29]

The Supreme Court has yet to decide whether the *Times* standard is applicable to reports of judicial proceedings, although it has never rejected the idea.[30] In fact, language in *St. Amant v. Thompson*[31] would tend to indicate

[24] 388 U.S. 130 (1967). The public figure in the *Butts* case was an athletic director and head football coach, while the public figure in the *Walker* case was a retired, yet still well-known, General.

[25] 390 U.S. 727, 731 (1968).

[26] The courts that have applied the *New York Times* standard have based their decisions on the fact that the judicial proceeding either involved a public official or was of such nature as to qualify as an issue of public interest. The *Jones* court, on the other hand, declined to apply the *New York Times* standard regardless of the notoriety of the subject matter or participants involved in the judicial proceedings. 463 S.W.2d at 95.

[27] In Hurley v. Northwest Publications, Inc., 273 F. Supp. 967 (D. Minn. 1967), the court examined the *Restatement* rule and concluded that it in fact did contain a requirement of a showing of malice in order for the plaintiff to recover. The *Restatement* says that the publication is privileged not only if it was accurate and fair, but also if it was not made solely for the purpose of causing harm to the person defamed. The court saw, in the latter requirement, an element of malice. The court continued, saying that by either rule, *Times* or *Restatement*, plaintiffs must prove actual malice in order to recover. *See also* Sellers v. Time, Inc., 299 F. Supp. 582 (E.D. Pa. 1969).

[28] *See, e.g.*, Edmiston v. Time, Inc., 257 F. Supp. 22 (S.D.N.Y. 1966); McCracken v. Evening News Ass'n, 3 Mich. App. 32, 141 N.W.2d 694 (1966); Binder v. Triangle Publications, Inc., 442 Pa. 319, 275 A.2d 53 (1971).

[29] Hanft v. Heller, 64 Misc. 2d 947, 316 N.Y.S.2d 255 (Sup. Ct. 1970).

[30] Prosser states that the recent decision in Time, Inc. v. Pape, 401 U.S. 279 (1971), indicates quite clearly that such a report, though inaccurate, is privileged unless maliciously made. W. PROSSER, THE LAW OF TORTS 832 (4th ed. 1971). The opinion in *Pape* does not indicate so clearly, however, the conclusion drawn by Prosser. *Pape* dealt with a *Time* article written about a report of the United States Commission on Civil Rights. In applying the *New York Times* rule, the Court created an important distinction between indirect and direct accounts of events. The Court mentioned the possibility that a rule which permitted recovery on the falsity of reports alone may be adequate when the alleged libel purports to be an eyewitness or other *direct* account of events that speak for themselves. 401 U.S. at 285. However, the constitutional zone of protection of *New York Times*, stated the Court, is applied when the report is derived *indirectly* (as through reports, speeches, press conferences, etc.). *Id.* at 291. Thus, the question is whether a report of a judicial proceeding would be classified as an indirect account, subject to the *Times* standard, or a direct account, falling without the *Times* standard. *Pape* was decided too late to be considered by the *Jones* court, although it appears that such a consideration would only have added perplexity to an already bewildering problem.

[31] 390 U.S. 727 (1968).

that the court either meant for the *Times* standard to apply to such reports, or would make such a decision if given the opportunity.[32] If such a standard was engrafted onto the law applicable to reports of judicial proceedings, it would, of course, serve to protect a publisher in such a circumstance to the same degree as if he were publishing a report on the actions of a public figure. The publisher would, thus, be protected even if the report he published was inaccurate, as long as he did not do so maliciously.

III. JONES V. COMMERCIAL PRINTING CO.

In *Jones v. Commercial Printing Co.*[33] the Arkansas Supreme Court made short work of the defendant's contention that the *New York Times* decision was controlling. Although the court agreed that trials are often of considerable public interest, it declined to accept the theory that the report was privileged despite any incompleteness, partiality, or inaccuracies unless actual malice was demonstrated.

"The lodestone of the *New York Times* decision and its progeny," stated the court, "was protection and encouragement of freedom of speech and press."[34] The fear of a costly lawsuit would only discourage the press from reporting the actions of public officials since many times even good faith investigative efforts cannot assure absolute accuracy. In addition, as the *Times* Court reasoned, public figures frequently have access to the news media through which they may refute a report concerning their own actions. It was for these reasons, according to *Jones*, that the Supreme Court in *New York Times* required the showing of malice as a prerequisite to recovery.

The court in *Jones* stated that this reasoning has little significance in relation to reports of judicial proceedings. Such reports, the court continued, are always susceptible of exact reporting in that court records are always available. Therefore, "the threat of a libel prosecution emanates only from incompetent reporting."[35] Since, according to the court, it is always possible for a report to be complete, impartial, and accurate, the court declined to require a showing of malice regardless of the notoriety of the subject matter or the participants involved in the judicial proceedings.

The reasoning of this court, and indeed the rationale behind its refusal to apply *New York Times*, is not valid. The public of today demands instantaneous reporting, and in order for a public journal to remain competitive it must report the news as it is happening. Unfortunately court records are not so immediately available and a public journal must rely on its reporters to interpret accurately the proceedings at hand. Thus, in most instances the method of reporting matters in a judicial proceeding is no different from that of reporting public events, speeches by public officials, and the like. Why they should be treated differently is unclear.

[32] The Court in *St. Amant* stated that "to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." *Id.* at 732. The Court, it seems, is placing no limitation on the type of publications that may fall under this constitutional safeguard.

[33] 463 S.W.2d 92 (Ark. 1971).

[34] *Id.* at 95.

[35] *Id.*