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NEWSPAPER LIBEL IN PENNSYLVANIA

By

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On September 27, 1954, the Pennsylvania Supreme Court handed down a decision in favor of the appellee, the editor and publisher of the Quakertown *Free Press,* in a libel action,[1] and on June 16, 1950, it reversed the Superior Court and found in favor of the appellant, the Scranton Republican Publishing Company.[2] The Superior Court, in its turn, had sustained the Lackawanna County Court of Common Pleas in which a verdict had been returned for the plaintiff. Except for these two cases, however, newspaper libel decisions in the appellate courts of this Commonwealth have gone in favor of the libelled complainants for thirty years.

The cases to be discussed in this article are those since 1924, when the defendant newspaper was awarded the decision in *Cresson v. North American Company.*[3] That was the last Pennsylvania appellate court case which a newspaper won until 1950.[4]

As in most cases of libel, the issues which have reached the appellate courts revolved in part around the question of what constitutes defamatory language. The Supreme Court's reversal of the Superior Court in the *Scranton Republican Publishing Company* case arose from a difference of opinion between the majorities of the two appellate courts on that question. That issue was also present in *Boyer v. Pitt*[5] and *Morgan v. Bulletin Company.*[6]

On the other hand, the decisions have revolved around that judicial shadowland requiring interpretation of the part of Article I, Section 7 of the Pennsylvania Constitution which reads:

> ". . . . No conviction shall be had for the publication of papers relating to the official conduct of officers and men in a public capacity or any other matter proper for public information and investigation where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury. . . ."

The problem is also well expressed in language first used by the Pennsylvania Supreme Court in *Neeb v. Hope,*[7] in 1886, and repeated many times in more re-

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1 Schnabel v. Meredith, 378 Pa. 609 (1954).

2 McAndrew v. Scranton Republican Publishing Company, 364 Pa. 504, 72 A.2d 780 (1950), reversing 165 Pa. Super. 276. The newspaper published by the defendant company is the Scranton Tribune.

3 280 Pa. 373, 124 Atl. 495 (1924).

4 This article will consider libel arising out of material printed in newspaper columns. A publishing company was a litigant in Will v. Press Company, 309 Pa. 539, 164 Atl. 621 (1932), but the action arose out of a notice sent to subscribers in connection with circulation practices, and, therefore, is not pertinent here.

5 324 Pa. 154, 188 Atl. 203 (1936).

6 369 Pa. 349, 85 A.2d 869 (1952).

7 111 Pa. 145, 2 Atl. 568 (1885).

cent decisions. To sustain a defense in a libel action, the court said, a defendant must show that the publication was "made on a proper occasion, from a proper motive, in a proper manner, and upon probable cause for belief in its truth".

The current of recent decisions against the newspaper press reflects the feeling on the part of appellate court justices that in each of these cases there was malice or negligence, frequently the latter. The courts have felt that these publications were not made "in a proper manner". The decisions run counter to what seems to have been a discernible trend in earlier judicial consideration of the problem in Pennsylvania. In a series of decisions of which *Jackson v. The Pittsburgh Times*[8] and *Press Company v. Stewart*,[9] handed down in 1893 and 1888 respectively, may be regarded as representative, appellate courts returned verdicts in favor of the lower court newspaper defendants.

Although the author of this article does not mean to impugn the integrity of judges and juries, the trend of these decisions raises a question in his mind. Is it not possible that certain press practices since the rise of "yellow journalism" after 1895 have led those responsible for administering the law unconsciously to subordinate in their thinking the concept of press responsibility that led to the drafting of Article I, Section 7 of the Constitution of this Commonwealth? Is it not possible that, instead of feeling strongly that the right of free discussion of public problems by the newspaper press must be protected, as was the intent of those who drafted our basic instrument of government, they allowed their feeling towards another of their judicial responsibilities, that of protecting reputation, to dominate them?

The author, viewing these problems from the perspective of nearly thirty years as a newspaperman and a professor of journalism, admits a predisposition to favor the press in libel cases. He feels that the duty to publish matter proper for public information and investigation must be jealously protected against the possible conflict of the libel laws, as long as that duty is carried out with scrupulous regard for the constitutional provision that the press must be "responsible for the abuse of that liberty". He regrets the decisions of the majority of the Supreme Court in *O'Donnell v. The Philadelphia Record*[10] and supports the dissent written by the then Chief Justice Maxey. In the *Scranton Republican Publishing Company* case, referred to above, he also supports the late chief justice rather than the findings of the Superior Court. He does not, however, disagree with the result of other cases to be discussed here, although he feels that *Boyer v. Pitt*[11] and *Morgan v. Bulletin Company*[12] are debatable.

Some of the recent decisions show that reporters or copy-readers, who write headlines, as illustrated in both the *Boyer* and *Morgan* cases failed to exercise

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8 152 Pa. 406, 25 Atl. 613 (1892).
9 119 Pa. 584, 14 Atl. 51 (1888).
10 356 Pa. 307, 51 Atl. 775 (1947).
11 See n. 5, supra.
12 See n. 6, supra.

enough caution in ascertaining facts or in interpreting possible innuendoes to support newspaper counsel's contention that ". . . such publication was not . . . negligently made. . . ." The decision in the *Morgan* case shows that danger of adverse libel damages may lie in a reporter's use of a catch phrase that looks well in a headline or picture caption but which carries an innuendo that more careful reporting would have prevented.

There is a yardstick long used by the courts to gauge normally careful action. They speak of a "reasonably prudent man". It seems to this author that in some of these cases a "reasonably prudent" city staff or copy desk would have headed off the libelous publication. On the other hand, reasonable prudence should not be allowed to become such timidity that the press fails to present matters which are "proper for public information and investigation" where there has been no malice or negligence in gathering the facts.

Debates in the Constitutional Convention of 1873 show that the delegates wished to protect the right of the press to discuss matters "proper for public information and investigation" even if the publication might present statements which were not entirely true and which might defame those in the public eye. This protection, however, was to be exercised only if a sense of responsibility prevailed.

When the Constitution of 1790 was drawn, the clause of the Bill of Rights intended to protect freedom of the press contained a sentence providing that, "In prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity the truth may be given in evidence; . . . ." It did not, however, include a mandate ordering the jury to return a verdict for the defendant if the matter published were true. This provision was in line with some of the legal thinking of the time which held that the truth should be presented and the jury authorized to "determine the law and the facts", but which felt that in some cases even true publications might constitute defamation justifying criminal prosecution.

No change was made in the Constitution of 1838. Before the delegates gathered in 1873, however, several libel decisions had gone against Pennsylvania newspapers, even when truth was pleaded and proven. Delegate George M. Dallas of Philadlphia led the fight in the Constitutional Convention for a change. In an extensive debate, he protested that the right to prove truth did not protect the press in its duty to present matter proper for public information. He felt that probable cause for belief in the truth should be adequate, and he proposed a clause providing that such publication be "privileged".

After debating several amendments, the convention adopted the present language and made it the third sentence of Article I, Section 7 of the new Constitution. The rest remained as it had been written in 1790.[13] The effect of the change was well stated by President Judge Simonton of the Dauphin County Court of

[13] Debates of the Convention to Amend the Constitution of Pennsylvania, v. 5, pp. 587-620.

Common Pleas twenty-five years later when, in ruling on a motion in his court, he said:

> "The implication of malice arising from the publication of matter prima facie libelous therefore remains under the constitution of 1874, and the change made by it in a prosecution for libel is to permit the defendant, when he cannot prove that the matters published were true, to interpose the defense that the publication was not maliciously or negligently made, with the burden of proof on him to make out his defense; and he may do so by showing that he exercised due care in investigating the matter before publication and had probable cause to believe that the charges made by him were true; and it is therefore competent for him to show on what information he acted in making the charges."[14]

What have been the issues presented to the appellate courts in determining when a publication "is not maliciously or negligently made"? What have been the circumstances of the cases requiring judicial intervention?

Jackson v. The Pittsburgh Times, supra, is sometimes cited by authorities as an illustration of the so-called "Kansas rule" in fair comment and criticism. This rule states that even if untrue defamatory matter is published, a verdict must be found for the defendant if the plaintiff is a public figure, the publication arises out of comment on or information about his public character and the defendant newspaper has probable cause for belief that the published matter is true.

In that case the plaintiff was a militia lieutenant on duty after the Johnstown flood. A correspondent of the Pittsburgh *Times* sent a story to his paper which said that the lieutenant had gotten drunk, had had a fight with a deputy-sheriff, had been placed under arrest by his commanding officer and had been ordered to surrender his sword. The story was inaccurate in several details. The court, however, held that the plaintiff was an officer whose conduct was subject to public scrutiny and that in spite of the inaccuracies the defendant newspaper and its employees had probable cause to believe the published material was true.

Press Company v. Stewart, supra, grew out of this incident. A reporter for the Philadelphia *Press,* pretending to be a prospective pupil, called on the proprietor of a private business school. The newspaper then published a story of the interview between the reporter and the proprietor. Although purporting to be an accurate, directly-quoted account, the article was colored with a tone of critical sarcasm. When the proprietor sued for libel, however, the courts held that, as a teacher offering his services to the public, he was liable to fair comment and criticism and that the article was not malicious and showed no negligence.

In these two early cases, the narrow line between the court's duty to protect reputation and to protect the right of free and responsible discussion of those in the public eye was resolved in favor of the latter. On the other hand, such early cases as *Wallace v. Jameson*[15] and *Coates v. Wallace*[16] found that what appeared

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14 Commonwealth v. Swallow, 8 Pa. Super. 539, 580 (1898).
15 179 Pa. 98, 36 Atl. 142 (1897).
16 4 Pa. Super. 253 (1897).

to be deliberate malice, in the former case, and negligence, in the latter, voided the defense.

It is time, now, to look at the decisions of the last thirty years. As has been pointed out, all but two have resulted in verdicts for the plaintiff.

Boyer v. Pitt, supra, decided in 1936, was one of those accidents which often make newspapermen protest that the libel laws are unfair. The plaintiff, Robert K. Boyer, was a witness in a vote fraud case being tried in the United States District Court for the Western District of Pennsylvania. On the first trial, the jury had been unable to agree. When Boyer, a government witness, was placed on the stand during the second hearing of the case, his testimony varied slightly from that which he had offered the first time. The prosecution pleaded surprise and had part of the record of the first trial read. The witness said his memory was at fault, and government attorneys professed themselves satisfied.

The reporter covering the case for the Pittsburgh *Sun-Telegraph* prepared a story describing the incident. It was published under the headline reading, "Coyne Trial Testimony Changed". In the story was the statement that Boyer "had changed his testimony".

The plaintiff charged that the headline and the article imputed perjury to him. The trial judge instructed the jury that if its members agreed that such a construction might reasonably be placed on the publication and that if they found the use of the language in question was due to negligence, they must find for Boyer. The jury did so, and the decisions was sustained on appeal.

In 1941, while Europe was at war and Americans debated the issues of isolation as against active support of Germany's enemies, John O'Donnell, Washington columnist for the New York *Daily News,* sent an article to his paper saying that American naval vessels were convoying merchant ships loaded with military supplies to a mid-Atlantic rendezvous where British warships took over. President Roosevelt, in a press conference, described the writer as a "liar". The Philadelphia *Record,* an administration supporter, published a front page editorial, certain paragraphs of which were set in bold-faced type indented from the column rules for emphasis. It described O'Donnell as an active Nazi sympathizer who had held forth at different times to "bar-flies within hearing" that Hitler had been a constructive force. It said O'Donnell was not revolted by German liquidation of the Jews. The writer sued for libel. On the stand, he denied that he held such beliefs and denied that he had made statements which would justify the imputation to him of such beliefs. The defense witnesses included several well-known Washington newspaper correspondents who testified to conversations that they had had with O'Donnell during the national political party conventions in Philadelphia in 1940 and in the bar of the National Press Club in Washington. They quoted him as expressing approval of the Nazi regime.

The jury returned a verdict for the plaintiff. A new trial was granted, and the jury again found for O'Donnell. A second motion for a new trial was refused,

and the majority of the Supreme Court refused to overrule the jury. Dissenting, however, Chief Justice Maxey wrote that the verdict was contrary to the weight of evidence and the court's instructions, and that judgment non obstante veredicto should be entered.

The Superior Court viewed the circumstances in *McAndrew v. Scranton Republican Publishing Company, supra,* as a case of careless reporting which constituted negligence. The case arose out of a newspaper story of a meeting during the political campaign of 1946. The Republican nominee for the State Senate was Capt. Fraser P. Donlon, a former Marine who had lost a leg in combat in the South Pacific. The *Tribune* story said that at the meeting, Matthew McAndrew, a county democratic leader, had taken the platform to accuse the former Marine of playing on his wound and his war record for sympathy in vote-gathering. It also quoted McAndrew as saying, ". . . we all have to have a little Communism today." McAndrew denied that he had made such statements. The jury found for him, and the Superior Court sustained it.

It was brought out on the trial that no reporter had attended the meeting. The city editor of the *Tribune* had secured the facts in telephone conversations with republican leaders. This, the Superior Court held, constituted negligence which might have been avoided if the newspaper's employees had checked democratic sources as well. On the other hand, as has been pointed out, the Supreme Court ruled that neither statement was defamatory and neither needed to have been submitted to the jury.

Certain fairly common reportorial techniques, an indirect statement from which the reader might draw obvious conclusions and a denial of a statement which had never been made affirmatively but which thereby gained currency made up part of the background for *Morgan v. Bulletin Company, supra.* The plaintiff, Miss Alyce Morgan, was vice president of a firm bidding on the sale of parking meters to the city of Philadelphia. At the same time, state officials were investigating reports of impropriety in connection with the bids. On one occasion, an investigator for the attorney-general's office remarked casually and informally in a restaurant that Miss Morgan was the "Mata Hari of the parking meters". A reporter and photographer for the Philadelphia *Bulletin* asked the plaintiff to allow herself to be photographed with each hand on one of the meters which her firm manufactured. The reporter asked her about the "Mata Hari" remark, but she laughed it off. Under a headline, "Bribe Offer Reported in Fight for Contract on Parking Meters", the *Bulletin* published a story with Miss Morgan's picture. At no point did it make a direct statement implicating the plaintiff in graft, but the second paragraph said, "Stories of high pressure methods, large rolls of currency waiting for a taker, and even of a woman known as the 'Mata Hari of the parking meters' have been circulated in City Hall and have reached the ears of State officials." At another point, it quoted the reporter's question about "Mata Hari" and Miss Morgan's amused denial.

At the trial, *Bulletin* attorneys contended that the story was privileged since the material came from state sources, and the subject matter was proper for public information. They further argued that Miss Morgan was not directly indentified as "Mata Hari" and that such a designation was not libelous. The court, however, held that the innuendo provided sufficient identification to justify redress. The Supreme Court said: "There is nothing to show that the statement was based on facts or even that there was reasonable grounds for believing it to be true." It described the language of the story and the picture caption as "pure reportorial hyperbole".

Bausewine v. The Norristown Times-Herald[17] arose out of a series of articles which attacked the Norristown chief of police as corrupt and said he engaged in criminal practices. Among other things, they charged him with having been associated with a Florida bootlegging ring. The articles were written in highly inflammatory language and were published under sensational headlines. During the trial, it was shown that Bausewine had not been in the Florida city. The court held that the inflammatory language of the publication and certain other evidence could be construed as showing express malice. A verdict was returned for the plaintiff. While appeal was pending, the police chief was found guilty of criminal charges arising out of alleged misuse of his office. The Supreme Court, however, held that that fact did not affect the question of express malice behind the publication and of negligence contributing to some erroneous statements in the stories. It sustained the verdict.

The latest case to reach the Pennsylvania Supreme Court, *Schnabel v. Meredith,*[18] resulted from a story in the Quakertown *Free Press* that there had been no recent gambling prosecutions in Bucks County. At one point, it said that six months earlier some gambling equipment had been seized in a raid on a building on a farm belonging to Carl F. Schnabel. Schnabel sued, charging that the story implied that he had been engaged in criminal activity. Attorneys for Charles M. Meredith, the defendant publisher, contended that the story was true and was not motivated by malice or marked by negligence. The lower court returned a verdict for the defendant, and it was sustained on appeal.

[17] 351 Pa. 634, 41 A.2d 860 (1945).
[18] See n. 1, supra.