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## DEVELOPMENTS IN THE LAW OF LIBEL: IMPACT OF THE NEW YORK TIMES RULE

ARTHUR B. HANSON\*

More than two years have passed since the Supreme Court handed down its decision in *New York Times v. Sullivan*.<sup>1</sup> Unquestionably, the most important developments in the law of libel during this period are those exploring the implications of the rule laid down in that case. While it is too early to tell the ultimate effects of the First Amendment's impact on the law of libel, it is already clear that these effects will be widespread and that requirements of free speech, as announced by the Supreme Court, are already being weighed in decisions far removed from the criticism of public officials.<sup>2</sup>

In *New York Times*, you will recall, the Supreme Court held that the First Amendment

... 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 knowledge that it was false or with reckless disregard of whether it was false or not.<sup>3</sup>

The subject of that dispute was a full page advertisement in the *New York Times* paid by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South." The introductory paragraphs of the advertisement contained several passages inaccurately describing repressive actions taken by the police of Montgomery, Alabama, against student civil rights demonstrations. Claiming that this material referred to him, and was libelous, the Commissioner of Public Affairs in Montgomery, who had supervision of the police department, brought suit. A jury in the Circuit Court of Montgomery County found that the words did in fact refer to the Commissioner, and awarded damages of \$500,000. In view of the climate of opinion in Alabama at that time,

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1. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

2. See, e.g., *Lulay v. Peoria Journal Star*,—N.E.2d—(Ill. 1966), citing *New York Times* in basing privilege to report restaurant's difficulties with health department on free speech requirements.

3. *Supra* Note 1, at 279-80.

such damages must be considered somewhat excessive, but the judgment was affirmed by the state supreme court.<sup>4</sup>

The Supreme Court's reversal rewrote an important segment of the law of libel. Up to this time, the majority rule permitted defamatory statements about public officials only in the case of statements of opinion. This was, of course, known as the "fair comment" rule, and applied equally to criticisms of government officials, public personalities, and works of art. Any untrue and defamatory statement of fact remained actionable, no matter how public the position of the person libelled. This was the law applied by the courts of Alabama, and those of three-fourths of the states in the United States.<sup>5</sup>

A minority view, however, was also extant, which gave some consideration to the special requirements of free speech under our Constitution. Under this rule, any defamatory statement, whether of opinion or untrue fact, was privileged if it referred to a public official, and could be the subject of a libel action only if published with actual malice.<sup>6</sup> While dicta have indicated that the rule has the same application as the "fair comment" rule,<sup>7</sup> it seems to have been applied only to public officials and candidates, and has come to be known as the "public official" rule.

As regards public officials, it is now settled that neither of these rules remains applicable. The *New York Times* decision specifically applied to misstatements of fact,<sup>8</sup> thus eliminating the difficult and unsatisfactory distinctions between fact and opinion which had plagued the "fair comment" rule. Any untrue defamatory statement, whether of fact or opinion, is now privileged unless made with "actual malice."

But the actual malice defined by the Supreme Court in the *New York Times* case is essentially a new and technical concept, and bears little relation to the malice which defeated the privilege under the old "public official" rule. That privilege, like other qualified privileges, could be overcome by a showing of ill will, or purpose other than that protected by the privilege.<sup>9</sup> As interpreted in *New York Times*, the First Amendment protects any defamatory statement unless made "with knowledge

4. 273 Ala. 656, 144 So.2d 25 (1962).

5. See 1 HARPER & JAMES, TORTS § 5.28 (1956); PROSSER, TORTS 812-16 (3d ed. 1964).

6. See, e.g., *Coleman v. MacLennan*, 78 Kan. 711, 98 Pac. 281 (1908); PROSSER, *op. cit. supra* note 5, at 814.

7. See *Coleman v. MacLennan*, *supra* note 6, at 285.

8. The Court noted with approval the idea that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" 376 U.S. at 271-72.

9. See, 1 HARPER & JAMES, *op. cit. supra* note 5.

that it was false or with reckless disregard whether it was false or not.”<sup>10</sup> Motivation is thus removed from the picture, and so defined, the state of mind required bears closer relation to scienter than to actual malice.

In *Garrison v. Louisiana*,<sup>11</sup> the requirements of freedom of speech received further elucidation in at least two important areas. Garrison was a Louisiana district attorney who was convicted of criminal libel for criticizing the judges of his parish as “vacation minded” and subject to “racketeer influences.” Like the majority of state criminal libel statutes,<sup>12</sup> Louisiana punished all publications of defamatory matter made with malice—that is, with ill-will—whether or not the statement was true or false.<sup>13</sup> If it was false, malice was presumed, and the defendant had the burden of proving good motives; if it was true, ill-will had to be proved by the state.

In reversing Garrison’s conviction, the Supreme Court logically extended to criminal libel the *New York Times* privilege and the protection of the First Amendment. The Court properly refused to recognize any purposes in criminal libel which might require a different interpretation of that amendment. If civil actions by defamed public officials are prohibited, *a fortiori*, criminal prosecutions are to be condemned.<sup>14</sup> Thus, “intent merely to inflict harm” was held insufficient to support a criminal prosecution for defamation of a public official,<sup>15</sup> and only false statements made with knowledge of their falsity or reckless disregard of the truth remain actionable as without constitutional protection.

What state of mind will dispel the privilege was also clarified in *Garrison*. It became more clear than ever that intent and motivation are immaterial to the protection of the First Amendment, but only “malice” as defined in *New York Times*, may cause liability. Actual knowledge of falsity is, of course, clear enough. But how may reckless disregard of truth or falsity be established? The Court in *Garrison* emphasized that it was not merely a lack of ordinary care, as was sufficient under the old reasonable-belief-in-truth tests.<sup>16</sup> In *New York Times*, the Court had held that the publisher’s failure to examine readily available files in its possession was not such reckless disregard. Thus, in

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10. 376 U.S. at 279-80.

11. 379 U.S. 64 (1964).

12. *Id.*, at 71, n. 7.

13. 14 LA. REV. STAT. §§ 47-50 (1950).

14. *Cf.* 376 U.S. at 277.

15. *See* 379 U.S. at 73.

16. *Id.* at 79.

*Garrison*, the Court stated that "... only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions."<sup>17</sup> This language, in addition to the factual holding of *New York Times*, suggests that only actual knowledge of probable falsity raises any duty to investigate the truth of statements relating to public officials. Absent such suspicion, the publisher is entitled to present the public with all political information of which it becomes aware.

But it may not be necessary that the actual contents of the publisher's mind be proved in order for the privilege to be dispelled. Two recent decisions of federal courts have held that "malice"—that is, awareness of falsity or probable falsity—may be implied. In one,<sup>18</sup> a magazine had stated that a Commission's Report had given as fact, what the Report really only said was alleged by a complainant in a civil suit. The Fifth Circuit held that if the conduct charged was defamatory, reporting it as a fact found by the Commission, rather than as a mere allegation in a civil suit, could very much change the impact on the average reader. Such rewording, the court held, could constitute reckless disregard for truth or falsity, thus rebutting the *New York Times* privilege.

In the other case, now on appeal from the District Court for the District of Columbia,<sup>19</sup> malice was implied from the content of the language itself. The plaintiff was a member of Congress from the State of New York. Confronted with affidavits of the employees of the Washington Post, publisher of the allegedly libellous article, stating that each man "had no reason to believe or evidence causing me to suspect that the Drew Pearson articles... contained any untrue fact statements," the Congressman asserted nevertheless that the Post had acted with reckless disregard of the truth. The court denied defendant's motion for summary judgment. With the following language, the court held that "malice," as defined by the *New York Times* case, could be implied from the face of the publication:

As defamatory statements become more and more vindictive, cruel and scandalous, they increasingly give cause to the printer and publisher to take care. He who tends to disregard the vengeful nature of his printing, tends to recklessly have disregard for the truth.<sup>20</sup>

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17. *Id.* at 74.

18. *Pape v. Time, Inc.*, 354 F.2d 588 (7th Cir. 1965).

19. *Keogh v. Pearson*, 244 F. Supp. 482 (D.D.C. 1965), *appeal docketed*, No. 19668, D.C. Cir., Sept. 3, 1965.

20. *Id.*, at 485.

Such a rule appears inconsistent with *Garrison's* requirements that actionable statements must have been "made with a high degree of awareness of their probable falsity." Virulent language does not always indicate falsity. In *New York Times*, the Supreme Court spoke of a "profound national commitment to the principle that debate on public issues 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."<sup>21</sup>

One may expect in the future, therefore, that the proof required to establish the publisher's scienter will be as weighty as interference with freedoms so important as those protected by the First Amendment would demand.

Of crucial importance to future litigation in this field is the question, to what persons does the rule apply? The Supreme Court in *New York Times* specifically included all public officials within the rule. But by means of the oft-quoted Footnote 23, the Court avoided two important questions: who is a public official, and to what other categories of persons does the public interest in free debate extend the rule?<sup>22</sup> Both of these questions, however, have received some subsequent attention from that Court.

In *Rosenblatt v. Baer*,<sup>23</sup> the Supreme Court held that criticism of the performance of a former supervisor of a county recreation area might be constitutionally protected. On its face the newspaper column, which contrasted the current success of the area with the questionable losses of the past, had contained "only an impersonal discussion of government activity."<sup>24</sup> The Court rejected a suggestion that state laws might be used to determine who was a public official, and stated

that the "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.<sup>25</sup>

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21. 376 U.S. at 270.

22. We have no occasion here to determine how far down into the lower ranks of government employers 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.

*Id.*, at 283, n. 23.

23. 34 U.S.L. Week 4111 (February 21, 1966).

24. In an alternative holding, the Court held that the trial judge's instructions were erroneous in permitting recovery without proof of specific reference to the plaintiff as an individual, and not just one of the body administering the area.

25. *Id.*, at 4114.

Furthermore it was for the trial judge in the first instance to determine whether the facts show the defendant to be a public official or not.<sup>26</sup>

But to what circumstances and persons other than "public officials" the constitutional protection applies remains in a state of considerable controversy. That the protection has other applications is now settled by *Linn v. Plant Guard Workers Local 114*.<sup>27</sup> In that case, the Supreme Court relied on section 8(c) of the Taft-Hartley' Act to indicate "a congressional intent to encourage free debate on issues dividing labor and management."<sup>28</sup> Thus, "actual malice" was held to be an essential element in a libel action brought by a company official against a union for defamatory statements made during a union organizing campaign.<sup>29</sup>

Although an important indication of the extensive boundaries of the rule, the statutory and federal preemption considerations deprive the *Linn* case of general application, and the decisions of the lower courts must also be examined. While their responses have been diverse, making ultimate resolution by the Supreme Court inevitable, a trend of liberal extension may be discerned. Judge Friendly, of the Second Circuit, has remarked:

Although the public official rule is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in principle the decision can be so limited. A candidate for public office would seem an inevitable candidate for extension. . . . Once that extension was made, the participant in public debate on an issue of grave public concern would be next in line.<sup>30</sup>

Thus, in *Walker v. Courier-Journal and Louisville Times Co.*,<sup>31</sup> the District Court for the Western District of Kentucky relied upon the rule to dismiss an action brought by former Major General Edwin A. Walker, U.S.A., who had been the subject of considerable nationwide news coverage, both as an Army General, and as a candidate for Governor of Texas, and had subsequently entered into various controversies on matters of public concern. The court acknowledged that Walker was not a public official, but held that the *New York Times* rule extended to persons of "political prominence," or "public men."<sup>32</sup>

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26. *Id.*, at 4115.

27. 34 U.S.L. Week 4136 (February 21, 1966).

28. *Id.*, at 4138.

29. *Ibid.*

30. *Pauling v. News Syndicate Co.*, 335 F.2d 659, 671 (2d Cir. 1964) (dictum).

31. 246 F. Supp. 231 (W.D. Ky. 1965).

32. *Id.*, at 234 ("inescapable conclusion").

In addition to conceptual interpretation of the New York Times decision, the court relied on interesting practical considerations, reminiscent of assumption-of-risk theory.<sup>33</sup> Walker's suit was based on news stories carried by defendant's newspapers and television stations, to the effect that he had participated in the riots incident to the integration of the University of Mississippi, had led a charge of rioters against U.S. marshals, and was a troublemaker. The court reasoned that for a person of Walker's political prominence to go to Oxford at the time he did was to invite news comment, thus magnifying the chance of inaccurate reporting.<sup>34</sup>

If the reporting complained of did not concern the plaintiff's official conduct, it clearly concerned conduct which was, and was intended to be, public conduct. Such conduct must clearly be included in any rule seeking to protect "uninhibited, robust and wide open" debate on public issues. A similar result was reached by the Superior Court of Alaska, which extended the rule to a news columnist. His criticism of the government was held to place him in a position similar to that of a public official.<sup>35</sup>

This broad interpretation of the *New York Times* rule has been accepted by other courts which have had occasion to consider the question. Thus, where a shipping company was charged in a newspaper article with taking advantage of a legal loophole and shipping goods to Cuba through the British West Indies, it was held that, even if libelous, the article dealt with a matter of public concern protected by the First Amendment.<sup>36</sup> The rule has been applied to a policeman who had shot a boy resisting arrest.<sup>37</sup> Critics supporting a civilian review board used the occasion to distribute handbills with the policeman's picture inscribed with "Wanted for Murder." The court said that the rationale of *New York Times* was to protect debate on public issues.<sup>38</sup> And in another interesting New York case, *Gilberg v. Goffi*,<sup>39</sup> an action was dismissed which had been brought by the partner of a mayor's law firm. The defendant, a political candidate, had charged his opponents with not investigating the mayor's firm for conflict of

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33. Cf., *Rosenblatt v. Baer*, *supra* note 23, 4114, n. 12.

34. *Ibid.*

35. *Pearson v. Fairbanks Pub. Co.*, 33 U.S.L. Week 2307 (Alaska Super. Ct., Nov. 25, 1964).

36. *H. O. Merren & Co. v. A. H. Belo Corp.*, 228 F. Supp. 515 (N.D. Tex. 1964).

37. *Gilligan v. King*, 264 N.Y.S.2d 309 (Sup. Ct. 1965).

38. *Id.*, at 313.

39. 21 App. Div.2d 517, 251 N.Y.S.2d 823 (1964), *aff'd* 260 N.Y.S.2d 29, 207 N.E.2d 620 (1965).

interests in practice before city courts. The court stated that the mayor's law firm was a proper subject of public comment, and insofar as he was a member of that firm, so must be the plaintiff.<sup>40</sup>

By no means all opinion, however, is so oriented. The rule has been held inapplicable to a major league baseball pitcher<sup>41</sup> suing under New York's right of privacy statute, and to a former heavyweight boxing champion,<sup>42</sup> suing for a charge that he had used loaded gloves in a championship fight some 45 years before. More significantly, it has been held inapplicable to a "world famous jurist and educator, having held academic, government and other posts," and who had signed an open letter condemning this country's Vietnam policy.<sup>43</sup>

Two federal district courts have espoused a narrow interpretation. In *Fignole v. Curtis Publishing Co.*,<sup>44</sup> the rule was not extended to a Haitian politician, living in exile, whose campaign slogans had been allegedly misquoted in a magazine article, in such a way as to be defamatory. In *Clark v. Pearson*,<sup>45</sup> now on appeal, it was held that a lobbyist, suing for a newspaper column suggesting he had "bought" a congressman, need not show "malice" as defined in *New York Times*. The court stated that the *New York Times* rule applied to public officials exclusively, and not to candidates.

It is difficult to imagine such a limitation being adopted by the Supreme Court. Advocates of the limited view point to the *New York Times* case, where the Court specified a desire to make reciprocal the privilege of public officials to make false statements about members of the public, so long as such statements were within the outer perimeter of their duties.<sup>46</sup> Clearly, candidates for public office, and other "public men" do not have such a privilege.

But reciprocity was only one of several arguments for First Amendment protection, and not the most important one, at that. Time and again, the Court returned to its basic premise that "debate on public issues should be uninhibited, robust, and wide-open." In *Garrison*,

40. 251 N.Y.S.2d at 831.

41. *Spahn v. Julian Messner, Inc.*, 43 Misc. 2d 219, 250 N.Y.S.2d 529 (Sup. Ct. 1964).

42. *Dempsey v. Time, Inc.*, 43 Misc. 2d 759, 252 N.Y.S.2d 186 (Sup. Ct. 1964).

43. *Harper v. National Review, Inc.*, — N.Y.S.2d — (Sup. Ct. 1964), *aff'd mem.* 263 N.Y.S.2d 292 (1st Dep't 1965).

44. 247 F. Supp. 595 (S.D.N.Y. 1965).

45. 248 F. Supp. 188 (D.D.C. 1965).

46. Such a privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when *he* is sued for libel by a private citizen.

376 U.S. at 282.

that philosophy was reaffirmed, "for speech concerning public affairs is more than self-expression; it is the essence of self-government."<sup>47</sup> The vigorous and healthy debate of an informed public necessary to a free society cannot be limited to discussion of "public officials."

An indication of future development may lie in two passages from *Coleman v. MacLennan*,<sup>48</sup> quoted by the Supreme Court:

Manifestly a candidate for public office must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office. . . .<sup>49</sup>

This privilege extends to a great variety of subjects and includes matters of public concern, public men, and candidates for office.<sup>50</sup>

A rule which protected criticism of persons once elected to office, but refused to protect statements about such persons before their appointment or election would present a peculiar anomaly indeed!

In concluding a discussion of current trends, it is interesting to note an increasing number of minimal verdicts in cases which go to judgment against the defendants. Juries are not readily persuaded of genuine injury. Where real injury has been recognized however, verdicts in large amounts have been returned, particularly by way of punitive damages. The *New York Times* case was a good example, and a recent jury in Missouri awarded \$1,000 compensatory damages and \$50,000 punitive damages. Unlike *New York Times*, however, the award was set aside by the trial judge, and is now on appeal. Thus, it appears that a strong case may be expected to result in a very substantial verdict. Contrarywise, where the facts are thin, the jury is likely to prove niggardly.

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47. 379 U.S. at 74-75.

48. 78 Kan. 711, 98 Pac. 281 (1908).

49. *Supra* note 11, at 77.

50. *Supra* note 1, at 281-82.