Torts -- Assault and Battery -- Provocative Words as Defense

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now be in a better position to furnish improved service, at lower operating costs, on the remaining lines. Perhaps the railroads can make the next step in meeting competition.[59]

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Torts—Assault and Battery—Provocative Words as Defense

In a recent Louisiana case,[1] plaintiff sued defendant for assault and battery. Defendant asserted the defense of justification because of plaintiff's use of opprobrious language directed toward him. The court held that provocative words may be justification for an assault, provided the person uttering the words understood or should have understood that physical retaliation would be attempted. The words must be "fighting" words.[2]

The court based its decision, as well as previous ones to the same effect,[3] on a section of the Louisiana Civil Code,[4] which, as interpreted by the court prevents one who provokes the difficulty from recovering damages for the resulting assault.[5] The rule was first extended to

[59] Perhaps the greatest advancement that has been made in commuter and branch-line equipment to meet the short-haul competition is the Budd RDC-1 (Rail Diesel Car). Each car is capable of carrying ninety passengers and several cars can be coupled together to make a train. Operating costs are 55¢ a mile with a two-man crew and 64¢ a mile with a three-man crew, compared with $1.80 a mile for a steam locomotive with two cars. The initial cost of a car is $128,750. The price of three cars with a total seating capacity of 270 would be $90,000 cheaper than a small diesel locomotive and three standard passenger cars seating only 162. See Business World, Oct. 22, 1949, p. 22; Popular Science, Dec. 1949, p. 114.

A problem which is closely related to abandonments of lines and discontinuance of service is that pertaining to the abandonment of railroad stations. See Utilities Comm'n v. Atlantic Coast Line R. R., 235 N. C. 273, 69 S. E. 2d 502 (1952); Public Service Comm'n v. Atlantic Coast Line R. R., 72 S. E. 2d 438 (S. C. 1952).

[1] Smith v. Parker, 59 So. 2d 718 (La. App. 1952).

[2] " . . . insulting or 'fighting' words . . . those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. State of New Hampshire, 315 U. S. 568, 572 (1942).

"The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . Such words, as ordinary men know are likely to cause a fight." Chaplinsky v. State of New Hampshire, *supra* at 573 (1942).

[3] Oakes v. H. Weil Baking Co., 174 La. 770, 141 So. 456 (1932); Gross v. Great A. & P. Tea Co., 25 So. 2d 837 (La. App. 1946) and cases cited therein.

[4] LA. STAT. ANN. § 2315 (1945) "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it."

[5] Notes, 14 FORD. L. REV. 95 (1945); 5 LA. L. REV. 617 (1944). The defense is apparently not an extension of self-defense, but based on the theory that the plaintiff by opprobrious language, puts himself under a legal disability to recover. See Gross v. Great A. & P. Tea Co., 25 So. 2d 837, 840 (La. App. 1945) ("The reason is that one who uses words or actions which it may be expected will bring about an attempt at retaliation has only himself to blame, if as a result of the attempt at retaliation, he, himself, is injured.") . *But see* McCurdy v. City Cab Co., 32 So. 2d 720, 723 (La. App. 1947); Ponthieu v. Coco, 18 So. 2d 351, 355 (La. App. 1944). In these cases the court referred to the plaintiffs as the

allow mere words as provocation in *Finkelstein v. Naihaus*.[6] The Louisiana courts have followed that decision in a number of cases,[7] and have evidently securely incorporated this extreme facet of a basically extreme principle into their jurisprudence.[8]

Three other states, Mississippi, Alabama and Georgia, have criminal statutes[9] which in effect provide that mere words, in the form of abusive or insulting language, are sufficient to justify the use of force. Alabama refuses to apply its penal statute to civil actions.[10] In Georgia and Mississippi, however, the criminal statutes have been held to apply to civil actions.[11] The courts in these two states are not necessarily extending the statute, but are changing the common law by adopting the penal policy of the legislature as the policy of the courts in this type of civil action.[12] Thus, they hold that under certain conditions,[13]

aggressors in denying recovery for plaintiff-provoked assaults, indicating at least, that the court may be thinking of some degree of self-defense as being justified by the aggression.

[6] 151 So. 686 (La. App. 1933) (" . . . the law is clear that, where the plaintiff provokes a difficulty by insults, abuse, threats, or other conduct calculated to arouse the resentment or fears of the defendant, plaintiff is not entitled to recover.").

[7] McCurdy v. City Cab Co., 32 So. 2d 720 (La. App. 1947); Gross v. Great A. & P. Tea Co., 25 So. 2d 837 (La. App. 1946); Ponthieu v. Coco, 18 So. 2d 351 (La. App. 1944) [discussed in Note, 14 FORD. L. REV. 95 (1945) and cases cited therein].

To be a defense, however, it has been consistently held that the words must come reasonably close to or be immediately provocative of the assault. Antley v. Davis, 199 So. 450 (La. App. 1940).

It has also been demanded that the words be reasonably provocative and that the assault not go beyond what is justified. Chisholm v. DeFrances, 27 So. 2d 467 (La. App. 1946); Randal v. Ridgeley, 185 So. 632 (La. App. 1939).

[8] Apparently these cases determined since the decision in Finkelstein v. Naihaus, 151 So. 686 (La. App. 1933) nullify a series of earlier holdings to the effect that mere words never constitute a defense. *But cf.* Beaucoudray v. Hirsch, 49 So. 2d 770 (La. App. 1951); Broussard v. Citizen, 44 So. 2d 347 (La. App. 1950), which recent cases seemingly follow the common law rule, holding that no provocation may be a complete defense. This indicates that the Louisiana courts are not entirely consistent in their holdings on the point.

[9] ALA. CODE ANN. tit. 14, § 37 (1940); GA. CODE ANN. § 26-1409 (1939); MISS. CODE ANN. § 2525 (1942).

[10] Gissendonner v. Temples, 232 Ala. 608, 169 So. 231 (1936); Jones v. Bynum, 189 Ala. 677, 66 So. 639 (1914); Empire Clothing Co. v. Hammons, 17 Ala. App. 60, 81 So. 838 (1919).

[11] Berkner v. Dannenberg, 116 Ga. 954, 43 S. E. 463 (1903) [dissent, adopted in Thompson v. Shelverton, 131 Ga. 714, 63 S. E. 220 (1908)]; Exposition Cotton Mills v. Crawford, 67 Ga. App. 135, 19 S. E. 2d 835 (1942); Holliman v. Lucas, 202 Miss. 463, 32 So. 2d 259 (1947); Woods v. Ill. Cent. Ry., 151 Miss. 395, 118 So. 197 (1928); Choate v. Pierce, 126 Miss. 209, 88 So. 627 (1921) (holding justified in that "it would be an unusual state of the law to hold that it was a question for the jury to determine whether insulting words were a sufficient excuse or justification of a criminal charge of assault and battery, while in a civil action of the same character that such words were no justification.").

[12] Note, 21 COL. L. REV. 818 (1921).

[13] Assault must not be disproportionate to the provocation. Robinson v. DeVaughn, 59 Ga. App. 37, 200 S. E. 213 (1938); Coleman v. Yazoo & M. V. Ry., 90 Miss. 629, 43 So. 473 (1907).

mere words may be sufficient provocation to justify a civil assault and battery. However, the statutes are not applicable in cases of aggravated assaults.[14]

The courts in the overwhelming majority of the jurisdictions follow the usual common law rule that no language, however abusive, will justify an assault so long as it is unaccompanied by any overt act.[15] This rule applies also to opprobrious words and epithets which are grossly insulting or abusive.[16]

While not allowing provocation as a defense, most courts applying the common law rule do allow words to be shown in mitigation of damages. The majority view is that provocation may go to mitigate punitive but not compensatory damages,[17] while other courts allow even compensatory damages to be mitigated.[18]

North Carolina has consistently followed the majority view that the plaintiff who uses insulting language or otherwise invites the assault by provoking conduct is not barred from recovery.[19] "As in criminal

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Provocation by opprobrious words, to justify assault, must be spoken to the accused, at the time and in the place where the assault takes place. Hutcheson v. Browning, 34 Ga. App. 276, 129 S. E. 125 (1925); Woods v. Ill. Cent. Ry., 151 Miss. 395, 118 So. 197 (1928).

[14] Suggs v. Anderson, 12 Ga. 461 (1853) (assault upon a female); Thomas v. Carter, 148 Miss. 637, 114 So. 736 (1927) (assault with a deadly weapon).

[15] *E. g.*, Rohrback v. Pullman's Palace Car Co., 166 Fed. 797 (C. C. E. D. Pa. 1909); Cooper v. Demby, 122 Ark. 266, 183 S. W. 185 (1916); Uptegrove v. Walker, 222 Mo. App. 758, 7 S. W. 2d 734 (1928); Royal Oak Stave Co. v. Groce, 113 S. W. 2d 315 (Tex. Civ. App. 1937); Goldsmith's Adm'r v. Joy, 61 Vt. 488, 17 Atl. 1010 (1889). For collection of cases and text discussion, see 4 AM. JUR., ASSAULT AND BATTERY § 53 (1936); PROSSER, TORTS 127 (1941); RESTATEMENT, TORTS § 69, comment *a* (1934).

[16] *E. g.*, Rohrback v. Pullman's Palace Car Co., 166 Fed. 797 (C. C. E. D. Pa. 1909); Chicago Mill & Lumber Co. v. Bryeans, 137 Ark. 341, 209 S. W. 69 (1919); Lewis v. Fountain, 168 N. C. 277, 84 S. E. 278 (1915); Daniels v. Starnes, 61 S. W. 2d 548 (Tex. Civ. App. 1933).

[17] Collier v. Thompson, 180 Ark. 695, 22 S. W. 2d 562 (1929); Scott v. Fleming, 16 Ill. App. 539 (1885); Osler v. Walton, 67 N. J. L. 63, 50 Atl. 590 (1901); Mahoning Valley Ry. v. DePascale, 70 Ohio St. 179, 71 N. E. 633 (1904); Ward v. White, 86 Va. 212, 9 S. E. 1021 (1889). For collection of cases see Note, 63 A. L. R. 890 (1929); 1 SUTHERLAND, DAMAGES, 460 (1916).

To be considered in mitigation of damages, it is generally required that the provocation be given at the time of the assault or reasonably close thereto. Keiser v. Smith, 71 Ala. 481 (1882); Cummins v. Crawford, 88 Ill. 312 (1878); Lee v. Woolsey, 19 Johns. 319 (N. Y. 1832); 1 SEDGWICK, DAMAGES 749 (9th ed. 1920).

[18] Smith v. Davis, 76 Ga. App. 154, 45 S. E. 2d 237 (1947); Bascomny v. Hoffman, 199 Iowa 941, 203 N. W. 273 (1925); Jackson v. Old Colony St. Ry., 206 Mass. 477, 92 N. E. 725 (1910); Genuing v. Baldwin, 77 App. Div. 584, 79 N. Y. Supp. 569 (3d Dep't 1902); Robinson v. Rupert, 23 Pa. St. 523 (1854); Evans v. Bryan, 24 Tenn. App. 405, 145 S. W. 2d 557 (1940); Richards v. Westmoreland, 63 S. W. 2d 715 (Tex. Civ. App. 1933); Mecham v. Foley, 235 P. 2d 497 (Utah 1951).

[19] Lewis v. Fountain, 168 N. C. 277, 84 S. E. 278 (1915); Palmer v. Winston-Salem Ry. & Elect. Co., 131 N. C. 250, 42 S. E. 604 (1902); Williams v. Gill, 122 N. C. 967, 29 S. E. 879 (1898).

actions, no words, however violent or insulting, justify a blow. . . . "[20] However, on the question of mitigation of damages, the North Carolina court is not so clear. Four cases state that provocation may be shown in evidence to mitigate the damages,[21] without expressly indicating what type damages may be mitigated.

Therefore, only three jurisdictions allow words to justify an assault: Louisiana under its civil code, and Georgia and Mississippi under their respective penal codes. Although these states have seemingly attained good results from the justification rule, there appears to be no tendency on the part of other jurisdictions to adopt the policy. Those states following the strict common law rule have reached equally good results by allowing provocation to go in mitigation of both punitive and actual damages.

As a matter of policy, the mitigation theory is probably best. It is said that this results in an illogical position, whereby the court allows provocation to be a defense by indirection while not permitting such directly.[22] It is also said that peace and good order forbid that individuals shall right their own wrongs.[23] But, these platitudes fail when applied to the actual application of the rule.

Under the mitigation rule, the case goes to the jury on the question of damages as well as questions of fact. The jury weighs the evidence and determines what damages should be assessed in view of the degree of provocation, mitigating even actual damages if provocation seems very great, just as they allow punitive damages when the provocation is very slight. A plaintiff will then be less apt to seek damages for an assault which he provoked, while a defendant will be unable to have a defense in language which would anger only the hypersensitive.

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[20] Lewis v. Fountain, 168 N. C. 277, 279, 84 S. E. 278, 279 (1915).

[21] Lewis v. Fountain, *supra* note 20; Palmer v. Winston-Salem Ry. & Elect. Co., 131 N. C. 250, 42 S. E. 604 (1902); Bell v. Hansley, 48 N. C. (3 Jones) 131 (1855); Barry v. Inglis, 1 N. C. (1 Tayl. 121) 163 (1799).

However, dictum in Palmer v. Winston-Salem Ry. & Elect. Co., *supra* at 251, 42 S. E. at 604, apparently indicates that provocation can be shown to mitigate even compensatory damages.

[22] Note, 3 NOTRE DAME LAW. 332 (1938).

[23] Tisdale v. State, 199 Ind. 1, 2, 154 N. E. 801, 802 (1927).