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LIBEL AND SLANDER IN VIRGINIA

Thomas E. Spahn*

I. INTRODUCTION

The law of libel and slander in Virginia is unsettled. Even defining the terms is difficult. While many states classify libel and slander as separate torts, in Virginia defamation encompasses them both.¹ Moreover, there are two separate definitions of "defamation per se" in Virginia.² There are also two types of "malice" which are applicable in defamation actions;³ and to make matters worse, one type of "malice" which actually is not malice at all is called "actual malice."⁴

Other aspects of the law of defamation are as confusing as the definition of its terms. Astonishingly, no one can say with certainty what statute of limitations governs Virginia defamation actions.⁵ Furthermore, the standard of liability which will apply to many defendants' actions has not even been determined.⁶ The *Virginia Model Jury Instructions* simply leave a blank, which invites attorneys to construct an appropriate standard.⁷

Much of the blame for the bewildering state of the law lies with the United States Supreme Court. Beginning in 1964, federal constitutional requirements arising from the first amendment⁸ and ap-

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1. See *infra* note 19 and accompanying text.

Virginia defamation law seems to have a language all its own. For instance, "[i]f the accusation is not made by the words spoken, taken in connection with the colloquium and averment, it cannot be supplied by the innuendo." 12A MICHIE'S JUR. *Libel and Slander* § 40 (1978).

2. See *infra* notes 111-15 and accompanying text.

3. See *infra* note 86.

4. See *infra* notes 82-85 and accompanying text. The term "actual malice" was formulated by the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Virginia has compounded the problem by referring to both forms of malice as "actual malice." See *infra* note 93 and accompanying text.

5. See *infra* text accompanying notes 46-48.

6. See *infra* text accompanying notes 95-99.

7. 2 VIRGINIA MODEL JURY INSTRUCTIONS-CIVIL No. 37.080 (Michie 1981).

8. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

plied to the states through the fourteenth amendment⁹ were injected into state defamation law.¹⁰ Unlike the situation in other areas of the law where constitutional principles simply serve as an overarching guardian of individual rights, the first amendment has seeped into almost every aspect of the law of libel and slander.¹¹ This infusion of constitutional doctrine has brought neither clarity nor uniformity. In an era when the law is thought to apply equally to all, the Supreme Court's interpretation of these constitutional principles mandates a threshold question in every defamation action as to the status of the plaintiff and the defendant because different rules apply to each category of plaintiffs and defendants.¹² Perhaps it would have been better if the constitutional inroads had been even more intrusive. In those areas of the law of defamation left to the discretion of the states,¹³ courts have often either contradicted constitutional principles or declined to set any legal standard at all.¹⁴

The law of libel and slander in Virginia is a perplexing mix of nineteenth century law, unique language, and first amendment principles dictated by the United States Supreme Court. This disorder might be excusable if libel and slander were a backwater of the law. However, it is difficult to find another tort deservedly receiving as much attention. Recent "megaverdicts"¹⁵ have highlighted the significance of libel and slander to defendants and attracted the attention of plaintiffs everywhere. Given the relative ease of preparing a defamation action, when compared to other lawsuits, as well as the public antipathy toward media defendants,¹⁶ defamation actions may become one of the fastest growing branches of tort law.

9. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ." U.S. CONST. amend. XIV. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (first amendment applies to the states through fourteenth amendment).

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

11. See, e.g., *infra* text accompanying notes 81-90.

12. Plaintiffs are categorized as public or private and defendants are categorized as media or individual.

13. See generally Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1448-51 (1975) [hereinafter cited as Eaton, *The American Law of Defamation*].

14. See *infra* text accompanying notes 95-99.

15. See Goodale, *Is the Public "Getting Even" With Press in Libel Cases?*, 188 N.Y.L.J., 29 (1982) (twenty-six million dollar verdict against *Penthouse* magazine; nine million, two hundred thousand dollar verdict against the Alton (Ill.) Telegraph).

16. *Id.*

Unfortunately, the law is not ready for this development. If the Supreme Court's intervention into state law of libel and slander was designed to guide courts to correct results, it has been an utter failure. One recent study has estimated that while plaintiffs win approximately eighty percent of the libel and slander jury trials in actions against media defendants, defendants are successful in approximately sixty percent of their appeals from these verdicts.¹⁷ The combination of an increased number of cases and the confused state of the law will undoubtedly heighten the danger of unjust results.

While it is impossible to explore all of the intricacies of Virginia's law of libel and slander in a brief article, it is appropriate to address many of the rudimentary concepts. These issues will be raised in the context of answers to eight questions that both parties should ask themselves when a defamation action is considered or initiated.

II. NECESSARY INQUIRIES BEFORE INSTITUTING OR DEFENDING A DEFAMATION ACTION

A. *What was the Communication?*

Since plaintiffs must plead the allegedly defamatory statement with particularity,¹⁸ it is necessary to know the exact words communicated. However, in Virginia it makes no difference whether the words were written or spoken. Unlike most states, Virginia recognizes no distinction between actions for libel and slander.¹⁹

The communication must be made to a third person — a process called "publication."²⁰ Although the issue of publication might

17. Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RESEARCH J. 797, 829.

18. *Federal Land Bank v. Birchfield*, 173 Va. 200, 215, 3 S.E.2d 405, 410 (1939).

19. *Fleming v. Moore*, 221 Va. 884, 889, 275 S.E.2d 632, 635 (1981); *Shupe v. Rose's Stores*, 213 Va. 374, 375-76, 192 S.E.2d 766, 767 (1972).

The Restatement (Second) of Torts § 568 sets forth the following distinctions:

- (1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.
- (2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in subsection (1) [above].

20. *Thalhimer Bros. v. Shaw*, 156 Va. 863, 866, 159 S.E. 87, 90 (1931). *But see*, VA. CODE ANN. § 8.01-45 (Repl. Vol. 1977) ("insulting words" exception) (citing *Hines v. Gravines*, 136 Va. 313, 112 S.E. 869 (1923); *Davis v. Heflin*, 130 Va. 169, 107 S.E. 673 (1921); *Rolland v.*

seem to be a simple matter, the question often arises as to whether the publication requirement is satisfied by communications between principals and agents, businessmen and their secretaries, etc. In this area, the law of defamation does not always follow that of conspiracy²¹ or agency.²² Communication between different agents of the same principal, such as employees of a corporation, can satisfy the publication requirement.²³

The communication must be false²⁴ — this is one of the few common law principles receiving the United States Supreme Court's imprimatur.²⁵ Unlike some states, Virginia has not taken the bold step of placing the burden on plaintiffs to prove the falsity of the allegedly defamatory communication,²⁶ but Virginia continues to permit defendants to plead truth as an affirmative defense.²⁷ Most defendants use the opportunity, since failure to establish truth after pleading it will not prejudice defendant unless he had no basis for his pleading.²⁸ Defendant need not establish the "literal truth" of the communication. If the statement is "substantially true," plaintiff loses.²⁹ The sanctity of truth as a defense could apparently lead to the odd result that a defendant might be absolved after maliciously spreading a rumor he thinks is false, but which is later found to be true. Since there is no common law invasion of privacy in Virginia,³⁰ and the torts of intentional³¹ or negli-

Batchelder, 84 Va. 664, 5 S.E. 695 (1888)).

21. 4A MICHIE'S JUR. *Conspiracy* § 4 (1978) ("Acts and declarations of one of several persons who have conspired to commit a crime, are, in contemplation of the law, the acts and declarations of all.")

22. 1A MICHIE'S JUR. *Agency* § 84 (1978) ("All the acts of an agent in the discharge of his duties and within the scope of his authority . . . are obligatory upon the principal."); see also *United Bhd. of Carpenters v. Humphreys*, 203 Va. 781, 127 S.E.2d 98 (1962), cert. denied, 371 U.S. 954 (1963).

23. See, e.g., *Montgomery Ward & Co. v. Nance*, 165 Va. 363, 379, 182 S.E. 264, 270 (1935).

24. See *Falwell v. Penthouse, Int'l*, 521 F. Supp. 1204, 1208 (W.D. Va. 1981).

25. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

26. See, e.g., *Manale v. City of New Orleans*, 673 F.2d 122, 125 (5th Cir. 1982); *McIntire v. Westinghouse Broadcasting Co.*, 479 F. Supp. 808, 811 (D. Mass. 1979); *Michaud v. Inhabitants of Livermore Falls*, 381 A.2d 1110, 1113 (Me. 1978); *Dunlap v. Philadelphia Newspapers*, 301 Pa. Super. 475, —, 448 A.2d 6, 11-14 (1982).

27. See, e.g., *Williams Printing Co. v. Saunders*, 113 Va. 156, 172, 73 S.E. 472, 476 (1912).

28. *Snyder v. Fotherly*, 153 Va. 762, 765-66, 151 S.E. 149, 150-51 (1930).

29. *Saleeby v. Free Press*, 197 Va. 761, 763, 91 S.E.2d 405, 407 (1956) ("Slight inaccuracies of expression are immaterial provided the defamatory charge is true in substance, and it is sufficient to show that the imputation is 'substantially' true.")

30. *Falwell v. Penthouse, Int'l*, 521 F. Supp. at 1206; *Evans v. Sturgill*, 430 F. Supp. 1209, 1213 (W.D. Va. 1977). *But cf.* VA. CODE ANN. § 8.01-40 (Repl. Vol. 1977) (an individual whose likeness is appropriated for trade or advertising purposes may file an action).

gent³² infliction of emotional distress have not evolved very far, there is little a plaintiff can do about the spreading of a true statement.³³

Since only false statements are actionable, the communication must be capable of such proof. Thus, opinion cannot be the basis of a defamation action because it cannot be proven false.³⁴ Unfortunately, it is often difficult to determine if a statement is one of opinion or fact.³⁵ Fact does not become opinion if prefaced by a statement such as "I believe" or "I think."³⁶ On the other hand, many statements that appear to be factual, such as "he has the morals of a snake," cannot be proven true or false, and are therefore nonactionable opinion. Cases involving some fairly harsh opinions have been dismissed for this reason.³⁷

31. See *Womack v. Eldridge*, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974) (only "outrageous and intolerable" conduct that causes "severe" emotional distress is actionable); see also *Moore v. Jefferson Hosp.*, 208 Va. 438, 441-42, 158 S.E.2d 124, 126-27 (1967).

32. *Hughes v. Moore*, 214 Va. 27, 31, 197 S.E.2d 214, 219 (1973) (in negligence actions, plaintiff must suffer physical injury that can be proven by "clear and convincing" evidence to have arisen from the emotional disturbance).

33. See *Falwell v. Penthouse, Int'l*, 521 F. Supp. at 1204 (no recovery for admittedly accurate interview).

Theoretically, truth should not be a defense to Virginia's statutory cause of action for defamation. VA. CODE ANN. § 8.01-45 (Repl. Vol. 1977) renders actionable communications which "tend to violence and breach of the peace." Although truthful statements can have this effect as readily as false statements, this statutory "insulting words" cause of action has now been completely assimilated into the law of defamation (except that it is not necessary that a third person hear the communication). *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 6-7, 82 S.E.2d 588, 591 (1954). Thus, the requirement of falsity has been read into the statute. See *Guide Publishing Co. v. Futrell*, 175 Va. 77, 87, 7 S.E.2d 133, 137 (1940).

34. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974); see also RESTATEMENT (SECOND) OF TORTS § 566 (1977) (Opinion "is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.").

Although the Virginia Supreme Court has not had an opportunity to apply this principle, at least one federal court applying Virginia law has adopted it. *Evans v. Lawson*, 351 F. Supp. 279, 287 (W.D. Va. 1972).

35. This determination is made by the court as a matter of law. A three-pronged analysis of the statement is used, whereby the court examines: 1) the context in which the statement was uttered or published; 2) any cautionary words used by the person publishing the statement; and 3) the circumstances surrounding the statement, such as medium of publication and its anticipated audience. See *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980); *Stuart v. Gambling Times*, 534 F. Supp. 170, 172 (D.N.J. 1982).

36. *Cianci v. New Times*, 639 F.2d 54, 66 (2d Cir. 1980), modified on other grounds, 6 Med. L. Rptr. 2145 (2d Cir. 1980).

37. See, e.g., *Rand v. New York Times Co.*, 75 A.D.2d 417, 430 N.Y.S.2d 271 (1980) (allegation that a manager had "screwed" and "f. . . d over" a singer was found incapable of supporting a defamation action).

The communication must not only be false, it must be defamatory. This requirement has two components. First, the communication must be derogatory³⁸ and "diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or . . . excite adverse, derogatory or unpleasant feelings or opinions against him."³⁹ Thus, a newspaper would not be liable if it listed an incorrect address for the subject of a news story, although it might be liable if the address given were that of a notorious whorehouse.⁴⁰ If the defamatory nature of the communication appears on its face, it is called defamation per se.⁴¹ If it is necessary to look beyond the statement, the action is one for defamation per quod.⁴² Analyzing defamation per quod involves a series of mysterious sounding procedures that make little sense. Plaintiffs must supply the extrinsic facts that render the communication defamatory, labeled the "inducement," and then combine the communication and the extrinsic facts, a process called "innuendo."⁴³ Second, it must be likely that those receiving the communication will believe it to be true. Obvious humor or hyperbole will not form the basis of a libel or slander action.⁴⁴ Although Virginia courts have not explicitly recognized this rule, it follows naturally from the law as it now exists in the state.⁴⁵

B. *When was the Communication Made?*

One of the most remarkable aspects of defamation law in Virginia is the uncertainty concerning the applicable statute of limitations; it is not explicitly outlined in the Code of Virginia. Defamation often harms the plaintiff personally, which would subject it to the two-year statute of limitations for personal injuries.⁴⁶ But defamation may instead injure plaintiff's business or other property,

38. *Falwell v. Penthouse, Int'l*, 521 F. Supp. at 1204.

39. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 111 (4th ed. 1971); see also *Fuller v. Edwards*, 180 Va. 191, 22 S.E.2d 26 (1942).

40. See *O'Neill v. Edmonds*, 157 F. Supp. 649, 651 (E.D. Va. 1958).

41. See *Shupe v. Rose's Stores*, 213 Va. 374, 192 S.E.2d 766 (1972); see also *infra* text accompanying note 108.

42. See *Wilder v. Johnson Publishing Co.*, 551 F. Supp. 622 (E.D. Va. 1982). In *Wilder*, the defamatory meaning of the magazine article arose "by innuendo from the published words in combination with known extrinsic facts, the 'inducement.'" *Id.* at 623.

43. *Id.* at 623-25; see also *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 82 S.E.2d 588 (1954).

44. See generally, W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 111 (4th ed. 1971).

45. See, e.g., *Corr v. Lewis*, 94 Va. 24, 26 S.E. 385 (1896).

46. VA. CODE ANN. § 8.01-243(A) (Repl. Vol. 1977) (two-year statute of limitations).

which would be governed by a five-year statute of limitations.⁴⁷ On the other hand, the fact that defamation might have both effects renders it likely that the defamation action is governed by the one-year "catch-all" provision of the Virginia Code.⁴⁸ The Revisers of the Code apparently did not see the logic of this analysis, since only malicious prosecution and abuse of process are mentioned in the Revisers' Note.

There are two interesting aspects of the limitations defense: one helps defendant, one hurts. Plaintiff need not even hear or read the communication for the limitations period to begin.⁴⁹ Thus, a plaintiff could be barred from filing an action even before he becomes aware of the defamation. On the other hand, defendant might be liable for someone else's repetition of the communication long after the statute has run on the original defamatory statements. Defendant is liable for any "re-publication" of defamatory statements that he authorizes or that are the "natural and probable consequences" of his original defamation.⁵⁰

C. *Who Was the Communication About?*

The communication need not refer to the plaintiff by name. If the plaintiff can be identified as the subject of the communication, there may be grounds for a defamation action.⁵¹ For instance, if an allegation were made about the best center to play basketball for the University of Virginia during the last decade, Ralph Sampson might have a cause of action even if his name is not explicitly mentioned.

If more than one person is the subject of the communication, other considerations apply. Although the Virginia law of "group libel" is largely undeveloped, it is generally acknowledged that members of a defamed group will be allowed to pursue a defamation action only if the group is small enough that the defamation

47. *Id.* § 8.01-243(B) (five-year statute of limitations).

48. *Id.* § 8.01-248 (one-year statute of limitations).

49. *Brown v. American Broadcasting Co.*, 704 F.2d 1296, 1299-1300 (4th Cir. 1983).

50. *Compare Weaver v. Beneficial Fin. Co.*, 199 Va. 196, 200, 98 S.E.2d 687, 691 (1957) (republication gives rise to new cause of action against original author) *with Watt v. McKelvie*, 219 Va. 645, 649, 248 S.E.2d 826, 829 (1978) (original publisher not liable for republication made by third party during privileged deposition hearing).

51. *Powell v. Young*, 151 Va. 985, 997-98, 144 S.E. 624, 627-28 (1928) (advertisement referring to a door-to-door jewelry salesman in Franklin, Va., found to identify plaintiff).

casts aspersions on all members of the group.⁵² For instance, a statement that all lawyers are thieves will not create a cause of action for any one lawyer. On the other hand, a comment that all members of a five-man law firm are dishonest will probably be actionable.

Group libel is one of the more interesting aspects of libel law. Under current principles, a statement that *one* lawyer in the hypothetical five-man firm is dishonest will create causes of action on behalf of all five.⁵³ Thus, the defendant who attempts to avoid liability by not explicitly naming the lawyer he believes to be dishonest may actually magnify his liability fivefold.

Once the subject of the communication is identified, it is critical to determine if that subject is a public or a private person. This distinction often determines the applicability of constitutional rather than common law rules. Different standards of proof apply to public and private plaintiffs in defamation actions. Generally, a public plaintiff has a higher burden of proof than a private plaintiff.⁵⁴ The Supreme Court has justified the higher standard for public plaintiffs by noting that they have voluntarily undertaken the risks of notoriety and they have greater access to opportunities of rebutting libelous statements.⁵⁵

Unfortunately, the tests used to make this important decision are less than clear. The court⁵⁶ must determine whether the plaintiff has become a "public" person either by reason of an office he holds⁵⁷ or by voluntarily entering the public "limelight."⁵⁸ Furthermore, a plaintiff may be considered "public" for all purposes or for only a limited range of issues.⁵⁹

Recent United States Supreme Court cases have narrowed the

52. See *Ewell v. Boutwell*, 138 Va. 402, 409-10, 121 S.E. 912, 914 (1924) ("unscrupulous rich men" and "whiskey smugglers" did not adequately identify House of Delegates members who supported certain legislation).

53. *Id.* at 411, 121 S.E. at 914.

54. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

55. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974).

56. See *Fleming v. Moore*, 221 Va. 884, 275 S.E.2d 632 (1981).

57. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) ("['P]ublic official' designation applies . . . to . . . government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."). See generally 19 A.L.R. 3d 1361 (1968) (discussing the definition of "public official").

58. *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 164 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. at 345.

59. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967) (when considered public for a limited range of issues, the plaintiff is classified as a "vortex" plaintiff).

definition of public persons.⁶⁰ The Court now appears to be emphasizing the voluntary nature of plaintiff's fame. This approach precludes clever media defendants from providing wide coverage to a potential or actual plaintiff in order to increase the plaintiff's burden of proof. Regardless of the rules used, determining whether a plaintiff is a "public" person or a "private" individual is often outcome determinative, on appeal if not at trial, and thus is a critical threshold determination.⁶¹

D. *Was the Defendant Privileged to Communicate?*

Even if a communication is false and defamatory, the defendant might be immunized by a privilege. The privilege can arise either as a result of the substance of the communication or because of the recipient himself. Virginia recognizes absolute and qualified privileges, which are derived from two sources — the common law and legislative enactment.

60. See, e.g., *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979). See Note, *Public Figures and Malice: Recent Supreme Court Decisions Restricting the Constitutional Privilege*, 14 U. RICH. L. REV. 737 (1980).

The extent of constitutional protection has fluctuated. For instance, in *Rosenbloom v. Metro Media, Inc.*, 403 U.S. 29 (1971), the United States Supreme Court extended the public figure doctrine to any communications about matters of public concern. The Virginia Supreme Court adopted this rule in Virginia one year later. *Sanders v. Harris*, 213 Va. 369, 192 S.E.2d 754, 757 (1972). Unfortunately for Virginia, the Supreme Court repudiated *Rosenbloom* in 1974. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Since the United States Supreme Court feels less compunction about overruling its earlier decisions than does Virginia's highest court, the Virginia court might justifiably feel "sandbagged" by the shifting rules. *Sanders* stands as a monument to the fallacy that constitutional doctrines are changeless.

61. This determination is even more difficult in actions brought by corporations. Having created the legal fiction that a corporation is treated the same as an individual, the law has had to live with this fiction even in areas such as defamation. That corporations can file actions for defamation might seem ridiculous, but it is true. See *General Prods. Co., v. Meredith Corp.*, 526 F. Supp. 546 (E.D. Va. 1981) (corporation alleged that magazine article defamed corporation's name and disparaged its products). The strain on logic and common sense caused by this rule is particularly evident when the court must determine if the plaintiff is a "public" or "private" person. Courts are called upon to dutifully determine if a corporation is a "public" corporation or a "private" corporation (whatever that means). At least one Virginia commentator has criticized the Fourth Circuit Court of Appeals for not creating an entirely separate test for determining if a corporation is a "public" or "private" entity. *Fourth Circuit Review*, 38 WASH. & LEE L. REV. 413, 716 (1981) (discussing *Arctic Co. v. Loudoun Times Mirror*, 624 F.2d 518 (4th Cir. 1980), cert. denied, 449 U.S. 1102 (1981)).

1. Absolute Privilege

As might be expected, absolute privileges are narrowly construed.⁶² Common law absolute privileges include communications made in the course of legislative,⁶³ judicial,⁶⁴ and quasi-judicial settings such as certain administrative proceedings.⁶⁵ The statutory absolute privileges include communications concerning an employee provided to the Virginia Employment Commission⁶⁶ and reports by school personnel of student alcohol or drug abuse.⁶⁷

2. Qualified Privilege

Qualified privileges are more subtle and more complex. The most widespread common law qualified privilege results when the defendant communicates in "discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests" to someone else with a reciprocal interest in the subject matter of the communication.⁶⁸ A typical statement subject to qualified privilege is that of an employer responding to a reference check about one of his former employees.⁶⁹ One of the more intriguing qualified privileges recognized in Virginia is that of the media or a citizen discussing "matters of public concern."⁷⁰ This privilege has been

62. On at least one occasion, the Virginia Supreme Court has given an incorrect definition of "absolute privilege." In *Alexandria Gazette Corp. v. West*, 198 Va. 154, 159, 93 S.E.2d 274, 279 (1956), the court found that "an absolutely privileged communication is one for which an action will not lie, unless there has been an abuse of the privilege." This is a definition of a *qualified* privilege. See *infra* text accompanying notes 72-75.

63. *Story v. Norfolk-Portsmouth Newspapers, Inc.*, 202 Va. 588, 590, 118 S.E.2d 668, 669 (1961). The court in *Story* mentions another intriguing absolute privilege — one protecting the communication of "military and naval officers." *Id.* Unfortunately, the exact contours of this variety of absolute privilege have not been delineated.

64. *Pennick v. Ratcliffe*, 149 Va. 618, 627, 140 S.E. 664, 670 (1927); see also *Massey v. Jones*, 182 Va. 200, 204, 28 S.E.2d 623, 626 (1944). There is some disturbing language in *Massey* indicating that the privilege may be lost if the communication is irrelevant to the subject matter of the proceeding. See *supra* note 62.

65. *Elder v. Holland*, 208 Va. 15, 155 S.E.2d 369 (1967).

66. VA. CODE ANN. § 60.1-40 (Repl. Vol. 1982).

67. *Id.* § 8.01-47 (Cum. Supp. 1983).

68. *Williams Printing Co. v. Saunders*, 113 Va. 156, 161, 73 S.E. 472, 476 (1912). See also *M. Rosenberg & Sons v. Craft*, 182 Va. 512, 519, 29 S.E.2d 375, 380 (1944).

69. See *Kroger Co. v. Young*, 210 Va. 564, 172 S.E.2d 720 (1970). Other examples include a statement made about a business competitor, *Powell v. Young*, 151 Va. 985, 144 S.E. 624 (1928), a communication between an insurance adjuster and an insured, *Crawford & Co. v. Graves*, 199 Va. 495, 100 S.E.2d 714 (1957), and media reports based on public records, *Alexandria Gazette Corp. v. West*, 198 Va. 154, 93 S.E.2d 274 (1956).

70. *James v. Haymes*, 163 Va. 873, 878, 178 S.E. 18, 20 (1935) (privilege exists only if the "comment or stricture is based upon established facts").

applied to immunize a newspaper editorial.⁷¹

The privilege is "qualified" because it can be lost if "abused."⁷² The court normally determines if the privilege exists, while the jury decides if it has been abused.⁷³ Abuses include common law malice,⁷⁴ exaggeration, and publication of the statement more widely than necessary.⁷⁵ Thus, the abuse can encompass either the substance of the communication or the way in which the communication was made.

The statutory qualified privileges include: 1) information supplied to the Judicial Inquiry and Review Commission;⁷⁶ 2) repetition by a radio or television station of a third party's statements;⁷⁷ 3) disclosure of information to an insurance institution;⁷⁸ and 4) statements made in disciplinary investigations of lawyers by the State Bar.⁷⁹

E. *Was the Communication Made with the Requisite Degree of Fault?*

As explained above in connection with the public-private person dichotomy, there are different standards of care applicable to different communications at different times.⁸⁰ This is one of the most confusing areas of libel and slander law in Virginia.

71. *Id.* At some point, however, a commentary on public affairs would become an "opinion" — which is not capable of supporting an action for defamation. This, of course, is a much safer means of characterizing an editorial, since protecting it with a qualified privilege provides only a limited immunity.

72. *Guide Publishing Co. v. Futrell*, 175 Va. 77, 87, 7 S.E.2d 133, 138 (1940).

73. *Story v. Norfolk-Portsmouth Newspapers, Inc.*, 202 Va. 588, 591, 118 S.E.2d 668, 670 (1961); *Bragg v. Elmore*, 152 Va. 312, 315, 147 S.E. 275, 279 (1928).

74. *See infra* note 86.

75. *See, e.g., Preston v. Land*, 220 Va. 118, 122, 255 S.E.2d 509, 511 (1979).

76. VA. CODE ANN. § 2.1-37.14 (Repl. Vol. 1979) (privilege lost if informant motivated by "actual malice"). *See infra* notes 84-85 and accompanying text (discussion of "actual malice").

77. VA. CODE ANN. § 8.01-49 (privilege lost if due care not taken).

78. *Id.* § 38.1-57.25 (Repl. Vol. 1981) (privilege lost if information is false and given with "malice").

79. *Id.* § 54-47 (Repl. Vol. 1982) (privilege lost if communicated with "actual malice" and without probable cause).

80. Defamatory communications can also lead to criminal misdemeanor prosecutions. *See, e.g., id.* § 18.2-416 (use of abusive language calculated to provoke a breach of the peace); *id.* § 18.2-417 (words imputing unchaste acts to chaste women, unless provoked); *id.* § 18.2-209 (knowingly making false statements to newspapers, television stations or other media); *id.* § 6.1-119 (defamatory statements about the financial conditions of banks).

1. Public Plaintiffs

In *New York Times Co. v. Sullivan*,⁸¹ the Supreme Court ruled that a media defendant cannot be found liable for a communication regarding a public person unless the plaintiff establishes with "convincing clarity"⁸² that the defendant communicated with "knowledge that [the statement] was false or with reckless disregard of whether it was false or not."⁸³ This standard may not be a paradigm of clarity, but it makes sense. However, the Supreme Court forfeited its chance to bring lucidity to the law of defamation by defining this standard as "actual malice."⁸⁴ The use of the term "actual malice" has only served to generate confusion among lower courts that have attempted to apply this standard to a variety of situations.⁸⁵

This article will use the term "constitutional malice" in discussing the Supreme Court's standard in *Sullivan*. "Constitutional malice" is very different from the common law "malice" with which most lawyers are familiar.⁸⁶ Constitutional malice focuses only on the communicator's belief concerning the truth of what he says.⁸⁷ The communicator's motives are entirely irrelevant. In pub-

81. 376 U.S. 254 (1964). The Virginia Supreme Court first applied *Sullivan* in *Sanders v. Harris*, 213 Va. 369, 372, 192 S.E.2d 754, 757 (1972).

82. As with other important aspects of its new doctrine, the United States Supreme Court selected a confusing phrase. It is not clear what "convincing clarity" means. Virginia has utilized the "clear and convincing evidence" standard to award punitive damages without actual or compensatory damages in a defamation per se action. *Newspaper Publishing Corp. v. Burke*, 216 Va. 800, 805, 224 S.E.2d 132, 136 (1976). "Convincing clarity" is considered by some state courts to be the burden of proof between "preponderance of the evidence" and "beyond a reasonable doubt." See, e.g., *Stone v. Essex County Newspapers*, 367 Mass. 849, —, 330 N.E.2d 161, 175 (1975).

83. *Sullivan*, 376 U.S. at 280.

84. *Id.*

85. See Eaton, *The American Law of Defamation*, supra note 13, at 1371.

86. See *Williams v. Trust Co. of Ga.*, 140 Ga. App. 49, —, 230 S.E.2d 45, 50 (1976) (distinguishing common law malice, defined as "ill will, hatred, or 'charges calculated to injure,'" from "actual malice" as defined by the Supreme Court).

87. It is difficult to determine what constitutes "constitutional malice." The Eastern District of Virginia has cited Supreme Court decisions in finding that "[t]his standard is met if the defendant entertained serious doubts as to the truth of his publication . . . or if the publication was made with a 'subjective awareness of probable falsity.'" *General Prods. Co. v. Meredith Corp.*, 526 F. Supp. 546, 552 (E.D. Va. 1981) (citing *Gertz v. Robert Welch, Inc.*, 419 U.S. 323, 334 n.6 (1974)).

As with many legal doctrines, it is easier to define what is *not* constitutional malice. It may not be inferred from the publication alone, regardless of the seriousness of the allegedly defamatory charge. Likewise, it may not be proven by failure to investigate alone. See *Nader v. DeToledano*, 408 A.2d 31, 41 (D.C. 1979), cert. denied, 444 U.S. 1078 (1980). The

lic person defamation, constitutional malice is often the only malice that must be considered by the court or jury.

The confusion caused by the Supreme Court's terminology runs deeper than might first be suspected. Having selected a totally inappropriate term to define its concept,⁸⁸ the Supreme Court proceeded to provide a misleading definition. It is now apparent that the word "reckless" as used in the Supreme Court's definition of constitutional malice does not follow the traditional definition of "reckless" from tort law. The court for the Southern District of New York has explained that in the context of a defamation action "reckless does not mean grossly negligent, its common use, but rather intentional disregard."⁸⁹ The "reckless" component of constitutional malice is naturally the more difficult to understand. It is no wonder that at least one Virginia scholar has cited the jury's confusion in concluding that "the much-vaunted distinction between negligence and recklessness, and thus the importance of characterizing the plaintiff as a public or private figure, appears evanescent."⁹⁰

As might be expected, the existence of two kinds of "malice" complicates defamation law. Consider a qualifiedly privileged communication — for it is with qualifiedly privileged communications that the confusion between constitutional malice and common law malice becomes clearest. If a public person is the subject of a communication which the court finds to be qualifiedly privileged, he can recover only if he establishes *both* (1) that the qualified privilege was abused by, *inter alia*, common law malice, *and* (2) that the defendant was guilty of constitutional malice.

Virginia courts have not attempted to cure the confusion. Before *New York Times Co. v. Sullivan*, Virginia used the term "actual

latter fact is the more interesting, because it might reward a media defendant for failing to check his sources. Courts have generally found that failure to investigate is not evidence of constitutional malice unless the source of information is known to be unreliable. *See, e.g.,* *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, —, 155 Cal. Rptr. 29, 36, *cert. denied*, 444 U.S. 984 (1979); *Savannah News-Press v. Whetsell*, 149 Ga. App. 233, —, 254 S.E.2d 151, 153 (1979).

88. At least one Supreme Court Justice has confessed his regret at having selected the term "malice" to define a standard that has nothing to do with hostility or ill will. *See* *Herbert v. Lando*, 441 U.S. 153, 199 (1979) (Stewart, J. dissenting). The Court as a whole seems unrepentant. *See* *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 251 (1974) (characterizing the term "actual malice" as a "convenient shorthand expression").

89. *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1349-50 (S.D.N.Y. 1977).

90. LaRue, *Living with Gertz: A Practical Look at Constitutional Libel Standards*, 67 VA. L. REV. 287, 294 (1981).

malice" to describe common law malice.⁹¹ Amazingly, the Virginia Supreme Court continued to use "actual malice" to mean common law malice even after *Sullivan*.⁹² In at least one case, the court used the term "actual malice" twice on the same page — once to mean common law malice, once to mean constitutional malice.⁹³ After *Sullivan*, use of the term "actual malice" to mean anything but constitutional malice is inexplicable.⁹⁴

2. Private Plaintiffs

The standard of liability is even more confusing in actions brought by private persons. The standard for damages in private plaintiff actions depends on the defendant. The Supreme Court in *Gertz v. Robert Welch, Inc.*⁹⁵ allowed the states to select any standard of care applicable to media defendants as long as strict liability was not imposed. The Virginia Supreme Court has refused the invitation.⁹⁶ The federal courts have not been so timid, but they cannot agree. One court believes that Virginia would apply the constitutional malice standard,⁹⁷ while two courts believe a negligence standard would apply.⁹⁸ It is probably safe to assume that media defendants will be held liable to a private plaintiff if merely negligent.

No Virginia court has stepped forward to fill the final void in the *Gertz* analysis — private plaintiff vs. private defendant. The Virginia Supreme Court has shown a remarkable degree of self-restraint in refusing to provide even a hint of what standard might apply.⁹⁹ A recent article by two William and Mary professors con-

91. *People's Life Ins. Co. v. Talley*, 166 Va. 464, 469, 186 S.E. 42, 44 (1936).

92. It would be interesting to observe the Virginia Supreme Court's interpretation of the term "actual malice" as used in the statutes discussed *supra* at notes 76-79.

93. *Sanders v. Harris*, 213 Va. 369, 373, 192 S.E.2d 754, 757 (1972). *But see* *Mills v. King-sport Times-News*, 475 F. Supp. 1005, 1011 (W.D. Va. 1979) (suggesting the confusion in *Sanders* was due to the Supreme Court's decision in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), which was overruled in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

94. In *Preston v. Land*, 220 Va. 118, 119, 255 S.E.2d 509, 511 (1979), the Virginia Supreme Court revived yet another term to describe common law malice - "malice in fact."

95. 418 U.S. 323 (1974).

96. *See* *Newspaper Publishing Corp. v. Burke*, 216 Va. 800, 804, 224 S.E.2d 132, 136 (1976).

97. *Ryder v. Time*, 3 MEDIA L. REP. (BNA) 1170 (D.D.C. 1977).

98. *General Prods. Co. v. Meredith*, 526 F. Supp. 546, 552 (E.D. Va. 1981); *Mills v. King-sport Times-News*, 475 F. Supp. 1005, 1010-11 (W.D. Va. 1979).

99. *See* *Fleming v. Moore*, 221 Va. 884, 893, 275 S.E.2d 632, 638 (1981).

cludes that a strict liability standard would govern.¹⁰⁰ This would be a remarkable development. Given the first amendment considerations present in defamation actions, the high standard of proof applicable to punitive damages in any situation,¹⁰¹ and the standard of proof applicable in an action brought by a public person, it would be shocking to have a private individual held liable for any defamatory communication concerning another private individual, even if innocently made with the best of motives. One can hope that the Virginia Supreme Court will apply a more logical and protective approach in cases involving a private plaintiff and a private defendant.

To summarize, as the law now exists in Virginia, the following standards apply: In a lawsuit involving a public plaintiff and a media defendant, the standard of proof is constitutional malice. Likewise, when a public plaintiff files suit against a private defendant, the standard is also constitutional malice. When the plaintiff is a private person, however, a media defendant will probably be held liable for mere negligence. Finally, when both the plaintiff and the defendant are private persons, the Virginia courts have not determined the applicable standard of proof.

F. *Is Anyone Other than the Communicator Liable?*

Imputed liability is one of the few areas of defamation law that is familiar to the general practitioner. Employers are liable for defamatory communications made by employees acting within the scope of their employment, but will generally be found liable for punitive damages only if they ratified or authorized the defamatory statement.¹⁰²

G. *What Damages Did the Communication Cause?*

The confused state of defamation law in Virginia is not limited to liability issues. If anything, the law of compensatory damages is even more perplexing, although the law of punitive damages is

100. Pagan and Walck, *Private Rights and Public Forums: Classifying Plaintiffs in Virginia Defamation Suits*, 7 VA. B.A. J. 8, 13 n.28 (Fall 1981).

101. See *infra* text accompanying note 103.

102. *Smith-Johnson Motor Corp. v. Hoffman Motors Corp.*, 411 F. Supp. 670, 675 (E.D. Va. 1975); *Slaughter v. Valleydale Packers*, 198 Va. 339, 343-46, 94 S.E.2d 260, 263-65 (1956); *W.T. Grant Co. v. Owens*, 149 Va. 906, 913, 141 S.E. 860, 862 (1928); *Virginia Ry. & Power Co. v. Deaton*, 147 Va. 576, 582, 137 S.E. 500, 502 (1927).

fairly simple. The United States Supreme Court has taken the law of punitive damages in defamation cases out of the states' control. They may be recovered by any plaintiff against any defendant if he establishes "constitutional malice" by "clear and convincing evidence."¹⁰³ In defamation per se¹⁰⁴ cases, punitive damages may be awarded even in the absence of a compensatory damage award.¹⁰⁵ Compensatory damages are a different matter. As the law now stands in Virginia, they are governed by a complex set of technical distinctions that are largely meaningless.

One of the few areas of defamation law that survives in the memory of a former law student is that of defamation per se. In the common law, some statements were seen as so vile that damages would be presumed. These include:

- (1) words imputing the commission of a crime involving moral turpitude, (2) words imputing infection with a contagious or loathsome disease,¹⁰⁶ (3) words imputing an unfitness to perform the duties of an office or employment of profit, or lack of integrity in the discharge of such duties, (4) words prejudicing a person in his profession or trade.¹⁰⁷

In all other cases, the plaintiff was not entitled to presumed damages and could not recover unless he proved that he had suffered "special damages."

Unfortunately, the courts never bothered to define "special damages" with any precision. A fair reading of the Virginia cases before 1981¹⁰⁸ would indicate that Virginia's definition of "special damages" would not vary from the generally accepted definition — provable monetary loss.¹⁰⁹ In fact, the Virginia Supreme Court has on at least one occasion used the term "pecuniary loss" in place of "special damage" in the standard formulation of damage in a defa-

103. *New York Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964).

104. See *infra* notes 106-07 and accompanying text.

105. *Newspaper Publishing Corp. v. Burke*, 216 Va. 800, 805, 224 S.E.2d 132, 136 (1976).

106. Fortunately for the real scholar, new diseases such as herpes and acquired immune deficiency syndrome (AIDS) have arisen to take the place of those vanquished by the advance of science.

107. *Fleming v. Moore*, 221 Va. 884, 889, 275 S.E.2d 632, 635 (1981); see also *Shuppe v. Rose's Stores, Inc.*, 213 Va. 374, 376, 192 S.E.2d 766, 767 (1972).

108. See, e.g., *M. Rosenberg & Sons v. Craft*, 182 Va. 512, 521, 29 S.E.2d 375, 379 (1944); *Connelly v. Western Union Tel. Co.*, 100 Va. 51, 53-54, 40 S.E. 618, 619 (1902).

109. See, e.g., *Smith v. Phoenix Furniture Co.*, 339 F. Supp. 969, 971 (D.S.C. 1972).

mation case.¹¹⁰

In *Fleming v. Moore*,¹¹¹ however, the Supreme Court of Virginia rendered the distinction between per se and non-per se defamation cases irrelevant for most practical purposes. The court found "special damages" to include "emotional upset and embarrassment."¹¹² Since only an uninformed plaintiff would fail to allege embarrassment and emotional harm, it would be a rare exception for a complaint to be deficient as a matter of law even if the defamation was not of the per se variety. Moreover, since proof of "special damages" would conceivably consist only of the plaintiff taking the stand and testifying that he was "upset,"¹¹³ the distinction between per se and non-per se defamation has been effectively eliminated by *Fleming*.¹¹⁴ Perhaps the supreme court did not mean what it said in *Fleming*. If it did, however, the per se analysis has become largely obsolete in Virginia.¹¹⁵

On a more practical level, establishing damages is one of the more intriguing aspects of defamation law. Plaintiffs usually allege three forms of damage — reputational, financial and personal. A layman might expect plaintiff to bring to the stand people who had a high regard for him before the defamation but now find him loathsome and repugnant. In practical terms, however, such a witness is never found. Plaintiff usually produces witnesses who know him. These people normally think highly of plaintiff before *and* after the defamation.

Financial damage is also difficult to prove. In a business setting, for instance, a plaintiff might try to show that a banker refused to loan him money because of a defamatory statement. However, since the banker would be chagrined to admit that he relied on what is probably a false statement about plaintiff in denying the loan, he would probably not admit to being affected by it. Proof of

110. *Williams Printing Co. v. Saunders*, 113 Va. 156, 171, 73 S.E. 472, 474 (1912).

111. 221 Va. 884, 275 S.E.2d 632 (1981).

112. *Id.* at 894, 275 S.E.2d at 639.

113. Perhaps expert testimony will be required to establish the plaintiff's emotional harm (as in medical malpractice cases). If the courts were to add this requirement, some of the harm done in *Fleming* might be avoided.

114. The constitutional issues remain, however. Although few states have taken the hint, the United States Supreme Court has stated in dicta that presumed damages should be unavailable absent constitutional malice. *Gertz v. Robert Welch, Inc.*, 419 U.S. 323, 349 (1974).

115. There is only one remaining difference — in per se cases punitive damages may be awarded in the absence of actual damages. See *supra* note 105 and accompanying text.

financial damage often takes the form of "yardstick" proof, in which plaintiff compares his income before and after the defamation. Finally, any claimed personal damage contains all the same vagaries as other forms of "pain and suffering." Most libel and slander cases therefore go to the jury with no real proof of damages. Even if plaintiff were able to muster some proof, the jury is normally given no guidance in setting the amount of damages. What could compensate a plaintiff for a false newspaper article that has been circulated to 25,000 people? There is simply no way to quantify such harm.

These uncertainties also make defamation actions difficult to settle. There are no multipliers that can be applied to "specials" as in automobile cases, or damage figures capable of being "massaged" by experts as in antitrust and securities cases. The best way to determine a proper settlement figure is to catalogue previous defamation awards given in the same area. Unfortunately, it is often difficult to amass such data.

H. *Should Plaintiff File a Defamation Action?*

After weighing the considerations described above, a prospective plaintiff must still decide if it is worthwhile to file a defamation action. Some peculiar aspects of Virginia law favor plaintiffs. For instance, summary judgment is a commonly used tool in federal courts to dispose of defamation cases. Although the Supreme Court seems to disagree,¹¹⁶ a number of courts have established a separate, defendant-oriented standard of summary judgment applicable to libel and slander cases.¹¹⁷ These courts reason that the enormous amount of time and expense needed to defend a libel case, including the inevitable jury loss and the expense of an appeal, would have a "chilling effect" on first amendment rights of media defendants.¹¹⁸ In Virginia, however, there is a law forbidding depositions to be used in summary judgment proceedings.¹¹⁹ This law renders the defendant-oriented standard inapplicable in

116. *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979).

117. *See, e.g., Anderson v. Stanco Sports Library, Inc.*, 542 F.2d 638, 641 (4th Cir. 1976) (applying South Carolina law) (Since plaintiff "failed to state unequivocally [in his deposition] that the allegedly libelous statements were false" and he failed "by affidavit or otherwise [to] offer evidence establishing a conflict as to whether the statements were false in any substantial degree," granting the defendant's motion for summary judgment was proper.).

118. *Id.*

119. VA. CODE ANN. § 8.01-420 (Repl. Vol. 1977).

Virginia.

On the other hand, a plaintiff who files a defamation action generally waives any right of privacy he might otherwise claim. Defendants use two keys to open plaintiff's life story. First, defendants have the right to establish the truth of the defamatory statement.¹²⁰ Second, defendants will often try to establish that plaintiff's reputation was so sullied before the alleged defamation that defendant should not be found liable for worsening it. These two approaches — especially the latter — often involve an investigation of the most personal aspects of the plaintiff's life. Whether plaintiff wishes to pay this price, especially given such a poor track record for plaintiffs on appeal,¹²¹ is a question that all prospective plaintiffs must seriously consider.

III. CONCLUSION

This brief article has explored some of the perplexities of Virginia defamation law. Many of the problems could be alleviated if proper terminology were developed and if the Virginia Supreme Court would fill in the blanks left by first amendment principles. Even then, however, the very nature of the tort will likely continue to produce some degree of uncertainty.

120. See *supra* notes 24-33 and accompanying text.

121. See *supra* note 17 and accompanying text.

