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IS TRUTH AN ABSOLUTE DEFENSE TO LIBEL IN PENNSYLVANIA?

At one time it was correct beyond a doubt to say truth was an absolute defense to a civil action for libel. Mr. Justice Trunkey said in *Rowand v. DeCamp*, 96 Pa. 493, 502:

"So long as he speaks the truth, in words meaning nothing else, he is not liable in damages, whether his language be chaste or vulgar, refined or scurrilous. The style of speech seems to be governed by the taste of the speaker and not by the law."

Mr. Justice Paxson said in *Press Company v. Stewart*, 119 Pa. 584, 602:

"While the truth would not have been a defense to an indictment, the rule is otherwise in a civil suit for damages. This is hornbook law."

This is also the general state of the law in most jurisdictions today. Prosser on Torts states the rule as follows: (p. 853)

"While at common law truth of the defamatory statement is not a defense to criminal libel, it is recognized as a defense to any civil action for defamation."

But he observes there is a trend to modify the rule: (p. 854)

"This rule has been attacked on the ground that it affords immunity for morally indefensible malevolence and needlessly kicking a man when he is down. There is some indication of a tendency to depart from it. A few states have statutory provisions (footnote stating Nebraska, Illinois, and West Virginia are such states) requiring that the publication must have been made for good motives or for justifiable ends, and one or two have reached the same conclusion without a statute (footnote stating New Hampshire, Delaware and Pennsylvania are such states, relying on the case of *Burkhardt v. North American Co.*, 214 Pa. 39, and then a statement that this rule has been subsequently adopted by statute). The recognition by a number of courts of the right of privacy had afforded a remedy in some cases apart from that of defamation."

This writer is unable to discover any presently effective statute to the effect of requiring good motives and justifiable ends for a defense to libel based on truth subsequent to *Burkhardt v. North American Co.*, *supra* (1906).

In the case of *Burkhardt v. North American Co.*, *supra*, the Court by Chief Justice Mitchell said: (p. 43)

"The truth of the facts published is in general a defense in a civil action for libel, though the benefit of such a defense may be lost where the matter described was a private one with which the defendant or the public had no legitimate concern, or where, even if the substance of the matter was proper, the manner and style rendered the publication libelous."

But this statement was purely dictum, for the decision of the court was for the defendant on the basis that there was nothing defamatory to the plaintiff in the publication:

"The article was apparently not in itself libelous as to the plaintiff."
(p. 44)

The effect of the Acts of 1897 and 1901 must be considered upon the early law as stated above. The Act of 1897, P. L. 204, section 3 reads:

"In any civil action for libel the plea of justification shall be accepted as adequate, when it is pleaded by the defendant that the publication is substantially true in every material respect and is proper for public information; and if such a plea shall be established to the satisfaction of the court and jury, there shall be no recovery."

The Act of 1901, P. L. 74, repeals this act and provides in section 2:

"In all civil actions for libel, the plea of justification shall be accepted as an adequate and complete defense, when it is pleaded, and proved to the satisfaction of the jury, under the direction of the court as in other cases, that the publication is substantially true and proper for public information or investigation, and has not been maliciously or negligently made." (12 P. S. 1582)

The language of the latter act must be carefully scrutinized to ascertain its true meaning. It says that truth *plus* proper occasion *plus* good motive "shall be accepted as an adequate and complete defense"; but it does not say that truth without more shall *not* be an adequate and complete defense. However, if truth without more is a complete defense, then the words "proper for public information" and "has not been maliciously made" are superfluous, for that meaning would be conveyed without those words. A statute is not to be construed so as to render any of its text superfluous, if another reasonable construction is possible in which the words are not superfluous. Act of 1937, P. L. 1019, article IV, section 52 (2).

It is possible, nevertheless, that the Legislature intended the Act as a purely procedural one. Previous to the Act of 1901, the only plea permissible to an action of trespass for libel was "not guilty." Act of 1887, P. L. 271, section 7. In the case of *Binder v. Daily News Publishing Co.*, 33 Pa. Super. 411, which held that the plea of not guilty was not an admission of the falsity of the statement in the defamatory publication, the court said: (p. 430)

"The act of 1887, it is true, provides that the only plea to the action of trespass shall be 'not guilty,' but the common-law principle of pleading seems to have been restored by the Act of 1901, which provides: (here quotes text of act given above)."

But on reason the better construction of the Act of 1901 seems to be that it is not merely procedural or declaratory, but is intended to eliminate the plea of truth without more as a defense to a civil action for libel.

The Act of 1901 seems to have received very little consideration by the courts. In *Burkhardt v. North American Co.*, *supra*, the court observed that the Acts of 1897 and 1901 were argued by counsel. Only one case has clearly held that the Act of 1901 eliminates truth without more as a defense to a civil action for libel. That case is *Peterman v. Dewey*, 24 Dist. R. 921, where Judge Little says: (pp. 923, 924)

(quoting from charge) "Third point. If the jury believe from the evidence that upon Jan. 30, 1912, the plaintiff, Philip Peterman, was drunk, or if they believe that at the time Dewey wrote the letter complained of, he had reasonable cause to believe that upon Jan. 30, 1912, Peterman was drunk, then your verdict must be for the defendant. Answer. That point I affirm in the same way. It is affirmed, and you should acquit the defendant if you find these facts to be true, unless this letter was written and mailed maliciously.

(commenting on the record above) ". . . The defendant pleaded not guilty and justification. The defense may be said to be two-fold, although the plea of justification involves the idea of a privileged communication. The question of justification, involving both the truthfulness of the charges and the bona fides of the communication, were submitted to the jury. They were instructed that if they found as a fact that the plaintiff was intoxicated upon the day mentioned in the letter, then their verdict must be for the defendant. . . . Upon reflection, I believe this instruction to be correct.

". . . This instruction is in harmony with the 2nd section of the Act of April 11, 1901, and furthermore, any communication tainted with malice is never justifiable on the grounds of a privileged communication, and the question of malice is for the jury."

In that case Judge Little relied on the opinion of Justice Mestrezat in *McIntyre v. Weinert*, 195 Pa. 52, where he said: (p. 57)

"The defendant further contends that the writing was a privileged communication. It is true that where the defendant and the person addressed have corresponding interests in the subject matter of the communication, it may be privileged. This privilege, however, is not absolute. It will not avail the defendant if, under the evidence submitted, the jury find that he was actuated by malice in making the communication: *Odgers on Libel and Slander*, p. 220. The plaintiff avers that the writing cannot be determined, but the cause must be sent to the jury."

It is very doubtful whether this part of the opinion means that even where the publication is true there must be a good motive for publication to establish a defense. For the case was heard on a demurrer to the complaint which stated that the publication was false, so that the decision is based on the non-existence of a privilege to make a *false* statement. The case did not consider the effect of the Act of 1897 (being decided in 1900).

Some of the digests (e.g. *Vale's* and *Purdon's*) cite the case of *Diamond v. Krasnow*, 136 Pa. Super. 68, for the proposition (to paraphrase) that where the

defendant causes a fact to be true about the plaintiff without fault on the part of the plaintiff (as where the defendant makes an improper claim, and then reports its non-payment to a credit association), truth is not a defense. But it is evident in reading the case, that the judges of the Superior Court were not disabused of the idea that truth without more is an absolute defense to a civil action for libel. The court by Judge Stadtfeld states the issue as follows: (p. 74)

"As to defendant's first contention, to wit: 'The statement as to the plaintiff's delinquency being true, the truth thereof is a complete defense to the action at bar,' etc.

The court does not say that this is an incorrect statement of the law, but goes on to show that the defendant's statement was false: (p. 75)

"The plea of 'truth' of the communication, embodying the innuendo that plaintiff was unworthy of credit, therefore fails. Had the report of the defendant stated the actual situation, viz., that there was a dispute to the extent of one-half of the alleged indebtedness, and that plaintiff had tendered payment of the other half, no exception could have been taken to such report. Sometimes half the truth is more injurious than the whole truth."

Thus it cannot be certainly said whether truth is an absolute defense to a civil action for libel in Pennsylvania or not.

Recommendations. Consequently, it is recommended:

1. If it is desired that truth alone shall constitute an adequate and complete defense to a civil action for libel, the Act of 1901, P. L. 74, section 2, should be repealed, for with the new Pennsylvania Rules of Civil Procedure it serves no useful procedural purpose; under those rules justification may certainly be pleaded.
2. If it is desired that truth alone shall not constitute an adequate and complete defense to a civil action for libel, the Act of 1901, P. L. 74, section 2, should be amended to be less ambiguous to read as follows:

"In all actions of trespass for libel, the truth of the publication shall be no defense, unless the publication is made without malice and unless the publication is communicated only to the proper persons; Provided however, that it shall still be a defense to an action of trespass for libel that improper persons received the publication without the intention or negligence of the defendant."

This writer does not attempt here to ascertain who are proper persons, and he believes that the present law sufficiently defines such persons so that a statute is not necessary, though it may be desirable to give statutory definition to "proper persons."

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