Libel -- Liability for Negligent Republication

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By giving these restrictions the dignity of an interest in land North Carolina has not only adhered to its established attitude toward equitable easements,[19] but has emerged with what would seem to be the most reasonable and logical view in regard to policy.

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Libel—Liability for Negligent Republication

In the recent case of *Hellar v. Bianco*,[1] a writing on the restroom wall of a tavern resulted in a suit against the owners for republication of a libel. The writing, which challenged the chastity of the plaintiff,[2] was shown to be false, and its defamatory nature was conceded. Though it was not shown that the defendants had knowledge of the writing on their wall, there was evidence that the defendants' servant had been advised of it by the plaintiff's husband. On plaintiff's appeal from a nonsuit in the lower court, it was held to be a question for the jury as to whether the defendants had a reasonable time in which to remove the libel after their servant was informed of it.

Generally, where there has been an original publication of libelous matter,[3] one who negligently or intentionally republishes the libel is as

in his property in any lawful way, by physical improvement, psychological inducement or otherwise. His obligation to recognize the power of eminent domain and the possibility of its exercise in no way restricts his right to a legitimate profit . . . He may order his affairs in the assurance that, if the state takes his property it will pay him the value of what it takes." Johnstone v. Detroit G. H. & M. Ry., 245 Mich. 65, 74, 222 N. W. 325, 328 (1928). Yet it was stressed in United States v. Certain Lands, 112 Fed. 622, 629 (C. C. R. I. 1899) that a landowner should not be able to increase the value of his land or impose a new burden on the exercise of eminent domain by contracting with a private individual.

[19] See note 2 *supra*.

[1] 244 P. 2d 757 (Cal. 1952).

[2] *Ibid.* The evidence was that the writing on the restroom wall indicated that plaintiff was an unchaste woman who was not adverse to engaging in illicit amatory ventures. It suggested, also, that anyone interested should call a stated number and "ask for Isabelle," which was the given name of the plaintiff. An interested "gentleman" called the plaintiff, only to find that plaintiff was a respectable married woman. He then advised the plaintiff to investigate the writing on the tavern's restroom wall. The plaintiff immediately told her husband of the matter, and he called the tavern and told the employee on duty there to get the writing off the wall, and that he would be down shortly to see that it was off. The employee informed plaintiff's husband that he was alone at the tavern and busy and would get it off when he got around to it. After some delay, the husband arrived with a constable to find that the writing was still on the wall.

[3] Generally, libel may be defined as the intentional or negligent unlawful publication of defamatory matter in a physical form to a third person resulting in injury to another's character in the minds of right thinking people. See NEWELL, SLANDER AND LIBEL § 2 (4th ed. 1924); ODGERS, LIBEL AND SLANDER § 16 (6th ed. 1929); PROSSER, TORTS § 92 at p. 797 (1941); RESTATEMENT, TORTS § 568 (1) (1938); 53 C. J. S. Libel and Slander § 1 (a, 2) (1948).

In RESTATEMENT, TORTS § 577 (1938), it is stated that "publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed"; and ODGERS, LIBEL AND SLANDER § 132 (6th ed. 1929) states that in order to hold one liable for publication, three things must

guilty as the original publisher.[4] Yet, in both instances, the burden of proving the publication of the libel remains on the plaintiff.[5]

In the instant case, the alleged liability of the defendants was predicated upon a negligent republication of the libel. The negligence was that of defendants' employee (and, consequently, that of defendants) in failing to remove the libelous matter after having been advised of the same,[6] while acting within the scope of his employment.[7] Although the evidence in the principal case did not reveal the identity of the original publisher of the libel, such evidence was unnecessary; for the original authorship of a libel is immaterial in determining the liability of one who republishes the same.[8] Consequently, since the defendants did not attempt to use privilege or truth as a defense,[9] that there was

concur: "first, the defendant must receive the libel and read it for himself, or in some other way become aware that it is or probably may be, a libel; next, he must deliver it to some third person; and then that third person must read it or hear or understand its contents"; See Horton v. Jackson, 87 Ark. 528, 133 S. W. 45 (1908) (lack of knowledge as a defense); 33 AM. JUR. Libel and Slander § 91 (1941) (negligence as basis of liability).

[4] Doyal v. Atlanta Journal Co., 82 Ga. App. 321, 60 S. E. 2d 802 (1950), *rehearing denied*, 84 Ga. App. 122, 65 S. E. 2d 432 (1951); RESTATEMENT, TORTS § 581 (b) (1938); *cf.* RESTATEMENT, TORTS § 577 (1938).

[5] Buckwalter v. Gossow, 75 Kan. 147, 88 Pac. 742 (1907).

[6] In the principal case, there was no proof that defendants had actual knowledge of or were negligent concerning the writing on the restroom wall; however, it was proved that their employee did know of the libelous matter, and the defendants are chargeable with the knowledge of their employee while acting within the scope of his employment. Randall Dairy Co. v. Pewely Dairy Co., 291 Ill. App. 380, 9 N. E. 2d 657 (1937); Breedings Dania Drug Co. v. Runyon, 147 Fla. 123, 2 So. 2d 376 (1941); Dressel v. Parr Cement Co., 80 Cal. App. 2d 536, 181 P. 2d 962 (1947).

[7] See Note, 20 MINN. L. REV. 805, 807 (1936) wherein the requirements to hold a master liable for defamatory publication by his servant are stated as follows: "(1) that there is a master-servant relationship and (2) that the servant was acting in the scope of his employment." *Cf.*, Fogg v. Boston and L. R. Corp., 148 Mass. 513, 20 N. E. 109 (1889) (ratification of servant's act though not in scope of employment); Choctaw Coal and Mining Co. v. Lillich, 204 Ala. 533, 86 So. 383 (1920) (liability of corporation for libel published by employee); Pa. Iron Works Co. v. Henry Voght Mach. Co., 139 Ky. 497, 96 S. W. 551 (1906) (liability of corporation for act of agent); Robinson v. McAhaney, 214 N. C. 180, 198 S. E. 647 (1938) (ratification of servant's act).

[8] Doyal v. Atlanta Journal Co., 82 Ga. App. 321, 60 S. E. 2d 802 (1950), *rehearing denied*, 84 Ga. App. 122, 65 S. E. 2d 432 (1951); *cf.*, Wayne Works v. Hicks Body Co., Inc., 115 Ind. App. 10, 55 N. E. 2d 382 (1944). See 53 C. J. S. Libel and Slander § 86 (1948) wherein it is said: "The maker of a republication, although not liable for the results of the primary publication, unless it is shown that he also made it or participated in making it is liable for the consequences of the subsequent publication which he makes or participates in making. It is no justification that the defamatory matter was previously published by a third person."

[9] In the principal case, the falsity of the writing was shown by the evidence, and there was no suggestion of privilege; however, in actions for libel, the defenses of truth and privilege are available to a defendant. Pennington v. Little, 266 Ky. 750, 99 S. W. 2d 776 (1936); Magnolia Petroleum Co. v. Davidson, 194 Okla. 115, 148 P. 2d 468 (1944); Tennant v. F. C. Whitney and Sons, 133 Wash. 581, 234 Pac. 666 (1925).

Also, the defamatory nature of the writing was conceded, probably because

a republication of the libel was qualified only by the question as to whether their employee had a reasonable time in which to remove the libel after being informed of it.[10]

It was implied by the court in the principal case that the owners of the tavern should be given a reasonable time in which to remove the libel from their wall after they became constructively aware of it, and that failure to remove it thereafter would constitute republication. In *Byrne v. Deane*,[11] cited as the basic authority in the principal case, there was dictum to the effect that a person should not be held liable for republication under the circumstance where it would cause great expense and trouble to remove the libel. But the evidence given in the instant case gave no clear indication as to how difficult the job of removal would have been if the the employee had "got around to it."

It follows from the decision in the instant case that owners of premises will have to remove libelous writings from their walls within a "reasonable time" after they become aware of such, through their own senses,[12] or those of their employees acting within the scope of their employment;[13] failure to do so will subject the owner to liability for republishing a libel. Depending on the court's interpretation of a "reasonable time" in which to remove the libel, we are faced with the possibility of an undue burden being placed on the owners of premises that have public restrooms, where such writings most frequently appear. Are the owners to be required to obliterate the libelous writings as soon as they have actual or constructive knowledge that it appears on their walls? Perhaps it can be easily obliterated, or it may require painting or even woodwork to obliterate it. It seems reasonable, as suggested in *Byrne v. Deane*, to consider the relative ease with which the libel might be removed and the trouble and expense to the owner in removing it in determining what is a "reasonable time" for its removal. It might be that the owner would be under a duty to inspect his restroom for

it challenged the chastity of the plaintiff, and, therefore, was considered libelous per se. See RESTATEMENT, TORTS § 559 (1938) which states: "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating with him"; *cf.*, Roth v. Greensboro News Co., 217 N. C. 13, 6 S. E. 2d 882 (1940) (distinction between words libelous per se and per quod); Flake v. Greensboro News Co., 212 N. C. 780, 785, 195 S. E. 55, 59 (1938) where it was said that: "the three classes of libel are (1) publications obviously defamatory which are termed libels per se, (2) publications susceptible of two interpretations, one defamatory and the other not, and (3) publications not obviously defamatory, but which become so when considered in connection with innuendo, colloquium and explanatory circumstances, which are termed libels per quod." See also N. C. GEN. STAT. § 99-4 (1943, recompiled 1950).

[10] See note 6 *supra*.

[11] 1. K. B. 818, 157 L. T. R. 10 (C. A. 1937).

[12] See ODGERS, LIBEL AND SLANDER § 132 (6th ed. 1929).

[13] Breedings Dania Drug Co. v. Runyon, 147 Fla. 123, 2 So. 2d 376 (1941). See note 7 *supra*.

such writings if he knew that such had regularly occurred in the past.[14] Possibly, this knowledge would require more prompt action on the part of the owner in removing the libel than if such writings were a rarity. Further, a restroom wall is not the only place that the owner of premises could be held responsible for republication of libel.[15] The mode of republication is immaterial,[16] but if the libel is unusual or subtle,[17] this may be another factor to consider in arriving at a "reasonable time" for removal.

Apparently, the courts have not been called upon frequently to decide a fact situation such as was presented in the instant case. North Carolina, too, seems to be lacking any such cases. Clearly, there is a great potential, since libelous writings in restrooms seem to be common occurrences, and therefore, the persons who furnish restrooms in connection with restaurants, stores, bus stations, etc., may be held to a constructive notice of all writings on the walls. To avoid a charge of negligence, regular inspection may be required, followed by removal within a reasonable time.

Hellar v. Bianco could be the impetus for more litigation, which, it is submitted, should be governed by a liberal interpretation of "a reasonable time for removal," taking into account such factors as mentioned above and considering that the defendant is usually the victim of an unknown third party and has no personal malice toward the person libeled.[18]

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[14] See Note, 16 TEX. L. REV. 115 (1938).

[15] Fogg v. Boston and L. R. Co., 148 Mass. 513, 20 N. E. 109 (1889) (notice in ticket office of Ry. company); Rosenberg v. J. C. Penney Co., 30 Cal. App. 2d 609, 86 P. 2d 696 (1939) (placard in window); *cf.* Thompson v. Adelberg & Berman, Inc., 181 Ky. 487, 205 S. W. 558 (1918) (creditor's notices); Walker v. Sheehan, 80 Ga. App. 606, 56 S. E. 2d 628 (1949) (collector's notices); Tidmore v. Mills, 33 Ala. App. 243, 32 So. 2d 769, *cert. denied*, 249 Ala. 648, 32 So. 2d 782 (1947) (placard on building).

[16] Freeman v. Busch Jewelry Co., 98 F. Supp. 963, 966 (N. D. Ga. 1951). *But see* N. C. GEN. STAT. § 99-2 (1943, recompiled 1950) (retraction law applicable only to libels by newspapers, periodicals, radio and television).

[17] Flake v. Greensboro News Co., 212 N. C. 780, 786, 195 S. E. 55, 60 (1938) (the standard is how ordinary people would naturally understand the alleged libel, not supersensitive persons).

[18] Doyal v. Atlanta Journal Co., 82 Ga. App. 321, 60 S. E. 2d 802 (1950), *rehearing denied*, 84 Ga. App. 122, 65 S. E. 2d 432 (1951). *But cf.* O'Connor v. Field, 266 App. Div. 121, 41 N. Y. S. 2d 492 (1943); 53 C. J. S. Libel and Slander § 252 (1948) wherein it is stated that "the defendant may show in mitigation of damages that the libel or slander was published under an honest conviction of its truth or that he otherwise acted in good faith and without malice."