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bear the burden of the security's becoming inadequate at any time for any reason. Since placing the risk of inadequate security at the time of sale on the mortgagee would not further the anti-depression goal, the court may have found purposes for section 580b not articulated in prior decisions. While it is possible to draw some conclusions about the effects of the decision on the mortgagee's position, it is not possible to say whether a provision making mortgagors responsible for damage to the security from third parties or natural calamity would be valid.

An authority on the law of mortgages has observed that "[i]n all legal systems there seems to be in the law of mortgages an evolution from a forfeit-idea in which the res is given as conditional satisfaction of some act for which there is no personal duty (at least not one for which there is a direct action) to a security idea."[33] This evolution has been due mainly to the skill of drafters of mortgages and other security agreements who, typically, are the lenders or their representatives. The California court's treatment of the anti-deficiency judgment statute has reversed the trend. The mortgaged real estate is no longer simply a convenient method for the lender to collect what is owed him, but a device for limiting the borrower's liability in loan transactions involving the sale of real estate. The facts that in the typical mortgage the lender is a professional and the borrowed an amateur, that the lender often is in the better bargaining position, and that the market is sometimes lacking in competitiveness may have influenced the reasoning that brought the court to this position. It is the court's view that these considerations influenced the legislature in enacting the statute. But the presence or absence of these facts in the individual case is now irrelevant, the determination having been made in advance for the whole class of such cases in favor of the borrower.

Thus, California has again given special encouragement to buyers of land, and in doing so has apparently revived an earlier view of the mortgage relation.

STEPHEN MASON THOMAS

Torts—A Clarification of the Actual Malice Test

In a recent libel case, *St. Amant v. Thompson*,[1] a majority of the Supreme Court reaffirmed and clarified, but declined to expand, the "reck-

[33] G. OSBORNE, MORTGAGES, § 13, at 31 (1951).

[1] 390 U.S. 727 (1968), *rev'g* 250 La. 405, 196 So. 2d 255 (1967).

less disregard" standard of *New York Times Co. v. Sullivan*.[2] In *New York Times* the Court, stating that the first and fourteenth amendments afford a qualified privilege to the maker of certain libelous misstatements of fact,[3] held that a false statement of fact relating to the official conduct of public officials is not actionable unless it is made with "actual malice—that is knowledge that it was false or with reckless disregard of whether it was false or not."[4] The Court in *St. Amant* refined this vague actual malice doctrine and formulated distinct guidelines to help determine the evidentiary criteria constitutionally necessary to support a finding that a publication was made with actual malice.[5]

New York Times established two methods by which the evidentiary requirements of the actual malice test could be satisfied.[6] The first, actual knowledge, is easily applied.[7] But the application of the second method—showing reckless disregard of the truth or falsity of a statement—is more difficult. The first effort to clarify the *New York Times* "actual malice" standard occurred in *Garrison v. Louisiana*,[8] where the Court expressly rejected the common law test of "ill will."[9] Requiring a "high degree of awareness"[10] of the probable falsity of a statement, the Court defined actual malice basically in terms of scienter[11] and stated that mere negligence or unreasonableness in making a false statement will

[2] 376 U.S. 254 (1964).

[3] The Court expressly adopted the view of the minority of state courts. 376 U.S. at 280-81. See Phoenix Newspapers, Inc. v. Choisser, 82 Ariz. 271, 312 P.2d 150 (1957); Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908); Annot., 150 A.L.R. 358 (1944).

[4] 376 U.S. at 279-80. An interesting part of the *New York Times* decision, the "public official" doctrine, is beyond the scope of this note. For examples, see Rosenblatt v. Baer, 383 U.S. 75 (1966); Pape v. Time, Inc., 354 F.2d 558 (7th Cir. 1965); Fignole v. Curtis Publ. Co., 247 F. Supp. 595 (S.D.N.Y. 1965); Comment, *Constitutional Law—Defamation—Privilege to Comment on Official Conduct Extended*, 46 BOST. U.L. REV. 568 (1966); Comment, *Defamation of a Public Official*, 1 U. SAN FRAN. L. REV. 356 (1967). For a discussion of the extension of the public official concept to the "public figure," see Time, Inc. v. Hill, 385 U.S. 374 (1967); Afro-American Publ. Co. v. Jaffe, 366 F.2d 649 (D.C. Cir. 1966); Pauling v. National Review, Inc., 49 Misc. 2d 975, 269 N.Y.S.2d 11 (Sup. Ct. 1966); Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L.J. 234 (1966); Note, *The Scope of First Amendment Protection for Good-Faith Defamatory Error*, 75 YALE L.J. 642 (1966).

[5] 390 U.S. at 728.

[6] 376 U.S. at 279-80.

[7] See Fox v. Kahn, 421 Pa. 563, 221 A.2d 181, *cert. denied*, 385 U.S. 935 (1966).

[8] 379 U.S. 64 (1964).

[9] *Id.* at 72.

[10] *Id.* at 74.

[11] See Hanson, *Developments in the Law of Libel: Impact of the New York Times Rule*, 7 WM. & MARY L. REV. 215 (1966).

not support a slander action by a public official. Nor will evidence of personal malice, or evidence that the misstatements affected the official's private reputation support it.[12] The holding in *Garrison* suggests that the defendant had a "general intent to make a false comment."[13]

Following *New York Times* and *Garrison*, numerous state and federal courts attempted to interpret the constitutional standard of reckless disregard. Lower court holdings generally used either the amount of the defendant's investigation of the source of his information or the inherently improbable nature of the information itself[14] as determinative. A conflict arose as to whether evidence of the defendant's investigation of his source was decisive. For example, the Third Circuit held that "investigatory failures are insufficient to show recklessness on the part of a newspaper."[15] However, the Seventh Circuit held there was sufficient evidence to go to the jury on the question of reckless disregard where defendant magazine published an article, based on the Civil Rights Commission Report, stating that the plaintiff was brutal to Negroes, when in fact the report only indicated it had been alleged.[16] The inherently improbable character of the libelous information was a determinative factor in other attempted definitions of reckless disregard. Motive to injure alone, that is, that the remark was incited by a prior grudge[17] or a desire to defeat a candidate,[18] was held not to constitute reckless disregard.

In *St. Amant*, the defendant in a televised political campaign address had charged the plaintiff with criminal conduct. Although the defendant failed to investigate the reliability of his charges, which were false, the Court held that the plaintiff had not satisfied his burden of proving that the statements were made with a "reckless disregard" for the truth.[19] The decision specifies that the fact finder must determine whether the publication was "indeed made in good faith."[20] To satisfy constitutional requirements, the evidence must be sufficient "to permit the

[12] 379 U.S. at 73, 76-77.

[13] Note, *Constitutional Law—Freedom of Speech—Defamation*, 39 TUL. L. REV. 355, 360 n.38 (1965).

[14] See Belli v. Orlando Daily Newspapers, Inc., 389 F.2d 579 (5th Cir. 1967).

[15] Baldine v. Sharon Herald Co., 391 F.2d 703, 706 (3d Cir. 1968).

[16] Pape v. Time, Inc., 354 F.2d 558 (7th Cir. 1965), *cert. denied*, 384 U.S. 909 (1966). For other examples in which investigation was important, see Ross v. News-Journal Co., —— Del. ——, 228 A.2d 531 (1967); Silbowitz v. Lepper, 55 Misc. 2d 443, 285 N.Y.S.2d 456 (Sup. Ct. 1967).

[17] Manbeck v. Ostrowiski, 384 F.2d 970 (D.C. Cir. 1967).

[18] Phoenix Newspapers v. Choisser, 82 Ariz. 271, 312 P.2d 150 (1957). The court applied a standard similar to that in *New York Times* before that decision was announced.

[19] 390 U.S. at 728.

[20] *Id.* at 732.

conclusion that the defendant *in fact* entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."[21] The Court further pointed out that not every uncontradicted assertion of good faith will guarantee a verdict for the defendant.[22]

> Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.[23]

The first two illustrations in the quoted passage indicate that if the defamatory publication has no source—neither an informant nor a fact situation of which the defendant has personal knowledge—a jury will be permitted to find reckless disregard. The Court implies that allegations by the plaintiff must be countered with positive evidence by the defendant that the statement was not a product of his imagination nor from a totally unknown and unverified source. If the source of the alleged defamation lies in some factual occurrence, the plaintiff then appears to have the burden of showing that only a reckless man would draw and publish such deductions from the situation, or that the defendant possessed knowledge sufficient to make his inference either recklessly or knowingly false. In other words, the deductions must be so improbable that the jury will be permitted to find by implication the scienter required by *Garrison*. If the defendant shows that the information came from an informant, the burden again shifts to the plaintiff. He must show either that there are obvious reasons for doubting the veracity of the informant, for example, by the reporter's past record of reliability,[24] or that the statements themselves are so "inherently improbable"[25] that only a reckless man would publish them. *St. Amant* implies that this inherent improbability may be established in either of two ways: the plaintiff must establish that knowledge contrary to the alleged defamation is so widely held that only a reckless man could publish it or that the defendant himself possessed facts from which the jury could find scienter.

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[21] *Id.* at 731 (emphasis added).
[22] *Id.* at 732.
[23] *Id.*
[24] See Washington Post Co. v. Koegh, 365 F.2d 965 (D.C. Cir. 1966).
[25] 390 U.S. at 732.

The Court's treatment of the evidence in *St. Amant* suggests that the emphasis by lower courts on the importance of investigation was misplaced, for evidence of investigation and of the nature of the defendant's statements are no longer the primary determinants of the standard of reckless disregard. These factors now seem to be of significance only as evidence tending to show the defendant's doubt as a matter of fact. It further seems that by allowing a factual determination of doubt to be inferred from the evidence, the Court is possibly retreating from the *New York Times* requirement of proof of reckless disregard with "convincing clarity."[26]

St. Amant establishes some needed guidelines by its examples in which the Court recognizes that reckless disregard may be inferred from the facts. But the catch-all of "inherent improbability" that follows the examples leaves the test of reckless disregard a still uncertain concept. The Court in effect replaces the illusive reckless disregard standard with a new label—inherent improbability. It admits that the standard of reckless disregard "cannot be fully encompassed in one infallible definition."[27]

Despite these lingering uncertainties, the Court rejects the absolutist standard of Justices Black and Douglas,[28] proving many of the early commentators and speculators wrong.[29] The actual malice standard was initially established in *New York Times* by balancing opposing societal interests. The Court continues to recognize that although there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[30] there still remains a "pervasive and strong interest in preventing and redressing attacks upon reputation."[31] The Court has apparently decided that in relation to public issues the actual malice prerequisite retains a constitutionally adequate measure of protection for reputation and good name. There is little reason to expect sweeping changes in this field in the near future.

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[26] 376 U.S. at 286.
[27] 390 U.S. at 730.
[28] See New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Garrison v. Louisiana, 379 U.S. 64, 79-80 (1964) (concurring opinions).
[29] See Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L.J. 234 (1966); Note, *Criminal Law—Criminal Libel—Constitutional Limitations on State Action*, 14 AM. U.L. REV. 220 (1965); Note, *The New York Times Rule and Society's Interest in Providing a Redress for Defamatory Statements*, 36 GEO. WASH. L. REV. 424 (1967); Note, *Constitutional Law—Freedom of Speech—Defamation*, 39 TUL. L. REV. 355 (1965); Note, *New York Times Co. v. Sullivan —(84 S. Ct. 710)—The Scope of a Privilege*, 51 VA. L. REV. 106 (1965).
[30] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
[31] Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).