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Laurence H. Eldredge

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Practical Problems in Preparation and Trial of Libel Cases

Laurence H. Eldredge*

The author discusses some of the more frequent problems that arise in defamation proceedings. Mr. Eldredge, drawing on his own experience in private practice, treats the action for libel in all its crucial stages: investigation, pleading, and trial of the case. He stresses the point that only the expert should handle a defamation action and gives convincing reasons.

The first thing which concerns me when I am consulted by a person who claims that he has been libelled, particularly where the defamation consists of serious charges, is to determine whether the charges are substantially true. As a general rule, truth is a complete defense. One who has skeletons in his own closet is foolish to press a libel action, particularly against a large newspaper. The institution of suit against the newspaper usually results in the most thorough investigation of the plaintiff's entire life. Under the rules of evidence the defendant can only show the truth of the very charge made against the plaintiff. Proof that the plaintiff has misconducted himself in other ways, even proof that he has committed serious crimes, is usually not admissible. However, such facts may well have affected the plaintiff's general reputation and the defendant is entitled to show a bad reputation in mitigation of damages.

Where the very thing the defendant has charged the plaintiff with is true, the plaintiff is a fool to proceed to trial because the trial will soon turn into what, as a practical matter, is a prosecution by the defendant to establish the plaintiff's guilt. I had a horrible example of this some years ago. The mayor of a city in upstate Pennsylvania, who was himself a lawyer, started a libel suit against a newspaper based upon certain advertisements during a political campaign which carried the clear inference that the mayor was corrupt and had been guilty of embezzlement and other crimes. The answer pleaded truth as a defense. The mayor and his attorney came to Philadelphia to see me for the purpose of retaining me to try the case. I pointed out to them that truth was pleaded as a defense and said, "Mayor, have you any skeletons in your closet? If you have, I don't want to handle this case." He assured me that he was an honest man and that the charges had seriously hurt him in the city of

* Member and former Chairman of the Board of Governors, Philadelphia Bar; author, *Modern Tort Problems*; Adviser on Torts for the American Law Institute.

which he was mayor and in which he had grown up. I accepted a retainer, did some investigating of my own and received assurances from some people that the mayor was honest, and rumors to the contrary from some other sources. The mayor kept insisting on his innocence and even refused a substantial cash settlement from the newspaper because it would not publish a retraction and an apology. The newspaper retained ex-F.B.I. men as investigators, who did a remarkable job, and two or three days before trial they broke the case wide open and found the witnesses who could, and did prove the truth of everything implied about the mayor in the advertisements. After the mayor's former secretary, whom the defendant had tracked down in a government position in Washington, and whose testimony had the ring of complete truth to me and to the trial judge, testified how the chief of police had turned the traffic fines over to the mayor, who put the money in his safe and at the end of the month had the secretary give part of it to the city treasurer while he retained the balance for himself, I rose with a heavy heart and moved to dismiss the case with prejudice. The trial judge who was convinced that my client had lied to me, as he had, did a wonderful thing in granting my motion to dismiss with prejudice. The courtroom was packed and jammed and I was in a strange city in which I was not known, except to members of the bar. The judge said, "The motion is granted; Mr. Eldredge, your motion is a great credit to you and is evidence of the high reputation you bear among the members of your profession." The local papers featured that statement by the judge and saved me from having at least part of the community think that a crooked lawyer had come up from Philadelphia to try a crooked case. The district attorney got the transcript and my former client was indicted, tried, and convicted and was also disbarred.

Where an honest man has been seriously defamed by a newspaper article, an important function of a libel action is to obtain a public vindication of his good name by the verdict of a jury. However, if this vindication can be obtained promptly by a published retraction, adequately worded, the client will be better off than by getting even a large verdict two or three years later. This is certainly the case with a client who is more interested in his good name than he is in collecting damages. For a retraction to do any real good it must be published very promptly after the libel appears and it must not have any strings attached to it. This can only be accomplished where the attorney is retained immediately after the article appears. The request for a retraction has another very important purpose. The refusal to retract after the falsity of the statement has been called to the newspaper's attention is, at least in my State of Pennsylvania, evidence of actual malice which will sustain an award of punitive damages. However, if a demand for a retraction is to have this effect, it should not be accompanied by any demand for the payment of damages in settlement.

My practice is to write a letter setting forth the defamatory statement, followed by a statement of the facts and the request that a retraction, in form approved by me, be published within a specified time. I then add that my client will give a general release without the payment of any money if this is done. If the retraction is published, there is a prompt public vindication of my client's good name; and if it isn't published, I have built up a case for punitive damages at trial.

In one case, a sensational type magazine owned by a corporation with practically no assets published a lurid article about filth and vermin in certain food products. The sources of the article were Food and Drug Administration prosecutions; among these there had been one against a Whitman Company which manufactured candy, but was not the famous Whitman Company which makes Whitman's Sampler. However, the article carried a large cut of a box of Whitman's Sampler, and that company was very much concerned about the fact that this magazine was on sale in many drug stores which sold Whitman's Sampler. It was imperative to have the situation remedied promptly, and any substantial verdict would have been uncollectible. After some maneuvering, I induced the magazine to publish in its next issue the same Whitman Sampler cut accompanied by a profuse retraction and apology which I wrote.

While truth is always a complete defense in some jurisdictions, and nearly always a complete defense everywhere, it should never be pleaded unless defense counsel has the evidence to prove it. It is the most dangerous plea there is and can boomerang upon the defendant with deadly effect in an award of punitive damages. The plea of truth is, in effect, a republication of the defamation after the plaintiff has formally called attention to the falsity of the statement. The iteration of the charge in a public record is evidence of express malice to be considered by the jury on the question of punitive damages. If at the close of the defendant's case the plea of truth has not been established, the plaintiff, in rebuttal, should promptly offer in evidence this unproved plea. Counsel for the plaintiff is then in a position to frame points for charge dealing with this issue on the question of punitive damages (and also to defeat a conditional privilege) and to talk to the jury about it with tones of righteous indignation in his closing speech. Where the article is clearly defamatory, there are no defenses except (1) truth and (2) other privileges, and usually the privilege is no more than a conditional one. Experienced counsel for large newspapers, when they know the defamation is false or that they are unlikely to be able to prove its truth, restrict their answer to pleading conditional privilege.

In drawing complaints I see no point in putting in an allegation concerning the plaintiff being a good and reputable citizen who, prior to the publication of the libel, enjoyed the esteem, etc., of his fellow citizens. An

allegation along these lines is found in many forms of complaints for libel, but why plead something on which you cannot offer evidence in the plaintiff's case in chief? The plaintiff is presumed to have a good reputation and, in Pennsylvania at least, he cannot offer any evidence about his reputation in his case in chief. Of course, he can show who he is and what he does and whether he is known locally or nationally because this bears upon the question of how seriously he has been damaged. In one case in which I represented the wife of the dean of students at a well known institution I proved that she was known in educational circles in many parts of the United States. This is entirely different evidence from that of good reputation. It is only after the defendant has introduced evidence of bad reputation that in rebuttal the plaintiff can bring in witnesses on this question.

A practical reason for not pleading the plaintiff's good reputation is that it opens the door to extensive pre-trial discovery cross-examination of the plaintiff on this issue. If you haven't pleaded good reputation you may be able to narrow the scope of the pre-trial cross-examination of the plaintiff. This may depend upon the state of digestion of the judge before whom an application for a protective order is made.

It is amazing how much bad pleading there is in complaints concerning the meaning of the words. Where the words are clearly defamatory on their face and they charge specific misconduct by the plaintiff, there is really no point in pleading anything about them. (*Res ipsa loquitur*). On the other hand, where the words, on their face, are capable of a defamatory meaning which does not immediately leap to the eye, there should be an allegation setting forth the meaning which the average reader of the newspaper derived from the words themselves. In this type of case I have also called as witnesses readers of the newspaper and had them testify to what the article meant to them and what they thought about the plaintiff after reading it. In this situation counsel can exercise a careful choice in selecting the witnesses to be called as "average readers." In "the Mata Hari of the Parking Meters" case¹ I called, in the order named, the president of a textile mill, a retired vice-president of the Baldwin Locomotive Works, a general contractor named Kelly, and a civilian employee for 15 years in the Philadelphia Navy Yard. Because the innocent and injured plaintiff was a *feme sole* named Alyce, I then wound up this part of the case by calling a respectable married woman who was a receptionist in the Esso marketing office, and ended with another married woman who was president of a company of dispensing opticians and whose husband was a U. S. Navy officer. I also called a dear old lady who was head of the Reference Department in the Free Library of Philadelphia. She went on the witness stand with Volume 18 of the *Encyclopedia Americana* and testified that it

1. *Morgan v. Bulletin Co.*, 369 Pa. 349, 85 A.2d 869 (1952).

was in the reference rooms of 39 of the 41 branches of the Free Library, that it was a popular reference work and frequently used. I had on hand photocopies of the two pages containing the lurid sketch of Mata Hari's history, and these photocopies were offered in evidence and read to the jury. Skillful defense counsel objected that they were inadmissible hearsay, but the trial judge agreed with my contention that even if Mata Hari was as pure as the Virgin Mary (and she certainly was not) what had been written about her was evidence concerning what the average reader would think about a person referred to as "a Mata Hari."

Lawyers in pleadings and judges in opinions frequently refer to this meaning of the words as an "innuendo." This reflects a complete misunderstanding of the true meaning of that very much misunderstood word in libel law. The meaning which can be reasonably derived from the words themselves is never an "innuendo." The innuendo is the defamatory meaning, because of extrinsic circumstances, of words which are in themselves quite innocent on their face. The classic example is the Scotch case of *Morrison v. Ritchie & Co.*,² which became illustration 4 in the *Restatement, Torts, Section 580* (1938). A newspaper published an innocent (but false) birth announcement of twins, a statement calculated to bring congratulations to the parents. The extrinsic circumstances were that the parents had been married one month. The defamatory innuendo, in the light of these extrinsic circumstances, was that the parents had engaged in premarital intercourse. When, as so frequently happens, counsel improperly plead "innuendo" and set forth what the words themselves mean, this may be regarded as surplusage and ignored by the court. The Supreme Court of Pennsylvania has recently brought some light on this subject in *Cosgrove Studio & Camera Shop, Inc. v. Pane*.³

The preparation and trial of a libel case requires special skill and knowledge of the intricacies and pitfalls in this highly specialized field. Being a good general trial lawyer is not sufficient to enable counsel to do the most effective job in representing either a plaintiff or a defendant in a libel trial.

I know of no other type of tort case in which it requires so little time to present the plaintiff's case in chief, in the absence of evidence of special harm. Where the words are clearly defamatory on their face and appear in a newspaper article and there is no claim of special damages, the plaintiff's case in chief may be rested within a few moments after the completion of the opening speech. All that is required is to get the article in evidence, and you have proved your case in chief. I like to do this by subpoenaing the publisher of the paper to bring it with him; then I call him on cross-examination and have him produce and identify the paper, at which time

2. 39 Scot. L.R. 432 (1902).

3. 408 Pa. 314, 182 A.2d 751 (1962).

I offer it in evidence. At this point, I generally get him to state (when it is impressive) what the newspaper circulation is and its area. There is no need to put the plaintiff on the stand but it is good strategy, unless there is some reason not to subject the plaintiff to cross-examination, to put him on very briefly and have the jury look at him and hear him tell about how emotionally upset the article made him, if that is a fact.

Then the defense goes on and, as stated above, the case turns into the defendant's prosecution of the plaintiff. The defendant's case in chief may take days or even weeks and the course of it will determine what, if any, rebuttal the plaintiff will offer at the end. If the defendant pleaded a conditional privilege, for example, and at the end of the defendant's case it is clear that the defendant has not shown any probable cause to believe the truth of the defamatory statement, the plaintiff has grounds for asking for a directed verdict for the plaintiff. In states which permit punitive damages he is also in a position to call the publisher back on the stand in rebuttal and cross-examine him about the financial worth of the defendant. In one case which I tried during the past year the newspaper was published by an individual defendant as surviving partner. His counsel objected strenuously to the exact net worth of the individual and the newspaper being shown but, after some in-fighting in the judge's chambers, I succeeded in getting a stipulation which enabled me to say in front of the jury, and put on the record, "It is stipulated by counsel for the defendant that the defendant is a millionaire." That was good enough for me. Unfortunately, the jury disagreed on liability and the court below subsequently entered judgment on the record for the plaintiff upon the ground no defense had been established, and ordered the case to be retried on the sole issue of damages. The defendant took an appeal which is presently pending in the Supreme Court of Pennsylvania.

If defense counsel do not thoroughly know their job in a libel case, their mistakes and their bad trial strategy may greatly increase the size of the verdict for the plaintiff. I recall two cases in recent years in which I was trying cases for plaintiffs in which I sat back, contentedly purred quietly to myself, and correctly revised my estimates of the verdict upward as the trial proceeded.

In this article I have endeavored to describe briefly a few of the problems which commonly arise. There are many other problems. Each case must be carefully studied in the light of its own particular facts and circumstances. The important thing is that unless a lawyer is an expert in the theoretical side of the law of defamation and also has had considerable practical experience in the trial of this type of case, he will not realize the problems which are confronting him and will undoubtedly blunder in the trial itself.

I have one case in my office at the moment which does not really come

within the scope of this article because the most important question in it is one of substantive law. However, it is a question on which there is very little direct authority, and it is so important to lawyers that I am going to mention it. A man who is a member of the Pennsylvania Bar applied for admission to the Michigan Bar and signed a request to the National Conference of Bar Examiners to investigate him and give the Michigan Bar Examiners a confidential report, about which the applicant was to know nothing. In the course of making the investigation, the National Conference of Bar Examiners wrote a letter to a lawyer who was also the district attorney in a Pennsylvania county in which this lawyer had been admitted to the bar. The lawyer wrote back a confidential letter which was defamatory of the applicant. By some surreptitious means the applicant got hold of a copy of this letter and, on the basis of it, filed a million dollar libel suit against the district attorney in a federal court in Pennsylvania. I was retained to defend him, and I have taken the position that the letter written in response to the inquiry from the National Conference of Bar Examiners was absolutely privileged and that the complaint should be dismissed on that ground without going to trial. I argued this point in the United States District Court recently and am awaiting a decision.⁴ The case may well end up in the Court of Appeals for the Third Circuit. It seems to me that an absolute privilege is essential in this situation. Courts do not know the moral background of applicants for admission to the bar. Under Canon 29 a lawyer has a duty to "aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education." It is certainly a matter of great importance to the welfare of society that unworthy persons do not become members of the bar.

In determining whether there should be an absolute privilege in this situation, we have to balance the interest of the applicant in not being unjustly defamed with the interest of the courts and the public in keeping out of the bar unworthy persons.

A letter from an attorney to bar examiners is a highly confidential document which is seen by very few persons and is studied by experienced lawyers, and is considered together with all other data on the candidate for admission to the bar. There is a very small chance that a member of the bar will abuse the occasion and maliciously state false and defamatory matter. In the rare case in which he does, the likelihood is that he will be caught as a liar. He will, in effect, defame himself rather than the applicant. Furthermore, as a member of the bar, he would be subject to disciplinary action for making false statements to the court or to the

4. On October 24, 1962, Judge Frederick V. Follmer held that the defendant's letter was absolutely privileged and dismissed the complaint. *Bufalino v. Teller*, Civil Action 7716, M.D. Penn. As I believe this is the first decision on this precise question in the United States, it will probably receive considerable attention.

court's board of law examiners. Consequently, in giving a lawyer an absolute privilege to communicate defamatory information about a candidate for admission to the bar, there is very little risk of malicious and unjust harm to the person defamed.

Now look at the other side of the coin. Any deterrent to complete information about a candidate for admission to the bar is contrary to the public welfare. A conditional privilege is an affirmative defense, which must be pleaded and proved. Not until the defendant rests his case, after what may be a long and expensive trial, does he know where he stands on such a defense, and it is generally left to the lay jurors to decide, under "instructions."

Life being what it is, only a few courageous lawyers will have the hardihood to run the risk of exposing themselves to a libel jury trial, with its uncertainties and expenses, by giving defamatory information which it is imperative the court should obtain concerning an unworthy candidate for admission to its bar.

I have no doubt whatever that the public welfare requires an absolute privilege for a member of the bar in writing defamatory matter to a court or its agent concerning a candidate for admission to the court's bar, and this is especially so where the information is given in response to a request for information. However, I think the lawyer who has the courage to volunteer information should also be protected by an absolute privilege, particularly as he is subject to disciplinary action if he acts maliciously.