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Is the Dictation of a Libelous Letter to a Stenographer a Sufficient Publication of the Libel to Sustain a Civil Suit for Damages?

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NOTES

IS THE DICTATION OF A LIBELOUS LETTER TO A STENOGRAPHER A SUFFICIENT PUBLICATION OF THE LIBEL TO SUSTAIN A CIVIL SUIT FOR DAMAGES?

I.

It is of course settled law that a libelous communication addressed to the person libeled and received and read by him only will not give rise to a cause of action unless the plaintiff in such case can prove that the defamatory matter was published to some third person—that is, that through no fault of plaintiff, the libel was brought to the attention of someone other than himself and the defendant.

Several rather interesting questions have arisen in cases where the only publication that a plaintiff in a suit for libel can prove is the dictation of the libelous or defamatory letter to the stenographer employed by the defendant. It is obvious that this question becomes imporant only in the following two instances:

1. Where the letter dictated and transcribed by the stenographer

is written upon a privileged occasion as between the communicants.

2. Where the letter is sent to and receivd by the person libeled and read only by him.

The questions considered by the courts are these: What is the status of the publication to the stenographer? Is there a publication in the sense that some third person has been informed of the defamatory written statements? Is the publication, if held to be such, privileged between the employer and the stenographer? Must the plaintiff sue for libel or for slander?

It may be said at the outset that the courts have held unanimously that the dictation to the stenographer constitutes a publication in the technical sense above referred to, thereby rejecting the defendant's ingenious argument in the Maryland case[1] that a stenographer or clerk does not receive the meaning and significance of the defamatory matter any more than the typewriting machine—that the stenographer must be looked upon as a mere mechanical device.

That there is any privilege between the employer and the stenographer can hardly be true, for there may be nothing of interest to the stenographer in the subject matter of the letter, however great the privilege between plaintiff and the defendant.

The law on this phase of the question, namely, the dictation of a libelous letter to a stenographer when the letter itself is written upon a privileged occasion seems to be well settled both in England and in this country.

In an English case decided in 1869,[2] plaintiff sought to hold a corporation liable for an alleged libel. The evidence showed that the directors of the corporation had given to a printer a report, submitted to them by the auditors of the company who were employed to investigate plaintiff's management of some of the corporation busisness, that the report thus submitted was defamatory, and that the report was to be sent or given to each stockholder. The court decided having failed to show that the directors in having the report printed that the report to the stockholders was privileged and the plaintiff, acted maliciously, was not entitled to recover. The court said:

> "I think we should be going against what I may call progress if we were to hold that the delivery of the manuscript of the report to the printer for the purpose of having it printed is a publication which prevents the communication from being privileged."

In 1891, however, the English Court of Appeals[3] decided that

[1] Gambril v. Schooley, 93 Md. 48.
[2] Lawless v. Cotton Co., 1869 4 Q. B. 262.
[3] Pullman v. Hill, 1891 1 Q. B. 524.

where a libelous letter is dictated to a stenographer in defendant's employ, who transcribes the letter from the stenographic notes, and hands it to defendant, who signs, it, and has a letter press copy made of it by a clerk the dictation of the letter constitutes a sufficient publication of the libel and plaintiff may recover without proving actual malice.

It was contended in that case that business conditions had changed considerably, that it was almost an absolute necessity to employ stenographers in conducting and managing large mercantile establishments, and that on account of these circumstances the dictation of all letters to a stenographer does not constitute such a publication as is contemplated in the law of libel and slander. In other words, the defendants contended that the legal inference of malice, which springs up in every case where one publishes a false statement about some person to another who has no interest in the subject matter of the defamatory statement, cannot be applied in those cases in which the only publication complained of is the dictation to the stenographer or clerk, whose relation to the defendant, and the circumstances under which the slanderous words come to his knowledge, are such as to clearly rebut the legal inference of malice.

The court, however, rejected defendant's contention both as to the alleged privilege existing between the employer and his stenographer and also those referring to the necessities and exigencies of business. Of the latter the court says:

> "I do not think that the necessities or the luxuries of business can alter the law of England. If a merchant wishes to write a letter containing defamatory matter and to keep a copy of the letter, he had better make the copy himself."

This and other statements of the court in the same case are rather broad, in fact much broader than necessary as far as the decision of the case is concerned, and on the face of it this case might be said to be decisive upon the question of the dictation to the stenographer in all cases, both as to letters written upon a privileged occasion, and those written upon a non-privileged occasion. The doctrine of Pullman vs. Hill was, however, reviewed and its effect limited in the case of Boxsius vs. Goblet Freres,[4] decided by the same court three years later. That was a case in which a solicitor, who had been engaged to make a collection of money due defendant from plaintiff, dictated a libelous letter to his stenographer who wrote it and sent it to plaintiff. Two of the judges who sat in the case of Pullman vs. Hill took part in the discussion and decision of this case and held that the rule adopted in Pullman vs. Hill was to be applied to such

[4] 1 Q. B. 842 (1894).

cases only where the occasion upon which the letter was written was not privileged, that a letter, though libelous, written by a solicitor in the ordinary course of his business was privileged, since it is a solicitor's duty to his client to do everything he deems necessary to obtain satisfaction. The letter being written upon a privileged occasion, the court holds that the solicitor, therefore, did an act on a privileged occasion and defendant could not be held liable unless actual malice was shown. In the Pullman vs. Hill case the occasion for writing the libelous letter was clearly not privileged.

This distinction between the two cases and the rules laid down in each is recognized and approved in a case decided in the King's Bench in 1907.[5]

The courts of Canada, though for a time confused by the apparent conflict in decisions, finally recognized both these rules, the Pullman case being followed by the Court of Appeals in a decision in which the Divisional Court was reversed,[6] although two of the judges were inclined not to adopt this rule.

"The stenographer ought not to be regarded as a third person. The communications to him ought to be treated as privileged," says one of the judges, while the other speaks as follows: "As at present advised, I am disposed to think that if the matter was *res integra* I would give in my adhesion to the view thus expressed as most in harmony with our present conditions."

In our own country there are numerous decisions involving both the question considered in the Boxsius v. Goblet Freres case and the one decided in the Pullman v. Hill case, and without exception all of them follow the English cases.

"This privilege was not lost because the report was incidentally brought to the notice of the stenographer in the office of Powell and Doyle," said the Supreme Court of Arkansas[7] in considering the case of a libelous communication made upon a privileged occasion and incidentally brought to the attention of the stenographer. The courts of Georgia[8], Mississippi,[9] and New York[10] have followed the English case of Boxsius v. Goblet Freres and the Supreme Court of Maryland[11] in adopting the rule in Pullman v. Hill recognized the distinction between the cases alluded to above. The New York case would make a distinction between the case in which the defendant is a corporation and one in which the defendant is an individual, and holds that, since

[5] 1 K. B. 371.
[6] Puterbaugh v. Gold Medal, etc., 7 Ontario L. R. 582.
[7] Bohlinger v. Insurance Co., 100 Ark. 477.
[8] Central of Georgia Ry. Co. v. Jones, 18 Ga. App. 414.
[9] Catwright v. Fischel, 113 Miss. 359.
[10] Owen v. Publishing Co., 32 App. Div. (N. Y.) 465.
[11] Gambrell v. Schooley, 93 Md. 48.

a corporation can act only through its agents, the acts of the person dictating, the one transcribing it, and of the one who makes a letter-press copy of it must in the law be considered as one act of a single individual, and that, therefore, there has been no publication of the libel to a third person. "It may be," said the court, "that the dictation to the stenographer and her reading of the letter would constitute a publication of the same by the person dictating it, if the relation existing between the manager and the copyist was that of master and servant *and the letter be held not to be privileged.*" The last few words would seem to indicate that the New York court would also recognize the difference maintained by the English courts, but would apply it only in such cases where the defendant is an individual.

The most thorough and elucidating case on this subject is the case referred to above decided in Maryland. The principle involved in this case is exactly like that involved in the Pullman v. Hill case. Defendant's counsel argued that Pullman v. Hill was practically overruled by the decision in the later case of Boxsius v. Goblet Freres and even if Pullman v. Hill was still law in England it ought not to be followed in the United States. The court, however, adopts the law of Pullman v. Hill and intimates that its decision would be otherwise had the libel in question been written upon a privileged occasion.

"But there was no question of privilege in Pullman v. Hill and there is none here," says the court, "as the appellant owed no duty in the matter to anyone." This case is cited and followed by the Supreme Court of Alabama[12] which says:

> "The dictation of a libelous letter to a stenographer who copies it from his notes on a typewriting machine and the subsequent signing thereof by the person dictating is a publication of the contents of the letter sufficient to support libel or slander although there is no communication of its contents to any other person."[13].

II.

The question as to whether or not the plaintiff must sue for slander or whether he may sue for libel was not pressed in the argument of Pullman v. Hill and received but little attention from the court, although Lord Esher did say that libel consisted of "making known the defamatory matter *after it has been written* to some person other than the person to whom it is written." The court's decision that the *dictation* of the defamatory letter was a libel in the face of its own definition as to what constituted libel is strongly criticised by Mr.

[12] Ferdon v. Dickens, 161 Ala. 181.
[13] Ferdon v. Dickens, 161 Ala. 181 l. c. 187.

Odgers,[14] who says, "It is doubtful whether the facts as proved at the trial in Pullman v. Hill support the decision of the Court of Appeals on the issue of publication. Dictating to a shorthand clerk words which that shorthand clerk takes down in writing is not publishing a libel to the shorthand clerk. No libel is yet in existence. Such dictation may be an actionable slander—indeed in Pullman v. Hill it was so—but the fact that *spoken words are intended to be written down* after they are uttered does not make their utterance the publication of a libel."

This criticism of Mr. Odgers was urged in a Canadian case but the court said, "As to this, however, I think it is reasonably to be inferred, looking at all the reports of the case that the *letter after having been* signed was handed back to the typewriter."

This phase of the question is, however, settled in Gambrill v. Schooley (supra.) The criticism by Mr. Odgers of Pullman v. Hill was called to the attention of the court and counsel insisted that there was no proof of the publication of a libel, because, at the time of the occurrence of the publication, no written defamation was in existence, and the communication up to that period being entirely oral, slander was the only proper form of action which could be maintained.

This contention was rejected by the court, which said, "We have no doubt that the dictation of these letters to the stenographer was the publication of a slander, for which, if nothing further had been done by either, an action of slander could have been maintained, but we have no more doubt that the stenographic notes, the typewritten copy, and the letter press copy constituted the publication of a libel and that either slander or libel could be maintained as the appellee should elect." This statement, it would seem, is followed by the Alabama court in the case above cited from that state.

The following conclusions may therefore be drawn as to the law on the subject as laid down and recognized by the courts.

First, It has been established by numerous English decisions and affirmed in this country, that where there is a duty as between two persons which forms the ground of a privileged occasion, the person exercising the privilege is entitled to take all reasonable means of so doing, and the use of the ordinary and reasonable means of giving effect to the privilege does not destroy it. The dictation to a stenographer of a letter written upon a privileged occasion, therefore, is not an actionable publication, even though the same may be libelous.

Second, Where the letter dictated is not one written upon a privileged occasion the dictation to the stenographer is a sufficient publi-

[14] Odgers on Libel and Slander, 5th Edition, 161, 162.

cation and is in law presumed to be malicious even though the letter was not sent out of the office and no one but the person dictating and the stenographer knew the contents thereof.

Third, Under the New York decision, if the defendant is a corporation, the acts of all of its agents in connection with the writing of the letters will be considered as one single act, so that there is no publication and consequently it would make no difference whether the communication was or was not privileged.

Fourth, That the plaintiff has the right to sue for slander or libel as he may elect.

In spite of the fact that there is quite respectable authority on this point, it is rather difficult to understand why a distinction should be made between the case of a letter written upon a privileged and one written upon an occasion not privileged, since the necessary effect of all the decisions is that the communication of the libelous letter to the stenographer in the regular routine of business is made upon an occasion and under such circumstances as will rebut the legal inference of malice which is a necessary ingredient of actionable libel and which is inferred in all cases where the defamatory matter is published to a stranger. Having recognized a special relationship, we think that it is but arbitrary to insist upon the distinction that courts have made.

What difference can there possibly be said to exist whether the libelous communication is ultimately to come into the hands of a person whom the author, if sued, will be able to show to have been interested in the subject matter, or is to come into the hands of a person not so interested. The intent on the part of the defendant in employing his stenographer to write up the libelous letter, his malice, his desire to hold up the person libeled to ridicule, and shame, and injure him in his reputation, is the same in both instances as far as the stenographer is concerned.

Supposing the same kind of a letter is addressed to two different persons. One letter is sent to a person having an interest in the subject matter of the communication, the other to one having no such interest. The letters are exactly alike, both are dictated by and to the same person, both transcribed by the same person, nothing being said to the stenographer as to the occasion upon which either letter is written. It turns out that one of the letters is written upon a privileged occasion and the other is not, and further, that the one supposed by the defendant to have been privileged is held by the court not to be a privileged communication. In one case it is said that there is no such publication as will entitle a plaintiff to recover without proof of actual malice, while in the other the mere proof of the dictation

to the stenographer is held to be a sufficient publication without proof of any actual malice. In fact, there was more malice on the part of the defendant in dictating the first letter than in dictating the second, and to hold that the law will infer malice in the second case is contrary to the true facts of the case.

It finally comes down to this—in the case of a letter not privileged the law imputes malice to the defendant *ab initio*, and, therefore, malice is to be presumed or imputed to him because he has dictated the letter to his stenographer. In the case of privileged communications malice is not presumed, therefore, the dictation to the stenographer is not malicious. In the one case the defendant is held liable for doing an act in aid of his unlawful purpose, while in the other he is excused because, his purpose not being wrongful, the acts done in aid of that purpose are not wrongful. This sort of distinction between the two cases supposed and the ground of such distinction may be well and reasonable enough when it comes to punishing one criminally, but it seems to the writer that it loses its force when an attempt is made to apply it to civil actions for damages. The wrong or injury to the plaintiff's reputation—which has been time and again held to be the foundation of plaintiff's action—is not healed nor enhanced by the fact that in the one case the letter was privileged and in the other it was not. The effect upon the mind of the stenographer for which he is allowed to recover if the occasion was not privileged is exactly the same in either case.

We submit that in view of the decisions, the proper test to determine whether or not a publication to a stenographer is sufficient to support an action for libel should be this: Does a consideration of all the evidence show that the defendant acted maliciously and intended to hold plaintiff up to ridicule and defame and injure his reputation. If so, then *in either* case the defendant should be made to pay damages and vice versa. Under such a rule no matter whether the libelous letter finally reached the hands of a person who is found to have received it upon a privileged occasion or whether it turns out that he had no such interest which made the communication privileged, the test of defendant's liability would be: Did the defendant act maliciously, or has plaintiff proven any malice on the part of defendant excepting that which would ordinarily be presumed in case of a publication to a stranger? There is nothing in all of the decided cases cited which would conflict in principle and in language with this test.

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