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The Effect of a Plea of Justification in a Libel Suit - Domchick v. Greenbelt Consumer Services

THE EFFECT OF A PLEA OF JUSTIFICATION IN A LIBEL SUIT

Domchick v. Greenbelt Consumer Services[1]

Employee, plaintiff, brought a libel suit against his corporate employer and its general manager, defendants, in the Circuit Court for Prince George's County. The plaintiff-appellant was discharged for misconduct while being employed in the defendant-appellee's food store in the meat department. The general manager of the defendant corporation set forth the incidents of misconduct in letters to the plaintiff and in memoranda to the directors of the corporation. Judgment was entered for the defendants at the close of the plaintiff's case, on their motions for directed verdicts, and the plaintiff appealed. The Court of Appeals held that the testimony as to publication, even if privileged, plus the republication of the alleged libelous material in the defendant's plea of justification made out a prima facie case of

[1] 87 A. 2d 831 (Md., 1952).

publication with malice, and, therefore, the case should not have been taken from the jury. The court thereupon reversed the lower court and remanded the case for a new trial, summarizing the law in part as follows:[2]

> "The testimony as to the publication, even if privileged, plus the republication in the plea, makes out a prima facie case of publication with malice. Proof of a publication not shown to be privileged infers malice, and is sufficient to require testimony in rebuttal. It cannot be taken from the jury at the close of the plaintiff's evidence."

The special plea of justification has always been a hazardous[3] one in Maryland, but the instant case has practically made such a plea prohibitive.

The Court of Appeals in reaching its decision, reviewed those cases in Maryland which dealt with the effect of a plea of justification after all the evidence had been considered and the plea had failed to be sustained.[4] They clearly established the rule that under such circumstances, a plea of justification, if not sustained, is evidence of malice.[5] The court also considered a case in Maryland dealing with a plea of justification joined with a general issue plea.[6] Here a directed verdict was not allowed at the end of the plaintiff's evidence, since such evidence showed actual malice.

In the *Domchick case* not only was there a plea of justification but also a general issue plea setting forth privilege. Corpus Juris Secundum,[7] in discussing the problem, says:

> "While there is some authority holding that an unsuccessful plea of justification may not be considered

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[2] *Ibid*, 837.

[3] PROSSER, HANDBOOK OF THE LAW OF TORTS (1941), Ch. 17, §95, p. 856.

[4] Rigden v. Wolcott, 6 G. & J. 413, 419 (Md., 1834); Blumhardt v. Rohr, 70 Md. 328, 342, 17 A. 266, 270 (1889); McBee v. Fulton, 47 Md. 403, 427 (1878); Coffin v. Brown, 94 Md. 190, 50 A. 567, 570 (1901); Bowie v. Evening News Co., 151 Md. 285, 288-289, 293, 124 A. 214 (1926).

[5] In Coffin v. Brown, *ibid*, 200, the Court states:

> "If, on the other hand, when the party is brought into court to answer a charge of libel he undertakes to meet it by placing on the public records the allegation that what he published was in fact true, and *then utterly fails to establish it*, why should not he be held responsible for it?" Emphasis added.

And Blumhardt v. Rohr, *ibid*, 342, says:

> ". . . the appellant had by plea asserted the truth of the charge his language imputed; and if untrue, as the jury found it to be, it was a reassertion of the slander, and, connected with other circumstances suggestive of malice, *it* could be considered as *some evidence* of malice."

[6] Deckelman v. Lake, 149 Md. 533, 131 A. 762, 765 (1926).

[7] 53 C. J. S. 229, "Libel and Slander", Sec. 144. Emphasis added.

an aggravation of damages, and that such plea is not admissible as a republication to enhance damages, as by showing malice, in the absence of constitutional or statutory provision to the contrary, the general rule is that, where the truth is pleaded in justification, failure to sustain the plea by proof may be considered by the jury as an aggravating circumstance in estimating damages where it has no reasonable evidence to support it. The jury should be guided by the motive with which the plea is made, and if it is interposed in good faith, under an honest belief in the truth of the matter published and with reasonable grounds for such belief, it cannot be regarded as an aggravation beyond the real injury sustained by the plaintiff. Indeed, it has even been held that if a plea of justification is made in good faith, and evidence is introduced honestly, for the purpose of supporting it, such evidence should be considered by the jury in mitigation of damages, although it is insufficient to prove the truth of the plea.

The pleading of the truth of the charge, . . . does not remove the qualified privilege from the communication."

Apparently former Chief Judge Marbury[8] believed that the moment the defendant filed a special plea of justification instead of being content with a general issue plea, a prima facie case of malice was raised as to the original publication. The defendant then must substantiate his plea with evidence sufficient to go to the Jury. Plaintiff's recovery hinged on defeating the qualified privilege of the original publication and this could only be done by the plaintiff showing malice. The lower court saw no malice, or even the possibility of it, because at the close of the plaintiff's case, it directed a verdict for the defendant. In this respect it is interesting to note the language used in the appellant's brief.[9]

"In granting the motion for a directed verdict as to the defendant corporation and the defendant Ashelman, it must be assumed that the lower court determined as a matter of law that there was no evidence of express malice on their parts, since statements made maliciously would not be privileged.

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[8] Chief Judge Marbury, who wrote the opinion in the instant case, retired from the Court of Appeals in August of 1952.

[9] No. 158, Oct. Term, 1951, p. 20.

> Before a prayer for a directed verdict can be granted, the court must assume the truth of all the evidence tending to sustain the suit and of all inferences of fact fairly deductible from it, even though such evidence may be contradicted in every particular by the opposing evidence in the case."[10]

It has been held elsewhere[11] that the mere fact that a plea of justification is filed in a libel suit is not alone evidence of malice sufficient to go to the jury.[12] According to such authority, a person may have a finding in his favor under a plea of privilege irrespective of a plea of justification since such privilege is not thereby waived.[13]

Those jurisdictions which have considered cases wherein there has been a plea of privilege as well as a plea of justification in a libel suit have held, as is set out by the Supreme Court of Colorado in *Hoover et al. v. Jordan*[14] which is almost identical to the *Domchick* case, as follows:

> "If the plaintiff in any case, where it has been determined that the communication was privileged, either absolute or qualified, has not produced any evidence of malice, the court should direct verdict for the defendant, even though it is conclusively shown that the matter in the communication was false.
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> It is contended . . . that conceding the law as to qualified privileged communications, in this instance such privilege was removed by excessive publication and unnecessary promulgation; and that the pleading of the truth of the charge in the answer . . . was sufficient evidence of malice to justify the court in submitting the matter to the jury. . . . The pleading of the truth of the charge was not of itself evidence of malice, nor did it remove the qualified privilege from the communication.[15] . . . The complaint and the testimony of the plaintiff clearly establish that the communication was a qualified privileged communication, and disclose that there was some reason and excuse for the charges made, and the testimony and all of the evidence of the plaintiff fail utterly to show any malice on the part of defendants; the evidence of the defendants show more

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[10] Development Co. v. Houston, 179 Md. 441, 445, 19 A. 2d 706 (1941).
[11] NEWELL, SLANDER AND LIBEL (4th ed., 1924), 333.
[12] Scott-Burr Stores Corp. v. Edgar, 181 Miss. 486, 177 So. 766 (1938).
[13] Lamb v. Fedderwitz, 72 Ga. App. 406, 33 S. E. 2d 839 (1945).
[14] 27 Colo. App. 515, 150 P. 333, 334-336 (1915).
[15] Citing Decker v. Gaylord, 35 Hun. 584 (N. Y., 1885).

clearly the same thing; and, if the defendants had moved for a direct verdict, at the close of their case, the court should have sustained it.

The mere plea of the truth of the charge did not authorize a verdict for the plaintiff in case the defendants failed to prove it. This is a correct rule in ordinary cases of libel and slander, but not in the case of a privileged communication, either qualified or absolute. In such cases the burden is upon the plaintiff, assuming the falsity of the charge, to prove actual malice on part of defendant, before a recovery can be had."[16]

As the present law of Maryland now stands, if the defendant wishes to plead the truth of the charge made, as well as the privilege, not only does he have to prove the privilege, but also must prove the truth. The question of the truth is for the jury to decide. This means that the defendant would not be entitled to a directed verdict at the end of the plaintiff's evidence.

[16] Citing Denver Public Warehouse Co. v. Holloway, 34 Colo. 432, 83 P. 131 (1905).