Maryland Law Review

Volume 23 | Issue 1 Article 7

Libel From Comment On Facts Generally Known - A. S. Abell Company v. Kirby

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Libel From Comment On Facts Generally Known

A. S. Abell Company v. Kirby[1]

Appellee, a member of the Rackets Squad division of the Baltimore City Police Department, sued for malicious defamation in the Circuit Court of Baltimore County. The alleged libel appeared in the editorial section of THE MORNING SUN, a Baltimore newspaper, in an article entitled "Not Proved", which discussed current hearings before the Baltimore City Delegation and the Governor for the possible dismissal of the Police Commissioner for incompetency and misconduct. In referring to some twenty-five witnesses who testified not under oath or subject to cross-examination, the editorial incidentally mentioned the plaintiff as follows: "Every important witness against the Police

[1] 227 Md. 267, 176 A. 2d 340 (1961), rehearing den. (1962).

Commissioner, moreover, was a man with a motive. We name especially the *infamous* Kirby, former Inspector . . . and former Chief Inspector. . . ."[2] Defendant pleaded the general issue and attempted to show that the statement was a fair comment on matters of legitimate public interest.[3] At the trial defendant excepted to the failure of the judge to permit the jury to consider in their determination of the issue of fair comment, facts about plaintiff's recent conduct in his official capacity as a justification of the use of the term "infamous".[4] Though not printed in the editorial in question, or referred to therein, the defendant claimed that they had been published in a number of previous articles and were within the common knowledge of the community. On appeal this decision was affirmed (Judge Prescott dissenting in part), the Court of Appeals ruling that, "To sustain fair comment, facts which are set out in the publication must be truly stated (if they are unprivileged), and that such a fact which is not set out must both be true and be so referred to in the publication as to be either recognizable or be made identifiable, and easily accessible."[5]

According to the Restatement,[6] there are two general classes of defenses to an action for defamation: (1) those which afford protection from liability irrespective of the purpose of the publisher or the manner of publication, namely truth,[7] consent,[8] and absolute privilege;[9] and, (2) those which afford protection only when the publication is made for a proper purpose and is appropriate thereto, namely conditional or qualified privilege which arises from particular occasions,[10] privileged criticism,[11] as well as some special types of conditional privilege.[12]

Fair comment is an immunity which all courts recognize; however, there are two theories on which it is based. Most classify it under the defense of privileged criticism[13]

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[2] *Supra*, n. 1, 271 (Emphasis added).

[3] Under MD. RULE 342c2(h), truth must be pleaded specially, but a general issue plea is sufficient to raise the defense of fair comment.

[4] These facts did go to the jury on the issue of malice.

[5] *Supra*, n. 1, 282.

[6] RESTATEMENT, TORTS (1938) *Scope note* to Ch. 25, p. 215.

[7] RESTATEMENT, TORTS (1938) § 582, p. 216.

[8] *Id.*, §§ 583-584.

[9] *Id.*, §§ 585-592.

[10] *Id.*, §§ 593-605.

[11] *Id.*, §§ 606-610.

[12] *Id.*, §§ 611-612.

[13] Campbell v. Spottiswoode, 3 B. & S. 769, 32 L.J.Q.B. 185 (1863); Dressler v. Mayer, 22 N.J. Super. 129, 91 A. 2d 650 (1952); Ullrich v. N.Y. Press, 23 Misc. 168, 50 N.Y.S. 788 (1898).

while a minority state that its existence precludes defamation.[14] According to the majority, express malice destroys the privilege; whereas, the minority holds that malice brings the statement within actionable defamation. As the Court points out in the *Kirby* case, this is a distinction of little practical significance except on the burden of proof.[15]

Fair comment may be defined as discussion, evaluation or criticism, founded on facts, upon matters of legitimate public interest, which is fair.[16] The privilege to comment is available to every member of the public with no preferred position given to newspapers.[17] It has long been recognized as serving to encourage democratic discussion and formation of opinion on matters of healthy interest to the public.[18]

In terms of the definition, the necessary elements constituting the defense of fair comment are as follows:

1. The matter complained of must be *comment, not assertion of fact* — If the jury finds the alleged defamation to be a statement of fact, whether true or false, the defense of fair comment is not applicable. In some cases the line distinguishing fact from comment is readily seen. For example, if the defendant states that plaintiff has robbed a bank, and in his opinion this demonstrates low moral character, it is obvious that the phrase "plaintiff has robbed a bank" is fact and the remainder is comment thereon. However, in many situations it is not easy to distinguish between the two. What may be intended to be comment may be phrased in terms of fact, or the two could be so intermingled as to be practically indistinguishable.[19] In the *Kirby* case the trial judge's instruction to the jury, which is adopted by the Court of Appeals, is in the accepted manner: "Would an ordinary person, reading the

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[14] Brinsfield v. Howeth, 107 Md. 278, 68 A. 566 (1908); Gott v. Pulsifer, 122 Mass. 235, 23 Am. Rep. 322 (1877); Walker v. Hodgson [1909] 1 K.B. 239; Dakhyl v. Labourchere, [1908] 2 K.B. 325.

[15] 227 Md. 267, 272, 176 A. 2d 340 (1961) and see the Court's footnote; see also Comment, *Fair Comment*, 8 Tex. L. Rev. 41, 41-43 (1930); as to the burden of proof, see 1917 B Ann. Cas. 409, 414.

[16] RESTATEMENT, TORTS (1938) § 606, p. 275. See Anno. 155 A.L.R. 1346, 1349 (1945).

[17] Negley v. Farrow, 60 Md. 158, 45 Am. Rep. 715 (1883); Snyder v. Fulton, 34 Md. 128, 6 Am. Rep. 314 (1871); Foley v. Press Pub. Co., 226 App. Div. 535, 235 N.Y.S. 340 (1929); Campbell v. Spottiswoode, 3 B. & S. 769, 32 L.J.Q.B. 185 (1863).

[18] Tabart v. Tipper, 1 Camp. 350 (1808); Commonwealth v. Clap, 4 Mass. 163, 3 Am. Dec. 212 (1809).

[19] Eikhoff v. Gilbert, 124 Mich. 353, 83 N.W. 110 (1900); RESTATEMENT, TORTS (1938) § 606, subsection (1), comment b, p. 276. See also Comment, Noel, *Defamation of Public Officers and Candidates*, 49 Col. L. Rev. 875, 878-880 (1949).

matter complained of, be likely to understand it as an expression of the writer's opinion or as a declaration of an existing fact?"[20]

2. The matter complained of must be one of *legitimate public interest* — This includes a large number of situations[21] which may be roughly divided into two categories:

(a) topics involving matters inherently of interest to the public, as governmental and quasi-governmental offices and agencies, and those entrusted with their administration;

(b) situations in which persons by their voluntary actions have ceded their right of privacy and submitted themselves to public scrutiny. Whether or not a particular subject is of public interest and therefore proper for criticism is a question of law.[22]

3. The comment must be *fair* — This involves a number of qualifications.

(a) The defendant may not *impute corrupt or dishonorable motives* to the plaintiff.[23] Some courts hold this is not a proper subject matter of public interest, while others consider as a matter of law that it is a statement of fact, therefore, not the proper subject of fair comment.[24] Most courts, then, impose liability regardless of which view is taken unless the defendant can show justification.[25] The English view for many years has been more liberal. According to it such imputations are not permissable unless they are the writer's honest opinion and are warranted by the facts and in addition permit a reasonable man to draw similar inferences.[26] A few American jurisdictions have adopted this rule,[27] as has the Restatement.[28]

(b) The *private character* of an individual is not included in fair comment. — Fair comment does not allow

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[20] 227 Md. 267, 274, 176 A. 2d 340 (1961); see also 1 HARPER AND JAMES, THE LAW OF TORTS (1956) § 5.28, p. 457, n. 6.

[21] See RESTATEMENT, TORTS (1938) § 606, subsection (1), comment a, p. 276, and §§ 606-611, pp. 275-293; 33 Am. Jur. 156-167, Libel and Slander, §§163-172; 53 C.J.S., 201-209, Libel and Slander, §§ 123-129; 24 HALSBURY'S LAWS OF ENGLAND, (Lord Simonds Ed. 1958) 72-74, Libel and Slander, § 4, subsection 126.

[22] McQuire v. Western Morning News Co., Ltd., (1903) 2 K.B. 100.

[23] The leading American case so holding is the Maryland case of Negley v. Farrow, *Supra*, n. 17. See also 14 M.L.E. 221, Libel and Slander, § 41.

[24] See Comment, *Fair Comment*, 62 Harv. L. Rev. 1207, 1209-1210 (1949).

[25] As to the difficulty of justification in Maryland, see Note, *The Effect of a Plea of Justification in a Libel Suit*, 13 Md. L. Rev. 357 (1953).

[26] Campbell v. Spottiswoode, *supra*, n. 12. Joynt v. Cycle Trade Pub. Co. [1904] 2 K.B. 292.

[27] *E.g.*, Merry v. Guardian Printing Co., 79 N.J.L. 177, 74 A. 464 (1909).

[28] RESTATEMENT, TORTS (1938) § 606 (2), p. 275, see text *infra*, n. 36.

an attack on the private citizen, or follow one, otherwise the subject of criticism, into his private life.[29] This is somewhat tempered by the modern rule which includes so much of one's private character as affects his public duty.[30]

(c) The publisher cannot be actuated by *malice.* — This is the situation in those classes of defenses to defamation which require a proper purpose. Malice here means actual or express malice, or where it is with wanton disregard to the rights of the plaintiff.[31]

(d) Comment may be *severe.* — Comment when it is severe does not negative the defense.[32] While it can serve as evidence of malice, it is not malice *ipso facto.*[33]

(e) To be fair comment, it must be supported by facts correctly stated, or referred to on the face of the comment, or so within the common knowledge of the reader as to make the comment fair.[34]

Knowledge of facts either stated or presupposed is generally considered to be another element of fairness, because if facts upon which comment is based are not known to the reader, he possesses no criterion with which to determine the fairness of the comment. Most courts agree that all the facts, as long as they are *referred* to, do not have to be contained within the four corners of the article.[35] The main issue in the *Kirby* case, however, was whether facts, though not stated or referred to in the article, but otherwise known to the public, were admissible as evidence of fair comment.

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[29] Snyder v. Fulton, 34 Md. 128, 6 Am. Rep. 314 (1871); Triggs v. Sun Printing & Pub. Ass'n, 179 N.Y. 144, 71 N.E. 739 (1904); Post Publishing Co. v. Moloney, 50 Ohio St. 71, 33 N.E. 921 (1893).

[30] Comment, *supra,* n. 19.

[31] Ryan v. Wilson, 231 Iowa 33, 300 N.W. 707 (1941). A. S. Abell Co. v. Kirby, 227 Md. 267, 284-285, 176 A. 2d 340 (1961). "Punitive damages were allowable only if the jury found the publication to have been malicious and wanton and that malice need not necessarily imply ill will or hatred but *in law* will exist if the editorial was recklessly written without reasonable justification or excuse." (Emphasis added.) See also, Brinsfield v. Howeth, 107 Md. 278, 68 A. 566 (1908).

[32] "Mere exaggeration, slight irony, or wit, or all those delightful touches of style which go to make an article readable, do not push beyond the limitations of fair comment. Facts do not cease to be facts because they are mixed with the fair and expectant comment of the story teller, who adds to the recital a little touch of his piquant pen." Briarcliff Lodge Hotel v. Citizens-Sentinel Publishers, 260 N.Y. 106, 183 N.E. 193, 198 (1932).

[33] Berg v. Printers' Ink Pub. Co., 54 F. Supp. 795 (S.D.N.Y. 1943), aff'd, 141 F. 2d 1022 (2d Cir. 1944); Kulesza v. Chicago Daily News, 311 Ill. App. 117, 35 N.E. 2d 517 (1941); Merivale v. Carson [1887] 20 Q.B.D. 275.

[34] See Court's discussion in A. S. Abell Co. v. Kirby, 227 Md. 267, 273-274, 176 A. 2d 340 (1961).

[35] 53 C.J.S. 211, Libel and Slander, § 131.

The defendant relied upon Section 606 of the Restatement of Torts to support its contention that facts were admissible. That section states in part as follows:

"(1) Criticism of so much of another's activities as are matters of public concern is privileged if the criticism, although defamatory,

(a) is upon,

(i) a true or privileged statement of fact, or

(ii) upon *facts otherwise known* or available to the recipient as a member of the public, and

(b) represents the actual opinion of the critic, and

(c) is not made solely for the purpose of causing harm to the other.

(2) Criticism of the private conduct or character of another who is engaged in activities of public concern, in so far as his private conduct or character affects his public conduct, is privileged, if the criticism, although defamatory, complies with the requirements of Clauses (a), (b) and (c) of Subsection (1) and, in addition, is one which a man of reasonable intelligence and judgement might make."[36]

The defendant also relied upon a similar statement from Harper and James in their work on torts.[37] The Court did not specifically reject these statements; rather the majority indicated that they were more appropriate in situations where the subject matter of the comment was more obviously well known.[38]

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[36] RESTATEMENT, TORTS (1938) § 606, p. 275.

[37] 1 HARPER AND JAMES, THE LAW OF TORTS (1956) § 5.28, p. 458-459.
"[I]t follows that criticism is privileged as fair comment only when the facts on which it is based are truly stated or privileged or otherwise known either because the facts are of common knowledge or because, though perhaps unknown to a particular recipient of the communication, they are readily accessible to him. If the facts criticized or commented upon are not stated or known, fair comment is no defense. The reason for this rule, of course, is this: an opinion must be based on facts; if the facts are not known, the opinion carries with it the implication of facts which will justify it."

[38] This seems evident from the Court's discussion Kemsley v. Foot, [1952] A.C. 345, noted in 68 Law Q. Rev. 294 (1952); 34 New Zeland L.J. 337 (1958), on which the defendant relied. There the defendant printed an editorial criticizing a well known newspaper. The article was entitled "Lower than Kemsley"; however, Kemsley, the plaintiff was not mentioned

The Court concluded that in the situation presented by the principal case it was necessary for the facts to either be stated or referred to in connection with the comment. This was so because from the content of the article there was nothing which would indicate to a reader that there were other facts upon which the comment was based. The Court stated:

> "There is nothing in the editorial to lead the reader to reasons why the writer thought Kirby was infamous or a man with a motive, or why the reader should. The linking of his name to Forrester and Ford was not a sufficient reference to the record relied on by the publisher, and there was nothing in the editorial to lead the reader to that search of the newspaper archives which would have been required to reconstruct that record."[39]

There is no case authority specifically discussing whether facts otherwise known should be admitted in the type of situation involved in the *Kirby* case.[40] Most second-

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in the article itself. On the basis of the import of the heading and the subject matter of the article, the House of Lords found implied a sufficient substratum of facts indicated to allow facts generally known about Kemsley's press to go to the jury on the issue of fair comment. The Court of Appeals distinguished this case from the principal case on the basis that by referring to the Kemsley press it was the same as literary criticism of a book and was impliedly referred to, thereby giving the reader a criterion on which to base the criticism.

[39] A. S. Abell Company v. Kirby, 227 Md. 267, 284, 176 A. 2d 340 (1961).

[40] In rejecting defendant's assertion that facts otherwise known be admitted, the court cited a number of cases but only discussed two New York cases, which state that in order to have fair comment the statement must be: "(1) comment, (2) *based on facts truly stated or referred to*, (3) free from imputations of corrupt or dishonorable motives . . . save in so far as such imputations are warranted by the facts truly stated, and (4) the honest expression of the writer's real opinion." Cohalan v. New York Tribune, Inc., 172 Misc. 20, 15 N.Y.S. 2d 58, 60 (1939) (emphasis added). See also Foley v. Press Publishing Co., 226 App. Div. 535, 235 N.Y.S. 340, 351 (1929). The Maryland Court quoted this statement in support of the proposition that facts upon which an opinion is based must be actually *stated* or *referred to* and not merely *otherwise known* in order to constitute an element of the defense of fair comment. However, the issues in those cases were on matters of pleading a special form of defense — in particular, the controversial "rolled-up plea," which presents different problems from those in the present case.

The "rolled-up plea" is typically stated as follows: in so far as the words complained of constitute statements of fact, such statements are true, and in so far as they are expressions of opinion, they are fair comment made in good faith, without malice, on matters of public interest. Cohalan v. New York World Telegram Corp., 172 Misc. 1061, 16 N.Y.S. 2d 706 (1939); Sutherland v. Stopes [1925] A.C. 47. See Anno. *Pleading or raising defense of privilege in defamation action*, 51 A.L.R. 2d 552, 556, 575 (1957). This plea has caused two problems. One is whether it raises more than one defense, *i.e.*, truth, justification, and/or fair comment.

ary authorities on their face seem to support the defendant's position,[41] but perhaps because of the lack of any primary authority, they do not discuss exactly what situations should be covered. Since the only basis of appeal on this issue was the specific instructions given by the trial judge, it could be argued that the Court did not necessarily establish a broad general rule. If a case arose where comment was made on facts which, though not stated or referred to in the article, were clearly so well known that the judge could, for example, take judicial notice of them, it is possible that they could be used as a basis for a fair comment defense.

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Most courts have decided it raises only the defense of fair comment. Foerster v. Flynn, 193 Misc. 373, 84 N.Y.S. 2d 297 (1948), comment, *Use of the Rolled-up Plea in Libel Action*, 49 Col. L. Rev. 583 (1949); Sutherland v. Stopes, *supra*. This is the main point discussed in the Foley and Cohalan cases, *supra*. The other point is how much is the defendant required to distinguish fact from opinion in the bill of particulars. See 49 Col. L. Rev. 583 (1949) *supra*. It is the dissents contention that these cases do not preclude the use of facts otherwise known. 227 Md. 267, 289, 176 A. 2d 340 (1961) ("But even if these decisions are followed, it does not require the result reached by the majority, as shown by the following quotation from Cohalan v. New York Tribune, Inc., 172 Misc. 20, 15 N.Y.S. 2d 58, one of said decisions, when the court, in sustaining the sufficiency of a plea of fair comment, said: 'On the basis of the facts stated in the editorials *and the other facts alleged in the defenses* a jury might find that the conclusions and comment contained in the editorials were within the realm of fair comment'.")

The other cases cited do not deal directly with the issue involved: Merivale v. Carson, 20 Q.B.D. 275 (1887) severity of criticism; Parsons v. Age-Herald Pub. Co., 181 Ala. 439, 61 So. 345 (1913) report of grand jury as privileged occasion; State Press Co. v. Willett, 219 Ark. 850, 245 S.W. 2d 403 (1952) false statements of fact and malice; Howard v. Southern California Associated Newspapers, 95 Cal. App. 2d 580, 213 P. 2d 399 (1950) opinion as distinguished from fact; Eikhoff v. Gilbert, 124 Mich. 353, 83 N.W. 110 (1900) considered fairness of statement; Edmonds v. Delta Democratic Publishing Company, 230 Miss. 583, 93 So. 2d 171 (1957) was privilege abused by malice; Leers v. Green, 24 N.J. 239, 131 A. 2d 781 (1957) no claim that facts otherwise known should be admitted. But see O'Brien v. Salisbury, 54 J.P. 215 (1889) for a good discussion of facts otherwise known as applied to slander.

[41] GATELY, LIBEL AND SLANDER (4th Ed. 1953) 622, 624; 1 HARPER AND JAMES, THE LAW OF TORTS (1956) § 5.28, p. 456; NEWELL, SLANDER AND LIBEL (4th Ed. 1924) § 483, p. 521; ODGERS, LIBEL AND SLANDER (6th Ed. 1929) 515-516; RESTATEMENT, TORTS (1938) § 606, p. 275; 62 Harv. L. Rev. 1207, 1211 (1949); 22 Va. L. Rev. 642, 658-659 (1936); 14 Notre Dame Lawyer 270, 278 (1938-39); 18 Aust. L.J. 158, 160 (1944-45).