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DAVIS *v.* MARXHAUSEN.[1] SUPREME COURT OF MICHIGAN. DECEMBER 22, 1894.

Newspaper Libel—Presumption as to Malice and Retraction in their Relation to Damages.

1. In an action for libel for publishing a newspaper article stating that plaintiff was arrested for larceny, and giving the number of his residence, the publication is presumed to be malicious and evidence that another person of the same name as plaintiff was arrested does not show, as a matter of law, that defendant intended in good faith to refer to such other person and, therefore, does not relieve him of punitive damages.

2. Evidence of a retraction by a newspaper of a libellous article is admissible in mitigation of damages if published before suit is brought.

3. No presumption of law exists by which a mere retraction becomes evidence of absence of malice in publishing such libellous article.

RETRACTION OF LIBEL.

Save in the most flagrant cases, harmonious social intercourse requires that a retraction of words causing offense or injury shall be accepted as a full withdrawal of the cause of displeasure and operate as a complete satisfaction for the injury ensuing. This is especially true when the words spoken are not the result of ill-will or malice but merely due to ignorance or indifference. Socially, he would be reckoned a boor, who under such circumstances, would refuse to accept and acknowledge an apology.

With less leniency but more justice, the law recognizes that the injury due to defamation, whether wilful or through negligence, is not repaired by a retraction, that the impression made by words spoken or written is not effaced by their re-

[1] Reported in 61 N. W. 504.

call and exacts that the injury produced be fully compensated. Holding, here as elsewhere, that a man shall be held responsible for the natural consequences of his acts, and viewing libel as a necessarily voluntary act, the publisher of a libellous newspaper article is held to have intended all the mischief and injury it may produce, this intent is denominated malicious, and for this presumed malice punitive damages may be given, as well as substantial damages for the actual injury. Proof of the absence of such malice may offset the vindictive, and a retraction offset the actual damages, but the "net" injury must be satisfied, and, broadly speaking, is the balance obtained by deducting from the defamatory effect of the original publication the corrective effect of the withdrawal of the words of offense. In striking this subtle and evasive "balance" the jury acts as a board of accountants, with the instructions of the court as its manual.

In aggravation of damages evidence may be given of malice or gross negligence, of the extent of publication, the position of the parties, etc., (Am. and Eng. Ency. Law, v. 13, p. 438; Odgers on Libel, *p. 295; Newell on Defamation, p. 876), and in mitigation it is admissible to prove the absence of malice, the truth of the publication, the degree of provocation and in general all matters which tend to justify or excuse the defendant: Odgers, *p. 299; Am. and Eng. Encycl. Law, p. 439. The motive in publishing a libel will be seen to go to the very root of the question of damages. In the case of the ordinary newspaper libel, however, published either through accident or neglect, with no special motive in publishing, and followed in due season by a retraction, three questions arise, which must be answered before a jury can be said to have any safe guide in determining the amount of damages to be awarded.

1. Admitting the article to be libellous and no proof offered of absence of malice in publishing it, what is the presumption of law as to the motive of publication in its relation to damages?

2. Under what conditions does subsequent retraction affect damages?

3. To what extent is the retraction evidence of the motive of the publisher, that the original publication was without malice or for justifiable ends?

As to the first point it seems to be definitely settled that where the words are libellous in themselves, punitive damages may be given if thought proper by the jury without evidence of malice beyond the words: Odgers, *p. 291, n. b.; Am. and Eng. Ency. Law, v. 13, p. 433, n. 1. The immediate authorities cited by the case under discussion in support of the proposition that punitive damages may follow malice which, without being proved is presumed, as a matter of law, are: *Detroit Daily Post Co.* v. *McArthur*, 16 Mich. 451 [1868]; *Whittemore* v. *Weiss*, 33 Mich. 353 [1876]; *Scripps* v. *Reilly*, 38 Mich. 25 [1878]; *Ass'n* v. *Tryon*, 42 Mich. 549 [1880]; *Bacon* v. *R. R. Co.*, 55 Mich. 224; 21 N. W. 324 [1884]; Newell Defam., pp. 319, 321. The first case, *Detroit Daily Post Co.* v. *McArthur*, contains a very careful and elaborate opinion by CAMPBELL, J., in which he says: "The law favors the freedom of the press, so long as it does not interfere with private reputation or other rights entitled to protection, and, inasmuch as the newspaper press is one of the necessities of civilization, the conditions, under which it is required to be conducted, should not be unreasonable or vexatious. But the reading public are not entitled to discussions in print upon the character or doings of private persons, except as developed in legal tribunals or voluntarily subjected to public scrutiny, and since an injurious statement inserted in a popular journal does more harm to the person slandered than can possibly be wrought by any other species of publicity, the care required of such journals must be such as to reduce the risk of having such libels creep into their columns to the lowest degree, which reasonable foresight can assure" * * * "It is in connection with the various degrees of blameworthiness chargeable on wrongdoers that the discussions have arisen on the subject of vindictive or exemplary damages, which, inasmuch as they rest upon actual fault, are by some authorities said to be designed to punish the wrong intent, while, according to others, the damages usually so called are

only meant to recompense the sense of injury, which, is in human experience, always aggravated or lessened in proportion to the degree of perversity exhibited by the offender. While the term exemplary or vindictive damages has become so fixed in the law that it may be difficult to get rid of it, yet it should not be allowed to be used so as to mislead, and we think the only proper application of damages beyond those to person, property or reputation is to make reparation for the injury to the feelings of the person injured." * * * "The injury to the feelings is only allowed to be considered in those torts, which consist of some voluntary act or very gross neglect, and practically depends very closely on the degree of fault evinced by all the circumstances. It has been very wisely left to the jury to determine each case upon its own surroundings, because the only safe rule of damages in matters of feeling is to give what, to the ordinary apprehension of impartial men, would seem proportionate to an injury, which must be measured by the instincts of our common humanity." * * * "There is no doubt of the duty of every publisher to see at all hazards that no libel appears in his paper. Every publisher is, therefore, liable, not only for the estimated damages to credit and reputation, and such special damages as may appear, but also for such damages on account of injured feelings as must unavoidably be inferred from such a libel, published in a paper of such position and character." * * * "When it appears that the mischief has been done in spite of precautions, he ought to have all the allowance in his favor, which such carefulness would justify in mitigation of that portion of the damages which is awarded on account of injured feelings." While basing the award of vindictive damages on the ground of injured feelings rather than punishment of the author of the libel, the rule as to damages is the same. The original presumption of malice in publishing a libellous article continues until it is shown that the mischief has been done in spite of precautions, and when the defendant has shown this, it is for the jury to say to what extent it mitigates the injury to feelings and abates the punitive damages.

In *Whittemore* v. *Weiss*, (*supra*), the court, in answering one of the assignments of error, says: "It is alleged for error that the judge refused to charge that, unless the jury should find that the publication complained of occasioned an actual injury and loss of trade to the plaintiff then, under the declaration, which only alleged such injury, the plaintiff could only recover nominal damages. That might be true if the words had not been actionable *per se;* but being so, if the jury found they were maliciously published, the jury could not, whatever the proof as to the influence upon business, be thus limited in their verdict."

It thus appears that where only special damage is alleged, the jury is still at liberty to inflict punitive damages on finding malice in the words themselves, and going a step farther, *Scripps* v. *Reilly*, holds that in order to escape such punitive damages, it must be shown that the publication was made in spite of proper precautions on the part of the publisher of the newspaper. The words of the decision are "Where the tort consists of some voluntary act, but no element of malice, carelessness or gross negligence is shown to have existed, but that the wrong was done in spite of proper precautions, the damages to be awarded on account of injured feelings, will be reduced to such sum as must inevitably have resulted from the wrong itself." This is following *Detroit Post Co.* v. *McArthur*, where we have seen that damages awarded for injured feelings is used in the sense of vindictive damages.

To the same effect as *Scripps* v. *Reilly*, is *Evening News Ass'n* v. *Tryon*, (*supra*), which holds "In cases like the present (an action for words libellous *per se*), the publication is considered a voluntary act and is presumed to have proceeded from malicious motives, thus entitling the plaintiff to recover exemplary damages. If it appears upon the trial that there was no intention in fact to injure the plaintiff, and that all proper precautions were observed in the publication of the article complained of, such facts will not prevent a recovery of such damages, but will reduce the amount thereof to such sums as must inevitably have resulted from the wrong."

The present case, *Davis* v. *Marxhausen*, was an action for

libel for publication of a newspaper article, stating that the plaintiff was arrested for larceny, and giving the number of his residence. Evidence of two separate retractions was given, showing that a person of the same name as the plaintiff had been arrested under the circumstances set forth in the original libel, but it was held that this did not show, as matter of law, that the defendant intended in good faith to refer to such other person, MONTGOMERY, J., saying, "It was competent for the defendant to offer testimony to show the want of actual malice, as that the publication was made through mistake, and that all proper precautions were observed, by which the damages will be reduced to such a sum as will compensate for the injury which must inevitably have resulted. But the defendant did not, in this case, make these facts appear conclusively. The circumstances of the publication are not shown, except as the jury are left to infer that because another Michael Davis was arrested the defendant must, in publishing this libel, have intended, in good faith, to refer to that Michael Davis and not to the plaintiff." And no such proof of the absence of malice or the employment of proper care and precaution having been presented on behalf of the defendant, the opinion endorses the following requests for instructions to the jury, which had been rejected by the court below: 1. "The law presumes that the article was published maliciously, and the burden is upon the defendant to show that he acted in good faith and with proper motive." 2. "The wilful publication of injurious statements involves the design to produce whatever injury must necessarily follow, and when done purposely, knowingly, and for no good purpose or justifiable end, it is malicious, in the sight of the law, even if done without any actual personal ill-will." In the absence of any proof of motive, the words being libellous in themselves, the charge of the court below was held to be error, which said "there was no evidence from which improper motives on the part of the defendant could be inferred." It would seem to be good law therefore that, there being no evidence of motive beyond the mere words of the libel, punitive damages may be given by the jury, the words being actionable in themselves.

In general, a retraction is competent evidence in mitigation of damages if made before suit is brought and immediately following the libel. But, in order to be effective, a "retraction should be made as publicly as the charge, and, as far as possible, to the same persons; and the defendant should do his utmost to stop the further sale of the libel. It should be printed in type of ordinary size, and in a part of the paper where it will be seen, not hidden away among advertisements or notices to correspondents:" Am. and Eng. Ency. Law v. 13, p. 442; See also, Newell on Defam., p. 907; Odgers, Libel and Slan. *p. 299. The recent case of *Turton* v. *N. Y. Recorder Co.*, 38 N. E. 1009 [N. Y. 1894], holds that a mere offer to retract cannot be shown in mitigation of damages but inclines to the position that a retraction in good faith after action brought may, under certain circumstances, be proved in mitigation. This is in conflict with *Evening News Ass'n* v. *Tryon*, 42 Mich. 549, and *Bradford* v. *Edwards*, 32 Ala. 628. Of the proposition laid down in the present case there can be no doubt whatever. On the authority of *Storey* v. *Wallace*, it holds that "the retractions were not evidence of the circumstances under which the original publication was made or of the good faith of the original publication. They were admissible, their publication having occurred before suit brought, and immediately following the libel, in mitigation of damages. The language of *Storey* v. *Wallace*, 60 Ill. 51 [1871] is: "Equally untenable is the position of appellant's counsel that the judgment should be reversed, because the publication of retraction, under the circumstances, was an accord and satisfaction." * * * "The evidence shows that they published this retraction as a simple act of justice to the plaintiff, and not as a condition of their being discharged from liability. Its publication was a matter to be considered by the jury in mitigation of damages, and they were so instructed by the court, but it had no other bearing upon the action."

The question of presumed malice is important as affecting punitive damages. The second question of retraction is related to both actual and punitive damages. The theory by which a retraction is made available to reduce actual damages.

is the very practical one that the injury caused by the orignal publication is to some extent mitigated by the withdrawal of and an apology for the libel: *Storey* v. *Wallace*, 60 Ill. 56; *Davis* v. *Marxhausen*. The retraction being admissible at all, the circumstances and conditions under which it is made are to be given to the jury, and it is for it decide to what extent the original injury to reputation has been repaired and remedied. The relation of the retraction to punitive damages raises the third question. To what extent is the retraction evidence of the motive of the publisher, that the original publication was without malice or for justifiable ends?

On whatever theory punitive, vindictive or exemplary, damages are awarded, we have seen that they are bound up in the question of motive of publication. Absence of malice, due care and justifiable end defeats them, while either proof of express malice or the legal presumption of malice, in the absence of proof to the contrary, justifies them. Without citing many cases, *Bradley* v. *Cramer*, 66 Wis. 297 [1886], and *Turton* v. *N. Y. Recorder Co.*, 38 N. E. 1009 [1894], seem to decide that retraction may be accepted as evidence of malice, or its absence in the publication of the libel. It therefore becomes available in mitigation of punitive damages. In both these cases the court argues at some length on the subject, and admitting the retraction as evidence would pass it to the jury, but it is to be noted that it had already been submitted in evidence for this purpose.

The present case would seem to decide that unless connected with the question of motive, by something in the pleadings or proofs, a retraction has no bearing on the question of punitive damages. In the present case the defendants desired the court to make the inference that the publication of the retraction disclosed that the libel was a mere mistake and done in good faith. This was rejected by the court in these words: "The retractions were not evidence of the circumstances under which the original publication was made, or of the good faith of the original publication." The retractions, as such, were therefore held to be no evidence of motive whatever.

The wisdom of this is manifest. The "power of the press," so

much spoken of, but so seldom brought home to a person through personal attack, should be strictly guarded when it attempts to sully the reputation of the citizen, and the liability of the publisher to punishment should not be limited to the actual damage inflicted, which in some cases is very slight, by a simple retraction, made after the libel has received a wide circulation, and manifestly for the purpose of avoiding all exemplary or vindictive damages. To throw the burden of showing the relation between the retraction and the motive of publication on the defendant, rather than leave it to the inference of a jury, is simple justice, for if such a relation exists there should be no difficulty in establishing it. At the same time such a rule holds the threat of substantial punishment over the careless or negligent editor and publisher, it withdraws the consciousness of an easy escape from heavy damages by a mere formal retraction, and serves in a measure to protect the citizen from one of the greatest powers for mischief in evil hands which modern civilization has evolved.

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