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LIBEL—NEWSPAPER CORPORATION—MALICE OF REPORTER—PUNITIVE DAMAGES.—Willes, J., in *Barwick* v. *English Joint Stock Bank* (1867), Ex. Ch. L. R., 2 Ex. 259, said, "The master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." In other words, the doctrine of "*respondeat superior*" is something more than a pedantic expression of the law. Blackstone recognizes it and bases its existence upon the principle that the agent acts under an "implied command" (Vol. i, 417). Shaw, C. J. (Mass.), in *Farwell* v. *Boston and Worcester Railroad Corporation* (1842), 4 Met. 49, and Bigelow, L. C. 688, had this to say, "This rule is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or by his agents or servants, shall conduct them as not

to injure another; and if he does not, and another thereby sustains damage, he shall answer for it."

Aside, however, from the reason for the existence of the rule, we have to inquire whether or not, in the various jurisdictions, it is to be applied with all its rigor and severity with reference to an action of libel against a newspaper corporation, thrown liable solely through the hatred and enmity a reporter bore one concerning whom he wrote.

In the case of *Clifford* v. *Press Publishing Company et al.* (1903), cited in 79 N. Y. Supp. 767, and 113 N. Y. St. Reporter, there were two defendants—the Press Publishing Company, which published, and Judson P. Worrell, the reporter who wrote the libellous article. The following was responsible for the suit: "Jacob Dasher, who was shot some time ago in Stapleton by Frederick Clifford, a saloon-keeper, on the corner of Canal and Bay Streets, during a street fight, was discharged yesterday." Both defendants admitted the falsity of the statement, and it appeared upon the trial that at previous times true accounts of the occurrence referred to had been published in the defendant corporation's newspaper, correctly giving the name of him who committed the assault, and who was plaintiff's brother, and stating that he had been held to await the action of the grand jury. The question upon the trial was whether the misstatement was intentional. The trial judge rejected evidence as against the corporation tending to show malice towards the plaintiff on the part of the reporter.

Upon appeal to the Supreme Court the ruling of the court below was reversed and a new trial ordered, in the following language, by O'Brien, C. J.:

"We have reached the conclusion, therefore, that it is competent in libel cases to prove as against a newspaper corporation the motives which inspired the publication, and that if they were shown to be good they may be relied upon for the purpose of mitigating damages, and if bad, of enhancing them. It follows, as the motives of a corporation can only be shown through the acts and feelings of its agents and officers, that it is competent to prove, for the purpose of recovering punitive damages, the ill-will or malice which existed at the time on the part of those who are responsible for the publication of the libel, and which it can be shown influenced the publication."

From this opinion Ingraham, J., dissents; but the facts in the case of *Kruger* v. *Pitass* (1900), 162 N. Y. 154, upon which he relies, may easily be distinguished from the state of facts under discussion. In this case there were three defendants, each of whom testified he had no malice or ill-will towards the plaintiff, and the latter, in order to show express malice, justifying a recovery of punitive damages, sought to prove as against

all that several years before the publication one of them, who knew nothing about the article until it had been published, had made statements expressing contempt and ill-will for the plaintiff never heard by or communicated to the other defendants before the publication. The evidence being admitted, and the judgment being recovered against all the defendants, was, upon appeal, reversed.

It seems strange that in the case of *Clifford* v. *Press Publishing Co., supra,* that of *Bruce* v. *Reed* (1883), 104 Pa. St. 408, was not referred to. The two cases are almost in point, at least essentially so. Mercur, C. J., delivering the opinion of the court in the Pennsylvania case, said, "If the libel was written under his (the editor's) authority and in furtherance of their (the proprietors') business, they (the proprietors) are responsible whether the wrong resulted from his (the editor's) mere negligence or from a wanton and reckless purpose to accomplish the business in an unlawful manner."

Wood on Master and Servant, pp. 576–83, enunciates the New York and Pennsylvania rule.

The exact point, however, in *Clifford* v. *Press Publishing Company* seems to have arisen in but comparatively few jurisdictions, and how it would be decided can only be conjectured from somewhat similar cases.

Manifestly, in the case under discussion the proprietors would not knowingly have permitted such an article to be published,—this inference must be taken,—consequently, are they (the proprietors) to be mulcted in punitive damages because an employé did an act which, had it come under their cognizance, would not have been permitted? At first blush it seems a harsh rule that would so hold a corporation for an act done solely for the gratification of a servant's malice. But in a day when almost every business of any importance is incorporated for the purpose of enjoying the privileges and immunities granted by law, and in which individuals cannot share, some rules must be harsh—or, rather, not harsh, but severe—if the individual is to have secured to him certain rights which it would be inimical even to jeopardize.

In this case the reporter probably had an "assignment," and the events which he reported thereunder were undoubtedly taken by his editor to be true; any benefits arising out of the matters reported and published accrued to the corporation; it seems to us, with submission, that the corporation should bear the incidental burdens.

Cooley's Law of Torts, page 228, contains this statement, "The publisher of a newspaper must, at his peril, see that the supervision of his business is such as to exclude all libellous publications, and he is responsible, though one is made without

his knowledge, and notwithstanding stringent regulations made by himself, which, if observed, would have prevented it."

In *Commercial Gazette Co.* v. *Grooms* (1889), 10 Ohio Dig. Reprint, 489, and 21 Ohio Weekly Law Bulletin, page 290, it was held that if the employé with whom authority and discretion to publish the libel was intrusted was guilty of actual malice towards the plaintiff, the newspaper corporation is liable in exemplary damages for the publication of the libel.

The court held in *Morning Journal Ass'n* v. *Rutherford* (1892), 51 Fed. Rep. 513, and U. S. App. 296, that it was proper to instruct the jury that if the article was wantonly published without inquiry or justifiable motive, or under circumstances of gross negligence, it was their (the jury's) right to award, besides actual damages, such punitive or exemplary damages as the facts warranted.

To the same effect see *Press Publishing Company* v. *McDonald*, 63 Fed. 238 (1894); *Mallory* v. *Bennett* (1883), 15 Fed. 371.

Haines v. *Schultz* (1888), 50 N. J. Law (21 Vroom) 481, 14 Atl. Rep. 488, held that where libellous language is inserted in a newspaper by a reporter without the knowledge or consent of the proprietor the latter is liable to the extent of compensatory damages, and for punitive damages only on proof from which his approval of his employé's conduct may be legally inferred.

In *Goodrich* v. *Stone* (1846), 52 Mass. (11 Metcalf) 486, the proprietor and publisher of a newspaper, being sued for a libel published in his paper, filed a specification of defence stating that he should prove that the publication complained of was inserted in his paper during his absence, without his consent or knowledge, by accident, and without the knowledge or agency of any person in his employment. On the trial it appeared that the defendant had employed F. to print the newspaper, that F. employed several workmen under him, and that S., one of F.'s workmen, set up the libellous article in the absence of the defendant and of the editor of the paper. The defendant proposed to ask a witness "if, at or about the time S. printed the article, or set it up, he" (the witness) "heard him express ill-will towards the plaintiff; and, if so, what he said." Held the question could not be put.

In *Detroit Daily Post Company et al.* v. *McArthur* (1868), 3 Jemison (Mich.) 447, the court say: "The employment of competent editors, the supervision by proper persons of all that is to be inserted, and the establishment and habitual enforcement of such rules as would probably exclude improper items should exempt a publisher from any aggravation of damages on account of the express malice of his subordinates, for any libel

published without his privity or approval. But if it should appear that he was wanting in reasonable care to prevent abuses, he would be liable to increased damages for his own misconduct, which might fairly be regarded as identifying him with facts which he took no pains to suppress."

Atkins v. *Johnson* (1870), 43 Vt. 78, held that a journalist cannot protect himself from the consequences of publishing a libellous article by assurances of its truthfulness, and by a contract of indemnity from the writer of the libel. This case comes within the rule that there can be no contribution between joint wrongdoers.

In *Childers* v. *Mercury P. and P. Company* (1894), 105 Cal. 284, we find that "Exemplary damages may be recovered when malice on the part of the defendant is established as a fact, either actually, or by presumption or by inference of fact from the libellous character of the publication.

Synder v. *Fulton* (1870), 34 Md. 128, was a case in which the court held that, if the publication proceed from express malice or ill-will, the jury may award such exemplary or punitive damages as they may think the facts of the case justify.

To the same effect see *Knight* v. *Foster* (1859), 39 N. H. 576.

The trend of the law seems to be towards the New York and Pennsylvania doctrines and, with submission, we think the decisions enunciating it are sound. The public has a right to expect that newspaper reporters are under such surveillance that nothing libellous will appear in their proprietors' papers; otherwise the press might easily become the machine of unscrupulous individuals who sought not to inform the public as to current events, but rather to impair reputations. If for any reason proper surveillance is not exercised over officers and agents, the fault lies with the corporation, and they should respond accordingly.

In many of the states the point here raised has never been decisively decided; nevertheless, the admission of evidence in somewhat similar cases shows a leaning towards the New York doctrine. The decision in *Clifford* v. *Press Publishing Company* is important, and a few years will doubtless see the courts in the various jurisdictions either adopting or registering it. We think the cases already decided which in any way bear upon the point justify the belief that it will soon become settled law "that it is competent to prove, for the purpose of recovering punitive damages, the ill-will or malice which existed at the time on the part of those who are responsible for the publication of the libel, and which it can be shown influenced the publication."

J. C. K.