> A moral universe in which the options are between no compensation at all or compensation for full replacement value strikes me as an overly legalistic universe and not a moral universe.

4. ***Best Cost-Avoider and Necessity Doctrine.*** Consider the choice faced by the captain of the Reynolds. He could let the boat drift and face possible damage to the boat, its crew, and other boats. Or he could secure the boat to the defendant's dock and risk damage to the dock. If he will be liable for all the damages in either case, the rational choice will be to choose the option that will present the least cost. A rational, self-interested person who could use another's property with impunity would always sacrifice another's property for the sake of his own. From this perspective, the privilege created by necessity retains the desirable incentives created by potential liability. It assumes that, in necessity cases, the person faced with an emergency is the best cost-avoider. Would that assumption be warranted in the *Vincent* case? Was the captain or the dock owner the best cost-avoider? Should the captain be morally and legally obligated to pay for these damages?

## II. Nuisance

Tort law recognizes two kinds of nuisance claims: private and public. The private nuisance cause of action protects a possessor's interest in use and enjoyment of his or her land. The public nuisance cause of action protects interests common to the public, such as the public's health, safety, comfort, and convenience.

There are important distinctions between trespass and nuisance. Unlike trespass, which is an intentional tort, nuisance claims may be based on conduct that is intentional, negligent, reckless, or violative of a statute. And unlike trespass, the tort of nuisance generally requires proof that the interference with the land possessor's interest was unreasonable. While any intentional, unpermitted entry would be a trespass, only an unreasonable interference with a land possessor's use and enjoyment would be a private or public nuisance.

Pestey v. Cushman discusses the elements of private nuisance and considers whether a dairy farm's production of odors was reasonable in light of the interests of the farmer, the neighbor, and the community. Armory Park Neighborhood Association v. Episcopal Community Services in Arizona distinguishes private from public nuisances, evaluates the reasonableness of a charitable organization's program for providing meals for the indigent in light of the interests of neighbors and the community, and discusses the special rules regulating who can bring public nuisance actions.

### PESTEY v. CUSHMAN

788 A.2d 496 (Conn. 2002)

VERTEFEUILLE, J.

The issues in this common-law private nuisance action arise out of the defendants' operation of a dairy farm near the plaintiffs' home. The principal issues in this appeal

are whether: (1) the trial court properly instructed the jury with respect to the unreasonableness element of the common-law private nuisance claim. . . .

The plaintiffs, James Pestey and Joan Pestey, brought this action against the defendants, Nathan R. Cushman, Nathan P. Cushman and Cushman Farms Limited Partnership, seeking money damages and injunctive and declaratory relief. After a lengthy trial, the jury returned a partial verdict for the plaintiffs for $100,000 in damages. . . .

The jury reasonably could have found the following facts. The plaintiffs' home is situated on property they own located along the west side of Route 87 in North Franklin. The defendants own and conduct farming operations on a large tract of land on the opposite side of Route 87, approximately one third of one mile north of the plaintiffs' property. In 1990, the defendants constructed a 42,000 square foot free stall barn and milking parlor on their land to house a herd of dairy cows and a pit in which to store the manure generated by the herd.

The plaintiffs first noticed objectionable odors emanating from the defendants' farm in early 1991, after the construction of the new barn. The odors were, at first, nothing more than the typical stercoraceous odors generated by a farm containing livestock. Over time, however, the odors became substantially more pungent and their character changed as they took on a sharp, burnt smell. In 1997, the defendants installed an anaerobic digestion system on their farm to process the manure generated by the dairy herd. The system was designed to mimic in a controlled manner the anaerobic process that occurs in nature. Under this process, manure is fed into the digester, which, through the use of high temperature and bacteria, breaks the organic compound into its constituent parts. The end result of a properly functioning anaerobic digestion process is the production of a low odor biosolid and a gaseous mixture that can be used as an energy source to power the digester's generators. Following the installation of the digester, the character of the odors affecting the plaintiffs' property changed again, becoming more acrid and evincing the smells of sulphur and sewage. This change was caused by the digester being either undersized or overloaded, which resulted in partially digested, higher odor manure being released at the end of the anaerobic digestion process. At times, the odors emanating from the defendants' farm were so strong that the smell would awaken the plaintiffs during the night, forcing them to close the windows of their home. Further facts will be set forth where relevant. . . .

"A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." 4 Restatement (Second), Torts §821D (1979). The law of private nuisance springs from the general principle that "[i]t is the duty of every person to make a reasonable use of his own property so as to occasion no unnecessary damage or annoyance to his neighbor." Nailor v. C.W. Blakeslee & Sons, Inc., 167 A. 548 (1933). "The essence of a private nuisance is an interference with the use and enjoyment of land." W. Prosser & W. Keeton, Torts (5th ed. 1984) §87, p.619.

The defendants' claim is based on the principle of private nuisance law that, in determining unreasonableness, "[c]onsideration must be given not only to the interests of the person harmed but also [to] the interests of the actor and to the interests of the community as a whole." 4 Restatement (Second), supra, §826, comment (c). "Determining unreasonableness is essentially a weighing process, involving a comparative evaluation of conflicting interests. . . ." 4 Restatement (Second), supra, §826, comment

(c). Unreasonableness cannot be determined in the abstract, but, rather, must be judged under the circumstances of the particular case.

In the present case, the trial court instructed the jury with respect to the unreasonableness element of the nuisance claim in the following manner: "You must also ask yourselves whether the defendants' use of their property [was] reasonable. A use which is permitted or even required by law and which does not violate local land use restrictions may nonetheless be unreasonable and create a common-law nuisance. You must . . . consider and weigh . . . the location of the defendants' dairy farm, the size of the farm, the manner in which they operate the farm, including their handling and maintenance of the manure, the free stall barn, the milking parlors and the anaerobic manure digester and associated equipment and any other circumstance which you find proven which indicates whether the defendants [were] making a reasonable use of their property." The court stated further: "The question is not whether the plaintiffs or the defendants would regard the condition as unreasonable, but whether reasonable persons generally looking at the whole situation impartially and objectively would consider it [to] be reasonable."

As the charge indicates, the trial court instructed the jury to consider a multiplicity of factors in determining the unreasonableness element. The defendants' argument that the instruction did not adequately instruct the jury to consider the defendants' interests assumes that the factors set forth by the trial court only regard the plaintiffs' interests. Such an assumption is unwarranted. The jury, for instance, was instructed to consider the location of the farm in making its finding regarding reasonableness. The location of the farm as a factor inherently includes the interests of both the plaintiffs and the defendants, and the jury was just as entitled to find that the location of the farm tended to show that the defendants' use was reasonable as it was to find that the location tended to show that the defendants' use was unreasonable. In addition, the trial court explicitly instructed the jury to consider any other circumstances that it found proven that would indicate "whether the defendants [were] making a reasonable use of their property." This instruction underscored the trial court's previous instruction that the jury was to consider various factors in reaching its decision, including factors relating to the interests of both the plaintiffs and the defendants. . . .

In prescribing the [elements that a plaintiff must prove to prevail on a claim for damages in a common law private nuisance action], we look to the leading authorities in the field of common-law private nuisance for guidance. According to the Restatement (Second) of Torts, a plaintiff must prove that: (1) there was an invasion of the plaintiff's use and enjoyment of his or her property; (2) the defendant's conduct was the proximate cause of the invasion; and (3) the invasion was either intentional and unreasonable, or unintentional and the defendant's conduct was negligent or reckless. 4 Restatement (Second), supra, §822. Although the language used in this third element does not make the point clearly, under this test, showing unreasonableness is an essential element of a private nuisance cause of action based on negligence or recklessness. See id., §822, comment (k). . . .

. . . Whether the interference is unreasonable depends upon a balancing of the interests involved under the circumstances of each individual case. In balancing the interests, the fact finder must take into consideration all relevant factors, including the nature of both the interfering use and the use and enjoyment invaded, the nature, extent and duration of the interference, the suitability for the locality of both the

interfering conduct and the particular use and enjoyment invaded, whether the defendant is taking all feasible precautions to avoid any unnecessary interference with the plaintiff's use and enjoyment of his or her property, and any other factors that the fact finder deems relevant to the question of whether the interference is unreasonable. No one factor should dominate this balancing of interests; all relevant factors must be considered in determining whether the interference is unreasonable.

The determination of whether the interference is unreasonable should be made in light of the fact that some level of interference is inherent in modern society. There are few, if any, places remaining where an individual may rest assured that he will be able to use and enjoy his property free from all interference. Accordingly, the interference must be substantial to be unreasonable.

Ultimately, the question of reasonableness is whether the interference is beyond that which the plaintiff should bear, under all of the circumstances of the particular case, without being compensated. With these standards in mind, we turn to the present case.

In reaching its verdict, the jury completed a set of interrogatories provided by the trial court. Each interrogatory asked the jury whether the plaintiffs had proven a specific element of the private nuisance claim, and the jury answered each interrogatory affirmatively. The first interrogatory asked: "Did the plaintiffs prove [that] the defendants' dairy farm produced odors which unreasonably interfered with [the] plaintiffs' enjoyment of their property?" This interrogatory correctly captured the crux of a common-law private nuisance cause of action for damages, i.e., whether the defendants' conduct unreasonably interfered with the plaintiffs' use and enjoyment of their property. It correctly stated that the focus in such a cause of action is on the reasonableness of the interference and not on the use that is causing the interference. In light of this conclusion, the fourth interrogatory, which involved the unreasonable use element that is at issue in this case, was superfluous. . . . We conclude that the jury interrogatories and the jury charge, considered together, properly informed the jury of the necessary elements of a common-law private nuisance cause of action for damages and provided the jury with adequate guidance with which to reach its verdict. Accordingly, the trial court's jury charge was proper under the law as clarified herein. . . .

## ARMORY PARK NEIGHBORHOOD ASSOCIATION v. EPISCOPAL COMMUNITY SERVICES IN ARIZONA

712 P.2d 914 (Ariz. 1985)

FELDMAN, J.

On December 11, 1982, defendant Episcopal Community Services in Arizona (ECS) opened the St. Martin's Center (Center) in Tucson. The Center's only purpose is to provide one free meal a day to indigent persons. Plaintiff Armory Park Neighborhood Association (APNA) is a non-profit corporation organized for the purpose of "improving, maintaining and insuring the quality of the neighborhood known as Armory Park Historical Residential District." The Center is located on Arizona Avenue, the western boundary of the Armory Park district. On January 10, 1984, APNA filed a complaint in Pima County Superior Court, seeking to enjoin ECS

from operating its free food distribution program. The complaint alleged that the Center's activities constituted a public nuisance and that the Armory Park residents had sustained injuries from transient persons attracted to their neighborhood by the Center.

The superior court held a hearing on APNA's application for preliminary injunction on March 6 and 7, 1984. At the commencement of the hearing, the parties stipulated that

> . . . there is no issue concerning any State, County, or Municipal zoning ordinance, or health provision, before the Court. And, the Court may find that defendants are in compliance with the same.

The residents then testified about the changes the Center had brought to their neighborhood. Before the Center opened, the area had been primarily residential with a few small businesses. When the Center began operating in December 1982, many transients crossed the area daily on their way to and from the Center. Although the Center was only open from 5:00 to 6:00 p.m., patrons lined up well before this hour and often lingered in the neighborhood long after finishing their meal. The Center rented an adjacent fenced lot for a waiting area and organized neighborhood cleaning projects, but the trial judge apparently felt these efforts were inadequate to control the activity stemming from the Center. Transients frequently trespassed onto residents' yards, sometimes urinating, defecating, drinking and littering on the residents' property. A few broke into storage areas and unoccupied homes, and some asked residents for handouts. The number of arrests in the area increased dramatically. Many residents were frightened or annoyed by the transients and altered their lifestyles to avoid them. . . .

A private nuisance is strictly limited to an interference with a person's interest in the enjoyment of real property. The Restatement defines a private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land." Restatement (Second) of Torts §821D. A public nuisance, to the contrary, is not limited to an interference with the use and enjoyment of the plaintiff's land. It encompasses any unreasonable interference with a right common to the general public.

We have previously distinguished public and private nuisances. In City of Phoenix v. Johnson, 51 Ariz. 115, 75 P.2d 30 (1938), we noted that a nuisance is public when it affects rights of "citizens as a part of the public, while a private nuisance is one which affects a single individual or a definite number of persons in the enjoyment of some private right which is not common to the public." Id. at 123, 75 P.2d 34. A public nuisance must also affect a considerable number of people. The legislature has adopted a similar requirement for its criminal code, defining a public nuisance as an interference "with the comfortable enjoyment of life or property by an entire community or neighborhood, or by a considerable number of persons. . . ." A.R.S. §13-2917.

The defendant contends that the trial court erred in finding both public and private nuisances when the plaintiff had not asserted a private nuisance claim. The defendant has read the trial court's minute entry too strictly. While we acknowledge that public and private nuisances implicate different interests, we recognize also that the same facts may support claims of both public and private nuisance. As Dean Prosser explained:

> When a public nuisance substantially interferes with the use or enjoyment of the plaintiff's rights in land, it never has been disputed that there is a particular kind

> of damage for which the private action will lie. Not only is every plot of land traditionally unique in the eyes of the law, but in the ordinary case the class of landowners in the vicinity of the alleged nuisance will necessarily be a limited one, with an interest obviously different from that of the general public. The interference itself is of course a private nuisance; but is none the less particular damage from a public one, and the action can be maintained upon either basis, or upon both. (Citations omitted.)

Prosser, *Private Action for Public Nuisance,* 52 Va. L. Rev. 997, 1018 (1966).

Thus, a nuisance may be simultaneously public and private when a considerable number of people suffer an interference with their use and enjoyment of land. See *Spur Industries,* 108 Ariz. at 184, 494 P.2d at 706. The torts are not mutually exclusive. Some of plaintiff's members in this case have suffered an injury to the use and enjoyment of their land. Any reference to both a public and a private nuisance by the trial court was, we believe, merely a recognition of this well-accepted rule and not error. However, both because plaintiff did not seek relief under the theory of private nuisance and because that theory might raise standing issues not addressed by the parties, we believe plaintiff's claim must stand or fall on the public nuisance theory alone.

Do the residents have standing?

Defendant argues that the Association has no standing to sue and that, therefore, the action should be dismissed. The trial court disagreed and defendant claims it erred in so doing. Two standing questions are before us. The first pertains to the right of a private person, as distinguished from a public official, to bring a suit to enjoin the maintenance of a public nuisance. The original rule at common law was that a citizen had no standing to sue for abatement or suppression of a public nuisance since

> such inconvenient or troublesome offences [sic], as annoy the whole community in general, and not merely some particular persons; and therefore are indictable only, and not actionable; as it would be unreasonable to multiply suits, by giving every man a separate right of action, by what damnifies him in common only with the rest of his fellow subjects.

IV Blackstone Commentaries 167 (1966). It was later held that a private individual might have a tort action to recover personal damages arising from the invasion of the public right. However, the individual bringing the action was required to show that his damage was different in kind or quality from that suffered by the public in common.

The rationale behind this limitation was two-fold. First, it was meant to relieve defendants and the courts of the multiple actions that might follow if every member of the public were allowed to sue for a common wrong. Second, it was believed that a harm which affected all members of the public equally should be handled by public officials. Considerable disagreement remains over the type of injury which the plaintiff must suffer in order to have standing to bring an action to enjoin a public nuisance. However, we have intimated in the past that an injury to plaintiff's interest in land is sufficient to distinguish plaintiff's injuries from those experienced by the general public and to give the plaintiff-landowner standing to bring the action. This seems also to be the general rule accepted in the United States.

We hold, therefore, that because the acts allegedly committed by the patrons of the neighborhood center affected the residents' use and enjoyment of their real property, a damage special in nature and different in kind from that experienced by the residents of the city in general, the residents of the neighborhood could bring an action to recover damages for or enjoin the maintenance of a public nuisance.

[The second standing issue was whether the association could bring the action on behalf of its members. The court held that because the purpose of the association was to "promote and preserve the use and enjoyment of the neighborhood by its residents," the association had a legitimate interest in the controversy and, for purposes of judicial economy, it was sensible to allow all the residents to bring their actions at once.]

Since the rules of a civilized society require us to tolerate our neighbors, the law requires our neighbors to keep their activities within the limits of what is tolerable by a reasonable person. However, what is reasonably tolerable must be tolerated; not all interferences with public rights are public nuisances. As Dean Prosser explains, "[t]he law does not concern itself with trifles, or seek to remedy all of the petty annoyances and disturbances of everyday life in a civilized community even from conduct committed with knowledge that annoyance and inconvenience will result." Prosser, supra, §88, at 626. Thus, to constitute a nuisance, the complained-of interference must be substantial, intentional and unreasonable under the circumstances. Our courts have generally used a balancing test in deciding the reasonableness of an interference. The trial court should look at the utility and reasonableness of the conduct and balance these factors against the extent of harm inflicted and the nature of the affected neighborhood. We noted in the early case of MacDonald v. Perry:

> What might amount to a serious nuisance in one locality by reason of the density of the population, or character of the neighborhood affected, may in another place and under different surroundings be deemed proper and unobjectionable. What amount of annoyance or inconvenience caused by others in the lawful use of their property will constitute a nuisance depends upon varying circumstances and cannot be precisely defined.

32 Ariz. 39, 50, 255 P. 494 (1927).

The trial judge did not ignore the balancing test and was well aware of the social utility of defendant's operation. His words are illuminating:

> It is distressing to this Court that an activity such as defendants [sic] should be restrained. Providing for the poor and the homeless is certainly a worthwhile, praisworthy [sic] activity. It is particularly distressing to this Court because it [defendant] has no control over those who are attracted to the kitchen while they are either coming or leaving the premises. However, the right to the comfortable enjoyment of one's property is something that another's activities should not affect, the harm being suffered by the Armory Park Neighborhood and the residents therein is irreparable and substantial, for which they have no adequate legal remedy.

Minute Entry, 6/8/84, at 8. We believe that a determination made by weighing and balancing conflicting interests or principles is truly one which lies within the discretion of the trial judge. We defer to that discretion here. The evidence of the multiple trespasses upon and defacement of the residents' property supports the trial court's conclusion that the interference caused by defendant's operation was unreasonable despite its charitable cause.

The common law has long recognized that the usefulness of a particular activity may outweigh the inconveniences, discomforts and changes it causes some persons to suffer. We, too, acknowledge the social value of the Center. Its charitable purpose, that of feeding the hungry, is entitled to greater deference than pursuits of lesser intrinsic

value. It appears from the record that ECS purposes in operating the Center were entirely admirable. However, even admirable ventures may cause unreasonable interferences. We do not believe that the law allows the costs of a charitable enterprise to be visited in their entirety upon the residents of a single neighborhood. The problems of dealing with the unemployed, the homeless and the mentally ill are also matters of community or governmental responsibility.

. . . We are squarely faced, therefore, with the issue of whether a public nuisance may be found in the absence of a statute making specific conduct a crime.

In MacDonald v. Perry, supra, we indicated that the inquiry in a nuisance claim is not whether the activity allegedly constituting the nuisance is lawful but whether it is reasonable under the circumstances. The Restatement states that a criminal violation is only one factor among others to be used in determining reasonableness. That section reads:

> (1) A public nuisance is an unreasonable interference with a right common to the general public.
>
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, *or*
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, *or*
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement, supra, §821B. Comment d to that section explains:

> It has been stated with some frequency that a public nuisance is always a criminal offense. This statement is susceptible of two interpretations. The first is that in order to be treated as a public nuisance, conduct must have been already proscribed by the state as criminal. This is too restrictive. . . . [T]here is clear recognition that a defendant need not be subject to criminal responsibility.

Restatement, supra, §821B comment d, at 89.

Our earlier decisions indicate that a business which is lawful may nevertheless be a public nuisance. For example, in *Spur Industries,* supra, we enjoined the defendant's lawful business. We explained that "Spur is required to move not because of any wrongdoing on the part of Spur, but because of a proper and legitimate regard of the courts for the rights and interests of the public." 108 Ariz. at 186, 494 P.2d at 708. This rule is widely accepted.

We hold, therefore, that conduct which unreasonably and significantly interferes with the public health, safety, peace, comfort or convenience is a public nuisance within the concept of tort law, even if that conduct is not specifically prohibited by the criminal law. . . .

The trial court's order granting the preliminary injunction is affirmed. By affirming the trial court's preliminary orders, we do not require that he close the center permanently. It is, of course, within the equitable discretion of the trial court to fashion a less severe remedy, if possible. The opinion of the court of appeals is vacated. The case is remanded for further proceedings.

## NOTES TO PESTEY v. CUSHMAN AND ARMORY PARK NEIGHBORHOOD ASSOCIATION v. EPISCOPAL COMMUNITY SERVICES IN ARIZONA

1. ***Private and Public Nuisance.*** The tort of private nuisance is designed to protect the interest of lawful possessors of land to the use and enjoyment of that land. The tort of public nuisance is designed to protect rights common to the public, which, according to the Restatement (Second) of Torts §821B, include the public's rights to health, safety, peace, comfort, and convenience. The torts share the common element that the interference must be unreasonable. What evidence related to reasonableness did the court consider in each case? What other elements must a private and public nuisance plaintiff prove to prevail?

2. ***Derivative Responsibility.*** In *Armory Park Neighborhood Association,* Episcopal Community Services was enjoined even though it was the people they were trying to help who caused the problems for the neighborhood residents. As a general rule, an actor who sets in motion the forces that eventually cause the tortious act may be liable for the damages caused by the chain of events resulting from a nuisance. See Restatement (Second) of Torts §824. Thus, operation of a bar may be enjoined where its patrons are often noisy and intoxicated and use the neighboring properties for toilet purposes and sexual misconduct (see Reid v. Brodsky, 156 A.2d 334 (Pa. 1959)) and music concerts at a mall that were designed to attract customers could be enjoined because of the increased crowds and noise in a residential neighborhood (see McQuade v. Tucson Tiller Apartments, 543 P.2d 150 (1975)). In Mark v. State Department of Fish and Wildlife, 974 P.2d 716 (Or. App. 1999), the court held that allowing users "to parade naked throughout the year all over the wildlife area" was a public and private nuisance for which the Department could be held liable if it was not otherwise immune.

3. ***Problem: Public and Private Nuisance.*** The Jamesville Federated Church plays its bells over amplified sound speakers in various musical arrangements three times a day and four times on Sundays at regular hours for a period of approximately four minutes each time. The Impellizerris sought to enjoin the church from playing its bells, complaining that the bells affect their son, who has a neurological disease and is kept awake; affect the wife, who claims to have migraine headaches and muscle spasms as a result of an accident that are aggravated by the bells; and generally affect Impellizerris' ability to hold conversations in their home. They claim that the sound causes severe anxiety and emotional stress. Does playing the bells interfere with the rights protected by private nuisance? By public nuisance? Are the elements of private nuisance met? Public nuisance? See Impellizerri v. Jamesville Federated Church, 428 N.Y.S.2d 550 (1979).

4. ***Trespass, Nuisance, or Both?*** Often an intentional, unpermitted entry onto land results in both an interference with the landowner's interest in exclusive possession of the land and the landowner's interest in use and enjoyment of the land. In such cases, the landowner has claims for both trespass and nuisance. The two legal theories are compatible with one another, but one may wonder why they are separate theories.

Historically, the tort of trespass applied only to direct and immediate entries, walking on another's land, or throwing stones or water onto it. Nuisance applied to indirect or consequential entries, such as that caused by the seepage of water or

chemicals onto the land. The directness requirement for trespass still appears in some states but is diminishing in importance. Some states have eliminated it as a requirement, and others interpret the requirement broadly. In the modern law of trespass and nuisance, the distinction between the two torts is based on the nature of the interest affected by the tortfeasor's conduct.

There are other differences between the legal theories of trespass and nuisance. For instance, the entry of some kind of object or at least a force of energy is necessary for a trespass but not for a nuisance. How small or intangible the object may be or whether energy rather than an object will suffice varies by jurisdiction. See Note 4 following Baker v. Shymkiv, above. Unlike trespass, nuisance requires consideration of the substantiality and unreasonableness of the invasion of the other's interest. Trespass allows for nominal damages while nuisance does not. Trespass and nuisance may also have different statutes of limitations, giving the choice between these legal theories procedural significance.

### *Statute:* NUISANCE DEFINED; ACTION FOR ABATEMENT AND DAMAGES; EXCEPTIONS

Nev. Rev. Stat. §40-140 (2002)

1. Except as otherwise provided in this section, anything which is injurious to health, or indecent and offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, including, without limitation, a building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, using or giving away a controlled substance, . . . is a nuisance, and the subject of an action. The action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

2. It is presumed:

(a) That an agricultural activity conducted on farmland, consistent with good agricultural practice and established before surrounding nonagricultural activities is reasonable. Such activity does not constitute a nuisance unless the activity has a substantial adverse effect on the public health or safety.

(b) That an agricultural activity which does not violate a federal, state or local law, ordinance or regulation constitutes good agricultural practice.

3. A shooting range does not constitute a nuisance with respect to any noise attributable to the shooting range if the shooting range is in compliance with the provisions of all applicable statutes, ordinances and regulations concerning noise. . . .

### *Statute:* PROSTITUTION HOUSES DEEMED PUBLIC NUISANCES

Mo. Rev. Stat. §567.080 (2002)

Any room, building or other structure regularly used for sexual contact for pay as defined in section 567.010 or any unlawful prostitution activity prohibited by this chapter is a public nuisance.

*Statute:* SMOKING PROHIBITED IN CERTAIN PUBLIC AREAS

R.I. Stat. §23-20.6-2(a) (2001)

Smoking tobacco in any form is a public nuisance and dangerous to public health and shall not be permitted in any of the following places used by or open to the public: the state house, elevators, indoor movie theaters, libraries, art galleries, museums, concert halls, auditoriums, buses, primary, secondary or post secondary school buildings, colleges and universities (including dormitories), and public hallways in court buildings, hallways of elderly housing complexes, supermarkets, medical offices, public laundries as defined in chapter 16 of title 5 and hospitals and other health care and assisted living facilities.

NOTES TO STATUTES

1. ***Public Policy and Private Nuisance.*** Statutory definitions of "nuisance" reflect states' particular public policy concerns. Many states accord special statutory protection to those who use agricultural activities, as the Nevada statute illustrates. Perhaps more surprising is the large number of states providing some exemption for shooting ranges. Observe, however, there are limits to the immunity from nuisance suits.

2. ***Nuisance Per Se.*** In many cases, proving that conduct is a public nuisance is simplified by a statute, which defines the conduct as a nuisance *per se*, distinguishing it from nuisances in fact, which required a more detailed balancing to determine unreasonableness. The New Mexico and Rhode Island statutes are illustrative of the many activities and uses of land defined as nuisances per se. Others include "engaging in debt management service" without a valid license (Ill. Comp. Stat. 205 §665/17 (2002); gambling houses (La. Rev. Stat. Ann. §13:4721 (2001); rooms, buildings, and structures used by criminal street gangs (Mo. Rev. Stat. §578.430 (2002); and owning a vicious dog (S.D. Codified Laws §40-34-13).

## III. Remedies

A plaintiff suing for trespass or nuisance may seek an injunction or damages. The court's choice between these alternative remedies depends on a balancing of the equities favoring each party as well as larger public policy issues. Boomer v. Atlantic Cement Co. is a classic case involving a cement company that created a nuisance (and perhaps also a trespass) by causing airborne particulates to fall on the land of seven neighboring property owners. While traditional doctrine would allow the plaintiffs to win an injunction against further pollution, the court was reluctant to shut down a $45 million cement plant that caused only $185,000 in damages.

Spur Industries v. Del E. Webb Development Co. is another classic case. The plaintiff developer of land for residential real estate complained that, as he built homes closer to a preexisting feedlot for cattle, those homes were less appealing to buyers because of the flies and stench. In *Spur*, the court considers the equity of enjoining the existing feedlot when the developer deliberately chose to build in that neighborhood. Taken together, the cases illustrate the variety of difficult remedial choices facing courts.

## BOOMER v. ATLANTIC CEMENT CO.

309 N.Y.S.2d 312 (N.Y. 1970)

BERGAN, J.

Defendant operates a large cement plant near Albany. These are actions for injunction and damages by neighboring land owners alleging injury to property from dirt, smoke and vibration emanating from the plant. A nuisance has been found after trial, temporary damages have been allowed; but an injunction has been denied. . . .

The cement making operations of defendant have been found by the court of Special Term to have damaged the nearby properties of plaintiffs in these two actions. That court, as it has been noted, accordingly found defendant maintained a nuisance and this has been affirmed at the Appellate Division. The total damage to plaintiffs' properties is, however, relatively small in comparison with the value of defendant's operation and with the consequences of the injunction which plaintiffs seek.

The ground for the denial of injunction, notwithstanding the finding both that there is a nuisance and that plaintiffs have been damaged substantially, is the large disparity in economic consequences of the nuisance and of the injunction. This theory cannot, however, be sustained without overruling a doctrine which has been consistently reaffirmed in several leading cases in this court and which has never been disavowed here, namely that where a nuisance has been found and where there has been any substantial damage shown by the party complaining an injunction will be granted.

The rule in New York has been that such a nuisance will be enjoined although marked disparity be shown in economic consequence between the effect of the injunction and the effect of the nuisance.

The problem of disparity in economic consequence was sharply in focus in Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 101 N.E. 805. A pulp mill entailing an investment of more than a million dollars polluted a stream in which plaintiff, who owned a farm, was "a lower riparian owner." The economic loss to plaintiff from this pollution was small. This court, reversing the Appellate Division, reinstated the injunction granted by the Special Term against the argument of the mill owner that in view of "the slight advantage to plaintiff and the great loss that will be inflicted on defendant" an injunction should not be granted (p.2, 101 N.E. p.805). "Such a balancing of injuries cannot be justified by the circumstances of this case," Judge Werner noted (p.4, 101 N.E. p.805). He continued: "Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction" (p.5, 101 N.E. p.806).

Thus the unconditional injunction granted at Special Term was reinstated. The rule laid down in that case, then, is that whenever the damage resulting from a nuisance is found not "unsubstantial," viz., $100 a year, injunction would follow. This states a rule that had been followed in this court with marked consistency. . . .

Although the court at Special Term and the Appellate Division held that injunction should be denied, it was found that plaintiffs had been damaged in various specific amounts up to the time of the trial and damages to the respective plaintiffs were awarded for those amounts. The effect of this was, injunction having been denied, plaintiffs could maintain successive actions at law for damages thereafter as further damage was incurred.

The court at Special Term also found the amount of permanent damage attributable to each plaintiff, for the guidance of the parties in the event both sides stipulated to the payment and acceptance of such permanent damage as a settlement of all the controversies among the parties. The total of permanent damages to all plaintiffs thus found was $185,000. This basis of adjustment has not resulted in any stipulation by the parties.

This result at Special Term and at the Appellate Division is a departure from a rule that has become settled; but to follow the rule literally in these cases would be to close down the plant at once. This court is fully agreed to avoid that immediately drastic remedy; the difference in view is how best to avoid it.[1]

One alternative is to grant the injunction but postpone its effect to a specified future date to give opportunity for technical advances to permit defendant to eliminate the nuisance; another is to grant the injunction conditioned on the payment of permanent damages to plaintiffs which would compensate them for the total economic loss to their property present and future caused by defendant's operations. For reasons which will be developed the court chooses the latter alternative.

If the injunction were to be granted unless within a short period — e.g., 18 months — the nuisance be abated by improved methods, there would be no assurance that any significant technical improvement would occur.

The parties could settle this private litigation at any time if defendant paid enough money and the imminent threat of closing the plant would build up the pressure on defendant. If there were no improved techniques found, there would inevitably be applications to the court at Special Term for extensions of time to perform on showing of good faith efforts to find such techniques.

Moreover, techniques to eliminate dust and other annoying by-products of cement making are unlikely to be developed by any research the defendant can undertake within any short period, but will depend on the total resources of the cement industry nationwide and throughout the world. The problem is universal wherever cement is made.

For obvious reasons the rate of the research is beyond control of defendant. If at the end of 18 months the whole industry has not found a technical solution a court would be hard put to close down this one cement plant if due regard be given to equitable principles.

On the other hand, to grant the injunction unless defendant pays plaintiffs such permanent damages as may be fixed by the court seems to do justice between the contending parties. All of the attributions of economic loss to the properties on which plaintiffs' complaints are based will have been redressed.

The nuisance complained of by these plaintiffs may have other public or private consequences, but these particular parties are the only ones who have sought remedies and the judgment proposed will fully redress them. The limitation of relief granted is a limitation only within the four corners of these actions and does not foreclose public health or other public agencies from seeking proper relief in a proper court.

It seems reasonable to think that the risk of being required to pay permanent damages to injured property owners by cement plant owners would itself be a reasonable, effective spur to research for improved techniques to minimize nuisance.

[1] Respondent's investment in the plant is in excess of $45,000,000. There are over 300 people employed there.

The power of the court to condition on equitable grounds the continuance of an injunction on the payment of permanent damages seems undoubted.

The damage base here suggested is consistent with the general rule in those nuisance cases where damages are allowed. "Where a nuisance is of such a permanent and unabatable character that a single recovery can be had, including the whole damage past and future resulting therefrom, there can be but one recovery" (66 C.J.S. Nuisances §140, p.947). It has been said that permanent damages are allowed where the loss recoverable would obviously be small as compared with the cost of removal of the nuisance. . . .

Thus it seems fair to both sides to grant permanent damages to plaintiffs which will terminate this private litigation. The theory of damage is the "servitude on land" of plaintiffs imposed by defendant's nuisance.

The judgment, by allowance of permanent damages imposing a servitude on land, which is the basis of the actions, would preclude future recovery by plaintiffs or their grantees.

This should be placed beyond debate by a provision of the judgment that the payment by defendant and the acceptance by plaintiffs of permanent damages found by the court shall be in compensation for a servitude on the land.

Although the Trial Term has found permanent damages as a possible basis of settlement of the litigation, on remission the court should be entirely free to re-examine this subject. It may again find the permanent damage already found; or make new findings.

The orders should be reversed, without costs, and the cases remitted to Supreme Court, Albany County to grant an injunction which shall be vacated upon payment by defendant of such amounts of permanent damage to the respective plaintiffs as shall for this purpose be determined by the court.

JASEN, Judge (dissenting).

I agree with the majority that a reversal is required here, but I do not subscribe to the newly enunciated doctrine of assessment of permanent damages, in lieu of an injunction, where substantial property rights have been impaired by the creation of a nuisance.

It has long been the rule in this State, as the majority acknowledges, that a nuisance which results in substantial continuing damage to neighbors must be enjoined. To now change the rule to permit the cement company to continue polluting the air indefinitely upon the payment of permanent damages is, in my opinion, compounding the magnitude of a very serious problem in our State and Nation today.

In recognition of this problem, the Legislature of this State has enacted the Air Pollution Control Act (Public Health Law, Consol. Laws, c. 45, §§1264 to 1299-m) declaring that it is the State policy to require the use of all available and reasonable methods to prevent and control air pollution.

The harmful nature and widespread occurrence of air pollution have been extensively documented. Congressional hearings have revealed that air pollution causes substantial property damage, as well as being a contributing factor to a rising incidence of lung cancer, emphysema, bronchitis and asthma.

The specific problem faced here is known as particulate contamination because of the fine dust particles emanating from defendant's cement plant. The particular type of nuisance is not new, having appeared in many cases for at least the past 60 years. It is interesting to note that cement production has recently been identified as a significant

source of particulate contamination in the Hudson Valley. This type of pollution, wherein very small particles escape and stay in the atmosphere, has been denominated as the type of air pollution which produces the greatest hazard to human health. We have thus a nuisance which not only is damaging to the plaintiffs, but also is decidedly harmful to the general public.

I see grave dangers in overruling our long-established rule of granting an injunction where a nuisance results in substantial continuing damage. In permitting the injunction to become inoperative upon the payment of permanent damages, the majority is, in effect, licensing a continuing wrong. It is the same as saying to the cement company, you may continue to do harm to your neighbors so long as you pay a fee for it. Furthermore, once such permanent damages are assessed and paid, the incentive to alleviate the wrong would be eliminated, thereby continuing air pollution of an area without abatement.

It is true that some courts have sanctioned the remedy here proposed by the majority in a number of cases, but none of the authorities relied upon by the majority are analogous to the situation before us. In those cases, the courts, in denying an injunction and awarding money damages, grounded their decision on a showing that the use to which the property was intended to be put was primarily for the public benefit. Here, on the other hand, it is clearly established that the cement company is creating a continuing air pollution nuisance primarily for its own private interest with no public benefit.

This kind of inverse condemnation may not be invoked by a private person or corporation for private gain or advantage. Inverse condemnation should only be permitted when the public is primarily served in the taking or impairment of property. The promotion of the interests of the polluting cement company has, in my opinion, no public use or benefit.

Nor is it constitutionally permissible to impose servitude on land, without consent of the owner, by payment of permanent damages where the continuing impairment of the land is for a private use. This is made clear by the State Constitution (art. I, §7, subd. (a)) which provides that "(p)rivate property shall not be taken for Public use without just compensation" (emphasis added). It is, of course, significant that the section makes no mention of taking for a private use.

In sum, then, by constitutional mandate as well as by judicial pronouncement, the permanent impairment of private property for private purposes is not authorized in the absence of clearly demonstrated public benefit and use.

I would enjoin the defendant cement company from continuing the discharge of dust particles upon its neighbors' properties unless, within 18 months, the cement company abated this nuisance.

It is not my intention to cause the removal of the cement plant from the Albany area, but to recognize the urgency of the problem stemming from this stationary source of air pollution, and to allow the company a specified period of time to develop a means to alleviate this nuisance.

I am aware that the trial court found that the most modern dust control devices available have been installed in defendant's plant, but, I submit, this does not mean that better and more effective dust control devices could not be developed within the time allowed to abate the pollution.

Moreover, I believe it is incumbent upon the defendant to develop such devices, since the cement company, at the time the plant commenced production (1962), was

well aware of the plaintiffs' presence in the area, as well as the probable consequences of its contemplated operation. Yet, it still chose to build and operate the plant at this site.

In a day when there is a growing concern for clean air, highly developed industry should not expect acquiescence by the courts, but should, instead, plan its operations to eliminate contamination of our air and damage to its neighbors.

Accordingly, the orders of the Appellate Division, insofar as they denied the injunction, should be reversed, and the actions remitted to Supreme Court, Albany County to grant an injunction to take effect 18 months hence, unless the nuisance is abated by improved techniques prior to said date.

## SPUR INDUSTRIES v. DEL E. WEBB DEVELOPMENT CO.

494 P.2d 700 (Ariz. 1972)

CAMERON, V.C.J.

From a judgment permanently enjoining the defendant, Spur Industries, Inc., from operating a cattle feedlot near the plaintiff Del E. Webb Development Company's Sun City, Spur appeals. Webb cross-appeals. Although numerous issues are raised, we feel that it is necessary to answer only two questions. They are:

1. Where the operation of a business, such as a cattle feedlot is lawful in the first instance, but becomes a nuisance by reason of a nearby residential area, may the feedlot operation be enjoined in an action brought by the developer of the residential area?

2. Assuming that the nuisance may be enjoined, may the developer of a completely new town or urban area in a previously agricultural area be required to indemnify the operator of the feedlot who must move or cease operation because of the presence of the residential area created by the developer?

The facts necessary for a determination of this matter on appeal are as follows. The area in question is located in Maricopa County, Arizona, some 14 to 15 miles west of the urban area of Phoenix, on the Phoenix-Wickenburg Highway, also known as Grand Avenue. About two miles south of Grand Avenue is Olive Avenue which runs east and west. 111th Avenue runs north and south as does the Agua Fria River immediately to the west.

Farming started in this area about 1911. In 1929, with the completion of the Carl Pleasant Dam, gravity flow water became available to the property located to the west of the Agua Fria River, though land to the east remained dependant upon well water for irrigation. By 1950, the only urban areas in the vicinity were the agriculturally related communities of Peoria, El Mirage, and Surprise located along Grand Avenue and 1½ miles north of Olive Avenue, the community of Youngtown was commenced in 1954. Youngtown is a retirement community appealing primarily to senior citizens.

In 1956, Spur's predecessors in interest, H. Marion Welborn and the Northside Hay Mill and Trading Company, developed feed-lots, about ½ mile south of Olive Avenue, in an area between the confluence of the usually dry Agua Fria and New Rivers. The area is well suited for cattle feeding and in 1959, there were 25 cattle feeding pens or dairy operations within a 7 mile radius of the location developed by Spur's predecessors. In April and May of 1959, the Northside Hay Mill was feeding between 6,000

and 7,000 head of cattle and Welborn approximately 1,500 head on a combined area of 35 acres.

In May of 1959, Del Webb began to plan the development of an urban area to be known as Sun City. For this purpose, the Marinette and the Santa Fe Ranches, some 20,000 acres of farmland, were purchased for $15,000,000 or $750.00 per acre. This price was considerably less than the price of land located near the urban area of Phoenix, and along with the success of Youngtown was a factor influencing the decision to purchase the property in question.

By September 1959, Del Webb had started construction of a golf course south of Grand Avenue and Spur's predecessors had started to level ground for more feedlot area. In 1960, Spur purchased the property in question and began a rebuilding and expansion program extending both to the north and south of the original facilities. By 1962, Spur's expansion program was completed and had expanded from approximately 35 acres to 114 acres.

Accompanied by an extensive advertising campaign, homes were first offered by Del Webb in January 1960 and the first unit to be completed was south of Grand Avenue and approximately 2½ miles north of Spur. By 2 May 1960, there were 450 to 500 houses completed or under construction. At this time, Del Webb did not consider odors from the Spur feed pens a problem and Del Webb continued to develop in a southerly direction, until sales resistance became so great that the parcels were difficult if not impossible to sell. . . .

By December 1967, Del Webb's property had extended south to Olive Avenue and Spur was within 500 feet of Olive Avenue to the north. Del Webb filed its original complaint alleging that in excess of 1,300 lots in the southwest portion were unfit for development for sale as residential lots because of the operation of the Spur feedlot.

Del Webb's suit complained that the Spur feeding operation was a public nuisance because of the flies and the odor which were drifting or being blown by the prevailing south to north wind over the southern portion of Sun City. At the time of the suit, Spur was feeding between 20,000 and 30,000 head of cattle, and the facts amply support the finding of the trial court that the feed pens had become a nuisance to the people who resided in the southern part of Del Webb's development. The testimony indicated that cattle in a commercial feedlot will produce 35 to 40 pounds of wet manure per day, per head, or over a million pounds of wet manure per day for 30,000 head of cattle, and that despite the admittedly good feedlot management and good housekeeping practices by Spur, the resulting odor and flies produced an annoying if not unhealthy situation as far as the senior citizens of southern Sun City were concerned. There is no doubt that some of the citizens of Sun City were unable to enjoy the outdoor living which Del Webb had advertised and that Del Webb was faced with sales resistance from prospective purchasers as well as strong and persistent complaints from the people who had purchased homes in that area. . . .

### May Spur Be Enjoined?

The difference between a private nuisance and a public nuisance is generally one of degree. A private nuisance is one affecting a single individual or a definite small number of persons in the enjoyment of private rights not common to the public, while a public nuisance is one affecting the rights enjoyed by citizens as a part of the public. To constitute a public nuisance, the nuisance must affect a considerable number of people or an entire community or neighborhood.

Where the injury is slight, the remedy for minor inconveniences lies in an action for damages rather than in one for an injunction. Moreover, some courts have held, in the "balancing of conveniences" cases, that damages may be the sole remedy.

Thus, it would appear from the admittedly incomplete record as developed in the trial court, that, at most, residents of Youngtown would be entitled to damages rather than injunctive relief.

We have no difficulty, however, in agreeing with the conclusion of the trial court that Spur's operation was an enjoinable public nuisance as far as the people in the southern portion of Del Webb's Sun City were concerned.

§36—601, subsec. A reads as follows:

> §36—601. Public Nuisances Dangerous to Public Health
>
> A. The following conditions are specifically declared public nuisances dangerous to the public health:
>
> 1. Any condition or place in populous areas which constitutes a breeding place for flies, rodents, mosquitoes and other insects which are capable of carrying and transmitting disease-causing organisms to any person or persons.

By this statute, before an otherwise lawful (and necessary) business may be declared a public nuisance, there must be a "populous" area in which people are injured:

> . . . (I)t hardly admits a doubt that, in determining the question as to whether a lawful occupation is so conducted as to constitute a nuisance as a matter of fact, the locality and surroundings are of the first importance. (Citations omitted.) A business which is not per se a public nuisance may become such by being carried on at a place where the health, comfort, or convenience of a populous neighborhood is affected. . . . What might amount to a serious nuisance in one locality by reason of the density of the population, or character of the neighborhood affected, may in another place and under different surroundings be deemed proper and unobjectionable. . . .

MacDonald v. Perry, 32 Ariz. 39, 49-50, 255 P. 494, 497 (1927).

It is clear that as to the citizens of Sun City, the operation of Spur's feedlot was both a public and a private nuisance. They could have successfully maintained an action to abate the nuisance. Del Webb, having shown a special injury in the loss of sales, had a standing to bring suit to enjoin the nuisance. The judgment of the trial court permanently enjoining the operation of the feedlot is affirmed.

### Must Del Webb Indemnify Spur?

A suit to enjoin a nuisance sounds in equity and the courts have long recognized a special responsibility to the public when acting as a court of equity:

> **§104. Where public interest is involved.**
> Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. Accordingly, the granting or withholding of relief may properly be dependent upon considerations of public interest. . . .

27 Am. Jur. 2d, Equity, page 626.

In addition to protecting the public interest, however, courts of equity are concerned with protecting the operator of a lawfully, albeit noxious, business from the result of a knowing and willful encroachment by others near his business.

In the so-called "coming to the nuisance" cases, the courts have held that the residential landowner may not have relief if he knowingly came into a neighborhood reserved for industrial or agricultural endeavors and has been damaged thereby:

> Plaintiffs chose to live in an area uncontrolled by zoning laws or restrictive covenants and remote from urban development. In such an area plaintiffs cannot complain that legitimate agricultural pursuits are being carried on in the vicinity, nor can plaintiffs, having chosen to build in an agricultural area, complain that the agricultural pursuits carried on in the area depreciate the value of their homes. The area being primarily agricultural, and opinion reflecting the value of such property must take this factor into account. The standards affecting the value of residence property in an urban setting, subject to zoning controls and controlled planning techniques, cannot be the standards by which agricultural properties are judged.
>
> People employed in a city who build their homes in suburban areas of the county beyond the limits of a city and zoning regulations do so for a reason. Some do so to avoid the high taxation rate imposed by cities, or to avoid special assessments for street, sewer and water projects. They usually build on improved or hard surface highways, which have been built either at state or county expense and thereby avoid special assessments for these improvements. It may be that they desire to get away from the congestion of traffic, smoke, noise, foul air and the many other annoyances of city life. But with all these advantages in going beyond the area which is zoned and restricted to protect them in their homes, they must be prepared to take the disadvantages.

Dill v. Excel Packing Company, 183 Kan. 513, 525, 526, 331 P.2d 539, 548, 549 (1958).

And:

> . . . a party cannot justly call upon the law to make that place suitable for his residence which was not so when he selected it. . . .

Gilbert v. Showerman, 23 Mich. 448, 455, 2 Brown 158 (1871).

Were Webb the only party injured, we would feel justified in holding that the doctrine of "coming to the nuisance" would have been a bar to the relief asked by Webb, and, on the other hand, had Spur located the feedlot near the outskirts of a city and had the city grown toward the feedlot, Spur would have to suffer the cost of abating the nuisance as to those people locating within the growth pattern of the expanding city:

> The case affords, perhaps, an example where a business established at a place remote from population is gradually surrounded and becomes part of a populous center, so that a business which formerly was not an interference with the rights of others has become so by the encroachment of the population. . . .

City of Ft. Smith v. Western Hide & Fur Co., 153 Ark. 99, 103, 239 S.W. 724, 726 (1922).

We agree, however, with the Massachusetts court that:

> The law of nuisance affords no rigid rule to be applied in all instances. It is elastic. It undertakes to require only that which is fair and reasonable under all the circumstances. In a commonwealth like this, which depends for its material prosperity so largely on the continued growth and enlargement of manufacturing of diverse varieties, "extreme rights" cannot be enforced. . . .

Stevens v. Rockport Granite Co., 216 Mass. 486, 488, 104 N.E. 371, 373 (1914).

There was no indication in the instant case at the time Spur and its predecessors located in western Maricopa County that a new city would spring up, full-blown, alongside the feeding operation and that the developer of that city would ask the court to order Spur to move because of the new city. Spur is required to move not because of any wrongdoing on the part of Spur, but because of a proper and legitimate regard of the courts for the rights and interests of the public.

Del Webb, on the other hand, is entitled to the relief prayed for (a permanent injunction), not because Webb is blameless, but because of the damage to the people who have been encouraged to purchase homes in Sun City. It does not equitably or legally follow, however, that Webb, being entitled to the injunction, is then free of any liability to Spur if Webb has in fact been the cause of the damage Spur has sustained. It does not seem harsh to require a developer, who has taken advantage of the lesser land values in a rural area as well as the availability of large tracts of land on which to build and develop a new town or city in the area, to indemnify those who are forced to leave as a result.

Having brought people to the nuisance to the foreseeable detriment of Spur, Webb must indemnify Spur for a reasonable amount of the cost of moving or shutting down. It should be noted that this relief to Spur is limited to a case wherein a developer has, with foreseeability, brought into a previously agricultural or industrial area the population which makes necessary the granting of an injunction against a lawful business and for which the business has no adequate relief.

It is therefore the decision of this court that the matter be remanded to the trial court for a hearing upon the damages sustained by the defendant Spur as a reasonable and direct result of the granting of the permanent injunction. Since the result of the appeal may appear novel and both sides have obtained a measure of relief, it is ordered that each side will bear its own costs.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

## NOTES TO BOOMER v. ATLANTIC CEMENT CO. AND SPUR INDUSTRIES v. DEL E. WEBB DEVELOPMENT CO.

1. ***Remedial Choices in Boomer.*** The *Boomer* court considered four alternative remedial measures: past damages, permanent (past, present, and future) damages, delayed injunction, and immediate injunction. What were the practical and policy considerations raised by the majority and dissent in evaluating these options?

2. ***Remedial Choices in Spur.*** The *Spur* court presents an additional remedial option, granting the plaintiff an injunction, but requiring the plaintiff to pay for damages the defendant suffers from the injunction. What policy justifications does the court offer to support this result?

3. ***Coming to the Nuisance.*** It is not unusual for courts to consider the "coming to the nuisance" doctrine when balancing the equities in search of an appropriate remedy. The majority rule, however, is that the fact that the plaintiff chose to move to the location of the nuisance is not a defense to a nuisance claim. See Restatement (Second) of Torts §840D. In Lawrence v. Eastern Airlines, Inc., 81 So. 2d 632, 634 (Fla. 1955), the Supreme Court of Florida explained the reasoning:

> The majority view rejects the doctrine of coming to the nuisance as an absolute defense to a nuisance action. Support for the majority view is found in the argument that the

doctrine is out of place in modern society where people often have no real choices as to whether or not they will reside in an area adulterated by air pollution. In addition, the doctrine is contrary to public policy in the sense that it permits a defendant to condemn surrounding land to endure a perpetual nuisance simply because he was in the area first. Another reason given for rejecting the doctrine is that the owner of land subject to a nuisance will either have to bring suit before selling his land in order to attempt to receive the full value of the land or reconcile himself to accepting a depreciated price for the land since no purchaser would be willing to pay full value for land subject to a nuisance against which he is barred from bringing an action.

***Perspective: Encouraging Valuable Land Use***

By granting or denying an injunction, the court is establishing property rights, saying which one of conflicting uses may prevail. In effect, however, an injunction is only a piece of paper, one the plaintiff can sell to the defendant for the right price. Thus, if the defendant's use of the land is the more valuable, the defendant may buy the plaintiff's right to stop the defendant's use. Bargaining between the parties may ensure that the more valuable use of the land continues. Awarding permanent damages, such as in *Boomer*, is another way of testing to see which use is more valuable. If the defendant is unwilling to continue its activity in the face of making a large payment, it may be that the plaintiff's use is more valuable. Stopping the activity might, in some cases, eliminate future harm and minimize permanent damages.

Commentators have suggested that there are two questions involved in nuisance remedies. The first is to decide whether an injunction or an award of damages is more appropriate. Injunctions are appropriate remedies when negotiations between the parties are feasible and damages are appropriate when there are obstacles to bargaining. The second issue is having to decide who should get the award. That decision may be made by contemplating the equities and by considering whether the plaintiff's damages or the defendant's damages are easier to calculate. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,* 85 Harv. L. Rev. 1089 (1972).

[illegible]

[illegible]

[illegible]

CHAPTER 16

# DEFAMATION

## I. Introduction

The tort of defamation protects a plaintiff's interest in his or her reputation. In the traditional common law of defamation, all that a plaintiff was required to prove in order to recover damages was that the defendant had communicated a defamatory statement about the plaintiff to a third party. Although the plaintiff was not required to prove that the statement was false, proof by the defendant that the statement was true was a complete defense. Defamation was a strict liability tort because there was no requirement that the defendant intended to harm the plaintiff or created an unreasonable risk of harming the plaintiff.

In some circumstances, privileges protect people from liability even if they communicate false statements. Among the beneficiaries of these privileges are judges and legislators acting in their official capacities and people speaking in certain contexts, such as testifying in court, reporting news, and giving letters of recommendation. These privileges are either *qualified (conditional)* or *absolute*. The privileges protect even people who publish false, defamatory statements in such contexts. Qualified privileges can be lost, or *defeated*, if the privilege is abused. An absolute privilege provides complete protection from a defamation claim. Cases in this chapter illustrate the application of frequently asserted qualified and absolute privileges.

Since the 1960s, constitutional law decisions by the U.S. Supreme Court have changed the traditional strict liability character of defamation law. To protect people's free speech rights, the law requires plaintiffs to prove that the defendant was at fault with respect to the truth or falsity of the statement. A second change is the requirement that many plaintiffs prove falsity. These changes require attention to the type of damages the plaintiff seeks and the status of the plaintiff. The last section of this chapter considers in detail the modern constitutional law of defamation.

Henderson v. Henderson introduces the elements of a modern defamation claim. Pay particular attention to the elements of the plaintiff's case.

## HENDERSON v. HENDERSON

1996 WL 936966 (R.I. Super. 1996)

WILLIAMS, J. . . .

The plaintiff [Susan R. Henderson] is the ex-wife of the defendant [Brian R. Henderson]. The parties were married in 1967 and had two children, Jill Henderson (daughter) and Brett Henderson (son), both of whom are now adults. The parties subsequently separated on October 28, 1989, and were officially divorced on May 15, 1991.

After the parties were separated in October 1989, the defendant began to send a steady stream of correspondences to the plaintiff at her sister Sarah Mancini's residence, where she was living at the time, and later to a home she shared with their daughter. These correspondences were addressed to the plaintiff, referring to her as "wacco" and "Sue T. Whore" on the envelope. The defendant also wrote numerous letters and correspondences to the parties' daughter referring to the plaintiff as "wacco" and "the whore." Additionally, the defendant sent copies of a letter to the plaintiff's father and her sister referring to the plaintiff as "Sue the whore," and copies of other letters to the plaintiff's father and stepmother claiming the plaintiff had mental problems. Moreover, the defendant initialized checks that were sent to the plaintiff, that allegedly had obscene connotations.

On September 22, 1992, the plaintiff filed suit against the defendant accusing him of defamation. On June 5, 1996, the plaintiff made a motion for an order permitting discovery on the issue of punitive damages. The defendant responded on June 20, 1996, by moving to strike the plaintiff's claim for punitive damages. An evidentiary hearing was held before this court on July 3, 1996 and July 5, 1996, on the motion to strike. . . .

In Rhode Island, an action for defamation requires proof of "(a) a false and defamatory statement concerning another; (b) an unprivileged communication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) damages." Lyons v. R.I. Public Employees Council 94, 516 A.2d 1339, 1342 (R.I. 1986). Restatement (Second) Torts 558 (1977). "Any words, if false and malicious, imputing conduct which injuriously affects a man's reputation, or which tends to degrade him in society or bring him into public hatred and contempt are in their nature defamatory." Elias v. Youngken, 493 A.2d 158, 161 (R.I. 1985).

On the evidence before it, this Court concludes that the plaintiff has made a prima facie showing that defendant's statements are defamatory. The plaintiff has shown that the defendant's numerous references to the plaintiff as being mentally unstable and a "whore" are false and defamatory statements. There is no competent evidence in the record that these statements are true. This Court is also of the opinion that the initials the defendant placed on checks made out to the defendant [sic, plaintiff?], would be found not only to be false and defamatory but possibly obscene. These statements and terms were published on envelopes, letters, checks and postcards that were communicated to third parties, including the parties' daughter and the plaintiff's sister, who testified to this at the hearing. Additionally, the evidence indicates that there was fault amounting at least to negligence on the part of the defendant, and that the plaintiff suffered damages. The statements made about the plaintiff clearly impute the kind of conduct which injuriously affects a person's reputation.

The plaintiff argues that the weight of the testimonial evidence of the plaintiff, the parties' daughter and the plaintiff's sister, as well as the exhibits introduced, answers by

the defendant to requests for admissions, and the portions of the deposition transcript read into the record, more than demonstrate facts sufficient to establish a prima facie showing of egregious conduct to warrant the imposition of punitive damages. This Court agrees.

This Court believes that a prima facie showing has been made that defendant's actions arose from spite or ill will, with willful and wanton disregard of the rights and interest of the plaintiff. This Court is also of the opinion that the competent evidence of record could support a finding that the defendant's statements were published with such malice and wickedness that they rise to the level of requiring punishment over and above that provided in an award of compensatory damages.

The defendant refers this Court to Johnson v. Johnson, 654 A.2d 1212 (R.I. 1995), a Rhode Island case in which punitive damages were denied when an ex-husband called his ex-wife a "whore." However, in this Court's opinion, the *Johnson* case is entirely different from the present matter. In *Johnson*, unlike here, the trial justice found that the ex-husband's statements were essentially truthful. . . . Furthermore, the defamatory statements in *Johnson* consisted of one incident, while here the defamatory statements occurred continuously over a period of almost three years, even after the plaintiff had initially brought this defamation suit.

This Court concludes that there are adequate facts to support an award of punitive damages in this case. This Court holds that the plaintiff established in the evidentiary hearing that a prima facie case for punitive damages exists. Accordingly, the defendant's motion to strike is denied, and the plaintiff may conduct discovery on the issue of punitive damages. . . .

## NOTES TO HENDERSON v. HENDERSON

1. ***The Publication Requirement.*** The plaintiff must prove that the defendant published a communication regarding the plaintiff. The word "publication" is a term of art referring to any kind of communication from the defendant to someone other than the plaintiff. The communication must be *about the plaintiff* and defamatory, which means it is injurious to the plaintiff's reputation.

*Illustration:* You might write statements in a diary that are harmful to someone's reputation. If you keep the diary locked and hidden and show it to no one, there is no publication. Just making the statement in a diary is not enough to be a basis for a defamation action. If you show the diary to someone else, however, that act would be an intentional publication of the defamatory statement, whether or not you intended to harm the person to whom it referred. If a thief stole your *carefully hidden* diary and read its contents, you would *not* be treated as having published the statement.

As the example illustrates, *publication* does not have to take place in a newspaper or some other public medium. Many defamatory publications are in written form, whether in newspapers or books or private letters. Others have been memorialized in some other tangible form, such as film, videotape, or audiotape. These publications are referred to as *libel.* More transitory forms of defamation, such as spoken words, are defined as *slander.* Other communications, such as a silent gesture, may qualify as a slanderous rather than libelous publication; for example, pointing a finger at someone to indicate that the person is the thief.

How was the defamatory statement published in *Henderson?* Was it a libel or a slander?

The plaintiff is required to prove that the defamatory statement is "about him or her." This is no problem where the defendant publishes specific injurious statements naming the plaintiff. Vague references to the plaintiff's identity or defamatory statements about a group of which the plaintiff is a member are more troublesome. The key is that the statement can reasonably be understood as applying personally to the plaintiff.

2. ***Defamation Damages and Fault.*** The fault element in *Henderson* appeared in two parts of the analysis. First, the court cited a rule requiring proof of "fault amounting at least to negligence on the part of the publisher." This fault requirement refers to the care the publisher took in ascertaining whether the allegedly defamatory statement was true or false. This fault requirement is the result of constitutional modifications of the common law of defamation, which are discussed in detail later in this chapter. Second, the court referred to a requirement that the plaintiff prove malice and wickedness. This fault requirement refers to the publisher's motive in publishing the statement. To recover punitive damages in this jurisdiction, the plaintiff must prove ill will, spite, willful and wanton disregard of the rights and interests of the plaintiff. Later in this chapter, the requirement of proof of malice is discussed both in the context of privileges and of constitutional developments.

### *Statute:* LIBEL AND SLANDER — SELF-PUBLICATION

Colo. Rev. Stat. §13-25-125.5 (2002)

No action for libel or slander may be brought or maintained unless the party charged with such defamation has published, either orally or in writing, the defamatory statement to a person other than the person making the allegation of libel or slander. Self-publication, either orally or in writing, of the defamatory statement to a third person by the person making such allegation shall not give rise to a claim for libel or slander against the person who originally communicated the defamatory statement.

### *Statute:* ONE CAUSE OF ACTION; RECOVERY

Cal. Civ. Code §3425.3 (2002)

No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in any jurisdiction.

## NOTES TO STATUTES

1. ***Self-Publication.*** A plaintiff who spreads the harm of a defamation by repeating it to others is prohibited from basing a claim on that retelling of the defamation. The Colorado statute codifies this rule. Does this discourage a defamed person from repeating the defamation to an attorney in the course of seeking advice? Does it

discourage someone who has been defamed from discussing the defamation with a friend?

2. ***Single Publication Rule.*** Many states have adopted the single publication rule described in the California statute. It avoids multiple lawsuits over a single defamatory publication, even if that publication reaches many people. This protects both courts and potential defendants. Only one suit may arise from a single broadcast or publication of an edition of a book or newspaper, or a single exhibition of a movie. This rule also helps the plaintiff by allowing recovery of all damages suffered in all jurisdictions in one action. It helps the defendant by barring any defamation action between the parties for damages based on that publication in all other jurisdictions. See Restatement (Second) of Torts §577A. A new suit arises from the defendant's repetition of the defamation, however, in a new edition of a book or newspaper (in a paperback or evening edition, for instance, designed to reach a new audience) or a second showing of a movie. What incentives does this create for those who publish defamatory speech?

***Perspective: Internet Publication***

The increased importance of the Internet gives rise to the question of whether a defamatory statement published on the Internet is a single publication, even though many individuals may view a Web site. Commentators have taken opposing views. Odelia Braun has observed,

> The size of the audience on the Internet each day is up to a thousand times larger than any single publication of print media. Information is assembled purposefully to reach wider and wider audiences so that exposure potentially increases over time, in contrast to the diminishing impact of the print media due to its decentralization after publication. . . . By failing to remove defamatory material, an Internet publisher theoretically makes a conscious decision to leave that material on the website daily. If the publisher has sustained his maximum liability when he first publishes, he has no motivation to limit the harm.

*Internet Publications and Defamation: Why the Single Publication Rule Should Not Apply*, 32 Golden Gate U. L. Rev. 325, 332-333 (2002). By contrast, Lori A. Wood, *Cyber-Defamation and the Single Publication Rule*, 81 B.U. L. Rev. 895, 913 (2001) has concluded that

> Publications on general access sites pose the very problems the single publication rule seeks to prevent — multiplicity of actions, undue harassment of defendants, possible excess recoveries for plaintiffs through multiple suits, unnecessary depletion of judicial resources, and unnecessary exposure of the court system to stale claims in which the evidence may have been lost, and witnesses may have died, disappeared, or suffered a loss of memory.

Which argument is most compelling?

## II. Defamatory Statements

Because the tort of defamation is designed to protect a person's reputation in the community, a major focus of the cases is determining which statements actually do cause harm to reputation. Some statements are obviously injurious to a person's reputation while others are not. A statement may refer to a plaintiff directly or only obliquely. It may not be obvious why the statement would injure the person's reputation. A statement of opinion may be less injurious than a statement of fact. The cases that follow describe the classifications traditionally used to identify and distinguish types of slanderous and libelous statements.

### A. Libel and Slander Per Se and Per Quod

When injury to reputation obviously will flow from a statement, the statement is described as *defamatory per se.* A statement that is libelous per se or slanderous per se can reasonably be understood from the context to be harmful to the plaintiff's reputation by itself, standing alone. When the likely injury is not apparent, the statement is said to be *defamatory per quod.* A statement that is libelous or slanderous per quod can be understood to be defamatory only by reference to additional, extrinsic facts not contained in the statement and/or damages the plaintiff suffered because of the statement.

Context is often relevant to determining whether a statement contains a factual assertion people are likely to believe is defamatory. The context of a statement may show that a person misstated something to be humorous and that no one would take the statement seriously, or it may show that a person exaggerated and overstated to emphasize a point and that no one would believe the assertion to be literally true. Context may show that a statement was just an expression of opinion, even though it might have sounded like a statement of fact. Statements understood in these ways are rarely defamatory.

Gifford v. National Enquirer explains what "defamatory" means and the different proof requirements for libel per se and libel per quod. The case focuses on the need for extrinsic evidence to prove the defamatory nature of statements that are not harmful standing alone. Agriss v. Roadway Express, Inc. also explains what "defamatory" means and the variety of approaches jurisdictions have taken to establishing the defamatory character of libels and slanders.

#### GIFFORD v. NATIONAL ENQUIRER

23 Media L. Rep. 1016, 1993 WL 767192 (D. Cal. 1993)

BAIRD, J. . . .

On June 22, 1993 Plaintiffs, Kathee Lee Gifford and Frank Gifford, filed the instant action against the *National Enquirer* [claiming that the *National Enquirer* had defamed them]. Plaintiffs are husband and wife, and are celebrities in the television industry. Kathee Lee Gifford is the co-host of the television talk show "Live with Regis and Kathee Lee," and Frank Gifford is a sports broadcaster and is currently a co-host of

"Monday Night Football" on the ABC Television Network. Defendant is the publisher of the *National Enquirer*, a national news tabloid.

The causes of action arise out of an article published by the *National Enquirer* on May 17, 1993, concerning the circumstances surrounding Mrs. Gifford's then pending pregnancy. In their complaint, Plaintiffs allege that the article, entitled *Kathee Lee's Baby Secret: The High-Tech, No-Sex Way She Got Pregnant*, contains statements that are false, deliberately defamatory, and totally contrived. . . .

Plaintiffs further allege that by publishing the article, Defendant has intentionally and maliciously misled the public, including Plaintiffs' fans, into believing, among other things:

> (a) that the Giffords are a "desperate pair" who resorted to artificial insemination in connection with the conception of their most recent child, (b) that the Giffords used a "shocking" and "controversial" laboratory technique of "sperm spinning" in an effort to avoid having another male child, (c) that the Giffords have abandoned one or more of their publicly-stated religious beliefs, and (d) that the Giffords are hypocrites who say one thing in the public, while doing the opposite in private.

(Complaint ¶2.) . . .

Plaintiffs seek damages for injury that has allegedly occurred to their personal and professional reputations, their careers, and for emotional distress. . . .

In order to state a cause of action for libel, a plaintiff must allege, among other things, that the defendant published a written statement about the plaintiff, and that the statement was "defamatory." There are two types of libel: libel per se and libel per quod. Words that are defamatory on their face are libelous per se, while words that are innocuous on their face, but defamatory in light of extrinsic circumstances are libelous per quod. A significant distinction between the two types of libel is that libel per quod requires the plaintiff to allege the extrinsic circumstances imparting a defamatory meaning to the words, and, just as significantly, to allege special damages.

Whether a statement is defamatory is an issue to be decided by the Court as a matter of law. Robinson v. Bantam Books Inc., 339 F. Supp. 150, 157 (D.C. N.Y. 1972). As the *Robinson* court stated, "[i]n libel actions the trial court must first determine whether a publication is libelous per se and, if not, the court must determine as a matter of law whether the writing is susceptible of a defamatory meaning derivable from extrinsic facts and circumstances which must be specifically pleaded and which must be supported by proof of special damages, that is, libelous per quod." *Robinson*, 339 F. Supp. at 157.

A statement is defamatory "if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community, even though it may impute no moral turpitude to him." Mencher v. Chelsey, 297 N.Y. 94, 100 (1947). Furthermore, "[w]hether language has that tendency depends, among other factors, upon the temper of the times, the current of contemporary public opinion, with the result that words, harmless in one age, in one community, may be highly damaging to reputation at another time or in a different place." *Chelsey*, 297 N.Y. at 100.

In making this inquiry, the New York Court of Appeals has developed various standards to guide the decision. First, the court shall not "pick out and isolate particular phrases but will consider the publication as a whole." James v. Gannet Co., Inc., 40 N.Y.2d 415, 419 (N.Y. 1976). Second, "[t]he publication will be tested

by its effect upon the average reader." Id. Third, "[t]he language will be given a fair reading and the court will not strain to place a particular interpretation on the published words." Id. at 420. Finally, "it is the duty of the court . . . to understand the publication in the same manner that others would naturally do." Id.

Applying these principles to the facts alleged in Plaintiffs' Complaint, this Court finds that Plaintiffs have failed to state a claim for libel per se. When condensed to their essence, the statements made in the article at issue here merely, on their face, state that Plaintiffs conceived their second child by means of artificial insemination, and that they employed the procedure of "sperm spinning" to increase the probability that this child would be a girl. Such medical practices are common enough in contemporary society that one could hardly claim that engaging in such a practice subjects one to "hatred, contempt or aversion," or induces "an evil or unsavory opinion of him [or her] in the minds of a substantial number of the community."

Although the article allegedly calls Plaintiffs' practices "shocking," "controversial," and "high-tech extremes," such sensationalization is no doubt immediately discounted by readers. This Court can take judicial notice of the fact that one who picks up a *National Enquirer* does so with the immediate caution that what they read is in large part rhetorical hyperbole. Such speech is not the type that libel law seeks to inhibit, nor is it the type that the First Amendment would see inhibited. See Greenbelt Coop. Publishing Assoc. v. Brestler, 398 U.S. 6, 13 (1970) (finding that "even the most careless reader must have perceived that the word [blackmail] was no more than rhetorical hyperbole").

Plaintiffs also allege that the article calls Plaintiffs a "desperate pair." However, such a statement is merely an opinion issued by the *Enquirer*, and opinions are not actionable under libel law in that readers are free to reject them and make their own.

In that Plaintiffs have failed to sufficiently allege libel per se, this Court must now determine whether they have adequately alleged libel per quod. In addition to the allegations discussed above, Plaintiffs have also alleged that the article misled the public into believing that Plaintiffs have abandoned one or more of their publicly-stated religious and moral beliefs, and that Plaintiffs are hypocrites who say one thing in public, while doing the opposite in private. As Plaintiffs have not alleged that the article directly makes such statements, but only makes the statements impliedly in light of other circumstances, Plaintiffs are essentially alleging libel per quod.

However, in order to sufficiently state a claim for libel per quod, Plaintiffs must *specifically* allege the extrinsic circumstances imparting a defamatory meaning to the words actually uttered. As to Plaintiffs' claim that Defendant has implied that Plaintiffs have abandoned one or more of their publicly-stated religious and moral beliefs, Plaintiffs have alleged no extrinsic evidence to support this. For example, Plaintiffs have failed to allege what their religious and moral beliefs are, and that they have made such beliefs public.

As to Plaintiffs' claim that Defendant implied that Plaintiffs are hypocrites who say one thing in public, while doing the opposite in private, Plaintiffs have alleged that Plaintiffs "do not believe in artificial insemination, and they have stated publicly that they would not use such a procedure." (Complaint ¶10.) However, even assuming that this allegation is true, this Court finds as a matter of law that Defendant's statement that Plaintiffs did use artificial insemination does not give rise to such a strong implication of hypocrisy that it would "tend to expose [Plaintiffs] to hatred, contempt

or aversion, or to induce an evil or unsavory opinion of [them] in the minds of a substantial number of the community."

Therefore, Plaintiffs have failed to state a claim for libel per quod, and this Court hereby orders that Plaintiffs' libel claim is dismissed without prejudice. . . .

## AGRISS v. ROADWAY EXPRESS, INC.

483 A.2d 456 (Pa. Super. Ct. 1984)

CIRILLO, J.

> The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled by reason and natural justice; since without these, it is impossible to have the perfect enjoyment of any other advantage or right. 1 W. Blackstone, Commentaries 134.

Appellant William Agriss sued his employer, Roadway Express, Inc., for what he considered a slight to his good name. A jury trial was held in the Monroe County Court of Common Pleas. After appellant had presented his evidence the court entered a nonsuit. This appeal followed. . . .

Appellant had been employed by Roadway Express since 1976 as a truck driver. In February 1979 he was elected as a shop steward for Teamsters Local 229, the union representing Roadway employees based at Roadway's facility in Tannersville, Pennsylvania.

On December 21, 1979, Agriss returned from a round trip to Hartford, Connecticut, and entered the Tannersville terminal. He was scheduled to begin his vacation that day, and went to the dispatcher's window to collect his vacation paycheck. The dispatcher told Agriss to see the driver foreman, Steve Versuk, before leaving. Versuk handed Agriss a company "warning letter," signed by Versuk and initialed by Roadway relay manager Joe Moran. The letter read:

> By reason of your conduct as described below, it is necessary to issue this notice of warning. On 12/21/79 at Tannersville, Pennsylvania you violated our policy (or contract) by opening company mail. Subsequent violations of any company policy or contract will result in your receiving more severe disciplinary action up to and including discharge in accordance with Article 44 of the Central Pa. Over-the-Road and Local Cartage Supplemental Agreement.

The accusation in the letter was false, as Agriss had never, on that or any other day, opened company mail. . . .

Shortly thereafter, Agriss flew with his girlfriend to Hawaii to spend the holidays. While Agriss was in Hawaii, Roadway driver Joseph Verdier heard stories about the warning circulating in the drivers' room at the Tannersville terminal. He heard other drivers and a Roadway dispatcher saying that Agriss was going to be fired for looking into company mail. . . .

Over the next year Agriss continued to receive comments and questions about the warning letter from Roadway workers and union officials. Agriss instituted this suit, claiming that Roadway had defamed him. Trial began on January 23, 1981. After the plaintiff rested his case, the court granted the defendant's motion for compulsory nonsuit, ruling that the plaintiff's evidence failed to prove a cause of action for

defamation. The court en banc denied the plaintiff's petition to remove the nonsuit. . . .

Appellant proved, for purposes of overcoming a motion for nonsuit, that when he returned from his vacation speculation was rampant among his fellow employees and union men about what exactly he had done and whether he would be discharged for it. Obviously the charge of "opening company mail" implied more to some people than that he had received a benign reprimand. For a Roadway employee to be charged with opening company mail was highly uncommon. Appellant testified that in all his time as a union steward, during which he had dealt with "thousands" of grievances, he had never heard of an employee's being warned or cited for opening company mail. Moreover, the specific misconduct alleged — opening mail he had no right to open — reasonably could be interpreted to call in question appellant's general character for honesty, integrity, or trustworthiness. In fact, appellant testified that the accusation prompted people to ask him what he was accused of stealing. Giving appellant the benefit of inferences to which he is entitled, the charge "opening company mail" was capable of impugning appellant's good name or reputation in the popular sense, and these are the interests that defamation law seeks to protect. [The court also concluded that the jury could reasonably have found that people under the control of Roadway published the defamatory statements contained in the letter by revealing its contents to third parties. The warning letter was distributed to three managerial employees of Roadway and to a union representative. Somehow the contents were spread to fellow employees. The court concluded that the question of whether it was the Roadway managers who spread the word should have gone to the jury.] . . .

[In addition, the] trial court held that the charge "opening company mail" was not "libel per se," and that because it was not, the plaintiff was obliged to prove special damages in order to recover. Appellant proved no special damages; thus the court's . . . ground for entering nonsuit.

Appellant quarrels mainly with the trial court's holding that the words "opening company mail" were not "libel per se." However, we are concerned also with what the court meant by "libel per se," and with the rule it applied upon determining that the words complained of in this case were not "libel per se." Implicit in the court's decision to grant nonsuit is a distinction between "libel per se" and "libel per quod," and between different burdens of proof which these two forms of libel are thought to require. We have come to the conclusion that the "per se/per quod" distinction is without validity in the modern law of libel, and should be abolished as a means of allocating the plaintiff's burden of proof in a libel case. We also conclude that the trial court erred in nonsuiting appellant on the grounds of a rule based on the "libel per se" concept. However, our task of correcting the error is difficult because the very meaning of "libel per se," let alone its legal significance, is an enigma in this jurisdiction.

The import of "per se" in a defamation case is a problem that has kept Pennsylvania courts going in circles for generations. Originally the term meant one thing when attached to slander, and something entirely different when attached to libel. In the courts these separate meanings and the separate rules they entailed gradually drifted toward, into, and among one another, until nowadays "per se" is used so inconsistently and incoherently in the defamation context that any lawyer or judge about to use it should pause and replace it with the English words it is intended to stand for. . . .

The difficulty the courts have had with "per se" springs directly from the historical distinction between libel and slander. Before going further, we should make that

distinction. Libel may be defined conveniently as "A method of defamation expressed by print, writing, pictures, or signs." Black's Law Dictionary 824 (5th ed. 1979). Slander, broadly, is usually understood to mean oral defamation. Id. at 1244.

"Per se" first cropped up in defamation law in connection with slander. At early common law a person generally could not recover for slanderous utterances unless they caused him "special harm," meaning

> harm of a material and generally of a pecuniary nature . . . result[ing] from conduct of a person other than the defamer or the one defamed which conduct is itself the result of the publication or repetition of the slander. Loss of reputation to the person defamed is not sufficient to make the defamer liable under the rule . . . unless it is reflected in material harm.

Restatement of Torts §575, Comment b (1938). The common law courts' insistence that a plaintiff in slander prove "material harm" in turn "goes back to the ancient conflict of jurisdiction between the royal and ecclesiastical courts, in which the former acquired jurisdiction over some kinds of defamation only because they could be found to have resulted in 'temporal' rather than 'spiritual' damage." Restatement (Second) of Torts §575, Comment b (1977).

Early exceptions to the requirement of proving special harm were carved for slanders imputing crime, loathsome disease, shortcomings affecting the plaintiff in his business, trade, profession, or calling, or (later) unchastity to a woman. W. Prosser, Law of Torts §112 at 754 (4th ed. 1971). These "per se" slanders were supposed to be so naturally injurious that the law allowed recovery of general or presumed damages for loss of reputation, even without proof of actual injury.

"Per se" and its counterpart "per quod" were common law pleading devices used to indicate whether the plaintiff's cause of action depended on general or special damages. Francis Murnaghan, in *From Figment to Fiction to Philosophy — The Requirement of Proof of Damages in Libel Actions,* 22 Cath. U. L. Rev. 1, 13 (1972), explains:

> In common law pleading, the right to recover general damages meant that the portion of the writ employed for institution of the suit devoted to specification of damage, and introduced by the words "per quod," became inapplicable whenever damages were presumed. To fill the void, and to signify that something had not been overlooked, the draftsmen in such cases would simply insert "per se" where the allegations of damages, headed by the phrase "per quod" otherwise would be expected.

These archaic pleading terms stuck so hardily to slander actions that today "slander per quod" and "slander per se" retain their original meanings as, respectively, slander actionable only on a showing of special harm to the plaintiff, and slander actionable even without special harm. The substantive law of defamation continues to recognize the original four categories of slander "actionable per se," see Restatement (Second), supra, §570, with all other slanders actionable only on a showing of special harm, see id., §575.

The per se/per quod distinction in libel originated differently. It was used to distinguish libel defamatory on its face ("libel per se") from libel not defamatory on its face ("libel per quod"). "Libel per quod" required a showing of facts and[1]

[1] Prosser's "classic case" of libel per quod is Morrison v. Ritchie & Co., [1902] 4 Fr. 645, 39 Scot. L. Rep. 432. Defendant's newspaper published a report that the plaintiff had given birth to twins. There were readers who knew she had been married only one month. Prosser, supra, at 763 n.30.

circumstances imparting a defamatory meaning to otherwise innocent or neutral words. The plaintiff in libel per quod had to plead and prove the extrinsic facts (the "inducement") imparting defamatory meaning, and the defamatory meaning (the "innuendo") imparted.

Originally, the per se/per quod distinction in slander, by which some slanders were actionable without proof of special damages while others were not, had no parallel application to libel. Any libel, whether libelous on its face or libelous only upon proof of extrinsic circumstances, was actionable with or without proof of special damages. The willingness of the law to presume damages for all libels as opposed to all slanders arose partly from the greater permanency, dissemination, and credence, and hence the greater harm, supposed naturally to attend defamations in printed or written form.

Inevitably, use of the identical per se/per quod terminology in two torts so similar in nature led to the distinct rules for libel and slander being blurred and melded together in the courts. The rule of slander per quod, requiring proof of special damages for any slander not coming under one of the four time-honored exceptions, came to be applied to "libel per quod" (i.e., libel not defamatory on its face). Under this "hybrid" rule of libel per quod, a libel not defamatory on its face was not actionable without proof of special harm. As a further twist to the hybrid scheme, a libelous imputation of crime, loathsome disease, unfitness for business or calling, or unchastity (the four imputations actionable without proof of special harm in slander) was held to be actionable without proof of special harm in libel, even if the libel were "per quod" (proven libelous through extrinsic facts).

The trial court *en banc* evidently applied this hybrid rule of libel per quod. It found appellant's evidence deficient for failure to show either "libel per se" or special harm. We agree that appellant's case did not establish that he suffered any economic or material loss amounting to "special harm." On the other hand, we believe that the words "opening company mail" did not require such proof of special damages under the hybrid rule because the charge imputed to appellant unfitness for business or calling and, arguably, criminal activity. We would, therefore, find that the trial court erroneously applied the hybrid rule to the facts of this case. However, we would be shirking our responsibility as an appellate court if we did not decide also whether the hybrid rule was the correct one to apply in the first place.

Although Prosser believed the hybrid rule of libel per quod to be the majority rule in America, see Prosser, Torts, supra, at 762-63, the American Law Institute, in both the First and Second Restatements of Torts, consistently has adhered to the traditional rule that all libels are actionable "per se," irrespective of special harm. Restatement of Torts §569; Restatement (Second) of Torts §569. The Institute views Prosser's hybrid rule as the "minority position." See Restatement (Second) of Torts §569, Comment b. Laurence Eldredge, for many years Court Reporter for the Pennsylvania Supreme Court, championed the ALI position and disputed Prosser's. See Eldredge, *The Spurious Rule of Libel Per Quod*, 79 Harv. L. Rev. 733 (1966). Eldredge listed Pennsylvania among those states holding that all libels, whether defamatory on their face or through extrinsic facts, were actionable without the need to prove special harm. Upon surveying Pennsylvania cases, we are unable either to confirm or disconfirm Eldredge's view. Instead, our survey demonstrates that Pennsylvania law on the subject remains fundamentally unsettled. We have also found that there are indeed cases to support the court *en banc*'s position that "libel per quod" is not actionable in Pennsylvania without

special damages. However, searching analysis and contrary authority cast grave doubt on these cases' validity. . . .

. . . [T]here are sound policy reasons for allowing a plaintiff to recover for any libel even where he cannot prove special harm in the form of direct economic or pecuniary injury. As Justice Eagen said in Gaetano v. Sharon Herald Co., 231 A.2d 753, at 755 (Pa. 1967),

> The most important function of an action for defamation is to give the innocent and injured plaintiff a public vindication of his good name. Its primary purpose is to restore his unjustly tarnished reputation, and "reputation is the estimation in which one's character is held by his neighbors or associates." Restatement, Torts §577, comment b (1938).

By its very nature, injury to reputation does not work its greatest mischief in the form of monetary loss. Where an individual is made the victim of a false, malicious, and defamatory libel published to third persons, it is unfair to hold that vindication of his good name in the courts depends upon proof that the injury to his reputation has injured him economically as well. Once reputational damage alone is proven, the plaintiff in libel has proven his entitlement to recovery, and to make that recovery contingent on whether the damage was done by words "defamatory on their face" merely adds another irrelevant factor to the equation.

The perceived requirement of "special damages" has been narrowly interpreted by trial courts in Pennsylvania. It is seen as a complete bar to relief in defamation if the plaintiff fails to prove that reputational injury has caused concrete economic loss computable in dollars. These cases are disapproved to the extent they conflict with the rule we announce today: a plaintiff in libel in Pennsylvania need not prove special damages or harm in order to recover; he may recover for any injury done his reputation and for any other injury of which the libel is the legal cause. Courts in libel cases should be guided by the same general rules regarding damages that govern other types of tort recovery.

The order of the court *en banc* refusing to take off nonsuit is reversed; appellant to receive a new trial in accordance with this opinion; jurisdiction relinquished.

## NOTES TO GIFFORD v. NATIONAL ENQUIRER AND AGRISS v. ROADWAY EXPRESS, INC.

1. ***Per Se and Per Quod Defamation.*** Reading *Gifford* and *Agriss* together reveals the differences among jurisdictions in the treatment of libel and slander. What are the options? To understand the law in a particular jurisdiction, you must be able to answer the following questions: (a) Do libel and slander both have per se and per quod categories; (b) What makes a libel a per se libel and what makes a slander a per se slander; c) What additional elements must a plaintiff prove if the libel is characterized as per quod and if the slander is characterized as per quod?

How would the *Gifford* and *Agriss* courts answer each of these questions?

Would the outcome in *Agriss* have been different if the court had adopted what it calls the "hybrid" rule?

2. ***Problem: The Defamatory Content of Statements.*** The court in *Gifford* describes the generally agreed upon rules for when a statement is defamatory. Which of the following statements are defamatory? If defamatory, are they defamatory

per se or per quod? Does it depend on the jurisdiction? Does the per se or per quod character of the statement depend on whether they are libel or slander?

A. The defendant characterized the architect's homes as "chicken coops." See Scott-Taylor, Inc. v. Stokes, 229 A.2d 733 (Pa. 1967).

B. The defendant characterized the politician as favoring "a little Communism." See McAndrew v. Scranton Republican Publishing Co., 72 A.2d 780 (Pa. 1950).

C. The defendant accused the township supervisor, who was considering purchasing for the township lands that he partly owned, of conflict of interest "and perhaps much more." See Redding v. Carlton, 296 A.2d 880 (Pa. 1972).

SECTION 45a: LIBEL ON ITS FACE; OTHER ACTIONABLE DEFAMATORY LANGUAGE

A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code.

SECTION 48a. LIBEL IN A NEWSPAPER: SLANDER BY RADIO BROADCAST

(a) "General damages" are damages for loss of reputation, shame, mortification and hurt feelings.

(b) "Special damages" are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other.

3. ***Problem: Defamatory Statements.*** The plaintiffs are a husband, wife, and 14-year-old son whose house was shown on television. A KCTV-5 newscaster reported that, "Others told TV-5 News most of the trouble has been traced to just two drug-dealing juveniles and about a dozen suspected drug houses in the area." Then, as a picture of the plaintiff's house was shown for approximately four seconds, he said, "And we have slides of homes that these boys are occupying; we are not revealing the names, we have given these names to the police." The plaintiffs have no connections to drug dealing. Is this statement defamatory? Per se or per quod? See Pennington v. Meredith Corp., 763 F. Supp. 415 (D. Mo. 1991).

4. ***Employers' Privileged Communications.*** An employer is entitled to send a warning letter to an employee without fear of a defamation claim because there is no publication to a third party. The employer is also entitled to communicate the contents to others with a legitimate need to know the information in the course of business, which, in *Agriss*, included two Roadway managers, the human relations manager in the company, and the employee's union representative. These *privileged* communications would protect the employer unless the privilege was exceeded by communication to others who do not have a legitimate reason to know. In *Agriss*, the court held that it was a jury question whether this privilege was exceeded. (Privileges are discussed in greater detail later in this section of the chapter.)

5. ***The Fault Requirement.*** Neither the *Gifford* nor the *Agriss* court discussed any requirement that a plaintiff prove that the defendant was at fault in ascertaining the truth or falsity of the statement. In *Gifford*, the issue never arose because the court

found the plaintiffs had failed to prove that the statements were defamatory, either per se or per quod. Similarly, in *Agriss*, the excerpt of the opinion is focused more on what statements are defamatory than on any underlying fault requirement. If a statement is not defamatory, it does not matter whether there was fault.

### *Statute:* LIBEL

Cal. Civ. Code §45 (2002)

Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

### *Statute:* SLANDER, FALSE AND UNPRIVILEGED PUBLICATIONS WHICH CONSTITUTE

Cal. Civ. Code §46 (2002)

Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:

1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;
3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;
4. Imputes to him impotence or want of chastity; or
5. Which, by natural consequence, causes actual damages.

### *Statute:* LIBEL ON ITS FACE; OTHER ACTIONABLE DEFAMATORY LANGUAGE

Cal. Civ. Code §45(a) (2002)

A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code.

## NOTES TO STATUTES

**1.** ***Per Se and Per Quod Defamation.*** The preceding opinions in *Gifford* and *Agriss* outlined the differences among jurisdictions in the treatment of libel and

slander. The California statutes do not mention the phrases "per se" or "per quod," but the three California statute sections set out above suggest different treatments of the two types of defamation in that state. According to these statutes, what distinguishes a per se libel from a per quod libel in that state? What distinguishes a per se slander from a per quod slander? What different elements must a plaintiff prove to recover damages for per se and per quod defamations according to the statutes?

2. ***Libel and Slander Compared.*** The statutes distinguish between statements classified as libel and those classified as slander. What justifies different proof requirements for statements a person hears and statements a person reads?

***Perspective: Defamation by Radio and Television***

The common law distinctions between libel and slander developed before television and radio were invented, requiring courts or legislatures to decide into which category publications on those media fell. Michael B. Farber, *"Actual Malice" and the Standard of Proof in Defamation Cases in California: A Proposal for a Single Constitutional Standard*, 16 Sw. U. L. Rev. 577, 582-583 (1986), argued that publications by such means should be considered libel:

> In California, defamation that is accomplished by means of electronic broadcast media, either radio or television, is slander, not libel. This runs contrary to the definition of the Restatement (Second) of Torts and to the recent trend of other state courts, which have increasingly held that defamation by electronic media is libel, not slander. If the distinction between libel and slander should be based on the greater ability of the printed or broadcast word to influence opinions than the merely spoken word, as has been suggested, then defamation by radio, television, tape recording, and other media of similar permanence and ease of transmission should be classified as libel, and the California statute should be amended.

In this classification debate, others have referred to the historical reasons for distinguishing between the two types of defamation. Libel was viewed as having a greater potential for damages because statements in a written form are more permanent and may therefore do harm repeatedly. Spoken words, as required for slander, are evanescent and transitory, and their effect not likely to be so severe. Comparing this reasoning to Mr. Farber's reasoning, should live radio and TV broadcasts be treated differently from pre-recorded broadcasts? What if live programming is being taped as it is being broadcast?

## B. Opinions

In general, opinions are treated as nondefamatory. Cook v. Winfrey and Milkovich v. Lorain Journal Co. illustrate the protections defamation law offers to statements of opinion. Cook v. Winfrey provides an example of a test for whether a statement alleged to be defamatory is not defamatory because it is an opinion—a conclusion about

which the hearer or reader is entitled to make up his or her own mind. In Milkovich v. Lorain Journal Co., the defendant asked the U.S. Supreme Court to create a special constitutional protection for statements of opinions. The Court evaluated the protections already given to nonfactual statements by the common law.

## COOK v. WINFREY

975 F. Supp. 1045 (N.D. Ill. 1997)

KOCORAS, J. . . .

This matter is before the court on the defendant's motion to dismiss the plaintiff's amended complaint for failure to state a claim upon which relief can be granted. For the reasons set forth below, this motion is granted, and the complaint is dismissed.

The following factual allegations are contained in the plaintiff's amended complaint. We are obligated to assume the truth of these allegations for purposes of deciding the motion to dismiss, without regard to whether they are in fact true or false. Plaintiff Randolph Cook ("Cook") is a resident of Columbus, Ohio. Defendant Oprah Winfrey ("Winfrey") is a television talk-show host living in Chicago. Cook and Winfrey had a relationship in the past, during which time Cook asserts that he and Winfrey used cocaine on a regular basis. In January, 1995, Cook was in contact with several media organizations with regard to publishing articles pertaining to his relationship with Winfrey. While he was entertaining offers from these organizations, Winfrey made statements both publicly and privately to third persons concerning their relationship and drug use. Cook asserts that Winfrey made statements indicating that he was a liar, that he could not be trusted or believed, that he would be sorry if he told anybody else his story, and that they had never had a prior relationship. Winfrey allegedly made similar statements in the *National Enquirer* of February 18, 1997. Cook also was attempting to seek compensation for the publication of his experiences with Winfrey in early 1995. Due to the statements made by Winfrey (discussed above), Cook's opportunity to market his story was interfered with and he was prevented from entering into an agreement with any outlet to sell his story.

As a result of the statements allegedly made by Winfrey, Cook filed a complaint against her on January 16, 1997. . . .

Cook alleges that he suffered slander . . . when Winfrey was quoted in the *National Enquirer* of February 18, 1997 as saying that "I will fight this suit until I am bankrupt before I give even a penny to this liar" and that "it's [this suit] all a pack of lies." See Complaint ¶21. . . .

In Ohio, statements of opinion are "absolutely privileged" and cannot be the basis for a defamation suit. Whether a statement is an opinion or a factual assertion is a matter of law, to be decided by the court. In determining whether a statement is fact or opinion, Ohio courts look to the "totality of the circumstances," Vail v. The Plain Dealer Publishing Co., 649 N.E.2d 182, 185 (1995), citing Scott v. News-Herald, 496 N.E.2d 699 (1986). As such, a court must analyze the allegedly defamatory statement utilizing the following considerations: 1) the specific language used; 2) whether the statement is verifiable; 3) the general context of the statement: and 4) the broader context in which the statement appeared. An analysis of these factors shows that Winfrey's statements that this suit is a "pack of lies" and that Cook is a "liar" are merely opinion, and Cook cannot maintain an action for slander based on them.

With regard to the first factor, the specific language used by Winfrey indicates that her statements were her opinions and not statements of fact. A statement such as "I will fight this suit until I am bankrupt before I give even a penny to this liar" is generally not taken seriously and does not convey to a listener that the speaker is making a factual assertion. Rather, a reasonable listener would take such a comment as an indication that the speaker had a negative opinion of the subject of the comment. This factor ties in with factor 2, since statements such as "he is a liar" are not necessarily concretely verifiable or subject to factual scrutiny. Most people, when saying someone is a liar or something is a pack of lies, are expressing their dislike for that person or the information they heard, not setting forth a factual assertion. Thus, the first two factors indicate that Winfrey's statements were opinion and not factual assertions.

Considering the third and fourth factors together, the context in which these statements were allegedly made shows that Winfrey, if she even spoke these words, was not making factual assertions. The statements were contained in the *National Enquirer*, a paper known for its sensational stories about celebrities. In addition, the story itself clearly shows that Winfrey is not being quoted directly by the reporter, but rather is having comments she allegedly made to a "friend" passed on to the paper. The tone of the story is also an important consideration, since it attempts to show how outraged Winfrey was at the commencement of this suit and the comments purportedly made by Winfrey match the article's general mood. A consideration of all of these factors indicates that an average person would not have taken the comments allegedly uttered by Winfrey as statements of fact but rather as statements of opinion. We find, therefore, that the statements made by Winfrey were her opinion, and as such she is entitled to privilege in this case. Since she is entitled to privilege, the comments cannot serve as the basis of a slander suit under Ohio law, and Cook's allegations fail to state a cognizable claim. . . .

## MILKOVICH v. LORAIN JOURNAL CO.

497 U.S. 1 (1990)

Chief Justice REHNQUIST.

Respondent J. Theodore Diadiun authored an article in an Ohio newspaper implying that petitioner Michael Milkovich, a local high school wrestling coach, lied under oath in a judicial proceeding about an incident involving petitioner and his team which occurred at a wrestling match. Petitioner sued Diadiun and the newspaper for libel, and the Ohio Court of Appeals affirmed a lower court entry of summary judgment against petitioner. This judgment was based in part on the grounds that the article constituted an "opinion" protected from the reach of state defamation law by the First Amendment to the United States Constitution. We hold that the First Amendment does not prohibit the application of Ohio's libel laws to the alleged defamations contained in the article. . . .

Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements. . . .

However, due to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of "fair comment" was incorporated into the common law as an affirmative defense to an action for defamation. "The principle

of 'fair comment' afford[ed] legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." 1 F. Harper & F. James, Law of Torts §5.28, p.456 (1956) (footnote omitted). As this statement implies, comment was generally privileged when it concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made solely for the purpose of causing harm. See Restatement of Torts, supra, §606. "According to the majority rule, the privilege of fair comment applied only to an expression of opinion and not to a false statement of fact, whether it was expressly stated or implied from an expression of opinion." Restatement (Second) of Torts, supra, §566, Comment a. Thus under the common law, the privilege of "fair comment" was the device employed to strike the appropriate balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech. . . .

Respondents would have us recognize, in addition to the established safeguards discussed above, still another First-Amendment-based protection for defamatory statements which are categorized as "opinion" as opposed to "fact." For this proposition they rely principally on the following dictum from our opinion in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974):

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. 418 U.S., at 339-340.

Judge Friendly appropriately observed that this passage "has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question." Cianci v. New Times Publishing Co., 639 F.2d 54, 61 (CA2 1980). Read in context, though, the fair meaning of the passage is to equate the word "opinion" in the second sentence with the word "idea" in the first sentence. Under this view, the language was merely a reiteration of Justice Holmes' classic "marketplace of ideas" concept. See Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion) ("[T]he ultimate good desired is better reached by free trade in ideas — . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market").

Thus, we do not think this passage from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled "opinion." See *Cianci*, supra, at 62, n.10 (The "marketplace of ideas" origin of this passage "points strongly to the view that the 'opinions' held to be constitutionally protected were the sort of thing that could be corrected by discussion"). Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of "opinion" may often imply an assertion of objective fact.

If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for

accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" See *Cianci,* supra, at 64. It is worthy of note that at common law, even the privilege of fair comment did not extend to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion." Restatement (Second) of Torts, §566, Comment *a* (1977).

Apart from their reliance on the *Gertz* dictum, respondents do not really contend that a statement such as, "In my opinion John Jones is a liar," should be protected by a separate privilege for "opinion" under the First Amendment. But they do contend that in every defamation case the First Amendment mandates an inquiry into whether a statement is "opinion" or "fact," and that only the latter statements may be actionable. They propose that a number of factors developed by the lower courts (in what we hold was a mistaken reliance on the *Gertz* dictum) be considered in deciding which is which. But we think the "breathing space" which "[f]reedoms of expression require in order to survive," Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 772 (1986) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, at 272 (1964)), is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and fact.

Foremost, we think *Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved. Thus, unlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable. *Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.

Next, the *Bresler-Letter Carriers-Falwell* line of cases provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988). [See also Greenbelt Coop. Publishing Assoc. v. Bresler, 398 U.S. 6, 13 (1970); Letter Carriers v. Austin, 418 U.S. 264 (1974).] This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our Nation. See id., at 53-55. . . .

We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the First Amendment. The dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative. As the Ohio Supreme Court itself observed: "[T]he clear impact in some nine sentences and a caption is that [Milkovich] 'lied at the hearing after . . . having given his solemn oath to tell the truth.'" *Scott,* 496 N.E.2d, at 707. This is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.

We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false. A determination whether petitioner lied in this instance can be made on a core of objective evidence by comparing, inter alia, petitioner's testimony before the OHSAA [Ohio High School Athletic

Association] board with his subsequent testimony before the trial court. As the *Scott* court noted regarding the plaintiff in that case: "[W]hether or not H. Don Scott did indeed perjure himself is certainly verifiable by a perjury action with evidence adduced from the transcripts and witnesses present at the hearing. Unlike a subjective assertion the averred defamatory language is an articulation of an objectively verifiable event." Id., at 252, 496 N.E.2d, at 707. So too with petitioner Milkovich.

The numerous decisions discussed above establishing First Amendment protection for defendants in defamation actions surely demonstrate the Court's recognition of the Amendment's vital guarantee of free and uninhibited discussion of public issues. But there is also another side to the equation; we have regularly acknowledged the "important social values which underlie the law of defamation," and recognized that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation." Rosenblatt v. Baer, 383 U.S. 75, 86 (1966). Justice Stewart in that case put it with his customary clarity:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty. . . .
>
> The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored. Id., at 92-93 (concurring opinion).

We believe our decision in the present case holds the balance true. The judgment of the Ohio Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

## NOTES TO COOK v. WINFREY AND MILKOVICH v. LORAIN JOURNAL CO.

**1. *Factual and Nonfactual Statements.*** Compare the tests used in *Cook* and *Milkovich* to determine which statements are actionable defamation and which are protected nonfactual assertions. The *Cook* "totality of the circumstances" test has four specific factors. The *Milkovich* test must be inferred from the Court's discussion of the facts of that case. How do the tests differ?

**2. *The Importance of Context.*** Both cases involved a statement that the plaintiff had lied. Why is only one statement actionably defamatory? If the court in *Cook* had applied the test from *Milkovich*, would the outcome have been different? If the Court in *Milkovich* had applied the test from *Cook* would the result have been different?

**3. *"Opinion" as a Matter of Law.*** While Judge Kocoras's reasoning in Cook v. Winfrey seems quite reasonable, the United States Court of Appeals for the Seventh Circuit reversed the grant of summary judgment motion on appeal:

> Although it is certainly correct that the Ohio constitution affords an absolute privilege to expressions of opinion, the conclusion that the privilege applied to the allegedly defamatory statements in this case required the district court to resolve factual issues that should not be reached on a motion to dismiss under Rule 12(b)(c). The Ohio Supreme Court has held that a court assessing whether speech is protected opinion "must consider the totality of the circumstances" [listing the factors applied by Judge

> Kocoras in the district court]. Bearing these factors in mind, it is not possible to say as a matter of law that Cook could prove no set of facts consistent with the amended complaint that would remove the alleged statements from the realm of protected opinion. In addition, Cook points to one Ohio opinion that observes that the statement "In my opinion Jones is a liar" is really a factual assertion masked as opinion, and is therefore not privileged. This is enough to reinforce the point that determining whether or not Winfrey's alleged statements were, in all the circumstances, opinions or assertions of fact requires an inquiry that goes beyond the allegations of the complaint into a consideration of the context in which the statements were uttered. It was therefore error for the district court to grant Winfrey's motion to dismiss . . . and we reverse.

Cook v. Winfrey, 141 F.3d 322, 330 (8th Cir. 1998). There are two lessons from this reversal. First, although one may disguise a factual statement as an opinion, courts may look past the disguise. Second, although judges may reasonably disagree on the application of summary judgment standards, the higher court's view prevails.

4. ***Problem: Fact Versus Opinion.*** Which of the following statements is/are actionably defamatory?

**A.** While Bloch's suit against Hoffman was pending, Hoffman made statements to Bloch's friend saying: "Bloch was a scumbag [who] doesn't pay his bills"; "Bloch was an incompetent attorney with no integrity"; that "representing Bloch was like representing a Nuremberg war criminal"; and that "Bloch was going to be very sorry he had brought an action against Hoffman and that he (Hoffman) was going to own Bloch's practice, 'the only thing of worth that [Bloch] had.'" See Schwartz v. Bloch, 2002 WL 374149 (Cal. App. 2002) (comparing the above to statements from other cases including descriptions of another as a "creepazoid attorney" and a "loser wannabe lawyer.")

**B.** Defending the university's punitive actions against a student against whom criminal charges were dismissed, Woodruff, a university employee, stated, "The information generated by the (university) police definitely met the definition of sexual battery, and certainly was a violation of the student code of conduct. It's not like some people want to make out, that this was two drunk people having a good time, and one of them felt bad about it the next day. For them to say (Mallory) was treated unfairly just seems kind of ridiculous, from my perspective. He definitely committed a sexual battery, from the information that was gathered." See Mallory v. Ohio University, 2001 WL 1631329 (Ohio Ct. App. 2001).

**C.** In a letter to the editor that appeared in the newspaper, the author accused the landlord of forcing a tenant, a grocery store, out of business by charging "exorbitant rent" and describing the landlord as a "ruthless speculator." See Wampler v. Higgins, 752 N.E.2d 962 (Ohio 2001).

## III. Qualified and Absolute Privileges

*Qualified* and *absolute privileges* protect people who publish statements in situations where free expression is particularly important. The traditional common law of defamation did not require the plaintiff to prove that the defendant was at fault or even that the defamatory statement was false. Easy recovery created a fear that liability for

defamation might *chill* (discourage) socially important speech. The common law's response to this fear was the development of privileges that protect a variety of types of speech necessary to the effective functioning of businesses and the government. These rules apply to both libel and slander.

An *absolute privilege* is the highest level of protection for socially important speech. Almost all absolute privileges involve speech by participants in governmental operations. A person defaming another in such a context is totally protected from liability. For instance, judges, attorneys, parties, witnesses, judicial personnel, and jurors publishing defamatory statements related to and part of a judicial proceeding have an absolute privilege. Similarly, participants in legislative proceedings and some federal and state executive and administrative officials are protected by absolute privilege for statements made in the course of carrying out their official duties. A significant nongovernmental communication that is absolutely privileged is a husband or wife's absolute privilege to make defamatory statements about a third party to the other spouse.

A *qualified privilege* (sometimes called a "conditional privilege") protects communications involving legitimate interests of speakers and recipients. The privilege to speak when defending one's rights, such as when responding to another's defamatory statements in order to protect one's own reputation, is similar to a "self-defense" privilege. An analogous privilege is given to speakers acting to protect the legitimate rights of others — the right of a person to know that his or her fiancé is a convicted murderer, of a prospective employer to know the qualifications of a job applicant, or of the public to receive reports on the functioning of the government.

Qualified privileges provide less than total protection because they may be *defeated.* Because these privileges protect speech within a particular social context to promote particular social interests, a plaintiff's proof of *excessive publication,* which is communication beyond the group of people who have a legitimate interest in the statement, or *express malice,* which is a bad motive, would overcome the privilege in traditional common law defamation. Additionally, in the modern law of defamation, *proof of fault* may overcome the privilege.

The following two cases explore the application and boundaries of absolute and qualified privileges. In Johnson v. Queenan, the defendant told a number of people that the plaintiff had raped her. The court considers which of these publications were privileged. Statements to some were absolutely privileged. Statements to the others were qualifiedly privileged. Shaw v. R.J. Reynolds Tobacco Co. is concerned with qualified privileges and how to defeat them. The court describes the elements of qualified privilege. The person asserting the privilege establishes that he had a legitimate interest to be protected, while the person seeking to defeat the privilege must establish that the other criteria are not met. The factual analysis in *Shaw* focuses on proof of express malice, which, if proved by the plaintiff, would defeat the privilege.

## JOHNSON v. QUEENAN

12 Mass. L. Rptr. 461 (Mass. Super. Ct. 2000)

GRABAU, J. . . .

The undisputed material facts as established by the summary judgment record are as follows. Johnson alleges that Queenan raped and assaulted her in a bedroom at a private party that both Johnson and Queenan attended on November 29, 1996 in

Westford, Massachusetts. Johnson acknowledges being in the bedroom and kissing Queenan. Johnson, however, contends that although she repeatedly told Queenan that she did not want to have intercourse, he held her down on the bed and raped her. Queenan denies raping Johnson, but acknowledges that Johnson was crying when he left the bedroom.

Upon leaving the bedroom, Johnson located her friend Ryan Dadmun (Dadmun) who was also at the party and told him that Queenan had just raped her. Johnson asked Dadmun to drive her home. She did not report the rape to anyone else that evening.

The next morning, Johnson telephoned Dadmun and asked him to help her make arrangements to see a doctor. After several telephone calls to various health care providers, Johnson realized that her only treatment option was the emergency room. Reluctant to go to the emergency room, Johnson asked Dadmun to bring her to her friend, Staci Scolovino's (Scolovino) home. After Johnson explained to Scolovino that Queenan raped her, Scolovino brought her to the Emerson Hospital emergency room. Johnson was not treated immediately and left the emergency room with Scolovino because the rape specialist at the emergency room was not on duty and Johnson was scheduled to work later that afternoon.

Later that evening, Dadmun again drove Johnson to Emerson Hospital's emergency room. Dr. Ingrid Balcolm and Nurse Heidi Crim (Nurse Crim) examined and treated Johnson in accordance with Massachusetts sexual assault protocol. Pursuant to G.L.c. 112 §12½, Nurse Crim reported the alleged incident to the Westford Police Department, however, at Johnson's request Nurse Crim did not provide the police with Johnson's name. Nurse Crim encouraged Johnson to discuss the incident with her parents or a close family friend.

Based on Nurse Crim's report, the Westford Police Department began a criminal investigation of the alleged incident. On December 5, 1996, as part of this investigation, Detective Michael Perron (Detective Perron) met with the Dean of Students, Carla Scuzzarella (Scuzzarella) at Johnson's school and told her that he needed to speak with Johnson. Scuzzarella arranged to have Johnson meet privately with Detective Perron. During the meeting, Johnson gave Detective Perron her account of the events of November 29, 1996. Detective Perron also encouraged Johnson to talk to her parents and accompanied her home, where Johnson told her mother about the incident involving Queenan.

As a result of the investigation, the Westford Police charged Queenan with rape and assault and battery. . . . The Grand Jury, however, did not issue an indictment to Queenan.

. . . The plaintiff bears the initial burden of proving prima facie elements of a slander claim — "the publication of a false and defamatory statement by spoken words of and concerning the plaintiff." Ellis v. Safety Ins. Co., 41 Mass. App. Ct. 630, 635 (1996), citing Restatement (Second) of Torts §§558 and 568 (1977). . . .

STATEMENTS MADE TO DETECTIVE PERRON, ASSISTANT DISTRICT ATTORNEY BEDROSIAN, AND THE MIDDLESEX GRAND JURY

Johnson asserts that various statements made to Detective Perron, ADA Bedrosian and the Middlesex Grand Jury are privileged under Massachusetts law. Once the plaintiff meets its initial burden, the defendant has the burden to show that a privilege applies. "An absolute privilege provides a defendant with complete defense to a

defamation suit even if the defamatory statement is uttered maliciously or in bad faith. A qualified or conditional privilege, on the other hand, immunizes a defendant from liability unless he or she acted with actual malice, or unless there is 'unnecessary, unreasonable or excessive publication,' and the plaintiff establishes that the defendant published the defamatory information recklessly." Mulgrew v. Taunton, 410 Mass. 631, 634 (1991). Johnson contends that her statements to Detective Perron, ADA Bedrosian and the Middlesex Grand Jury fall under an absolute privilege, thus immunizing her from any claim of defamation.

Statements made in the course of judicial proceedings which pertain to the proceeding are absolutely privileged and cannot support a claim of defamation, even if communicated with malice or in bad faith. Therefore, I find that all statements Johnson made to Detective Perron, ADA Bedrosian, and the Middlesex Grand Jury are protected under an absolute privilege because they pertain to the judicial proceeding and were made in the course of that proceeding.

STATEMENTS MADE TO NURSE CRIM, DADMUN, SCOLOVINO, AND JOHNSON'S MOTHER

Johnson also contends that her statements to Nurse Crim, Dadmun, Scolovino and her mother are conditionally privileged and thus protected against Queenan's defamation claim. Massachusetts recognizes certain privileges that are conditioned upon the manner in which they are exercised. See Sheehan v. Tobin, 326 Mass. 185, 190 (1950). One type of conditional privilege protects statements "where the publisher and the recipient have a common interest, and the communication is of a kind reasonably calculated to protect or further it." *Sheehan*, 326 Mass. at 190-91 (citations omitted). Where there is no dispute about the existence of the facts surrounding the publication, a judge must determine whether or not the privilege applies.

Here, after Johnson told Dadmun that she had been raped, he immediately brought her home. The next morning, Dadmun and Scolovino assisted Johnson in seeking medical care. Johnson told Nurse Crim about the alleged rape in order to receive the appropriate medical treatment. Johnson later confided in her mother after both Nurse Crim and Detective Perron encouraged her to do so, presumably to enable her to get proper emotional support. Thus, Johnson's publication to her two close friends Dadmun and Scolovino, Nurse Crim, and her mother are protected by a qualified privilege because the communications were reasonably calculated to further a common interest, namely Johnson's physical and emotional well-being.

Once a defendant asserts a claim of privilege, it is plaintiff's burden to prove abuse of the privilege or actual malice. In order to defeat a motion for summary judgment where state of mind, such as malice, is a material element, plaintiff must indicate "that he can produce the requisite quantum of evidence to enable him to reach the jury with his claim." Humphrey v. National Semiconductor Corp., 18 Mass. App. Ct. 132, 134 (1984), *rev. denied*, 394 Mass. 1102 (1985). Plaintiff provides no evidence to support a claim that Johnson abused the privilege through unnecessary, unreasonable or excessive publication, nor does he indicate that he can produce any evidence to enable him to reach the jury on the issue of malice. Based on the foregoing, Queenan has failed to provide sufficient evidence for a jury to infer that Johnson, without a privilege to do so, published a false and defamatory statement about Queenan. Thus, Johnson is entitled to summary judgment on Queenan's defamation counterclaim. . . .

## SHAW v. R.J. REYNOLDS TOBACCO CO.

818 F. Supp. 1539 (D. Fla. 1993)

KOVACHEVICH, J. . . .

This cause came before the Court on Defendant's Motion for Summary Judgment . . .

Plaintiff was employed by Defendant from July 6, 1971 to December 6, 1989, and worked as a sales representative at the time of his termination. Plaintiff was terminated after Eli Witt, a customer of Defendant, alleged that the Plaintiff had stolen sixty cartons of cigarettes from the customer's warehouse facility. Prior to termination, Defendant conducted an inventory of the cartons of cigarettes in Plaintiff's vehicle. This inspection revealed that Plaintiff had an excess number of cartons in his van in violation of company policy, although the parties disagree as to why there was an overage. Plaintiff was tried and acquitted of the criminal charges filed by Eli Witt pertaining to the alleged theft. Following Plaintiff's termination, Dorothy Giantonio, a customer, asked a managerial employee of Defendant about the circumstances surrounding Plaintiff's departure from the company. This employee responded that the plaintiff had been fired for stealing cigarettes from another customer. Dorothy Giantonio was an acquaintance of Plaintiff and did not believe that he had stolen anything. She did not relay this information to any other persons. This is the only communication that has been established by Plaintiff in this defamation suit, although he contends that other unidentified persons and possibly prospective employers were also told that the Plaintiff was a thief. . . .

The elements that a Plaintiff must prove in a defamation case are that the Defendant published a false statement, that the statement was communicated to a third party, and that the Plaintiff suffered damages as a result of the publication. False statements which suggest that someone has committed a dishonest or illegal act are defamatory per se. As a general rule, there is a presumption of malice where statements are defamatory per se, but that presumption ceases to exist where the Defendant has a qualified privilege to make the statements. Instead, the plaintiff then has the burden of rebutting a presumption of good faith.

The elements of qualified privilege are: good faith, an interest to be upheld, a statement limited in scope to a specific purpose, published on a proper occasion, and published in a proper manner. The question of whether publication of a false statement on a certain occasion is subject to qualified privilege is a question of law to be resolved by the Court where there is no dispute as to the circumstances surrounding the publication.

A jury question is created, however, where there is sufficient evidence of the presence of express malice indicating that the qualified privilege has been abused. Express malice has been defined as "ill will, hostility, evil intention to defame and injure," and is a very high standard for a plaintiff to meet. Montgomery v. Knox, 3 So. 211 (1887). In Nodar v. Galbreath, 462 So. 2d 803, 811-12 (Fla. 1984), the Florida Supreme Court expanded the definition of express malice and stated:

> Where a person speaks upon a privileged occasion, but the speaker is motivated more by a desire to harm the person defamed than by a purpose to protect the person or social interest giving rise to the privilege, then it can be said that there was express malice and the privilege is destroyed. Strong, angry, or intemperate words do not alone show express malice; rather, there must be a showing that the speaker used his

> privileged position "to gratify his malevolence." If the occasion of the communication is privileged because of a proper interest to be protected, and the defamer is motivated by a desire to protect that interest, he does not forfeit the privilege merely because he also in fact feels hostility or ill will toward the plaintiff. The incidental gratification of personal feelings of indignation is not sufficient to defeat the privilege where the primary motivation is within the scope of privilege. (Citations omitted.)

In the instant case, Plaintiff has specifically identified only one person to whom Defendant has published information relating to the Plaintiff's dismissal. The deposition testimony of Mrs. Giantonio and the employee who published the information to her are consistent with respect to material issues, and Plaintiff has failed to allege any material fact with respect to this publication which would prevent this Court from resolving this matter on summary judgment. . . .

The single publication by Defendant's employee established by Plaintiff is qualifiedly privileged, and the privilege was not abused in this particular instance. The Defendant's statements were made in good faith in response to an inquiry from a customer, its publication was limited in scope, and the information was not disclosed to additional persons. Furthermore, the parties to the conversation shared corresponding business interests: the customer had an interest in learning what happened to a sales representative with whom she had a longstanding personal and business relationship, and the Defendant had the primary motive of responding adequately to a customer's inquiry. Plaintiff has failed to offer evidence that Defendant acted with the "ill will, hostility, and evil intent to defame" required to establish express malice, or that Defendant's primary motive in publishing the information was to harm Plaintiff. In fact, the Plaintiff's only allegations relating to the presence of express malice are contained in his Affidavit which states: "I am at a total loss to discern any factual basis by which Mr. McMahon could conclude that I was a thief. Although we tolerated each other in the business relationship, we were not friends on a personal basis." Clearly, the lack of a personal friendship does not equate to express malice as defined by the Florida Supreme Court in *Nodar*.

Plaintiff further contends in his Affidavit that he believes that Defendant had been planning to fire him for some time, and that he had received a final warning a few weeks before his termination. This allegation is irrelevant to whether the Defendant acted with express malice on a later occasion when publication occurred. Florida's status as a right-to-work state prohibits Plaintiff from recovering for the loss of his employment, despite his claims for damages for lost wages in his pleadings, and accordingly, the factors surrounding his termination are only relevant to the issue of whether the Defendant knew that the allegations were false when its employee published the allegedly defamatory statements. However since Plaintiff has failed to provide this Court with any evidence of express malice, it is unnecessary to address whether the allegations of theft were true, and more importantly, whether Plaintiff has suffered any compensable injury as a result of the publication. Accordingly, it is ordered that the Defendant's Motion for Summary Judgment . . . be granted.

## NOTES TO JOHNSON v. QUEENAN AND SHAW v. R.J. REYNOLDS TOBACCO CO.

**1. *Absolute and Qualified Privileges.*** The various third parties to whom Ms. Johnson published her allegedly defamatory statements about Mr. Queenan

were divided into two groups. Statements to one group were absolutely privileged, while statements to the other were given only a qualified privilege. What justifies the difference in treatment of the two groups?

2. ***Problem: Qualified and Absolute Privileges.*** In an omitted portion of the opinion in *Johnson*, the court discussed Queenan's allegation that after the grand jury failed to indict him, Johnson told Scuzzarella, the dean of students at Johnson's school, "the bastard got off." Queenan does not allege that Johnson told Scuzzarella that he raped her. Is this statement actionable slander? Consider first whether it is slander per se or per quod. Queenan made no allegations of special damages. If this statement is otherwise actionable, is this publication absolutely or qualifiedly privileged?

3. ***Express Malice.*** The court in *Shaw* considers whether the offered proof of express malice was sufficient to defeat the qualified privilege on which the employer relied. What is that evidence? The court in *Johnson* held that Queenan had not produced any evidence to enable him to reach the jury on the issue of malice. What evidence might Queenan have produced? If he could prove that the plaintiff was angry with him because she thought he had raped her, would that testimony be useful in establishing her express malice? Would it be sufficient to overcome a qualified privilege? Consider carefully the quotation from the Florida Supreme Court's opinion in Nodar v. Garbreath.

4. ***"Defamation-Proof" Defendants.*** A defendant may claim that a plaintiff's reputation in the community was so tarnished that no harm could have occurred. If accepted, this claim may result in the award of only nominal damages because no damages could reasonably be presumed and no actual damages could be proved. In Wynberg v. National Enquirer, Inc., 564 F. Supp. 924, 927-928 (D. Cal. 1982), the court held that the plaintiff, who had a brief but highly publicized romance with actress Elizabeth Taylor, was libel-proof. Wynberg had been convicted of criminal conduct on five separate occasions, including a conviction for contributing to the delinquency of minors. The court concluded

> When, for example, an individual engages in conspicuously anti-social or even criminal behavior, which is widely reported to the public, his reputation diminishes proportionately. Depending upon the nature of the conduct, the number of offenses, and the degree and range of publicity received, there comes a time when the individual's reputation for specific conduct, or his general reputation for honesty and fair dealing is sufficiently low in the public's estimation that he can recover only nominal damages for subsequent defamatory statements.

Even if a plaintiff is not completely defamation-proof, evidence of a tarnished reputation will diminish the amount of damages recoverable. See Marcone v. Penthouse International Magazine for Men, 754 F.2d 1072, 1079 (3d Cir. 1985), in which the defamation claim was brought by an attorney who had been prominently linked to a motorcycle gang, indicted in connection with drug trafficking, tried for criminal income tax evasion, and fined for punching a police officer. The court instructed the jury that it could consider this evidence in determining the appropriate amount of compensatory damages.