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Torts—Evidence of Lack of Malice by Defendant to Mitigate Damage in Defamation Action

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cept of valuable consideration is often used in a conveyancing context to determine whether one taking a conveyance without notice of an outstanding interest will be protected by a recording statute. In this context it has been explained thus:

Although there is authority to the contrary, generally the term "valuable consideration" is used in contradistinction to a good, valid, or sufficient consideration. The term means something of substantial value, such as money, or something that is worth money, as, for example, legal or other services. Moreover, to constitute a consideration the thing of value which is given must be in respect of the contract of sale.³⁸

At least one other jurisdiction has required such consideration under a comparable statute: "actual monetary consideration or . . . considerations which have a reasonably determinable pecuniary value."³⁹

If the county taxing authorities cannot be convinced of the justice of one's position on the basis of the sources and principles above discussed, then the taxpayer must become reconciled to payment of the tax although convinced that it is unjustly levied, unless he is prepared to sacrifice for the sake of principle. Only in rare instances, such as the *Doric* case, are sufficient amounts involved as to make an eventual victory worth the cost of the battle.

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³⁸ 92 C.J.S. *Vendor & Purchaser* § 323 at p. 225 (1955). See also 55 AM. JUR. *Vendor & Purchaser* § 736 (1946); Annot., 59 A.L.R. 632, 636 (1929).

³⁹ *DeVore v. Gay*, 39 So. 2d 796, 797 (Fla. 1949) (holding that promises to pay rent in the future and perform other covenants were not valuable consideration).

TORTS

Evidence of Lack of Malice by Defendant to Mitigate Damages in Defamation Action. Prior to the appearance of *Farrar v. Tribune Publishing Co.*,¹ it appeared reasonably clear that in defamation actions,² evidence of the defendant's malice or good faith was not admissible for the purpose of enhancing or mitigating damages. Since

¹ For a survey of the law of libel in Washington see Comment, 30 WASH. L. REV. 36 (1955).

² 57 Wn.2d 549, 358 P.2d 792 (1961).

malice is not an essential element of civil libel or slander,³ evidence of malice was considered immaterial⁴ and hence inadmissible⁵ under the Washington rule prohibiting punitive or exemplary damages.⁶ The actual malice of the defendant was considered relevant only in those actions which involved overcoming a qualified privilege.⁷ *Farrar* seems to have changed or at least obscured the clarity of these rules.

The *Farrar* litigation arose out of the 1956 political campaign for the state senate between Farrar and George W. Kupka. During the course of the campaign Kupka had a libelous article concerning Farrar published in the Tacoma News Tribune, as a paid political advertisement. Farrar sued both Kupka and the newspaper, but Kupka was dropped during the course of the proceedings. Judgment was entered against the newspaper alone for \$23,000.

On appeal the newspaper assigned as error the trial court's ruling that evidence showing lack of malice on the part of the newspaper was inadmissible. The supreme court reversed and remanded the cause, holding that under the express provisions of RCW 4.36.130⁸ defendant might introduce such evidence to mitigate damages. The court assigned the following reasons to support its conclusion: (1) in *Ott v. Press Publishing Co.*,⁹ the court had interpreted the same statute to allow the admission of evidence showing defendant's lack of malice. (2) The recovery of compensatory damages in Washington for mental pain and suffering is akin to the exemplary damage rule in other jurisdictions. The jury, exercising broad discretion in each case, should have all the surrounding circumstances before it. (3) Malice was inferred from a publication libelous per se and being thus before the jury, was relevant to the litigation.

The statute which now appears as RCW 4.36.130 was enacted in the first session of the territorial legislature in 1854,¹⁰ thirty-seven years

³ *Yelle v. Cowles Publishing Co.*, 46 Wn.2d 105, P.2d 671 (1955); *Ziebell v. Lum-bermen's Printing Co.*, 14 Wn.2d 261, 127 P.2d 677 (1942).

⁴ *Wilson v. Sun Publishing Co.*, 85 Wash. 503, 148 Pac. 774 (1915); *Woodhouse v. Powles*, 43 Wash. 617, 86 Pac. 1065 (1906); *Davis v. Tacoma Ry. & Power Co.*, 35 Wash. 203, 77 Pac. 209 (1904).

⁵ *Olympia Water Works v. Mottman*, 88 Wash. 694, 153 Pac. 1074 (1915).

⁶ *Spokane Truck & Dray Co. v. Hoeter*, 2 Wash. 45, 25 Pac. 1072 (1891).

⁷ *Ward v. Painters' Local Union* 300, 41 Wn.2d 859, 252 P.2d 253 (1953); *Ecuyer v. New York Life Ins. Co.*, 101 Wash. 247, 172 Pac. 359 (1918).

⁸ RCW 4.36.130 "Answer in justification and mitigation." In an action mentioned in RCW 4.36.120, [libel or slander, how pleaded] the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances."

⁹ 40 Wash. 308, 82 Pac. 403 (1905).

¹⁰ Wash. Terr. Sess. Laws 1854, Civil Practice, § 62 Rules of Pleading.

prior to the announcement of the rule prohibiting the award of punitive damages in Washington.¹¹ In the *Ott* case, counsel argued that the admission of evidence that a publisher of a defamatory statement was not motivated by malice would violate the rule against punitive damages. The court rejected that argument and indicated that the statute gave the defendant the right to introduce such evidence. However, it appears that the defendant in the *Ott* case proved the truth of the allegedly libelous statement, thus establishing a complete defense.¹² The court's interpretation of the statute should therefore be regarded as dictum, being unnecessary to the decision.

In subsequent Washington cases concerning the relevancy of malice to damages in defamation actions, the statute was not considered,¹³ and it was uniformly held that evidence of actual malice was immaterial.¹⁴ The position of the court appeared to be that "actual malice . . . is material only on the question of punitive or exemplary damages. . . ."¹⁵ Where the defendant sought to introduce evidence of lack of malice for the purpose of mitigating damages it was held properly excludable.¹⁶ In the *Farrar* case this position was abandoned without comment, the court relying on the statutory interpretation of the *Ott* case to reach the desired result.

It must be noted that the *Ott-Farrar* interpretation of the statute was not the only possibility. In *Republican Publishing Co. v. Mosman*,¹⁷ the Colorado court under an identical punitive damages rule had interpreted an identical statute¹⁸ as not allowing the introduction of evidence of defendant publisher's lack of malice.¹⁹ Evidence showing that the libelous statement had been previously circulated throughout

¹¹ *Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45, 25 Pac. 1072 (1891).

¹² "[B]y reason of the truth of the publication, which must have been found by the jury, appellants were not entitled to recover any damages whatever." 40 Wash. 308, 311, 82 Pac. 403, 404 (1905).

¹³ *Olympia Water Works v. Mottman*, 88 Wash. 694, 153 Pac. 1074 (1915); *Wilson v. Sun Publishing Co.*, 85 Wash. 503, 148 Pac. 774 (1915); *Woodhouse v. Powles*, 43 Wash. 617, 86 Pac. 1065 (1906). A possible explanation is that the *Ott* interpretation was not recorded in the annotations to the Washington code.

¹⁴ *Ibid.*

¹⁵ *Davis v. Tacoma Ry. & Power Co.*, 35 Wash. 203, 207, 77 Pac. 209, 211 (1904).

¹⁶ *Olympia Water Works v. Mottman*, 88 Wash. 694, 153 Pac. 1074 (1915). In this case the appellant-defendant had attempted, in the trial court, to introduce evidence in mitigation to show that the libelous statement was published without malice. The trial court's ruling that the proffered evidence was inadmissible because immaterial for the purposes of mitigating damages was affirmed.

¹⁷ 15 Colo. 399, 24 Pac. 1051 (1890).

¹⁸ COLO. CODE CIVIL PROC. § 69.

¹⁹ In the *Farrar* case the court cited the *Republican Publishing Co.* case for the proposition that evidence of lack of malice by the publisher was admissible under the statute. The Colorado court held directly to the contrary.

the community, thus damaging plaintiff's reputation, was, however, held admissible under the statute. It appeared that not all the surrounding circumstances could properly be placed before the jury, but only those factors considered relevant to the amount of injury suffered by the plaintiff.

The Washington court in 1891 announced that punitive damages are not recoverable.²⁰ The unavailability in a civil action of the procedural safeguards of a criminal proceeding was assigned by the court as sufficient reason to confine punishment to criminal actions.²¹ This position was strengthened four years later²² when the court interpreted the term "exemplary damages" in a statute providing for their recovery²³ to mean *actual* damage to reputation, pride and feelings. This construction has been subsequently avoided and the fully developed rule appears to be that punitive or exemplary damages²⁴ are not recoverable except as expressly provided for by statute.²⁵

In the *Farrar* decision the court has in effect approved the awarding of exemplary damages in cases where mental pain and suffering are involved. The court indicated that there was little or no difference between the exemplary damage rule of other jurisdictions and the Washington rule of compensatory damages for "wounded feelings, shame, humiliation, mental anguish and distress. . . ."²⁶ "In either case, the jury is guided solely by its own discretion. . . . [and] is entitled to know all of the surrounding circumstances. . . ."²⁷

By holding that "mental suffering and injury to feelings are proper elements of compensatory damages,"²⁸ an anomalous situation may be presented in which the amount of the plaintiff's recovery may in part

²⁰ *Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45, 25 Pac. 1072 (1891).

²¹ For a discussion of the punitive damages question from a policy standpoint, see *Morris, Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931).

²² *Levy v. Fleischer*, 12 Wash. 15, 40 Pac. 384 (1895).

²³ RCW 7.12.080 (wrongful and malicious attachment).

²⁴ The terms "exemplary" and "punitive" damages are normally used synonymously. *E.g.*, exemplary damages are additional damages to "solace the plaintiff for mental anguish . . . or else punish the defendant for his evil behavior or to make an example, for which reason they are also called punitive . . . damages . . ." *Black, Law Dictionary* 467 (4th ed. 1951). A possible distinction might be that the purpose of exemplary damages is to make an example of the wrongdoer for the purpose of deterring similar conduct by others, while punitive damages are directed toward punishing the defendant.

²⁵ *Anderson v. Dalton*, 40 Wn.2d 894, 246 P.2d 853 (1952); *Walker v. Gilman*, 25 Wn.2d 557, 171 P.2d 797 (1946). Treble damages are also recoverable in Washington when authorized by statute. *E.g.*, RCW 64.12.020 (voluntary waste by tenant or sub-tenant); RCW 79.01.756 (conversion of timber); RCW 64.12.030 (injury to or removal of trees from state or private lands).

²⁶ 57 Wn.2d 549, 553-554, 358 P.2d 792, 795 (1961).

²⁷ *Id.* at 555, 358 P.2d at 796.

²⁸ 57 Wn.2d 549, 557, 358 P.2d 792, 797 (1961).

depend upon which party he sues. The majority opinion did not discuss the issue, but Judge Mallery in dissent stated that "the advertising medium has never before been permitted to establish a lesser liability than that of the advertiser by showing that it did not share the advertiser's malice. Mitigating circumstances went to the amount of the damage, not to the question of which party was defending the action."²⁹ If the measure of damages is the amount that the plaintiff has been injured, it is submitted that the party against whom the action is brought should not affect the extent of the plaintiff's recovery.

In the *Farrar* case the court concludes by stating, "since the existence of malice was implied from the publication which was libelous *per se* and was thus before the jury, the jury should have before it all relevant circumstances."³⁰ The court is apparently saying that actual malice may be inferred from a libelous publication.

The terms "actual" and "implied" malice have been a source of confusion to the courts of many jurisdictions. Originally, actual malice was a necessary element in a civil defamation action, but by 1825 it had become an irrebutable presumption and thus a fiction.³¹ Modernly, courts have referred to malice in two senses: "implied" malice meaning that the libelous statement is actionable, and "actual" malice meaning ill will or improper purposes.³² In view of the fact that these two meanings are unrelated, it seems improbable that the Washington court would hold that since "implied" malice will be presumed from a publication libelous *per se*, evidence of lack of "actual" malice would be admissible to rebut this presumption.

A California case, *Shumate v. Johnson Publishing Co.*,³³ was cited by the court for the proposition that actual malice may be inferred from a publication which is libelous *per se*.³⁴ In referring to the question of

²⁹ *Id.* at 561, 358 P.2d at 799.

³⁰ 57 Wn.2d 549, 559, 358 P.2d 792, 799 (1961).

³¹ PROSSER, TORTS § 94 (2d ed. 1955).

³² 1 HARPER & JAMES, TORTS § 5.27 (1956).

³³ 139 Cal. App. 2d 121, 293 P.2d 531 (Dist. Ct. App. 1956).

³⁴ Two Washington cases were also cited by the court for this proposition: *Chambers v. Leiser*, 43 Wash. 285, 86 Pac. 627 (1906). This action involved a qualified privilege and actual malice was therefore in issue. The court said at 289 "[Since the communication was privileged it] . . . was therefore incumbent upon plaintiff, by means of the matters in the letter or by any other competent evidence, to show that defendant had been actuated by malice or ill will towards plaintiff . . ." *Stewart v. Major*, 17 Wash. 238, 49 Pac. 503 (1897), states that if it is proved that the defendant made a false statement, knowing it to be false, it will be assumed to be malicious. It is not clear from this statement which type of malice is intended. Furthermore, liability for defamation is not usually based upon knowledge by the defendant that the statement was false, but upon a strict liability theory. *Miles v. Wasmer*, 172 Wash. 466, 20 P.2d 847 (1933); PROSSER, *op. cit. supra* note 31, § 94.

exemplary damages, the California court stated that a trier of fact might infer actual malice "from the intrinsic evidence which the publication affords. . . ."³⁵ Because the question of actual malice was raised in considering an award of exemplary damages,³⁶ the holding of the *Shumate* case was proper. The California court has distinguished between actual and implied malice as indicated by *Childers v. San Jose Mercury Printing & Publishing Co.*,³⁷ cited in the *Shumate* opinion. In the *Childers* case, the court stated that "actual malice, or malice in fact, is only material in libel as establishing a right to recover exemplary damages, or to defeat defendant's plea that a publication is privileged."³⁸ In the *Farrar* decision the court failed to recognize that an inference of actual malice from a publication does not establish its relevance. Prior Washington cases consistently holding that actual malice is not relevant in a libel action³⁹ (where no qualified privilege is involved) were not distinguished.

No prior decisions were expressly overruled by the *Farrar* case. As a result, conflicting rules in three separate aspects of an already confused defamation area have been created: (1) Ignoring a consistent line of Washington cases to the contrary, the court holds that evidence of lack of malice by a publisher of a defamatory statement is admissible, under the statute, for the purpose of mitigating damages. (2) Although punitive or exemplary damages are not recoverable in Washington, unless authorized by statute, the court states that the compensatory damage rule, where mental pain and suffering are involved, is indistinguishable from the exemplary damage rule of other jurisdictions. (3) Although in Washington actual malice is not an essential element in civil libel or slander, the court indicates that actual malice is to be inferred from a publication which is libelous per se, and being thus before the jury is a proper element for consideration.

In view of the conflicting positions taken by the court and the un-

³⁵ *Shumate v. Johnson Publishing Co.*, 139 Cal. App. 2d 121, 293 P.2d 531, 541 (Dist. Ct. App. 1956).

³⁶ CAL. CIVIL CODE § 3294 provides for the award of exemplary damages in certain situations.

³⁷ 105 Cal. 284, 38 Pac. 903 (1894).

³⁸ *Id.* at 904.

³⁹ *Hollenbeck v. Post-Intelligencer Co.*, 162 Wash. 14, 19, 297 Pac. 793, 795 (1931) ("The article having a necessary tendency to damage appellant and her business, any allegation of malice was immaterial."); *Byrne v. Funk*, 38 Wash. 506, 514, 80 Pac. 772, 774 (1905) (*Held*, in a libel action where no qualified privilege was involved that "the special finding of the jury that respondent was not actuated by malice is not inconsistent with the general verdict awarding recovery."). See also cases cited *supra* note 3.

certainties involved in this area, it is hoped that the court will have occasion to review the questions here presented and clarify its position on these issues.

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Interspousal Actions—Personal Torts. In *Goode v. Martinis*,¹ the Washington Supreme Court held that a wife has a cause of action in tort for an assault committed upon her by her husband while the parties are legally separated and divorce proceedings are pending. While restricting its holdings to the particular facts, the court rejected the rationale advanced in favor of the common law doctrine of spousal disability.²

The trial court dismissed the plaintiff's complaint for failure to state a claim upon which relief can be granted. The complaint alleged the following facts. On the evening of January 9, 1958, Paul V. Martinis entered the residence of the plaintiff, Edna V. Goode, his wife, and assaulted her by forcibly having sexual intercourse with her against her will. The assault occurred approximately eight weeks after the parties had separated. However, it was not until almost six weeks after the alleged assault that a divorce action was tried and a final divorce decree awarded.

On appeal the court held that the leading Washington case on interspousal personal torts action, *Schultz v. Christopher*,³ was not controlling because of the narrow purpose of the statute⁴ upon which the holding was based. The court recognized the existence of three statutes⁵ which make reference to the right of spouses to maintain actions in their individual capacity. The court did not construe the aggregate effect of these statutes upon abrogation of the common law doctrine of spousal disability. However the tenor of the opinion manifests serious

¹ 158 Wash. Dec. 222, 361 P.2d 941 (1961).

² *Id.* at 226, 361 P.2d at 944-45.

³ 65 Wash. 496, 118 P. 629 (1911).

⁴ RCW 26.16.160, providing that "All laws which impose or recognize civil disabilities upon a wife, which are not imposed or recognized as existing as to the husband, are hereby abolished, and for any unjust usurpation of her natural or property rights, she shall have the same right to appeal in her own individual name, to the courts of law or equity for redress and protection that the husband has: *Provided always*, That nothing in this chapter shall be construed to confer upon the wife any right to vote or hold office, except as otherwise provided by law."

⁵ RCW 26.16.130, providing that "A wife may receive the wages of her personal labor and maintain an action therefor in her own name and hold the same in her own right, and she may prosecute and defend all actions at law for the preservation and protection of her rights and property rights as if unmarried." RCW 26.16.150, providing that "Every married person shall hereafter have the same right and liberty to acquire, hold, enjoy and dispose of every species of property, and to sue and be sued, as if he or she were unmarried." RCW 26.16.160, *supra* note 4.