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Thomas J. Brennan

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COMMENTS

AN OUTLINE OF THE LAW OF LIBEL IN WASHINGTON

THOMAS J. BRENNAN

For legal writers, the law of defamation has provided one of the fairest targets for criticism. It is an area of law which in many respects is extremely anomalous and confused. The Washington law in this respect is no different from that of other jurisdictions. But in reading over the cases it seemed that, rather than criticise or discuss the problems to any great extent, it might be helpful to those concerned with the subject to provide an outline and citations which would serve as a starting point and guide for further research. This is the purpose of this article.

A convenient formula has been developed for dealing with defamation. It has been expressed in these words: "The publication of any defamatory false statement hurtful to [another] gives rise to an action for damages unless the publication is protected by some privilege."¹ The elements of this formula may be grouped under five general headings: I. Defamatory statements; II. Publication; III. Defenses; IV. Damages; V. Burden of proof and functions of judge and jury.²

I. DEFAMATORY STATEMENTS.

Defamation is divided into the actions of libel and slander. The former is defined in a general way as written or printed defamation, the latter as spoken. There are cases, however, which do not conform to this narrow definition. Defamation by means of pictures, statues, or "persistent conduct," for example, is treated as libel by expanding its definition to include "embodiment in physical form, or any other form of communication which, because of its permanence, has the potentially harmful qualities characteristic of written or printed words."³ The

¹ Green, *Relational Interests*, 31 ILL. L. REV. 35 (1936).

² In considering the elements of defamation, the emphasis will be placed on libel, with only incidental discussion of slander. The footnotes, *infra*, contain all of the Washington cases on civil libel.

³ 3 RESTATEMENT, TORTS § 568. (1938). The following cases are illustrative: Peck v. Tribune Publishing Co., 214 U.S. 185 (1908) (pictures); Merle v. Sociological Research Film Corp., 166 App. Div. 376, 152 N.Y.S. 829 (1915) (motion pictures);

differing rules which, in most jurisdictions, have been developed for the two forms of actions make a distinction necessary. The most important of these rules provides that an action for libel will lie without proof of actual loss, while an action for slander requires proof of special damage. There is the exception, however, that when a slander is "actionable *per se*," proof of special damage is not required. The phrase is applied to those defamatory words which impute a crime or loathsome disease, or which effect the plaintiff in his business, trade, profession or calling.⁴ Modern statutes and decisions also include the imputation of unchastity to a woman,⁵ and the Washington cases seem to have expanded the phrase to include words which "tend to subject [the plaintiff] to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse."⁶

In Washington, as in several other states, the rules of slander have been carried over to the area of libel, and the distinction must also be made between libel *per se* and libel which is actionable only in the event that special damages can be pleaded and proved.⁷ This distinction apparently resulted from confusing the necessity of proof that the words have a tendency to defame, with that of the damage suffered as a result. In other words, because the plaintiff must show the defamatory character of the charge, he must also show special damage.⁸ This is vigorously opposed by modern writers.⁹ As a result of the distinction, it is safe to say that, though they are discussed separately, there are no substantial differences in the rules of civil libel and slander as they

Johnson v. Commonwealth, 14 Atl. 425 (Pa., 1888) (hanging plaintiff in effigy); Cox v. National Loan & Exchange Bank, 138 S.C. 381, 136 S.E. 637 (1927) (dishonoring valid check drawn on defendant bank); Schultz v. Frankfort Marine Ins. Co., 151 Wis. 537, 139 N.W. 386 (1913) (following plaintiff in obvious manner, *i.e.*, "shadowing").

⁴ Ecuyer v. N.Y. Life Ins. Co., 101 Wash. 247, 172 Pac. 359 (1918); 107 Wash. 411, 181 Pac. 871 (1919); ODGERS, LIBEL AND SLANDER 35 (6th ed. 1929).

⁵ PROSSOR, TORTS 799 (1941).

⁶ Magee v. Cohn, 187 Wash. 157, 59 P.2d 1131 (1936). This, of course, would include the imputation of unchastity to a woman.

⁷ The "doctrine" was adopted in Washington without consideration of the implications. Urban v. Helmick, 15 Wash. 155, 45 Pac. 747 (1896). Some courts use the terms "libel *per se*" and "libel *per quod*." Isham, *Libel per se and Libel per quod in Ohio*, 15 OHIO ST. L. J. 303 (1954). But the latter phrase has not found its way into the Washington cases.

⁸ In a few Washington cases the court seems to recognize the distinction. *E.g.*, Haynes v. Spokane Chronicle Pub. Co., 11 Wash. 503, 39 Pac. 969 (1895); Wilson v. Sun Pub. Co., 85 Wash. 503, 148 Pac. 774 (1915). These cases use the phrase "*prima facie libelous*."

⁹ *E.g.*, PROSSOR, TORTS § 92 (1941); McCORMICK, DAMAGES § 113 (1935); Green, *Relational Interests*, 31 ILL. L. REV. 35 (1936); Burke, *Libel per se*, 14 CAL. L. REV. 61 (1925); Carpenter, *Defamation—Libel per se—Special Damages*, 7 ORE. L. REV. 353 (1928).

exist in Washington. In one particularly illustrative case¹⁰ a radio station was held liable for defamatory statements broadcast over its facilities, though the court refrained from saying whether the decision and liability were predicted upon the rules of slander or upon those of libel.¹¹ As the outcome would have been the same in either case, the determination was unnecessary.

It is generally agreed that the rules of libel and slander should be united.¹² That this was accomplished in Washington by applying the rules of slander to all defamation is unfortunate, for these are rules which contain many absurdities. For instance, in those states which do not consider the imputation of unchastity to a woman as "actionable *per se*," the rules of slander will permit a woman to recover for ridicule of her hat, but will deny recovery if she is unmarried and called a prostitute.¹³ At least four proposals have been offered as a more desirable and logical basis on which the two might be united. 1. It has been suggested that, in all cases, proof of actual damage should be required as essential to the existence of a cause of action. 2. The opposite view would make all defamation, oral or written, actionable without proof of damage. 3. A compromise proposal would distinguish between major and minor defamatory imputations, and, having regard to all extrinsic facts, make only the former actionable without proof of damage. 4. As an alternative, the extent of publication has been submitted as the basis of distinction.¹⁴

Though more workable rules would be desirable, the fact remains that the present rules in this respect are well engrafted into the Washington law. If, therefore, it is determined that the writing is not libelous *per se*, it is necessary to show its defamatory nature and in addition to

¹⁰ *Miles v. Wasmer*, 172 Wash. 466, 20 P.2d 847 (1933).

¹¹ The question is still the subject of debate. *Sorenson v. Wood*, 123 Neb. 348, 243 N.W. 82, 82 A.L.R. 1098 (1932) (defamation by radio is libel); *Summit Hotel Co. v. Nat'l Broadcasting Co.*, 336 Pa. 182, 8 A.2d 302, 124 A.L.R. 968 (1939) (slander). See *Graham, Defamation and Radio*, 12 WASH. L. REV. 282 (1937); *Leflar, Radio and TV Defamation*, 15 OHIO ST. L. J. 252 (1954). The Restatement would turn the decision on the deliberate and premeditated character of the publication, and the persistence of the defamatory conduct. 3 RESTATEMENT, TORTS § 568, Comment f (1938). In 1935 the criminal libel code was amended to include radio broadcasting. RCW 9.58.010. But this leaves open the question whether the same rules apply in a civil action. *Cf. Enright v. Bringold*, 106 Wash. 233, 179 Pac. 844 (1919). The liability of the owner or operator of a radio or television station has been limited by RCW 19.64.010 (owner or operator shall not be liable in damages for defamatory statements if person speaking is required to submit a written script prior to the broadcast, unless the defamatory statements are contained in the written script).

¹² *E.g.*, 3 RESTATEMENT, TORTS § 568, Comment b (1938).

¹³ *Barnett v. Phelps*, 97 Ore. 242, 191 Pac. 502 (1920).

¹⁴ An elaboration and citations can be found in *PROSSOR, TORTS* § 92 (1941). He suggests that a combination of the latter two are most likely to be adopted generally.

plead and prove special damages. In making the determination, which is a matter of law,¹⁵ the court has said that the writing should be "read as a whole, in its natural and obvious sense, and not extended by the conclusions of the pleader, and the defamatory matter must be certain and apparent from the words themselves."¹⁶ In conjunction with this statement, a safe rule of thumb to follow is that, eliminating the statutory element of malice, any defamatory writing which comes within the criminal libel statute is considered to be libelous *per se* in a civil action.¹⁷

¹⁵ *Ward v. Painters' Local Union*, 41 Wn.2d 859, 252 P.2d 253 (1953).

¹⁶ *Graham v. Star Pub. Co.*, 133 Wash. 387, 233 Pac. 625 (1925).

¹⁷ By RCW 9.58.010, a writing, picture, effigy, sign, etc., is criminally libelous if it tends—

"(1) To expose any living person to hatred, contempt, ridicule, or obloquy, or to deprive him of the benefit of public confidence or social intercourse; or

"(2) To expose the memory of one deceased to hatred, contempt, ridicule, or obloquy; or

"(3) To injure any person, corporation, or association of persons in his or its business or occupation. . . ."

The following are illustrative of writings considered to be libelous *per se*: *Byrne v. Funk*, 38 Wash. 506, 80 Pac. 772 (1905) (calling public officer a "liar and poltroon"); *Reynolds v. Holland*, 46 Wash. 537, 90 Pac. 648 (1907) (newspaper article charging that plaintiff, an attorney, charged an excessive fee for the foreclosure of a mortgage, when the work was done by defendant's attorney); *Quinn v. Review Pub. Co.*, 55 Wash. 69, 104 Pac. 181 (1909) (charging city inspector of sidewalks with being part of a system of jobbery and graft); *Lanthrop v. Sundberg*, 55 Wash. 144, 104 Pac. 176 (1909) (charge that osteopaths were "criminal practitioners, fakirs, quacks, charlatans and other fraudulent concerns"); *Wells v. Times Printing Co.*, 77 Wash. 171, 137 Pac. 457 (1913) (charge of violation of statute defining the public desecration or disrespect of the United States flag); *Wilson v. Sun Pub. Co.*, 85 Wash. 503, 148 Pac. 774 (1915) (charge that plaintiff's restaurant was dirty, unsanitary, poorly ventilated, the abode of microbes, etc.); *Dick v. Northern Pac. RR Co.*, 86 Wash. 211, 150 Pac. 8 (1915) (publication of a writing discharging employee "for intimidating company's employees"); *Olympia Water Works v. Mottman*, 88 Wash. 694, 153 Pac. 1074 (1915) (statements concerning a water company to the effect that the city's drinking water came through an open ditch past China gardens, that every time it rained "we drink drainage water"); *Cyclo homo Amusement Co. v. Hayward-Larkin Co.*, 93 Wash. 367, 160 Pac. 1051 (1916) (billboard posters, printed in red, stating that plaintiff's theater could not display union card and was therefore dangerous); *McKillip v. Grays Harbor Pub. Co.*, 100 Wash. 657, 171 Pac. 1026 (1918) (charge of violation of statute prohibiting false reports concerning a candidate for election); *Roane v. Columbian Pub. Co.*, 126 Wash. 416, 218 Pac. 213 (1923) (newspaper article criticising city councilman for an ordinance relating to dogs, characterized as an "idiotic performance"); *Graham v. Star Pub. Co.*, 133 Wash. 387, 233 Pac. 625 (1925) (charge that police officer was discharged from service for criminal offenses); *Tenant v. Whitney & Sons*, 133 Wash. 581, 234 Pac. 666 (1925) ('report of plaintiff's prosecution for unlawful possession of "booze" of which plaintiff had been acquitted on a technicality); *Hansen v. Parks*, 139 Wash. 241, 246 Pac. 584 (1926) (charging burglarious entry); *Ryan v. Tribune Pub. Co.*, 148 Wash. 295, 268 Pac. 893 (1928) (charging plaintiff with collusion in connection with county printing contract); *Holenbeck v. Post-Intelligencer Co.*, 162 Wash. 14, 297 Pac. 793 (1931) (charge that plaintiff's rooming house was being operated as a vice den to lure young girls and ply them with liquor); *Luna de la Peunte v. Seattle Times Co.*, 186 Wash. 618, 59 P.2d 753 (1936) (false report of all night drinking party at which plaintiff attended and got drunk); *Ziebell v. Lumberman's Printing Co.*, 14 Wn.2d 261, 127 P.2d 677 (1942) (article charging public utility district officer with being a confessed tool of Wall Street); *Carey v. Hearst Publications*, 19 Wn.2d 655, 143 P.2d 857 (1943) (false report that judge had censured an attorney for falsely testifying); *Arnold v. Nat'l*

II. PUBLICATION.

Since the interest protected is that of reputation, it is an essential element that the defamation be communicated to someone other than the person defamed.¹⁸ To this element is given the name "publication." The term is not used in its technical sense as meaning written or printed, since, as was mentioned above, a libel may be conveyed by means of pictures, statues, or "persistent conduct." In Washington, republication of a libel is actionable to the same extent as the original release.¹⁹

One problem in particular which has confronted the Washington court as to what constitutes publication relates to business communications. It has been held that a defamatory communication sent by a corporation from its home office to a branch office, relating to and for the attention of its employees, is not itself a publication within the law of libel, since the employees are not third persons in their relation to the corporation.²⁰ A few cases from other jurisdictions have held that such communications are qualifiedly privileged.²¹ The difference is an important one, for if there is no publication, the existence of "malice" will not serve to overcome the defense as would be the case were the communication considered to be qualifiedly privileged. To say that there is no publication is somewhat of a legal fiction of course, yet the term "publication" is a technical one, and as such it is not surprising that restrictions should be placed on its meaning. Other types of business communications are considered to be qualifiedly privileged.²²

III. DEFENSES.

If the defamatory nature of the alleged libel has been established, and there has been a publication thereof, the defendant has resort to

Union, etc., 36 Wn.2d 557, 219 P.2d 121 (1950) (letter of union agent charging that certain members were "renegades"); *Yelle v. Cowles Pub. Co.*, 146 Wash. Dec. 98, —P.2d— (1955) (editorial comment that certain acts of plaintiffs as state auditor and land commissioner "must be considered by the taxpayers as an unnecessary and culpable squandering of state funds.")

¹⁸ *Prins v. Holland-North America Mortgage Co.*, 107 Wash. 206, 181 Pac. 680 (1919).

¹⁹ *Carey v. Hearst Pub. Co.*, 19 Wn.2d 655, 143 P.2d 857 (1943). See Note, *Libel and Slander—Strict Liability—Press Dispatches—Defamation by Radio*, 19 WASH. L. REV. 169 (1944). Another view is to the effect that to show a good cause of action, it must be shown that the defendant was reckless or wanton in republishing the falsehood. *Layne v. Tribune Co.*, 108 Fla. 177, 146 So. 234 (1933).

²⁰ *Prins v. Holland-North America Mortgage Co.*, *supra* note 18. *Accord*, *Brigs v. Atlantic Coast Line RR Co.*, 66 F.2d 87 (5th Cir. 1933).

²¹ *E.g.*, *Nichols v. Eaton*, 110 Iowa 509, 81 N.W. 792 (1900); *Bohlinger v. Germania L. Ins. Co.*, 100 Ark. 477, 140 S.W. 257 (1911).

²² As, for example, a letter by one stockholder to another relating to an officer of the corporation. *Chambers v. Leiser*, 43 Wash. 285, 86 Pac. 627 (1906).

several defenses: (1) truth;²³ (2) consent to the publication;²⁴ (3) the absolute privilege extended to legislative and judicial proceedings,²⁵ to proceedings of executive officers charged with responsibility of importance,²⁶ and to communications between husband and wife;²⁷ (4) the qualified privilege conditioned upon good motives and reasonable behavior, which is extended to publications made to advance a legitimate interest of the publisher,²⁸ the recipient or other third person,²⁹ to communications between those having a common interest for the advancement of that interest,³⁰ to publications made to proper persons in the interest of the public,³¹ and to reports of proceedings of public interest;³² and, (5) fair comment or criticism.³³ Of these, the first three are absolute defenses;³⁴ the latter merely qualified.³⁵ Though Washing-

²³ Truth was a complete defense in the following cases: *Haynes v. Spokane Chronicle Pub. Co.*, 11 Wash. 503, 39 Pac. 969 (1895) (report of conduct of plaintiff's from which it could be inferred that he committed murder, but not a direct charge); *Leghorn v. Review Pub. Co.*, 31 Wash. 627, 72 Pac. 485 (1903) (article charging plaintiff with abstracting money from a "special postal fund"); *Ott v. Press Pub. Co.*, 40 Wash. 308, 82 Pac. 181 (1909) (defamatory article concerning employment agency); *Lynch v. Republic Pub. Co.*, 40 Wn.2d 379, 243 P.2d 636 (1952) (article stating that plaintiff had repeatedly demonstrated his disqualifications as a judge). The injured party may still be afforded a remedy in those jurisdictions which recognize a "right of privacy." Cf. *Brents v. Morgan*, 221 Ky. 765, 229 S.W. 967 (1927).

²⁴ 3 RESTATEMENT, TORTS § 583 (1938).

²⁵ *Abbott v. Nat'l Bank of Commerce*, 20 Wash. 552, 59 Pac. 376 (1899) (allegations contained in pleadings); *Miller v. Gust*, 71 Wash. 139, 127 Pac. 845 (1912) (affidavit in divorce case charging adultery); *Johnston v. Schlarb*, 7 Wn.2d 528, 110 P.2d 190 (1941) (allegations in pleadings which were stricken as being irrelevant); *McClure v. Stretch*, 20 Wn.2d 460, 147 P.2d 935 (1944) (allegations in pleadings which were not legally sufficient); 3 RESTATEMENT, TORTS §§ 585-590 (1938).

²⁶ *Stivers v. Allen*, 115 Wash. 136, 196 Pac. 663 (1921) (words spoken by U.S. district attorney of one suspected of a criminal offense—slander). This category also includes proceedings of certain administrative agencies, though some writers would consider this as a separate classification. See Comment, *Defamation—Absolute Immunity*, 15 OHIO ST. L. J. 330 (1954).

²⁷ 3 RESTATEMENT, TORTS § 592 (1938). A few courts hold that there is no publication; while still others say that the privilege is merely conditional. See Comment, *supra* note 26.

²⁸ *Fahey v. Shafer*, 98 Wash. 517, 167 Pac. 1118 (1917) (publication to Ad club, created for purpose of preventing questionable advertising, that "upstairs" clothiers were attacking "street-level" clothiers in advertising charging questionable business methods and "fake" reduction sales).

²⁹ *Kimble v. Kimble*, 14 Wash. 369, 44 Pac. 866 (1896) (letter by son to his mother warning her of danger of loss of her property rights by efforts of plaintiff).

³⁰ *Chambers v. Leiser*, *supra* note 22; *Bass v. Matthews*, 69 Wash. 214, 124 Pac. 384 (1912) (church committee's report on investigation of minister); *Ward v. Painters' Local Union*, 41 Wn.2d 859, 252 P.2d 253 (1953) (report to members of union purporting to show shortages which occurred while plaintiff was in office).

³¹ 3 RESTATEMENT, TORTS § 598 (1938).

³² *McClure v. Review Pub. Co.*, 38 Wash. 160, 80 Pac. 303 (1905) (articles reporting acts of law officers relating to pursuit, arrest and trial of plaintiff, who was charged with burglary).

³³ 3 RESTATEMENT, TORTS § 606 (1938), and cases cited *infra* note 50.

³⁴ 3 *id.* §§ 582-592.

³⁵ 3 RESTATEMENT, TORTS §§ 593-598, 606. The terms "conditional" and "qualified," though used interchangeably, denote the same defense.

ton has no apparent problems concerning the absolute defenses, the qualified defenses are in a considerable state of confusion.

Several cases recognize the defense of qualified privilege,³⁶ and at least as many recognize that substantial truth is a complete defense in any civil action for libel.³⁷ These defenses are separate and distinct: the essence of the qualified privilege is a defense despite falsity.³⁸ Confusion has been injected into the cases, however, by the unfortunate choice of language illustrated by these statements: "The privilege ends when falsity begins, and if, as the complaint alleges, the charge is false, the privilege, if there was one, was therefore exceeded";³⁹ or "The article was libelous *per se*. If false, its publication does not fall within the rule of qualified privilege."⁴⁰ In the cases using these or similar phrases, either a privilege never existed, or the occasion of the qualified privilege had been destroyed by excesses; in none of them was it necessary to consider the element of truth or falsity. Many courts have established that the privilege is lost if the defendant does not believe what he says; or that it is lost if the defamer does not have reasonable grounds or "probable cause" to believe the statement or writing to be true; or that good faith, no matter how unreasonable the basis, is all that is required.⁴¹ But the quoted statements would indicate that in all cases the privilege is lost if the writing is false. Such a rule would subvert the defense of qualified privilege.⁴² This was not intended, but it leaves the state of the law of qualified privilege extremely uncertain, and serves as "an excellent illustration of the extent to which uncritical use of words bedevils the law."⁴³ The court is aware of the

³⁶ *Supra* notes 28-32. "Immunity" is probably a more accurate term than "privilege." PROSSOR, TORTS 822 (1941); Comment, *Defamation—Absolute Immunity*, 15 OHIO ST. L. J. 330 (1954).

³⁷ *Supra* note 23.

³⁸ *Fahey v. Shafer*, 98 Wash. 517, 167 Pac. 1118 (1917).

³⁹ *Graham v. Star Pub. Co.*, 133 Wash. 387, 233 Pac. 625 (1925); *Hollenbeck v. Post-Intelligencer Co.*, 162 Wash. 14, 297 Pac. 793 (1931).

⁴⁰ *Carey v. Hearst Publications*, 19 Wn.2d 655, 143 P.2d 857 (1943), citing *Byrne v. Funk*, 38 Wash. 506, 80 Pac. 722 (1905). See also *McKillop v. Grays Harbor Pub. Co.*, 100 Wash. 657, 171 Pac. 1026 (1918).

⁴¹ PROSSOR, TORTS 850 (1941).

⁴² See *Gaffney v. Scott Pub. Co.*, 35 Wn.2d 272, 212 P.2d 817 (1949); 41 Wn.2d 191, 248 P.2d 390 (1952), *cert. denied*, 73 S.Ct. 1131. The error in the first *Gaffney* case was perpetrated by a strict application of the law of the case doctrine. See Comment, *The Law of the Case Doctrine*, 28 WASH. L. REV. 137 (1953). The brief *Amici Curiae*, submitted in connection with the second appeal of the *Gaffney* case contains an excellent discussion of the present confusion surrounding the defenses of truth and qualified privilege. It also illustrates the influence that a well written brief, even when partially in error, will have upon the court. An attempt to reconcile the cases will be found in *Holden v. American News Co.*, 52 Fed. Supp. 24 (E.D.Wash. 1943).

⁴³ Mr. Justice Frankfurter in *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54 (1943).

problem, and has indicated that correction can be expected when the proper occasion arises.⁴⁴

The confusion surrounding the defenses of truth and qualified privilege is further complicated by the fact that only vague distinctions are made between the defense of fair comment or criticism and that of qualified privilege. The fault, if it can be termed a fault, is not alone that of the court. Legal writers as well have disagreed as to whether the defense of fair comment or criticism is regarded as a privilege or something other than a privilege.⁴⁵ Though the generic term "privilege" is used to denote both,⁴⁶ it is important to make a distinction. The qualified privilege relates to statements of fact, while comment or criticism is "an expression of opinion of the commentator or critic upon the facts commented upon or criticised."⁴⁷ A much broader immunity is conferred upon discussion of matters of public concern in the form of expressions of opinion, but the critic or commentator is not "privileged" to express more than his opinion. He may be liable if he misstates the facts, or if his opinion is based upon facts which are untrue and are not subject to a qualified or absolute privilege. It is in this latter connection that the distinction gains importance. This becomes apparent in light of two differing legal philosophies covering fair comment or criticism of public affairs. The minority rule, and the one advocated by the newspaper and other public communications interests, provides that misstatements of fact in a publication relating to public affairs (or to a public officer in the performance of public duties, or to a candidate for public office) made in good faith, with proper motives and with reasonable grounds for believing them to be true, do not in themselves destroy the defense of fair comment or criticism based upon those facts.⁴⁸ The traditional and more widely accepted view is that the facts upon which the criticism is based must be true, or be shown to

⁴⁴ "Some of the law of libel expressed in our previous decisions should be recanvassed." *Gaffney v. Scott Pub. Co.*, 41 Wn.2d 191, 248 P.2d 390 (1952). A step in this direction is *Ward v. Painters' Union*, 41 Wn.2d 859, 252 P.2d 253 (1953). But see the contradictions in *Yelle v. Cowles Pub. Co.*, 146 Wash. Dec. 98, —P.2d— (1955), an action for libel: "Defamatory words spoken of a person, which in themselves prejudice him in his profession, trade, vocation, or office, are slanderous and actionable *per se*, unless they are either true or privileged. Words spoken, however, which are not in fact true, are not privileged." [Emphasis supplied.]

⁴⁵ PROSSOR, TORTS 842 (1941), and material cited therein.

⁴⁶ Note, 155 A.L.R. 1346 at 1348 (1943); 3 RESTATEMENT, TORTS § 606 (1938).

⁴⁷ 3 RESTATEMENT, TORTS § 606, Comment b (1938).

⁴⁸ *E.g.*, *Coleman v. MacLennan*, 78 Kan. 711, 98 Pac. 281 (1908). See Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413 (1910).

fall within a qualified or absolute privilege.⁴⁹ It seems apparent that fair comment or criticism is a defense separate and apart from that of qualified privilege, and that the confusion could be considerably lessened by classifying fair comment or criticism by something other than the appellation "privilege." Washington has been placed in the company of both those states which have adopted the modern rule, and those states which adhere to the older or traditional view.⁵⁰ Quite valid arguments have been advanced for either side,⁵¹ but there are dicta in recent Washington cases which indicate that the court intends to adhere to the traditional rule, and will so hold at the first opportunity.⁵²

As an answer to the defenses of qualified privilege and fair comment or criticism, the use of the term "malice" becomes relevant. The Washington court, without stating exactly what is meant, has repeatedly held that a qualified privilege is lost if the publication is made "maliciously."⁵³ This leads to a certain amount of confusion, for the meaning is threefold: (1) It has been used in the sense of spite, ill will, or a desire to do harm for its own sake; (2) in the sense of something less than spite or ill will; and, (3) in the sense of excessive publication.⁵⁴ The term is nebulous and unsatisfactory, but if it is kept in mind that it has taken these technical meanings, no particular harm results from its use.

Quite apart from the use of malice as an answer to the qualified defenses, the early law of defamation burdened the plaintiff with pleading and proving malice (in the sense of spite or improper motive) in the first instance. This was later reduced to the fiction that malice

⁴⁹ This is the rule adopted in the Restatement. ". . . The facts upon which the criticism is based must either be true or, if untrue, the critic must be privileged to state them. In the case of a defamatory opinion expressed upon a false statement of fact, the critic, to escape liability, must show the privileged character of the statement of fact, and, in addition, show that the criticism or comment thereon is privileged under the rule stated in this section." 3 RESTATEMENT, TORTS § 606, Comment c (1938).

⁵⁰ That Washington is in the majority column: Notes, 110 A.L.R. 412 (1936), 150 A.L.R. 358 (1943), based on *Miles v. Louis Wasmer, Inc.*, 172 Wash. 466, 20 P.2d 847 (1933), and *Ziebell v. Lumberman's Printing Co.*, 14 Wn.2d 261, 127 P.2d 677 (1942). See also *Byrne v. Funk*, 38 Wash. 506, 80 Pac. 772 (1905); *Quinn v. Review Pub. Co.*, 55 Wash. 69, 104 Pac. 181 (1909); *McKillip v. Gray's Harbor Pub. Co.*, 100 Wash. 657, 171 Pac. 1025 (1918). That Washington follows the minority view: *Stebert, THE RIGHTS AND PRIVILEGES OF THE PRESS* 331 (1934), based on *State v. Wilson*, 137 Wash. 125, 241 Pac. 970 (1925) (criminal libel).

⁵¹ For a discussion, see *Egan v. Dotson*, 36 S.D. 459, 155 N.W. 783 (1915); *Coleman v. MacLennan*, *supra* note 48; *Boyer, Fair Comment*, 15 OHIO ST. L. J. 280 (1954).

⁵² *E.g.*, *Cohen v. Cowles Pub. Co.*, 145 Wash. Dec. 241, 273 P.2d 893 (1954).

⁵³ *E.g.*, *Kimble v. Kimble*, 14 Wash. 369, 44 Pac. 866 (1896); *Chambers v. Leiser*, 43 Wash. 285, 86 Pac. 627 (1906); *Graham v. Star Pub. Co.*, 133 Wash. 387, 233 Pac. 625 (1925).

⁵⁴ See *Stewart v. Riley*, 114 W.Va. 578, 172 S.E. 791 (1934); *PROSSOR, TORTS* 849 (1941); *Green, Relational Interests*, 31 ILL. L. REV. 35 (1936).

would be implied by the law from an intentional publication of a defamatory character, and it is so held in several jurisdictions. In many cases, there is at most only thoughtlessness or negligence, rather than any malice or intent to injure, and "implied malice" becomes a disguise for strict liability in any case of unprivileged defamation.⁵⁵ It has not been accepted in Washington, however, and though there are occasional dicta to the contrary, the large majority of the cases reiterate that "malice is not a necessary element in civil libel."⁵⁶

IV. DAMAGES.

The injury required to satisfy the element of special damages is a pecuniary or material one.⁵⁷ A further requirement is that the pleader identify the particular loss with a definiteness which is not ordinarily requisite in pleading damages. The lost contract, employment, sale, or other valuable object must be identified in pleading and proof by name, date, and place.⁵⁸ But where the defamation is libelous *per se*, the plaintiff can recover general damages, which will be presumed,⁵⁹ as well as special damages if alleged and proved.⁶⁰ The principal elements of general damages may be listed as: (1) injury to the plaintiff's reputation; (2) the general falling off of business or patronage; (3) wounded feelings and humiliation.⁶¹ In support of the claim for general damages, the extent of the "circulation" seems material.⁶² An apology or retraction by the defendant may greatly diminish the injury to plaintiff's reputation, and is also material.⁶³ If the defamation relates to the plaintiff in his business or profession, the reputation he bears in that capacity may be shown, but only if the defendant strikes at the plaintiff's reputa-

⁵⁵ For a discussion, see Prosser, *Torts* 816 (1941). On the question of strict liability in Washington, see *Carey v. Hearst Publications*, 19 Wn.2d 655, 143 P.2d 857 (1943), relying on *Peck v. Tribune Co.*, 214 U.S. 185 (1909). As applied to radio owners and operators, and press dispatches, see citations in notes 11 and 19 *supra*.

⁵⁶ *E.g.*, *Ziebell v. Lumberman's Printing Co.*, 14 Wn.2d 261, 127 P.2d 677 (1942), and cases cited therein. But perhaps contra in the case of slander. *Stewart v. Major*, 17 Wash. 238, 49 Pac. 503 (1897).

⁵⁷ McCORMICK, DAMAGES § 114 (1935).

⁵⁸ *Denney v. Northwestern Credit Ass'n*, 55 Wash. 331, 104 Pac. 769 (1909) (loss of credit insufficient without specifying persons who have withdrawn credit or showing that such specification is impossible); *Catarau v. Sunde d'Evers Co.*, 188 Wash. 592, 63 P.2d 365 (1936) (loss of profits insufficient where it did not appear that the business had been in successful operation for a period of time to give it permanence and recognition).

⁵⁹ *Arnold v. Nat'l Union, etc.*, 44 Wn.2d 183, 265 P.2d 1051 (1954).

⁶⁰ *Coffman v. Spokane Chronicle Pub. Co.*, 65 Wash. 1, 117 Pac. 596 (1911); *Dick v. Northern Pac. RR Co.*, 86 Wash. 211, 150 Pac. 8 (1915).

⁶¹ McCORMICK, DAMAGES § 116 (1935), and cases cited *supra* note 17.

⁶² But this has been subjected to limitations. *Id.* § 117.

⁶³ *Coffman v. Spokane Chronicle Pub. Co.*, 65 Wash. 1, 117 Pac. 596 (1911).

tion.⁶⁴ And finally, though there are contrary holdings in some jurisdictions, testimony is admissible to show change in the manner of conduct of the plaintiff's family, friends and acquaintances toward him in consequence of the detraction.⁶⁵

In those states which allow exemplary damages, the jury may award them where the evidence shows that the defendant was actuated by malice, as used in the sense of ill will or wanton indifference to the consequences, and the burden is upon the plaintiff to show the requisite malice regardless of any claim of qualified privilege. Where, as in Washington, exemplary damages are not permitted, the question arises as to whether malice is relevant in aggravation or mitigation of damages. The courts of some jurisdictions take the position that the defendant's apparent ill will may heighten the humiliation or suffering sustained by the plaintiff, and that the showing of malice or of mitigating good faith should come in as bearing not only on exemplary, but also on compensatory damages.⁶⁶ In the Washington cases, it is held that evidence of the defendant's malice or good faith is immaterial on the question of damages.⁶⁷

V. BURDEN OF PROOF AND FUNCTIONS OF JUDGE AND JURY.

No particular problems are apparent in the Washington cases as to the burden of proof and the functions of the judge and jury. If they are set down in an orderly fashion, and considered as they arise, no great difficulty is encountered. To this end, the following outline should serve as a guide.⁶⁸ 1. If the plaintiff cannot as a matter of law show that the words are libelous *per se*, he must prove his "inducement, colloquium, or innuendo." In this he must satisfy the court and jury that the words bear an actionable meaning⁶⁹ and, whether libelous *per se* or

⁶⁴ *Contra*, Hall v. Elgin Dairy Co., 15 Wash. 542, 46 Pac. 1049 (1896). *Accord*, Tennant v. Whitney & Sons, 133 Wash. 581, 234 Pac. 666 (1925) (distinguishing Hall case).

⁶⁵ Luna de la Peunte v. Seattle Times Co., 186 Wash. 618, 59 P.2d 753, 105 A.L.R. 932 (1936).

⁶⁶ McCORMICK, DAMAGES 119 (1935).

⁶⁷ Davis v. Tacoma Railway and Power Co., 35 Wash. 203, 77 Pac. 209 (1904); Woodhouse v. Powles, 43 Wash. 617, 86 Pac. 1063 (1906).

⁶⁸ See 3 RESTATEMENT, TORTS § 613 (1938).

⁶⁹ In the following cases, the writings were not libelous *per se*, and plaintiff had burden to show their actionable meaning: Urban v. Helmick, 15 Wash. 155, 45 Pac. 747 (1896) (publication charging hotel proprietor with being a "hog" because he would not trade at home and build up the home trade); Wright v. Daniel, 40 Wash. 6, 82 Pac. 139 (1905) (charge that plaintiff conducted an entertainment in a manner that "would be a disgrace to the Comique or the worst dance hall in the city," no explanation appearing as to the character of the places referred to); Woodhouse v. Powles, 43 Wash. 617, 86 Pac. 1063 (1906) (mistaken report that plaintiff, a grocer, was delinquent in payment of his debts, causing an association of wholesale grocers to

otherwise, that they refer to himself.⁷⁰ Where the words are actionable only by reason of the plaintiff's special character, he must prove that the words refer to himself in that special character.⁷¹ 2. The plaintiff must next prove that the defendant published the libel to some third person who understood its defamatory meaning and that it was intended to be applied to the plaintiff.⁷² The libel itself must be produced at the trial, or must be set out in full in the complaint.⁷³ 3. If the writing is not libelous *per se*, special damages must be pleaded and proved.⁷⁴ 4. The plaintiff having established his case, it is then incumbent upon the defendant to show either that the statements were true (justification); or to establish the existence of a privileged occasion for the publication, or a defense of fair comment or criticism. Where the words are actionable only because written of the plaintiff in the way of his trade or profession, the defendant may show, as an additional defense, that such trade or profession is illegal, or is practiced in an illegal way.⁷⁵ Whether the occasion was a privileged one, and whether the subject of comment or criticism was a legitimate matter of public

refuse him credit); *Whitehouse v. Cowles*, 48 Wash. 546, 93 Pac. 1086 (1908) (publication that plaintiff secured a marriage license, attempted to suppress the fact, and could not find the bride); *Velikanje v. Millichamp*, 67 Wash. 138, 120 Pac. 876 (1912) (letter charging that an attorney had presented forged receipts and attempted to collect money on them, it not being charged that he forged the receipts or knew of the forgery); *Wood. v. Star Pub. Co.*, 90 Wash. 85, 155 Pac. 400 (1916) (newspaper article charging one K. was offered a bribe in connection with political job, and that plaintiff was present, it not being charged that plaintiff had committed bribery); *General Market Co. v. Post-Intelligencer Co.*, 96 Wash. 575, 165 Pac. 482 (1917) (publication that plaintiff owned quantity of cheese which was destroyed as unfit for human consumption, it not having charged plaintiff with possession with intent to sell in violation of statute); *Blende v. Hearst Publications*, 200 Wash. 426, 93 P.2d 733 (1939) (newspaper article to the effect that plaintiff, a physician, made incomplete diagnosis of patient who subsequently died, it not being intimated that an earlier discovery of the ailment would have saved the patient's life); *Group Health, etc. v. King Co. Med. Soc.*, 39 Wn.2d 586, 237 P.2d 737 (1951) (charge that physicians were "unethical," the word being used in a special sense).

⁷⁰ In the following cases, the action failed for failure to show that the libelous statements referred to plaintiff: *Dunlap v. Sundberg*, 55 Wash. 609, 104 Pac. 830 (1909) (petition to owners of building by physicians demanding the removal from the building of osteopaths, neuropaths, autopath, chiropractors, uptontereists, unprofessional masseurs, criminal practitioners, 'medical institutes,' advertising 'specialists,' patent medicine fakers, quacks, charlatans, and other fraudulent concerns"); *Hillman v. Star Pub. Co.*, 64 Wash. 691, 117 Pac. 594 (1911) (publication of plaintiff's photograph, inoffensive in itself, in connection with a story of her father's crime, since the photograph did not make the article "of and concerning" the plaintiff); *Ryan v. Hearst Publications*, 3 Wn.2d 128, 100 P.2d 24 (1940) (newspaper article charging a woman with a swindle "profitable enough to raise 16 children," it not having mentioned by name the husband and children, who brought the action).

⁷¹ *Dunlap v. Sundberg*, *supra* note 70.

⁷² *Prins v. Holland-North America Mortgage Co.*, *supra* note 18.

⁷³ *McClure v. Review Pub. Co.*, 38 Wash. 160, 80 Pac. 303 (1905).

⁷⁴ Discussed *supra* and notes 7, 57-60.

⁷⁵ *Lathrop v. Sundberg*, 62 Wash. 136, 113 Pac. 574 (1911) (osteopath not allowed to recover damages for libel where it appeared that he was practicing osteopathy in violation of the law).

concern or interest are issues of law to be determined by the court.⁷⁶ Of course where the facts are in dispute, the jury must decide, guided by instructions as to the proper rules to apply. 5. If the defense is one of absolute privilege, it is a complete bar. If it is one of qualified privilege, or fair comment or criticism, the burden is upon the plaintiff to reestablish his case by a showing of malice in any one of its three technical meanings, and this must be pleaded and proved. Though the Washington court has not decided the question, other courts, as was mentioned above, have established that the privileged occasion may be abused either because of the publisher's lack of good faith, or because of his lack of belief, or because of his lack of reasonable grounds for belief. Unless only one conclusion can be drawn from the evidence, it is the province of the jury to determine whether the qualified privilege or defense of fair comment or criticism has been abused.⁷⁷

VI. CONCLUSION.

An effort has been made to circumscribe an entire area of Washington law. It must be borne in mind that this article is nothing more than the title indicates—an outline. As such, it necessarily glosses over some of the confusion. But this is not to say that confusion does not exist; the law of libel is, as a matter of fact, in considerable disarray. The fault, however, lies as much with the pleader and brief writer as with the courts, and only by careful and intrepid efforts on the part of counsel to call the attention of the courts to the difficulties can correction be expected. This article was written in the hope that it would be of use in these efforts.

⁷⁶ *Ward v. Painters' Local Union*, 41 Wn.2d 859, 252 P.2d 253 (1953); 145 Wash. Dec. 497, 276 P.2d 576 (1954).

⁷⁷ *Ibid.*