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CIVIL LIBEL AND SLANDER IN OKLAHOMA

John W. Hager*

Who steals my purse steals trash . . . but he that filches from me my good name robs me of that which not enriches him and makes me poor indeed.
Othello (Act III, Scene III)

On April 14, 1962, in the course of a public interview conducted by Edmond N. Cahn,¹ the following question was asked of Justice Hugo Black of the United States Supreme Court: "Do you make an exception in freedom of speech and press for the law of defamation? That is, are you willing to allow people to sue for damages when they are subjected to libel or slander?" In his usual forthright and unequivocal manner Justice Black replied:

My view of the First Amendment, as originally ratified, is that it said Congress should pass none of these kinds of laws. As written at that time, the Amendment applied only to Congress. I have no doubt myself that the provisions, as written and adopted, intended that there should be no libel or defamation law in the United States under the United States Government, just absolutely none so far as I am concerned.

That is, no federal law. At that time—I will have to state this in order to let you know what I think about libel and defamation—people were afraid of the new Federal Government. I hope that they have not wholly lost that fear up to this time because, while government is a wonderful and an essential thing in order to have any kind of liberty, order or peace, it has such power that people must always remember to check them here and balance them there and limit them here in order to see that you do not lose too much liberty in exchange for government. So I have no doubt about what the Amendment intended. As a matter of fact, shortly after the Constitution was written, a man named St. George Tucker, a great friend of Madison's, who served as one of the Commissioners at the Annapolis convention

* B.A. 1949, LL.B. 1950, University of Oklahoma; LL.M. 1964, New York University; member of the Oklahoma Bar Association, the American Bar Association, Scribes, and the American Judicature Society; Mr. Hager is presently a Professor of Law at the University of Tulsa.

¹ Professor of Law, New York University; author of *The Sense of Injustice* (1949); *The Moral Decision* (1955); *The Predicament of Democratic Man* (1962). (After this article was written, Prof. Cahn met an untimely death in August, 1964.)

of 1786 which first attempted to fill the need for a national constitution, put out a revised edition of Blackstone. In it he explained what our Constitution meant with reference to freedom of speech and press. He said there was no doubt in his mind, as one of the earliest participants in the development of the Constitution, that it was intended that there should be no libel under the laws of the United States. Lawyers might profit from consulting Tucker's edition of Blackstone on that subject.

As far as public libel is concerned, or seditious libel, I have been very much disturbed sometimes to see that there is present an idea that because we have had the practice of suing individuals for libel, seditious libel still remains for the use of government in this country. Seditious libel, as it has been put into practice throughout the centuries, is nothing in the world except the prosecution of people who are on the wrong side politically; they have said something and their group has lost and they are prosecuted. Those of you who read the newspaper see that this is happening all over the world now, every week somewhere. Somebody gets out, somebody else gets in, they call a military court or a special commission, and they try him. When he gets through sometimes he is not living.

My belief is that the First Amendment was made applicable to the states by the Fourteenth. I do not hesitate, so far as my own view is concerned, as to what should be and what I hope will sometime be the constitutional doctrine that just as it was not intended to authorize damage suits for mere words as distinguished from conduct as far as the Federal Government is concerned, the same rule should apply to the states. . . .

I believe with Jefferson that it is time enough for government to step in to regulate people when they *do* something, not when they *say* something, and I do not believe myself that there is *any* halfway ground if you enforce the protections of the First Amendment.²

Until that improbable time arrives when the United States Supreme Court agrees with Justice Black and holds that all federal and state defamation laws violate the United States Constitution, we shall continue to be plagued with the multitudinous problems which began with the bifurcation of defamation into libel, over which the Court of Star Chamber generally had jurisdiction, and slander, which was determined by the Ecclesiastical Courts. It would seem that courts and legislatures prefer the more moderate views of Shakespeare and Justice Holmes,³ and will continue to add technicality to technicality and heap absurdity upon the ever-increasing pile of absurdities. Oklahoma, perhaps, has been no worse than the other states in this regard, but neither has it been any better.

²Black, *One Man's Stand for Freedom*, 476-477 (1963); 37 N.Y.U. L. REV. 557-558 (1962).

³Frohwerk v. United States, 249 U.S. 204, 39 Sup.Ct. 249 (1919).

In this article I⁴ hope to give the reader a survey and sometimes critical analysis of the law of libel and slander in Oklahoma as such law is reflected in the Constitution, the statutes, and the cases, leaving for a later article perhaps some suggested and badly needed changes in our law of defamation. Some such article as this seems timely. For a long time there were comparatively few actions brought for defamation, but it would appear from newspaper reports (most cases not yet having reached the case reports) that within the past few years there has been a great increase in the number of defamation cases filed both in Oklahoma and in the other states, and a corresponding increase in the amount of damages sought by the plaintiffs.

The twin torts of defamation, libel and slander, will be treated separately herein except where doing so would result in unnecessary duplication of analysis and discussion.

LIBEL

Unlike most tort actions in Oklahoma which are creatures of common law, both libel and slander actions are authorized and regulated by statutes and by a few constitutional provisions. Civil libel is defined in Section 1441 of Title 12 of the Oklahoma Statutes (1961) as follows:

Libel is a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation, or any malicious publication as aforesaid, designed to blacken or vilify the memory of one who is dead, and tending to scandalize his surviving relatives or friends.

That definition was copied directly and exactly from the statute defining the crime of libel.⁵ Whatever may have been the motive of the Legislature in making the criminal and civil definitions of libel identical, the definition *supra* has created troublesome problems for the trial and appellate courts, some of which problems the Oklahoma Supreme Court has resolved to the satisfaction of no one, unless it be a winning party. Inherent in the definition are other problems which continue to disturb law students, law professors, attorneys, trial judges, and perhaps even Supreme Court justices who may one day be called upon for definitive resolutions to these problems. Under appropriate headings these semantic and other difficulties in the quoted definition will be explored.

I. PARTIES TO AN ACTION

A. PLAINTIFFS

1. NATURAL PERSONS

There can be no doubt that any living person can maintain an action for either libel or slander. But may such an action be maintained on

⁴To those who object to my use of the first-person pronoun I would answer with the following: "In some previous books, I shunned the first-person pronoun, saying 'the writer' when I meant 'I,' on the assumption that the indirect locution signified modesty. That assumption now seems to me a mistake. To say 'I' removes a false impression of a Jovian aloofness. . . ." Franks, *Courts on Trial*, Preface (1949).

⁵21 OKLA. STAT. § 771 (1961).

behalf of a deceased person? At first glance the Oklahoma Abatement Statute⁶ would appear to answer the question unequivocally and negatively. That statute provides in part: "No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander . . .". In *Alles v. Interstate Power Co.*,⁷ the Oklahoma Supreme Court held that a civil action for libel did not survive where the plaintiff died before judgment. Note, however, that the question originally posed encompasses two distinct factual situations: (1) a plaintiff is defamed but dies while his action for libel or slander is pending; (2) a person dies and is defamed thereafter. The Abatement Statute and the *Alles* decision answer only the first factual situation. It would perhaps be ridiculous to raise the second factual situation in any common law jurisdiction and it would be equally ridiculous to raise it in Oklahoma were it not for that troublesome language in the latter part of Section 1441 defining libel. That language, it will be remembered, is as follows: ". . . or any malicious publication as aforesaid, designed to blacken or vilify the memory of one who is dead, and tending to scandalize his surviving relatives or friends." One can only speculate on the legislative intent (or lack of intent) in including this language. Three possibilities are suggested: (1) the Legislature copied this language from the criminal definition without realizing any possible import on civil litigation; (2) the Legislature intended to provide an action on behalf of one defamed after his death; (3) the Legislature intended to provide an action on behalf of surviving relatives and friends where the publication, defamatory of the dead, indirectly defamed such relatives or friends. I believe, for reasons indicated hereafter, that the first named possibility is the most probable, particularly if one employs Occam's razor in his analysis, the third possibility is the next most probable, and the second suggested possibility is the least logical and least probable. I will discuss these suggested possibilities in inverse order. Had the Legislature intended to provide an action on behalf of surviving relatives and friends where the defamation of the dead indirectly defamed such relatives or friends, it would have done a vain and useless thing. (Not at all unusual with Legislatures, but I believe the verdict in this instance should be "not guilty.") Whether the defamation comes about directly or indirectly makes no difference on the existence of a cause of action, and such surviving relatives or friends are granted full right to maintain a libel action by the language of Section 1441 preceding that portion which refers to one who is dead. That the Legislature did not intend to grant a cause of action on behalf of one defamed after his death seems clear on at least four points: (1) the common law tradition denying such an action; (2) the theory behind the Abatement Statute inveighs against such interpretation; (3) the concluding words of the statute, "and tending to scandalize his surviving relatives or friends," would have no relation to the reputation of the deceased; (4) the words "any malicious publication as aforesaid" could apply to a deceased person in only one of the statutory ways a person can be defamed. A malicious publication about a deceased person obviously could not tend to deprive

⁶ 12 OKLA. STAT. § 1052 (1961).

⁷ 176 Okla. 252, 55 P.2d 751 (1936).

him of public confidence nor tend to injure him in his occupation. It could only expose his reputation to "public hatred, contempt, ridicule, or obloquy." The troublesome language referred to earlier seems entirely in context in the criminal definition, and I believe the Legislature meant the word "scandalize" to mean "shock" or "anger" rather than to mean "defame." For the reasons given, I believe the Legislature either inadvertently or unthinkingly carried over into the civil definition language which is out of context there. No civil case of libel based upon that language has reached the Oklahoma Supreme Court. The question, however, was presented in a case⁸ brought in the Federal District Court of the Northern District of Oklahoma. Judge Kennamer, in sustaining defendant's motion to dismiss, said:

The only question presented is whether one who falsely, and without privilege so to do, publishes libelous matter of a deceased person, is liable to the estate of said person or to his relatives.⁹

In the opinion no authority of Oklahoma's highest court is cited (as there was none), and the Judge, whom I believe correct in his decision, begged the question in his reasoning. He said:

Unless an Oklahoma statute provides for liability in such a case, there can be no action for the recovery of damages for libeling a deceased person.¹⁰

The above Section cannot be construed as creating a cause of action, but is merely a definition of libel.¹¹

At common law no recovery was possible by relatives or the estate of a deceased person who had been libelled, and Oklahoma is without any statute expressly creating a right of recovery or changing common law with respect thereto.¹²

The decision, while highly persuasive, is not binding on the Oklahoma Supreme Court and the essential question raised remains without any definitive answer.

2. GROUP DEFAMATION

One troublesome problem on who may maintain an action for libel or slander, the right of a member of a group or class¹³ to sue in his own behalf, has been resolved partially in Oklahoma by the recent case of *Fawcett Publications, Inc. v. Morris*.¹⁴ Before discussing this aspect of what is truly a revolutionary and significant decision, I should like to illustrate briefly by a few quotations and remarks the problem confronting other jurisdictions. The rule that no person who is a member of a large class which has been defamed, and who is not identified individually in the

⁸ *Turner v. Crime Detective*, 34 F.Supp. 8, (N.D. Okla. 1940).

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Id.* at 9.

¹² *Ibid.*

¹³ Technically, there is a distinction between a "group" and a "class," but no such distinction will be made in this article. Neither will the discussion concern "class suits," the action being maintained by one or more individuals on behalf of themselves and other members of a class.

¹⁴ 377 P.2d 42 (Okla. 1962); *Affirmed without opinion*, 376 U.S. 513.

publication, can maintain an action appears to have had its origin in the ancient case of *King v. Alme & Nott*,¹⁵ wherein it was said:

Where a writing inveighs against mankind in general or against a particular order of men, as for instance men of the gown, this is not libel, but it must descend to particulars and individuals to make it libel.

"As an overall consequence of the *Alme & Nott* precedent, recovery today for defamation is dependent on the sheer size of the group. On the average, any number over twenty is too large."¹⁶ The ironical thing about this heritage from the common law, as is true in many similar instances, is that the case does not stand for the rule for which the case is cited as authority. *Alme & Nott* was a case of criminal libel, and the indictment was set aside, not because a large group had been libeled, but because the jurors were unable to determine from the proof who, if anyone, had been defamed. It was said recently:

The courts are fairly uniform in denying recovery to any person who seeks damages simply on the basis that he was a member of a class.¹⁷

The ability to show the court that he was sufficiently identified by the publication will determine the individual's success.¹⁸ The court, in sustaining a motion to dismiss, in *Fowler v. Curtis Publishing Co.*¹⁹ said much the same thing in these words:

In case of a defamatory publication directed against a class, without in any way identifying any specific individual, no individual member of the group has any redress . . . The only exception involves cases in which the phraseology of a defamatory publication directed at a small group is such as to apply to every member of the class without exception.²⁰

Until the *Fawcett* case, recovery by one or more plaintiffs for defamation leveled at a large group was restricted to civil law jurisdictions. In *Ortenberg v. Plamondon*,²¹ seventy-five families of Jewish faith out of a total population of 80,000 were permitted to recover on the basis of a defamatory lecture which generally traduced the Jewish religion. In 1949 a law school classmate²² of mine wrote a note in 2 Okla. L. Rev. 377, 378, which became a prophecy of what the Oklahoma Supreme Court did in the *Fawcett* case concerning group defamation. This classmate wrote:

In cases where the group libeled may be easily recognized by the public, by virtue of being confined to a certain geographical area, it seems unjust to deny an action to a member of a group because the

¹⁵ 3 Salk. 224, 91 Eng.Rep. 790 (1700); also found as Rex v. Orme & Nutt, Trin. 11 Will. 3, B.R. 1 Ld. Raym. 486, 91 Eng.Rep. 1224 (1700).

¹⁶ Brown and Stern, *Group Defamation in the U.S.A.*, 13 CLEV.-MAR. L.REV. 7, 12 (1964).

¹⁷ Note, 17 U. MIAMI L.REV. 519, 522 (1963).

¹⁸ *Id.* at 519.

¹⁹ 78 F.Supp. 303 (D. D.C. 1948).

²⁰ *Id.* at 304.

²¹ 24 QUEL.REV. 69 (1914), 35 CAN. L. T. 262 (1915) (Civil law jurisdiction).

²² Ralph C. Thomas, now Professor of Law at the University of Tulsa.

libel is worded so as to apply impartially to the members of the group. As the basis for an action for libel is injury to reputation, the determining factor should be whether this plaintiff's reputation has suffered, rather than whether his identity can be found to have been spelled out by the words of the libel. It should be for a jury to determine whether, in fact, the plaintiff would be prejudiced in the eyes of a reasonable man because he was one of a group at which a libel, written in general and impartial terms, has been directed.

What did the *Fawcett* decision do to the ideas expressed in the foregoing quotations and how did it resolve for Oklahoma the problem of group defamation? First, a few background facts are necessary to an understanding of the answer. In 1958 the defendant published an article in *True Magazine* which accused the 1956 Oklahoma University football team of using amphetamine and similar drugs to "promote aggression, increase the competitive spirit, and work the same as the epinephrine (adrenalin) produced in your body." Plaintiff was one of some sixty or seventy members on the 1956 team. Neither he nor any other player was identified specifically in the article. At the conclusion of the evidence, the trial court instructed the jury to return a verdict against Fawcett Publications. The verdict returned was for \$75,000 actual damages (plaintiff had prayed for general damages in the amount of \$100,000 and punitive damages in the amount of \$50,000 in his petition). The Oklahoma Supreme Court affirmed the judgment below, and made a thorough examination of one of defendant's major grounds of appeal, to-wit; "(D) Plaintiff is a member of a large and changing group class and therefore the article is not libel per se." In answer to the defendant's contention the court said:

The additional and final legal argument presented under Fawcett's second proposition is that a defamatory publication concerning a large group is not libelous per se as to an unnamed member of that group. In this connection it appears that the courts have generally held that defamatory words used broadly in respect to a large class or group will not support a libel action by an individual member of that group.²³

While there is substantial precedent from other jurisdictions to the effect that a member of a "large group" may not recover in an individual action for a libelous publication unless he is referred to personally, we have found no substantial reason why *size* alone should be conclusive. We are not inclined to follow such a rule where, as here, the complaining member of the group is as well known and identified in connection with the group as was the plaintiff in this case.²⁴

Despite the apparently unreserved language concerning the old rule about group defamation, it should be noted that while the court did hold that size alone should not be conclusive on one's right to sue, it followed this with the further statement:

We are not inclined to follow such a rule where, as here, the

²³ *Fawcett Publications, Inc. v. Morris*, 377 P.2d 42, 50 (Okla. 1962).

²⁴ *Id.* at 51-52.

complaining member of the group is as well known and identified in connection with the group as was the plaintiff in this case.

Perhaps that language is not a restriction on the rule concerning the right of a group member to sue for defamation of a large group, but is merely explanatory that plaintiff has met his burden of showing that the article had particular application to him, which would be a requirement in any defamation case. (As there were sixty to seventy members on the 1956 football team, most of whom were less well known to the public, the Oklahoma Supreme Court may have fifty-nine to sixty-nine further opportunities to explain its quoted language.) It should be noted also that the case did not involve, and the court did not decide, what the result would have been had the defamatory language been other than all-inclusive. In this connection the court said:

Fawcett also refers to *Owens v. Clark* (1931) 154 Okl. 108, 6 P.2d 755. . . . It will be observed that the libelous article in the Owens case dealt with "certain members" of the Oklahoma Supreme Court and not *all* of its members. Without attempting to defend the Owens case we do observe that it is distinguishable from the case now under consideration. * * *

One obvious distinction between the Owens case and the instant case is that the article by Fawcett in *True Magazine* is leveled at the entire team.²⁵

Now that the United States Supreme Court has decided the *Fawcett* case, Oklahoma lawyers might well remember these words:

It will be as well for the future for lawyers to concentrate on the question whether the words were published of the plaintiff rather than on the question whether they were spoken of a class.²⁶

3. CORPORATIONS

No Oklahoma appellate cases were found in which a corporation, either one operated for profit or a charitable one, had brought an action for libel against it as a legal entity, as opposed to libel of individual officers, directors, or managers of the corporation. Assuming for the moment that Oklahoma law permits a corporation to maintain such an action, there are several possible reasons why a corporation has not done so. Some of the possibilities are: (1) the usual libel, although perhaps aimed at a corporation, defames one or more officials of the corporation and any action would be brought in their names as plaintiffs as they would be the real parties in interest; (2) the reputation of a corporation, unless perhaps it be a very small organization, ordinarily would not be damaged enough to warrant the expense, trouble, and publicity of a trial; (3) the remedy of money damages, often ineffective even with private individuals, would not be an efficacious way to restore public confidence in the corporation. Advertising and other self-help remedies would be far more effective.

The constitutional and statutory provisions give no definitive answer to the issue of a corporation's power to sue for a libel directed against it. Section 1.19 of Title 18 of the Oklahoma Statutes (1961) provides in part:

²⁵ *Id.* at 49-50.

²⁶ *Knuffer v. London Express Newspapers, Ltd.*, (1944) A.C. 116, 122.

Every domestic corporation shall, in so far as incidental to the transaction of its business or expedient for the attainment of its purposes stated in its articles of incorporation, have and possess the following general powers:

(1) To sue and be sued in its corporate name. . . .

A strict construction of that statutory grant of power would seem to deny to a corporation the right to maintain a libel action. Such action would not be, in any meaningful sense, "incidental to the transaction of its business." However, it could be argued with greater force that a libel action is "expedient for the attainment of its purposes stated in its articles of incorporation." Common sense and logic would seem to dictate that this section neither grants nor denies to a corporation the power to maintain an action for libel but is merely procedural. That is, the section merely designates the name by which a corporation may bring an action. Such interpretation is strengthened by the fact that corporations undoubtedly may be sued for libel, and the section quoted also says every domestic corporation shall have the power to be sued in its corporate name. By no stretch of the imagination could a libel suit against a corporation be "incidental to the transaction of its business or expedient for the attainment of its purposes stated in its articles of incorporation."

In the Oklahoma Constitution it is provided:

The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation. . . .²⁷

Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right. . . .²⁸

Although these provisions, as well as the statutes²⁹ on libel, refer to "every person," such designation would not exclude corporations necessarily. As corporations can be sued for libel and thus fall within the meaning of "person" in the constitutional provision making one responsible for the abuse of the right to free speech, then, a fortiori, corporations should fall within the meaning of "person" in the constitutional provision granting a remedy for injury to reputation.

4. PARTNERSHIPS

As was true with the question of whether a corporation could be a plaintiff in a libel action, no appellate court cases were found in which a partnership had brought an action for a libel against its reputation, as opposed to a libel of one or more of the individual partners. Whether a partnership has a cause of action for libel of the business association itself is perhaps a moot question, as it would be a very rare instance where a libel damaged the reputation of a partnership without also damaging the reputation of the individual partners. In the latter instance the partners would sue as individuals as they would be the real parties in interest.

As two writers have observed:

At common law, a partnership could neither sue nor be sued in the partnership name. All members had to join as parties plaintiff

²⁷ OKLA. CONST. ART. 2, § 6.

²⁸ OKLA. CONST. ART. 2, § 22.

²⁹ E.g., 12 OKLA. STAT. § 1441 (1961).

and be named as parties defendant. Oklahoma follows the common law in actions brought by the partnerships. . . .³⁰

As has been suggested previously in connection with corporations, but with far less force in this instance, perhaps the rule quoted neither grants nor denies a partnership power to maintain a libel action, but is merely a rule of procedure as to the name by which a partnership may sue or be sued. It is very doubtful, however, that a partnership could maintain an action for libel directed against the business reputation of the association.

B. DEFENDANTS

In the discussion in the foregoing section regarding who may be a party plaintiff, it was pointed out that any natural person may sue, corporations may be sued for libel in their corporate names, and partnerships must be sued by naming the individual partners as defendants. The only real problem concerning defendants as parties to a libel action is the liability, if any, of a defendant who plays merely a secondary role in the publication of the libel. That is, a party who does not originate the libel but is merely a middleman through whose hands the libel passes from the originator to the persons receiving it.

Libel is considered as a tort based upon a theory of liability without fault, and neither the lack of intent to defame nor absence of negligence is regarded as a defense. This harsh rule has been ameliorated to some extent in Oklahoma. Television and radio personnel are favored by an Act passed by the 1957 Legislature, which Act provides:

The owner, licensee or operator of a television and/or radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a television and/or radio broadcast, by one other than such owner, licensee or operator, or agent or employee thereof, unless it shall be alleged and proved by the complaining party, that such owner, licensee, operator or such agent or employee, has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast.³¹

So far, no cases have reached the Oklahoma Supreme Court concerning this Act. Consequently, it is not known what constitutes "due care," nor whether this statute violates the Oklahoma Constitution which provides:

The Legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges, or immunities within this State.³²

Other jurisdictions have reached the same result by judicial decision as that set out in the Oklahoma statute. In *Summit Hotel Co. v. National Broadcasting Co.*,³³ the liability of a broadcasting company was limited to

³⁰ Bandy and Elkouri, *The Uniform Partnership Act*, 9 OKLA. L. REV. 377, 379 (1956).

³¹ 12 OKLA. STAT. § 1447.1 (1961). Liability for political broadcasts will be discussed at a later point in this article.

³² OKLA. CONST. ART. 5, § 51.

³³ 336 Pa. 182, 8 A.2d 302, 124 A.L.R. 968 (1939).

defamation resulting from the negligence of its servants. The rule was followed in *Kelly v. Hoffman*.³⁴ In that case the plaintiff alleged that defendant owned and operated a radio station over which a news announcer, not a servant of defendant's, defamed the plaintiff. On a motion to strike portions of the petition, the court held that defendant was not liable for the defamation if it could not have prevented the publication by the exercise of reasonable care. Such favoritism of defendant broadcasters is not without criticism. As one person wrote:

It would seem, therefore, that the equities of the parties should control, in which case the rule of limited liability . . . should not be followed. A return to the absolute liability doctrine of the earlier cases would be most in accord with the equities of the parties and with the general body of law usually applied in the fields of defamation and extra-hazardous activities.³⁵

But what of Oklahoma defendants who are not so favored by statute? In *World Pub. Co. v. Minahan*,³⁶ where the managing editor of a newspaper was an officer of the corporation owning the newspaper and in active charge of the management, control, and policy of the paper, the editor was held equally liable with the owner for the publication of a libelous article. In *Jackson v. Little*,³⁷ a railroad superintendent who had authorized his chief clerk to write a letter concerning an employee, who suggested certain statements to include in the letter, and who signed his name thereto, was held liable along with the clerk for the libelous matter in the letter. In another case³⁸ defendant was held liable for defamation published in its newspaper although the published words had been obtained from a nation-wide newsgathering service and were published in good faith. It can be argued that none of these decisions is definitive on the issue of liability of one who plays merely a secondary role in the publication of the libel as in all three cases, the defendant played a more active role than that of a mere distributor. A definitive answer to a part of the question was supplied by the previously discussed case of *Fawcett Publications, Inc. v. Morris*.³⁹ In addition to naming as defendant the publisher of *True Magazine* in which the defamatory article appeared, plaintiff sued Mid-Continent News Company, the Oklahoma distributor for Fawcett's publications. The trial court sustained the distributor's motion for a directed verdict in its favor. The Oklahoma Supreme Court affirmed this portion of the judgment with very little discussion. In connection with another argument by defendant Fawcett Publications, the court said: ". . . we are forced to the conclusion that for all practical purposes Mid-Continent was little more than a mere conduit. . . ."⁴⁰ On the issue raised by plaintiff on appeal, the court said:

The record does not show, as contended by plaintiff, that Mid-Continent had knowledge of the article prior to its distribution and

³⁴ 61 A.2d 143 (N.J. 1948).

³⁵ Note, 2 OKLA. L. REV. 257, 259 (1949).

³⁶ 70 Okla. 107, 173 P. 815, L.R.A. 1918F, 283 (1918).

³⁷ 110 Okla. 70, 236 P. 392 (1925).

³⁸ Oklahoma Publishing Co. v. Givens, 67 F.2d 62 (10th cir. 1933).

³⁹ 377 P.2d 42 (Okla. 1962).

⁴⁰ *Id.* at 46.

we are unable to conclude from the argument that the trial court erred in directing a verdict for Mid-Continent.⁴¹

It seems clear from this decision that in Oklahoma, the rule is that a mere distributor of a libelous publication is not liable where he had no knowledge that the publication contained a libel before he distributed it. Note, however, that the court did not decide what would be the liability, if any, of a mere distributor who should have known of the libel or was negligent in not discovering it. For the time being this is an open question in Oklahoma.

II. ELEMENTS, PROOF, AND DEFENSES

A. ELEMENTS AND PROOF BY PLAINTIFF⁴²

The appropriate statutes would indicate that a plaintiff need plead and prove very little to state and make out a prima facie case for libel or slander. Section 303 of Title 12 of the Oklahoma Statutes (1961) provides:

In an action for libel or slander, it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff; and if the allegation be denied, the plaintiff must prove, on the trial, the facts, showing that the defamatory matter was published or spoken of him.

The section on pleading in the chapter on Libel and Slander is very similar and provides as follows:

In all civil actions to recover damages for libel or slander, it shall be sufficient to state generally what the defamatory matter was, and that it was published or spoken of the plaintiff, and to allege any general or special damage caused thereby, and the plaintiff to recover shall only be held to prove that the matter was published or spoken by the defendant concerning the plaintiff.⁴³

To plead a prima facie case of libel or slander the quoted statutes would require the plaintiff to establish only four elements (reserving a discussion of damages until a later point): (1) publication; (2) of defamatory matter; (3) about the plaintiff; and (4) by the defendant. Let us not, however, be misled; plaintiff's task of getting to trial is not all that easy.

1. PUBLICATION

As was true at common law, the statutory meaning of publication is not the restricted one assigned to it by a layman. For example, a layman would not consider the exhibition of a picture or an effigy as a "publication." Publication is the communication of the alleged libel, whatever form such libel may take, to at least one person other than the plaintiff. That the Legislature meant publication in the common law sense seems clear from reading the civil definition of libel. In Section 1441 of Title 12 of the Oklahoma Statutes (1961), it is provided in part: "Libel is a false or malicious unprivileged publication by writing, printing, picture. . . ." The use of the word "publication" would be redundant had not the Legislature intended to mean communication. In Oklahoma the element

⁴¹ *Id.* at 54.

⁴² Because of their importance in Oklahoma law, Libel Per Se, Libel Per Quod, and Damages will be discussed separately in sections following this one.

⁴³ 12 OKLA. STAT. § 1444 (1961).

of publication rarely is denied, and the defendant relies instead on one or more of the several defenses available to him.

Whether consent to a tort is a defense on the ground that usually the issue is raised by the defendant, or is not a true defense as it negatives the existence of the tort in the first instance will not be discussed herein. Let it suffice to say that a plaintiff fails to meet the element of publication if he, personally or through his agent, is the party who makes known the libelous matter. In *Taylor v. McDaniels*,⁴⁴ the Oklahoma Supreme Court held that there was no actionable publication where the plaintiff's agent, at plaintiff's request, exhibited to others the alleged libelous matter. As there are no appellate court cases, it is an open question in Oklahoma whether publication by plaintiff as a matter of necessity would be actionable. For example, the plaintiff finds it necessary to show the libelous matter to another because he is immature, blind, illiterate, unable to read the English language, etc. It is suggested that a trial court should overrule any demurrer based on such facts and leave to the jury the question whether such publication was reasonably necessary under the particular circumstances.

Oklahoma has not answered the intriguing question whether it is a publication for an employer to dictate to his secretary a letter which libels the plaintiff, which letter is transcribed and sent to the plaintiff. Is the secretary a person or a machine? An analogy might be drawn to the situation in the slander case of *Magnolia Petroleum Co. v. Davidson*,⁴⁵ where the court held there was no publication when the defamatory words regarding a discharged employee were spoken by supervisory employees in the presence and hearing of a fellow employee.

2. DEFAMATORY MATTER

It is not sufficient that plaintiff show a publication of just any defamatory matter. The defamatory matter must meet the statutory definition of libel, a question of law for the court. It must be in the form of a "writing, printing, picture or effigy or other fixed representation to the eye." All the listed forms of libel, except the last one, are clear and their meanings unmistakable. In *Collins v. Oklahoma State Hospital*,⁴⁶ the Oklahoma Supreme Court, while conceding that numerous authorities could be cited on either side as to the legislative intent in including the category "or other fixed representation to the eye," followed what it referred to as "the well known rule of statutory construction" and held that the quoted phrase refers to the same general nature or class of libels as those specifically enumerated. It is interesting to speculate whether defamation by means of television constitutes "a fixed representation to the eye." A libel case brought for defamation which had occurred by that medium of communication would raise such questions as: (1) are the electronic impulses which form the picture "fixed," and would this turn on whether the offending picture was a fleeting one or stayed on the screen for a longer time? (2) Is television within the same general nature or class as a writing, printing, picture, or effigy?

⁴⁴ 139 Okla. 262, 281 P. 967, 66 A.L.R. 1246 (1929).

⁴⁵ 194 Okla. 115, 148 P.2d 468 (1944); see also *Collins v. Oklahoma State Hospital*, 76 Okla. 229, 184 P. 946, 7 A.L.R. 895 (1919).

⁴⁶ 76 Okla. 229, 184 P. 946, 7 A.L.R. 895 (1919).

Assuming a situation where a plaintiff would not have to prove that his reputation was in fact damaged (i.e., a case of libel per se), a literal reading of the statutory definition of libel would eliminate the necessity of a plaintiff having to allege or prove his reputation was actually affected in any way. He need show only that the publication "exposes" him to public hatred, etc., or "tends" to deprive him of public confidence, etc. It must be remembered that this definition of civil libel was copied verbatim from the Criminal Code, and the Oklahoma Supreme Court, recognizing that libel is a tort which in fact damages one's reputation, held in the *Collins* case that the alleged defamatory matter must be seen or read by someone and a statute⁴⁷ to be discussed later indicates inferentially that the publication must be injurious to the reputation.

Not only must the plaintiff allege and prove that the libel takes one of the forms prescribed by statute, but he must show also that injury to his reputation had one or more of the following effects: (1) it exposed him to public hatred, contempt, ridicule, or obloquy; (2) it deprived him of public confidence; (3) it injured him in his occupation. As libel is an injury to one's reputation, the determinative question on the existence of a cause of action is objective, rather than subjective. That is, the question is not what effect did the libel have on the mind of the plaintiff, but what effect did it have on the minds of those persons to whom it was communicated. Thus, it has been held that the fact that a publication is unpleasant and annoys or irks the subject thereof, or subjects him to jest or banter is not sufficient by itself to make the publication libelous.⁴⁸

The following selected factual situations are listed to give some indication of what the Oklahoma Supreme Court has regarded as libelous: (1) accusing one of operating his business with "shady ethics" or on a "sneak basis" is actionable;⁴⁹ (2) imputing impairment of plaintiff's mental faculties is libelous;⁵⁰ (3) it is libel to refer to a white person as a Negro or as colored, or to use the abbreviation "col.";⁵¹ (4) an article stating that a suit filed by plaintiff on the "pretence" of a back injury was dismissed was held actionable;⁵² (5) it is libel to state that plaintiff believes in disobedience to law and forcible appropriation of property;⁵³ and (6) attributing to a Negro attorney words commonly used by the more illiterate southern Negro is not libelous.⁵⁴

3. ABOUT THE PLAINTIFF

Having shown that there was a publication of defamatory matter, the plaintiff must allege and prove that such defamatory matter "was

⁴⁷ 12 OKLA. STAT. § 1445 (1961).

⁴⁸ *Wimmer v. Oklahoma Pub. Co.*, 151 Okla. 123, 1 P.2d 671 (1931); *Fite v. Oklahoma Pub. Co.*, 146 Okla. 150, 293 P. 1073 (1930); *Phoenix Printing Co. v. Robertson*, 80 Okla. 191, 195 P. 487 (1921).

⁴⁹ *Nichols v. Bristow Pub. Co.*, 330 P.2d 1044 (Okla. 1958).

⁵⁰ *Taylor v. McDaniels*, 130 Okla. 262, 281 P. 967, 66 A.L.R. 1246 (1929).

⁵¹ *Hargrove v. Oklahoma Press Pub. Co.*, 130 Okla. 76, 265 P. 635 (1928); *Collins v. Oklahoma State Hospital*, 76 Okla. 229, 184 P. 946, 7 A.L.R. 895 (1919).

⁵² *Gentry v. Wagoner County Pub. Co.*, 351 P.2d 715 (Okla. 1960).

⁵³ *Toomey v. Jones*, 124 Okla. 167, 254 P. 736, 51 A.L.R. 1066 (1927).

⁵⁴ *Franklin v. World Pub. Co.*, 183 Okla. 507, 83 P.2d 401 (1938).

published or spoken of" him as required by the statutes.⁵⁵ If the plaintiff is not named in the libel or is not otherwise clearly identified, then he must plead facts extrinsic to the libel to show he is the person defamed. This particular averment has the technical name of "colloquium." It should be noted carefully that this pleading may be necessary and can be employed in any kind of libel case and it is not restricted to cases of libel per se. Whether a particular libel is per se and whether the libel refers to the plaintiff are entirely distinct questions. This was made clear in *National Ref. Co. v. Benzo Gas Motor Fuel Co.*,⁵⁶ wherein the court said:

Whether an article is of a libelous character per se, and whether it has application to a particular party plaintiff, are *entirely distinct questions*, and should not be confused. The answer to the first question is to be found in the article itself. The answer to the second question is to be found in the proof supporting proper allegations in the complaint. Those proofs may consist either of the article itself, or of *extrinsic evidence*. (Emphasis added.)

Thus, to meet the requirements of this third element, the plaintiff can prove the libel was published about him by: (1) showing he was named in the publication; (2) showing that he was otherwise singled out and identified in the libel; or (3) showing by extrinsic facts and circumstances that persons to whom the libel was communicated believed it had reference to the plaintiff. In this latter connection, plaintiff's evidence in the *Fawcett* case showed that many people asked him about the article. The weakness of the plaintiff's evidence in showing the article was published of him and a disagreement with the majority over what constitutes libel per se caused Justice Halley to dissent in the case.⁵⁷

4. BY THE DEFENDANT

As we have seen from the previous discussion, a plaintiff may have some trouble in pleading and proving that the matter was defamatory and that it was about him, but rarely does a plaintiff have difficulty with the element of publication. This is likewise true in showing that the defendant is responsible for the publication. Nevertheless, there are some matters about this last element of plaintiff's prima facie case which deserve at least a cursory discussion.

First, the doctrine of respondeat superior applies as it does to other tort actions. In *German-American Ins. Co. v. Huntley*,⁵⁸ the Oklahoma Supreme Court held that a corporation is liable for defamation by its officers, agents, or servants in the performance of, or within the scope of their general duties.

Reverting once more to the difficulties and ambiguities caused by the verbatim adoption of the criminal definition to define civil libel, and looking at the wording in that statute alone, it would appear that in two of the effects which libel may bring about, these effects would have

⁵⁵ 12 OKLA. STAT. §§ 303, 1444 (1961).

⁵⁶ 20 F.2d 763, 55 A.L.R. 406, quoted in *Fawcett Publications, Inc. v. Morris*, 377 P.2d 42, 50 (Okla. 1962).

⁵⁷ *Fawcett Publications, Inc. v. Morris*, 377 P.2d 42, 55 (Okla. 1962).

⁵⁸ 62 Okla. 39, 161 P. 815 (1916).

to be public in nature. The statute speaks of exposing any person to "public" hatred, etc., or depriving him of "public" confidence. To my knowledge no issue has ever been raised concerning this question of the libel having to be public. Perhaps this is because in nearly every instance, the dissemination of the libel has been widespread enough to be termed "public," but even more probable as an explanation is that the statutes⁵⁹ on what the plaintiff must plead make no reference to any necessity for a public defamation. Whether the libel is communicated to but one person or to many would seem important only on the amount of damages recoverable.

In *Spencer v. Minnick*, 41 Okla. 613, 139 P. 130 (1914), it was held that a defendant cannot escape liability for a libelous publication by using a question mark after the actionable language. Nor can a defendant evade his responsibility by saying he "understood" that plaintiff had committed perjury.⁶⁰ By analogy, the publication is by the defendant even though he names the source of his information, expresses disbelief in the truth of the libel, or uses words of qualification such as, "it is rumored;" "I heard from a friend;" "it is being said," etc.

Must the publication, although undoubtedly made by the defendant, be shown to have been made maliciously before plaintiff has a prima facie case? The statutory definition speaks of a "malicious" publication, implying that plaintiff must show this as an element. The court in *Craig v. Wright*,⁶¹ however, said: "Malice is emphatically no part of a plaintiff's cause of action for libel. . . ."⁶² But in another case the same court said:

In all cases of defamation, whether oral or written, malice is an essential ingredient, and must be averred. But when averred, and the language, verbal or written is proved, the law will infer malice. . . .⁶³

Section 1443 of Title 12 of the Oklahoma Statutes (1961) says in part: "In all cases of publication of matter not privileged. . . malice shall be presumed from the publication, unless the fact and the testimony rebut the same," and Section 1445 of the same Title says: "An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown." These various authorities, seemingly contradictory, are reconciled if they mean, as I believe they do, that to plead a prima facie case, plaintiff must allege malice, but he may prove this element in most instances and establish his prima facie case by means of the statutory presumption of malice.

B. LIBEL PER SE AND LIBEL PER QUOD

1. PLEADING SPECIAL DAMAGES

At common law a writing which was clearly defamatory on its face was libelous per se, while if it were necessary for the plaintiff to plead extrinsic matter to show the defamatory nature of the libel, then it

⁵⁹ 12 OKLA. STAT. §§ 303, 1444 (1961).

⁶⁰ (Slander case) *Smith v. Gillis*, 51 Okla. 134, 151 P. 869 (1915).

⁶¹ 169 Okla. 245, 43 P.2d 1017 (1934).

⁶² *Id.* at 1019.

⁶³ *Harris v. Rich*, 104 Okla. 120, 229 P. 1080 (1924).

was merely libel per quod. In neither situation did the common law rule require allegation or proof of any special damages. While Oklahoma has retained in essence the common law test for a libel per se, it has changed the common law rule about special damages. The Oklahoma cases hold that where a publication is not libelous per se, special damages must be alleged and proved, and further, extrinsic matter may not be referred to for the purpose of making the publication libelous per se. As one writer said:

The Supreme Court of Oklahoma has consistently made a distinction between publications that are libelous per se and libelous per quod. There is no doubt that in order to recover, the latter requires allegation and proof of special damages. Libel per se exists where the words are defamatory on their face, and are recognized as injurious without the aid of extrinsic proof. Libel per quod exists when extrinsic facts are necessary to prove the imputation conveyed.⁶⁴

The question of whether a publication is libelous per se is a question of law for the court.⁶⁵ The difficulty is that the Oklahoma Supreme Court has not laid down a definite guide for the trial courts to follow in determining whether a libel is per se in one frequently occurring situation. Words charged to be libelous fall into one of three classes: (1) those that cannot possibly bear a defamatory meaning; (2) those that are reasonably susceptible of a defamatory meaning as well as an innocent one; or (3) those that are clearly defamatory on their face.⁶⁶ The first class clearly is not actionable and just as clearly, the third class is libelous per se. But what of the second class? Here the Supreme Court suffers from mental myopia or judicial schizophrenia. As one writer has correctly observed:

. . . The Supreme Court of Oklahoma has not been consistent in applying a uniform test to determine this question. Two possible tests which the courts may use are: (1) the court can hold that the words are not libelous per se if the publication cannot be reasonably capable of a defamatory meaning; otherwise, whether the statement is libelous is a jury question; (2) if an innocent meaning is possible the words are not libelous per se, and in the absence of allegations of special damages, a demurrer will be sustained.⁶⁷

The same writer concluded: "It is submitted that the Supreme Court of Oklahoma should clear up the inconsistency that presently exists and state a definite test to be used in determining what is libel per se in Oklahoma."⁶⁸

For a while it looked as if the Supreme Court were going to do just that in the *Fawcett* case. The court said:

Having concluded that the article is defamatory and libelous on its face we think it follows that the article is *libelous per se*. How-

⁶⁴ Note, 10 OKLA. L. REV. 474 (1957).

⁶⁵ Kelly v. Roetzel, 64 Okla. 36, 165 P. 1150 (1917).

⁶⁶ See Wimmer v. Oklahoma Pub. Co., 151 Okla. 123, 1 P.2d 671 (1931).

⁶⁷ Note, 10 OKLA. L. REV. 474, 475 (1957).

⁶⁸ *Id.* at 478.

ever, in view of the prominence given to the subject of *libel per se* in Fawcett's brief and its contention the plaintiff's name must appear in the face of the article; and the superficial lack of harmony in the decisions from this court on what constitutes libel per se, we find it appropriate to consider the matter extensively.⁶⁹

Unfortunately for our analysis and our search for an answer to the question posed, after making the above quoted statement, the Supreme Court considered "extensively" only the question of whether plaintiff must be named and not the issue of what constitutes libel per se. This the court did, despite having made very clear that these are two distinct questions. It would appear we are left in doubt on the true nature of libel per se in Oklahoma.

2. DAMAGES — SOME GENERAL RULES

In defamation which is not per se the plaintiff must plead and prove "special damages" as we have seen. But what is meant by the phrase in the context of a defamation action? Does Oklahoma adopt the technical meaning of the term, those damages which do not necessarily flow from the wrong alleged,⁷⁰ or the more restricted meaning of actual pecuniary loss? Oklahoma has never answered the question definitively. The history of libel and slander would seem to favor the latter meaning. Whatever Oklahoma means by the term, it is clear that the damages must be alleged with great specificity as opposed to the general allegations permitted in the defamation per se cases.⁷¹

The objection that, "The very nature of an action which prays for damages, in a society where economic values dominate, implies failure in the action if substantial damages be not awarded,"⁷² has been answered to some extent by the Oklahoma statute⁷³ providing for a minimum recovery of one hundred dollars and costs. The objection, however, is still valid to a large extent as the general public may have learned of the alleged defamation of the plaintiff, but it is unlikely to hear of his justification at the hands of a jury as the various news media seem interested in reporting only cases where recovery is in the five or six figure brackets.

The amount of damages awarded is limited only by the Oklahoma rule that damages may not exceed the amount prayed for even though the evidence adduced at trial might justify more money. There are no other criteria and no other limitations. As has been said by McCormick:

Apart from the occasional traceable money loss recovered as special damage, damages in defamation cases are measurable by no standard which different men can use with like results. Amounts of verdicts vary from nominal damages of a few cents to a fortune in six figures, according to numberless factors, such as the age,

⁶⁹ Fawcett Publications, Inc. v. Morris, 377 P.2d 42, 48 (Okla. 1962).

⁷⁰ McCormick, DAMAGES § 8 (1935).

⁷¹ Tulsa Tribune Co. v. Kight, 174 Okla. 359, 50 P.2d 350 (1935); Owens v. Clark, 154 Okla. 108, 6 P.2d 755 (1932); Wimmer v. Oklahoma Pub. Co., 151 Okla. 123, 1 P.2d 671 (1931); Oklahoma Publishing Co. v. Gray, 138 Okla. 71, 280 P. 419 (1929).

⁷² Leflar, *Legal Remedies for Defamation*, 6 ARK. L. REV. 423, 428 (1952).

⁷³ 12 OKLA. STAT. 1446 (1961).

sex, wealth, and personal attractiveness of the parties, the skill of respective counsel, the pungency of the defaming words, and the infinite variety of the experiences, sympathies, and prejudices of the jurymen.⁷⁴

In the *Fawcett* case the court followed what appears to many persons to be an unfair rule when it said: "It is well settled that in an action wherein punitive damages are proper, evidence of the financial worth of the defendant is competent and admissible."⁷⁵ (Are jurors so unsophisticated that such evidence, presumably to aid them in determining what amount of money will punish this particular defendant, will be disregarded by them in assessing the compensatory damages? Allied to that question and admittedly outside the scope of this article, but do not compensatory damages also have a punitive role to play?)

C. DEFENSES

1. TRUTH

From personal conversations with judges and attorneys I have found among them a common assumption (in which I formerly shared more readily than now) that truth alone is a defense in Oklahoma to a civil case of defamation. That is, if the defendant can establish the truth of his defamatory statement, this is a defense regardless of the motive with which he made his statement. This "rule" is doubtful. No constitutional or statutory provision supplies any such rule in unequivocal language, and no Oklahoma Supreme Court case has so held in clear, unambiguous terms.

Article II, Section 22 of the Oklahoma Constitution, after providing for the right of free speech and related matters, concludes with this language:

In all criminal prosecutions for libel, the truth of the matter alleged to be libellous may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libellous be true, and was written or published with good motives and for justifiable ends, the party shall be acquitted.

Two interpretations are possible on the intent of the framers of the Constitution in using that language: (1) the framers intended to make certain that truth alone would not be a defense to a criminal libel, but decided to leave to the Legislature the problem of what effect truth alone should have in an action for civil defamation; (2) the framers intended to leave truth as a defense to a civil action, but to add a qualification where truth was pleaded in a criminal action. The Legislature unfortunately has been just as ambiguous in its enactments. Section 304 of Title 12 of the Oklahoma Statutes (1961) provides:

In the actions mentioned in the last section, the defendant may allege the truth of the matter charged as defamatory, and may prove the same, and any mitigating circumstances, to reduce the amount of damages, or he may prove either.

Here again, at least two reasonable interpretations of intent are possible:

⁷⁴ McCormick, *DAMAGES* 443 (1935).

⁷⁵ *Fawcett Publications, Inc. v. Morris*, 377 P.2d 42, 53 (Okla. 1962).

(1) the Legislature intended to allow a defendant to plead truth as a defense and to plead any mitigating circumstances to reduce the damages, or he could plead one or the other at his discretion; (2) the Legislature intended to allow defendant to plead truth and any other mitigating circumstances to reduce the amount of damages. Although the Oklahoma legislators rarely are good grammarians, the addition of the comma following the word "circumstances" would favor the second possibility. The legislative history of this section, however, gives greater weight to the first interpretation. Section 304 was taken from the Kansas statutes,⁷⁶ a State with a constitutional provision very similar to Oklahoma's Article II, Section 22. In both *Castle v. Houston*⁷⁷ and *Munday v. Wright*,⁷⁸ the Kansas Supreme Court held that a reasonable interpretation of their constitutional and statutory provisions required it to hold that truth alone was a complete defense in a civil action, but a defense in a criminal action only when the truth was published with good motives.

Oklahoma Legislatures are known for either duplicating or providing parallel Acts to cover the same subject matter. So it is with pleading defenses to a defamation action. Despite the existence of Section 304 providing for the pleadings by a defendant, the Legislature provided in Section 1444 of Title 12, Oklahoma Statutes (1961) in part as follows:

As a defense thereto the defendant may deny and offer evidence to disprove the charges made, or he may prove that the matter charged as defamatory was true, and in addition thereto, that it was published or spoken under such circumstances as to render it a privileged communication.

Does the Legislature mean that a defendant has three possible defenses, to-wit: (1) a defense of "I didn't do it"; (2) "I only told the truth"; or (3) "I may have lied but I was privileged in doing so?" Or does the Legislature mean that a defendant has three defenses and he can plead any one of the three and/or the other two as well, the Legislature using the ambiguous phrase "and in addition thereto" to avoid the awkward and sometimes meaningless "and/or" designation? Logic and common sense would dictate the second possibility. If a defendant can establish that his communication is privileged (to be discussed hereafter), this is a defense in itself and the truth or falsity of his publication is immaterial. It would seem an unreasonable interpretation which would require defendant to show as a defense both the truth of what he said and also that it was privileged. This analysis is strengthened by the definition of libel which provides that it is a "false or malicious unprivileged publication." Thus, the defendant should be able to win by proving that his statement was true or that it was without malice and privileged. The most we can say is that some argument for the existence of truth alone as a defense can be based on the constitutional and statutory language. We cannot say that these authorities definitely establish this as the rule in Oklahoma.

The cases are little more definitive than the legislative authorities.

⁷⁶ GEN. ST. KAN. 1889, par. 4209.

⁷⁷ 19 Kan. 417, 27 Am.Rep. 127 (1877).

⁷⁸ 26 Kan. 173 (1881).

*Craig v. Wright*⁷⁹ is most often quoted for the rule that truth is always a defense. That rule, however, is not the true holding of the case and its frequent quotation results from a misunderstanding of the procedural steps in the case. The defendant admitted publication and pleaded in defense only one ground, substantial truth of the import conveyed. The trial court instructed the jury that "the truth of the article is always a defense," and that "if the defendant establishes the truth of the alleged libelous statement by fair preponderance of the evidence then plaintiff cannot recover, and your verdict should be for the defendant."⁸⁰ The Oklahoma Supreme Court, speaking about this instruction, said:

More serious objection is taken to the instruction because it treats truth as an absolute defense to an action for libel. It is contended that our statutory definition of "civil libel," section 724, O.S. 1931, adopted from our criminal libel definition by the Revised Laws of 1910 (Section 4956) states that, 'Libel is a false or malicious unprivileged publication,' etc. and so negatives the idea that falsity is essential.⁸¹

The Supreme Court, however, did not have to answer the question of whether truth alone is an absolute defense because the defendant's motive in defaming the plaintiff was not disputed, and the trial court held as a matter of law that the motive was a justifiable one. This destroyed the statutory presumption of malice,⁸² raised an issue of conditional privilege, and left to the plaintiff the task of proving malice. Thus, the trial court's instruction (erroneously phrased but harmlessly so under the facts of the case) dealt not with truth as an absolute defense, but with the question of defendant's malice, which would have been shown and his privilege lost under the particular circumstances of the case had his statement been false.

In *Spencer v. Minnick*,⁸³ the Supreme Court implied that truth alone is not an absolute defense in Oklahoma when it said: "The publication was not privileged, under the facts shown, and the defendant had remaining to him but the defense of 'truthful publication without malice' as a complete defense. . . ."⁸⁴ *Bodine v. Times-Journal Pub. Co.*⁸⁵ is of no help in our analysis as both truth and privilege were involved and intertwined in the case.

The cases concerning the defense of truth in Slander fall under the same sections on pleading as Libel, but in one slander case to be mentioned shortly, the court seems more lenient in saying that truth is an absolute defense than it has in the libel cases. This despite the fact that the definition of slander begins, "Slander is a false and unprivileged publication"⁸⁶ (emphasis added) while the definition of libel begins, "Libel is a false or malicious unprivileged publication."⁸⁷ (emphasis

⁷⁹ 169 Okla. 245, 43 P.2d 1017 (1934).

⁸⁰ *Id.* at 1018.

⁸¹ *Ibid.*

⁸² OKLA. STAT. § 1445 (1961).

⁸³ 41 Okla. 613, 139 P. 130 (1913).

⁸⁴ *Id.* at 132.

⁸⁵ 26 Okla. 135, 110 P. 1096 (1910).

⁸⁶ 12 OKLA. STAT. § 1442 (1961).

⁸⁷ 12 OKLA. STAT. § 1441 (1961).

added.) In *Weber v. Rusch*,⁸⁸ the court said:

Under section 304, supra, the general denial is provided for.

Under section 305, supra, the special defense of truth as a justification is provided for, and the defendant by his answer had the right, under proper allegations, to raise both propositions, although they are inconsistent defenses, as was decided by this court in an opinion by Justice Hayes in the case of *Wallace v. Kopenbrink*, 119 P. 579 31 Okl. 26. The first paragraph of the syllabus is as follows:

In an action for slander, the defendant, by reason of sections 5634 and 5666, Comp. Laws 1909, may set up in his answer a general denial, and that the defamatory language alleged to have been used by him is true.⁸⁹

Proponents of the "truth alone is an absolute defense" rule might feel hopeful as a result of the quoted language until they realize that the real holding of the case is that truth (whatever its legal effect may be) is not raised as an issue under a general denial. Those same proponents may be heartened by this language:

It will be noticed that the facts pleaded in the answer are pleaded, not in mitigation of damages, but as justification for the charge. The importance of this distinction must be borne in mind. . . . When called to account, in order for him to justify this charge, he must be able to prove the exact offense charged, and not some other similar offense.⁹⁰

If, as I suspect, the rule in Oklahoma, although not clearly enunciated, is that truth alone is an absolute defense, prospective plaintiffs might bear in mind Timothy Sullivan's classic remark, "What's the use of a libel suit? They might prove it on you."

2. PRIVILEGE

a. Absolute

Particular privileges are termed "absolute" because the existence of such a privilege is a defense by itself and it matters not that defendant may have defamed the plaintiff untruthfully, maliciously, viciously, spitefully, etc.⁹¹ Whether a situation is privileged at all and, if it is, whether the privilege is an absolute one are questions of law for the trial court. If the court decides that the particular occasion gives rise to an absolute privilege, the circumstances being undisputed, there is nothing to submit to a jury, the plaintiff is through, his case is dismissed, and his only remedy is an appeal.⁹²

The Oklahoma statute⁹³ on privilege, being somewhat lengthy, will be broken down and discussed in its component parts. The statute begins: "A privileged publication or communication is one made: First. In any legislative or judicial proceeding or any other proceeding

⁸⁸ 117 Okla. 4, 245 P. 46 (1926).

⁸⁹ *Id.* at 47.

⁹⁰ *Vorhees v. Toney*, 32 Okla. 570, 122 P. 552, 553 (1912).

⁹¹ *Pacific Emp. Ins. Co. v. Adams*, 196 Okla. 597, 168 P.2d 105 (1946).

⁹² *German-American Ins. Co. v. Huntley*, 62 Okla. 39, 161 P. 815 (1916).

⁹³ 12 OKLA. STAT. § 1443 (1961).

authorized by law." More defamation cases are brought by legislators than are brought against them in their capacity as legislators. Such situation stems logically from the fact that legislators always have enjoyed an absolute privilege for anything said or done in connection with and related to their official duties, whether such defamation occurs on the floor of the legislative body, during committee hearings either at or away from the legislative seat, official reprints of speeches, etc. This absolute privilege, as is true of all privileges, has its ultimate origin in public policy. William Howard Taft, while a Circuit Judge, stated the policy argument in these words:

"The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed."⁹⁴

The same public policy extends to judges on all levels of the judicial hierarchy the same absolute privilege in defamation cases as it extends to legislators. The statute is broader and speaks of a judicial proceeding, and not of judges alone. Thus, pleadings relevant to the issues (all doubts being resolved in favor of the pleader),⁹⁵ proceedings after judgment in a divorce action,⁹⁶ witnesses whose testimony is pertinent to the issues,⁹⁷ parties and attorneys,⁹⁸ and pleadings and proceedings before the State Industrial Commission⁹⁹ (now designated a Court) are all absolutely privileged under the term "judicial proceeding." Very few, if any, cases have turned only on the statutory phrase "or any other proceeding authorized by law." It should be noted, however, that the phrase is "authorized by law," and not "required by law."¹⁰⁰

The next part of the statute defining what are privileged communications reads as follows: "Second. In the proper discharge of an official duty." Three problems, two arising from the language itself and one from the decided cases, deserve some comment. If the Legislature, as a matter of sound public policy, desired to grant the absolute privilege to officials discharging their duties, why was it necessary to add the word "proper" and what, if anything, does the word mean in this context? If it means anything and is not just a matter of careless draftsmanship, it would seem to qualify the privilege, and a "qualified" privilege is certainly not an "absolute" one. Secondly, how far down in the bureaucratic hierarchy did the Legislature intend this defense of absolute privilege to extend? The Governor of the State, certainly; the janitor who sweeps out the office of the Governor?

In *Hughes v. Bizzell*,¹⁰¹ the Oklahoma Supreme Court held the

⁹⁴ *Post Publishing Co. v. Hallam*, 59 Fed. 530, 540 (6th cir. 1893).

⁹⁵ *Pacific Emp. Ins. Co. v. Adams*, 196 Okla. 597, 168 P.2d 105 (1946).

⁹⁶ *Hammert v. Hunter*, 189 Okla. 455, 177 P.2d 511 (1941).

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Pacific Emp. Ins. Co. v. Adams*, 196 Okla. 597, 168 P.2d 105 (1946).

¹⁰⁰ *Holway v. World Pub. Co.*, 171 Okla. 306, 44 P.2d 881 (1935).

¹⁰¹ 189 Okla. 472, 117 P.2d 763 (1941).

president of the University of Oklahoma and the dean of the university medical school absolutely privileged, regardless of motives and alleged falsity, for statements made to the Board of Regents concerning a librarian of the medical school whom the defendants had fired. Presumably, the president and dean were in the proper discharge of an official duty. Two years earlier the Supreme Court had reached the same conclusion in a similar case.¹⁰² After having been directed by the Board of Regents to report "any misconduct" or "any irregularity" of any "teacher or employee of the university," the defendant president of the university reported to the Board that the matron and the supervisor of buildings and grounds had been arrested while together in a room. This statement was held absolutely privileged as it was made in the proper discharge of an official duty. More difficult to explain or reconcile is the holding in *Collins v. Oklahoma State Hospital*.¹⁰³ After saying that the law as well as the dictates of common humanity imposed upon the superintendent of a state hospital for the insane the duty of responding to a letter from a patient's father inquiring about her condition, the court held that responding to the inquiry was only qualifiedly privileged. Surely the Supreme Court is not suggesting that the superintendent was any less "in the proper discharge of an official duty" than the defendants in the other two cases, nor that public policy decrees protection for academicians but not for superintendents?

The third and final part of the statute defining what are absolutely privileged communications reads as follows:

Third. By a fair and true report of any legislative or judicial or other proceeding authorized by law, or anything said in the course thereof, and any and all expressions of opinion in regard thereto, and criticisms thereon, and any and all criticisms upon the official acts of any and all public officers, except where the matter stated of and concerning the official act done, or of the officer, falsely imputes crime to the officer so criticised:

Justice Jackson, writing the majority opinion in the *Fawcett* case, said: "Our statutory definition of 'privileged publication' (12 O.S. 1961 § 1443) refers to the type of privilege commonly called absolute."¹⁰⁴ While the Justice has judicial precedent¹⁰⁵ for his statement, and while his statement is undoubtedly true as applied to the three enumerated sections of the statute, the privilege defined in the third section, *supra*, cannot be called "absolute" to the same degree as the privilege defined in the first two sections. There are certain limitations placed upon the exercise of this privilege before it will be considered as absolute within the statute. As one writer said:

Section 1443 of Title 12 of the Oklahoma Statutes (1951) in part provides that criticisms of public officials are privileged publications, but the privilege does not extend to falsely imputing

¹⁰² *Sanford v. Howard*, 185 Okla. 660, 95 P.2d 644 (1939).

¹⁰³ 76 Okla. 229, 184 P. 946, 7 A.L.R. 895 (1919).

¹⁰⁴ *Fawcett Publications, Inc. v. Morris*, 377 P.2d 42, 52 (Okla. 1962).

¹⁰⁵ E.g., *Sanford v. Howard*, 185 Okla. 660, 95 P.2d 644 (1939); *German-American Ins. Co. v. Huntley*, 62 Okla. 39, 161 P. 815 (1917).

crime to the officer so criticized. Case law in Oklahoma recognizes an additional qualification: If the criticism is based on false allegations of fact also appearing in the publication or if the criticism consists of false accusations, then there is no privilege.

In both the *Thompson* case and the *Kendall* case, the court recognizes that false imputation of crime is not the sole limitation on the privilege. If the criticism is based on false accusations or on false allegations of fact also appearing in the publication, there is no privilege. This thus limited privilege *is* a substantial privilege because, if the publisher raises the defense of privilege to criticize public officials, the burden of proving the comment is a false accusation or is based on false statements of fact is on the plaintiff.¹⁰⁵

The decisions reveal a tendency on the part of the court to be lenient toward publication of criticisms of public officials, judicial proceedings, and other matters of public interest.¹⁰⁷ Such leniency does not extend, however, to honest misstatements of fact. In this respect, it has been said:

It has been suggested that Oklahoma extends privilege to honest, though mistaken, misstatements of fact made without negligence concerning public officers. However, *Holway v. World Publishing Co.*, cited for this proposition does not support it. No authority for the proposition seems to exist in Oklahoma. All the cases . . . stress the distinction between commenting on facts and misstating facts.¹⁰³

b. Conditional or Qualified

A privilege is said to be qualified or conditional in the sense that for the defense to prevail, the alleged defamatory matter must have been published without malice. Lack of malice, then, is a qualification or condition attached to this privilege. The only statutory authority for the existence of the qualified privilege is Section 1443 of Title 12 of the Oklahoma Statutes (1961), which, after enumerating the situations absolutely privileged, says: "In all cases of publication of matter not privileged under this section, malice shall be presumed from the publication, unless the fact and the testimony rebut the same."

Whether lack of malice is the only requirement for the invocation of the privilege, what "malice" means when used in a defamation case, and the respective roles played by the judge and jury in connection with this privilege are all confusing issues in many instances. The issue of malice does not become a question for determination unless the particular factual situation is one which gives rise to the privilege. In a sense it may be said there are two conditions to be met before the privilege operates as a defense: (1) the factual situation is one giving rise to a defense of qualified privilege; and (2) the privilege was not abused. That is, defendant's statement was made without malice. On the first condition it has been said:

This privilege arises in situations wherein the interest which

¹⁰⁵ Note, 12 OKLA. L. REV. 300, 300-302 (1959).

¹⁰⁷ Note, 7 OKLA. L. REV. 105 (1954).

¹⁰⁸ *Id.* at 112.

the publisher is seeking to vindicate is considered to have an intermediate degree of importance, so that the immunity conferred is not absolute, but is conditioned upon publication for a proper purpose in a reasonable manner.¹⁰⁹

Because of the innumerable factual situations in which the privilege may arise, no precise formulation of a rule can be made which will embrace all such situations. As the court said in the *Fawcett* case:

Definitions of qualified privilege are usually very general in nature and difficult of precise construction. See 53 C.J.S. Libel and Slander § 89 et seq; 33 Am.Jur. Libel and Slander, Sec. 126. With regard to privilege generally, it is said that '. . . in order to be shielded . . . on this ground, the communication must be a privileged one uttered on a privileged occasion by a privileged person to one within the privilege'; 53 C.J.S. Libel and Slander § 87. With regard to qualified, or conditional privilege, it is said in 53 C.J.S. Libel and Slander § 89, that 'It relates more particularly to private interests. . . .' An examination of the cases in which the defense of qualified privilege has been held applicable reveals that as a general rule some special private relationship has been involved, such as fraternal, fiduciary, business or professional.¹¹⁰

Other Supreme Court cases¹¹¹ have used language to the effect that the privilege arises in a situation where the communication is one made in good faith upon any subject matter in which the party communicating has an interest, or in reference to which he has or honestly believes he has a duty to perform, and which, without the occasion upon which it is made, would be defamatory and actionable. It can be seen that the two necessary conditions to the existence of the privilege, a proper occasion for making the statement, and lack of malice in doing so, are closely related and often difficult to separate, one from the other.

Malice has many meanings in law. Unfortunately, from the viewpoint of simplicity, that statement is likewise true when applied to an action for defamation, a particular meaning depending upon the procedural step which involves the issue of malice. As we have seen heretofore, a plaintiff must plead malice but in proving such allegation, he often need do no more than rely on the statutory presumption of malice. Section 1445 of Title 12 of the Oklahoma Statutes (1961) provides: "An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown." Thus, on the first procedural step, malice means merely an absence of any justifiable motive. If the fact of the publication itself or the testimony suggests the presence of a justifiable motive, then plaintiff must prove that the defendant made his statement with malice.¹¹² Malice in this instance means "actual"¹¹³ or "express"¹¹⁴ malice, a feeling of hatred, ill-will, spite, revenge, etc. This same meaning of malice becomes important in yet another procedural

¹⁰⁹ Note, 2 OKLA. L. REV. 387 (1949).

¹¹⁰ *Fawcett Publications, Inc. v. Morris*, 377 P.2d 42, 52 (Okla. 1962).

¹¹¹ *E.g.*, *Hammitt v. Hunter*, 189 Okla. 455, 117 P.2d 511 (1941).

¹¹² *Harris v. Rich*, 104 Okla. 120, 229 P. 1080 (1924).

¹¹³ *Ibid.*

¹¹⁴ *Missouri, K. & T. Ry. Co. v. Watkins*, 77 Okla. 270, 188 P. 99 (1920).

step, the prayer for and proof of punitive damages.¹¹⁵

We can say in a very general way that the trial court decides whether any privilege at all exists and if it does, whether the privilege is absolute or conditional.¹¹⁶ If the privilege is conditional, the court submits to the jury for its determination whether the privilege was abused; that is, whether the defendant made his statement with malice.¹¹⁷ The immediately preceding statements presuppose, of course, no dispute as to the facts and circumstances of the publication. If there were a dispute, the resolution of the facts would be questions for the jury under proper instructions on malice and privilege given the jury by the trial court.

c. Fair Comment

Oklahoma has no specific statutory provision for the defense of Fair Comment, and it is often regarded as a type of conditional privilege. There are, however, significant differences between the two defenses which should be noted briefly. Conditional privilege exists where the particular factual situation is one giving rise to the privilege and the publication is made without malice, although the facts stated are untrue. Fair Comment exists only if the comment is a conclusion drawn from facts which are true. Conditional privilege exists even though the plaintiff's reputation is directly assailed by the language. Fair Comment is limited to opinions about plaintiff's work as an author, artist, public official, etc., and personal imputations having no relation to such opinions are not within the defense. As one writer said:

The privilege of fair comment extends to those who comment upon matters of public interest. The comment must be based on facts truly stated or generally known to the public.

Fair comment is not confined to a discussion of public officers or candidates for office. It is much more extensive. . . .

According to the majority of courts, fair comment must never take the form of a statement of fact. Comment may be distinguished from fact by inquiring whether the statement should be construed as being a conclusion drawn from facts stated. . . .

The distinction between comment on public conduct and an imputation of a personal nature is responsible for a great deal of the confusion that exists in the law of libel.¹¹⁸

In a 1935 case,¹¹⁹ the Oklahoma Supreme Court held that matters of public interest are legitimate subjects of fair comment and honest criticism, no matter how severe its terms may be, and are not libelous.

It may be noted that both the quotation *supra* and the Oklahoma case refer to Fair Comment as applying to matters of "public" interest. No inference should be drawn that the defense is limited to comments on matters in which the public has an interest, as both these sources were speaking of libel actions. That is, if the communication is to the public, fair comment should apply only if the public has an interest in the subject matter, but if I defame the plaintiff to a friend concerning a

¹¹⁵ 23 OKLA. STAT. § 9 (1961).

¹¹⁶ *Pacific Emp. Ins. Co. v. Adams*, 196 Okla. 597, 168 P.2d 105 (1946).

¹¹⁷ *Bland v. Lawyer-Cuff Co.*, 72 Okla. 128, 178 P. 885 (1919).

¹¹⁸ Note, 2 OKLA. L. REV. 111-112 (1949).

¹¹⁹ *Holway v. World Pub. Co.*, 171 Okla. 306, 44 P.2d 881 (1935).

matter of interest to the three of us only, I should have a defense of fair comment if the prerequisites to its application are met.

3. FEDERAL COMMUNICATIONS ACT AND RETRACTION

Section 315 of Title 47 of the United States Code provides:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate.

The Supreme Court of North Dakota in 1958 held that the quoted section of the Federal Communications Act granted immunity to a television station from liability for defamatory statements made by a candidate for a political office in a broadcast under the section, where the statements¹²⁰ were germane to the political issues discussed by the candidates. On certiorari to the United States Supreme Court, the decision was upheld in a 5 to 4 decision, the court saying:

Agreeing with the state courts of North Dakota that Section 315 grants a licensee an immunity from liability for libelous material in broadcasts, we merely read Section 315 in accordance with what we believe to be its underlying purpose.¹²¹

The Supreme Court decision renders more meaningful a statute passed by the Oklahoma Legislature two years before the decision. That statute, Section 1447.2 of Title 12 of the Oklahoma Statutes (1961), provides in part:

In no event, however, shall any owner, licensee, or operator, or the agents or employees of any such owner, licensee or operator of such a television and/or radio station or network of stations be held liable for any damages for any defamatory statement uttered over the facilities of such station or network by any candidate for public office, where such statement is not subject to censorship or control by reason of any Federal statute or any ruling or order of the Federal Communications Commission made pursuant thereto.

...

The Oklahoma Legislature has provided for retraction by newspapers, periodicals, and broadcasting stations, although the effect of a retraction by the latter does not seem to have the same legal effect as a retraction by the former two classes of defendants. Section 1446a of Title 12 of the Oklahoma Statutes (1961) provides in effect that if an article is published in good faith and under an honest mistake of the facts, and the newspaper or periodical, on notice by the libeled person, publishes a retraction in accord with the statutory requirements as to size of type, location of the retraction, and number of times published,

¹²⁰ *Farmers Educational & Cooperative Union of America v. WDAY*, 89 N.W. 2d 102 (N.D. 1958).

¹²¹ *Farmers Educational & Cooperative Union of America v. WDAY*, 360 U.S. 525, 535, 79 Sup. Ct. 1302, 1308, 3 L.Ed. 2d 1407, 1415 (1959).

etc., the plaintiff shall be entitled to recover actual damages only. (The word "actual" has not been interpreted, and it is assumed the Legislature intended a retraction to eliminate any punitive damages.) The section does not apply to a libel: (1) imputing unchastity to a woman; (2) to one made maliciously or with premeditated intention and purpose to injure, defame or destroy reputation; (3) to anonymous communications; nor (4) to an article pertaining to a candidate for public office published within three weeks of an election. The Oklahoma statute has never been interpreted and its constitutionality is an open question. The Supreme Court of California, a State with constitutional and statutory provisions similar to Oklahoma's, upheld California's retraction statute in *Werner v. Southern California Associated Newspapers*, 216 P.2d 825 (Cal. 1950). As one writer said:

Perhaps the strongest argument against the validity of these statutes is that provisions, such as those found in the Oklahoma and California Constitutions, which hold persons responsible for the abuse of their right to speak and write freely on all subjects, create an absolute right to civil indemnity for injuries to reputation through speech and print.¹²²

Another argument could be based on Article V, Section 51 of the Oklahoma Constitution which provides: "The Legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges, or immunities within this State."

In Section 1447.5 of Title 12 of the Oklahoma Statutes (1961), the Legislature provided for the broadcast, upon demand, of a true statement after the broadcast of an untruth, but the Legislature did not indicate what the legal effect of such retraction would be. Presumably, it can go only to mitigation of damages, as Section 1447.3, passed by the same Legislature, provides: "In any action for damages for any defamatory statement published in or uttered as a part of a television and/or radio broadcast, the complaining party shall be allowed such actual and/or punitive damages as he has alleged and proved."

SLANDER

Although there is no need for two torts of defamation and no rational basis for a compartmentalization of one basic wrong, the Oklahoma Legislature continues, as it has since statehood, to make certain distinctions between Libel and Slander. No arguments need be adduced to prove that only one tort of defamation should suffice. The truth of the proposition is self evident. That the Legislature and the Oklahoma courts recognize this truth can be demonstrated by at least two facts: (1) only one section of the entire statutory title on defamation concerns slander alone, and that section merely defines the tort; (2) the only difference between slander and libel lies in the form of publication which the defamation takes, and perhaps in the court-devised test of slander per se as opposed to the test of libel per se.

Section 1442 of Title 12 of the Oklahoma Statutes (1961) provides:

Slander is a false and unprivileged publication, other than libel, which:

¹²²Note, 3 OKLA. L. REV. 426, 428 (1950).

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 profit.
4. Imputes to him impotence or want of chastity; or,
5. Which, by natural consequences, causes actual damages.

Any first year law student will recognize that the first four of these instances listed, with certain changes, are merely declaratory of what finally came to be slander per se at common law. With this knowledge of what constituted slander per se at common law, a reasonable interpretation of the statute would be that the Legislature intended the first four paragraphs to constitute slander per se and thus actionable without allegation and proof of special damages, and intended that actual damages must be alleged and proved in the situation listed in paragraph 5.

The courts, however, have not spoken with such clarity. In *Findley v. Wilson*,¹²³ the Oklahoma Supreme Court in defining "slander per se" said that the meaning of "per se" is taken alone; in itself; by itself; and that words which expose a person to public hatred, contempt, or obloquy, or tend to deprive him of public confidence, or injure him in his occupation are slanderous per se. It will be remembered that this sounds very much like the statutory effects which libel must take and sounds, moreover, like the test of what is libelous per se. The court has left us in a quandry as to what is slander per se in Oklahoma. Several questions should be raised: (1) Is the court trying to establish a single test for defamation per se, one which will apply equally to libel or slander, namely; a defamation is per se if it does not require the pleading and proof of extrinsic circumstances to show a defamatory meaning? Such simplicity of concepts might be admirable, but if this is what slander per se means, why the statutory listing of essentially the old common law categories of slander per se? The Legislature could have provided merely, "Slander is a false and unprivileged publication other than libel." (2) Is the court trying to say that slander per se must meet the test for libel per se, that is, the slander must be plain on its face and in addition, to be slander per se, the slander must fall within one of the four statutory classes? This would establish a more difficult test than for the historically more wrongful tort of libel and would seem an unreasonable requirement. (3) Lastly, is *Findley* just an old decision that the court has never had occasion to overrule and is slander per se the reasonable interpretation suggested earlier? No one knows the answer and we will get a clear-cut answer to what is slander per se, if at all, only when the following type of case is appealed to the Oklahoma Supreme Court: Plaintiff is defamed in a form which clearly is slander

¹²³ 115 Okla. 280, 242 P. 565 (1926).

and not libel; he neither alleges nor proves special damages; the defamation is plain and unambiguous; but the slander does not fall within one of the first four instances listed in Section 1442.

Or perhaps all the issues raised throughout this article will miraculously become moot by the adoption of Justice Black's views on the First Amendment Absolutes.