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Malice

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> Therefore, the composition, printing, and distribution of libelous material constitute only one cause of action. The rule of law to be applied in such circumstances is that the one issue of a newspaper or magazine, although it consists of thousands of copies widely distributed, gives rise to one cause of action, there being but one publication, and the statute of limitation runs from the date of such publication. The number of copies is considered as aggravating the seriousness of the publication, and therefore, being evidence of the extent of the injury, goes only to the matter of damages. . . . A careful examination of the cases leads to the conclusion that the decided weight of authority in this country is, where large distributions of published matter are involved, that the cause of action accrues, for the purpose of the statute of limitations, upon the first publication, when the issue goes into circulation generally. . . .[24]

Illinois adopted by statute July 22, 1959, the Uniform Single Publication Act.[25] The law statutized what had been the rule under *Winrod v. Time*,[26] and goes further, encompassing the use of air waves and the showing of motion pictures. Hence, the plaintiff is held to "one cause of action for libel, slander, or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance. . . ."[27] To date, there are no Illinois cases construing the statute.

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MALICE

Malice is the gist of the action of libel, and it may exist in fact or it may be implied in law. Malice in fact is a "formed design of doing mischief to another person,"[1] while malice in law has been defined as a "presumption of law and dispenses with proof of malice when words raise such presumption and does not imply ill will, personal malice or hatred to injure another. . . ."[2] Words amounting to a libel or slander per se necessarily import damages and malice in legal contemplation, so these elements

[24] *Id.* at 61, 78 N.E.2d at 709-10.

[25] Ill. Rev. Stat. ch. 126, § 11 (1963). "No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions."

[26] Winrod v. Time, *supra* note 23.

[27] Ill. Rev. Stat. ch. 126, § 11 (1963).

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[1] Cook v. East Shore Publishing Co., 327 Ill. App. 559, 64 N.E.2d 751 (4th Dist. 1945).

[2] Van Norman v. Peoria Journal Star, 31 Ill. App. 2d 314, 175 N.E.2d 805 (2d Dist. 1961).

need not be pleaded or proven; they are conclusively presumed as a matter of law in such cases.[3]

In *Hatch v. Potter*,[4] defendant said to a third person about the plaintiff that she had consented to sexual intercourse with him. Since fornication was a crime, the court held that the remark was actionable per se, and consequently that the law would imply that defendant was maliciously motivated.

The presumption of malice is not conclusive, however, and may be rebutted by circumstances indicating that defendant did not make the publication with malice, but rather did so with some innocent intention. In an early Illinois case enunciating this principle, *Ayers v. Grider*,[5] plain-

[3] Cook v. East Shore Publishing Co., *supra* note 1. See also Gilmer v. Eubank, 13 Ill. 271 (1851). In this case defendant said the plaintiff had stolen a steer belonging to the defendant. Said the court at page 275:

> Malice is the gist of the action of slander. But the term malice has a twofold signification. There is malice in law as well as malice in fact. In the former and legal sense it signifies a wrongful act, intentionally done, without any justification or excuse. In the latter and popular sense it means ill-will towards a particular person; in other words, an actual intention to injure or defame him. . . .
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> In an ordinary action for words, it is sufficient to charge that the defendant spoke them falsely; it is not necessary to state that they were spoken maliciously . . . though evidence of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for the defendant on the ground of the want of malice. . . . The existence of malice in fact was not necessary to maintain the action. The law raised the presumption of malice, and that presumption was conclusive. The court erred in refusing the instruction demanded by the plaintiff, and in giving the one asked by the defendant. He makes the publication at his peril and, if untrue, he is responsible for all the consequences naturally flowing from the act. The real motive by which he was activated is unimportant, except upon the question of damages. The injury to the plaintiff may be as serious where the charge is made without an actual intention to defame, as if it proceeds from the most malignant motives.

[4] 7 Ill. 725 (1845). See also Nolte v. Herter, 65 Ill. App. 430 (3d Dist. 1895). Here there was a meeting of a company board, the plaintiff was president and defendant the director. In discussing company affairs, which were not prosperous, defendant said plaintiff was stealing sour milk at night and could prove it. Those present all understood the statement, though it was spoken in a foreign language, German. After affirming for the plaintiff in the amount of $500, the court said at page 433: "Where the words charged and proved are actionable per se the law implies malice and injury, and does not require proof of any actual damage to warrant a verdict for more than merely nominal damages." In Gaines v. Gaines, 109 Ill. App. 226 (3d Dist. 1902), a libel was published by means of a letter sent to the father of the plaintiff, alleging that plaintiff had perjured himself in a previous lawsuit against the defendant. In affirming a judgment in the amount of $500 for the plaintiff the court said: "When slanderous words, actionable per se, are uttered, the law implies malice and consequent injury." In Stephens v. Commercial News Co., 164 Ill. App. 6 (3d Dist. 1911) it was held that in cases where an actionable defamation has been published, it is error to instruct the jury that malice must be proven. Where a publication is shown to have been made and the publication charges a felony, malice is presumed. See also Flagg v. Roberts, 67 Ill. 485 (1873); Hintz v. Graupner, 138 Ill. 158 (1891).

[5] 15 Ill. 37 (1853); see also McKee v. Ingalls, 4 Ill. 30, 38 (1842): "The speaking of actionable words is evidence of malice. Malice is the gist of the action. . . . If the meaning be doubtful, other parts of the same conversation may explain it, and do away with the malicious intent. If there be no such explanatory conversation, the law will infer malice. The defendant, however, has a right to explain the meaning, and rebut the presumption

tiff, the town constable, had arrested Ayers in the public square for breach of a town ordinance and had taken a knife away from him. Later plaintiff was accused by Ayers of stealing the knife and some money. The charge of stealing was understood by the hearers to relate to the arrest. The lower court refused defendant's request for an instruction to the effect that if the words were proven to have been spoken by defendant about and in relation to a known act, and that act in law was not a felony, which was known by the bystanders, the defendant should be found not guilty. Said the court:

> Actionable words impute malice, and that is the gist of the action; it is a question of intention, therefore, sufficiently evidenced by the use of actionable words, unaccompanied by explanatory words or circumstances. These, however, may show the intention to have been innocent; the presumption of malice is wanting and no foundation for the action exists. . . .
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> Under these circumstances no larceny could be committed, as such a taking could at most only amount to a trespass, and therefore, being spoken in reference to such a transaction, and so understood by the hearers, they were not actionable, and the court should have granted a new trial.[6]

Passion will not rebut malice implied. In *Hosley v. Brooks*,[7] at the time of the alleged defamatory utterance, defendant was angry and in a fit of passion. Said the court in upholding a decision for the plaintiff: "Our law implies malice from the speaking of the words, and the heat of the aggressor's passions has no tendency to rebut the malice thus implied."[8]

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SPECIAL DAMAGES

In actions for libel and slander, it is essential for the plaintiff to allege and prove special damages resulting from the defamatory statement before he will be entitled to recover, unless the words are actionable per se. "One who falsely and without a privilege to do so publishes a slander which, although not actionable per se, is the legal cause of special harm to the person defamed, is liable to him."[1]

"Special damages" means that there must be specific proof of a

of malice by proof." See also Zuckerman v. Sonnenschein, 62 Ill. 115 (1871); Schofield v. Baldwin, 102 Ill. App. 560 (1st Dist. 1902).

6 Ayers v. Grider, 15 Ill. 37, 38 (1853).

7 20 Ill. 116 (1858); see also Flagg v. Roberts, 67 Ill. 485, 487 (1873): ". . . as the law implied malice from the speaking of actionable words, the passion of the slanderer could have no tendency to rebut the malice thus implied."

8 Hosley v. Brooks, *supra* note 7, at 119.

1 Restatement, Torts § 575 (1938).