Mitigation of Damages

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MITIGATION OF DAMAGES

In addition to the ordinarily complete defenses of privilege and truth there are a few partial defenses which do not avoid the defendant's liability, but which may reduce the damages for which the defendant is liable. The process of reducing plaintiff's recovery for a defamatory publication is known as mitigating damages. Mitigation of damages is allowed in a suit for libel or slander so as not to punish the defendant when he makes the utterance without actual malice, or unjustly enrich the plaintiff by allowing him to recover more than his actual injury.

A defendant in an action for libel or slander may mitigate damages in two ways. First, he may present evidence tending to disprove actual malice, but which does not tend to prove the truth of the defamatory publication.1 This qualification excludes not only such circumstances as the law recognizes as competent evidence tending to prove the truth of the charge, but all circumstances which, in the popular mind, tend to cast suspicion of guilt upon the plaintiff.2 Secondly, defendant may mitigate damages by proving plaintiff's bad reputation in general.3

LACK OF ACTUAL MALICE

Evidence which is admissible to prove lack of actual malice is competent on the question of exemplary damages but not as affecting compensatory or actual damages.4 Exemplary damages are given as a punishment where the defamatory publication is uttered with actual malice,5 and to give a warning to others similarly inclined in order to deter them from committing the same offense.6 Exemplary damages are allowed in the interest of society and for the public benefit,7 not as compensatory damages but rather in addition to such damages.8

To subject a wrongdoer to liability for exemplary damages it must be shown that the defendant was actuated by ill-will, malice, or evil motive.9 Thus, evidence which tends to disprove actual malice is admissible to mitigate exemplary damages.10

PLAINTIFF'S CONDUCT PRIOR TO THE PUBLICATION

Certain conduct by the plaintiff, prior to the defamatory publication by defendant, may be considered as disproving actual malice if it explains defendant's motivation for speaking.

1 Sheahan v. Collins, 20 Ill. 326 (1858).
2 Storey v. Early, 86 Ill. 461 (1877).
3 Ibid.
4 Rearick v. Wilcox, 81 Ill. 77 (1876).
5 Consolidated Coal Co. v. Haenni, 146 Ill. 614, 35 N.E. 162 (1893).
6 Eshelman v. Rawalt, 298 Ill. 192, 131 N.E. 675 (1920).
7 Ibid.
8 Chicago v. Martin, 49 Ill. 241 (1868).
9 Eshelman v. Rowalt, supra note 6.
10 Sheahan v. Collins, 20 Ill. 326 (1858).
In Moore v. Mauk,\textsuperscript{11} the court held that if it appears that the defendant had reason to believe from the plaintiff's own conduct that the charge was true, then such fact should be considered in mitigation of damages. There plaintiff signed an affidavit in a court proceeding to the effect that he didn't refuse defendant the use of a particular church, but always opened it and lighted it up when directed by defendant to do so. Defendant charged that plaintiff had sworn falsely in this affidavit, and plaintiff then brought suit for slander. Plaintiff introduced evidence to the effect that he only refused to let the defendant have the key to get into the church and had not refused defendant the use of the church. Defendant introduced evidence which indicated that under the circumstances the refusal of the key was tantamount to a refusal of the use of the church. The court held that the conduct and language of the plaintiff engendered an honest belief that the affidavit was false and this evidence was admissible in mitigation of damages.

The anger or passion of defendant at the time of the defamatory publication may be considered in mitigation of damages only if it is shown that the passion or anger was provoked by the plaintiff.\textsuperscript{12} The mere fact that the plaintiff has a quarrelsome disposition will not be admissible as evidence in mitigation of damages.\textsuperscript{13}

Certain publications by plaintiff may be considered in determining whether defendant was actuated by actual malice. In Thomas v. Dunaway,\textsuperscript{14} defendant introduced into evidence the fact that plaintiff published two newspaper articles within two weeks prior to defendant's defamatory publication. The articles charged defendant with fraud and crimes, and challenged and invited plaintiff to a newspaper controversy. The defamatory publication was in reply to plaintiff's invitation. The court held that evidence of prior publications by the plaintiff of a provoking nature are admissible in mitigation of damages in an action for libel or slander. This is because such publications may show that defendant's act was not of such a malicious character as to require severe punishment.

**Defendant's Conduct Prior to the Publication**

Certain conduct by a defendant prior to the defamatory publication may also be considered if it tends to show lack of actual malice.

In Burns v. Hicks,\textsuperscript{15} the First District Appellate Court considered the fact that the defendant had consulted an attorney prior to the publication. The attorney advised the defendant that plaintiff in using certain corporate money for a particular purpose was guilty of embezzlement under the laws of Indiana. As a result of the attorney's advice, defendant in a letter to a

\begin{itemize}
  \item \textsuperscript{11} 3 Ill. App. 114 (4th Dist. 1878).
  \item \textsuperscript{12} Flagg v. Roberts, 67 Ill. 485 (1873).
  \item \textsuperscript{13} Hosley v. Brooks, 20 Ill. 116 (1858).
  \item \textsuperscript{14} 30 Ill. 373 (1863).
  \item \textsuperscript{15} 242 Ill. App. 198 (1st Dist. 1926).
\end{itemize}
third person stated that plaintiff had embezzled corporate funds. The court held that the fact that the defendant had acted on the advice of counsel is available as a circumstance in mitigation of damages.

The fact that defendant merely repeated what he heard from another was considered in Spoler Denni Hlasatel v. Hoffman,16 where the defendant newspaper published an article accusing plaintiff of committing adultery on the basis of a story related to it by plaintiff's husband. The court held that a defendant may show, as tending to mitigate damages, that he published the article upon the strength of facts told to him by a party in a position to be cognizant thereof and whom defendant believed was telling the truth.

In Rearick v. Wilcox,17 defendant published an article about the plaintiff who was then a candidate for the office of police magistrate. The article charged him with dishonesty and corruption as mayor and charged that if elected magistrate this type of activity would continue and broaden. Defendant in mitigation of damages wanted the jury to consider the facts that he published the article for the sole purpose of defeating plaintiff; that he acted in the excitement of a political campaign; and that he was actuated solely by what he believed to be for the public good. All three arguments were rejected as facts in mitigation of damages. As to acting for what he believed to be in the public good, the court said:

It may be true that defendant supposed . . . he was doing a meritorious act for the public. But . . . it would establish a dangerous rule to hold that the . . . press might, whenever they thought the public good required it, defame the character of the citizen.18

The mere fact that the defendant was paid to publish the defamatory statement is not admissible in evidence to show absence of actual malice for the purpose of mitigating damages.19

DEFENDANT'S CONDUCT SUBSEQUENT TO THE PUBLICATION

Certain conduct by the defendant subsequent to the defamatory publication may be considered as evidence of lack of actual malice.

The effect of publishing a retraction was discussed in Storey v. Wallace,20 where plaintiff demanded a retraction which defendant made on being satisfied that he was wrong. The defendant contended that a retraction was an accord and satisfaction and released him from all liability. The court held that in the absence of an express agreement, the publication of a

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16 204 Ill. 532, 68 N.E. 400 (1902).
17 81 Ill. 77 (1876).
18 Id. at 81.
20 60 Ill. 51 (1871).
retraction of a defamatory statement, satisfactory to the injured party, does not constitute an accord and satisfaction, nor a release of a claim for damages. The court also noted that in order for the retraction to be considered in mitigation it must be effective. To be effective a retraction must receive the same publicity and circulation as the defamatory publication.21

In Thomas v. Dunaway22 the effect of pleading justification and introducing evidence of such in good faith was decided. The defendant published in a newspaper that plaintiff, who was entrusted with a herd of cattle, sold them and didn't account for the purchase money. Defendant placed in evidence testimony of plaintiff's brother to the effect that the facts in defendant's publication were true. The court held that if a plea of justification is made in good faith and evidence is introduced honestly, for the purpose of supporting the plea, such evidence is to be considered by the jury in mitigation of damages, even though it is insufficient to prove the truth of the plea.

**CONDUCT OF THIRD PERSONS**

The conduct of third persons as evidence of lack of actual malice in the publication of a defamatory statement has been considered by Illinois courts on various occasions.

The fact that plaintiff was considered by third persons to be guilty of the charge in the defamatory publication was considered in Young v. Bennett.23 There, the defendant offered to prove that there was a report current in the neighborhood of the plaintiff at the time the defendant charged him with stealing corn, that the plaintiff had stolen the defendant's corn. The court concluded that in an action for libel or slander a defendant cannot prove in mitigation of damages that plaintiff was generally suspected to be guilty of the act charged. The reason for the rule is that the supposed suspicion could have been created by the defamatory publication for which the suit was brought or by similar words spoken by defendant at some time prior to the defamatory publication which plaintiff is able to prove.24

Publication as a result of being deceived by a third person was discussed in Storey v. Early.25 There, the defendant offered to show the jury that he had published the article because of two letters he received purportedly written by two reputable citizens of Rockford, which were in fact forged. The court held that a defendant may show in mitigation of damages forged letters purportedly written by reputable citizens charging the plaintiff with certain conduct which induced the defendant to publish the article. The court distinguished this from the case where the defendant introduces

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21 Id. at 56.
22 30 Ill. 373 (1863).
23 5 Ill. 43 (1842).
25 86 Ill. 461 (1877).
evidence merely to prove that a like charge has been published, which would tend to excite in the minds of the jury a suspicion against the plaintiff and tend to prove the truth of the matter and thus be inadmissible in mitigation of damages. 

**Plaintiff’s Bad Reputation**

Compensatory or actual damages are awarded in a libel or slander suit to compensate a person for the injury to his reputation. Therefore, the value of the plaintiff’s reputation is in issue and the measure of damages is vastly different where the plaintiff sustains a good reputation rather than a bad one. This is because there can be less injury inflicted on the man who has a general bad character than one whose general character is good.

The question of what evidence a defendant may submit to show that plaintiff’s reputation was not injured as much as he claims was considered in *Sheahan v. Collins*. The court held that anything which tends to show that the plaintiff sustains a general bad character is proper evidence in mitigation. It is a rule that the character of a party cannot be impeached by special acts, for no man is supposed at all times to be prepared with proof to meet every individual act. However, a person is presumed at all times to be able to support his general character. The result of this rule is that a witness, testifying to plaintiff’s reputation, can only testify to the general reputation of the plaintiff among his associates, and not to particular acts or to what particular individuals have charged.

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26 *Id.* at 464.
28 *Sheahan v. Collins*, 20 Ill. 326 (1858).
30 *People v. Stanton*, 1 Ill. 2d 44, 115 N.E.2d 630 (1953).
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