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Robert J. Berry v. Louis G. Moench : Brief of Respondent

Utah Supreme Court

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DEC 19 1958

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IN THE SUPREME COURT
of the
STATE OF UTAH

ROBERT J. BERRY,

Plaintiff and Appellant,

vs.

LOUIS G. MOENCH

Defendant and Respondent.

FILED
DEC 19 1958
Supreme Court, Utah
No. 8786

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF FACTS	2
STATEMENT OF POINTS	9
ARGUMENT	9
POINT I. THE DISTRICT COURT, AT BOTH PRETRIAL HEARINGS, AT TRIAL AND UPON THE HEARING OF THE MOTION FOR NEW TRIAL, RULED CORRECTLY THAT THE DEFENDANT WROTE THE LETTER, EXHIBIT 2, UNDER A CONDITIONAL PRIV- ILEGE.	10
POINT II. THE TRIAL COURT CORRECTLY IN- STRUCTED THE JURY AND ITS VERDICT IS OVERWHELMINGLY SUPPORTED BY THE RECORD.	18
CONCLUSION	26

CASES CITED

Combes vs. Montgomery Ward & Company (Utah, 1951) 228 P. 2d 272.....	10, 19
Crellin vs. Thomas (Utah, 1952) 247 P. 2d 264.....	23
Hales vs. Commercial Bank of Spanish Fork (Utah, 1948). 197 P. 2d 910.....	10
Morley vs. Rodberg (Utah, 1958) 323 P. 2d 717.....	2
National Standard Life Ins. Co. v. Billington, 89 S. W. 2d 491	20
Williams v. Standard-Examiner Pub. Co., 27 P. 2d 1.....	21

AUTHORITIES CITED

Restatement of the Law of Torts.....	10, 13, 14, 22
--------------------------------------	----------------

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INTRODUCTORY STATEMENT

The parties will be designated as they appeared in the trial court.

Plaintiff's suit alleged defamation of character, resulting from a letter written by defendant, a Salt Lake

City psychiatrist, to a Wyoming physician who had asked defendant to state his impressions of the plaintiff when the latter was under defendant's professional care.

Judgment was entered upon a verdict of no cause of action in the court of Third District Judge Ray Van Cott, Jr. A motion for new trial was seasonably filed, argued and denied. This appeal followed.

STATEMENT OF FACTS

Defendant cannot accept plaintiff's Statement of Facts. It is incomplete and does violence to the familiar rule that the Supreme Court should "consider those facts that most strongly support the verdict, where there is evidence pointing in different directions." *Morley vs. Rodberg* (Utah, 1958) 323 P. 2d 717. Defendant accordingly will set forth a different statement of facts.

Plaintiff was examined at the Salt Lake Clinic in the fall of 1949, at the insistence of his then wife, Mrs. Ethela Berry. Plaintiff was first seen by Dr. Miller, one of the physicians at the clinic, and after a preliminary interview, Dr. Miller determined that the matter was of an emergency nature, and he requested that the defendant doctor see the patient immediately on an emergency basis (R. 43).

The patient's wife was fearful that her marriage was being destroyed and it was the defendant's impression that she was earnestly seeking help in order to save her marriage (R. 46).

Plaintiff was physically examined and was interviewed concerning his troubles. The defendant also interviewed the plaintiff's wife and discussed the case with Dr. Miller, who had interviewed the plaintiff's wife and her sister. Defendant diagnosed plaintiff's condition as "manic depressive depression in a psychopathic personality." (Ex. 2).

Defendant recommended electro shock treatments and plaintiff submitted to four of such treatments between September 24 and October 1, 1949. He was seen on two subsequent occasions, but refused further treatment and was not seen by the defendant after October 11, 1949 (R. 16).

On September 11, 1956, Dr. J. S. Hellewell, a physician in the Evanston Medical Group, Evanston, Wyoming, addressed a letter to the defendant doctor as follows:

"One of my patients, Mr. J. I. Williams of Evanston, Wyoming, has a daughter who is seriously considering marriage with a Mr. Bob Berry, whom you have seen professionally. They are quite concerned about the matter, in view of his numerous and frequent troubles. I wonder if you could give me a brief resume of his condition and your impressions of the man." (Ex. 1).

Dr. Moench had seen patients in consultation with Dr. Hellewell prior to this time (R. 50). When he received the letter, Exhibit 1, the defendant doctor went

to the record room at Salt Lake Clinic, obtained the record concerning the plaintiff, sat down to a typewriter and from the contents of the record he wrote a letter in response to Dr. Hellewell's inquiry (R. 49). The letter, which is the cause of this lawsuit, is represented by Exhibit 2.

Although plaintiff contends defendant's medical record was unreliable because it was based, in part, on hearsay from plaintiff's wife and her sister, the doctors who testified said psychiatrists rely "substantially" on such information, that medical students are taught to do so, that this is "a very valuable method and that, where patients are depressed (as plaintiff was), doctors "usually get more of " the history in this fashion (R. 46, 124).

Dr. Hellewell's letter conveyed to defendant the impression that Dr. Hellewell was "apparently the counselor for this contemplated marriage" (R. 21 and 22). Dr. Hellewell is not a psychiatrist and it was defendant's expectation that Dr. Hellewell "would use the letter (Ex. 2) in his capacity of marital counselor to the best of his ability" on the question of whether or not he should advise the marriage (R. 50). He gave the information to Dr. Hellewell to try to help him be the best marital adviser he could be (R. 42).

Although defendant had not seen the plaintiff for nearly seven years, he had reason to believe that the psychopathic personality disorder, with which the plain-

tiff had been afflicted in 1949, was still present because there is no known cure for this disorder, and as stated by Dr. Nelson, another psychiatrist, “. . . if a patient has a basic psychopathic character in 1955 or 1956, then he certainly had it in 1949.” (R. 122).

In addition, prior to the date of the letter in question, the defendant had received a professional inquiry from the Director of the Colorado State Hospital, indicating that the plaintiff was a patient in that institution, and from the information received by the defendant, it was apparent that plaintiff's condition had not improved. (R. 47, 48).

The “manic depressive depression” phase of plaintiff's illness has hereditary characteristics (R. 51). In such instances there is a custom or practice in this community between medical men to transmit information about a patient who is so afflicted to other doctors upon request of the latter, when the inquiry is received in the course of medical practice (R. 51). Such information would not be sent to the public generally, but only to other doctors who, by their request, indicate a direct connection with the patient (R. 51, 52).

In reviewing the matter for the jury, Dr. Moench stated that he recalled no feeling of malice whatsoever at the time he wrote the letter. He had not seen the plaintiff for nearly seven years, did not remember what he looked like, had had no personal nor social dealings with either the plaintiff or his former wife, Ethela

Berry, and the contents of the letter were based entirely upon the record concerning the plaintiff's treatment in the fall of 1949 (R. 49).

Prior to the time the letter was written, the plaintiff had been divorced by Ethela Berry, and at the time of the letter, September, 1956, he was courting Mrs. Mary Booth, the daughter of Mr. J. I. Williams, one of the patients mentioned in Dr. Hellewell's letter of inquiry. Plaintiff asserts, as his principal claim of damage in this case, that the statements in the defendant's letter damaged his character and reputation in the eyes of Mr. Williams, and although he married Mrs. Booth as planned, he claims that his association with his wife's parents has been seriously impaired as a result of the letter.

In advancing this claim of damage, plaintiff's brief ignores completely the fact that information, almost identical with that contained in the defendant's letter, had already been received by the prospective bride and her family from plaintiff's former wife and from her father, both by letter and by long distance telephone (R. 101-103). The letter from the former Mrs. Berry was four or five typewritten single spaced pages, containing considerable detail about the subject matter discussed in the defendant's letter (R. 100).

Plaintiff claims the statements in Dr. Moench's letter were not true, but plaintiff himself made substantially the same statements to another Salt Lake City

psychiatrist, Dr. C. Craig Nelson, who was consulted by plaintiff in 1955 (R. 112-116). Plaintiff's brief is entirely silent about this evidence.

A day or so after Dr. Moench's letter was received, another letter, similar in content, was received by Dr. Hellewell from Dr. Nelson, who wrote in response to a professional request from Dr. Hellewell.

Dr. Nelson testified, concerning the statements made by Dr. Moench which plaintiff alleges were defamatory, that plaintiff had related to him essentially the same information concerning his background and his trouble, as had been set forth in Dr. Moench's letter (R. 112-116). This testimony was never contradicted and plaintiff never explained to the jury how statements he made to Dr. Nelson, which were presumably true, because they were given voluntarily in an effort to obtain medical aid, became "untrue" and "lies" when repeated by Dr. Moench in his letter.

Prior to the receipt of Dr. Moench's letter, the prospective bride had begun to wonder a little about the plaintiff, stating, in response to a question from plaintiff's counsel, that "there was a little question in my mind, yes," which gave her reason at that time to want to investigate the plaintiff (R. 105, 106). She therefore sought out Dr. Nelson, and asked the doctor to discuss plaintiff's mental condition and his suitability as a spouse (R. 115).

According to Dr. Nelson, she asked questions about the things which had been related by plaintiff to Dr. Nelson when he consulted him professionally in 1955, and she also “indicated awareness of some other facts about his background” and she “wondered what the outcome of them might be.”

Dr. Nelson testified he was careful to tell her she ought to make the decision on her own, after weighing all factors, because “things like this, problems like this, situations like this, were difficult to predict, and . . . I didn’t want to be pessimistic . . . and on the other hand I couldn’t be optomistic about it . . .” (R. 115).

Five days after the letter in suit was written by the defendant, plaintiff appeared at defendant’s office in Salt Lake Clinic and informed the defendant he intended to sue him because of the letter (R. 39). Plaintiff demanded that the defendant write to Dr. Hellewell and to the Williams family a statement to the effect that the information he had furnished was largely obtained from plaintiff’s former wife, Mrs. Ethela Berry (R. 40).

Dr. Moench complied with this request and Exhibit 3 is the letter which he wrote at the request of the plaintiff.

Plaintiff filed suit November 1, 1956, seeking a total of \$50,000.00 general and punitive damages for the alleged defamation of character. Upon issue being joined, the matter was called for pretrial before District Judge

A. H. Ellett, who ruled, as a matter of law, that the defendant wrote and sent the letter under a conditional privilege (R. 7).

Plaintiff attacked this ruling by motion, which was heard by Judge Ellett September 19, 1957, at which time the ruling was reaffirmed and the pretrial order was approved as made. (R.8). Subsequently, prior to submission of the case to the jury, and upon motion for new trial, plaintiff again attacked the ruling of the trial court that a conditional privilege was in effect, and upon each occasion the District Court found that such a privilege existed and rejected plaintiff's contention. (R.147,155). Plaintiff appealed.

STATEMENT OF POINTS

POINT I.

THE DISTRICT COURT, AT BOTH PRETRIAL HEARINGS, AT TRIAL AND UPON THE HEARING OF THE MOTION FOR NEW TRIAL, RULED CORRECTLY THAT THE DEFENDANT WROTE THE LETTER, EXHIBIT 2, UNDER A CONDITIONAL PRIVILEGE.

POINT II.

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY AND ITS VERDICT IS OVERWHELMINGLY SUPPORTED BY THE RECORD.

ARGUMENT

POINT I.

THE DISTRICT COURT, AT BOTH PRETRIAL HEARINGS, AT TRIAL AND UPON THE HEARING OF THE MO-

TION FOR NEW TRIAL, RULED CORRECTLY THAT THE DEFENDANT WROTE THE LETTER, EXHIBIT 2, UNDER A CONDITIONAL PRIVILEGE.

The rule governing the doctrine of conditional privilege is found in the Restatement of the Law of Torts, Section 594, page 242:

“An occasion is conditionally privileged when the circumstances induce a correct or reasonable belief that

(a) facts exist which affect a sufficiently important interest of the publisher, and

“(b) the recipient’s knowledge of the defamatory matter will be of service in the lawful protection of the interest.”

The Supreme Court of Utah has announced its approval of this rule as evidenced by the decisions in *Hales vs. Commercial Bank of Spanish Fork*, (Utah 1948), 197 P. 2d 910, and *Combes vs. Montgomery Ward & Company* (Utah, 1951), 228 P. 2d 272.

These cases are not directly in point on the questions presented by this appeal, but examination of the Restatement of Torts, Section 597, page 258, reveals a statement of the rule of conditional privilege which is believed to apply directly to this case. It is there stated that a conditional privilege arises when circumstances induce a correct or reasonable belief that

“(a) facts exist which affect the well-being of a member of the immediate family of the recipient or of a third person and

“(b) the recipient’s knowledge of the defamatory matter will be of service in the lawful protection of such person’s well-being and,

“(c) the recipient has requested the publication of the defamatory matter or is a person to whom its publication is otherwise within generally accepted standards of decent conduct.”

Turning now from the applicable rules of law to the facts in the case, it is obvious that Dr. Moench, as a respected member of his profession, viewed the request from Dr. Hellewell as placing him under a medical and social duty to transmit the information in his possession to Dr. Hellewell, whom he considered to be a marital adviser. The information in the defendant’s possession included not only the facts obtained upon examination and interview, but, by the very nature of his profession, included his impressions and professional interpretations of the facts thus obtained.

Inasmuch as the condition with which the plaintiff had been afflicted had hereditary characteristics, there was even greater need for the defendant to fulfill his medical and social duty by forwarding such information so that Dr. Hellewell’s patient would be fully advised when she made her decision to marry or not to marry the plaintiff.

Contrary to the implications throughout plaintiff’s brief, this information was not being transmitted to Dr. Hellewell for the purpose of advising only the prospec-

tive father-in-law, but was instead being transmitted to the doctor to enable him to advise not only the girl's father but the girl herself. Consider for a moment the language of Exhibit 1, in which Dr. Hellewell stated that his patient, Mr. Williams had a daughter who was considering marriage to Mr. Berry. His letter then continues "*they* are quite concerned about the matter." (Emphasis added.)

Any reading of this letter can lead only to the conclusion that "they" referred to Mr. Williams and to his daughter, both of whom, so far as Dr. Moench could tell, had apparently sought the advice and help of the physician consultant to whom the letter was addressed.

Scarcely a better example of a medical duty or social duty could be found than in the present case. For to permit a person to marry blindly when one has information of a mental disorder which may, because of its hereditary characteristics, affect as yet unborn generations, would be the most gross violation of medical duty.

Further, it is clear that Dr. Moench could not have performed what he felt to be his duty without some description or explanation of the meaning of the medical diagnosis and the significance of the personal history. He knew Dr. Hellewell was not a psychiatrist and it is obvious that laymen do not understand the parlance of the profession.

That the defendant's choice of wording now seems harsh cannot change the basic fact that he had to convey

a meaning which would be clearly understood. In the language of the Restatement rule, Dr. Moench, under the circumstances, had a reasonable belief that facts existed which affected the well-being of Dr. Hellewell's patient, and Dr. Hellewell could only be of service in the lawful protection of that well-being if he clearly understood the medical and social significance of Dr. Moench's information.

The present situation is analagous to the illustration found in the comment on the Restatement rule, at page 260. It is there said:

“A, a minister, voluntarily writes to B, a parishioner, telling him that he understands that the fiancé of B's daughter is a felon. The occasion is conditionally privileged.”

Plaintiff repeatedly attacks the trial court's various rulings on conditional privilege by contending that the law requires the publisher of defamatory matter to have either a pecuniary interest or a public interest, which he endeavors to protect when he publishes the statements involved. The difficulty with this contention is that neither the defendant nor the trial court, nor the court upon pretrial hearing, ever based the contention or ruling of privilege upon these grounds since it was felt obvious that the interest which was involved was neither pecuniary nor public.

Rather, the ruling of the District Court was based upon the proposition that this case was unlike any case

which has heretofore been decided by the Supreme Court of Utah and that the case was comparable to the rules set forth in the Restatement of Torts concerning privileges which arise under family or social relationships.

We urged in the court below, and we reiterate here, that this is the kind of case where the defendant had reasonable grounds for the belief in the truth of the statements he made, and that Dr. Hellewell, the person to whom the publication was made, was a person whose knowledge of the information was reasonably believed to be of value for the protection of the well-being of a member of the immediate family of a third person, within the meaning of the Restatement rule set forth in Section 597, and the comments b and c found on pages 258 and 259 of the Restatement of Torts.

It is apparent that the defendant had every reasonable ground to believe that he obtained accurate information while compiling plaintiff's record in 1949. The testimony is uncontradicted that psychiatrists, by the very nature of the patients with whom they deal, must rely upon information received from the families of such patients and there was nothing received by the defendant from the plaintiff or his family which in any way seemed inconsistent with the impressions which the defendant formed as he examined the plaintiff.

Further, plaintiff's then wife was "upset" and seemed genuinely interested in attempting to save her marriage. There would be no reason for any doctor to

believe that the statements that a wife would give under such circumstances would be untrue or inaccurate. Human experience indicates that people usually tell the truth when, in desperation, they seek medical aid for the analysis and solution of a problem which has grown to proportions which otherwise would overwhelm them.

Possibly the best reason that can be asserted in support of the contention that the defendant had reasonable grounds to believe the truth and accuracy of the statements he received, is found in the fact that subsequent events, including statements made by the plaintiff himself, establish the essential truth of such statements. While every small detail is not admitted by the plaintiff himself, it is clear that the statements have been substantially confirmed by the plaintiff, both in his interview with Dr. Nelson and in his testimony upon the witness stand in this case.

For example, it was conceded that his father had committed suicide and that his brother had been confined to a mental institution because of a mental affliction. Further, the plaintiff told Dr. Nelson and admitted under cross-examination in this case that he gambled and had been in difficulty with the authorities. He told Dr. Nelson that he had had "suicidal impulses," and that because of drinking and heavy gambling, he had become greatly indebted, which led to marital discord. (R. 112, 113, Exhibit 6). From his own testimony it was shown that in school, while attending the Uni-

versity of Utah under the G.I. Bill of Rights, he flunked two classes in the nine quarters of his attendance, and, in addition, he compiled a 1.42 scholastic average. According to University standards of scholarship, which are widely publicized, this indicates a grade average of only D plus or slightly better, since a 2. average is considered equivalent to a C grade.

Concerning the statements which Dr. Moench found in his record, and therefore inserted in the letter to Dr. Hellewell, about the plaintiff's early life, no reason has been suggested by plaintiff why such statements should not have been accepted by the defendant as being true, particularly when it is remembered that, according to the record, much of the information contained on the record was received in statements made by the plaintiff's wife in the presence of the plaintiff without protest or argument of any kind from the plaintiff. Its truth seems to be further confirmed by an examination of the testimony of Dr. Nelson, wherein the doctor pointed out that the psychopathic character, which was his diagnostic term, "is formed, is layed down in very early years as the psychiatrist sees it. In what we call the formative years from birth up through six, seven and eight years of age." (R. 122).

Thus, the conditions which Dr. Nelson noted in 1955, which clearly indicated that plaintiff was abnormal and out of mental balance, have their origin in early childhood and if the basic character disorder is now

found to be present, it is obvious that it would have been present in the earlier years, at least to some extent.

If the statements were not true, and if the defendant had no reasonable grounds for believing the information which he was given, it is difficult to understand why plaintiff then accepted four electro-shock treatments without apparent protest. The fact that he took such treatments was a further indication to the doctor that plaintiff knew of his difficulties and desired to correct them. This is all the more reason for Dr. Moench to have reasonably believed that his information, impressions and diagnosis were correct.

Plaintiff attempts to make much of the last paragraph of the letter, Exhibit 2, as indicating that the defendant wrote the letter "with the intent . . . to paint the character of the plaintiff as black as possible to influence the unknown girl." (Brief P. 23). Why defendant should have had such a motive has never been shown, and it is clear that the last paragraph of the letter constituted nothing more than an expression of the defendant's belief and understanding of the general conduct of people who are afflicted with the same condition as was plaintiff, and the results of such conduct upon people who do not realize the full implications of that condition. The defendant, knowing that Dr. Hellewell was not a psychiatrist, was reasonably required to acquaint him with the usual result which is encountered when people with a psychopathic personality become

emotionally involved with normal individuals. Had the defendant failed, after giving the background facts and medical diagnosis, to state in laymen's terms an explanation of the psychiatric significance of the facts and diagnosis, he would not have fulfilled his duty, because he would have then given Dr. Hellewell only part of the story and could not have given him enough to enable the doctor to advise his patients intelligently concerning the nature and extent of the problem with which they were confronted.

Even if the doctrine of conditional privilege were unknown to the law, we submit that, in answer to a professional inquiry, the defendant performed a social and medical responsibility well within generally accepted standards of decent conduct. We believe his duty required him to disclose his record and his opinion, completely and frankly, since, to have withheld the full story, to have given less than the truth, to have "sugar-coated" his opinion, would have been to perform a disservice to the inquiring doctor and his patients.

POINT II.

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY AND ITS VERDICT IS OVERWHELMINGLY SUPPORTED BY THE RECORD.

The second and third points of plaintiff's brief relate to claimed errors in certain instructions to the jury, and to the refusal of the trial court to give two of plaintiff's requested instructions. However, since plain-

tiff's requested instructions were not designated by him as part of the record, and were not set forth nor discussed in his brief, our discussion will be directed to the alleged errors in the instructions actually submitted to the jury.

After reiterating his contention that a conditional privilege did not exist, plaintiff next says that the court's instruction No. 9 erroneously informed the jury that plaintiff had the burden of proving actual malice, that actual malice had to be shown by evidence apart from the defamatory letter itself, and that if plaintiff failed to prove that the defendant wrote the letter because of spite, ill will, or hatred toward plaintiff, defendant would not be liable.

Plaintiff apparently concedes that the language of the instruction is patterned after the discussion by this Court in *Combes v. Montgomery Ward & Company*, (Utah, 1951) 228 P. 2d 272, but he contends that here "the facts are different." Of course the facts are different, but the principle of law involved remains unchanged. It is in the failure to recognize this principle that the weakness of plaintiff's argument is most pronounced.

As defined in the *Combes* case, the principle is that there is a distinction between the malice that is to be inferred from every defamatory statement and the malice that must be proved if the protection of conditional privilege is to be overcome. The Court said

that a “privileged communication” constitutes “an exception to the rule that every such defamatory publication implies malice.”

The Court went on to quote with evident approval a Texas decision in which it was said:

“This kind of malice . . . which overcomes and destroys the privilege, is, of course, quite distinct from that which the law, in the first instance, imputes with respect to every defamatory charge, irrespective of motive. It has been defined to be an ‘indirect and wicked motive which induces the defendant to defame the plaintiff.’” *National Standard Life Ins. Co. v. Billington*, 89 S.W. 2d 491.

The rule for which plaintiff contends — that every defamatory statement furnishes its own proof of malice — would strike down the doctrine of conditional privilege and render it meaningless. It would require a defendant to prove affirmatively that he had no malice, which is to require him to prove a negative. Such a rule would defy the public policy upon which the entire structure of privilege, in the law of defamation, has been based. This is a public policy:

“which recognizes that it is essential that true information shall be given whenever it is reasonably necessary for the protection of one’s own interests, the interests of third persons, or certain interests of the public. In order that such information may be freely given, it is necessary to afford protection against liability for mis-

information given in an honest and reasonable effort to protect or advance the interest in question. Were such protection not given, true information which should be given or received would not be communicated through fear of the persons capable of giving it that they would be held liable in an action for defamation unless they could meet the heavy burden of satisfying a jury that their statements were true." *Restatement of the Law-Torts, Conditional Privilege*, p. 240.

While the *Combes* case announced the principle followed by the trial court in this case, it is not the first decision of our Supreme Court in which the doctrine may be found. In 1933, the Court had before it an entire series of newspaper articles and editorials which defamed the competency and integrity of a public official. *Williams v. Standard-Examiner Pub. Co.*, 27 P. 2d 1. The defamatory language is set forth in great detail in the opinion, and even a cursory examination will reveal that the plaintiff in that case was lashed with criticism, comment and condemnation which was far more harsh, violent and defamatory than any of the language involved in the case at bar.

It was claimed in the *Williams* case, as here, that the publication itself was evidence of the existence of actual malice. In disposing of that contention, this Court said:

"It is true that some of the language used . . . was severe, but that alone, as we have heretofore indicated, is not sufficient to support a

finding that the motive which prompted the writing of the article declared on was actual malice.”

The *Williams* case also furnishes an answer to plaintiff’s next contention which is that the trial court erred in telling the jury, in Instructions 10 and 11, that it might exonerate the defendant if it found that the defendant made the statements in his letter with probable cause and a reasonable belief that they were true. Concerning probable cause, the *Williams* decision said:

“The authorities, however, are all to the effect that the presence of probable cause for believing the truth of a qualifiedly privileged communication is important as evidence of good faith and of the absence of malice in fact.”

With reference to the term “reasonable belief,” it is significant that the Restatement of Torts, in nearly all the sections on conditional privilege, prefaces each rule with this phrase: “An occasion is conditionally privileged when the circumstances induce a correct or *reasonable belief* . . .” (emphasis added) See pp. 242, et seq.

Plaintiff, however, disregards all such fundamental pronouncements in his dogged insistence, throughout his brief, that the letter itself shows malice and ill will toward plaintiff. Never does he even suggest the slightest reason why the defendant should have had such a feeling about a patient whom he could not even remember, and with whom he had had no contact for nearly seven years. As the Court commented, in the *Williams* case, in answering a similar contention:

“It is rare indeed that ill will is nourished for a period of eighteen or twenty months and then manifests itself in a slander or libel.”

If this be so, what possible basis can be found for the claim that, after nearly seven years, defendant viewed plaintiff with malice? To state the question is to answer it.

Defendant could safely rest his defense upon the principles heretofore outlined, but he need not do so, for the record in this case conclusively shows another, and absolute, defense to plaintiff's claim. That is the defense of truth.

Substantially every statement in defendant's letter has been shown to have been true, and to have been true, either at the time the letter was written or within the immediate past. Defendant was not required to show the literal truth of what he said, particularly when he was dealing with a professional opinion and diagnosis. It is enough for a successful defense if, from the entire record, it can be said that the statements were substantially true. This is exemplified by *Crellin v. Thomas* (Utah, 1952) 247 P. 2d 264, in which it was said:

“Admittedly, when truth is pleaded in justification, it is not necessary to prove the literal truth of the precise statement made. Slight inaccuracies of expression are immaterial, providing that the defamatory charge is true in substance.”

Plaintiff's mental condition, personal habits, family life, school life, record during the war years, gambling habits and unstable tendencies form the substance of the letter in suit. All of these subjects were discussed and admitted by plaintiff himself, either to Dr. Nelson, or to the jury from the witness stand. Plaintiff admits this statement, it would seem, because his brief completely ignores his own testimony and the uncontradicted testimony of Dr. Nelson. Instead of explaining or minimizing this evidence, he hammers away at the statement in defendant's letter to the effect that in view of plaintiff's modest financial circumstances, only a "token charge" had been made for the services of the Salt Lake Clinic, and "even that" had never been paid.

The difficulty with this position is found in the fact that the evidence is undisputed that the bill had never been paid in full, and collection of the balance had been referred to a collection agency. True, only 10% remained unpaid, but, in the light of the context of the letter and the concession on the bill when originally charged, it was not only reasonable, but perfectly accurate for the defendant to make the statement that the bill had not been paid.

Plaintiff repeatedly assails defendant's reliance upon the information he received from plaintiff's family at the time of the consultation and treatment in 1949.

It is urged that to rely upon such information is to base a diagnosis and an opinion upon hearsay. Finally it is claimed that no one could reasonably believe the truth of information gathered in this fashion.

Plaintiff's argument might have force if it were not for the uncontradicted evidence that in the practice of psychiatry, a doctor necessarily must rely upon information so obtained, since it is often the only reliable information available. Plaintiff's argument also loses its entire force in the light of later developments, since it was shown conclusively, and without even an attempt at contradiction, that substantially the same information which plaintiff now attacks as hearsay was given to Dr. Nelson in 1955 when plaintiff, acting on his own and without the insistence of his wife or family, consulted the doctor in an effort to find out what was wrong with him, and at a time when he was in obvious need of help.

It is significant that at no time, either in the lower court nor in his brief in this court, has plaintiff ever asserted that what he told Dr. Nelson about his past life, his personal problems and habits, was untrue. If he now claims that such information was untrue, or not susceptible of a reasonable belief that it was true, he must supply evidence to support such an assertion, but this he wholly failed to do.

CONCLUSION

We believe it has been clearly demonstrated that plaintiff presented no evidence of actual malice, no evidence supplying a motive for malice, and no evidence to rebut the defense of truth. It is equally plain that the trial court instructed the jury in accordance with long-established principles announced in the decisions of this Court.

Despite this state of the record, plaintiff claims he should be granted a reversal of the judgment because, somehow and some way, the law ought to provide a remedy for so “palpable” a wrong. The complete answer is that the law does indeed provide a remedy when there is evidence to support it but we know of no theory or authority, and plaintiff cites none, which will enable a remedy to ripen into judgment unsupported by fact or by law.

Respectfully submitted,

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