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"Actual Malice" is not Actually Malice: Clarifying and Solving One of the Supreme Court's Enduring Paradoxes

February 3, 2012 By Jesse Jenike-Godshalk

"[T]hese definitions distort common English . . . . When the Supreme Court uses a word, it means what the Court wants it to mean. 'Actual malice' is now a term of art having nothing to do with actual malice."[1]

I. INTRODUCTION

"Actual malice" has long been an important concept in libel suits. As early as 1837, courts used it as a common law "element of a libel plaintiff's burden of proof."[2] At common law, actual malice had many different definitions[3], but "ill will [was] very much at the heart of the concept."[4]

Then, in 1964, the U.S. Supreme Court decided *New York Times Co. v. Sullivan*[5] and transformed "actual malice" from a common law matter to a constitutional one. In *New York Times*, the Court held that, pursuant to the First Amendment, a public official cannot recover "damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.'"[6] The Court did not define actual malice in terms of ill will. Instead, a publisher makes a statement with "actual malice" if the publisher acts "with knowledge that [the statement] was false or with reckless disregard of whether it was false or not."[7]

In *New York Times*, Justice Goldberg concurred in the result stating in part that, "[i]f the constitutional standard is to be shaped by a concept of malice, the speaker takes the risk not only that the jury will inaccurately determine his state of mind but also that the jury will fail properly to apply the constitutional standard set by the elusive concept of malice."[8] Justice Goldberg was here rather prescient, for actual malice has proved to be an "elusive concept," though jurors have not been the only ones confused.

Following *New York Times*, lower courts were unsure what the relationship was between common-law malice and the Court's newly-minted constitutional standard of "actual malice."[9] Were they equivalent concepts? Could a court define actual malice in terms of ill will? Could litigants prove actual malice with evidence of ill will? The Supreme Court subsequently answered some of these questions,[10] but it also left other questions open. Thus, the lower federal courts and the state courts have adopted a variety of different stances on these questions,[11] and the relationship between common-law malice and actual malice remains an unsettled area of the law.

This lack of clarity is no minor issue. Although the Supreme Court originally applied actual malice only where the plaintiff in a defamation case was a public official, the Court has imported this concept into more and more areas of First Amendment jurisprudence.[12] In addition, one must understand the relationship between common-law malice and actual malice, because the two concepts often arise in the same case.[13]

This paper seeks the clarity that this area of the law so desperately requires. This paper has three main parts.

In Part II, this paper first discusses Supreme Court jurisprudence that sheds light on the relationship between common-law malice and actual malice. This paper then discusses the reactions of lower federal courts, state courts, and scholars to the Supreme Court jurisprudence. In Part III, this paper argues that Supreme Court jurisprudence, properly understood, declares that: (1) common-law malice and actual malice are separate concepts with unrelated definitions, but (2) courts may consider evidence of common-law malice on the issue of actual malice. Still, this paper shows that, under the Federal Rules of Evidence, evidence of common-law malice should rarely be admissible to prove actual malice. Having clarified what the law currently is, this paper then considers what the law should be. In order to bring greater lucidity to the law of defamation, this paper argues that the Supreme Court should abandon the term "actual malice" and should adopt, in its place, the phrase "knowing or reckless falsity." Finally, Part IV concludes this paper.

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(1) Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1350 (S.D.N.Y. 1977).

(2) W. WAT HOPKINS, ACTUAL MALICE: TWENTY-FIVE YEARS AFTER *TIMES V. SULLIVAN* 47 (1989) (citing State v. Burnham, 9 N.H. 34, 36 (1837)).

(3) *See generally id*. at 47¬-74.

(4) *Id*. at 52. *See* also ROBERT D. SACK & SANDRA S. BARON, LIBEL, SLANDER, AND RELATED PROBLEMS § 5.5.1.1, 278 (2d ed. 1994) (noting that "[a]t common law, actual malice had a meaning akin to spite or ill will – a wrongful motivation on the part of the defendant"); 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 3:46 (2d ed. 2010) ("traditional common-law malice [is] usually articulated in the form of ill will, spite, or hatred").

(5) 376 U.S. 254 (1964).

(6) *Id.* at 279-80.

(7) *Id.* at 280.

(8) *Id.* at 302 n.4 (Goldberg, J., concurring in the result).

(9) This paper will refer to the traditional, common-law concept of actual malice as simply "common-law malice." It will refer to the constitutional concept of actual malice, adopted in *New York* Times, as "actual malice." This usage may seem odd, because this paper ultimately argues against usage of the term "actual malice." But by using the term "actual malice," this paper impresses on the reader how confusing this terminology can be, thus showing the urgent need for the solution that this paper ultimately endorses.

(10) *See infra* Part II.A.

(11) *See infra* Part II.B. *See also* Sheldon W. Halpern, Of *Libel, Language, and Law*: New York Times v. Sullivan at *Twenty-Five*, 68 N.C. L. REV. 273, 279 (1990) (noting that, because of terms such as "actual malice," "the courts have had to struggle mightily, and often clumsily, with problems of definition and meaning").

(12) See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 335-36, 349 (1974) (noting that the actual malice standard now applies to "public figures" and holding that the standard applies where a plaintiff seeks punitive or presumed damages); Time, Inc. v. Hill, 385 U.S. 374, 390 (1967) (applying the actual malice standard in a case of false light invasion of privacy); Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988) (applying the actual malice standard in a case of intentional infliction of emotional distress); 1 SMOLLA, supra note 4, § 3:31 (noting that some "states have adopted the actual malice standard in private figure cases in which the allegedly defamatory speech involves matters of public or general interest"). But see Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 570-76 (1977) (holding that New York Times and its progeny do not apply to the tort of appropriation of a right of publicity).

(13) Halpern, supra note 11, at 278-79 (citing Cantrell v. Forest City Publ'g Co., 419 U.S. 245 (1974)).